No. _____

In The Supreme Court of the United States

CHINYERE OGBONNA-MCGRUDER,
Petitioner,

v.

AUSTIN PEAY STATE UNIVERSITY;
TUCKER BROWN, AND MARSHA LYLE-GONGA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully petitions the United States Supreme Court to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case and resolve a split in the circuits as to the standard for retaliation.

QUESTIONS PRESENTED

Whether Petitioner's claim for retaliation required her to prove she suffered severe or pervasive conduct by her supervisor rather than conduct which would cause a reasonable employee to be dissuaded from filing or supporting a charge of retaliation against her employer.

Whether the caption of Petitioner's First Amended Complaint, along with paragraph 107 therein, provides adequate notice to Respondents for what they are being sued, and is therefore sufficient to survive Respondents' Motion to Dismiss her claim of violation of her civil rights under color of state law.

Whether the Petitioner's failure to object to the magistrate's denial of her motion to amend her complaint within 14 days of said ruling should have been excused in the interest of justice.

RELATED PROCEEDINGS

Petitioner originally filed her case against Respondent Austin Peay State University in the United States Court for the Middle District of Tennessee on July 1, 2021 and was assigned docket number 3:21-cv-00506. She filed her First Amended Complaint adding Tucker Brown and Marsha Lyle-Gonga as individual defendants on June 30, 2022.

Respondents filed their Motions to Dismiss Austin Peay State University and the individual defendants, Brown and Lyle-Gonga on July 15, 2022. The District Court issued its Memorandum Opinion dismissing Brown and Lyle-Gonga on March 8, 2023, followed by dismissal of Austin Peay State University on May 19, 2023.

Plaintiff filed her Motion seeking to amend her First Amended Complaint on March 30, 2023, and the Court denied Petitioner's s Motion on April 25, 2023.

Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals on June 13, 2023 and was assigned docket number 23-5557.

The Sixth Circuit in a panel of three Judges, Griffin, Bush, and Readler decided and filed their opinion on January 30, 2024. (Chinyere Ogbonna-McGruder v. Austin Peay State University; Tucker Brown and Marsha Lyle Gonga, 23-5557)

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

OPINIONS BELOW

The opinion of the court of appeals is unpublished but has been assigned docket No. 23-5557. The opinions of the District Court were assigned docket number 3:21-cv-00506.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-3(a) which provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 2000e-3

United States Constitution, Amendment Fourteen (14) Section one (1) which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

STATEMENT OF THE CASE

This case is about whether the severe or pervasive level of harm which the Sixth Circuit applies to demonstrate retaliatory conduct by Petitioner's employer, conflicts with the holding of this Court in *Burlington & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006). Multiple circuits as shown below have adopted the standard established in *Burlington* that retaliation is conduct of the employer which would cause a reasonable worker to be dissuaded from filing or supporting a claim of discrimination. The result is that workers in the several states receive disparate treatment based upon where they live or work. Petitioner respectfully asserts that the Sixth Circuit is in error when it requires Petitioner to show severe or pervasive conduct by her employer to demonstrate that retaliation has occurred, when this Court requires

only a showing that her employer's conduct would cause a reasonable worker to be dissuaded from filing or supporting a complaint of discrimination. Here, had Petitioner lived in DC, or a state encompassed by the Seventh, Eleventh, or the Ninth Circuit she would have survived the Respondents' motion to dismiss.

The Sixth Circuit's standard for the level of harm showing retaliation results in disparate treatment of victims of retaliation. Petitioner respectfully urges this Court to vacate the Sixth Circuit's severe and pervasive standard so that all victims of retaliation may be treated equally.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Complaint is not required to show severe or pervasive harm in order to demonstrate a retaliatory hostile work environment claim.

Petitioner's retaliation claim was dismissed by the Sixth Circuit – but it should not have been. Respectfully, the Sixth failed to apply the proper standard.

Fortunately, some of its sister courts have applied the correct standard, including the 11th U.S. Circuit Court of Appeals in *Tonkyro v. Sec;y Dep't of Veterans Affs.*, 995 F. 3d. 828 (11th Cir. 2021). As noted in *Burlington & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), "the Seventh and DC Circuits have said that the plaintiff must show that the employer's challenged action would have been

material to a reasonable employee, which in contexts means that it would likely have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id at* 60.

This clear split in the circuits is a key reason why Petitioner urges this Court to accept this petition for writ of certiorari and bring stability to this crucial area of the law.

To reiterate, had Petitioner Chinyere Ogbonna-McGruder been a resident of the State of Florida instead of Tennessee, it is unlikely that this matter would be pending before this Court. That is because the 11th Circuit views retaliation in the same light as this Court as to retaliatory conduct by her employer.

Unfortunately for Petitioner, the Sixth Circuit requires that harassment meted out by her employer must be "severe or pervasive" *Cleveland v. S. Disposal Waste Connections*, 491 F. App'x 698, (6th Cir. 2012) citing *Morris v. Oldham Cnty*, *Fiscal Ct.*, 201 F.3d 784,792 (6th Cir. 2000). In this case, the Sixth Circuit applied that demanding standard and held that Petitioner had not met that standard in her complaint.

Nevertheless, the District Court highlighted the tension between the circuits, writing:

> There is arguably some tension between saying that the harassment must be "severe and pervasive" and saying that it need only be sufficient to dissuade a reasonable worker

> from making or supporting a charge of discrimination. The Eleventh Circuit has resolved this tension by saying that the harassment actually need not be severe and pervasive to support a claim of retaliatory hostile work environment. *Tonkyro*, 995 F.3d. at 836. The Sixth Circuit has not necessarily resolved this arguable tension, but it is clear about what it requires for a claim of hostile work environment. It requires, separate and apart from a showing of material adversity, that the collective conduct that allegedly constitutes the retaliatory harassment be "severe" or "pervasive"; in other words, it requires that the retaliatory harassment be severe and pervasive, and second that the retaliatory harassment be *sufficiently* severe or pervasive to *create an environment that a reasonable person would find hostile or abusive*.

See Mulvey v. Hugler, No. 17-5633. (3:21-cv-00506, Memorandum Opinion, Doc. 100 P. 26 of 32, FN 19)

It was on this basis that the District Court concluded that Petitioner's complaint was deficient and granted the Respondents' Motion to Dismiss her claim. (3:21-cv-00506 Memorandum Opinion Doc 100 P.29 of 32 ¶1) Petitioner asserts that while this decision may support the holding of the Sixth Circuit, it is contrary to this Court's holding in *Burlington & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), which held that the Petitioner needed to only show that her employer's conduct would cause a

reasonable worker to be dissuaded from filing or supporting a complaint of racial discrimination rather than the "severe or pervasive" standard.

In *Burlington*, this Court pointed out that the anti-retaliation provision (of Title VII) seeks to secure the primary objective of preventing discrimination in the workplace by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. *Id at* 63.

The Court in *Burlington* also recognized the potential for employers to do harm to workers who acted to oppose discrimination outside the workplace saying "the antiretaliation provision unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id at* 64. Considering the Court's analysis of the intent of Congress in providing a means to enforce Title VII's substantive provisions, Petitioner asserts that the holdings of the lower courts in her case conflict with the intent of Congress and the Court's decision in *Burlington*. Therefore, the decision of the Sixth Circuit Court of Appeals should be vacated.

The District Court stated that "the weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e-3(a)". It added, "We hold explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment

action for purpose of 42 U.S.C. § 2000e-3(a)." Thus, a hostile work environment is just another form of retaliation.

Therefore, Petitioner asserts that employer conduct that would dissuade a reasonable worker from filing a charge of discrimination, opposing discrimination, or supporting a charge of discrimination constitutes retaliation which is what happened to Petitioner. Moreover, Petitioner asserts that the conduct of Respondents she has demonstrated in her complaint is sufficient to cause a reasonable worker to be so dissuaded and in her complaint she has shown sufficient support to survive Respondents' Motion to Dismiss.

The Sixth Circuit below recognized four incidents in Petitioner's First Amended Complaint that the panel said could constitute harassment to support her hostile work environment claim: (1) that Brown instructed her to move to the basement; (2) Brown scolded her in the presence of a white faculty member, (3) Brown denigrated her teaching abilities during a video call; and (4) Lyle-Gonga stated that she was not qualified to teach political science courses. (Opinion of COA, P 8, ¶ 3).

The District Court disregarded other acts taken against her such as the lowering of her evaluation scores for academic year 2020/2021, the fact that she was the only political science/public management professor who failed to receive a faculty evaluation for the year 2019/2020, the refusal of her supervisors to confer with her on her assignment to create a Master's program, the denial of summer teaching

opportunities, and her exclusion from a group of professors creating a proposal for a new juvenile facility for Montgomery County. Yet, the Appellate Court stated "Ogbonna-McGruder did not sufficiently allege facts from which we may infer that the harassment she experienced was severe or pervasive. *Id. at* P. 7 ¶ 1. Petitioner asserts that under *Burlington* she is not required to reach that standard, nevertheless, based upon the facts in this case, the retaliatory actions of the university against the professor in totality are severe and pervasive.

The Sixth Circuit upheld the Trial Court's decision stating that "*Tonkyro* is an out of circuit decision that does not bind this court" (23-5557, P.8 ¶ 3) and "does not apply in the context of a retaliatory hostile work environment". *Id.*

Petitioner finds it strange that the Sixth Circuit posits that *Burlington* does not apply in the context of a retaliatory hostile work environment claim. For as this Court held in *Burlington*:

> Title VII's antiretaliation provision forbids employer actions that discriminate against an employee (or job applicant) because he has opposed a practice that Title VII forbids or has made a charge, testified, assisted, or participated in a Title VII investigation, proceeding, or hearing § 2000-e(a). No one doubts that the term "discriminate against" refers to distinctions or differences in treatment that injure protected individuals.

Burlington, 548 U.S. at 59.

The Sixth Circuit did not deny that Petitioner asserted the treatment she received. It simply said that she failed to plausibly allege that the harassment she suffered was severe or pervasive (Opinion of COA P.8 ¶ 3) and contrary to this Court's decision in *Burlington*, upheld the decision of the District Court.

As noted in *Burlington*, "the Seventh and the DC Circuits have said that the plaintiff must show that the employer's challenged action would have been material to a reasonable employee, which in contexts like the present one means that it would have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 54 U.S. at 60. Further the *Burlington* court stated "…the Ninth Circuit following EEOC guidance, has said that the plaintiff must simply establish adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Id. at* 60-61.

The Sixth Circuit's requirement that a plaintiff show severe and pervasive conduct to show retaliation conflicts with *Burlington*, as well as the intent of Congress and should be reversed. There are myriads of workers within the states encompassing the Sixth Circuit that are currently exposed to the severe and pervasive standard and who consequently are at risk of retaliation by those employers who would prefer to dampen the effect of Title VII's antiretaliation provision.

For all of the foregoing reasons, Petitioner respectfully requests the Court to vacate the decision granting Respondents' Motion to Dismiss her complaint, overrule the severe or pervasive standard of the Sixth Circuit and bring its standard as to the level of harm required on retaliation claims into line with the holding in *Burlington & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006).

II. Petitioner's Complaint provided adequate notice to Respondent that they were being sued for violation of her civil rights under color of state law.

The District Court relying upon an unpublished case from the Sixth Circuit holds that Petitioner failed to provide adequate notice of her claims for purposes of a motion to dismiss. *23-5557 quoting Seigner v Twp of Salem*, 654 F. App'x 223, 233 (6th Cir. 2016). The Sixth Circuit upheld that decision stating that "when a plaintiff asserts both a Title VII claim and a claim of infringement of rights guaranteed by the constitution, the plaintiff must allege that the conduct forming the basis of her § 1983 claim violates a constitutional right apart from the rights protected under Title VII."(*COA* P 11-12 ¶¶4 and 1.)

In the caption of her First Amended Complaint, Petitioner clearly states that her lawsuit seeks:

> "relief for discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq. and pursuant to 42 U.S.C. § 1983 for violation of Plaintiff's rights under color of state law by Defendants

> Brown and Gonga, to correct unlawful employment practices on the basis of race, and to provide appropriate relief to Plaintiff who was adversely affected by such practices."

Ptf First Amended Complaint Doc 45-1 P1 ID#:276 and ID#289 ¶ 107.

Paragraph 107 of the Complaint reads:

> 42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Plaintiff asserts that Defendants Brown and Gonga as illustrated in the foregoing have engaged in conspiratorial behavior that has caused her to be deprived of rights to which she is entitled under laws of the United States, including but not limited to retaliation for having reported the violations of her rights.

Petitioner asserts that the caption of her First Amended Complaint, as well as paragraph 107, should cause a reasonable Defendant to be on notice that he or she is being sued for both a violation of

Title VII and a violation of her rights under color of state law, a separate constitutional claim.

Both the District Court and the Sixth Circuit appear to rely upon an unpublished case from the Sixth Circuit as the key support for this ruling. *Seigner v Twp of Salem*, 654 F. App'x 223, 233 (6th Cir. 2016) In *Siegner*, the court said it granted summary judgment to the defendants because "it paralleled his Title VII claim without alleging a separate constitutional violation." *Id*.

Petitioner asserts that her First Amended Complaint clearly references a separate constitutional violation in both the caption and in paragraph 107 of her complaint therefore decisions of the District Court and the Sixth Circuit Court of Appeals should be reversed.

III. Petitioner's motion to amend her complaint to correct a pleading deficiency should be excused in the interest of justice.

The Sixth Circuit cited FRCP 72(a) and *Berkshire v. Dahl*, 928 F.3d 520, 530-31 (6th Cir. 2019) in declining to overturn the holding of the District Court concerning Petitioner (Plaintiff's) motion to amend her complaint to correct the deficiency in her § 1983 claim. As noted above, Petitioner asserts that her complaint satisfied any notice requirement regarding that claim.

In her order, the Magistrate found that Petitioner failed to establish good cause because she "has not provided the Court with any evidence to show that she could have moved to amend her

complaint or to enlarge the deadline prior to June 3, 2022." *Memorandum Opinion and Order*, Doc 89, P. 6 of 8, Page ID# 991.

In its order, the District Court suggests that the Petitioner should have moved to amend her complaint in response to the defendants' response to the Plaintiff's original motion to amend in early June 2022 wherein defendants "plainly stated that the proposed amended complaint does not once suggest, let alone allege a violation of a right protected by the constitution." *Id at* P.7 of 8 PageID #992.

Petitioner asserts that arguments of the Respondents were not a basis upon which she should have advanced a motion to amend before June 3, 2022. Petitioner asserts at that time the court might well have accepted Petitioner's First Amended Complaint as properly providing notice to the defendants that they were being sued for a constitutional violation. This would have made a motion to amend premature and a waste of the court's time to argue the issue.

It was only upon receiving the District Court's Memorandum Opinion that Petitioner became aware of a pleading deficiency that needed to be addressed. *Document 84*, PageID # 875. Said opinion was filed March 8, 2023. The Magistrate's Memorandum Opinion and Order was filed April 25, 2023, thus there was no delay on Petitioner's part after receiving the opinion. Said opinion (*Document 84*) was not filed until well past the scheduling order deadline of June 3, 2022.

To demonstrate good cause, Petitioner (Plaintiff) must show: (1) the original deadline could not reasonably have been met despite due diligence, and (2) the opposing party will not suffer prejudice by virtue of the amendment. *Leary v Daeschner*, 349 F.3d. 888, 906 (6th Cir. 2003.)

Petitioner asserts that the original deadline could not reasonably have been met because the District Court's decision was not filed until March 3, 2023, well past the scheduling order deadline of June 3, 2022.

There is no evidence that the opposing party would have been prejudiced by an amendment. Said parties were already on notice that they were being sued for violation of Petitioner's rights under color of state law and either were or should have been in the process of constructing their defenses to Petitioner's claims. Had the District Court denied their motion to dismiss, it is presumed Respondents (defendants) would not have been prejudiced by that denial because the caption of Petitioner's First Amended Complaint clearly put them on notice that they were being sued for a constitutional violation.

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the holding of the court below and permit her to amend her complaint to cure the deficiencies announced by the District Court and upheld by the Court of Appeals.

CONCLUSION

The writ of certiorari should be granted.

Respectfully Submitted.

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