No. 21-1523

In the Supreme Court of the United States

Wendell Tabb,

Petitioner,

Vs.

Board of Education of
The Durham Public Schools,

Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964 mandate trial courts exclude comparators who received a benefit discriminatorily doled out as defined in *Hishon v. King & Spalding*, 467 U.S. 69 (1984) from its analysis solely because the comparators received such benefit outside the 180-day statutory period for filing an EEOC Charge of Discrimination?

2. Is it ever appropriate to negate FLSA compliance for all school employees whether exempt or non-exempt when the time invested surpasses the minimum workload requirements?

3. Is it constitutionally equitable for school districts that receive federal funding to allow inequalities between exempt and non-exempt employees who perform the same or similar extra duties (i.e., Theatre Directors and Theatre Technical Directors)?

PARTIES TO THE PROCEEDING

Petitioner Wendell Tabb was the appellant in the court below. Respondents are the Board of Education of the Durham Public Schools and were the appellees in the court below.

RELATED CASES

- *Tabb v. Bd. of Educ. of Durham Pub. Sch., 1:17CV730 (M.D.N.C. Sep. 28, 2020)*
- *Tabb v. Bd. of Educ. of Durham Pub. Schs., 29 F.4th 148 (4th Cir. 2022)*

CORPORATE DISCLOSURE STATEMENT

Petitioner Wendell Tabb is a theatre teacher for the Durham Public Schools. The Board of Education for the Durham Public Schools is the Respondent in this case.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit affirmed by published opinion. Judge Niemeyer wrote the opinion in which Judge Richardson Joined. Judge Motz wrote an opinion concurring in part and dissenting in part. The opinion in the United States Lower Court for the Middle District of North Carolina ordered that the Defendant's Motion for Summary Judgement was granted. It further ordered that this case was dismissed with prejudice.

JURISDICTION

The judgement of the court of appeals was argued on December 8, 2021, and decided on March 2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, (a)(1)(2):

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

INTRODUCTION

Petitioner Wendell Tabb is an African American who has been employed at Hillside High School in Durham, North Carolina since 1987 as a Teacher and Drama Director. The Petitioner has had an exceptional teaching career during his 35 years at Hillside. Under Petitioner's direction, the Hillside Theatre Program has achieved both national and international acclaim. Actors under the tutelage of Mr. Tabb have achieved fame on stage and on screen, while he, personally, has received numerous awards and national honors, including Respondent's "Teacher of the Year" award, "Educator of the Year" award from ABC-WTVD, the WRAL "Viewer's Choice" Educator of the Year award, and recognized by the Tony Awards with an honorable mention for Excellence in Education. Despite the success of the Hillside Theatre Program, Respondent failed to provide the school with the same level of funding and support that it provides other high schools within the school system. Because Petitioner did not have technical theatre staff (referred to herein as a "Technical Theatre Teacher" or "Theatre Tech"), he

worked after the school day ended, doing lighting, sound and set design, working the lighting and sound boards for rehearsals, building, and painting sets.

Respondent regularly used Hillside's theatre for district-wide events. Petitioner was required to be present at district events in order to provide technical theatre support. Although Petitioner received extra-duty contracts for some of this work, he was not paid for extra duty work on several occasions, unlike similarly situated employees in the school system.

STATEMENT OF THE CASE

A. At the motion to dismiss phase, the lower courts erred in considering facts outside of the complaint and made evidentiary determinations regarding whether Durham School of the Arts is a valid comparator.

B. The lower court erred in dismissing Petitioner's technical supplement claim.

C. The lower court erred when it granted summary judgement in favor of the Respondent.

For more than ten years before this litigation ensued, Petitioner complained in writing and in person to Respondent's administration and School Board members about the failure to provide him with adequate technical assistance or compensate him for doing the technical work himself. Many of the principals at Hillside High School, including Principals Pankey and Lassiter requested that Respondent's administration provide Petitioner with a technical theater teacher. However, their requests were rejected. In conversations with Assistant Superintendent Elsie Woods, Deputy Superintendent Janice Davis, and Superintendent Ann Denlinger, Principal Henry Pankey, discussed creating a School of the Arts and hiring a technical theater assistant to assist Petitioner. Despite Mr. Pankey's efforts,

Respondent rejected his proposals.

Hans Lassiter, Hillside's principal from 2009 to 2011, requested a technical theater teacher's position as part of a $1.3 million School Improvement Grant awarded to Hillside, but was rebuffed by Superintendent Becoats who was "dismissive about hiring a Theatre Tech for Hillside" and threatened Lassiter by dumping out a box onto his desk and saying he was considering starting over at the school.

Hillside's current principal, Dr. William Logan, also recognized the need for a technical theater position at the school. As early as 2013, Dr. Logan was telling Director of Arts Mary Casey, Assistant Superintendent James Key, and Deputy Superintendent Osteen that he was in favor of hiring a technical theater teacher at Hillside.

During this litigation, Respondent finally hired a technical theater teacher at Hillside. Petitioner has estimated his damages for failure to hire a technical theater teacher during the relevant time period up until the hiring date at $251,328.

The racial make-up and racial history of the schools within the Durham public school system are relevant to Petitioner's claims. Until 1992, Durham had two school systems run by separate school boards - the Durham City Schools and the Durham County Schools. Hillside and Durham High School were the only two high schools in the City School System and they were segregated by race.

Hillside had a black student population and was located in a predominantly black neighborhood. While Durham High School had a white student population and was located in a predominantly white neighborhood. After *Brown v. Board of Education*, 347 U.S. 483 (1954), Durham High School was integrated and eventually became a majority black school.

When the City and County systems merged in 1992, Respondent Durham Public Schools was created. Respondent closed Durham High School and developed a magnet school program to achieve racial integration within its schools. Durham High School

reopened in 1995 as the Durham School of the Arts. Two years later, Hillside was designated as an International Baccalaureate ("IB") magnet program. Racial balance was achieved at Durham School of the Arts, where the student population in 2016 was 34.7% African American, 35.2% white, and 21.9% Hispanic.

However, Hillside's student population remains approximately 80% black, with almost twice as many African American students as any of the other high schools in the school system.

Race continues to be an issue in School Board elections, the selection of superintendents, and the allocation of resources to particular schools. In written communication with Respondent's administrators, Petitioner complained that the inequities in staffing and compensation he experienced began at the merger. School Board member Minnie Forte-Brown understood this meant Petitioner was complaining about race discrimination.

In order to adequately staff Hillside's theater program, Respondent could have provided a new allotment from local funds, or it could have provided local funds to create a new classified position. It is for reasons related to race that Respondent limited Hillside's discretion on how to use its enrollment-based allotments, instead of providing the same technical theater support to Petitioner that Respondent provided to comparable white theater teachers at other schools.

I. At the motion to dismiss phase, the lower courts erred in considering facts outside of the complaint and made evidentiary determinations regarding whether Durham School of the Arts is a valid comparator.

The lower court ruled that evidentiary determinations regarding whether a comparator's features are sufficiently similar to constitute appropriate comparisons generally should not occur at the 12(b)(6) phase. *Woods v. City of Greensboro*, 855 F.3D 639, 651-52 (4th Cir. 2017). In reviewing information outside of the complaint, the lower court

misapplied relevant case law and found an alternative explanation for increased drama department staffing at Durham School of the Arts, dismissing Petitioner's claims to the extent those claims were based on a comparison to Durham School of the Arts.

Ample case law provides that at the Rule 12(b)(6) phase, Petitioner was not required to plead facts sufficient to establish a prima facie case of race-based discrimination or satisfy any heightened pleading requirements. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). Instead, a complaint must only contain enough facts to state a "plausible" claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "In Reeves, the Supreme Court held that an employee could create a jury issue solely by establishing a prima facie case and then offering evidence as to the falsity of the employer's proffered reason." *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 728 (4th Cir. 2019)

The lower court undermined the well-established plausibility standard and, as an alternative, applied a heightened pleading standard to Petitioner's claims. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013) ("On a motion to dismiss pursuant to Rule 12(b)(6), the court's task is to test the legal feasibility of the complaint without weighing the evidence that might be offered to support or contradict it."); *Butler v. U.S.*, 702 F.3d 749, 752 (4th Cir. 2012).

Respondent's brief did not address case law cited in Petitioner's opening that provided that a lower court's inquiry into whether an alternative explanation is more probable undermines the requisite plausibility standard. *See Houck v. Substitute Trustee Services, Inc.*, 791 F.3d 473 (4th Cir. 2015). "To survive a motion to dismiss, a plaintiff need not demonstrate that her right to relief is more probable or that alternative explanations are less likely; rather, she must merely advance her claim across the line from conceivable to plausible. If her explanation is plausible, her complaint survives a

motion to dismiss . . ., regardless of whether there is a more plausible alternative explanation." Houck, 791 F.3d at 474 (emphasis added).

Additionally, Respondent erroneously contends that the lower court applied a thoughtful analysis of Woods in its opinion granting, in part, Respondent's motion to dismiss. In the lower court's analysis of Woods, the court acknowledged that evidentiary determinations regarding comparators are generally not permissible at the motion to dismiss phase. However, in an attempt to explain away the holding in Woods, the court went on to reason:

"While it is permissible to consider the existence of comparators themselves, it is not permissible to consider comparator-specific facts other than racial identity or position. However, the holding in Woods does not preclude this court from considering obvious non-discriminatory alternative reasons for any disparate treatment. This court concludes that it may consider alternative explanations for the alleged discriminatory conduct when those explanations are obvious from the face of the complaint and relate to the general practices of the Respondent (applicable to all comparators) rather than comparator-specific facts."

The court went even further to speculate about fact patterns that "would have been permissible in Woods," without any support from the Fourth Circuit's holding in that case.

Respondent argued that despite the lower court's dismissal of Durham School of the Arts at the pleadings phase of the case, Petitioner was able to obtain sufficient evidence and devote a portion of his brief to arguments related to Durham School of the Arts at the summary judgment phase. Respondent mischaracterized this portion of Petitioner's response brief. Contrary to Respondent's description, the Petitioner's response brief discussed the historical context of this case and the race-based rationale for the magnet school program. It did not discuss extensive comparator-specific evidence related to

Durham School of the Arts.

Respondent contended that although the lower court dismissed Durham School of the Arts as a comparator at the motion to dismiss phase, it still conducted a thorough review of the school's comparator information at the summary judgment phase. However, Respondent's statement belied by the record. The lower court provided that it "should not reconsider its previous judgement," and only discussed Durham School of the Arts in a footnote in its opinion. A footnote does not constitute a "thorough review" of evidence related to Durham School of the Arts.

The lower court misapplied the applicable legal standard and improperly made evidentiary determinations regarding whether Durham School of the Arts is a valid comparator at the motion to dismiss phase. This analysis should have occurred later, when established a prima facie case of discrimination. As a result, Durham School of the Arts was not properly considered at the summary judgment phase.

II. The lower court erred in dismissing Petitioner's technical supplement claim.

Teachers in the performing arts (theatre, music, band, dance, and chorus) who engage in extracurricular activities for the Respondent are compensated with a "performing arts supplement."

Respondent provides four different supplements for high school teachers who work after hours with students: a theatre director supplement, theatre technical director supplement (for lights, sounds, and staging support), band director supplement, and dance/music director supplement.

In Petitioner's amended complaint he alleged that as a result of Respondent's failure to provide Hillside with a technical theatre director, Petitioner continuously worked an excessive number of hours which were, in effect, "overtime" hours. Although Respondent has generally paid Petitioner a supplement as a theatre director, it denied him payment for technical theatre work he provided,

despite his repeated requests to be compensated for this work.

All theatre productions in Durham Public Schools have lighting, sound, and set designs. Petitioner did, in fact, perform these jobs without assistance. However, this work was necessary to the success of his productions. However, going above and beyond his duties was not the basis of the lawsuit. The base level work that Petitioner performed was necessary on part and parcel, and the minimum standard requirements were not doled out in equal manner for all theatre teachers.

Petitioner's amended complaint provided that all schools with comparable drama programs have a theatre director and also a technical theatre teacher. Petitioner specifically named the comparable white theatre directors who did not have to perform dual duty as a theatre technician and who did not have to work unreasonable and excessive hours without pay. Moreover, Petitioner expressly pled that Respondent intentionally overloaded him with extracurricular work and denied him staffing assistance with his work overload, while providing that assistance to similarly situated white employees. Petitioner further pled that he suffered both physically and mentally from excessive hours on the job. At the motion to dismiss phase, Petitioner sufficiently alleged that he was required to perform the job of two teachers, where comparable theatre directors were not because those schools had technical theatre support that was denied to the Petitioner.

Respondent pointed to a footnote in the lower court's opinion where the court provided that Petitioner failed to allege that a single white theatre director was paid a technical supplement. Petitioner, alternatively, alleged that comparable white theatre directors had proper staffing at their respective schools. It follows that since other theatre programs were adequately staffed, these theatre directors would not have worked an excessive number of hours providing technical support, which would entitle them to the supplement. Petitioner claimed a right

to a technical supplement because technical features such as lighting, sound, and staging are necessary components of theatre productions. Respondent contended that "Petitioner's job is to teach high school students theatre." It is a logical conclusion that part of teaching high school theatre also includes theatrical productions, which require technical support. Petitioner was required to serve both roles. Theatre teachers in the school system are evaluated on the same scale, using the same rating system. Theatre teachers are encouraged by Respondent to build their performing arts program in order to get higher quality ratings.

Respondent also mentions evidence presented at the summary judgment phase. However, the lower court dismissed Petitioner's technical supplement claim at the motion to dismiss phase, not at summary judgement. At the motion to dismiss phase, Petitioner alleged sufficient facts to support his technical supplement claim.

III. The lower court erred when it granted summary judgement in favor of the Respondent.

A. Petitioner came forward with sufficient evidence to support a claim that Respondent took an adverse employment action.

In analyzing whether Respondent took an adverse employment action against Petitioner, the lower court determined that a theatre tech is not "part and parcel" of employment as a high school drama teacher. *See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). The lower court's limited analysis of Hishon's part and parcel requirement misses a crucial point in this case: technical work such as lighting, sound, and staging are necessary functions of a theatre department and all comparable drama departments within the school system used such fundamental components.

Under these circumstances, technical theatre work is part and parcel of Petitioner's employment as a theatre teacher within DPS. Petitioner was required

to work excessive hours to provide technical theatre support at Hillside, where other comparable white theatre teachers were not because they were provided additional technical theatre staff to provide the necessary technical work.

"While there is no bright-line rule for what makes two jobs "similar" under Title VII, courts consider "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications—provided the employer considered these latter factors in making the personnel decision." *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019) (quoting Bio v. Fed. Express Corp., 424 F.3d 593, 597 (7th Cir. 2005)) The failure to hire a technical director or provide a technical support does affect a privilege of employment and is part and parcel as defined by the case in Hishon. The failure of the work performed by the theatre tech directly impacted Petitioner's performance and prerequisite to a successful production. This impact was inextricably tied to the Petitioner's ability to perform his job duties.

B. The lower court erred when it found that Respondent's priorities were legitimate and non-discriminatory reasons for Petitioner's disparate treatment.

Respondent's magnet program requirements cannot be considered in ahistorical manner. Petitioner was denied equal staffing for many years after the merger of the school systems with comparable white performing arts teachers receiving more favorable treatment than Petitioner. Contrary to Respondent's assertions, the race of Petitioner's students and the race-based rationale for the magnet school program are strong circumstantial evidence supporting Petitioner's case and refuting the non-discriminatory rationale put forth by Respondent.

Even if Respondent's magnet program appears to be a presumptively valid reason for treating

Petitioner in a different manner, he is entitled to have a jury decide whether it is truly a race-neutral reason. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (an employee is entitled to a "full and fair opportunity" to prove the employers "presumptively valid reasons" are pretextual).

C. The lower court erred when it found that Petitioner lacks sufficient comparator evidence.

Durham School of the Arts is a key comparator in this case. Because the lower court dismissed Durham School of the Arts from this case at the motion to dismiss phase the school was not properly considered on Respondent's motion for summary judgment.

With respect to Riverside High School, Kee Strong, a white theatre teacher, worked at Riverside during the relevant statutory period and is a valid comparator in this case. Monique Taylor, an African American, was also a theatre teacher at the school. Respondent seemingly infers that because Respondent hired a theatre tech to support another African American theatre teacher, Petitioner could not have been subjected to racial discrimination by Respondent. The law is clear, however, that "the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionally represented in the workforce." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). The nondiscriminatory treatment of one member of the protected class does not mean that another protected member was not discriminated against.

"We would never hold, for example, that an employer who categorically refused to hire black applicants would be insulated from judicial review [*546] because no white applicant had happened to apply for a position during the time frame in question." *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 545-46 (4th Cir. 2003)"

Further, with respect to Petitioner's extra-duty compensation claims, although Mr. Holley is classified as a non-exempt employee under the Fair Labor Standards Act, he is still a valid comparator in this case. Mr. Holley's testimony illustrates that although he is not classified as a certified teacher, he still performs the work of a teacher he teaches classes on his own, without the assistance of a certified teacher.

Considering this evidence, a reasonable fact finder could conclude that Mr. Holley and Petitioner were appropriate comparators because they engaged in similar conduct. A comparison between similar employees will never involve precisely the same set of circumstances, and the fact that Mr. Holley is a non-exempt employee does not render him an inappropriate comparator. *Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 223 (4th Cir. 2019) (quoting *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993)).

Brinkley-Obu v. Hughes Training, Incorporated, 36 F.3d 336, 346 (4th Cir. 1994) "In the context of the Equal Pay Act, the statute of limitations does not dictate which co-workers the plaintiff may submit as comparators.

Respondent implies that Petitioner was treated more favorably than other theatre teachers in the school system because he is the highest paid performing arts teacher in the district and earned more in extra duty pay than any other performing arts teacher. This information is misleading and has no probative value. Teacher pay is largely based on years of service.

Consequently, Petitioner's compensation is based on the fact that he is the longest serving performing arts teacher in the school system. Additionally, the bulk of Petitioner's extra duty pay is for non-district related theatre rentals, which is not at issue in this case.

REASONS FOR GRANTING THE WRIT

I. The lower and circuit court analysis of part and parcel is incorrect.

II. Discrimination of fair labor for exempt and non-exempt employees presents an issue of national importance.

The court should grant certiorari to address whether or not additional work burden or disproportionate assignment of workloads can constitute adverse action. The primary issue in this case is the failure of the Respondent to hire, or provide, technical assistance for the Petitioner, which is part and parcel to his employment conditions. However, courts have not determined what is "part and parcel" in case law.

In this context, a benefit that's part and parcel of an employment relationship should not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. In determining what is part and parcel in this context, the benefit should be considered part and parcel of employment if it's central to the employment relationship so that its absence materially changes in terms of employment and substantially impairs the employee's ability to perform their job; as it has done for the Petitioner.

In terms of fair labor, white theatre directors at white high schools with comparable theatre programs have had two or more teachers assigned to assist them. While the fourth circuit found no support for the Petitioner's claim that the terms and conditions of a drama teacher included the benefit of hiring additional teachers for assistance, in partial dissent, Judge Motz held that the lower court erred in dismissing the teacher's technical supplement claim. The Petitioner alleged he was forced to do the work of multiple teachers to maintain the school's drama program. That allegation, the dissent argued, was sufficient to survive a motion to dismiss. Finally, Judge Motz would have reversed the lower court's

finding the performing arts school was not a proper comparator as the court improperly considered matters outside the pleadings.

The case presents national issues for teachers working extra duties and school districts using unfair discretion on who should be compensated when persons are fulfilling the same or similar job assignments as defined by Fair Labor Standards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Friday, May 27, 2022