IN THE

Supreme Court of the United States

NO. 21-1112

SONYA GORBEA

Plaintiff/Petitioner

v.

VERIZON NEW YORK INC.

Defendant/Respondent

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court accept certiorari to hear new arguments raised for the first time in this petition?

   Suggested answer: No.

2. Has Petitioner presented a compelling reason for certiorari to review the award of summary judgment in this employment discrimination claim in favor of the employer when the Petitioner has failed to demonstrate that she was qualified to perform the functions of her position and that the employer terminated her employment because of her disability?

   Suggested answer: No.

CORPORATE DISCLOSURE PURSUANT TO RULE 26.1

Verizon New York Inc. is a wholly-owned subsidiary of Verizon Communications Inc., its corporate parent. Verizon Communications, Inc. is a publicly owned corporation and has no corporate parent.

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COUNTER-STATEMENT OF THE CASE

A. FORM OF ACTION

This petition for writ of certiorari represents another attempt by *pro se* Plaintiff/Petitioner, Sonya Gorbea ("Petitioner"), to drag out litigation and bring claims regarding her employment with Verizon New York Incorporated ("Verizon") that have been found repeatedly to be meritless. Petitioner alleges that Verizon discriminated against her because of her disability by refusing to accommodate her and by terminating her employment.

The courts below held that Petitioner is unable to prove that she has a disability under the ADA, she is otherwise qualified to perform the essential functions of a field technician, and that she failed to demonstrate that she suffered an adverse employment action as a result of her disability. Petitioner now seeks to continue her battle in the highest court of the land through this petition.

Petitioner contends that the District Court erred in dismissing her claims against Verizon. Further, she alleges that the Second Circuit erred in affirming the dismissal of her claims because it did not consider her supposed "extraordinary circumstances," which would have allowed her to present new facts and evidence on Verizon's repeated violations of the Americans with Disabilities Act ("ADA").

Contrary to these baseless allegations, the lower courts correctly decided this case and no further issues exist. Petitioner was terminated following her four-month period of job abandonment. Throughout

this time, Verizon made several attempts to allow Petitioner to return to work, advising her she could request a reasonable accommodation if necessary. Ignoring these attempts, Petitioner now seeks to invoke this Court's discretionary jurisdiction through this petition. Despite Petitioner's assertions, no basis exists in fact or law for certiorari.

B. PROCEDURAL HISTORY

Petitioner began her employment with Verizon in 1997 as a field technician. The role required heavy lifting and climbing of poles and ladders in order to install and repair telephone service for Verizon customers. Beginning in 2005, Verizon began providing Petitioner reasonable accommodations due to her back and asthma problems. Between 2005 and 2010, Verizon accommodated Petitioner by relieving her of the duty to climb telephone poles and ladders, lifting ladders, and carrying in excess of 25 pounds. Following a settlement agreement between the parties in 2014, the accommodations were made permanent.

In December 2016, Verizon terminated Petitioner's employment after she abandoned her position for a period of four months. On March 17, 2017, Petitioner then filed a charge with the Equal Employment Opportunity Commission ("EEOC") for disability discrimination arising out of her termination. The EEOC issued a Notice of Right to Sue, and Petitioner commenced this action in the United States District Court for the Eastern District of New York on January 22, 2018. She amended her Complaint on April 20, 2018, alleging that Verizon fired her due to her disability and failed to provide her

with reasonable accommodations in violation of the ADA, New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL"). The District Court granted summary judgment on August 27, 2018, in Verizon's favor, determining that Petitioner did not establish a *prima facie* case of discrimination or failure-to-accommodate under the ADA, NYSHRL, and NYCHRL. Specifically, the court held that Petitioner failed to: (1) demonstrate she had a disability under the ADA; (2) meet the "otherwise qualified" prong of the ADA; and (3) demonstrate that she was fired because of her disability.

On January 25, 2021, Petitioner appealed that decision. In an Opinion issued on October 19, 2021, the Second Circuit Court of Appeals affirmed the District Court's holding. In reaching this decision, the court also found that Petitioner did not establish that she was "otherwise qualified" or that she suffered an adverse employment action because of her disability. Petitioner attempted to raise new arguments on appeal, but the court held that all other arguments had no basis for reversal.

The Second Circuit denied a petition for rehearing *en banc* on December 7, 2021.

STATEMENT OF THE CASE

Rule 15.2 of this Court provides that Respondent has an obligation to correct any perceived misstatement of facts in the brief in opposition to a petition for writ of certiorari. Verizon disputes Petitioner's principal misstatements below.

A. 2014 ACCOMMODATIONS

In 2011, Petitioner filed an action against Verizon for failure to accommodate. The parties reached a settlement agreement in September 2014 and Petitioner was offered the opportunity to return to work for Verizon as a field technician. Following the settlement, Verizon provided Petitioner with reasonable accommodations in the form of not having to climb ladders or telephone poles and not lifting or carrying in excess of 25 pounds. These accommodations were made permanent and in place until Petitioner abandoned her job.

B. PETITIONER'S RETURN TO WORK

Petitioner returned to work after the settlement in October 2014 and within two weeks she went back out of work on disability leave. Petitioner used the maximum duration allotted under her short-term disability leave and returned to work around September or October 2015. Shortly thereafter, Petitioner once more went out of work on disability leave for approximately one month. Then, in April 2016, only a few months after returning to work, Petitioner requested another disability leave. The request was denied because it was made during a union strike. Petitioner appealed that decision, but the appeal was also denied.

On July 9, 2016, Petitioner engaged in a verbal altercation with her then manager over an overtime issue. During the argument, Petitioner advised she was feeling unwell, and the manager called an ambulance. When the EMTs arrived, Petitioner began arguing with one of the EMTS, going so far as to yell

profanities and accuse the EMT of attempting to kill her. Petitioner then got in her personal vehicle and left the Verizon premises before she could be taken to the hospital.

A month after the incident, on August 8, 2016, Petitioner requested short-term disability leave. MetLife, Verizon's third-party carrier, denied the leave. MetLife sent Petitioner a letter on December 12, 2016, detailing its basis for denial of her short-term disability benefits. Despite acknowledging that she understood MetLife's claim process and how to appeal if she wished to, Petitioner continues to blame Verizon for the denial. Since then, Petitioner has not filed an ERISA complaint to allege that her claims were not properly handled by MetLife.

C. PETITIONER'S ABANDONMENT OF EMPLOYMENT

Petitioner never returned to work after August 8, 2016. In an attempt to get her to return to work, Verizon sent Petitioner five letters over the course of the next four months. Letters were sent on August 24, 2016; September 7, 2016; December 1, 2016; and December 22, 2016. In each letter, Verizon advised Petitioner that her short-term disability leave was denied, that she was absent from work without authorization, that she was required to return to work or be considered AWOL, and that she should advise Verizon if she needed a reasonable accommodation to return to work. Despite acknowledging receipt of every letter, Petitioner never responded, never returned to work, and never requested a reasonable accommodation. On December 29, 2016, Verizon sent Petitioner its fifth and final letter. As in its previous

four letters, Verizon advised Petitioner that her short-term disability leave was denied, she was absent from work without authorization, she was required to return to work or be considered AWOL, that she had not requested any reasonable accommodation to return to work, and as a result, her employment with Verizon was being terminated.

Petitioner admitted that from August 9, 2016, up until her termination on December 29, 2016, her doctors advised her that she could not return to work at Verizon in any capacity, *with or without* accommodation. Further, she admitted that her doctors advised that she could not return to work in any capacity for all of 2017 and 2018, *with or without* accommodation. Petitioner also admitted to being aware of Verizon's Code of Conduct and Equal Employment Opportunity Policies and acknowledged that she never made any attempts to contact Verizon's Human Resources or Equal Employment Opportunity Office regarding any claims of disability discrimination.

Petitioner now files this petition to seek review of the Second Circuit Court of Appeal's decision to affirm the dismissal of her claims against Verizon.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court grants discretionary certiorari only for compelling reasons and only in the rarest of cases. Sup. Ct. R. 10. Such compelling reasons include the presence of a conflicting decision, an important, novel, or unsettled federal question, or a substantial departure from existing law. Sup. Ct. R. 10. This case

presents none of them. Instead, this case represents a circuit court's ordinary and correct interpretation of federal and state laws.

I. PETITIONER INAPPROPRIATELY ATTEMPTS TO RAISE NEW ARGUMENTS NOT RAISED BELOW

It is a fundamental principle of law that arguments are forfeited on appeal when not raised below. This Court will only consider issues not raised below in "exceptional cases or particular circumstances…where injustice might otherwise result." Hormel v. Helvering, 312 U.S. 552, 557 (1941). As such, Petitioner's arguments regarding a hostile work environment, disparate treatment, Title VII violations, and theft of wages have no merit and are not appropriate to be raised at this juncture because they were not properly raised and briefed below. Further, Petitioner has alleged no facts to suggest that this is an exceptional case and that injustice will result if her new arguments are not heard.

II. THE SECOND CIRCUIT PROPERLY DISMISSED PETITIONER'S ADA CLAIMS

To prevail on a claim of discrimination under the ADA, a plaintiff must show by a preponderance of the evidence that: (1) her employer was subject to the ADA; (2) she was disabled within the meaning of the ADA; (3) she was otherwise qualified to perform the essential functions of her job, with or without reasonable accommodation; and (4) she suffered an adverse employment action because of her disability. McDonnell Douglas Corp. v. Green, 411 U.S. 792

(1973). As correctly held by the District Court and affirmed by the Second Circuit Court of Appeals, Petitioner fails to meet the third and fourth prongs of the standard outlined in McDonnell.

A. PETITIONER IS NOT OTHERWISE QUALIFIED TO PERFORM THE ESSENTIAL FUNCTIONS OF HER JOB

Petitioner incorrectly alleges that she is "otherwise qualified to perform the essential functions" of a field technician. To establish the third element of the McDonnell framework, an employee must demonstrate that she was "otherwise qualified to perform the essential functions" of the job "with or without reasonable accommodation." Woolf v. Strada, 949 F.3d 89, 93 (2d Cir. 2020). Petitioner has offered no indication at all that she could perform the functions of a field technician.

Petitioner repeatedly makes mention that she arrived and work willing and ready, but willing and ready do not equate being qualified. While the ADA is silent on the definition of what "essential functions" are, showing up to work is certainly an essential function. As noted by the Second Circuit, an employee's admission that she is unable to work "negate[s] an essential element of her ADA case" absent a "sufficient explanation." Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1996). Here, Petitioner admitted she was unable to work and further admitted her doctors advised that she was unable to work from August 2016 through 2018, *with or without accommodation*. More importantly, Petitioner did in fact not show up for work for a period

of four months. Petitioner does not deny that she received Verizon's correspondence advising her that her continued absence would lead to her termination. Yet, she failed to appear for work and made no attempts to communicate with Verizon in an attempt to return. She has also never given an explanation as to why she chose to ignore Verizon's repeated attempts to help her return to work. As the District Court held, Petitioner's own "admission that she is unable to work" coupled with "her failure to appear for work" make her unable to perform the essential functions of a field technician. There is no question or confusion that this renders her unable to perform the functions of a field technician.

B. PETITIONER DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION AS A RESULT OF HER DISABILITY

Petitioner is unable to demonstrate that she was fired because of her disability. To establish causation, an employee must show "that [her] disability was the but-for cause of the adverse employment action." McCrain v. Metro. Transp. Auth., No. 17-CV-2520 (RA), 2020 U.S. Dist. LEXIS 47363, *34 (S.D.N.Y. Mar. 18, 2020). Petitioner cannot prove causation here because the sole reason for her termination is the voluntary abandonment of her position and her failure to respond to the multiple letters sent by Verizon.

Petitioner alleges that Verizon's decision to fire her was intentional and influenced by discrimination because it occurred within close proximity to her

complaints of PTSD. Yet, there is not one shred of evidence that indicates Petitioner's termination was in any way motivated by her disability. Verizon sent five letters to Petitioner indicating that her continued absence would lead to her termination and despite indicating she received these letters, she made no attempt to respond or to return to work. In fact, Petitioner testified that the reason she thought Verizon discriminated against her was because her request for short-term disability was denied. This alone does not demonstrate causation and there is no credible argument to be made that the termination was in any way motivated by her disability. Verizon, on the other hand, has demonstrated that it made a good faith attempt to allow Petitioner to return to work and only terminated her employment following Petitioner's express abandonment. For this reason, Petitioner cannot prove that she suffered an adverse employment action as a result of her disability and she certainly cannot demonstrate that Verizon's proffered reason for her termination is pretextual.

III. PETITIONER HAS NO VIABLE CLAIMS UNDER NYSHRL OR NYCHRL

Similar to Petitioner's ADA claims, Petitioner's NYSHRL and NYCHRL have already been correctly decided below. NYSHRL and NYCHRL claims are "governed by the same legal standards as Federal ADA claims." Jones v. N.Y.C. Transit Auth., No. 17-cv-06460 (AMD) (SMG), 2020 U.S. Dist. LEXIS 56489, *9 (E.D.N.Y. Mar. 31, 2020). Claims under the NYCHRL must be analyzed independently from any federal or state claims. Id. Nonetheless, under NYCHRL, a "plaintiff must still show that the conduct

complained of is caused by a discriminatory motive." Id. As discussed above, Petitioner is unable to show that Verizon was motivated in any way to terminate her employment due to her disability. As such, no further analysis is needed as to Petitioner's NYSHRL and NYCHRL claims.

CONCLUSION

Petitioner fails to establish any compelling reason for this Court to grant her petition. As a result, Respondent respectfully asks this Court to deny the petition.

Respectfully submitted,

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