No. 21-5886 ORIGINAL

In the Supreme Court of the United States

Sasha McGarity
Petitioner,

v.

Birmingham Public Schools
Respondents

ON PETITION FOR A WRIT OF CENTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CENTIORARI

Office of:
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QUESTIONS PRESENTED

i. Does filing an answer with the court via electronic means but failing to serve the plaintiff satisfy service of process in accordance with *28 U.S. Code § 3004 and 28 U.S. Code 1652?*

ii. Should the court uphold establishing pretext in race discrimination as not having to be "so apparent as to jump off the page and slap you in the face" *Anthony Ash et al. v. Tyson Foods, INC 546 U.S. 454 (2006)*

iii. Is establishing the *but-for cause* standard for retaliation limited to one decision maker's motives?

iv. Should assertions of harassment and hostile work environment be excluded due to applications of state laws?

LIST OF PARTIES

Petitioner, Sasha McGarity an individual and citizen of the state of Michigan is the Plaintiff-Appellant in these proceedings. Respondent, Birmingham Public Schools (BPS) are the Defendant-Appellees in these proceedings below.

RELATED CASES

Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006

Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004)

Brotherhood of Teamsters v. United States 431 U.S. 324 (1977

EEOC v. American Glory Restaurant Corp., Civil Action No. 1:20-cv-00184

EEOC v. Workplace Staffing Solutions, L.L.C., Case No. 1:15cv360LG-RHW

Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005)

Loudermilk v. Best Pallet Co., 636 F.3d 312 315 (7th Cir.2011

Shager v. Upjohn Co., 913 F. 2d 398 - 1990

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES **PAGE NUMBER**

STATUES AND RULES

OTHER

OPINIONS BELOW

The Sixth Circuit Court opinion is unreported and reproduced in Appendix A. The Eastern District Court of Michigan opinion is unreported and reproduced in Appendix B.

JURISDICTION

The Sixth Circuit court judgment was entered September 7, 2021. This court has jurisdiction under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides:
(a) It shall be an unlawful employment practice for an employer –
(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
(2) 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.
42 U.S.C. § 2000e-2(a).

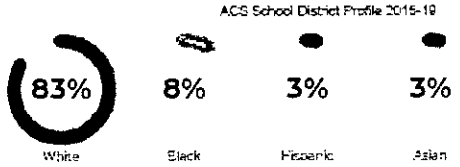
42 U.S. Code § 12203.Prohibition against retaliation and coercion

28 U.S. Code § 1652 - State laws as rules of decision

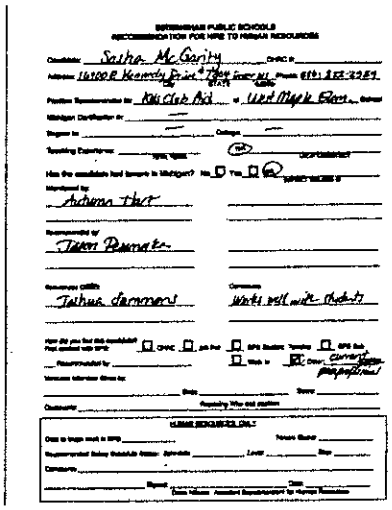
STATEMENT OF THE CASE

I. Factual Background

August 2018, Sasha McGarity was hired as a special education paraprofessional for BPS. Birmingham Public Schools is an affluent school district and according to the ACS school district profile, predominately Caucasian.



Despite the racial inequalities among employees, McGarity was exceeding her performance standards and received a letter of recommendation after only 2 months of employment. BPS hired McGarity in a secondary role at the elementary school.



Unlike the other three special education paraprofessionals, McGarity was an aspiring teacher and begin to associate and make acquaintances with teachers and employees outside the special education department. December 11, 2018, McGarity notified Weiss she would be late to a meeting due to her secondary role at the school.

Weiss and Theys reported McGarity to the assistant principal. December 12, 2018, Pesamoska, masking the meeting as a getting to know you conference revealed to McGarity his true motives for the gathering was the "girls" reported her. Pesamoska directed McGarity to meet with Weiss & Theys to keep the lines of communication open.

December 19, 2018, McGarity met with Weiss and Theys as Pesamoska directed. Upon learning Weiss reported McGarity because she failed to acknowledge or greet her in the hallway, McGarity expressed discontent. McGarity's assertiveness frustrated Weiss who stated, "Why don't you put in your two weeks notice and leave." Pesamoska begin a series of bias performance investigations in order to appease Weiss & Theys discontent with McGarity standing up them. In a meeting with McGarity on December 20, 2018, Pesamoska revealed to McGarity that his mentor Mahler expressed concern over his one-sidedness in the conflict. Shocked at Pesamoska's own admittance of prejudice, McGarity in distress requested she have Christmas recess to think things over. Pesamoska granted her request.

January 1, 2019, McGarity informed Pesamoska that she would like to stay at the school and work things out but would like to invite a union rep to the reconciliation meeting with Weiss & Theys. In panic, Pesamoska disinvited Weiss & Theys invited Mahler, Special education director and Niforos, EEOC compliance officer/Superintendent of Human resources. On January 10, 2019, Pesamoska spewed out several lies about McGarity's supposed performance failures. McGarity contested all of them. Without independent investigations by Mahler, Niforos, or Dalton (union rep), she was terminated on the spot. McGarity immediately filed a complaint of discrimination and retaliation with the EEOC and received her right to sue in February 2019.

II. Proceedings in Eastern District Court of Michigan

In May 2019, McGarity sued BPS in Eastern District Court of Michigan for Title VII claims of race discrimination, retaliation, and harassment. McGarity moved for default judgment but the district court denied the motion asserting failure to obtain entry of default by

the clerk. BPS answer submitted only to the court via electronic means rendered the Plaintiff served.

May 18, 2020, Plaintiff moved for summary judgment because the facts she presented could not be disputed. The district court confirmed McGarity has established a *prima facie* case of race discrimination but denied the motion for summary judgment in whole. The trial court states, "Whether McGarity occasionally communicated with her colleagues via text message is immaterial to the reason she was terminated – her failure to communicate in-person regularly about the students' needs while at work.

Next, the district court decided McGarity failing to, "raise a material question of fact that Mahler's attendance at the termination meeting was in any way a motivating factor in the decision to terminate her, or that the proffered reasons for her termination were pretext. Additionally, the trial court decided, "McGarity has failed to raise a material question of fact that Principal Pesamoska reasonably believed the reasons for terminating McGarity were true due to his own observations and investigation.

Lastly, the trial court asserts Shimshock is not a similarly situated because, the "incident in question involved an agitated student who became physical, throwing items and grabbing Shimshock around her legs. (ECF No. 63-3, PageID.934.) Shimshock radioed for assistance, but did not physically engage with the student. (*Id.*) BPS put Shimshock on paid leave while it investigated this incident. (*Id.*) BPS determined that Shimshock responded appropriately.

The district court denied the Plaintiff's retaliation claim asserting, "even assuming McGarity can satisfy the first three elements of a retaliation claim, BPS is entitled to summary judgment because she fails to raise a material question of fact as to the issue of causation. Additionally, the district court determined, "thus, McGarity's refusal to communicate with the LRC teachers after January 1st is an intervening event that is a legitimate reason for her termination, and McGarity cannot prove that but for her earlier "request" for a union representative she would have remained employed.

On claims of harassment, Eastern District Court of Michigan denied McGarity summary judgment

exclaiming, "The isolated non-race-based comment alleged by McGarity clearly does not meet that high threshold. *See Id.* (non-race-based comments that reflect on the plaintiff's work habits rather than racial animosity do not create a hostile work environment).

III. *Proceedings in the Sixth Circuit Court of Appeals*

The Appellate Courts decided, "the Plaintiff must obtain a clerk's entry of default before the clerk or court may enter default judgment." The Sixth Circuit decided, "McGarity filed her first request for an entry of default on July 1, well after BPS filed its answer with the court on June 12, the clerk was under no obligation to enter a default against BPS." Therefore the Sixth Circuit confirmed the district court's decision.

In the matter of race discrimination disparate treatment, the Appellate court's states, "Inconsistencies are inevitable when the record takes into account numerous documents and witness statements, but McGarity does not identify any blatant contradictions, only factual determinations made by the district court that she disagrees with."

On the claim of retaliation, the appellate court decided, "In either case, McGarity's failure to depose Mahler truncated the necessary "inquiry into the motives of an employer" to develop the issue of causation. Also, the circuit court determined, "In any event, the district court denied the retaliation claim primarily by identifying an intervening event that broke the causal connection. Specifically, Pesamoska had told McGarity that she must maintain communication with the LRC teachers in order to continue as a paraprofessional. "After McGarity had requested the presence of a union representative in her upcoming meeting with Pesamoska and other school officials, Pesamoska learned that McGarity had not talked at all with the LRC teachers in the weeks after he had stressed with her the importance of maintaining communication; that lack of communication persuaded Pesamoska to move toward dismissing McGarity from her position. Because McGarity does not raise any arguments toward identifying a genuine dispute of material fact over this intervening event, the district court's conclusion must be affirmed."

Finally, on the claim of harassment, the Circuit court concluded, "In any case, McGarity now concedes that Weiss's words "are not unlawful under [T]itle VII," but she argues that they are unlawful under "the common tort law." Unfortunately for McGarity, she did not assert such a state-law claim below, and we will not consider it in the first instance on appeal.

REASONS FOR GRANTING THE PETITION

I. *Default Judgment*-The Appellate court's decision raises a serious issue important Constitutional law.

28 U.S. Code § 1652 designate state laws as rules of decision in civil actions. Therefore, Michigan Rules of Civil Procedures established by the constitution and laws of the State of Michigan states, "A defendant **must serve and file** an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint (MCR 2.108). The Defendants filed an answer with the court but failed to **serve** the Plaintiff-Appellate. Plaintiff-Appellate made several attempts to file default but the clerk refused to certify. Birmingham Public Schools finally served the Plaintiff its answer on July 12, 2019 which is well passed the June 11, 2019 deadline. This lack of service of process by experienced Defendants prejudiced the Plaintiff by delaying these proceedings and prolonging her emotional distress and suffering. No proof of service is on docket from Birmingham Public schools for June 12, 2019. The Defendants knowingly filed electronically well aware that the Plaintiff was not a registered user. While Pro se litigants follow the proper procedures or risk dismissal, the same should be afforded to Defendants who attempt to circumvent proper service of process. Plaintiff prays that the justice scales would balance by holding Birmingham Public schools accountable for insufficient service of process.

The Sixth Circuit Courts decision is clearly incorrect. Rule 55(b) allows for default by the court even if the party has appeared. Birmingham Public school responded to the court but failed to serve the Plaintiff. Similarly, after

being served with notice of EEOC's suit, the company failed to respond EEOC's allegations (*EEOC v. Workplace Staffing Solutions, L.L.C.*, Case No. 1:15cv360LG-RHW). Therefore, default judgment against the Birmingham Public Schools should be granted.

II. Disparate Treatment & Pretext- The Appellate Court's decision conflicts with Supreme Court decision

In the case of *Anthony Ash et al. v.Tyson Foods, INC 546 U.S. 454 (2006)* where the Supreme court disagree when the Eleventh Circuit held that Ash's evidence did not meet the standard for establishing pretext: the disparity in qualifications needed to be "so apparent as virtually to jump off the page and slap you in the face." McGarity provided a host of evidence to prove communication with the teachers, accurate if not superior job performance, as well as numerous contradictory statements from BPS **in chart form** to prevent errors for the Sixth Circuit. The circuit court apparently neglected to say whether the evidence was sufficient to prove or disprove pretext. It is not just that McGarity disagrees with the circuit court but the evidence disagrees with the trial courts and circuit courts determinations.

Race discrimination amongst the educated, wealthy, and elite is not blatant but masked as if hidden under a white sheet. 2015-2019 BPS district demographic statistics prove racially disproportionate with 83% Caucasian and only 8% African Americans.
In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), a case brought under the "pattern or practice" provision of Title VII, the Court stated that "statistics showing racial or ethnic imbalance are probative ... because such imbalance is often a telltale sign of purposeful discrimination." McGarity, excelling in this environment would not be applauded by everyone.

McGarity showed pretext by pointing to inconsistencies and contradictions in BPS arguments. A plaintiff can show pretext by pointing to "weaknesses, implausibility, inconsistencies, incoherencies, or contradictions" in the defendant's proffered legitimate reasons for its action,

such that a reasonable fact finder could rationally find them unworthy of credence (Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005). Mahler did not recommend her for the position. Even if she had, Mahler and/or Niforos acting on behalf of another biased employee, Pesamoska cannot escape responsibility. Mahler (Pesamoska's mentor) could only be made aware of the conflict by Pesamoska or her daughter, Theys.

In Shager v. UpJohn Co., 58 Judge Posner first coined the term "cat's paw" to describe a situation where a biased subordinate with no decision making authority dupes the unbiased decision maker into taking adverse employment actions against an unfortunate employee." In this instance, Pesamoska is the biased subordinate and Niforos is the decision-maker. Mahler and presumable Niforos were cognizant of Pesamoka's discriminatory behavior and cannot escape liability according to the Seventh Circuit, "supervisor's recommending termination without conducting an independent investigation cannot escape liability." Niforos' email clearly infers that the EEOC compliance officer had no intention of giving McGarity any credence in the matter. Niforos' hurriedness to resolve can be proffered as race discrimination. There is no other reason for haste but that McGarity is African American and her discovery of Pesamoska's prejudice.

Dean Niforos

From: Dean Niforos
Sent: Monday, January 7, 2019 2:07 PM
To: Jason Pesamoska (JPesamoska@birmingham.k12.mi.us)
Subject: Sasha McGarity

Hi Jason,

I've been speaking with Laura, who shared that you've been having concerns about para Sasha McGarity.

Let's talk later today or tomorrow, because she is on probation only through January 22nd.

Dean T. Niforos, SPHR
Assistant Superintendent for Human Resources
Birmingham Public Schools
(248) 203-3032

Plaintiff asks the Supreme Court to review Shimshock, Theys, and Tomaselli as similarly situated employees. During discovery, BPS stated only one employee was disciplined for a cell phone violation in the past 5 years.

Shimshock originally testified she was never reprimanded for striking a student during her deposition with McGarity but then recanted her story to counsel for the defendants, hence inconsistencies by BPS.

Theys' dispute with McGarity and having her mother, Mahler as a decision maker is clearly a conflict of interest and a demonstration of BPS non-compliance with its own policies. Finally, Tomaselli has the same amount of experience as McGarity, remained employed when in person communication was prohibited while McGarity was fired for supposed lack of communication (in person communication determined by the trial court) satisfies the Sixth Circuits assertion that McGarity only established her race. If in person communication was revealed during discovery McGarity would have subpoenaed video and has since tried to obtain the footage from another source.

III. Retaliation & Causation- The Sixth Circuit conclusion contradicts with other Supreme court decisions

42 U.S. Code § 12203 and Title VII prohibits retaliation. The but-for causation standard is not limited to Mahler as the Circuit Court claims. Mahler, Niforos, and Pesamoska played a role in the decision to end McGarity's employment. EEOC compliance officer, Niforos', email to Pesamoska instructing him to act quickly because the Plaintiff-Appellant probationary period was ending infers other motive. If McGarity was white, what would be the hurry in dismissal without proper investigation? An EEOC compliance officer is tasked to uphold regulations, policies, and fair treatment of employees. Niforos had already made a decision without hearing from McGarity. Plaintiff-Appellant provided a heighten causation based upon Pesamoska's own testimony of wanting to become a principal his whole life. Hence, McGarity's awareness of his racism and now involving the union would potentially render his dreams deferred.

The Supreme Court should review the timing of this supposed intervening coined by the lower courts. There was no ultimatum given to McGarity in order to continue her employment. If this were true, McGarity would have

no need to contact Dalton (union rep) for reasons for termination. Additionally, Dalton (union rep) did not even know the reasons for termination himself. Therefore, no mention of a lack of communication was mentioned at the surprise termination meeting only Pesamoska ranting lies in order to prevent any further exposure of his prejudice. All the more, BPS has now switched the timing of this supposed lack of communication from Weiss' declaration stating "no communication on the first day of school," to October 2018, and now January 2019. Adverse reactions due to ace discrimination is masked in incalculable job standards as in the case of *Back v. Hastings On Hudson Union Free Sch.Dist.*, 365 F.3d 107 (2d Cir. 2004), an African American woman terminated for supposed lack of organizational and interpersonal skills. It is nonsense to consider such a derived and undocumented performance parameter as lack of communication.

The Defendants proffered reasons for termination are concocted. McGarity was the only one given directives that were ignored and is held solely responsible for making amends for the dispute with the teachers. Not one directive was given to the teachers which furthers supports disparate treatment.

In order to survive summary judgment, BPS created a book of bogus declaratory statements from fellow employees and even asserted the **front desk secretary** as a witness to McGarity's supposed lack of communication. The Sixth Circuit neglects to consider the merit of BPS assertion as well as proximity between the Plaintiff-Appellant's protected activity and Pesamoska's adverse actions. Loudermilk v. Best Pallet Co., 636 F.3d 312, 315 (7th Cir. 2011)

IV. Harassment & Hostile work environment- The Appeals Court decision is clearly erroneous

The Supreme Court should review the Sixth Circuit's decision because hostile environment harassment is another form of intentional discrimination prohibited by Title VII and Michigan state laws. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive

enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. McGarity was forced to continue working with and for a teacher who recommended she **"put in her two weeks notice and leave."**

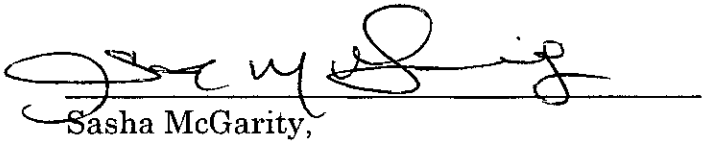
The lower courts are incorrect in stating that this single comment would not cause a hostile work environment for McGarity. This same teacher would provide input to Pesamoska and other decision makers on whether McGarity successfully completed her probationary period. After this incident, McGarity's schedule changed to assisting many students and teachers to now assisting one student in one classroom. Similarly, the Supreme Court should consider *EEOC v. American Glory Restaurant Corp., Civil Action No. 1:20-cv-00184,* African Americans were assigned less desirable duties when objecting to ill treatment. After Christmas break, it was clear that everyone including Weiss's friends/co-workers were made aware of the situation. The law makes Birmingham Public School liable for harassment by a supervisor that results in negative employment action or failure to promote or hire.

McGarity's objection to the Weiss' comments was the spark that initiated biased performance investigations by the Pesamoska who would make Weiss' command reality. Pesamoska even offered McGarity **two weeks pay to leave**, hence even more correlation between actions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Date: October 01, 2021