No. 22-5092

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

James E. Moore — PETITIONER
(Your Name)

vs.

Jason Koenigsfeld; Collins Community Credit Union — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Eighth Circuit Court of Appeal
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James E. Moore
(Your Name)

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Question(s) Presented

(1) Did the district court sua sponte dismissal of complaint prior to service of complaint and summons on defendants violate Federal Rules of Civil Procedure 4 (a) as most appellate courts hold contrary to eighth circuit precedent.

(2) Did the eighth circuit incorrectly affirm the district court title 12 U.S.C 4002 (a) (1) (B) Expedited Funds Availability Act interpretation contrary to the clear statutory mandatory directives and this court interpretation in Bank One Chicago v. Midwest Bank & Trust.

(3) Did the eighth circuit affirmance of district court dismissing complaint for failure to state a plausible claim violate Federal Rules of Civil Procedure 8 (a)(2) pleading and this court decision in Swierkiewicz v. Sorema NA.

(4) Did the eighth circuit err in affirming district court dismissal of Title 42 U.S.C. 1981 discrimination and retaliation claims based on lack of proof of discrimination contrary to this court precedent and other appellate court decisions.

(5) Did the eighth circuit in affirming the district court violate federal Rules of Civil Procedure 8 (e) and this court decision in Erickson v. Pardus.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

Constitutional and Statutory Provisions Involved

United States Fifth Amendment Due Process

Title 12 U.S.C 4001-4010

Title 28 U.S.C.1915 (e)(2)(B)(ii)

Title 42 U.S.C. 1981

Statement of the Case

On the morning of Friday April 16, 2021 plaintiff received a paycheck protection program loan wire transfer direct deposit into my Collins Community Credit Union checking account in the amount of $20,838.69 from Customer's Bank. After work early Friday evening I went to withdraw money to pay some urgent bills, but while having a face to face conversation with defendant Jason Koenigsfeld about withdrawing money he started to talk about other people doing wrong but was not suggesting I did anything wrong. But then defendant seized my account and stated I could not withdraw funds out of my checking account. I asked why not and he stated the money would not be available for withdrawal until later that Friday evening or Monday. I returned Monday April 19, 2021 to try and withdraw money but was told by defendant I could not and I asked why not but defendant gave me no reason or explanation. I then ask to apply for a personal loan to at least pay my urgent bills. After I applied for the loan I returned Tuesday April 20, 2021 to see if I could withdraw money or if the loan had been approved but was told again by defendant I could not withdraw money when asked again why not again he gave me no reason or explanation and stated he does not know when the money would become available. Defendant also told me my loan request was denied. I then became suspicious I was being discriminated against because

I received a paycheck protection loan and I had been seeing the internet show pictures of only black people committing the paycheck protection fraud and not white people who were also committing the same fraud. Because I have a little knowledge of the law I went to the law library to research the banking regulations on withdrawing funds and located the title 12 U.S.C 4001-4010 Expedited Funds Availability Act which required banks to make funds available within certain time periods in my case for the direct deposit wire transfer next business day which was Monday April 19, 2021. I then went home to review my banking policy which was consistent with the bank regulation requirements. I then returned to the bank to speak with defendant with three pieces of paper. I handed him the first piece of paper which was my United States Supreme Court pro se decision and explained to him I understood the law. I then handed him a copy of the expedited funds availability act schedule withdrawal requirements and explained they had until Monday the 19th to make the money available for withdrawal and today was Tuesday the 20th and therefore they were in violation of the funds act and their own banking policy. The defendant then got on his computer and emailed his superior who responded to make the money available but with certain conditions. I could continue allowing them to hold the money unlawfully with no date on when the money would be made available or I could send the money back to Customer's Bank and have it redeposited into another account at Wells Fargo without any explanation for the adverse decision. Rather than simply allow me to withdraw funds. I chose to have the money sent back to Customer's bank so that I could have the funds rewired to my Wells Fargo account. Upon contacting Customer' Bank to have the funds rewired to my Wells Fargo account the bank told me they could not because I sent the money back I had to re-due the application process over with application service provider with the new bank information. Because of the pandemic the only way to reach my service provider was by email which took I was unable to do before I found out the program ran out of funds. I then filed this civil law suit against defendant and his superior for the loss of the loan and discrimination and retaliation. The district court after initial review dismissed the complaint for failure to state a claim pursuant to 28 U.S.C 1915 (e)(2)(B)(ii) because plaintiff failed to prove the prima facie elements of intentional discrimination. I then filed a reconsideration motion to the district

Court contesting its application of the prima facie case and to ask the court to address two of the issues the court failed to address in its initial denial order, the title 12 U.S.C. 4001-4010 Expedited Funds Availability Act. Violation and the 1981 retaliation claim. The district court denied the reconsideration motion based on the same grounds including the expedited funds availability act. Stating I did not prove the bank did not comply with the act, and denied the 1981 retaliation claim because I did not specifically tell the defendants they were discriminating against me for which they retaliated. I appealed the issues to the United States Eighth Circuit Court of Appeal which affirmed the district court decision. I then ask the eighth circuit for en banc review which was also denied.

Reason(s) for Granting the Petition

This courts review is necessary because this case presents issues of exceptional importance and a circuit split among the courts of appeals.

Sua sponte dismissal of complaint prior to service

On defendants.

The district court pursuant to 28 U.S.C 1915 (e)(2)(B)(ii) conducted an initial review of pro se complaint and dismissed the complaint for failure to state a claim pursuant to Federal Rules of civil Procedure 8(a)(2) prior to service of the complaint and summons upon defendants and their responses. See appendix (B) district court denial pg. 1-3.

The district court recognized there was some conflicting case law on whether the district court had authority to sua sponte dismiss the complaint prior to service citing Johnson v. Bloomington police Dept. 193 F. Supp.3d 1020, 1023 (D. Minn. 2016) and Porter v. Fox 99 F.3d 271,273 (8th cir. 1996). Which held a district court may not sua sponte dismiss a complaint prior to service on the defendants and

A response. See appendix (B) pg. 2. The district court dismissed the complaint prior to serving the complaint and summons on defendants and their responses citing another eighth circuit decision Benton v. Iowa dept. of Transp. 221 Fed. Appx. 471 (8th cir. 2007). See appéndix. (B) pg. 3.

The eighth circuit affirmance of the district court decision created a conflict within the circuit and this court and other appeals court decisions on the issue. See Estelle v. Gamble 429 U.S. 97, 112 (1976) citing seventh circuit decision Nichols v. Schubert 499 F.2d 946, 947 (7th cir. 1974) and Franklin v. Oregon 662 F.2d 1337, 1340 (9thcir. 1981), Lewis v. New York 547 F.2d (2nd cir. 1976), Tyler v. Mmes Pasqua Toloso 748 F.2d 283, 287 (5th cir. 1981)and Tingler v. Marshal 716 F.2d 1109, 1111 (6th cir. 1983).

The seventh circuit in Nichols interpreted Federal Rules of Civil procedure 4 (a) to require service of the complaint and summons on defendants before the court could dismiss sua sponte a complaint for failure to state a claim, giving defendants and plaintiff and opportunity to respond or plaintiff an opportunity to amend the complaint to correct any deficiencies See Nichols 499 F.2d at 947 (7th cir. 1974), and other appellant courts requiring service and a response before court sua sponte dismiss complaint for failure to state a claim. See Franklin 662 F.2d at 1340-1341 99th cir. 1981), Lewis 547 F.2d at 4 (2nd cir. 1976), Porter 99 F.3.d. at 274 (8th cir. 1996) citing hake v. Clarke 91 F.3d 1129, 1131- 32 (8th cir. 1996).

A majority of the appeal courts have disfavored the district court dismissing sua sponte a complaint prior to service because it cast the court in the role of a proponent for the defense rather than an independent entity. See Porter 99 F.3d at 274 (8th cir. 1996). Therefore this court should resolve the issue split amongst the appeal courts.

Title 12 U.S.C 4002 Expedited Funds Availability Act

And Due Process violation.

Plaintiff states in his complaint, I initially argued a title 12 U.S.C 4002 (a)(1)(B) expedited funds availability act violation. The district court did not address the issue in his initial order denying and dismissing the complaint. See appendix (B) district court denial. I then filed for a reconsideration and ask the district court to address the funds act violation. see appendix (D) district court reconsideration order pg.1,2. The district court then addressed the 4002 violation denying the issue stating – absent alleging facts showing that the bank wrongfully barred plaintiff from withdrawing funds from his account plaintiff cannot show defendants failed to comply with the 4002 funds act. See appendix (D) district court reconsideration order pg. 3,4. The eighth circuit court of appeal affirmed an incorrect statutory interpretation of 4002 funds act violation by the district court in violation of the clear statutory directives and this court interpretation in Bank One Chicago v. Midwest Bank & Trust Co. 516 U.S.264 (1996). The eighth circuit decision also creates a circuit split with the ninth circuit appeal court interpretation.

This court in Bank One interpreted the funds act 4002 section to require banks to make deposited funds available for withdrawal within specified time periods, subject to stated exceptions pursuant to 4002 and 4003. Bank One Chicago id at 267.

The ninth circuit consistent with the court decision explained – To properly make a claim under the expedited funds availability act, Little Donkey was required to

Come forward with some evidence that it had made a specific deposit as defined by the act and the bank held that deposit beyond the timeframe allowed for by statute citing 4002. See little Donkey Enterprises Washington Inc. v. U.S. Bank Corp. 136 F. Appx. 91,92 (9th cir. 2005) and Beffa v. bank of West 152 F.3d 1174, 1176 (9th cir.1998).

All the lower district courts follow the 9th cicuit interpretation see Hass v. commerce Bank 497 Supp. 2d 562, 565 (S.D.N.Y. 2007), Nix v. Nasa Fed. Credit Union 200 F. Supp. 3d 578, 586-87 (D. Md 2016) and Essex Construction Corp. v. Industrial bank of Washington 913 F. Supp. 416, 417-18 (D. Md 1995). Which requires a plaintiff to prove only (1) that he received a deposit as defined by the funds act and (2) that the bank withheld that deposit beyond the specified timeframe.

No court requires a plaintiff to prove the bank (wrongfully barred) plaintiff from withdrawing funds out of their account as the district court requires in plaintiff case. See appendix (D) district court reconsideration pg. 3. The district court interpretation is inconsistent with the statute and this court interpretation in bank One Chicago id at 267.

The district court interpretation amounts to an unlawful switching of the burden of proof by requiring plaintiff to prove the bank wrongfully barred plaintiff from withdrawing funds rather than the bank proving the delay was based on an exception listed under 4002 or 4003 as required by statute to prevent civil liability pursuant to 4010 civil liability provision. See Bank One Chicago id at 267.

Also the district court statement that plaintiff did not prove defendants did not comply with the act is contradicted by the court own factual case analysis. See appendix (B) district court case analysis pg. 4 explaining – plaintiff complaint describes events surrounding the " direct deposit " of a PPP check. First of all the term direct deposit refers only to a wire or electronic transfer of funds from one bank to another bank not a paper check, and the term "PPP" refers only to the program through which the loan was obtained known as the – " Paycheck Protection Program " or ppp. Therefore plaintiff complaint alleged a deposit as defined by 4002 (a)(1)(B).

The district court analysis continued to state – plaintiff returned Monday to withdraw funds but could not and plaintiff was unable to withdraw funds the following Tuesday as well see appendix (B) court case analysis pg. 4. This statement shows a clear violation of the funds act because the funds was direct deposited on Friday April 16th and 4002 (a)(1)(B) requires the funds to be made available within the next business day which was Monday the 19th and the court analysis states specifically the funds was not made available. A clear violation of the funds act making the bank responsible for the loss of the loan plus damages.

The eighth circuit affirmance of the district court decision violated the 4002 statutory directives and my due process right to recover the loss of the loan.

Plausible Claim for Relief

The district court decision and eighth circuit affirmance dismissing complaint for failure to state a plausible claim for relief violates the federal rules of civil procedure 8 (a)(2) and this court decision in Swierkiewicz v. Sorema N.A. 534 U.S. 506 (2002) and other appellate court decisions.

The district court in determining whether plaintiff complaint stated a plausible claim for relief required plaintiff complaint to allege a title 12 U.S.C 4001-4010 expedited funds availability act prima facie case of discrimination under the McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973) elements requirement (1) that he is a member of a minority, (2) the defendant intended to discriminate against him on the bases of race and, (3) the discrimination concerned an area enumerated by statute, citing Williams v. Lindenwood University 288 F.3d 349,355 (8th cir. 2002) referring to the prima facie case element proof requirements. See appendix (B) district court order pg. 5,6.

Such requirement is contrary to this court decision in Swierkiewicz, stating – an employment discrimination complaint need not contain specific facts establishing a prima facie case under McDonnell Douglas framework, but instead must contain only " a short and plain statement of the claim showing that the pleader is entitled to relief. The McDonnell Douglas framework which requires the plaintiff to show (1) membership in a protected group,(2) qualification for the job in question,(3) an adverse employment action, and (4) circumstances supporting an inference of discrimination is an evidentiary standard, not a pleading requirement, the court has never indicated that the requirements for establishing a prima facie case apply to pleading. This court also stated - it is inappropriate

To measure a complaint against a particular formulation of a prima facie case at the pleading stage before discovery has unearthed relevant facts and evidence. See Swierkiewicz 534 U.S at 512. Also citing eighth circuit Ring v. First Interstate Mortgage Inc. 984 F.3d 924, 925-26 (8th cir. 1993).

The seventh circuit in Bennett v. Smith F.3d 516,518 (7th cir.1980) explained – to the extent the court required plaintiff to include in the complaint allegations sufficient (if proved) to prevail at trial, the court imposed a requirement of fact-pleading, as we said of another claim of employment discrimination; a complaint is not required to allege all or any, of the facts logically entailed by the claim. A plaintiff does not have to plead evidence. A complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.

The district court in plaintiff case required plaintiff to allege specific facts that would prevail at trial. See appendix (D) district court reconsideration order pg. 2 Stating - the court continues to find that his complaint fail to allege facts from which a reasonable jury could conclude defendants acted on the basis of race.

See also Whiney v. Guys Inc. 700 F3d.1118, (8th cir. 2012) stating- we refuse however, to incorporate some general and formal level of evidentiary proof onto the plausibility requirement of Bell Atlantic Corp. v. Twombly 550 U.S. 544 (1007) and Ashcroft v. Iqbal 556 U.S. 662 (2009).

Prima facie case evidence

Also the district court and eighth circuit erred in stating plaintiff complaint does not state a prima facie case of discrimination contrary to this court precedent and other

appellate court decisions.

The district court in determining whether plaintiff complaint alleged evidence of a prima facie case of discrimination or plausible claim focused solely on the McDonnell Douglas Corp. V. Green 411 U.S.792 (1973) prima facie element requirement. See appendix (B) district court order pg. 5 citing Williams v. Lindenwood University 288 F.3D 349,355 (8th cir. 2002).

The district court denied the discrimination claim based on the following reasons stating -----plaintiff does not allege defendant Koenigsfeld was aware of his race, said anything about his race or referenced others of plaintiff race his race committing ppp fraud. Therefore plaintiff has not shown in any way that the CCCU"s hold on his check was motivated by plaintiff race.see appendix (B) district court order pg.6.

Plaintiff states first, the district court statement that plaintiff did not allege that defendant knew his race was wrong because plaintiff alleged that he was African American and had multiple face to face conversations with defendant. This is sufficient to inform the district court defendant knew my race, in spite of the district court unnecessary facts stating ------ Plaintiff does not state what it is about his appearance that put , or should have put, defendant Koenigsfeld on notice about plaintiff race. see appendix (D) district court reconsideration order pg.2, because this court made clear in Erickson v. Pardus 551 U.S.89,93 (2007) specific facts are not required.

Also the distric court statements that defendant did not say anything about my race or reference others of my race is also misplaced, because the courts are well aware of the fact that racial statements are rarely made in discrimination cases. See Gaworski v. ITT Commercial Corp 17 F.3d 1104, 1108 (8th cir. 1994) stating ---- it is axiomatic that discrimination need not be proved by direct evidence, and indeed, that doing so is often impossible citing Postal Service BD. Of Governers v. Aiken 460 U.S. 711, 716 (1983).

The eighth circuit in Beshears v. Asbill 930 F.2d 1348, 1354 (8th cir. 1991) explained ----- direct evidence may include evidence of " actions" or " remarks" of the employer that reflect a discriminatory attitude. Cited in Williams v. Lindenwood University 288 F.3d 349,356 (8th cir. 2002). The same case cited by the district court in his decision. See appendix (B) district court order pg. 5.

See also ninth circuit decision Nanty v. barrows 660 F.2d 1327 (9th cir. 1981) explaining-----the Supreme Court has made it clear, however. That the McDonnell Douglas test is not the exclusive method by which a plaintiff may establish his prima facie case. Citing Teamsters v. United States 431 U.S. 324, 358 (1977) and plaintiff may meet his initial burden simply by offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the act. Evidence that indicates it is more likely than not the employers actions were based on unlawful considerations. Sse Nanty 660 F .2d at 1331.

See also first circuit decision in Loeb v. Textron Inc. 600 F.2d 1003, 1012 (1st cir. 1979) explaining ---------The Supreme Court said that the prima facie case sustains an inference of discrimination only if defendants acts are otherwise unexplained

And that an employer can dispel the adverse inference from a prima facie case showing by articulating a legitimate reason for its actions. The court also explained ----The Mc Donnell Douglas affirms the right of the complainant to make a prima facie case showing of discrimination, by establishing that his rejection did not result from the two most common legitimate reasons, a lack of qualifications or absence of job opening citing Teamsters 431 U.SD. at 358 and that the McDonnell prima facie case assures the plaintiff his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the employer – defendant for whatever action was taken. Loeb 600 F.2d at 1014.

Therefore the district court failed to consider defendants " actions" that reflected a discriminatory attitude toward plaintiff together with the fact plaintiff eliminated all the common legitimate reasons a bank would have for refusing a depositor from withdrawing funds out of their account after receiving a large direct deposit and defendants never could give any explanation when asked multiple times. See Furnco Construction Co. v. Waters stating -----

A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts if otherwise unexplained, are more likely than not based on consideration of impermissible factors, and we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner without any underlying reasons, especially in a business setting. Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the

employer actions, it is more likely than not the employer who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. See Furnco id at 577.

Therefore clearly judicial experience has recognized that failure of defendants to explain their adverse actions especially in a business setting is evidence of a prima facie case of discrimination or at the very least a plausible claim of discrimination, but the district court refused to apply a presumption of discrimination based on his judicial experience. See appendix (D) district court reconsideration order pg. 2. See also McDonough v. Anoka County 799 F.3d 931 (8th cir. 2015) explaining ----- determining whether a complaint states a plausible claim for relief will be a context specific task that requires courts the reviewing court to draw on its judial experience and common sense. The courts should consider whether there are lawful, obvious alternative explanations for the alleged conduct, if the alternative explanations are not sufficiently convincing however, the complaint states a plausible claim for relief. McDonough 799 F.3d at 946

Retaliation claim

With respect to the 1981 retaliation claim the district court denied the plausible claim stating – plaintiff did not allege facts , if true would show that he made a claim under 1981 against defendants for which they retaliated. See appendix (D) district court reconsideration pg.4 the eighth circuit has explained there are three elements of a prima facie case in title vii retaliation claims (1) the plaintiff engaged in statutory protected activity, (2) the plaintiff suffered an

Adverse employment action; and (3) this adverse employment action occurred because the plaintiff engaged in the statutorily protected activity. See Coffman v. Tracker Marine 141 F.3d 1241, 1245 (8th cir. 1998).

Plaintiff was engaged in statutorily protected activity. See appendix (B) district court order pg. 6 stating- plaintiff has also alleged facts showing that the alleged discrimination concerned an area enumerated by statute title 12 U.S.C. 4001-4010 expedited funds availability act. Plaintiff also suffered an averse action as a consequence of defendant's retaliation the loss of the loan. Requirement number 2. The adverse action occurred because plaintiff was engaged in the statutorily protected activity. Requirement number 3.

The district court also stated – plaintiff did not allege facts showing that he accused defendants of racial discrimination or that defendants took any additional adverse actions against him based on such allegations. See appendix (D) district court reconsideration order pg. 4.

Plaintiff states because he is an African American man who told defendants they had no suspicion he had done anything wrong, violated any laws or banking policies to prevent me from withdrawing funds out of my account after receiving a large deposit and the fact they did not give me any explanation after multiple request was sufficient to imply to defendants they were discriminating against me because of my race. And the later retaliation for forcing them to unfreeze my account was connected adverse actions. Also the eighth circuit in Sisco v. Alberici Construction Co 655 F>2d 146, 150 (8th cir. 1981) explained – that as long as the employee had

a reasonable belief that what was being opposed constituted discrimination under title vii, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of title vii. 1981 forbids a retaliatory response by an employer against an applicant who genuinely believed in the merits of his complaint.

It is clear the district court in deciding plaintiff case was deciding the issues as a proponent for the defense and the district court made no attempt to liberally construe pro se motion so as to do substantial justice as required by Federal rules of civil procedure 8 (e) and this court in Erickson v. Pardus 551 U.S.89,94 (2007).

This court should grant review and reverse all three decisions affirmed by the eighth circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

For the following reason, in recent years the banking industry has discriminated against blacks on a large scale by not complying with the expedited funds availability act, which has produced the slogan "Banking while Black" most blacks do not know about the law or not able to afford representation to hold the bank accountable' This court is the only opportunity to put the banks on notice that they must comply with the expedited funds availability act.

Respectfully Submitted

James E. Moore

Date July 5, 2022