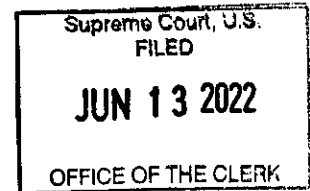


No. 22-162



In The
Supreme Court of the United States

TARIQ B. ALABBASSI,

Petitioner,

v.

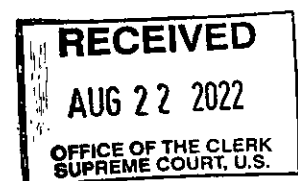
JOHN E. WHITLEY, Acting Secretary,
U.S. Department of the Army,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- A- 29 C.F.R. § 1614.105(a)(1), when does the 45-day time limit start? Is it when the plaintiff became aware of the discriminatory actions or at the time the actions happen?
- B- Why submitting newly discovered evidence at the 5th Circuit court level is not allowed?
- C- Is asking "where were you born?" during a job interview standard and allowed?
- D- Did the district court abuse discretion by refusing to reopen discovery?
- E- Did the 5th Circuit court err by not addressing the defendant abandoned of some of plaintiff's allegations?
- F- Can an employer get away with discrimination just by claiming that their choice was more qualified?

PARTIES TO THE PROCEEDING

Petitioner Tariq B. Alabbassi was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings.

Respondent John E. Whitley, Acting Secretary, U.S. Department of the Army was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

- *Tariq B. Alabbassi v. John E. Whitley, Acting Secretary, U.S. Department of the Army*, No. 4:18-cv-3131, U.S. District Court for the Southern District of Texas. Judgment entered July 29, 2020.
- *Tariq B. Alabbassi v. John E. Whitley, Acting Secretary, U.S. Department of the Army*, No. 4:18-cv-3131, U.S. District Court for the Southern District of Texas. Judgment entered December 03, 2020.
- *Tariq B. Alabbassi v. John E. Whitley, Acting Secretary, U.S. Department of the Army*, No. 21-20070, U.S. Court of Appeals for the Fifth Circuit. Judgment entered January 11, 2022.
- *Tariq B. Alabbassi v. John E. Whitley, Acting Secretary, U.S. Department of the Army*, No. 21-20070, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mr. Tariq B. Alabbassi, respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS OF OPINIONS

Southern District of TX; Case # 4:18-CV-3131

Fifth Circuit Court of Appeals; Case # 21-20070

STATEMENT OF THE BASIS FOR THE JURISDICTION

The Judgment of the 5th Circuit Court of Appeals was entered on January 11th, 2022. A petition for rehearing was denied on March 14th, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

Fifth Amendment

Statutes

Title VII of the Civil Rights Act of 1964

Regulations

29 C.F.R. § 1614.105(a)(1)

STATEMENT OF THE CASE

On March 12th, 2010, The USARCENT Civilian Personnel Office, who is a Department of Army official office, denied Mr. Alabbassi request for change in Mr. Alabbassi's service computation date without explanation, and this was reaffirmed on September 2nd, 2011. No explanations were given even though the DOD Directive #1400.25, Volume 631, dated Aug 31, 2009, allows that.

Mr. Alabbassi's further requests went unanswered. Mr. Alabbassi qualified for this change in service computation date. Mr. Alabbassi is Kuwaiti born, and no Kuwaiti born other than Mr. Alabbassi had to go through this discrimination and got denied the change in service computation date. Mr. Alabbassi suffered a loss in pay and vacation pay. In addition, Mr. Alabbassi went, and still is going through, emotional pain and suffering as a result of this discrimination.

On April 2011, Lieutenant Colonel LeiAnn Lang, who is a Department of Army official, downgraded Mr. Alabbassi's award that was awarded to him by Brigadier General Scott Jansson, from Meritorious Civilian Service Award to Joint Civilian Service Commendation

Award and told CPL Christina Lucena not to tell anyone. When Mr. Alabbassi became aware and questioned the change, he was informed "we don't give this kind of award at theater." Lieutenant Colonel LeiAnn Lang said to Mr. Alabbassi on different occasions that she does not like foreigners and that foreigners take jobs from us. Mr. Alabbassi qualified for this award. Mr. Alabbassi is Kuwaiti born, and no Kuwaiti born other than Mr. Alabbassi had to go through this discrimination. The same award was awarded, without any downgrading or any delay, to two coworkers who are white males American born and not Kuwaiti born, during the same period and with the same organization. Mr. Alabbassi went, and still is going through, emotional pain and suffering as a result of this discrimination.

Mr. Alabbassi, a federal civilian employee, had to apply to his own position twice, but Mr. Alabbassi got no response to his applications since the position was to be moved to the three-star-General level. In October 2011, Mr. Alabbassi became aware that the position is about to be filled, therefore; Mr. Alabbassi questioned Brigadier General McMurry about it. On October 15th, 2011, Mr. Alabbassi was granted an interview with Brigadier General Bryan Roberts who asked Mr. Alabbassi during the interview "what brought you to Houston?" Mr. Alabbassi became uncomfortable, but still answered "Houston is where I live, and I went to school, and where my family live." Brigadier General Bryan Roberts did not like Mr. Alabbassi's answer, and he, the General, tilted his head to the side, and asked Mr. Alabbassi with a tone "where were you born?"

Mr. Alabbassi became extremely uncomfortable and had to pause for a minute or so, but still answered "Kuwait."

Brigadier General Bryan Roberts wrote by his handwriting "Kuwait" on Mr. Alabbassi's resume and the interview sheet. Brigadier General Bryan Roberts, the interviewer, marked Mr. Alabbassi's resume and interview sheet with a "star" on the left top side corner, but he never marked the other candidates' resumes and interview sheet with the same, and this only indicate singling out Mr. Alabbassi from the others, a Kuwaiti born out from the not Kuwaiti born. On October 30th, 2011, Mr. Alabbassi was informed that he was not selected. On April 3rd, 2012, a contractor was converted to a GS employee (Government Employee) since the person who was hired for the position initially resigned. Mr. Alabbassi was not given the chance to apply on the second hire. Mr. Alabbassi had the strongest Foreign Military Sales (FMS) experience of all who applied and hired, as Mr. Alabbassi worked at the Foreign Military Sales (FMS) office since and before March 1st, 2010.

On July 26, 2019, the defendant filed a Motion to Dismiss. On December 4th, 2019, the court found that Claim 1, failed to employ the plaintiff, 1) was timely filed by Mr. Alabbassi, 2) Mr. Alabbassi exhausted his administrative remedies, 3) Mr. Alabbassi stated a claim for national origin discrimination, and DENIED the defendant's Motion to Dismiss in regard to Claim 1. The defendant did not raise the question of the Court jurisdiction.

While no discovery took place, on March 23rd, 2020, the defendant filed a Motion for Summary Judgment. On July 29th, 2020, the court granted the defendant their Motion for Summary Judgment.

On September 16th, 2020, Mr. Alabbassi filed motion to alter or amend judgment. On December 3rd, 2020, the court denied the latest.

The Judgment of the Court of Appeals was entered on January 11th, 2022. A petition for rehearing was denied on March 14th, 2022.



REASONS FOR GRANTING THE WRIT

This case presents “substantial questions.”

A. 29 C.F.R. § 1614.105(a)(1), when does the 45-day time limit start?

Should the 45 days start from the day plaintiff became aware? Or from the date of action?

The 5th Circuit court found that Mr. Alabbassi did not exhaust his administrative remedies on some of his claims since he did not file his complaint 45 days from the action taking place even though the plaintiff was not aware that the action was discriminatory until after. This is a question that needs to be settled by The Supreme Court.

B. Why submitting new evidence at the 5th Circuit level is not allowed?

Mr. Alabbassi discovered that an ex parte hearing took place when he ordered the transcripts as part of filing an appeal with the 5th Circuit court. At this point the records will have no evidence that what the plaintiff is claiming is true. Mr. Alabbassi informed the 5th Circuit court that he has in his position the un rebuttable proof to support his claim if the court deemed it necessary. The court ignored his request to submit the supporting evidence and ruled that Mr. Alabbassi failed to attend the hearing, thus; no ex parte hearing took place. This is a question that needs to be settled by The Supreme Court.

C. Is asking "where were you born?" during a job interview standard and allowed?

The 5th Circuit court ruled that asking where you were born, and other background questions are STANDARD part of interviews. This statement is extremely dangerous and stands against the very idea of all are equal no matter where we came from and opens a wide door for discrimination. This court ruling is in conflict with the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, and in conflict with Title VII of the Civil Rights Act of 1964. This is a question that needs to be settled by The Supreme Court.

D. Did the district court abuse discretion in refusing to reopen discovery?

This question has conflicting opinions within the 5th Circuit. “[A]lthough the district court is customarily accorded wide discretion in handling discovery matters; we will not uphold a ruling which has failed to adhere to the liberal spirit of the Rules.” *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991). “[T]he district court abused its discretion in refusing to allow [the plaintiff] to conduct sufficient discovery . . . to support the allegations he ha[d] fairly raised[.]” *Austin v. Kroger Tex., L.P.*, 864 F.3d 759 (5th Cir. 2017). “To put it simply, the court’s discovery restrictions suffocated any chance for [Plaintiff] fairly to present h[is] claims.” *Miller v. Sam Houston State Univ.*, 986 F.3d 880 (5th Cir. 2021).

Mr. Alabbassi requested from the district court to reopen discovery to better serve justice, but the district court abused its discretion and denied his request.

The 5th Circuit court agreed with the district court and ruled that the district court did not abuse its discretion even though some rulings within the same court disagreed. This is a question that needs to be settled by The Supreme Court in order to unify the opinions within this court.

E. Did the 5th Circuit court err by not addressing the defendant abandoned some of plaintiff's allegations?

The 5th Circuit court tagged some of the allegations as "meritless." This question has conflicting opinions within the 5th Circuit and the sister courts. "Failure to brief and argue an issue is grounds for finding that the issue has been abandoned." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. Unit "B" 1980). "The defendant does not deny . . . then the plaintiff's allegations are assumed admitted and the defendant cannot later assert that a condition precedent has not been met . . . the defendant waived its right to raise the claim." *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992 (11th Cir. 1982). The defendant admits some of Mr. Alabbassi's allegations by abandoning and failing to deny the allegations when was first presented by Mr. Alabbassi, including the direct evidence which was presented and was never denied by the defendant during the motion to dismiss stage, yet the 5th Circuit court does not recognize the defendant failure to answer and tags some of Mr. Alabbassi's claims as "meritless." Courts need to hold any party within a case responsible by considering the allegation admitted for abandoning, not denying, or failing to answer even if the party is the U.S. as the case is here. This is a question that needs to be settled by The Supreme Court to unify the opinions within the 5th Circuit court and unify the opinions across the sister courts of appeal.

F. Can an employer get away with discrimination just by claiming that their choice was more qualified?

On May 15th, 2020, the defendant filed a motion to strike plaintiff's exhibits. This motion was ultimately denied by the district court. Exhibits were admitted into evidence. The defendant never filed an appeal in the 5th Circuit court. Mr. Alabbassi submitted evidence and strong declarations that can easily rebut the not creditable delectation of BG Roberts who has a criminal record, but the district court here ruled "the problem is, Mr. Alabbassi, that in this part of the *McDonnell Douglas* test, there is some discretion given to the employer. The law functions so that the Courts are not in the position of second-guessing an employer's decision when it's anything like a close all. It may have been a close call here, but the law does not give me the right to disagree with the call that was made." In addition, the district court here ruled "when an employer makes a decision between two qualified candidates, courts are very reluctant to intervene." The 5th Circuit court agreed with the district court by affirming its decision. The courts here stood handcuffed to rule against the employer just because the employer claimed that their choice is better qualified!! Will a panel of jury have stood handcuffed like the courts did? Defiantly the Jury would never have stood handcuffed here! Is this just? For sure this is not just!

The *McDonnell Douglas* test is outdated and must be abolished as it is in conflict with the Fifth Amendment and the Fourteenth Amendment, and in

conflict with Title VII of the Civil Rights Act of 1964. *McConnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

The *McDonnell Douglas* test permits discrimination by giving the employer a FREE "Get Out Of Jail" card whenever the employer commits discrimination as is the case here.

This is a question that needs to be settled by The Supreme Court in order to guarantee justice for all.

CONCLUSION

Mr. Alabbassi respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,
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