No. 22A546

In the Supreme Court of the United States

BAILIE BYE,
Applicant,

v.

MGM RESORTS INTERNATIONAL, INCORPORATED,
DOING BUSINESS AS BEAU RIVAGE RESORT AND CASINO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 6, 2023

TO: The Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit

Applicant Bailie Bye respectfully seeks a further 30-day extension of the time within which to file a petition for a writ of certiorari to review the Fifth Circuit's judgment in this case, to and including February 25, 2023.

1. On September 28, 2022, the Fifth Circuit entered judgment and issued its opinion, a copy of which is attached. On December 19, 2022, Justice Alito granted an application extending the time to file a petition for certiorari from December 27, 2022, until January 26, 2023. This application is being filed more than ten days before that date.

2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

3. Between 2015 and 2019, Bailie Bye was employed as a waitress at the Beau Rivage Resort and Casino in Biloxi, Mississippi. Ms. Bye alleges that, when she returned from maternity leave in March 2019, Beau Rivage failed to provide her with adequate lactation breaks, she was harassed on the job due to the lactation breaks that she did take, and she was retaliated against and ultimately forced to quit her job due to the casino's failure to allow her to pump breast milk.

4. Ms. Bye's complaint alleges that the lactation breaks that Beau Rivage afforded her "were sporadic." "The room was filthy, and [she] had to complain to make sure that the room was cleaned up so that the room was sanitary to pump." "Every time she needed a break [she] was questioned or told that she had to wait." Her "breast became engorged" because she "was not given regular breaks," leading to "unbearable pain at work." She was "told that she could not take a break until employees who had not taken

their breaks yet had taken their breaks." As a result, she was only given her break "hours past its required time." "Because of [her] pumps breaks," "co-workers began to harass" her. She was eventually "forced to leave her employment because she could no longer endure the harassment and physical pain from not being allowed to take her pump breaks."

5. Ms. Bye initially filed this action against Beau Rivage in the Circuit Court of Harrison County, Mississippi. The casino removed the case to federal district court, and the district court ultimately granted summary judgment to Beau Rivage, holding that Ms. Bye did not present sufficient evidence to support a prima facie case of disparate treatment, harassment, or constructive discharge under Title VII.

6. In addition to her Title VII claims, Ms. Bye asserted—in response to the casino's motion for summary judgment—that her complaint pled facts sufficient to make out a claim under a 2010 amendment to the Fair Labor Standards Act, which requires employers to provide nursing mothers reasonable unpaid break time to express breast milk after the birth of a child. *See* Pub. L. No. 111-148, § 4207, 124 Stat. 119, 577–78 (2010). As amended, the FLSA requires employers to "provide . . . a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk," and "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(R)(1)(A)-(B). Without addressing the merits, the district court rejected the FLSA claim as untimely and therefore not properly before the court. Ms. Bye appealed.

7. On appeal, Ms. Bye challenged the district court's dismissal of her Title VII claims on the merits and its dismissal of her FLSA claim as untimely. The Fifth Circuit (Jones, J.) affirmed. With respect to the FLSA claim, the court relied on circuit precedent holding that "[a] claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." *Bye v. MGM Resorts Int'l*, 49 F.4th 918, 925 (5th Cir. 2022) (quoting *Jackson v. Gautreaux*, 3 F.4th 182, 188 (5th Cir. 2021)). Judge Jones's opinion for the majority held that this Court's decision in *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10 (2014), did not compel a different result. *Id.* at 926 ("*Johnson* is inapposite here for various reasons.").

8. Judge Ho concurred in the panel's decision to affirm dismissal of the Title VII claims but dissented with respect to the FLSA claim, reasoning that "the Supreme Court has made clear that plaintiffs need only plead facts—not legal theories." *Id.* at 929 (Ho, J., concurring in part and dissenting in part). In *Johnson v. City of Shelby,* he explained, "the Supreme Court summarily reversed our court for mistakenly requiring plaintiffs to plead legal theories as well as facts. The Court explained that [a] plaintiff . . . must plead *facts* sufficient to show that her claim has substantive plausibility.' It concluded that the complaint in that case alleged sufficient facts: 'Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city.' 'Having informed the city of the factual basis for their complaint, they were required to do *no more* to stave off threshold dismissal for want of an adequate statement of their claim.' So *Johnson* makes clear that 'it is unnecessary to set out a legal theory for the plaintiff's claim for relief.'" *Id.* (internal citations omitted).

9. Judge Ho further noted that "other circuits have interpreted *Johnson* similarly." *Id.* For example, he cited *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020) (Easterbrook, J.), which held that, under *Johnson*, "[c]omplaints plead *grievances*, not legal theories," and so it didn't matter that a complaint "initially relied only on the First Amendment"—the plaintiff could still invoke the Due Process Clause "at later stages of the suit." *Koger*, 950 F.3d at 975. The Seventh Circuit recognized that the plaintiff "did not [even] need to amend the complaint to do so." *Id.; see also Quinones v. City of Binghamton,* 997 F.3d 461, 468 (2d Cir. 2021) ("[T]he complaint identifies a single cause of action for retaliation and does not similarly label a cause of action for discrimination. But this failure is not fatal here.") (following *Johnson*).

10. This case thus presents a square circuit split, as well as a recognized conflict between the decision below and this Court's precedent, over a frequently recurring and fundamentally important question of civil procedure: Where a plaintiff's complaint pleads facts sufficient to plausibly allege a legal theory, does the plaintiff's failure to cite that legal theory in her complaint preclude her from raising it in opposition to a dispositive motion?

11. Applicant respectfully requests a further 30-day extension of time to file a petition for a writ of certiorari seeking review of the Fifth Circuit's ruling and submits that there is good cause for granting the request. Counsel of record, Deepak Gupta did not previously participate in this litigation and has required additional time to study the record, in consultation with the applicant and her counsel, and prepare the petition in collaboration with his colleagues. In addition, applicant's counsel and his colleagues will be heavily engaged with other appellate matters, including arguments in the Washington Supreme

Court in *Spadoni v. Microsoft*, No. 100634-9 (on January 24, 2023); in the Fourth Circuit in *Opiotennione v. Bozzuto*, No. 21-1919 (on January 26, 2023); in the Massachusetts Supreme Judicial Court in *Doucet v. FCA US LLC*, No. SJC-13354 (on February 8, 2023); in the California Court of Appeals in *Lanier v. Ford*, No. B315114 (on February 9, 2023); and in the Ninth Circuit in *Mills v. Target*, No. 21-56308 (on February 10, 2023).

11. Applicant's counsel and his colleagues also have multiple briefs due: in this Court in *Apple v. Cohen*, No. 22A427 (on January 23, 2023), and *Vidal, Under Secretary of Commerce and Director, Patent and Trademark Office v. Elster*, No. 22A442 (in February 2023); in the Third Circuit in *Scanlan v. American Airlines*, No. 22-3294 (on January 31, 2023); in the Fourth Circuit in *Mohamed v. Bank of America*, No. 22-1954 (on February 23, 2023); in the Ninth Circuit in *Anderson v. Intel*, No. 22-16268 (on January 24, 2023); in the Eleventh Circuit in *Louis v. Bluegreen*, No. 22-12217 (on February 17, 2023); in the Washington Supreme Court in *Spadoni v. Microsoft*, No. 100634-9 (on January 11, 2023); and in the California Court of Appeals in *Liapes v. Facebook*, No. A164880 (on January 11, 2023), *McCormack v. Ford*, No. G061849 (on February 9, 2023), and in *Aguilar v. Nissan*, No. B321733 (on February 13, 2023).

12. Extending the deadline to February 25, 2023, will allow the applicant's counsel sufficient time to prepare a petition.

CONCLUSION

For the foregoing reasons, the applicant respectfully requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including February 25, 2023.

Dated: January 6, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Deepak Gupta, a member of the Supreme Court Bar, hereby certify that on December 15, 2022, a copy of the accompanying Application for a Further Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

January 6, 2023

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