

IN THE
Supreme Court of the United States

EDWARD FRANCIS DAVIS,

Petitioner,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION

Respondents Power Authority of the State of New York (“NYPA”), Guy Sliker, Sangeeta Ranade, Rani Pollack, Kristine Pizzo, Paul Belnick, Justin Driscoll, Nancy Harvey and Gil C. Quinones (together, “Respondents”) file this brief in opposition to the petition for certiorari in this case.

COUNTER-STATEMENT OF THE CASE

1. Background.

Petitioner Edward F. Davis (“Petitioner”) is a former employee of NYPA. The individual Respondents are various management and human resources officials of NYPA. Petitioner brought a *pro se* action against Respondents in the United States District Court for the Southern District of New York based on Respondents’ alleged violations of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (“ADA”), the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et. Seq.* (“FMLA”) and the New York State Human Rights Law, N.Y. Exec. Law §§ 290, *et seq.* (“NYSHRL”).

Specifically, Petitioner claimed in his Second Amended Complaint that Respondents discriminated against him on the basis of his disability, retaliated against him for complaining about said disability, and retaliated against him for requesting and/or taking leave under the FMLA. Respondents produced documentary and testimonial evidence of Petitioner’s history of poor performance, inappropriate behavior in the workplace and misuse of a corporate credit card as reasons for NYPA’s decision to terminate Petitioner. Furthermore, Respondents produced evidence that demonstrated that NYPA had for many years granted Petitioner’s requests for FMLA leave, which Petitioner took without issue. Respondents also produced evidence of

comparators who similarly engaged in misuse of corporate credit cards from NYPA and whose employment with NYPA were likewise terminated.

Following the completion of discovery, and based on the foregoing, the District Court granted summary judgment to Respondents on all causes of action and dismissed Petitioner's action in its entirety. The Second Circuit subsequently affirmed that decision.

2. *Discrimination.*

With respect to Petitioner's claims of disability discrimination, both under the ADA and the NYSHRL, the District Court found that Petitioner made out a *prima facie* case of discrimination. However, the District Court found that Respondents met their burden of demonstrating a legitimate, non-discriminatory explanation for the actions taken against Petitioner (*i.e.*, Petitioner's poor performance, behavioral issues and misuse of his corporate credit card). The District Court further found that Petitioner failed to show that Respondents' proffered reasons were pretextual. More specifically, the District Court held that “[t]he mere fact that an employee disagrees with [his] employer's assessments of [his] work, however, cannot standing on its own show that [his] employer's asserted reason for termination was pretextual.”

See Appendix E to the Petition (Opinion and Order of the District Court for the Southern District of New York's Granting Defendants' Motion for Summary Judgment) at p. 27. The District Court then rejected Petitioner's argument that his leaves of absence occasioned by his disability could not lawfully form the basis of a termination decision. The District Court explained that “[c]ourts have declined to find pretext where an employer terminates an employee due to a failure to communicate or provide documentation regarding medical leave, in violation of a

company policy or employment agreement.” Id. at p. 29. Finally, the District Court rejected Petitioner’s inaccurate statement that he was “acquitted of [his] employer’s claims of misuse [of the corporate credit card]” by an Administrative Law Judge in an administrative hearing regarding his denial of unemployment benefits. Id. at p. 30. As a result, the District Court granted summary judgment on Petitioner’s claims of discrimination under the ADA and the NYSHRL.

3. Retaliation under the ADA and NYSHRL.

Next, the District Court turned to Petitioner’s claims of retaliation under the ADA and the NYSHRL. On the retaliation claim, the District Court held that Petitioner could not meet the fourth element of his claim of retaliation – that is, a causal connection between the protected activity in which Petitioner engaged and the adverse action taken against him. Id. at p. 35. The District Court noted that Petitioner last engaged in protected activity (by filing a complaint of discrimination) in March 2016 but was not terminated until more than two (2) years later, in April 2018. Id. The District Court held that “a lapse of as much as two years ‘suggests, by itself, no causality at all.’” Id. at p. 36. The District Court went on to address Petitioner’s negative performance review, which was still ten months removed from his closest protected activity. Id. at p. 37. Accordingly, the District Court held that Petitioner failed to make out a *prima facie* case of retaliation under the ADA or the NYSHRL.

Although the District Court did not have to address Respondents’ legitimate, non-retaliatory explanation for the actions taken against Petitioner, the District Court acknowledged that, even if Petitioner could make out a *prima facie* case of retaliation, Respondents, as

explained above, could meet their burden of setting forth legitimate, non-retaliatory reasons for the adverse actions taken against Petitioner. As a result, the District Court granted summary judgment on Petitioner’s retaliation claims under the ADA and the NYSHRL.

4. *FMLA Retaliation.*

The District Court next addressed Petitioner’s claim that Respondents retaliated against him for requesting and/or taking FMLA leave. The District Court noted that Petitioner had requested, and NYPA had granted to Petitioner, numerous FMLA leaves over the course of seven years prior to Petitioner’s termination. The District Court found Petitioner’s argument that Respondents suddenly developed retaliatory animus against Petitioner after seven years and multiple leaves “defies logic and is unsupported by the record.” *Id.* at p. 40. Accordingly, the District Court found that Petitioner could not set forth a *prima facie* claim for FMLA retaliation. Finally, the District Court noted that even if Petitioner could set forth a *prima facie* case of FMLA retaliation, Respondents established legitimate, non-retaliatory reasons for the actions taken against Petitioner, and Petitioner failed to demonstrate that these reasons were pretextual. *Id.* at p. 42-43. As a result, the District Court granted summary judgment on Petitioner’s FMLA retaliation claim. Petitioner appealed to the Second Circuit Court of Appeals and on April 25, 2023, the Second Circuit issued a summary order upholding the District Court’s dismissal of the action.

REASONS FOR DENYING THE PETITION

I. STANDARD

Rule 10 of the Supreme Court Rules states that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” Such “compelling reasons” include: (1) when there is a split in authority among Circuit Courts; (2) when a Circuit Court “has decided an important federal question in a way that conflicts with a decision by a state court of last resort; (3) when a Circuit Court has “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power; (4) when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a Circuit Court; (5) a state court or Circuit Court has decided an important question of federal law that has not yet been settled by the Supreme Court but should be so settled; or (6) a state court or Circuit Court has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. Id. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Id.

II. THE QUESTION WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER’S MOTION FOR RECONSIDERATION OF A DISCOVERY MOTION IS NOT WORTHY OF THIS COURT’S REVIEW.

Petitioner attempts to use the denial of Petitioner’s motion for reconsideration of a discovery motion to establish a compelling reason to warrant Supreme Court review. However, Petitioner does not identify any conflict among federal Circuit Courts or between a Circuit Court and a state court of last resort. Petitioner does not even identify “an important question of

federal law” in dispute. Instead, Petitioner merely restates his disagreement with the decision made by the Magistrate Judge, which was subsequently adopted by the District Judge, with respect to a motion to compel filed by Petitioner. At most, Petitioner may argue that the District Court erred in its decision. Petitioner does not, and cannot, argue that, even if incorrectly decided, that the District Court’s denial of Petitioner’s motion for reargument of a discovery motion “so far departed from the accepted and usual course of judicial proceedings” as to warrant review by this Court.

III. THE QUESTION WHETHER THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT IS NOT WORTHY OF THIS COURT’S REVIEW.

Petitioner argues that the Second Circuit erred in holding that “[w]hile we must ensure that employers do not act in a discriminatory fashion, we do not sit as a super-personnel department that reexamines an entity’s business decisions.” Petitioner cites to no case law to the contrary from another Circuit Court to demonstrate a split among Circuit Courts. Nor does Petitioner identify any reason whatsoever that this allegedly incorrect decision warrants intervention by this Court. Instead, Petitioner simply asserts that his case, for reasons unexplained, is so complex as to require the Second Circuit to sit as a super-personnel department. See Pet. Br. At 17 (“[T]his is exactly what is required given the complexity of Petitioner’s case . . .”).

Next, Petitioner baselessly claims that the Second Circuit failed to review the record. To the contrary, the Second Circuit issued a six-page decision, addressing all of Petitioner’s arguments on appeal, including those he raised for the first time on said appeal. Following this

complete review of the record, the Second Circuit correctly affirmed the District Court’s grant of summary judgment on all claims. Petitioner’s subjective disagreement with this outcome is insufficient to carry his burden under Rule 10.

Finally, Petitioner devotes the final five pages of his Petition to rearguing his opposition to Respondents’ motion for summary judgment. In so doing, Petitioner fails to identify any basis for intervention by this Court. As explained above, Petitioner’s mere disagreement and dissatisfaction with the outcome of his case are not a basis to justify this Court’s exercise of its supervisory authority.

IV. THE QUESTION WHETHER PETITIONER WAS DENIED A GUARDIAN AD LITEM IS NOT WORTHY OF THIS COURT’S REVIEW.

Petitioner next turns to his argument that the District Court erroneously failed to conduct a hearing to determine Petitioner’s competence. At no time during the litigation at the District Court level did Plaintiff ever request a competence hearing, nor was there any indication that one was required. Petitioner filed a Complaint, responded to discovery requests, engaged in motion practice and sat for a deposition without issue. Only now that Petitioner has had judgment entered against him does Petitioner claim that he was incompetent to proceed in litigation. Similarly, Petitioner claims that the medication he took prior to his deposition acted as a memory suppressant, resulting in poor testimony that was used in Respondents’ motion for summary judgment.

Petitioner offers no evidence, other than the fact that he informed the District Court that he suffered from a chronic illness (Crohn’s Disease), to demonstrate his incompetence. Indeed, Petitioner admits that the District Court advised him that he was welcome to work with the New

York Legal Assistance Group (“NYLAG”), a non-profit organization that provides free civil legal services. Petitioner rejected this as “not qualify[ing] as satisfactory legal assistance for the chronically ill.” Pet. Br. at 18. With respect to Petitioner’s argument that his deposition testimony was influenced by certain medications, Petitioner’s own deposition testimony contradicted this allegation. Petitioner was specifically asked:

Q: “Mr. Davis, are you currently under the influence of any substance that would affect your ability to testify accurately and completely during this deposition?

A: “No.”

Accordingly, there is no reason for this Court to exercise its appellate authority over these claims.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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