

No. _____

In the

Supreme Court of the United States

Christopher Sullivan,

Petitioner

v.

Texas A&M University System,

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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QUESTION PRESENTED

Whether the Fifth Circuit correctly interpreted that a State Entity who receives Federal funds waives its Eleventh Amendment Immunity from the Texas Commission on Human Rights Act (“TCHRA”) of the Texas Labor Code Chapter 21 relevant parts found in Pet App. 26

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Christopher Sullivan, Plaintiff and Petitioner,
2. Texas A&M University System Defendant and Respondent.

RELATED PROCEEDINGS

Case No. 4:19-CV-4586; Christopher Sullivan v. Texas A&M University United States District Court for the Southern District of Texas Houston Division, (April 8, 2020)

United States Court of Appeals for the Fifth Circuit, No. 20-20248 - Christopher Sullivan v. Texas A&M University System (February 2, 2021)

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Texas Labor Code Chapter 21.211 26a

Texas Workforce Commission

[https://www.twc.texas.gov/programs/civil-rights-
program-overview](https://www.twc.texas.gov/programs/civil-rights-program-overview). 27a

Tex. Const., art. I, § 19 29a

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OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is available at No. 20-20248 (5th Cir. February 2, 2021). The opinion of the United States District Court for the Southern District of Texas is available at USDC No. 4:19-CV-4586.

STATEMENT OF JURISDICTION

On February 2, 2021, the Fifth Circuit issued its judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment limitations on State entity immunity 42 U.S.C. § 2000d-7, 29 U.S.C. § 794 and their application to State entities' waiver of immunity by accepting federal funding.

STATEMENT OF THE CASE

Under 29 U.S.C. § 794, state entities waive immunity of being sued in Federal court by accepting federal funds. The Texas Commission Human Rights Act, allows employees, even those of State entities, to bring claims in a court of competent jurisdiction.

A. Factual Background

Sullivan was diagnosed with atrial fibrillation in April 2012. Shortly thereafter, he began training at the Texas A&M University Police Department. Sullivan sought and received treatment for his condition, and the University eventually offered him employment in data entry and filing. Pet. App. 1

On February 29, 2012, an Emergency Medical Services vehicle took Petitioner Sullivan to an emergency room with an increased heart rate. A month and a half later, in April 2012, Petitioner Sullivan was formally diagnosed with atrial fibrillation. In May 2012, Petitioner Sullivan had an ablation for atrial fibrillation. Petitioner Sullivan had two more ablations in 2014, while employed by Texas A&M University Police Department. During his job interview, he made Sgt. Johnson aware of his heart condition. Mr. Sullivan's attending physicians gave him optimistic recovery prognoses, expecting a full recovery, after the treatment was completed in 2012. Pet. App. 18.

On May 6, 2013, Petitioner Sullivan was given a new bona fide offer of employment by Texas A&M University Police Department for Data Entry and Filing, based on Mr. Sullivan's health issues. On June 3, 2013, Petitioner Sullivan had a follow up for his atrial fibrillation procedure, with a new return to

work date of June 18, 2013, as prescribed by the physician. On June 20, 2013, Dr. Nancy Dickey ordered a radiology brain MRI (sinus tachycardia investigation). Petitioner Sullivan received a work release for June 24, 2013, and 80 hours of sick pool leave withdrawal on June 29, 2013. *Id.*

In 2013, prior to requiring unforeseen medical attention, Petitioner Sullivan received three quarterly evaluations from Sgt. Paxton, his supervisor at Texas A&M University Police Department. Sgt. Paxton was a first year, inexperienced supervisor during Mr. Sullivan's time with him. The feedback on all three evaluations if Petitioner Sullivan's performance met or exceeded expectations. However, around the time of Petitioner Sullivan's diagnosis and subsequent health leave, Sgt. Paxton's attitude towards Petitioner Sullivan started changing. Pet. App. 19.

In late 2013, Sgt. Paxton commenced singling out Petitioner Sullivan and treating him differently, compared to his other reports. Subsequently, Petitioner Sullivan received lower marks during his annual evaluation, which stated that the "improvement was needed." In May 2014, while at a training event in Austin, Petitioner Sullivan suffered from another bout of atrial fibrillation, in front of coworkers, and was hospitalized. Petitioner Sullivan continued to be impacted by his condition throughout the year, which negatively affected his ability to perform his work on the full schedule. Pet. App. 19-20.

In 2016, Petitioner Sullivan was transferred to work under the supervision of Sgt. Rodriguez, a first-year, inexperienced supervisor. Petitioner Sullivan went to the police academy with Sgt. Rodriguez. Sgt. Rodriguez picked up right where Sgt. Paxton left off,

by treating Petitioner Sullivan worse than Petitioner Sullivan's non-disabled peers and by creating a negative work environment for Petitioner Sullivan. Around that time, Texas A&M University Police Department invested into a system called Guardian Tracking. Sgt. Rodriguez started using the system to document any miniscule problem with Petitioner Sullivan's performance. The Guardian Tracking system was used by Petitioner Sullivan's supervisors, often at the direction of Lt. Kary Shaffer, to document every issue possible, however minor, to use it against Petitioner Sullivan. Pet. App. 20-1.

By the end of 2016, Petitioner Sullivan was transferred again, this time to Sgt. Hartman's supervision. On a prior internal survey, Petitioner Sullivan purposely omitted Sgt. Hartman as a possible choice for his supervisor. Sgt. Hartman utilized the Guardian Tracking system against Petitioner Sullivan on many occasions, despite the fact that the system was only to be used to document discussions and not for disciplinary action, per, Texas A&M University Police Department's internal policy. Pet. App. 21

Petitioner Sullivan's career at Texas A&M University Police Department came to an abrupt end on November 14, 2017. Petitioner Sullivan was called in for a meeting with Chief Ragan and Assistant Chief Robert Meyer. When Petitioner Sullivan arrived, he was presented with a letter stating that his employment was terminated, with the pay continuing until November 28, 2017. Pet. App. 22.

Petitioner Sullivan was escorted throughout the building to collect his personnel files and personal effects. When Petitioner Sullivan received his

documents, he noticed that one folder in the office contained all his doctor's notes, medical records, FMLA paperwork, and symptom information, to name a few items. The file containing all of this information was described to Petitioner Sullivan by Karen Terrell as his "Personnel File." It was apparent that Mr. Sullivan's personnel file stood out, compared to other employees' files, because of his extensive medical history, which made him a liability to supervisors at Texas A&M University Police Department. Pet. App. 22-3.

When Petitioner Sullivan appealed the termination, the investigation resulted that in the University's own HR response, it was documented that Petitioner Sullivan's health was discussed in at least one supervisors' meeting. The following is a direct quote from assistant chief Robert Meyer in response to Mr. Sullivan's original HR complaint after termination: "Meyer stated that UPD tried very hard to take actions based on his disability early on because of the safety concern (i.e. job change, termination, etc.), but was told they could not according to the law. Since then, Meyer told his supervisors to address performance issues, and not worry about Sullivan's medical issues." Assistant Chief, Robert Meyer, was the direct supervisor over the patrol division at that time. Lt. Kary Schaffer answered directly to Assistant Chief Meyer in the chain of command. Pet. App. 24.

Petitioner Sullivan had worked for Texas A&M University Police Department for almost five and a half (5 ½) years. Petitioner Sullivan's career started out strong, with great grades in training and positive evaluations. Prior to him acquiring a known disability, he earned regular pay increases and promotions, finishing with the rank of a Police Officer

III. However, once Petitioner Sullivan began to suffer from serious medical problems, his evaluation grades immediately went down, and he was blindsided at a yearly evaluation. Pet. App. 23.

B. Procedural Background

The police department terminated Petitioner Sullivan in November 2017. Sullivan then filed disability-discrimination and retaliation claims with the Equal Employment Opportunity Commission. The EEOC issued him a Right to Sue letter. (Pet App. 2).

Sullivan timely filed suit in the United States District Court for the Southern District of Texas. He alleged employment-discrimination claims under Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (“ADA”), and the Texas Commission on Human Rights Act, Tex. Lab. Code §§ 21.001 et seq. (“TCHRA”). He further alleged unlawful retaliation in violation of both Title I of the ADA and the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq. (“FMLA”). The suit sought compensatory damages, punitive damages, and attorney’s fees. *Id.*

The district court dismissed all of Sullivan’s claims as barred by sovereign immunity. That dismissal was without prejudice. Sullivan timely appealed. *Id.*

REASONS FOR GRANTING THE PETITION

I. Federal Court has jurisdiction to hear this case, because the state has validly, knowingly, and voluntarily waived its Eleventh Amendment immunity to Plaintiff’s TCHRA and ADA claims.

In raising its Eleventh Amendment argument before the Court and alleging that the District Court lacks jurisdiction to hear Plaintiff's TCHRA discrimination claims against Defendant, Defendant seems to forget that Defendant (1) was Plaintiff's employer for the entirety of the period during which Plaintiff's claims ripened; and (2) receives extensive federal funding, which receipt is unequivocally conditioned on the Defendant's waiver of its Eleventh Amendment sovereign immunity to suits as Plaintiff's employer. Unfortunately for Defendant, the jurisprudence of the Fifth Circuit and the Supreme Court bars Defendant from having its cake, by accepting federal monies with one hand, and eating it too, by holding the text of the Eleventh Amendment as a shield against the federal jurisdiction over employees' TCHRA claims with the other.

Currently, the Texas Attorney General Ken Paxton is arguing a decision in the Fifth Circuit Court of Appeals, as the opinion of the Southern District Court Judge Hoyt, Pet. App. 13 agreed with the premise of the federal funding issue under *Pederson v. La. State Univ.* 213 F.3d 858, (5th Cir. 2000).

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment protection, however, is neither absolute nor as extensive as Defendant is trying to lead this Court to believe. See *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 276 (5th Cir. 2005). The States can waive their sovereign

immunity. *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 451 (5th Cir. 2005). Congress may further abrogate state sovereign immunity pursuant to the enforcement power conferred by § 5 of the Fourteenth Amendment. *Id.*

For instance, 42 U.S.C. §2000d-7(a)(1) explicitly conditions the receipt of the federal education funds on the State's or any of its arms' voluntary waiver of the Eleventh Amendment sovereign immunity to suits under the ADA like the present action. 42 U.S.C. § 2000d-7(a)(1), *Johnson v. La. Dep't of Educ.*, 330 F.3d 362, 364 (5th Cir. 2003) (Wiener J., concurring). Any post-2001 receipt of federal funding by a State is considered, as a matter of law, a knowing and unconditional waiver of the Eleventh Amendment immunity to suits filed under the ADA. *Johnson*, 330 F.3d at 365, *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 345 (5th Cir. 2005).

This suit was filed over a decade after the Fifth Circuit held that post-2001 receipt of federal funds equated to a knowing and voluntary waiver of Eleventh Amendment immunity to ADA discrimination and retaliation suits in *Johnson*. *Johnson*, 330 F.3d at 365, See *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). Defendant has been receiving federal funding after 2001, with the full knowledge that such receipt of funding entailed a waiver of its Eleventh Amendment sovereign immunity, under Section 2000d-7(a)(1). Defendant, therefore, voluntarily and knowingly waived its Eleventh Amendment sovereign immunity to Plaintiff's ADA and TCHRA discrimination and retaliation claims, including claims for money damages, which makes the purpose and the value of

Defendant's pleas to jurisdiction a mystery to Plaintiff.

EEOC and HUD allocate funds to state and local agencies that investigate complaints filed under state or local laws that are substantially equivalent to the federal laws. These funds in general are based on case closures. Pet. App. 27.

Once the Texas Workforce Commission – Civil Rights Division accepted funding to support their agency investigating these state claims by state employees and requiring Plaintiff to exhaust their administrative remedies through this Federally funded state agency, it waived its Eleventh Amendment immunity argument.

II. Defendant does not enjoy Eleventh Amendment immunity to Plaintiff's TCHRA Claims, pursuant to the language in the statute itself

Chapter 21 of the Texas Labor Code section. 21.211. ELECTION OF REMEDIES. A person who has *initiated an action in a court of competent jurisdiction* [emphasis ours] or who has an action pending before an administrative agency under other law or an order or ordinance of a political subdivision of this state based on an act that would be an unlawful employment practice under this chapter may not file a complaint under this subchapter for the same grievance. Chapter 21 fails to require an aggrieved individual to file a cause of action under its statute in state district or county court. Such failure constitutes waiver.

To argue otherwise would lead to this scenario - Plaintiff's Chapter 21 claims, while distinct and allowing separate recoveries from its Federal counterparts, arise out of the same facts, that is, Defendant would rush to claim res judicata in response to any Plaintiff's subsequent filings in the State court. At the same time, Defendant claims Eleventh Amendment immunity to Plaintiff's Chapter 21 claims in this Court. If the Court allows Defendant to prevail on its sovereign immunity argument as to Plaintiff's Chapter 21 claims, Plaintiff would be effectively barred from recovering under Chapter 21 after the conclusion of the present case.

CONCLUSION

The petition for writ of certiorari should be granted because the Fifth Circuit Court erroneously affirmed a decision that relied on false information.

Respectfully submitted,

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