No. _____

In The
Supreme Court of the United States

PETER COOKS,

Petitioner,

v.

CONTRA COSTA COUNTY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does 28 U.S.C § 1658 supplying a 4 uniform year statute of limitations apply to claims made under the Rehabilitation Act of 1973, as Amended?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OPINIONS BELOW

The opinion of the court of appeals is unpublished. (App. *infra* A1-A4*)*. The order of the district court is unpublished. (App.A5-A1

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2021. A1. Justice Kagan granted an extension of time until April 22, 2022 to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C § 1658 – text is at App. A21

STATEMENT

Peter J. Cooks is a retired United States Navy veteran who rendered twenty-five years of service to his country, including the wars in Afghanistan and Iraq. A16. At the time of his retirement Mr. Cooks was a Chief Petty Officer and his job was Information Technology. Id. Mr. Cooks is also a disabled veteran. Id.

Mr. Cooks hired on with Contra Costa County in or around 2010 as an IT professional. Beginning in July 2015 and re-occurring in November of that same year, Mr. Cooks suffered a series of service-related health setbacks which required hospitalization, specifically he was

hospitalized for mental stress and mental health issues [preliminary diagnosis Psychosis with Paranoia]. Id.

Mr. Cooks' diagnosis meant that he had (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) was regarded as having such an impairment. A16 Mr. Cooks shared his hospitalization with his supervisor, Patrick Wilson. Id. After Mr. Cooksshared his diagnosis, Mr. Wilson and others began to treated him less favorably because he had a history of a disability and/or because he was perceived as having a physical or mental impairment that was not transitory and minor. Upon Mr. Cooks' his return to work, Mr. Wilson began to question him about the reason for his hospitalization and what his prognosis going forward. A16. Mr. Cooks declined to provide this information as it is private and not related to his ability to perform his job. [Id.]. Mr. Cooks was able to perform all the duties and responsibilities of his job with or without a reasonable accommodation. However, Mr. Cooks' work history prior to his hospitalization and after made it abundantly clear that he needed an accommodation with regard to his start time and schedule. Mr. Cooks had discussions with Mr. Wilson regarding this need, but the Defendant never engaged in the "interactive process" to ascertain what accommodation would be appropriate. A16-A17.

Beginning in or around April 2016, Mr. Wilson began writing up Mr. Cooks for trivial matters and subjecting his work performance to increased scrutiny. A17 Mr. Cooks' alleged co-workers were

not subjected to the level of scrutiny directed towards him. Mr. Wilson also began threatening to terminate Mr. Cooks' employment. Id. In September 2016, an incident between Mr. Cooks and Mr. Wilson ended with Mr. Cooks' suspension. On October 31, 2016, Mr. Cooks was terminated. A17.

PROCEEDINGS BELOW

On April 18, 2020, Mr. Cooks filed a lawsuit alleging that his employer, Contra Costa County, violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and for breach of contract. On June 26, 2020, the County filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The County sought dismissal on the following grounds: (1) Mr. Cooks' USERRA claim fails because the statute does not establish a cause of action for disability discrimination, regardless of whether the plaintiff's claimed disability was sustained or aggravated during a period of uniformed service; (2) even if the USERRA did protect against disability discrimination, the complaint lacks the necessary well-pled factual allegations showing that Plaintiff's employment was terminated based on disability; and, (3) Mr. Cooks' breach of contract time barred. On July 17, 2020, Mr. Cooks filed an opposition to the County's motion to dismiss. On July 23, 2020, the County filed a reply. On August 6, 2020, the district court granted the County's motion to dismiss, but extended Mr. Cooks the opportunity to amend his complaint within 21-days of the date of the order. Mr. Cooks missed the deadline by one-day and filed a Motion to File Amended Complaint One-

Day Out of Time, *inter alia*, and attached the Amended Complaint. The Amended Complaint attached to this motion contained an additional claim under the Rehabilitation Act of 1973. The County filed an opposition to this motion on September 1, 2020. On September 4, 2020, the district court denied Mr. Cooks' motion without prejudice and stated, *inter alia*, "plaintiff's motion for leave to file an amended complaint is DENIED WITHOUT PREJUDICE. Plaintiff shall file a renewed motion for leave to file an amended complaint that addresses the deficiencies raised in this order, including the claim added without court approval,within14 days of the date of this order."

On September 16, 2020, Mr. Cooks filed a Second Motion to Amend his Complaint. In this motion Mr. Cooks sought the district court's leave to add the Rehabilitation Act of 1973 claim. On September 30, 2020, the County filed an opposition to Mr. Cooks' Second Motion to Amend. On October 14, 2020, the district court granted Mr. Cooks' Second Motion to Amend his Complaint. Mr. Cooks filed his Amended Complaint against the County on October 15, 2020. In this Amended Complaint, Mr. Cooks advanced claims under the Rehabilitation Act of 1973 and the Uniformed Services Employment and Reemployment Rights Act. On October 21, 2020, the County filed a Motion to Dismiss Mr. Cooks' First Amended Complaint. Mr. Cooks filed a response in opposition to the County's motion on November 12, 2020. In his response, Mr. Cooks **expressly** adopted by reference all applicable legal arguments made in his prior motion to amend complaint. Specifically, in the referenced motion to amend, Mr. Cooks advanced a detailed argument that the 1992 and 2008

amendments to the ADA created new causes of action under the Rehabilitation Act of 1973 making those newly created causes of action subject to 28 U.S.C. § 1658's four-year catch-all provision. The County filed a reply on November 17, 2020.

On November 30, 2020, the district court granted the County's motion to dismiss all counts on the grounds that (1) a two-year statute of limitations applied to Mr. Cooks' Rehabilitation Act of 1973 claim, and (2) that he failed to plead facts sufficient to support his USERRA claim. Believing the district court's ruling to be in error, Mr. Cooks filed a notice of appeal to the Ninth Circuit Court of Appeals on December 29, 2020.

REASONS TO GRANT THE WRIT

Recognizing that The Rehabilitation Act of 1973 was too restrictive Congress amended the statute twice in 2002 and 2008. A2-A3.

> "…The Rehab Act initially made no mention of accommodations and its implementing regulations defined "qualified" only in the context of the position in question. *See* 29 C.F.R. § 1613.702(f) (1992). ***371** Thus, the ADA eliminated the Rehab Act's inference that only an employee's current job could be considered in the "reasonable accommodation" calculus. *See* Arlene Mayerson, *Title I—Employment Provisions of the Americans With Disabilities Act,* 64 Temp.L.Rev. 499, 515 (1991)."

Lolos v. Solutia, Inc., 193 F.Supp.2d 364, 370–71 (D.Mass.,2002). The amendments changed that.

The ADA Amendment Acts of 2008 widened the scope "being regarded as disabled" claims,

> Nearly a decade later, however, Congress passed the ADAAA. Those 2008 amendments expressly rejected the interpretation of "regarded as having such an impairment" that the Court had set forth in Sutton. Pub. L. No. 110–325, sec. 1, § 2(b)(3). In enacting those amendments, *588 Congress changed the relevant portion of the ADA by adding a new paragraph (3). That new paragraph defined the scope of the term "being regarded as having such an impairment," id. sec. 4, § 3(1)(C), as follows:
>
> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Id. sec. 4, § 3(3)(A) (emphasis added).[4]

Mercado v. Puerto Rico, 814 F.3d 581, 587–88 (C.A.1 (Puerto Rico),2016).

Mr. Cooks' complaint includes that he was regarded as disabled and that he was not afforded any accommodation in any form as a disabled United States Navy War Veteran. A16 ¶10, A17.

The amendments to the Rehabilitation Act afforded robust changes to the statute, including expanding the obligations for the federally funded employer to make a reasonable accommodation.

The 9th Circuit opinion in this case acknowledges the changes; yet affirms dismissal because Cooks' complaint did not specify reassignment as an accommodation and placed his claim under the more restrictive state statute of limitations. "The federal four-year statute of limitations under 28 U.S.C. § 1658 applies only to federal claims that were "made possible by a post-1990 amendment." *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 382 (2004)." A3. While Mr. Cooks raised the issue of needing an accommodation, no discussion took place. A16, ¶13. This case was decided on a motion to dismiss, not summary judgment. The broadening of Rehabilitation Act's scope to include reassignment requires viewing termination claims under the 4-year catch all statute of limitations.

The 9th Circuit opinion also explained, "In 2008, Congress amended the Rehabilitation Act's definition of "disability" to align it with the ADA's definition, meaning plaintiffs are no longer required to prove an impairment was perceived to limit a major life activity. See 42 U.S.C. § 12102(3); Pub. L. No. 110-325, 122 Stat. 3553 (2008)" A4. With these significant changes applying shorter inconsistent state statute of limitation for alleged discriminatory conduct by federally funded employers frustrates the implementation of statutory goals. This is not matter of distinguishing between a promotion and a retaliation claim but how one proves a violation.

As one district Court explained the addition of the term "reassignment" to the statute expanded the duty to accommodate.

> More importantly for purposes here, the ADA included "reassignment" in the list of possible accommodations. *See* 42 U.S.C. § 12111(9)(B). The absence of that term in the Rehab Act led a number of courts to conclude, regulatory language to the contrary, that reassignment, though perhaps permitted, was not required. *See, e.g., Carter,* 822 F.2d at 467; *Fields v. Lyng* 705 F.Supp. 1134, 1137 (D.Md. 1988), *aff'd,* 888 F.2d 1385 (4th Cir.1989). In the studied opinion of at least one commentator, this component of the ADA erased at least one element of Rehab Act unfairness, namely, that it allowed disabled federal workers to be terminated from jobs they could no longer do even though there were vacant positions for which they were qualified and able to perform. *See* Jeffrey S. Berenholz, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act,* 15 Hofstra Lab. & Employment L.J. 635, 636 (1998). Many courts have since recognized that the ADA's use of the word "reassignment" did indeed expand the Rehab Act's obligation to accommodate. *See Eckles v. Consolidated Rail Corp.,* 94 F.3d 1041, 1048 (7th Cir.1996); *Shiring,* 90 F.3d at 831; *Emrick v. Libbey–Owens–Ford Co.,* 875 F.Supp. 393, 395–96 (E.D.Tex.1995); *Haysman v. Food*

> *Lion, Inc.,* 893 F.Supp. 1092, 1104 (S.D.Ga.1995).
>
> Regardless, in 1992, two years after the ADA's enactment, Congress amended the Rehab Act to incorporate the ADA standards, including the ADA's reference in 42 U.S.C. § 12111(9)(B) to reassignment as a potential accommodation. *See* 29 U.S.C. §§ 791(g), 794(d); *McLean v. Runyon,* 222 F.3d 1150, 1153 (9th Cir.2000). Thereafter, in October of 1992, the regulations were amended to reflect this change. *See* 29 C.F.R. § 1614.203 (2001). As a result, the substantive standards for handicap discrimination are now deemed the same whether suit is filed under the Rehab Act against a federally-funded entity or under the ADA against a private employer. *See Myers v. Hose,* 50 F.3d 278, 281 (4th Cir.1995).

Lolos v. Solutia, Inc., 193 F.Supp.2d 364, 371 (D.Mass.,2002)

Such changes are significant enough to be considered new rights to be covered under the 4 year catch all limitations period.

> Regardless of what Congress now says it meant to say, what is controlling is what it actually said. Courts across the country, including the United States Supreme Court, in fulfillment of their constitutional duties under the United States' tripartite system of government, conclusively determined that Congress had not said what it now says it intended. In response, Congress proceeded as it is entitled and changed the law.

> Irrespective of whether Congress tried to characterize its action as merely clarifying its original intent, the Amendments Act undisputedly changed the law. An employer can generally be expected to comply only with laws as they are at the time of a certain action, not as laws might be at some point in the future. Because Congress did not say otherwise, the Amendments Act applies to only matters occurring after the law's effective date.

Steffen v. Donahoe, 2011 WL 13187022, at *5 (E.D.Wis., 2011)

The overhaul of the Rehabilitation Act of 1973 requires application of the 28 U.S.C. ¶ 1658 4 year catch all limitations period.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Roderick T. Cooks

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