No. 23-12

In the Supreme Court of the United States

JOHN P. KOWAL,

Petitioner,

v.

FERNDALE AREA SCHOOL DISTRICT and the FERNDALE AREA SCHOOL DISTRICT BOARD OF EDUCATION,

Respondents.

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

REPLY BRIEF OF PETITIONER

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September 15, 2023

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REPLY BRIEF OF PETITIONER

I. Kowal Seeks Certiorari Review for the Following Reasons:

A. Pure Question of Law, (ADEA), 29 U.S.C. § 621 et seq. and Anti-discrimination Provisions of 42 U.S.C. § 1983

B. Violations of Constitutional Rights

C. Miscarriage of Justice

II. Kowal Corrects False Statements in Ferndale's "Brief in Opposition"

A. Ferndale claims:

> *"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."*

District Court's "Memorandum Opinion," claimed:

> *"(4) Kowal failed to meet all prerequisites to be eligible to participate in the Sick Leave Incentive Program,"*

First, the District Court ***knew or should have known*** that the prerequisite of the "Incentive," *"(v) the retirement shall occur before the employee attains the age of eligibility for Medicare;"* violates ADEA. The Court failed to understand that Kowal's Complaint correctly and sufficiently asserted those required aspects of a cause of action and Age was the determining factor in the decision to terminate Kowal's

HRA; "but for" age, the employee would not have been subjected to the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

Second, **Beard Legal** claimed, in "Defendant's Preliminary Objections to the Complaint," filed on 04/18/2022.

> *"Plaintiff's claims for breach of contract,* ***Age Discrimination in Employment Act*** *("ADEA"), and retaliation are barred by the doctrines of res judicata and collateral estoppel* ***as Judge Kim Gibson issued final judgments on the merits in favor of the Defendants on those claims*** *in the federal litigation of Kowal v. Ferndale Area Sch. Dist. et al., No. 3:18-cv-181."*

Ferndale's statement demonstrates clear recognition that an "***Age Discrimination in Employment Act***" complaint existed in District Court.

Third, Petition pp.33-34 shows that the District Court's "Memorandum Opinion" dismissal incorporated Ferndale's false, unlawful claim that . . .

> *". . . he was ineligible to receive Ferndale-provided post-retirement healthcare coverage because he was over 65 years old . . . "*

. . . which clearly violates ADEA/OWBPA. This dismissal demonstrates the lower courts' lack of application of the ADEA.

Fourth, *see* "**opening brief**" citations below.

B. Ferndale claims:

> *". . . 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."*

Superintendent Kakabar's 11/14/2019 Deposition p.14:14-20 admitting Kowal's entitlement to 20 vacation and 3 personal days is clear " . . . support for this assertion in the record.":

> *"So at this meeting we provided him days that he had. These were the sick days that John had that could have been cashed in. As well as personal days he was entitled to and vacation days he was entitled to leading to this total amount of $52,000.00, which should have been the cash in value and what he was entitled to."*

Kowal referenced vacation/personal days **nine times** in his **opening "Informal Brief**," to the 3rd Circuit and **three times** in his **"Petition for a de novo review . . ."**

Employers must pay for earned, unused vacation within 10 days of termination or within 60 days of when the employee makes a claim for the pay. (PA Stat. Ch. 43 Sec. 260.2a-260.9) *Ressler v. Jones Motor Co.*, 487 A.2d 424 (1985).

See "**opening brief**" citations below.

C. Ferndale claims:

> *"... 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."*

Beard denies reality and offers no proof whatsoever that Kowal's allegations are false. This vague false statement is indicative of the non-existent ethical principles of Beard Legal. This Court can easily review the Petition and record containing the referenced false and/or perjured statements.

III. Response to Ferndale's Counter Question Presented

Ferndale claims:

> *"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?"*

And the 3rd Circuit Opinion claims:

> *"We note that Kowal includes numerous new arguments and theories of liability in his briefs that were never raised in his counseled filings in the District Court. He cannot pursue these arguments and claims for the first time on appeal. See Jenkins v. Superintendent of Laurel Highlands,* 705 F.3d 80, 88 n.12 (3d Cir. 2013)."

See II(A.) response above.

First, *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136 (3d Cir.2017) shows that Kowal can "*. . . pursue these arguments and claims for the first time on appeal*" as the citations below confirm:

> *"We have **long recognized**, consistent with **Federal Rule of Appellate Procedure 28(a)** and **Third Circuit Local Appellate Rule 28.1**, that an **appellant's opening brief** must set forth and address each argument the appellant wishes to pursue in an appeal. See Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) ("[A]ppellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their **opening brief**."); see also Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 398 (3d Cir. 1994) (holding that an argument is not preserved "unless a party raises it in its **opening brief**").*

As *Barna* illustrates, Kowal clearly raised these "*. . .* numerous new arguments and theories of liability . . . " in his **opening brief** as set forth in the above rules and citations.

Second, in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382-83 (1995), the **U.S. Supreme Court** held that if a claim is properly before the court, then it may consider any number of new arguments or theories underlying that claim.

Third, Ferndale's claim that " . . . age discrimination . . . claims were not raised or addressed in the lower court . . . " is **false**.

In addition to the inclusion of an Age Discrimination claim in the District Court, above, the following was in his **opening "Informal Brief,"** pp.13-14 to the 3rd Circuit.

> *"Plaintiff retired after reaching " . . . the age of eligibility for Medicare;" "But for" age alone, Plaintiff was eligible for the Sick Leave Incentive Upon Retirement benefit. This act is a clear violation of the ADEA . . . "*

Kowal referenced Ferndale's "but-for" test violation nine times in this same **opening "Informal Brief."**

Furthermore, this statement was on p.3 in Kowal's "Petition for a de novo review . . . " filed on 01/19/2023:

> *"Contrary to allegations made by Defendant and this Appeal Panel, Plaintiff has been, and is, asserting both an Age Discrimination and Retaliation Complaint against Defendant in Violation of the . . . (ADEA/ OWBPA) . . . This statement is provided to clarify any confusion, misconception, misinterpretation, misunderstanding, and misrepresentation by Defendant and this Appeal Panel.*
>
> *Please contact Plaintiff if this statement needs any further clarification."*

The political, biased 3rd Circuit opinion against Kowal could not be more evident. Is it because Kowal is a non-attorney? Lower courts have not treated Kowal fairly when contending that he negotiate a

thicket of legal formalities at peril of losing his right to be heard. This practice has excluded him from access to "Justice."

The term "Waived" means the affirmative disavowal of a claim or argument. *See Wood v. Milyard*, 132 S.Ct. 1826,1832 n.4(2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve."); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right[;] waiver is the intentional relinquishment or abandonment of a known right."

In *Cesare v. DOT, Bureau of Driver Licensing*, 16 A.3d 545, 550 (Pa. Cmwlth. 2011), in response to a waiver argument, the Commonwealth Court held that Pa. R.A.P. 302(a) does not require a litigant to make "identical arguments at each stage of his case." The issue must be preserved, but "this does not mean every argument is written in stone at the initial stage of litigation. Thus, logic dictates that an appellant can raise new arguments so long as they relate to the same issue." The Cesare court relied upon *Wert v. DOT, Bureau of Driver Licensing*, 821 A.2d 182, 186 (Pa. Cmwlth. 2003), in which an appellant raised new arguments in support of his privileges and immunity "issue." The Court distinguished between the "issue" and the "arguments" in support. It also echoed the sentiments of some of the federal courts that if the new arguments do not require additional facts, then there is no prohibition against considering them. *See: Doe-Spun, Inc. v. Morgan*, 502 A.2d 287 (Pa. Cmwlth. 1985)

In *Tri-M Group, LLC v. Sharp*, 638 F.3d 406 (3d Cir. 2011), appellant advanced a new argument for the first time on appeal. Third Circuit provided a lengthy justification for considering the new argument, discussing "exceptional circumstances" and "public interest" and "justice" and at least one prior decision in which it had held that argument could be considered where it "is closely related to arguments" raised below.

From "A Third Circuit Debate About Waiver (or Forfeiture) of Arguments Not Raised Below." Bruce Greenberg, 03/22/2011, in part:

> *"Tri-M Group, LLC v. Sharp, 638 F.3d 406 (3d Cir. 2011). In this case, the Third Circuit affirmed a district court ruling that Delaware's Prevailing Wage Regulations unlawfully discriminated against out-of-state contractors, in violation of the dormant Commerce Clause.*
>
> *The waiver principle, she [Judge Rendell] wrote, is an issue of discretion and "may be relaxed whenever the public interest or justice so warrants." Judge Rendell found multiple reasons not to apply the waiver doctrine in this case.*
>
> *First, there was a strong public interest in considering all arguments, . . . Given that public interest, it was better to address the issue than to ignore it.*
>
> *Second, the fact that the Third Circuit has not yet considered an issue may itself be an "institutional consideration" that would constitute exceptional circumstances.*

> *Third, citing* ***another Third Circuit case*** *that had declined to bar a newly-raised argument, Judge Rendell found that the omitted argument in Tri-M Group was sufficiently "intertwined" with other contentions that had been made below so as to counsel against a finding of waiver.*
>
> *Fourth, the Third Circuit has been "reluctant to apply the waiver doctrine when only an issue of law is raised." Judge Rendell found that Delaware's new argument presented only a "pure question of law."*

Kowal has never "knowingly and intelligently relinquished" a right to his protections afforded by law or the Constitution.

The Supreme Court has also noted that "[t]he terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chicago*, No. 16-658, ___ U.S. ___, 138 S.Ct. 13,17 n.1, ___ L.Ed.2d ___, 2017 WL 5160782, at *3 n.1 (U.S. Nov. 8, 2017). "Waiver is different from forfeiture," *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and the distinction can carry great significance. *See Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) ("Waiver is accomplished by intent, but forfeiture comes about through neglect." (quoting *United States v. Zubia-Torres*, 550 F.3d 1202,1205 (10th Cir. 2008))). "[F]orfeiture is the failure to make the timely assertion of a right," an example of which is an inadvertent failure to raise an argument. *Olano*, 507 U.S. 733, 113 S.Ct. 1770. Waiver, in contrast, "is the 'intentional relinquishment or abandonment of a known right.'" (quoting

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). *see also Flynn v. Comm'r*, 269 F.3d 1064,1068–69 (D.C. Cir. 2001) (noting that "exceptional circumstances" may exist where the case involves "uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice").

Although our narrow exceptional circumstances rule applies to all forfeited issues, we have been slightly less reluctant to bar consideration of a forfeited pure question of law. *See Hormel*, 312 U.S. at 557, 61 S.Ct. 719. We have thus observed that we will reach "a pure question of law even if not raised below where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005) (quoting *Loretangeli v. Critelli*, 853 F.2d 186, 189–90 n.5 (3d Cir. 1988)); *see also Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 835 (3d Cir. 2011) (addressing a "purely legal question" despite the Appellant's failure to preserve the issue); *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 140 (2d Cir. 2011) (excusing a forfeiture when the issue was "purely legal" and the default results from inadvertence); Council of Alt. Political *Parties v. Hooks*, 179 F.3d 64,69 (3d Cir. 1999) (reaching for the "first time on appeal" an issue that "concerns a pure question of law"); *cf. N.J. Carpenters & the Trs. Thereof v. Tishman Const. Corp.*, 760 F.3d 297, 305 (3d Cir. 2014) ("It is appropriate for us to reach an issue that the district court did not if 'the issues provide purely legal questions, upon which an appellate court exercises plenary review.'" (quoting *Hudson*

United Bank v. LiTenda Mortg. Corp., 142 F.3d 151, 159 (3d Cir. 1998).

IV. Debunking Ferndale's "Coordination" Claim:

Ferndale claims:

> *"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 C.F.R. § 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 . . . 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 C.F.R. § 1625.32(b) . . . "*

First, this is a manufactured, nonsensical "red herring." Kowal ***has never*** "contended" that ADEA does not permit "coordination of benefits." In fact, "coordinate," in any form, does not appear on Pet.40-41 or ***anywhere*** in the Petition. Beard clearly has cognitive issues regarding claims in this case. Beard makes the above false claim, yet disputes that this is an Age Discrimination case. There is clearly a gap in "Beard logic."

Second, Ferndale attempts to "gaslight" this court by inferring 29 C.F.R. § 1625.32(b) somehow exempts age as a factor in determining eligibility. Pet.40-41 actually refers to a series of "but-for" decisions and the "equal benefit or equal cost" principle.

The "exemption" only allows for **"... coordination of retiree health benefits with Medicare or a comparable State health benefit plan"** ***and in no way*** "exempts age" in determining eligibility.

> *"29 C.F.R. § 1625.32(c) Scope of exemption. This exemption shall be narrowly construed. No other aspects of ADEA coverage or employment benefits other than those specified in paragraph (b) [Exemption] of this section are affected by the exemption. Thus, for example, the exemption does not apply to the use of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section . . . "*

Third, "Coordination" of retiree HRA benefits with "Medicare" and/or "State health benefits" ***is impossible*** since an HRA ***is not insurance*** and according to IRS Publication 969 (p.19) an HRA can actually be used to pay for " . . . *insurance premiums . . .* "

Fourth, the PA Public School Employees Retirement System-Health Option Program Report by the Segal Company, p.56, clearly states Schools can and do cover retirees over age 65, as permitted by § 1625.32(c):

> ***"About 200 of the 700+ school districts still have some over-65 retirees covered with health benefits, although in most circumstances these are small numbers and are often former administrators of the district who have negotiated a special employment contract where the district***

> ***agreed to pay for the administrator's health care benefits after age 65."***

For full report, see: https://www.psers.pa.gov/About/Board/Resolutions/Documents/2013/hop_elig_review.pdf

Fifth, the 09/22/2016 email, in part, from the Reschini Agency, *Ferndale's Highmark Broker of Record*, demonstrating the ability of retirees over age 65 to remain on district healthcare.

> ***"Important Information Regarding Healthcare for Active Employees Age 65 or Older***
>
> ***". . . This paragraph should be in this letter if the employee over age 65 years will remain on coverage after their retirement due to an incentive, contractual provision, or other agreement.***
>
> ***When you retire, you will still have eligibility for coverage through our plans which are not Medicare plans . . . "***

Sixth, Ferndale agreed to continue Kowal's HRA, at nearly age 67, after requesting Consolidated Omnibus Budget Reconciliation Act (COBRA) Continuation coverage.

V. Debunking Ferndale's "Adverse" Claim:

Ferndale claims:

> *"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."

This statement is baseless and further demonstrate the bias of the 3rd Circuit.

See Petition pp.44-46 for rebuttal of this claim.

VI. Debunking Ferndale's "Constitutional" Claims

Ferndale claims:

". . . 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."

A. False statement as the Fifth and Fourteenth Amendments were raised in Kowal's 3rd Circuit Appeal on Page six.

B. Furthermore, in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382-83 (1995), the U.S. Supreme Court held that if a claim is properly before the court, then it may consider any number of new arguments or theories underlying that claim.

CONCLUSION

The Petition for writ of certiorari should be granted for the above reasons which are based on Pure Question of Law, (ADEA, 29 U.S.C. § 621 et seq.; Anti-discrimination Provisions of 42 U.S.C. § 1983), Violations of Constitutional Rights and a Gross Miscarriage of Justice.

Respectfully submitted,

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