

No. ____

**In the
Supreme Court of the United States**

MARIE PFAU

PETITIONER,

v.

JANET YELLEN,

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

Whether the Fifth Circuit erred in holding that a reasonable jury could not hold that the Petitioner experienced discrimination based on sex.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Marie Pfau

Janet Yellen, in her official capacity as the
Secretary of the Treasury

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, AUSTIN
DIVISION

Case No. 1:18-cv-00422-RP

MARIE PFAU V. JANET YELLEN

Summary Judgment GRANTED in favor of Janet Yellen. Judgment Dated June 1, 2022. Judgment not reported but reproduced in the Appendix.

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Case No. 22-50542

MARIE PFAU V. JANET YELLEN

Appeal DENIED, Lower Court grant of summary judgment AFFIRMED. Judgment reported as *Pfau v. Yellen*, No. 22-50542 (5th Cir. Nov. 23, 2022) and reproduced in the Appendix.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pfau respectfully requests that a Writ of Certiorari be issued to review the granting of summary judgment by the United States District Court for the Western District of Texas and the subsequent affirmation of the same by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The June 1, 2022, order granting summary judgment in favor of Respondent from the United States District Court For The Western District of Texas is reproduced in the Appendix (“Pet. App. 9a”).

The November 23, 2022, order from the United States Court Of Appeals For The Fifth Circuit is reproduced in the Appendix. (“Pet. App. 1a”). This order is published as *Pfau v. Yellen*, No. 22-50542 (5th Cir. Nov. 23, 2022).

BASIS FOR JURISDICTION IN THIS COURT

The United States Court Of Appeals For The Fifth Circuit entered judgment on November 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

No person shall be deprived of life, liberty, or property without due process of law.

RULE PROVISIONS INVOLVED

Fed. R. Civ. P. 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

As explained by the Fifth Circuit Court of Appeals – Petitioner, formerly a seasonal clerk for the Internal Revenue Service (“IRS”), filed suit against the Secretary of the Treasury alleging that her employer engaged in sex and age discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act of 1967 (“ADEA”). Pet. App. 2a. Specifically, Petitioner claimed that certain actions of her co-worker, Mario Drumgoole, constituted sex and age discrimination and created a hostile work environment. Pet. App. 2a.

The district court partially granted the Government’s Rule 12(b)(6) motion and dismissed Petitioner’s age discrimination and retaliation claims under Title VII and the ADEA. Pet. App. 2a. Pfau’s only remaining claim, sex discrimination based on a hostile work environment, proceeded to trial on May 31, 2022. Pet. App. 2a. At trial, Petitioner testified generally that a co-employee, Drumgoole, frequently spoke in an excessively loud manner to co-workers and to her which she found disruptive and disturbing. More specifically, she testified about the following six incidents involving Drumgoole that she believes constituted harassment:

(1) Drumgoole “announced” to the office he was going to let everybody go home because the department’s computer system was malfunctioning;
(2) Drumgoole “interjected himself” into Petitioner’s conversation with her coworker, Margaret Rhoads;

(3) Petitioner overheard Drumgoole tell Rhoads that Rhoads “was going to get a complaint filed against her for not working;” (4) Petitioner overheard Drumgoole and Rhoads reference “old people having sex;” (5) Drumgoole “yelled” at Petitioner to “get back to work right now;” and (6) Petitioner saw Drumgoole walking around the office smacking his fist into one hand and grunting. Pet. App. 2-3a.

Notably, Drumgoole, for all relevant periods, held an authority role within the Department. Drumgoole repeatedly approached female employees in their cubicles, at the sign out desk and at the fax machine to examine the female employee’s work, excise his assumed supervisory authority and make remarks about the female employee’s appearance or person.

On April 28, 2017, Drumgoole demanded Pfau return to work while she was taking her scheduled lunch break. During the conversation, Drumgoole clenched his fists at Pfau and told her to quit her job. Pfau reported the incident to her supervisor Eller. But, ultimately to no avail. Additionally, during this time, Drumgoole was blocking Ms. Pfau’s escape. This was not done in front of cameras that captured the incident on video, but the IRS in-house investigator never reviewed the footage. Neither did any IRS interviewer.

Eller told Pfau that Drumgoole was “more important” than Pfau, and no action could be taken despite previous disciplinary actions and ongoing harassment. Eller asserted that Drumgoole had been counseled about his workplace behavior previously, the counseling had been ineffective and “nothing could

be done.” Eller met with Drumgoole regarding Ms. Pfau’s complaints. Drumgoole complained that he felt like he was the one being falsely accused, intimidated and harassed.

Soon thereafter, Drumgoole took offense to Ms. Pfau’s complaint and began to make threats. For instance while they were walking between the cubicles, Drumgoole repeatedly punched one fist into his other hand’s open palm. The effect this had on Ms. Pfau made it impossible for Ms. Pfau to comfortably work. Drumgoole also frequently grunted and repeatedly made eye contact with Plaintiff. Plaintiff regarded this as direct threat of violence against her due to her complaints regarding Drumgoole and she feared that Drumgoole would physically assault her.

Drumgoole further stated in his affidavit that he did not like the way Ms. Pfau looked. This highlights his predisposition to treat Ms. Pfau differently. And this is further highlighted by his actual discrimination.

At the close of Petitioner’s case, the Government moved for judgment as a matter of law pursuant to Rule 50(a). The district court granted the Government’s motion, finding that Petitioner had presented “simply no competent evidence” to support the essential elements of her hostile work environment claim. Petitioner timely appealed to the Fifth Circuit. The Fifth Circuit affirmed the District Court’s ruling.

B. Procedural History

On June 1, 2022, the District Court granted Respondent summary judgment and enforced the

award. The Fifth Circuit then affirmed the District Court on November 23, 2022.

Now, this Petition for Writ of Certiorari follows.

REASONS TO GRANT THIS PETITION

I. THE FIFTH CIRCUIT COURT INCORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT NO REASONABLE JURY COULD CONCLUDE THE PETITIONER EXPERIENCED DISCRIMINATION BASED ON SEX.

Judgment as a matter of law is appropriate after a party has been fully heard by the jury on a given issue, and “there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue.” *Burch v. Coca-Cola Co.*, 119 F.3d 305, 313 (5th Cir. 1997) (citing *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir. 1994)).

However, if “evidence is such that a reasonable jury could return a verdict for the nonmoving party”, there is a genuine dispute of material fact and the issue should be heard by a jury. *Royal v. CCC&R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013). When evaluating motions for judgment as a matter of law, the court should examine all evidence in the light and with all reasonable inferences ***most favorable to the party opposed to the motion.*** *Id.* (emphasis added).

Here, the Fifth Circuit failed to recognize that a reasonable fact finder ***could have*** found instances of discrimination and harassment based on the Petitioners’ sex; notably, Petitioner’s claims survived

the motion to dismiss phase - The elements of Petitioners claim of hostile work environment under Title VII are genuinely disputed and this assertion is supported by the district court itself. When it ruled on a motion to dismiss in 2019, it upheld Petitioner's claim of sex discrimination as sufficiently pleaded. The district court asserted that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face," and it found Petitioner's case stated such a plausible claim. The order denying the Respondents motion to dismiss held that Petitioner's claim of sex discrimination sufficiently satisfied all five prongs.

A. Petitioner Meets the Requirements to State a Valid Claim of Sex Discrimination.

To state a claim for hostile work environment under Title VII, a plaintiff must allege:

- (1) she belongs to a protected group;
- (2) she was subject to unwelcome harassment;
- (3) the harassment complained of was based on her protected class;
- (4) the harassment complained of affected a term, condition, or privilege of employment; and
- (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.

Williams-Boldwar v. Denton Cnty., Tex., 741 F.3d 635, 640 (5th Cir. 2014).

The objective severity of harassment should be judged from the perspective of a reasonable person, considering “all the circumstances.”¹ These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.²

A work environment is considered hostile when it is “objectively and subjectively offensive” such that “a reasonable person would find [it] hostile or abusive” and the victim herself “perceive[d] [it] to be so.”³ In *Abbt.v. City of Houston*, the Fifth Circuit overturned a ruling of summary judgment because there was at least a genuine dispute of material fact for each of the elements of the Petitioner’s sexual discrimination and hostile workplace claim.⁴

It is submitted that the Petitioner has adduced evidence of disputes of material fact with respect to each of the elements required to establish a valid claim of sexual discrimination. In particular, the Petitioner satisfies the first prong of a valid claim by virtue of her membership in a protected class, namely, individuals sharing her gender identity. Furthermore, the Petitioner satisfies the second prong of a valid sexual discrimination claim by demonstrating that

¹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

² *Harris v. Forklift Sys.*, 510 U.S. 17, 23, 114 (1993).

³ *Abbt v. City of Hous.*, 28 F.4th 601, 607 (5th Cir. 2022).

⁴ *Id.*

she was subjected to harassing conduct by Drumgoole.⁵

The Fifth Circuit erred in its determination that the third prong of the sexual discrimination claim was undisputed. The Petitioner, in fact, presented sufficient evidence to demonstrate that there is a genuine dispute of material fact concerning the third prong, which should have been considered by a jury. The third prong is disputed because there are multiple allegations of harassment against Drumgoole by members of the same protected class as the Petitioner, which stands in stark contrast to the lack of complaints made by coworkers who do not belong to the protected class. Furthermore, the Petitioner has highlighted the disparate and unfavorable treatment of women at the hands of Drumgoole, further bolstering her claim of a dispute of material fact.

The harassment endured by the Petitioner satisfies the fourth prong of the sexual discrimination claim and presents a dispute of material fact. The fourth prong requires a determination of whether the harassment was so severe or pervasive as to create an abusive or hostile work environment and alter a term or condition of employment. This prong has two distinct elements: (1) whether the behavior was objectively offensive and (2) whether it was subjectively offensive.⁶ Isolated instances, if egregious, can alter the terms and conditions of

⁵ (1) she belongs to a protected group; (2) she was subject to unwelcome harassment.

⁶ *Harvill v. Westward Communs., L.L.C.*, 433 F.3d 428, 435 (5th Cir. 2005).

employment.⁷ Additionally, even shorter time periods of harassment can compound the impact of smaller yet pervasive instances of harassment.⁸

In this case, the allegations of harassment against Drumgoole clearly satisfy both elements of the fourth prong. The persistent harassment and physical threats directed towards the Petitioner far exceeded the bounds of “merely offensive utterances,” thereby rendering them actionable under Title VII. The frequency and repetition of the harassment during the three-month span of the Petitioner’s employment only exacerbated its impact. The Petitioner has cited six incidents of harassment, including intimidating body language, which subjectively caused her to experience fear of harm, anxiety, and insomnia. The severity of the harassment was such that the Petitioner felt compelled to resign for the sake of her own safety, resulting in a constructive discharge and the forfeiture of employment benefits. Therefore, the harassment endured by the Petitioner satisfies the fourth component of the sexual discrimination claim and constitutes a material dispute of fact that must be tried by a jury.

Last, Petitioner presented sufficient evidence to satisfy the fifth prong and therefore presents a dispute of material fact that must be heard by a jury.⁹ The Fifth Circuit previously held that “[i]f the employer has structured its organization such that a

⁷ *Id.*

⁸ *Royal*, 736 F.3d at 403.

⁹ (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.

given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.”¹⁰ To avoid liability, the employer must take prompt remedial action and said action must be reasonably calculated to end the harassment.¹¹

Here, the Petitioner reported the harassment to her immediate supervisor and was informed that prior disciplinary efforts had proven ineffectual¹². The supervisor failed to promptly address the harassment. At trial, Drumgoole acknowledged that he was not subjected to any discipline despite previous complaints. Furthermore, he was not required to participate in sensitivity training. The supervisor merely issued a directive forbidding communication between Drumgoole and the Petitioner, which Drumgoole declined to sign. Subsequently, Drumgoole approached the Petitioner after she submitted her written complaint. The employer was apprised of the ongoing harassment and failed to undertake appropriate corrective measures, fulfilling the final prong for a valid claim of discrimination based on sex.

¹⁰ *Williamson v. City of Houston*, 148 F.3d 462, 467 (5th Cir. 1998).

¹¹ *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 615 (5th Cir. 1999).

¹² It is worth noting that there is no protection for those with a disability involving anxiety and that the Department of Justice does not analyze such for complete representation of the complaints it sees. Moreover, this sort of hostile work environment exacerbates waste and abuse of government resources.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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