No. 21-5926

In the
The Supreme Court of the United States

RIMMA KUNIK,

Petitioner,

v.

NEW YORK CITY DEPARTMENT
OF EDUCATION, et al.,

Respondents.

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

PETITION FOR REHEARING

Rimma Kunik
296 Hubert Humphrey Dr
Apt. A10
Chestnut Ridge, NY 10977
kunikrimma@gmail.com
(845) 623 1364

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ACTIONS VERSUS SLURS

The case petitioner presented for a review is meant to alert this court to an inherent flaw in the approach to discrimination cases and **complete lack of guidance** on slurs versus actions and its effect on court's decisions.

It is the out of the ordinary circumstances of the petitioner's age and religious discrimination case dating back to 2012-2014 that force petitioner to file this petition and humbly request that this Court kindly accept petitioner's Writ of Certiorari for a review. The presented case lacks slurs in its evidentiary record. According to information from EEOC, "...the problem of workplace discrimination in the US... isn't usually expressed through slurs or physical threats... . Complaint data show that discrimination can often manifest itself in more subtle ways, such as the assignments workers are given, ...the ways their performance is judged..." Workplace Discrimination is Illegal.... by Christina Animashaun/Vox. EEOC advises that a determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

However, it is an observation of petitioner that courts are reluctant to accept discrimination and harassment if specific cases do not contain slurs, name calling, etc. in their evidence. However, people abuse others most often through their actions. Bias, deception and discriminatory intent inevitably leak through and taint the actions of those

associated with them. Those who openly resisted their attitude and actions, such as taken by defendants Houlihan and AP Fuentes, suffered. Standing up to the abusers made it hard for petitioner to stay in the system after long years of dedicated work.

The need for granting a review to this case is pressing because courts need guidance on correct handling of such cases of "mute" discrimination so that they do not overlook discrimination covered up by lack of "slurs".

The beauty of the American Constitution is that it takes deprivation of inherent rights of its people very seriously and protects them from it. However, American people are protected only to the extent that the country's courts understand very well what is unacceptable in view of the individual articles of the Constitution. The case presented by petitioner for a review reached the United States Supreme Court level only because two federal courts disregarded actions in its context in favor of "slurs" and thus need to be advised by the highest authority in law if their conclusions violate the rights of those who were exposed to discrimination dense actions where lack of slurs provided abusers with an excellent loophole. Such situations need to be addressed because it affects too many Americans. This case presents an excellent opportunity to do it as defendants pronounced no slurs, but their actions do not leave any doubt that both engaged in age and religious discrimination of petitioner and retaliation. "Slurs" and their absence form the basis for

petitioner's first question presented for consideration to this Court.

DECISIONS MOTIVATED BY THE AGGRESSIVE PRESSURE FROM DEFENDANTS' COUNSEL

The decisions pronounced by Judge Broderick on September 29, 2017 and January 31, 2020 represent the abuse of discretion on his part caused by disregard of the factual evidence in her case. It is petitioner's observation that the abuse of discretion may have been caused by the tremendous pressure from defendants' counsels who aggressively manipulated most relevant evidence on record or avoided mentioning it as if it had never existed. They understood early that the evidence presented by petitioner did support her claims of discrimination, and NYC Department of Education (DOE), a huge governmental administrative body, absolutely could not afford to be exposed to a negative publicity. Defendants' counsels, determined to stop the petitioner from being granted a jury trial, were completely relentless. It is another reason to accept this case for a review as it could have precedential value on this account, too. Under this pressure, Judge Broderick abandoned neutrality expected of a judge and followed the lead from the defendants' lawyers.

The case is rich in factual evidence that supports the discrimination claims of the petitioner, but Judge Broderick refers to them as "inapplicable to legal conclusions" in Memorandum and Order

(Doc.34, p.8:2), never explaining why exactly solid facts of this case were "inapplicable to legal conclusions". He does not deny the facts as most of them are recorded, but just does not analyze them in good faith.

PETITIONER HAS PROVED BOTH AGE AND RELIGIOUS DISCRIMINATION

Petitioner has proved both age and religious discrimination she claims in her Amended Complaint (Doc.23).

"In order to establish 42 U.S.C. SECTION 1983 (1988) claim for age or religious discrimination, a plaintiff must demonstrate that(1)defendants acted unlawfully under the color of state law; and (2)plaintiff suffered a denial of her federal constitutional or statutory rights as a result."*Annis v. City of Westchester*, 136F.3d239,245(2d Cir1998). Defendants Houlihan and Munoz Fuentes were appellant's supervisors at Fort Hamilton High School (FHHS) operating under the NYC DOE, so the normal rules of supervisory and municipal liability apply (Doc.23 p.4:10-22).

The available evidence (Appeal Brief p.16:1-3) disproves that petitioner was allegedly a "bad" teacher – defendants' exclusive defense (AB13:16;27:6-15). Defendant Fuentes had been rating petitioner as a satisfactory teacher for about 10 years before her retaliatory actions of 2011-2012 schoolyear. Defendant Houlihan implemented the

discriminatory change of petitioner's schedules/classrooms **110 days prior to her first observation of petitioner**, so she cannot claim it as her defense. Instead, it points to the pretext for age/religious discrimination against appellant (AB p.15:7-10). Indeed, defendants presented no legitimate defense for creating burdensome schedules for ONE teacher only in the Department, the only one that belonged to two protected groups. It proves that defendants treated similarly-situated employees outside appellant's religion/age group more favorably (Reply Brief p.8;9;10:1-5).

No evidence involving petitioner's comparators was presented by defendants to show that they had treated petitioner's comparators as harshly as they treated petitioner. It would have been an easy way to disprove petitioner's charges of disparate treatment, but obviously, such evidence does not exist. It leaves petitioner's claim of disparate treatment unchallenged. Petitioner did prove her claims of age and religious discrimination. To be actionable under the Equal Protection Clause, however, a plaintiff must show that the abusive conduct occurred because of her membership in a protected class. In 2012-2014 petitioner was and remained the oldest ESL teacher and the only person of Jewish faith among her similarly positioned comparators(RB p.7:1-4). Defendants' Responses and Objections to Plaintiff's Requests for Admissions on 8/15/2018. (Doc# unavailable) unequivocally confirmed the above status of appellant in her department. Defendants were aware of it and never denied knowing it.

Furthermore, conscious failure of Houlihan to address Kunik's written complaint about her AP's harassment and resorting to the same abusive speech behavior(ABp.23-24:1-15) shows that Houlihan, too, had an intent to discriminate against petitioner based on her age and religion. See *Bohen v. City of East Chicago, Ind.,*799F.2d at 1187-describing similar behavior of the supervisor in a sex discrimination case.

Houlihan/Fuentes representing NYC DOE covered by anti-discriminatory statues (AB p.3:14-21;p.4:1) **could not freely assign challenging burdensome schedules exclusively on the basis of prohibited discrimination**, and this act of defendants consequently presents a plausible inference of discriminatory intent based on violating age and religious rights of petitioner belonging to both the groups. Compare *Russel v. Principi*, 257 F3d815,819(D.C.Cir.2001). Houlihan's "failure to accommodate" petitioner's religious observances(AB p.27:6-15) although they could not lead to any monetary losses establishes a prima facie case of religious discrimination, too.

In his Memorandum and Order (Doc 34,p.17:6-8) Judge Broderick writes, "...the Second Circuit held that "the assignment of ' a disproportionately heavy workload' can constitute an adverse employment action" (quoting *Feingold v. New York*, 366F3d 138, 152-153(2d Cir. 2004)). Obviously, petitioner who was forced to sleep no more than 5 hours a day and failed to keep up with

her normal religious observances did have "a disproportionally heavy workload", and thus was indeed exposed to an adverse employment action by defendants. Judge Broderick writes in his Opinion and Order (p.18:bottom), " the cumulative effect of Kunik's allegations, including that she received a heavier workload than her comparators, meets the "minimal" bar necessary to plead an adverse employment action at the pleading stage" See Vega, 801 F.3d at 85(holding that a disproportionally heavy workload can constitute and adverse employment action") and keeps her claim of age discrimination alive in his order dated September 29, 2017. He also refuses to address "...Defendants' arguments to dismiss the action for failure to state a claim for age discrimination" in his Opinion and Order (Doc.73,p.8:11-20).

However, in the same Opinion and Order (Doc.73) he contradicts himself when he writes,"...Plaintiff fails to cite evidence in the record to establish, or create an issue of facts that her workload was so burdensome as to constitute a departure from normal academic practice. Plaintiff's course load was also not greater than that of her peers."(Doc.73, p.12:9-12). In support of this statement, he quotes Doc.63-2 Ernst Declaration. and Doc. 68-16 Lewbel Declaration Ex M-2.

Doc. 63-2 from Ernst Declaration presents 111 pages from the petitioner's deposition. Nowhere in this deposition was petitioner asked to explain why her workload was unusually burdensome or her sleep was curtailed to no more than 5 hours daily, as

stated in her Amended Complaint. Instead, defendant's counsel asked her a question about the **number** of classes she taught daily. The UFT-DOE contract confirms that all teachers working under this Contract taught 5 classes each day. Petitioner never claimed that she had taught **more** classes – her claim was **the level of difficulty and responsibility** imposed on her by the unprecedented schedule in her department when she was forced to teach **exclusively** Regents classes that terminated in a Regents test students needed for graduation from high school. The general practice for each teacher had been teaching ONE such two-period class and the other three classes would be of a lower level. By asking the question about the number of classes taught and aggressively **preventing** the deposed petitioner from explaining the problem she had with grading an unprecedented number of pages of student written work, defendants' counsel switches the focus from the **difficulty** of the assigned classes to a **number** of classes taught and thus misrepresents the genuine evidence on the record. Judge Broderick uses the counsels' rhetoric. This explanation is an example of how defendants' counsel manipulated the genuine material evidence on record and Judge Broderick followed the lead which resulted in the abuse of discretion coming from the court whereas it was supposed to be absolutely neutral in its evaluation of the evidence.

The above explanation confirms petitioner's claim in her application for this review that no solid contextual analysis of the material evidence on record presented by her was carried out, as required

by the decision of the US Supreme Court in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007). The conclusions made by Judge Broderick were erroneous, but his aggressive attitude toward the petitioner confirms his intent was to arrive at these conclusions because defendants needed them to stop petitioner's case from proceeding.

Moreover, when Judge Broderick writes, "The fact that Plaintiff's classes included Regents classes is not a departure from normal academic practice, is consistent with her level of experience, and is not actionable."(Doc.73, p.12:13-15), he himself manipulates factual evidence. The judge supported his specific decision on petitioner's burdensome workload in 2012-2013 in a public school and petitioner's claim of adverse employment action created by it with his personal opinion of it. This way he again opened the door to that very abuse of discretion petitioner was exposed to. Indeed, there is no statement in Federal Education Laws or New York State or City regulations on education that makes it legal or a "normal academic practice" assigning classes of the highest difficulty, such as Regents classes are in the context of a public school, exclusively to ONE teacher in the department only, as was the case in petitioner's schedule for the spring semester of 2012-2013. This fact was avoided by the defendants' counsel and Judge Broderick .

Furthermore, all plaintiff's comparators had to satisfy the same certification requirements to be able to get tenure under their ESL license in a New York City public school and thus were equally able to

teach Regents classes, so assigning exclusively Regents classes to petitioner **was not a necessity** or "normal academic practice", but a sign of preplanned harassment of petitioner based on her age and religion as she was the only person among her comparators exposed to such a burdensome schedule. Never does the Judge mention the 5 hour sleep and complete lack of personal time, provably being an **intended** consequence known to both Fuentes and Houlihan from their own teaching experience. Both confirmed in their depositions that Regents classes presented the highest level of difficulty in teaching and in developing the skills ESL students required in order to pass this standardized test indispensable for graduation.

Examples of evidentiary misrepresentation resulting in obvious abuse of discretion are numerous in papers by defendants' counsel and Judge Broderick.

GENUINE DISPUTE ON THE MATERIAL FACTS

In addition, the evidence introduced into the case by defendants and used by Judge Broderick to arrive at his erroneous conclusions provably contains errors or misrepresentations which created genuine dispute on the material facts. ".. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." (Doc. 73, P.9:11-12) The Judge writes, " The basic facts are not disputed by the parties. What is

disputed is whether the facts support Plaintiff's claims for age and religious discrimination. I find they do not". Incorrect! Petitioner did address and dispute most of the factual evidence on record in 2019. Not even ONE such denied fact from Responses of Plaintiff...to the Statements of Undisputed Material Facts (Doc.69, Suppl.1) is addressed in Opinion and Order (Doc.73). Why?

THE SECOND CIRCUIT COURT OF APPEALS SUPPORTS ITS DECISION WITH NON-EXISTING EVIDENCE

The three judges of the Second Circuit Court of Appeals who upheld Broderick's decision showed indifference to the overwhelming evidence of the claimed discrimination presented by petitioner in the Appeal Brief(AB). It included instances of unacceptable speech behavior, disregard for her right to privacy, unsupported negative evaluations (successfully challenged in her Article 78 case and unanimously recognized by four judges who write,"...respondents' determination was made in violation of lawful procedure, or was arbitrary and capricious or an abuse of discretion." – see App.78:14-17), lies, disregard for her complaints, unsupported disciplinary meetings and letters, violation of her tenure rights and many other discriminatory ACTIONS. Although all the evidence is factually supported, the actions were not considered by two major courts as proof of discrimination based on the two protected groups petitioner belongs to. The absence of slurs in the

case was the only solid ground for them to deny discrimination altogether. Mandate p.5:11-13 "...To be actionable under the Equal Protection Clause, moreover, a plaintiff must show that the abusive conduct occurred because of her membership in a protected class. " *Littlejohn v. City of New York,* 795 F.3d 297, 320 (2d Cir. 2015) (internal quotation marks omitted). Didn't petitioner prove it by being the only person uniquely belonging to two protected groups and the only person exposed to the treatment discussed in the Appeal Brief in great detail? "...Her allegations of implicit discrimination were speculative and conclusory..." (Mandate p.6:8-10) Petitioner never mentioned "implicit" discrimination. She presented solid evidence of openly **explicit** pervasive discriminatory and retaliatory actions only. "...She testified that defendants never commented on her age or religion, and she presented no evidence to support her speculative allegations that defendants harbored implicit bias towards her based on her age or religion." See *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 456 (2d Cir. 1999) ("[feelings and perceptions] of being discriminated against [are] not evidence of discrimination") see (*Mandate*,p.9:11-15) **Never in any papers** presented to different courts did petitioner refer to **feelings or perceptions,** but to **actions and actions** only. So the above quote is not about her case. She knew that she was discriminated from the completely illegal and thus discriminatory actions taken by defendants, and their consequences. She did not need slurs for her to be completely sure about what was happening. She just analyzed the actions and their **intended** consequences and found them

unquestionably discriminatory. How do you fight discrimination when courts themselves present "the wall" as described in the poem "As I Grew Older" by Langston Hughes?

"MUTE" DISCRIMINATION

The above factual evidence was described here to arrive at the issue of greatest importance and concern for petitioner, namely, discrimination based exclusively on defendants' discriminatory actions where lack of "slurs" is the best protection for those who committed acts of "mute discrimination" and successfully got away with it. In reality, no slurs are needed if courts analyze the evidence against the background of the laws or regulations that were violated and what these violations resulted in for plaintiffs. **Slurs are not an indispensable component of discriminatory behavior.** They are a sign of emotional state of those who pronounces them. Discrimination manifests itself in unacceptable, illegal actions, first and foremost, as correctly observed by EEOC. This Court, possessing a unique concentration of knowledge and experience, must kindly accept this case for a review and bring clarity into how actions can confirm discrimination even if slurs are absent. This is the most important reason for this request for rehearing and granting a review to petitioner's case which is uniquely positioned to present this major problem to their attention . No justice will be given to those who were exposed to such "mute" discrimination if this Justices of this Court do not take it upon themselves to look into this matter as one of the questions presented for a

review asks. This case contains a lot of compelling evidence based on defendants' discriminatory and retaliatory actions which were disregarded and "cancelled" by courts because of absence of recorded slurs in it.

Respectfully submitted,

Rimma Kunik
296 Hubert Humphrey Dr.
Apt. A10
Chestnut Ridge, NY 10977
kunikrimma@gmail.com
(845) 623 1364

No. 21-5926

The Supreme Court of the United States

Certification of Rimma Kunik, *pro se*

RIMMA KUNIK

Petitioner

v.

NEW YORK CITY OF EDUCATION, et al.

Respondents

This certification is to confirm that petitioner's request for reconsideration is absolutely filed in good faith. Not accepting her case for a review will cause a serious miscarriage of justice, considering she was exposed to abuse of discretion by two federal courts on claims of age and religious discrimination she cannot fight alone. Discretion in legal battles on discrimination is very important for the interests of the American public at large.

Sincerely,

Rimma Kunik

No. 21-5926

The Supreme Court of the United States

Certification of Rimma Kunik, *pro se*

RIMMA KUNIK

Petitioner

v.

NEW YORK CITY OF EDUCATION, et al.

Respondents

This certification is to confirm that petitioner's request for reconsideration is absolutely filed in good faith. Not accepting her case for a review will cause a serious miscarriage of justice, considering she was exposed to abuse of discretion by two federal courts on claims of age and religious discrimination she cannot fight alone. Discretion in legal battles on discrimination is very important for the interests of the American public at large.

Sincerely,

Rimma Kunik