

No. _____

In the

Supreme Court of the United States

Dolores Machuca,

Petitioner,

v.

Louis DeJoy, Postmaster General and Chief Executive Officer, United States Postal Service,

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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QUESTIONS PRESENTED

Section 504, the Rehabilitation Act of 1973, 29 U.S.C. §701-96 et seq., (hereinafter, the “Rehabilitation Act”), prohibits discrimination against otherwise qualified individuals based on physical or mental disability. The Americans With Disabilities Act of 1990, as amended (hereinafter “ADA”), 42 U.S.C. §§ 12101-12102, et seq., §§12111-12112, et seq., and 42 U.S.C. § 12133 prohibits the discrimination of people with physical or mental disabilities that diminish a person’s right to fully participate in all aspects of society including the critical area of employment.

The questions presented are:

1. Whether the Exhaustion of Administrative Remedies is allowing the United States Postal Service as an employer to discriminate against disabled employees.
2. Whether the United States Postal Service has the right to create a hostile work environment for a disabled employee based on the denial of reasonable accommodations recommended by his physician.
3. Whether United States Postal Service employees have remedies available to them based on disability discrimination, retaliation, and hostile work environment.

LIST OF PARTIES

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

1. Dolores Machuca, Plaintiff and Petitioner,
2. Louis DeJoy, Postmaster General and Chief Executive Officer, United States Postal Service Defendant and Respondent.

RELATED PROCEEDINGS

Civ. Action No. P:17-CV-00046-DC; Dolores Machuca v. Megan J. Brennan, Postmaster General and Chief Executive Officer, United States Postal Service; In the United States District Court Western District of Texas, Pecos Division, (February 13, 2020)

United States Court of Appeals for the Fifth Circuit; No. 20-50193 - Dolores Machuca v. Louis DeJoy; (December 16, 2020)

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The original opinion of the United States Court of Appeals for the Fifth Circuit is available at No. 20-50193 (5th Cir. Dec. 16, 2020). The opinion of the United States District Court for the Western District of Texas is available at USDC No. 4:17-CV-46.

STATEMENT OF JURISDICTION

On December 16, 2020, the Fifth Circuit issued its judgment. This Court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 504, the Rehabilitation Act of 1973, 29 U.S.C. §701-96 et seq. and Americans With Disabilities Act of 1990, as amended (hereinafter “ADA”), 42 U.S.C. §§ 12101-12102, et seq., §§12111-12112, et seq., and 42 U.S.C. § 12133, provides in relevant part:

(a) Disability Discrimination

1. Ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living. 29 U.S.C. §701 (b)(3)

(b) Employer practices

1. No entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment. 42 U.S.C. § 12112 (a).
2. The term “discriminate against a qualified individual on the basis of disability” includes: (3) utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis if disability; (B) that perpetuates the discrimination of others who are subject to common administrative control. 42 U.S.C. § 12112 (b).

STATEMENT OF THE CASE

Under Rehabilitation Act of 1973 exhaustion of administrative remedies is not required. *Home Box Office, Inc. v. Crimpers Promotions Inc.*, 467 U.S. 1252 (1984). Additionally, the Americans With Disabilities Act of 1990 ("ADA") "prohibits an employer from discriminating against "an individual with a disability" who with "reasonable accommodation" can perform a job's essential functions, 42 U.S.C. § 12112(a) and (b)" *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

The United States Postal Service used the requirement of exhausting administrative remedies to discriminate, retaliate, and create a hostile work environment for employees without any consequences. The United States Postal Service knew the Plaintiff was disabled and knew that the Plaintiff had requested accommodations. The United States Postal Services did not make a good faith effort to assist the Plaintiff in providing the reasonable accommodations. Instead, the United States Postal Service deliberately and in bad faith harassed and punished the Plaintiff for his disability in addition to refusing his request for accommodations. Despite the Plaintiff's multiple complaints, the United States Postal Service failed to take prompt, remedial action.

A. Factual Background

Petitioner Machuca worked as a letter carrier for the United States Postal Service. He was diagnosed with Lumbar Radiculopathy a disease which causes pain in the lower back and hip and radiates down the back of the thigh. The damage is caused by the compression of nerve roots which exit the spine. On

August 20, 2013, Petitioner was placed on Limited Duty/Modified Work Assignment based on his disability. The retaliation began the same day when the United States Postal Service changed his employee benefits. The retaliation and discrimination became evident in October of 2014 when Petitioner was required to work on his scheduled days off. When other similarly situated non-disabled employees were not. Petitioner refused to comply with his supervisor's request due to his physician recommendations, that angered his supervisor. He called Petitioner a burden on the United States Postal Service.

This was only the beginning of Petitioner's hostile work environment. Petitioner did exhaust his administrative remedies. On Mary 7, 2017, Petitioner filed a formal complaint of discrimination and retaliation on the basis of his disability. On March 7, 2017, a Final Agency Decision was issued dismissing Petitioner's claims and the EEOC confirmed the Agency's decision on July 14, 2017.

B. Procedural Background

Dolores Machuca, a letter carrier with the United States Postal Service, sued the Postmaster General for disability discrimination, retaliation, failure to accommodate, and hostile work environment under the Americans with Disabilities Act and § 504 of the Rehabilitation Act. No. 20-50193, at *1 (5th Cir. Dec. 16, 2020). The Fifth Circuit States Machuca only challenged the ruling on his Rehabilitation Act claim. Falsely states that Petitioner conceded the key point of exhaustion of administrative remedies. *Id* at *2.

During the original proceeding in the Western District of Texas, Postmaster General moved for summary judgment after the discovery period based solely on the fact that they claim Petitioner did not exhaust his administrative remedies *Id.* Therefore, the factual disputes that precluded summary judgment were not taken into consideration by either court.

REASONS FOR GRANTING THE PETITION

I. Different Circuits have Different Approaches regarding Exhaustion of Administrative Remedies.

- A. The Fifth Circuit has a longstanding history of dismissing claims for failure to exhaust administrative remedies.

The Fifth Circuit only excuses a claimant's failure to exhaust administrative remedies in limited situations such as situations in which the unexhausted administrative remedy would be plainly inadequate. *Taylor v. United States Treasury Department*, 127 F.3d 470 (5th Cir. 1997).

In *Taylor*, the district court concluded that Taylor failed to make a proper request under the Privacy Act because his request did not comport with applicable regulatory requirements. Specifically, the court concluded that Taylor's Privacy Act request failed to comply 31 C.F.R. § 1.26(d)(1)(iii), which requires that a request for records under the Privacy Act. *Id.*

Here, the United States Postal Service on their website has a dedicated section with a comprehensive drop-down option for various sections. Under Publication 133, titled "What you Need to Know About

EEO -Contents” it explains the numerous EEO laws including the relevant Section 501 and of the Rehabilitation Act of 1973, as Amended, in which it states, “Section 501 and 505 of the Rehabilitation Act prohibit discrimination based on mental and physical disability and require agencies to reasonably accommodate the known physical or mental limitations of qualified employees or applicants with disabilities. *United States Postal Service*, Section 501 and 505 of the Rehabilitation Act of 1973, as Amended, (last visited May 14, 2021, 08:46 PM), https://about.usps.com/publications/pub133/pub133_006.htm.

Additionally, this same section it states the Administrative Process for Complaints of Illegal Discrimination if you are a postal service employee, stating “you have the right to file an EEO complaint with the Postal Service. You must take the EEO pre-complaint process before filing a formal EEO Complaint.” Explaining that, “the purpose of the pre-complaint process is to advise you of your rights and responsibilities under the EEO process, to identify your claims, and to try to resolve the matter informally.” It goes on to explain the formal EEO complaint process, which must file using PS Form 2565, titled *EEO Complaint of Discrimination in the Postal Service* to file the formal EEO compliant which must be in writing and signed. Adding that to be timely, you must mail the EEO complaint to the National Equal Employment Opportunity Investigative Services Office postmarked no later than 15 calendar days after you received the PS Form 2579, *Notice of Right to File* at a specified address in Tampa, Florida. It goes on to instruct procedures for requesting a EEOC hearing by submitting the request

to the office in your geographical area within thirty (30) days of the receipt of the investigative file. It then states appeal procedures with appeal form and instructions with notes on timeliness. Finally, it provides various options with corresponding deadlines as to when a civil suit is appropriate. Though the process to file a complaint with the United States Postal Service as an employee is tedious and, the process is very different from the very specific regulations and additional requirements necessary to comply with the IRS's Privacy Act as in *Taylor*. The U.S. Privacy Act makes the process intentionally rigorous to protect sensitive information about private individuals recorded by Federal Agencies.

It can be argued that the systematic procedures in place by the United States Government are intentionally particular and precise, not to protect employees but to protect themselves. One misstep from a complaint and the United States Postal Service can argue that the complaint did not comply as required and the complaint should be dismissed thus avoiding liability. In this case, the Plaintiff followed the administrative process for United States Post Office employees as instructed. He attempted to resolve the issue at the required level and escalated as necessary. When relief efforts were exhausted, he filed an EEO complaint process as entitled. The process for filing a complaint when being blatantly discriminated, abused, and harassed by your employer should not be as rigorous as complying with the IRS Privacy Act as demonstrated in *Taylor*. Imposing such convoluted protocols, discourages already disadvantaged victims from coming forward with valid allegations of discrimination and protects the United States Postal Service from liability. The

Plaintiff here followed the protocol and exhausted all his remedies in seeking relief. In the event, the Plaintiff failed to satisfy one of the requirements imposed by the United States Postal Service his complaint should not be dismissed. It is in the interest of public policy to make is practicable for employees who are being discriminated against due to a disability, race, gender, national origin to come forward with grievances. The Fifth Circuit erred in finding that the Plaintiff failed to exhaust all administrative remedies. On the contrary, the Plaintiff has gone above and beyond in his effort to seek relief.

B. The Fourth Circuit Has Allowed Cases in Which Plaintiffs have Attempted to, but could not, Exhaust Administrative Remedies.

The Fourth Circuit has declared that failure-to-exhaust is an affirmative defense and that the dismissal of a complaint for failure to exhaust administrative remedies are rare. *Custis v. Davis*, 851 F.3d 358 (4th Cir. 2017).

In *Custis*, Mr. Custis, an inmate, requested a bottom bunk because the missing toes on his right foot inhibit his ability to climb to the top bunk. *Id.* at 358. Initially, he was accommodated by the Virginia Corrections Department, however he was later moved to an upper-level bunk where he fell and injured himself while ascending the stairs. *Id.* Custis pursued his administrative grievance process, and then filed suit. The district court sua sponte dismissed the complaint on the ground that Custis failed to properly exhaust administrative remedies. *Id.* Custis alleged that he “attempted to exhaust [his] Administrative remedies,” that the grievance was dismissed as

“untimely,” and that he” appealed the determination to the highest level available. *Id.* The court stated that an inmate need not to demonstrate exhaustion of an administrative remedy in his complaint. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Instead, failure-to-exhaust is an affirmative defense that the defendant must raise. *Jones*, 549 U.S. at 216. The court found that the Custis complaint did not present the rare, exceptional instances where administrative exhaustion was apparent on the complaint’s face. *Id.*

Here, the Plaintiff exhausted all remedies available to him. The Plaintiff has been relentless in pursuing not only relief, but also justice that he is entitled to for the harm suffered. He has been pursuing this for years to the very best of his ability, with counsel and there is a paper trail of documentation proving so. This case does rise to the level of “rare exceptions” of when a case should be dismissed for failure to exhaust an affirmative defense and thus should be granted review.

C. The Sixth Circuit Dismissed Claim for Failure to Exhaust Administrative Remedies Despite Plaintiff Providing Documentation.

The Sixth Circuit reversed summary judgment on a case where the District Court ruled that Plaintiff had not exhausted his administrative remedies when in fact, he submitted documentation to show that he had attempted multiple times to exhaust his remedies and Defendants denied him access to the courts as well as the ability to exhaust his administrative remedies. *Surles v. Andison*, 678 F.3d 452 (6th Cir. 2012).

In *Surles*, the district court dismissed Surles case without prejudice finding that he failed to file documentation indicating that Surles exhausted the remedies available to him. *Id.* at 454. Surles then filed a pro se complaint against the defendants, alleging they had on many occasions confiscated his legal documents, damaged, or destroyed legal and religious papers and property, taken action to deprive him of access to the courts, violated his First Amendment rights, retaliated against him by filing misconduct charges and transferring him to other prisons, and/or conspired against him to violate his rights. *Id.* The defendant's insisted that they did not have to demonstrate exhaustion, arguing that the burden of proof would fall on the plaintiff to show that he had exhausted his administrative remedies. *Id.* at 456. The defendants further asserted that they satisfied their burden regarding the exhaustion defense by demonstrating that Surles's previous lawsuit was dismissed for failure to exhaust and that since the dismissal of the lawsuit, Surles had filed only untimely grievances related to the claims. *Id.* at 457. The court found that this position is contrary to the holding of *Brock* and *Napier*. *Id.* at 456. Noting that Surles's first complaint was dismissed prior to *Jones v. Brock*; thus, Surles bore the burden of proving exhaustion under pre-Jones case law and thus the ruling. *Id.* The court ultimately held that the defendants bore the burden of production and persuasion on the issue of exhaustion. The defendant has the burden of showing that the plaintiff did not exhaust his administrative remedies on the claims raised.

Here, in the event the Plaintiff did not exhaust the remedies available to him, the burden is nonetheless

on the Defendant to prove that the Plaintiff did not exhaust his remedies under *Jones v. Brock* and the Defendant has failed to meet such burden.

II. The United States Postal Service Bad Actors Realize that Discrimination Cases Rarely Make It to Court and They Use This Information to Discriminate Against Its Employees.

The Fifth Circuit has not made a ruling on Discrimination at a United States Postal Service. This leaves District Courts and the Postal Service's internal Equal Employment Opportunity Department to interpret what constitutes discrimination. *Johnson v. Brennan*, CIVIL ACTION No. 4:16-02612, at *5 (S.D. Tex. Nov. 27, 2017) (The EEO's investigation of Plaintiff's claims was completed on March 8, 2016. On May 26, 2016, the USPS issued a final agency decision finding no discrimination), hostile work environment, and harassment allegations. That is, only if the case survives summary judgment or motion to dismiss due to a claim that Plaintiff has failed to exhaust administrative remedies. *Poynter v. U.S.*, 55 F. Supp. 2d 558 (W.D. La. 1999) (Dismissing for lack of jurisdiction for failure to exhaust). *Grace v. Potter*, Civil Action No. H-04-1182, at *3 (S.D. Tex. Apr. 24, 2006) (Grace has not exhausted her administrative remedies and this court therefore lacks subject matter jurisdiction to consider this claim. Citing *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 303 (5th Cir. 1981)). This allows USPS supervisors and authority figures almost exclusive control over discrimination claims of their employees. Therefore, USPS supervisors such as the supervisors Petitioner Machuca was working under to treat employees as in a discriminatory manner knowing that discrimination

cases rarely make it to a stage in which their decisions and actions will come under criticism.

III. The Fifth Circuit Decision is Wrong because it Affirmed the Summary Judgment and Refused to Consider that Petitioner Did or the Possibility that The Petitioner Could Not Exhaust Administrative Remedies Were Fault of the United States Postal Service.

Difference Circuit Courts have decided that while exhaustion of administrative remedies is a requirement under Title VII but not a jurisdictional requirement. *Temengil v. Trust Territory of Pacific Islands*, 881 F.2d 647, 654 (9th Cir. 1989) (relying on Zipes and holding that “[p]ursuit of administrative remedies is a condition precedent to Title VII claim. The requirement however, is not jurisdictional”), (cert. denied, 496 U.S. 925 (1990); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (a timely filing before the EEOC was not jurisdictionally required to maintain suit in the district court).

In the case at bar, the Magistrate Judge decided to grant Defendant’s Motion for Summary Judgment based on a two-paragraph section where Defendant alleges Petitioner did not exhaust the administrative remedies. This in turn affected Petitioner Machuca’s rights because he has exhausted his administrative remedies. Upon further discussion, Petitioner could have provided evidence to demonstrate that he had exhausted the administrative remedies before filing suit.

Additionally, the Fifth Circuit could have reviewed the exhaustion of administrative remedies as other circuit courts have ruled that this issue can be reviewed de novo. *Vinieratos v. United States Dep’t of*

Air Force, 939 F.2d 762, 767-68 (9th Cir. 1991) (whether claimant has exhausted his administrative remedies is a question of law reviewable de novo).

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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