

No. 23-12

IN THE

Supreme Court of the United States

JOHN KOWAL,

Petitioner,

—v.—

FERNDALE AREA SCHOOL DISTRICT, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED

This case involves a claim that Respondents, Ferndale Area School District and Ferndale Area School District Board of Education (collectively “District”), retaliated against John Kowal (“Kowal”) in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, *et seq.*, and Pennsylvania Human Relations Act (“PHRA”), 43 P.S. § 951 *et seq.*, after his contact with the Equal Employment Opportunity Commission. The Western District Court of Pennsylvania granted summary judgment in favor of the District as Kowal failed to establish a *prima facie* case of retaliation under both Acts, specifically finding that Kowal did not suffer any adverse employment action and that he otherwise failed to show that the District’s legitimate, non-retaliatory reasons for its actions were pretextual. Pet. App. 34a-38a, 42a-44a. The Third Circuit Court of Appeals affirmed the lower court’s decision, finding that Kowal failed to establish a *prima facie* case of retaliation under both Acts when he did not suffer any adverse employment action in this matter. Pet. App. 6a-8a.

The question presented is: Whether this Court should grant certiorari to review Kowal’s claims of age discrimination and constitutional challenges where those claims were not raised or addressed in the lower court and are otherwise unworthy of review?

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents Ferndale Area School District and Ferndale Area School District Board of Education certify that it has no parent corporation, and that no publicly-held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Misstatements within the Petition

The District incorporates by reference the factual summary of this case contained in the Third Circuit's opinion. Pet. App. 2a-5a.

However, the District must correct the following misstatements made in the Petition. First, Kowal asserts that his then-counsel filed complaints before the District Court "alleging both age discrimination and retaliation" claims. Pet. 5. The complaints filed before the District Court did not raise an age discrimination claim, regardless of the fact that the claim was titled "Discrimination in Violation of the ADEA." The complaints instead asserted facts and claims relative to alleged retaliation under the ADEA and PHRA; this fact was acknowledged by the Third Circuit Court in its opinion. Pet. App. 5a at n.3.

Second, the Petition asserts that the District "defrauded" Kowal of \$11,450 in unused vacation and personal day pay. Pet. 6. The complaints filed before the trial court did not raise such claims nor is there any support for this assertion in the record.

Third, the Petition asserts at various points that District representatives engaged in acts of perjury and counsel made "false and misleading statements in Court filings." Pet. 8, 11, 27-28. Nothing in the record supports these assertions. The District and counsel continue to vehemently deny all allegations of perjury and improper conduct as contended. Kowal's disagreement with the undisputed material facts in the record does not constitute perjury or false and misleading statements.

B. The Proceedings Below

1. The District Court

Kowal filed a complaint on September 14, 2018 in the District Court asserting claims against the District for breach of contract and retaliation in violation of the ADEA and PHRA. Pet. App. 27a. On November 19, 2018, the District filed a motion to dismiss seeking dismissal of the breach of contract claim and retaliation claim asserted under the PHRA (for failure to exhaust administrative remedies); this motion was granted by the District Court on January 3, 2019 without prejudice. Pet. App. 47a-62a.

Kowal filed a First Amended Complaint on January 30, 2019 alleging claims against the District for retaliation under the ADEA and violations of Pennsylvania's Wage Payment and Collection Law ("WPCL"), 43 P.S. § 260.1 *et seq.* Pet. App. 27a. The District filed a motion to dismiss the WPCL claim with prejudice; said motion was granted by the District Court on March 25, 2019. *Id.*

Kowal subsequently filed a Second Amended Complaint on April 4, 2019 alleging retaliation under the ADEA and PHRA to which the District filed an Answer and Affirmative Defenses on April 24, 2019. Pet. App. 27a-28a. Following extensive discovery, the District filed a motion for summary judgment on March 22, 2021. Pet. App. 28a. The District sought summary judgment as Kowal could not establish a *prima facie* case of retaliation under the Acts—as he was not subject to an adverse employment action when the District refused to reinstate the expired HRA proposal, paid Kowal the actual value for his unaccumulated and unused sick days, and declined his requests to speak with the School Board but did not prevent him from attending any public School

Board meeting—and Kowal otherwise could not show that the District's legitimate, nondiscriminatory reasons for same were pretextual. Pet. App. 31a-32a.

On November 29, 2021, the District Court granted the District's motion for summary judgment finding that Kowal could not establish a *prima facie* case of retaliation under the Acts as the three allegedly adverse acts taken by the District did not constitute an adverse employment action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Pet. App. 34a-38a. The District Court further agreed with the District that Kowal was unable to show that the District's legitimate, non-retaliatory reasons for its actions were pretextual. Pet. App. 42a-44a.

2. The Third Circuit Court

Kowal filed a timely appeal with the Third Circuit Court of Appeals. The Third Circuit Court thereafter granted the Motion to Withdraw by Kowal's then-counsel, Attorney Susan Williams, on August 1, 2022 with Kowal proceeding in the appeal pro se.

Kowal raised numerous new arguments and theories of liability for the first time in his appellate brief which the Third Circuit refused to address. Pet. App. 7a, n.4. As the District Court had, the Third Circuit Court agreed that the record did not support that Kowal was subject to an adverse employment action and that the actions complained of would not have dissuaded a reasonable person from seeking to pursue a discrimination complaint. Pet. App. 6a-8a. The Third Circuit Court concluded that summary judgment was properly granted in favor of the District and affirmed the decision of the District Court on January 5, 2023. *Id.*

Kowal filed a petition for panel rehearing, which was denied on February 9, 2023. Pet. App. 63a-64a.

REASONS FOR DENYING THE PETITION

I. Kowal failed to raise or otherwise preserve the issues presented in the Petition.

The Petition should be denied because Kowal failed to raise or otherwise preserve the issues contained within the questions presented in the Petition to the lower courts.

Kowal's complaints before the District Court did not raise an age discrimination claim, but only facts and claims relative to alleged retaliation under the ADEA and PHRA. Kowal now seeks to have this Court make determinations relative to age discrimination, the Older Workers Benefit Protection Act ("OWBPA"), PL 101-433, 104 Stat. 978 (1990), and constitutional challenges in the first instance.

It is well settled that this Court is "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)(citation omitted). The Court does "not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

Kowal did not challenge the District's employee benefit plan or the requirement of the sick leave incentive to retire before reaching the age of eligibility for Medicare, as contained within the District's Act 93 Agreement, as being violative of the ADEA and OWBPA before the District Court.

Kowal attempted to raise multiple new arguments and theories of liability in his appellate brief before the Third Circuit. Pet. 38-39. However, the Third Circuit has held that a “failure to raise an issue in the district court constitutes a waiver of the argument.” *Belitskus v. Pizzinigrilli*, 343 F.3d 632, 645 (3d Cir. 2003); *see also Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 88 n.12 (3d Cir. 2013).

Kowal contends that the District “knew or should have known” his complaint asserted an age discrimination claim. Pet. 36. However, in order to preserve any argument for appeal, a party “must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.” *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999). “Merely raising an issue that encompasses the appellate argument is not enough.” *Spireas v. Comm'r of Internal Revenue*, 886 F.3d 315, 321 (3d Cir. 2018). Moreover, the argument must have been made with “exacting specificity” in the district court. *Id.* Accordingly, the Third Circuit appropriately declined to address Kowal’s new arguments and theories of liability raised for the first time on appeal. App. 7a at n.4.

Significantly, Kowal’s arguments concerning alleged violations of the Eighth Amendment, Takings Clause of the Fifth Amendment, and equal protection rights under the Fourteenth Amendment, as presented in questions 4-6 (Pet. ii), were never raised, briefed, or argued before the District Court and Third Circuit in any capacity.

Kowal further fails to provide a compelling reason for the Court to grant review of the questions

presented, all of which were not presented before the lower courts. With no reason presented by Kowal as to why this Court should take up issues not raised before the lower courts, and having failed to preserve these claims, this Petition should be denied.

II. The Petition fails to present a genuine conflict of Circuit Court decisions.

As Kowal misconstrues the legal claims raised in his counseled complaints before the District Court, he continues to assert caselaw and theories pertinent to age discrimination claims, such as *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *Babb v. Wilkie*, 140 S. Ct. 1168, 206 L. Ed. 2d 432 (2020). Pet. 42. There is no dispute that an age discrimination claim was not asserted before the District Court as outlined in Section I above. As such, Kowal's arguments concerning *Gross* and *Babb* are inapplicable to the instant matter and cannot serve as a basis for granting the Petition.

More importantly, Kowal focuses on an alleged intra-Circuit conflict in his Petition that the Third Circuit panel's decision affirming summary judgment in the District's favor is at odds with *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.*, 220 F.3d 193 (3d Cir. 2000). Pet. 40-43.

As previously stated, the issue of whether the sick leave incentive violated the ADEA was not before the lower courts. That being said, there is no intra-Circuit conflict as *Erie Cnty.* was decided prior to *Am. Ass'n of Retired Persons v. E.E.O.C.*, 489 F.3d 558 (3d Cir. 2007). In *Am. Ass'n of Retired Persons*, the Third Circuit upheld the EEOC's exercise of authority to put into effect a regulatory exemption (29 CFR § 1625.32(b)) allowing employers to coordinate "employer-sponsored retiree health benefits with

eligibility for Medicare and state-sponsored health programs for the necessary and proper purpose of encouraging employers to provide the greatest possible health benefits for all retirees.” 489 F.3d at 565. As such, Kowal’s contention that the ADEA does not permit an employer to coordinate benefits with Medicare eligibility (Pet. 40-41) is wholly inaccurate and in direct contradiction to 29 CFR § 1625.32(b).

Accordingly, Kowal has not identified any genuine conflict with the Court’s precedent or any other Circuit Court.

III. The Petition seeks to revisit a fact-bound dispute unworthy of review.

Kowal baldly asserts that the Third Circuit’s ruling affirming summary judgment for the District is an “unprecedented backward step in taking away basic protections enacted by Congress for those over 40 years of age and putting their financial security at risk.” Pet. 43. However, it is clear that Kowal is seeking fact bound, case-specific review relative to his perception of the monetary value of his unused sick days and not a broader issue of importance.

As seen from Kowal’s arguments in the Petition, he seeks to have this Court review evidence and “correct” factual findings of the lower courts to adopt his perception that he is somehow entitled to District provided post-retirement healthcare coverage. Pet. 10, 15, 22-25, 44-45. However, a writ of certiorari is not the appropriate vehicle to do so. *See Sup. Ct. R. 10; Moore v. Texas*, 139 S. Ct. 666, 673 (2019) (“We do not grant a certiorari to review evidence and discuss specific facts.”) (Alito, J., dissenting) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); *Salazar-Limon v. Houston*, 137 S.Ct. 1277, 1278, 197 L.Ed.2d 751 (2017) (ALITO, J., concurring in denial

of certiorari) (“[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case”).

Accordingly, the Petition does not warrant review by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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