

In the
Supreme Court of the United States

LARRY WHETSTONE,

Petitioner,

v.

FRALEY AND SCHILLING TRUCKING COMPANY,
Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner Larry Whetstone (hereinafter “Petitioner”) knowingly and willfully waived his discrimination claims under Title VII by executing a Resignation from Employment Agreement and Release.
2. Whether the District Court correctly applied W.D. Pa. Local Rule 56 in dismissing Petitioner’s Complaint for failure to establish a *prima facie* case of race discrimination under Title VII.
3. Whether the Third Circuit Court of Appeals properly affirmed the determination of the District Court of the Western District of Pennsylvania in denying Petitioner’s Motion for Summary Judgment and granting Respondent Fraley and Schilling Truck Company’s (hereinafter “Respondent”) Motion for Summary Judgment, resulting in dismissal of Petitioner’s case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup. Ct. Rule 29.6, Respondent FRALEY AND SCHILLING TRUCKING COMPANY discloses the following: There is no parent company and no publicly held company owns 10% or more of Respondent's stock.

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PRIOR OPINIONS AND ORDERS

Whetstone v. Fraley and Schilling Trucking Company, No. 2:20-CV-01842, 2021 WL 5647813 (W.D. Pa. Dec. 1, 2021), *aff'd*, No. 22-1018, 2022 WL 4533847 (3d. Cir. Sept. 28, 2022)



STATEMENT OF JURISDICTION

The Third Circuit entered Judgment affirming the District Court's dismissal of Petitioner's claims on September 28, 2022. Petitioner filed a Petition for Rehearing *En Banc*, which was denied by the Third Circuit on November 28, 2022. The Third Circuit issued final judgment affirming the District Court's ruling on December 6, 2022. Petitioner filed a timely Petition for Writ of Certiorari pursuant to U.S. Sup. Ct. Rule 13(1) on February 27, 2023, which was docketed on March 31, 2023. Petitioner's Petition for Writ of Certiorari is properly before this Court under 28 U.S.C. § 1254(a).



COUNTERSTATEMENT OF STATUTORY PROVISIONS AT ISSUE

Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”), as amended, 42 U.S.C. §§ 2000e, *et seq.* for employment discrimination on the basis of race:

42 U.S.C. § 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;

The Americans with Disabilities Act of 1990 (hereinafter “ADA”), as amended, 42 U.S.C. §§ 12101 *et seq.* for employment discrimination on the basis of disability.

42 U.S.C. § 12112(a)

(a) General rule

No covered 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.

W.D.Pa. L.R. 56 (“Local Rule 56”)

Motion for Summary Judgment

[. . .]

B. Motion Requirements. The motion for summary judgment must set forth succinctly, but without argument, the specific grounds upon which the judgment is sought and must be accompanied by the following:

1. **A Concise Statement of Material Facts.** A separately filed concise statement setting forth the facts essential for the Court to decide the motion for summary judgment, which the moving party contends are **undisputed and material**, including any facts which for purposes of the summary judgment motion only are assumed to be true. The facts set forth in any party’s

Concise Statement shall be stated in separately numbered paragraphs. A party must cite to a particular pleading, deposition, answer to interrogatory, admission on file or other part of the record supporting the party's statement, acceptance, or denial of the material fact;

[. . .]

C. Opposition Requirements. Within 30 days of service of the motion for summary judgment, the opposing party shall file:

- (1) **A Responsive Concise Statement.** A separately filed concise statement, which responds to each numbered paragraph in the moving party's Concise Statement of Material Facts by:
 - (a) admitting or denying whether each fact contained in the moving party's Concise Statement of Material Facts is undisputed and/or material;
 - (b) setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety (as to whether it is undisputed or material), with appropriate reference to the record (See LCvR 56.B.1 for instructions regarding format and annotation); and
 - (c) setting forth in separately numbered paragraphs any other material facts that are allegedly at issue, and/or that the opposing party asserts are necessary for the Court to determine the motion for summary judgment;

[. . .]

E. Admission of Material Facts. Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party.



COUNTERSTATEMENT OF THE CASE

Petitioner was employed by Respondent as a flatbed truck driver beginning in 2012. Pet.App.B at 4. On or about April 27, 2018, Petitioner was injured in a work-related accident when the truck he was driving was struck on the right passenger side by a bus. Pet.App.B at 4.

Following the accident, Petitioner filed a workers' compensation claim which was adjudicated on December 18, 2018. Pet.App.B at 4. On December 18, 2018, Petitioner executed a "Resignation from Employment Agreement and Release", wherein he agreed to release Respondent "from any claim that he has or thinks he may have, if any, under the Family Medical Leave Act or any Pennsylvania laws related thereto; the Americans with Disabilities Act; or any Pennsylvania laws related thereto; or any other claims that may arise from his April 27, 2018 work injury." Pet.App.B at 4-5. Petitioner was represented by counsel when executing this agreement and subsequently received a settlement related to his April 27, 2018 work-related workers' compensation claim. Pet.App.B at 5.

Petitioner dually filed a charge of race and disability discrimination as well as retaliation with the EEOC and PHRC on August 21, 2019. Pet.App.A at 3. The EEOC issued its right-to-sue notice on August 26, 2020. Pet.App.A at 3.

Petitioner alleged in his Complaint that he was discriminated against due to race and disability. Pet.App.A at 3. Petitioner also alleged that he was wrongfully terminated following his April 27, 2018 work accident. Pet.App.A at 3. Petitioner

further alleged that he was denied workers' compensation and that he was terminated while his claim was still open. Pet.App.A at 3. As to alleged racial discrimination, Petitioner alleged that the Respondent did not offer him temporary or light duty work that other similarly situated white drivers were offered following worker-related injuries. Pet.App.A at 3. Petitioner, however, entered into a Compromise and Release Agreement agreeing to resign from his employment in exchange for payment pursuant to the Agreement. Pet.App.A at 2-3, Pet.App.B at 4-5.

The parties filed cross-motions for summary judgment in the District Court. Pet.App.B. at 2. The District Court found that Petitioner failed to file a concise statement of facts or respond to Respondent's assertion of facts in accordance with Western District of Pennsylvania Local Civil Rule 56, and therefore deemed Respondent's assertions of fact as admitted. Pet.App.B at 3-4. As such, the District Court denied Petitioner's Motion for Summary Judgment because he failed to assert any facts in support of his request for judgment as a matter of law. Pet.App.B at 7-9. The District Court granted Respondent's Motion for Summary Judgment, finding that based on the totality of the circumstances, the Resignation from Employment Agreement was valid and effectively released Respondent from any potential liability for claims related to Petitioner's April 2018 injury. Pet.App.B at 9-11. The District Court further ruled that Petitioner failed to establish a *prima facia* claim for racial discrimination under Title VII because of his lack of evidence under Local Rule 56 and lack of sufficient comparator evidence to support an inference of discrimination. Pet.App.B at 11-13.

On appeal, the Third Circuit Court of Appeals found no error in the District Court’s application of Local Rule 56 to the extent that the Court also considered contradictory facts asserted in Petitioner’s original Brief in Support of Motion for Summary Judgment. Pet.App.A at 5. The Third Circuit did not reach the question of the validity of the Resignation of Employment Agreement because Petitioner’s claim of wrongful termination for participating in the “protected act of workers’ compensation” did not give rise to a claim under the ADA as a matter of law. Pet.App.A at 6. Furthermore, Petitioner had also failed to state a *prima facie* case of discrimination where there was no evidence to create a triable issue regarding whether he had suffered an adverse employment action. Pet.App.A at 7. Based on the foregoing, the Third Circuit Court of Appeals affirmed the District Court’s dismissal of Petitioner’s claims in their entirety.

As indicated by the Third Circuit Court of Appeals in its per curiam non-precedential opinion affirming the District Court, Petitioner impermissibly attempted to raise a claim under the Age Discrimination in Employment Act of 1967 (hereinafter “ADEA”), as amended, 29 U.S.C. §§ 621 *et seq.*, for the first time on appeal. However, Petitioner’s original Complaint did not include such claim. Therefore, application of the ADEA has not been properly placed at issue by Petitioner and is consequently not subject to review by this Honorable Court.



ARGUMENT

I. This Court should deny Petition for Writ of Certiorari where the only questions presented are based on alleged erroneous factual findings and misapplication of a properly stated rule of law.

Under U.S. Sup. Ct. Rule 10, “a petition for a writ of certiorari will be granted only for compelling reasons” including the following:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court’s supervisor power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

U.S. Sup. Ct. Rule 10.

Furthermore, when the claimed errors are based on “erroneous factual findings or the misapplication of a properly stated rule of law”, review on certiorari is rarely granted. *Id.* Neither the District Court’s ruling nor the Third Circuit’s ruling in this case trigger review on certiorari under any of the foregoing circumstances.

The District Court applied well-established Local Rule 56 in deeming all of Respondent's allegations of fact in support of summary judgment as admitted due to Petitioner's failure to respond to such allegations or file his own statement of facts. Under W.D.Pa. L.R. 56(B)(1), Petitioner was required to submit a separate concise statement of material facts in support of his Motion for Summary Judgment with appropriate citations to the record. Under W.D.Pa. L.R. 56 (C)(1), the Petitioner was required to also separately file a concise statement in response to each of the averments in Respondent's concise statement of material facts in support of Respondent's Motion for Summary Judgment. Petitioner filed neither. As such, the District Court was required to enforce W.D.Pa. L.R. 56(E) and deem Respondent's averments of facts admitted for purposes of evaluating the cross-Motions for Summary Judgment. By applying the plain language of L.R. 56, the District Court committed no error of fact or law in denying Petitioner's Motion for Summary Judgment based on an absence of undisputed evidence to support his claims of discrimination under the ADA and Title VII.

The District Court furthermore appropriately applied the totality of the circumstances test adopted by the Third Circuit to evaluate whether the Resignation from Employment Agreement executed by Petitioner was valid and therefore barred Petitioner from bringing any claims against Respondent related to his April 2018 work injury. *See Cuchara v. Gai-Tronics Corp.*, 129 F. App'x 728, 731 (3d Cir. 2005). Under this test, the court was to consider 1) the clarity and specificity of the language in the release; 2) the Petitioner's education and business

experience; 3) the amount of time available to the Petitioner to consider the release before signing; 4) whether the Petitioner knew or should have known his rights upon executing the release; 5) whether the Petitioner was encouraged to seek, or did receive, the benefit of counsel; 6) whether there was an opportunity to negotiate the terms of the Agreement; and 7) whether the consideration given in exchange for the waiver exceeds the benefits to which the employee was already entitled by contract or law. *Id.* At 371 (citing *Cirillo v. Arco Chem Co.*, 862 F.2d 448, 451 (3d Cir. 1988)).

Upon consideration of these factors, the District Court found that the language of the Agreement specifically pertained to Petitioner's claims under the ADA and Title VII, that Petitioner, as a college graduate, had the education required to understand the Agreement and his waiver of rights, that Petitioner knew or should have known the rights he was compromising, that Petitioner benefited from the assistance of counsel in considering the Agreement, and that the Agreement was properly supported by consideration. Therefore, under the totality of the circumstances test, the District Court appropriately determined that Petitioner had waived his rights to raise the claims of discrimination at issue.

On appeal, the Third Circuit did not find it necessary to address whether the Resignation Agreement was valid and enforceable to bar Petitioner's claims of discrimination against Respondent. Rather, the Third Circuit determined that the District Court had nonetheless properly dismissed Petitioner's claims because the Petitioner had failed to state a claim of discrimination under the ADA as a matter of law. In so finding, the Third Circuit reiterated that the ADA does not protect

employees from retaliation for seeking compensation for work-related injuries. *See Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 154 (4th Cir. 2012); *Rorrer v. City of Stow*, 743 F.3d 1025, 1046 (6th Cir. 2014).

The Third Circuit noted that Petitioner did not properly preserve or challenge on appeal the District Court's dismissal of his Title VII claims and deemed such claim "forfeited". Pet.App.A at 6, n. 2. The Court further noted, to the extent that, Petitioner sought for the first time in this litigation to recast his Title VII claim as a claim under the ADEA or initiate a new claim under the ADEA, such claim was barred because it was not included in Petitioner's original Complaint. *Id.*

In addition to the foregoing, Petitioner was furthermore unable to establish a *prima facie* claim of discrimination under the ADA because he at no point asserted sufficient evidence to create a triable issue as to whether he suffered an adverse employment action. Such finding was based in part on the District Court's proper application of Local Rule 56 in deeming the statement of facts asserted by Respondent as admitted due to Petitioner's failure to contradict such averments explicitly or by presentation of his own allegations of fact.

For each and all of these reasons, upon exercise of plenary review of the parties' cross-Motions for Summary Judgment, the Third Circuit affirmed the District Court's application of L.R. 56 and determination that Petitioner had failed to state a viable claim of discrimination under any statute as a matter of law. Respondent avers that the factual and legal issues addressed by the District Court and the Third Circuit, as well as the accuracy of those findings, are the proper questions

before this Court on Petition for Writ of Certiorari. To this extent, Respondent avers that such issues should not be subject to review by this Court has they pertain solely to claims “of erroneous factual findings” as to the validity of the Resignation Agreement or “the misapplication of a properly stated rule of law”, namely, Local Rule 56, the ADA, and Title VII. *See* U.S. Sup. Ct. Rule 10. For these reasons, this Honorable Court should deny Petitioner’s Petition for Writ of Certiorari.

II. Petitioner’s unsubstantiated and defamatory claims of unfairness, bias, and prejudice throughout this litigation do not serve as a valid basis to grant review via Writ of Certiorari.

The foregoing argument pertains to the factual and legal findings of the district and appellate courts, which Respondents maintain are the true issues before this Court and should not be subject to review on Writ of Certiorari under Rule 10. However, Petitioner’s Petition for Writ of Certiorari also includes additional “questions” to be presented before this Court accusing Respondent and the federal Courts of unfair prejudice and misconduct which are not only offensive but entirely unsupported by the record.

In addition to raising issues as to the sufficiency of the record evidence, Petitioner also asserts questions as to whether the Third Circuit Court and District Court upheld their sworn duties as members of the federal bench in dismissing Petitioner’s claims and whether the District Court unfairly applied L.R. 56 against

Petitioner. *See* Petition for Writ of Certiorari at (i).¹ Since his initial failed Motion for Summary Judgment, Petitioner has begun concocting a conspiracy theory of unfairness and prejudice permeating every level of the federal courts in Western Pennsylvania. Petitioner has gone so far as to accuse the undersigned of committing “bribery” to obtain a beneficial outcome before the District Court and Third Circuit Court of Appeals. *See* Petition for Writ of Certiorari at 6. Petitioner also claims that the courts “twist[ed] [his] claim into a lie” Petition for Writ of Certiorari at 4. Petitioner uses the term “lie” to describe the findings of the District Court and Third Circuit no less than ten times in his Petition. *See* Petition for Writ of Certiorari at 4, 5, 9, 10, 13, 15. Respondent maintains that no such misconduct has occurred and avers that such allegations are directly contradicted by the well-reasoned opinions of both the District Court and the Third Circuit Court of Appeals.

Although inflammatory, these fictitious accusations do not support review on a Writ of Certiorari under Rule 10. Neither the decision of the District Court nor the Third Circuit conflict with any decision of any other state or federal court, or otherwise pertain to an undecided important question of federal law. Moreover, neither Court “departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court’s supervisory power.” U.S. Sup. Ct. Rule 10(a). Both the District Court and the Third Circuit acted fairly and

¹ The “Questions Presented” section of Petitioner’s Petition for Writ of Certiorari is not numbered. Respondent has therefore assigned this page as page (i) for reference as it is the first page following the Cover Page.

professionally in applying well-established standards of law regarding motions for summary judgment in determining that Petitioner was not entitled to relief. The fact that Petitioner is disappointed in those results is understandable, but certainly not a basis for this Court's review of the well-reasoned non-precedential opinions of the District Court or the Third Circuit.



CONCLUSION

For all these reasons, Defendant-Respondent Fraley and Schilling Trucking Company respectfully requests this Court deny Plaintiff-Petitioner Larry Whetstone's Petition for Writ of Certiorari and deny review of the District Court and Appellate Court rulings.

Respectfully submitted,

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