

NO. 22-_____

In the
Supreme Court of the United States

VALERIE KLINE, J.D.

PETITIONER,

v.

KIRAN AHUJA,

in her official capacity as Director,
U. S. Office of Personnel Management,

RESPONDENT.

APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS FOR LEAVE
TO FILE A PETITION FOR WRIT OF CERTIORARI OUT-OF-TIME

Valerie Kline, J.D., pro se

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Petitioner, Valerie Kline, J.D., *pro se*, hereby applies to Chief Justice John G. Roberts for leave to file a *Petition for Writ of Certiorari* (the “Petition”) out-of-time pursuant to Rule 13.5 and 30.2 of the Rules of the Court, and 28 U.S. Code § 2101(c), which reads:

A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Chief Justice Roberts has jurisdiction over this application pursuant to this Court's current circuit assignments as this case falls under the D.C. Circuit. This Court also has jurisdiction following issuance of Orders of the Court of Appeals for the D.C. Circuit on August 18, 2022, affirming the district court's rulings, and denying rehearing on November 3, 2022. This application is being sought solely by and for Valerie Kline, *pro se*.

Rule 13.5 reads in pertinent part:

For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. . . . The application must be filed with the Clerk at least 10 days before the date the petition is due, *except in extraordinary circumstances*. [Emphasis added.]

For good cause shown, due to reliance on the *advice of counsel* per *Maples v. Thomas, infra*, concerning the filing deadline, the facts herein warrant an *extraordinary circumstances* exception. Thus, Kline requests a 60-day extension to file the Petition.

SUMMARY

Extraordinary circumstances arise from *the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process*. *Buck v. Davis*, 580 U.S. 100, 100, 137 S. Ct. 759, 763 (2017). Kline was unable to obtain a fair and impartial adjudication of her cases due to material misrepresentations made by OPM's attorney amounting to *fraud on the court* that squarely prejudiced Kline's cases.

As the magistrate judge professed to Kline:

"I don't think I've got two [DOJ and OPM] lawyers . . . who are going in (sic) misrepresent something, as members of the Court. . . . an officer of the Court [is] not supposed to make incorrect statements, to the Judge particularly. So I'm going to assume that both counsel . . . made some effort to inquire about this." Exhibit 5.

As a result, the court adopted without reservation all of the attorney's misrepresentations over Kline's factual ones. Based on the misrepresentations, the district court denied Kline discovery of material facts. Thus, Kline was unable to obtain fair and impartial adjudication of her cases and denied due process. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

Moreover, allowing this injustice to stand creates a strong *risk of undermining the public's confidence in the judicial process*, as this *involves far more than an injury to a single litigant* as an attorney's misrepresentations are *a wrong against the institutions set up to protect and safeguard the public*. *Id.*

Finally, this Court has yet to address a Fed. R. Civ. P. 60(d)(3) *fraud on the court* claim of prejudice caused by an attorney's misrepresentations against a *pro se* party. Thus, this issue presents a *novel case of first impression*.

BACKGROUND

The Petition springs from three Title VII discrimination and retaliation cases. In 2010, Kline, *pro se*, filed a *diminution of duties* suit (*Kline II*) against her employer, OPM for stripping her duties and replacing her as the backup to Jacqueline Carter, who managed the Regulatory Issuances System (RIS). The district court granted summary judgment to OPM finding Kline suffered no adverse action and dismissed the case.

In 2014, by and through counsel, Kline filed a *failure to promote* suit (*Kline III*) against OPM for failing to detail her into the position for managing the RIS after Carter retired in 2006. OPM unofficially detailed Stephen Hickman into the position 17 days after he was hired contrary to OPM's regulations and law. Undisputedly, Hickman was not qualified nor eligible for the detail whereas Kline was both qualified and eligible. Despite this, the district court again granted summary judgment to OPM and dismissed the case. Both cases were summarily affirmed on appeal.

In 2016, by and through counsel, Kline filed suit on a *failure to promote* claim for the position of managing the RIS (*Kline IV*) when OPM officially filled it in 2008, two years after Carter retired. During the proceedings, it was revealed that OPM's

attorney had squarely made material misrepresentations to the court in *Klines II and III* that would have affected the outcome of those cases had the attorney accurately represented the facts.

Specifically, in *Kline II*, Kline attempted to discover facts pertaining to Hickman and wanted OPM to admit that Hickman had taken over Carter's position in 2006 after she retired. This would have provided evidence to support a finding that Kline suffered an adverse action when Hickman replaced her as Carter's "backup", and thus took over the position after Carter retired, which gave him experience managing the RIS.

In both *Klines II and III*, OPM's attorney represented *to the court* that Hickman did **not** take over Carter's position until 2008. Thus, the court denied Kline discovery of facts related to Hickman as irrelevant. Yet in *Kline IV*, OPM conceded that Hickman had taken over because he had been "managing" the RIS "since his employment with OPM," which began in 2006. OPM relied on this fact to proffer that Hickman had experience in managing the RIS. This concession was evidence that Hickman *had* taken over Carter's managing position in 2006 contrary to OPM's attorney's representations to the court in *Klines II and III*.

Kline raised OPM's misrepresentations in her *Kline IV* opposition to summary judgment to no avail. The district court found that OPM had a legitimate, non-discriminatory reason for promoting Hickman because he had experience managing the RIS (albeit via the unlawful detail) and granted summary judgment to OPM.

The circuit court affirmed the decision. Kline petitioned this Court, which denied certiorari.

STATEMENT OF FACTS

On April 14, 2021, Kline, by and through counsel, filed a Fed. R. Civ. P. 60(d)(3) motion to vacate rulings and reopen *Klines II and III* based on after-discovered evidence in *Kline IV* that defendant's attorney committed fraud on the court in *Klines II and III*. The district court denied Kline's motion and dismissed the case. The D.C. Circuit summarily affirmed the district court's ruling by finding no abuse of discretion.

Kline alleged the attorney's misrepresentations caused prejudice to her cases because, as the court professed to Kline:

THE COURT: -- . . . *I don't think I've got two lawyers sitting over at the table who are going in (sic) misrepresent something*, as members of the Court. One of the things you have when you become a member of the Bar is that you're an officer of the Court and you're not supposed to make incorrect statements, to the Judge particularly. So *I'm going to assume that both counsel sitting at the table made some effort to inquire about this[.]* [Emphasis added.] *Excerpt Of Motions Hearing*, May 11, 2012, Exhibit 5.

The court then adopted all of the attorney's representations without reservation over Kline's because he was a lawyer and she was not. As a result, the court denied Kline discovery of material facts in *Kline II*, denied Kline discovery altogether in *Kline III*, and granted summary judgment to OPM in both cases.

On appeal, the circuit court summarily affirmed the district court's rulings on August 18, 2022, Exhibit 1, denied rehearing on November 3, 2022, Exhibit 2, and issued its mandates on November 14, 2022, Exhibit 3. Kline also filed with the circuit court a motion to amend its order in *Kline III*, to accurately reflect the summary affirmance of the district court's ruling. That motion too was denied, Exhibit 4.

On November 18, 2022, Kline received five documents from her attorney (exhibits 1-4) consisting of three orders and two mandates. Kline conferred with her attorney whose opinion was that the deadline for filing a petition to this Court was 90 days from the date of the mandates, i. e., February 13, 2023.

Due to the pressures of researching the law and writing a petition within 90 days, Kline conferred with another attorney who reviewed the Petition yet he too did not inform her that the filing date was incorrect and should have been based on the Orders and not the mandates.

On February 13, 2023, Kline filed the Petition. After several days of not seeing the Petition on the Court's docket, Kline called the Clerk's Office and on February 24, 2023, the Clerk informed her that the Petition had been returned because it was filed out-of-time. Thus, Kline immediately prepared this application for leave to file the Petition out-of-time for good cause shown.

ARGUMENT

Kline has “good cause” for missing the deadline due to reliance on *advice of counsel* and through no fault of her own. *See Maples v. Thomas*, 565 U.S. 266, 132 S. Ct. 912 (2012). In addition a finding of *extraordinary circumstances* is warranted.

In *Buck v. Davis, supra*, this Court held:

“[i]n determining whether **extraordinary circumstances** are present, a court may consider a wide range of factors. These may include, in an appropriate case, *the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process.*” (Emphasis added.)

An attorney's misrepresentations *to a court* in a case involving a *pro se* party are especially prejudicial and *risk injustice* since a court is bound to accept a lawyer's representations over a non-lawyer's, as the judge professed to Kline. Squarely, the misrepresentations worked to deny Kline due process of law because they rendered the court incapable of impartially and fairly adjudicating her cases. *See Hazel-Atlas, supra.*

The attorney's misrepresentations also caused a *grave injustice* to Kline since they succeeded at depriving her of material discovery that could have affected the outcome of her cases. If this injustice is allowed to stand, there is a strong *risk of undermining the public's confidence in the judicial process*, especially since this involves far more than an injury to a single litigant in that it is a *wrong against the institutions set up to protect and safeguard the public. Id.*

In *Grady v. Corbin*, 495 U.S. 508, 510, 110 S. Ct. 2084, 2087 (1990), this Court held that, “an attorney may not misrepresent facts[.]” Thus, an attorney’s deliberate misrepresentations *to a court* should be deemed egregious, per *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005), and will cause grave injustice particularly to a *pro se* party, by taking advantage of the court’s bias toward a lawyer’s representations.

As this Court held in *Hazel-Atlas, supra, fraud on the court* is grounds for reopening a case. In *Klines II and III*, defendant’s attorney made deliberate false statements to the court, which prevented Kline from obtaining discovery of material facts so that she was unable to fully and fairly present her case. See *Philips Lighting Co. v. Schneider*, 636 F. App’x 54, 58 n.3 (2d Cir. 2016). As a result, Kline was denied due process of law and *fair and impartial adjudication* per *Hazel-Atlas, supra*.

Since this Court has yet to address the prejudice caused to a *pro se* party by a attorney’s misrepresentations *to the court*, this issue will be a *novel case of first impression* if this application, and subsequently the Petition, are granted. It is imperative that this Court address this issue to avoid the *risk of injustice* to future *pro se* parties. For this reason, not only is there a *risk of injustice* but a strong *risk of undermining the public’s confidence in the judicial process* due to an attorney’s deliberate misrepresentations, which misrepresentations amount to *a wrong against the institutions set up to protect and safeguard the public*. Thus, these facts

establish extraordinary circumstances that warrant granting leave to file the Petition out-of-time.

An additional reason for granting this application is due to *excusable neglect*. In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 382, 113 S. Ct. 1489, 1491 (1993), this Court held that excusable neglect is grounds for allowing an out-of-time filing.

Applying the guidance set forth by this Court in *Pioneer Inv. Servs.* on what constitutes excusable neglect, Kline submits she meets the four-factor balancing test for finding excusable neglect, as follows.

1. *The delay in filing was not within the reasonable control of the Petitioner.*

Loaded with researching the legal bases for and writing the Petition, Kline relied on assistance of counsel to guide her, including a determination of the deadline for filing the petition. which led to the late filing. *See Maples, supra.*

2. *The length of the delay and the delay's potential impact on judicial proceedings.*

Kline only missed the filing deadline by eight business days so that the delay was minimal. While this Court opined in *Johnson v. United States*, 544 U.S. 295, 311, 125 S. Ct. 1571, 1582 (2005) that the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for *prolonged inattention*, here, Kline acted immediately upon learning that the Petition was not filed in a timely fashion. Furthermore, filing the Petition out-of-time will not have

any impact on judicial proceedings since all of the proceedings in the lower courts are complete.

3. The danger of prejudice to the non-moving party.

There is no danger of prejudice to the non-moving party since the Appellee at this point in time is not involved in the petition process.

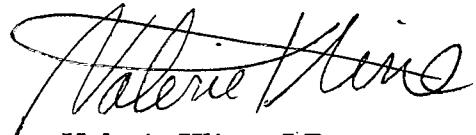
4. Whether the movant acted in good faith.

Kline acted in good faith by believing that the deadline for filing the petition was February 13, 2023, per advice of counsel. Thus, the late filing was not due to bad faith. Therefore, the late filing was due to "excusable neglect." See also Fed. R. Civ. P. 6(b)(1)(B).

CONCLUSION

For good cause shown, Petitioner respectively requests that this Court grant her application for leave to file the Petition out of time. A proposed Order is attached.

Respectfully submitted,



Valerie Kline, J.D., pro se

NO. 22-_____

In the
Supreme Court of the United States

VALERIE KLINE, J.D.

PETITIONER,

v.

KIRAN AHUJA,

in her official capacity as Director,
U. S. Office of Personnel Management,

RESPONDENT.

On Application For Leave To File A
Petition For Writ Of Certiorari Out Of Time

ORDER

For good cause shown, the *Application for Leave to a Petition for Writ of Certiorari Out-of-Time* is GRANTED.

Petitioner shall refile the Petition no later than April 3, 2023.

Chief Justice John G. Roberts

EXHIBIT 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5014

September Term, 2021

1:07-cv-00451-RCL
1:10-cv-01802-RCL
1:14-cv-01498-RCL

Filed On: August 18, 2022

Valerie Kline,

Appellant

v.

Kiran Ahuja, Director, U.S. Office of
Personnel Management,

Appellee

Consolidated with 22-5015, 22-5016

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the motion for leave to file surreply, the opposition thereto, and the reply, it is

ORDERED that the motion for leave to file surreply be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying appellant's motions for relief under Federal Rule of Civil Procedure 60(b), see Smalls v. United States, 471 F.3d 186, 191 (D.C. Cir. 2006), or under Federal Rule of Civil Procedure 60(d)(3), see El Bey v. United States, 697 F. App'x 13, 14 (D.C. Cir. 2017) (per curiam).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5014

September Term, 2021

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

EXHIBIT 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5014

September Term, 2022

**1:07-cv-00451-RCL
1:10-cv-01802-RCL
1:14-cv-01498-RCL**

Filed On: November 3, 2022

Valerie Kline,

Appellant

v.

Kiran Ahuja, Director, U.S. Office of
Personnel Management,

Appellee

Consolidated with 22-5015, 22-5016

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing and the supplement thereto, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5248

September Term, 2022

1:14-cv-01498-RCL

Filed On: November 3, 2022

Valerie Kline,

Appellant

v.

Kiran Ahuja, In her capacity as Director of the
U.S. Office of Personnel Management, et al.,

Appellees

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for reconsideration of the court's August 18, 2022 order denying appellant's motion to amend, which was construed as a motion to recall the mandate, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXHIBIT 3

No. 22-5014

September Term, 2022

**1:07-cv-00451-RCL
1:14-cv-01498-RCL
1:10-cv-01802-RCL**

Filed On: November 14, 2022 [1973554]

Valerie Kline,

Appellant

v.

Kiran Ahuja, Director, U.S. Office of
Personnel Management,

Appellee

Consolidated with 22-5015, 22-5016

MANDATE

In accordance with the order of August 18, 2022, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

[Link to the order filed August 18, 2022](#)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5014

September Term, 2022

1:07-cv-00451-RCL
1:14-cv-01498-RCL
1:10-cv-01802-RCL

Filed On: November 14, 2022 [1973554]

Valerie Kline,

Appellant

v.

Kiran Ahuja, Director, U.S. Office of
Personnel Management,

Appellee

Consolidated with 22-5015, 22-5016

MANDATE

In accordance with the order of August 18, 2022, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

[Link to the order filed August 18, 2022](#)

EXHIBIT 4

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5248

September Term, 2022

1:14-cv-01498-RCL

Filed On: November 3, 2022

Valerie Kline,

Appellant

v.

Kiran Ahuja, In her capacity as Director of the
U.S. Office of Personnel Management, et al.,

Appellees

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for reconsideration of the court's August 18, 2022 order denying appellant's motion to amend, which was construed as a motion to recall the mandate, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

VALERIE KLINE, . . . Case No. 1:10-CV-01802
Plaintiff, . . . (RWR/AK)
v. . . Washington, D.C.
May 11, 2012
JOHN M. BERRY, . . .
Defendant. . .

EXCERPT OF MOTIONS HEARING
VOLUME II
BEFORE THE HONORABLE ALAN KAY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: By: MS. VALERIE KLINE, PRO SE
For the Defendant: U.S. Attorney's Office
Civil Division
By: KENNETH ADEBONOJO, AUSA
ELIZABETH GHAURI, AUSA
555 Fourth Street, N.W.
Washington, DC 20035

BOWLES REPORTING SERVICE
P.O. BOX 607
GALES FERRY, CONNECTICUT 06335 - (860) 464-1083

1 THE COURT: Okay. That's your answer. Good.

2 Okay.

3 MR. ADEBONOJO: Thank you.

4 THE COURT: Have a copy, Ms. Kline?

5 MS. KLINE: I did and I furnished it, and
6 the --

7 THE COURT: Okay.

8 MS. KLINE: -- Report of Investigation, so
9 they could look at it.

10 THE COURT: Yeah. Okay.

11 MS. KLINE: I didn't ask for a copy of it,
12 just to admit that that was the one I was hired under.

13 THE COURT: Well, it seems to me that they
14 can't object if you introduce that in evidence --

15 MS. KLINE: Okay.

16 THE COURT: -- on that.

17 If they don't have a copy, I mean, I don't
18 think I've got two lawyers sitting over at the table
19 who are going in misrepresent something, as members of
20 the Court. One of the things you have when you become
21 a member of the Bar is that you're an officer of the
22 Court and you're not supposed to make incorrect
23 statements, to the Judge particularly.

24 So I'm going to assume that both counsel
25 sitting at the table made some effort to inquire about