No.

In the Supreme Court of the United States

BARBARA JOHNSON-LUSTER,
Petitioner,

v.

CHRISTINE WORMUTH, *Secretary of the Army*,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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December 15th, 2023

QUESTION RAISED

I

Whether an appellant in the Circuit Courts, with an invisible disability and previous court appointed attorneys in the Lower District Courts should receive a court appointed attorney for their Title VII appeal under *the equal protection clause*, when exceptional circumstances remain unchanged from the District Courts orders?

LIST OF PROCEEDINGS

United States Court of appeals for the Fifth Circuit

Barbara Johnson-Luster v. Christine Wormuth, Secretary of the Army

Date of Decision: September 18th, 2023

U.S. District Court for the Eastern Louisiana

Barbara Johnson-Luster v. Christine Wormuth, Secretary of the Army

Decision Date: March 14th, 2023

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF CONTENTS - Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Barbara Johnson-Luster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of appeals for the Fifth Circuit is unreported and is reproduced in the Appendix at 1a–5a. The decision of the U.S. District Court for the Eastern Louisiana is unreported and is reproduced in the Appendix at 6a–36a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment on September 19th, 2023. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Equal Protection Clause

> 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 to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1651(a).

The **All Writs Act of 1789**, which provides in relevant part as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

42 U.S.C. § 2000e-5 (f)(1)

> Equal Employment Right To Request Counsel (Z 0815). Inference at: Doc. No. 2. At 10. *Johnson-Luster v. Wormuth*, (2:19-cv-02335-MBN) (Eastern District of Louisiana).

18 U.S.C. § 3006A(a)(1) or (2)

> **(a)Choice of Plan.—**Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.
> *Herein, Criminal Justice Act*.

28 U.S. Code § 1915

> **Proceedings in forma pauperis**
>
> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense

or appeal and affiant's belief that the person is entitled to redress.

42 U.S. Code § 2000e–2, Civil Rights Act of 1964, *herein* Title VII.

(a) Employer practices
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S. Code § 12101 est seq
Americans With Disabilities Act of 1990

(1)
Physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination.

29 U.S.C. § 701 et seq
Rehabilitation Act of 1973, Section 504

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any

> program or activity conducted by any Executive agency or by the United States Postal Service.

STATEMENT OF THE CASE

Ms. Barbara Johnson-Luster was hired by the "Army" in 2015 as a GS-0326-05 Office Automation Assistant. "Record of Investigation," *herein* "ROI" at 360. She obtained the job through Louisiana Vocational Rehabilitation Services, which connects disabled employees with employers. ROI at 362-63. To participate in the program, plaintiff was required to demonstrate evidence of severe disability. ROI at 374-75.

Plaintiff suffers from dysthymia, or chronic depression, and her doctor says she has an "adjustment disorder" stemming from depression. ROI at 46, 370. She manages her disability through medication and by attempting to reduce aggravating factors like stress and anxiety. ROI at 378-79. Living with her disability requires her to make, and request others to make, efforts to control her environment and stress level beyond what a non-disabled person may require. ROI at 371-72, 390-91. She needs a clear and detailed understanding of her responsibilities, additional time to learn and ask questions to understand her role, instructions in writing, and flex time to mentally reset during the day. *Id.*

Plaintiff was identified as a qualified candidate for the GS-05 position by the Army's Equal Employment Manager, Chris Moore. Conravey Dep., pp. 15-16 (attached as Ex. A). Conravey interviewed plaintiff and selected her for the job. *Id.;* ROI at 368. Her hiring was approved by the Chief of the Construction Division, Stuart Waits. Conravey Dep., p. 15; ROI at 535. Conravey was aware that plaintiff was coming in as a "Schedule A" appointment, referring to the federal concerning the hiring of employees with intellectual disabilities, severe physical disabilities, or psychiatric disabilities. Conravey Dep., p. 15; *cf.* 5 CFR § 213.3102(u). He acknowledges that plaintiff was able to perform the essential functions of her job. ROI at 653.

Moore told Conravey before the interview that plaintiff had a mental and psychiatric disability. Conravey. Dep., p. 27. During the interview, plaintiff and Conravey discussed her disability and accommodations she would need to perform her job, including flex time, additional time for training, and the need for detailed instructions and an opportunity to ask questions to her supervisors about her responsibilities. ROI at 369-72, 389-90, 393-94. Further, plaintiff asked Conravey, "there won't be anybody yelling at me, will there?" ROI at 583. Conravey

understood from their discussion that she had anxiety issues involving conflict. *Id.*

"And of course, I told her, no, nobody should be yelling at you. Why would you ask that? She told me that with the VA there are always people yelling. And that, you know, she had, I deduced from that, that she didn't deal well with stress". Conravey Dep., p. 26; *see also* ROI at 583 (testifying that he recognized plaintiff had "an anxiety type situation"). Conravey also understood that plaintiffs' accommodations were things he could provide as her supervisor without any formalized procedure. Conravey Dep., pp. 26-27.

DEMONSTRATED INVISIBLE DISABILITY

Ms. Johnson-Luster suffers from Dysthymia, an invisible disease associated with the inability to adjust in various social settings, and which is a product of depression. This condition was presented to the district court: Doc. No. 14, (Letter from Tara G. Simpson) *Johnson-Luster v. Wormuth*, (2-19-cv-02235) (Eastern District of Louisiana)

Furthermore, such evidence was docketed as follows: Dysthymia is a clinical term for chronic depression. Record of Investigation ("ROI") at 360 (attached as Ex. A to Defs. Mem.) [ECF Doc. 45]. *Id.* Johnson-Luster's psychiatrist describes her as

having "adjustment disorder" related to depression. ROI at 46, 370. *Id.*

That Ms. Johnson-Luster suffers from *dysthymia* is a fact undisputed in the lower District court or contested by the "Army." The question has always been whether such disability was the subject of discrimination regarding the claim for disparate treatment, and lack of accommodation, not the disability's medical diagnoses.

In the Army's summary judgment motion, they never refuted Ms. Johnson-Luster's invisible disability or offered expert testimony in their favour to rebut the need for accommodation based on that disability's veracity.

PROCEDURAL HISTORY OF CASE

Johnson-Luster filed suit *pro se* on March 8, 2019. "Record of Appeal" *herein* "ROA".12-57. *Id.* She claimed she was discriminated against for termination of employment, failure to promote, failure to accommodate disability, unequal terms and conditions of employment, retaliation, and harassment. ROA.18. *Id.* She further claimed that she was discriminated against based on her race, color, national origin, sex, disability, and prior EEO activity. ROA.18-19. *Id.*

Shortly after filing suit, Johnson-Luster moved to have the district court appoint her counsel. ROA.84. The order appointing Luz Molina was on September 21, 2020. ROA.215.

The Army filed a motion for summary judgment on liability for all Johnson- Luster's claims on August 17, 2021. ROA.253-1153. The day after the Army filed its motion, Johnson-Luster moved to withdraw her *pro bono* attorneys and continue the case until new counsel could be appointed. ROA.1161-1162. She was appointed a second *pro bono* attorney on December 7, 2021. ROA.1207.

Johnson-Luster, through her second court-appointed counsel, filed an opposition to the Army's motion for summary judgment on February 15, 2022.

ROA.1214-1265. The district court granted the Army's motion on March 14, 2022, finding that Johnson-Luster failed to carry her burden of proving the Army denied her reasonable accommodation; failed to prove her disparate-impact claim that the Army treated her less favorably than other employees without a disability; failed to prove she suffered retaliation; failed to prove a hostile work environment; and failed to prove she suffered constructive discharge. ROA.1276-1305. The district court

entered a judgment dismissing her Complaint with prejudice on March 15, 2022. ROA.1306.

Johnson-Luster filed a motion for reconsideration of the district court's dismissal of her Complaint on April 18, 2022. ROA.1317-1478. This motion was filed 34 days after the entry of judgment on the motion for summary judgment. Johnson-Luster also filed a motion for leave to file additional exhibits on April 28, 2022, which the district court granted on May 4, 2022, noting its untimeliness under FED. R. CIV. P. 59. ROA.1483-1640. The Army filed an opposition to the motion for reconsideration on May 6, 2022. ROA.1642-1646. Johnson-Luster thereafter filed a second memorandum in support of her motion for reconsideration attaching additional exhibits on May 18, 2022. ROA.1647-2132. She filed a motion for leave to file revised exhibits on May 23, 2022, which was granted on May 25, 2022. ROA.2133-2140.

The district court treated Johnson-Luster's motion for reconsideration as a Rule 60(b) motion because it was filed more than 28 days after the entry of judgment. ROA.2142. The district court denied that motion on June 13, 2022. ROA.2141-2144. Johnson-Luster filed a notice of appeal from the order denying her motion for reconsideration on July 12, 2022. ROA.2145-2146.

This notice was filed 120 days after the March 15, 2022, final judgment.

Prior to the court filing: Ms. Johnson-Luster filed an informal Equal Employment compliant on July 6, 2015. Subsequently she was constructively let go on August 21, 2015. On August 17th, 2015, filed a formal EEO complaint of discrimination alleging that she was subjected to discrimination based on race, sex and disability and reprisal. Later adding constructive discharge. Ms. Johnson-Luster submitted a formal claim in District court on March 8, 2019.

Appellant was granted *in Forma Pauperis* status by the Trial Court Magistrate on July 29, 2022. She was also granted an Order for a Court appointed Attorney, and Andrea Agee was first pro bono counsel. Docket. No. 28, *Johnson-Luster v. Christine Wormuth, Secretary of the Army*, Case 2:19-cv-02235-MBN (East Louisiana District Court). App. 36a.

Defendants never filed a motion to dismiss for failure to state a claim but filed for summary judgment on August 17, 2021; Doc. No. 45. *Id.* Ms. Johnson-Luster's claims were dismissed with prejudice under summary judgement. App. 6a. She timely appealed in the Fifth Circuit, after her motion for reconsideration was denied. Doc Nos. 80 and 90. *Id*.

In the District Court Ms. Johnson-Luster was represented by firstly by Loyola clinic's Ms. Luz Molina and Ms. Agee and then by Stephen Klaffky, both sets of court appointed attorneys, under that court's *pro bono* office. The Loyola clinic was dismissed by Ms. Johnson-Luster for their failures to adequately represent her during discovery[1]; a disappointment she pointedly pointed to the Ms. Molina's supervisors. While Mr. Klaffky's representation was limited to Ms. Johnson-Luster's District matter's summary judgment submission.

Consequently, Ms. Johnson-Luster filed a timely appeal in the Fifth Circuit, *pro se*. She moved to seek representation, General Docket No. 25. The Fifth Circuit denied this request. App 41a. In the same order, the Fifth Circuit denied Ms. Johnson-Luster, request for more time to file her brief. *Id*. Ms. Johnson-Luster then filed for reconsideration, and this was also denied. App. 39a.

That the Fifth Circuit did not seek to accommodate Ms. Luster's earlier court appointment of attorneys is a deviation from the judicial discretion of the earlier court requiring the Fifth Circuit to state its facts and reasons, not merely the summation:

[1] Ms. Johnson-Luster has commenced legal malpractice against the Loyola Clinic on this issue.

"Nor has she demonstrated exceptional circumstances warranting appointment of counsel." *Id.* A conclusory statement.

Evidently, pauper status, invisible disability, and underlying appeal merit (civil ineffective legal assistance) should have been discussed in the Fifth Circuit's Order denying Ms. Johnson-Luster court appointed attorney. App. 41a. This omission of legal standards was an error under the prevailing legal standard. And in turn factures the course taken by other Circuits who follow their District court's fact findings under accepted doctrines of *issue estoppel* and law of the case.

A. INADEQUATE DISCOVERY ON MS. JOHNSON-LUSTER'S BEHALF

In the District Court after Ms. Johnson-Luster was granted court appointed attorney she elected, Ms. Luz M. Molina and Ms. Andrea M. Agee from *Loyola Law School: Stuart H. Smith Law Clinic and Center For Justice, Workforce Justice Project*, primarily responsible for discovery.

Attorneys failed to adduce expert witness information on behalf of Ms. Barbara Johnson-Luster and to reschedule her deposition, which never happened.

After the deposition happened without Ms. Barbara Johnson-Luster being present, she told her two attorneys (Molina and

Agee) of her intension to let them go and they filed a motion to withdraw.

Lack of proper discovery was fatal to her case from a fact-based perspective, which would have allowed her to oppose defendant summary judgment. However, this argument would have been a meritorious argument to overturn the summary judgment against her if properly argued and if the Fifth Circuit was convinced that a civil equivalent of "ineffective legal assistance," required the courts judicial intervention. Thus, Ms. Johnson-Luster's appeal to the Fifth Circuit was meritorious, but insufficiently articulated as a *pro se* appeal: remand to the Fifth Circuit with instructions to appoint counsel on her behalf is proper from a merit-based view; it was not harmless error.

B. INADEQUATE RESPONSE TO SUMMARY JUDGMENT MOTION

Summary judgment is essentially defeated by presenting facts by the nonmovant, here Ms. Johnson-Luster. The District Court was correct in articulating this factual burden of proof needed; and in correct in its application of the standard – thus, error was not harmless.

I. District Court Correctly Stated the Law:

"Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) (en bane) (per curiam).

When assessing whether a dispute to any material fact exists, [the Court] consider[s] all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co*., 530 F.3d 395, 398- 99 (5th Cir. 2008). All reasonable inferences are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985) (quoting l0A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2738 (2d ed. 1983)); see also Little, 37 F.3d at 1075. "No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *EEOCv. Simbaki, Ltd.,* 767 F.3d 475,481 (5th Cir. 2014).

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Int'/ Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-65 (5th Cir. 1991) (quoting *Golden Rule Ins. Co. v. lease*, 755 F. Supp. 948, 951 (D. Colo. 1991)). "[T]he nonmoving party can defeat the motion" by either countering with evidence sufficient to demonstrate the "existence of a genuine dispute of material fact," or by "showing that the moving party's evidence is so sheer that it may not persuade the reasonable factfinder to return a verdict in favor of the moving party." ld. at 1265.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim. See *Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. See id. at 324. The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue for resolution. See, e.g., id.; *Little*, 37 F.3d at 1075 ("Rule 56

'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" (quoting Celotex, 477 U.S. at 322 (emphasis added))."

App. 7a.

This is a fact determination seduced by proper discovery. Ms. Johnson-Luster never adduced proper facts in her favor because of ineffective civil counsel. She was aware of this ineffectual representation. Docket. No. 80 (Motion for reconsideration Filed by Ms. Barbara Johnson-Luster, *pro se*). Accordingly, her appeal had merit.

III. The McDonnell Douglas Standard

"The burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny establish the respective burdens and standards for plaintiffs and defendants on a motion for summary judgment for causes of action under Title VII and the Rehabilitation Act. *Duncan v. Univ. of Texas Health Sci. Ctr. at Houston*, 469 F. App'x 364, 368 & n.6 (5th Cir. 2012); *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Under this framework, Plaintiff bears the initial burden of

proving a prima facie case of retaliation or discrimination by a preponderance of the evidence. McDonnell Douglas, 411 U.S. at 802. To establish a prima facie case of discrimination under the McDonnell Douglas burden-shifting framework, "an employee must demonstrate that she '(1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside his protected group or was treated less favorably than other similarly situated employees outside the protected group.'" *Garrison v. Tregre*, No. CV 19-13008, 2021 WL 6050179, at *2 (E.D. La. Dec. 21, 2021) (quoting Morris v. Town of Independent, 827 F.3d 396, 400 (5th Cir. 2016) (quoting *Willis v. Cleco Corp.*, 749 F.3d 314, 319-20 (5th Cir. 2014)). An individual who alleges a retaliation claim under Title VII establishes a prima facie case by demonstrating that: (1) she engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action. *Septimus*, 399 F.3d at 609.

To establish a prima facie case of discrimination under the Rehabilitation Act, a plaintiff must show that she was: (1) disabled within the meaning of the Act; (2) subjected to an adverse action solely by reason of her disability; and (3) otherwise

qualified for the program. Duncan, 469 F. App'x at 368. To be covered by the Rehabilitation Act, a person must have a "physical or mental impairment that substantially limits one or more life activities." 42 U.S.C. § 12102(1)(A).

If a prima facie case is made, a presumption of retaliation/discrimination arises, and the burden then shifts to the employer to produce a legitimate, nondiscriminatory reason for the alleged adverse employment action. *Broadway v. United States Dep't of Homeland Sec.*, Civ. A. No. 04-1902, 2006 WL 2460752, *3 (E.D. La. Aug. 22, 2006). "Defendant's burden is one of production, not persuasion...." *Reeves v. Sanderson Plumbing Prods*., Inc., 530 U.S. 133, 142 (2000). A defendant must merely set forth, through admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). This causes the presumption of discrimination to dissipate. Smith v. Aaron's Inc., 325 F. Supp. 2d 716, 724 (E.D. La. 2004).

At the third stage of the burden-shifting framework, the plaintiff is given a "full and fair opportunity to demonstrate" that the defendant's proffered reason is a pretext for intentional discrimination. *Price v. Fed. Express*, 283 F.3d 715, 721 (5th Cir.

2002) (citing Hicks, 509 U.S. at 507-08). On summary judgment at the third step, the plaintiff must substantiate her claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision. *Price*, 283 F.3d at 721. Even when such a showing is made, however, it will not always be enough to prevent summary judgment if no rational factfinder could conclude that the action was discriminatory. Id. (citing *Reeves*, 530 U.S. at 148). As the Reeves court explained,

> The ultimate question is whether the employer intentionally discriminated, and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiffs proffered reason ... is correct. In other words, it is not enough ... to dis believe [sic] the employer; the factfinder must believe the plaintiffs explanation of intentional discrimination.
>
> . . . Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the

plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.... 530 U.S. 146-48 (internal citations omitted). "Whether summary judgment is appropriate depends on numerous factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered."

App. 8a.

The *McDonnell Douglas* shifting burden of proof required Ms. Johnson-Luster to adduce facts in her favor, as correctly stated by the District court. But again, she was unable to do so because of ineffective legal counsel.

As a result of a lack of adequate representation in the District Court's discovery phase, Ms. Johnson-Luster did not have her own deposition taken, comparative evidence adduced – this hindered her ability to rebut defendants' summary judgment under *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). Evidently, summary judgment is defeated by adducing facts. *Id.*

How then was Ms. Johnson-Luster supposed to rebut defendants' summary judgment when her counsel neglected a thorough and comprehensive factual discovery on her behalf? This is a question for the Fifth Circuit – but the question posed in this *writ* is whether that denial violated the guidelines under the caselaw for the circuit courts to appoint her legal assistance so that her appeal could be robust and effective, not formalistic?

The question of *extraordinary importance* is whether Ms. Johnson-Luster, with a demonstrable invisible disability, having received court appointed attorneys, in the lower court, should have received a court appointed attorney to handle her Fifth Circuit Appeal?

REASONS FOR GRANTING THE WRIT

This writ of certiorari should be granted because this issue goes to this matter - equal protection and equal justice in the courts for those before the circuit courts with a combination of invisible disability and pauper status. A disabled litigant, with a meritorious claim, should be afforded the assistance of a court appointed attorney, as much as possible under *Gonzalez v. Carlin*, 907 F.2d 573, 580 (5th Cir. 1990).

As stated supra, Ms. Johnson-Luster was given a Court appointed attorney (twice for her Title VII District matter). When

she moved by motion for a Court appointed attorney in her appeal, the fifth Circuit refused. General Docket No. 45. It erred, in this regard. A proper reading of Ms. Johnson-Luster's motion for court appointed attorney, should have resulted in the Fifth circuit court of appeals addressing the facts which warranted that finding in the lower court – the Eastern District of Louisiana, because the *exceptional circumstances* of invisible disability and lack of finance remained unchanged. *Id*. The Fifth Circuit did not do this: instead, it offered its own "trial," assessment, ignoring the District Court's, Pauper Order, App. 37a.

Other Circuits lean towards follow the posture and decision of the lower court's treatment of litigant's request for appointment of counsel because this is essentially a fact finding, an exercise of judicial discretion. It is a history of the case record in the lower court which cannot be relitigated or summarily brushed away; especially when the facts of the lower Court triggering Court appointment of an attorney remain unchanged.

For the Circuit court to refuse to uphold the Lower court's appointment of an attorney for Respondent's Circuit appeal, amounts to an appeal of the District court's order granting such a right in the first place. It ignores the doctrine of issue estoppel and the history of the case in general. It is a reversal of a fact

finding in place by the lower court; a very high bar for the Circuit court to overcome as it introduces new facts at the appellate stage.

I. The Circuits Are Divided On Whether a Circuit Court Should Follow Their District Court's Court Appointment Findings When Exceptional Circumstances Persist[2].

A. Nature of Circuit Split

The Circuit split arises from competing principles of finality and accuracy underlying the jurisprudence for electing to give an appellant, such as a Ms. Johnson-Luster, a court appointed attorney during appeal. Do Circuit courts operate within the law when they refuse to certify a previously court appointment precedent for an appellant allowing her appeal to have more gravitas?

The Fifth circuit cited three cases for its reasons in denying Ms. Johnson-Luster court-appointed attorney in its two pages, those cases are the subject of this writ of certiorari because they were wrongly applied and conflict with other

[2] U.S. Supreme Court Rule 10.

Considerations Governing Review on Writ of Certiorari

Review 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. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

circuits on the issue of court appointed attorney for a Title VII appeal:

"Johnson-Luster has not shown that the appointment of counsel is warranted for her Title VII claims. See *Gonzalez v. Carlin*, 907 F.2d 573, 580 (5th Cir. 1990); see also *Edwards v. City of Houston, 78 F.3d 983, 995 (5th Cir*. 1996) (en banc).

The *Gonzalez* case is unavailing. In fact it supports Ms. Johnson Luster's plea for an appointed court attorney stating - "exceptional circumstances" standard for appointing counsel in in forma pauperis cases was not applicable to analyze need for appointing counsel in Title VII case." *Gonzalez v. Carlin*, 907 F.2d 573 (5th Cir. 1990)

The fifth Circuit then erroneously stated, "Nor has she demonstrated exceptional circumstances warranting appointment of counsel." See *Cooper v. Sheriff, Lubbock Cnty.*, 929 F.2d 1078, 1084 (5th Cir. 1991).

As the Gonzalez court clearly sated – no exceptional circumstances are needed in Title VII cases, in *forma pauperi* applications for a court appointed attorney. *Gonzales* at 573.

As for the *Cooper* case itself, it has eleven instances wherein it was not followed and distinguished. Outrightly it was refused as good jurisprudence in *Regalado v. City of Edinburg*, No. 7:22-CV-228, 2023 WL 2394299, at *10 (S.D. Tex. Feb. 1, 2023).

"An indigent plaintiff is ineligible for appointment of counsel unless the court finds his claims meet a level of plausibility. *Naranjo v. Thompson*, 809 F.3d 793, 799 (5th Cir. 2015). If the plaintiff's claim meets the required threshold of plausibility, counsel will only be appointed where plaintiff shows exceptional circumstances necessitating counsel. *Dallas Police Dept.*, 811 F.2d at 261. Such circumstances depend on the type and complexity of the case, petitioner's ability to adequately represent himself, presence of evidence requiring skill and presentation, and the likelihood that petitioner would benefit from appointment of counsel. *Parker v. Carpenter*, 978 F.2d 190, 193 (5th Cir. 1992). ***32** Plaintiff has requested appointment of counsel based on his *pro se* status, inability to afford legal representation, and lack of resources because of his financial status and incarceration. (Dkt. No. 26.) Plaintiff argues that his case

presents an "exceptional circumstance" for which counsel should be appointed. (*Id.* at 2-3, ¶¶5, 6.) As explained above, Plaintiff's case lacks merit, and thus, his claim does not meet the threshold plausibility requirement to be eligible for court appointed counsel."

The *Cooper* court did find deprivation of food to be an exceptional circumstance[3] then proceeded to dismiss the matter for failure to state a claim – it was not summary judgment. In comparison, Ms. Johnson-Luster's claims proceeded to discovery: they were plausibly plead and dismissed through summary judgment.

The Fifth Circuit then cited *Edwards v. City of Houston, 78 F.3d 983, 995 (5th Cir*. 1996), for refusing to appoint an attorney for her. This decision was refused by the *Cotter* court who stated:

"This court has not followed this approach, *International Paper,* 887 F.2d at 343–44, because in many situations, the district court's findings or reasons can be reasonably inferred. *See United States v. Owens,* 167 F.3d 739, 743

[3] *Cooper v. Sheriff, Lubbock Cty., Texas*, 929 F.2d 1078, 1084 (5th Cir. 1991) (continuous denial of all food for twelve consecutive days is enough to give rise to the possibility of relief as "[t]his circuit has long held that state prisoners are entitled to reasonably adequate food." (citations omitted)) *Regalado v. City of Edinburg*, No. 7:22-CV-228, 2023 WL 2394299, at *10 (S.D. Tex. Feb. 1, 2023), report and recommendation adopted, No. 7:22-CV-228, 2023 WL 2391014 (S.D. Tex. Mar. 7, 2023). Ms. Johnson-Luster is not a prisoner denied food, and any comparisons to the *Cooper case* were unavailing or anecdotal, insufficient to be the basis of a precedential jurisprudence by the Fifth Circuit.

(1st Cir.), *cert. denied,* 528 U.S. 894, 120 S.Ct. 224, 145 L.Ed.2d 188 (1999). If they cannot be inferred, then there is nothing to which to give deference *Cotter v. Massachusetts Ass'n of Minority L. Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000)."

Thus, a closer look at the three cases cited in the Fifth Circuits denial for court appointed attorney produces a result in Ms. Johnson-Luster's favor because the cases are not conclusive – in fact, they are fractured in their decisions on very different facts dissimilar to Mr. Johnson-Luster's Title VII facts. Ms. Johnson-Luster has in her favor - prior court appointed history; her continued pauper status, App. 37a, and her deteriorating invisible disability. As well as the underlying merits of her claims pursuant to Federal Rule of Civil Procedure Rule 8[4]. The Fifth Circuit court erred in its application of the following three cases; and they equally erred in failing to consider other Circuit court precedents at variance with what they tried to do. Such a consideration would have resulted in Ms. Johnson-Luster receiving a court appointed attorney and potentially

[4] If Respondent did not believe Ms. Johnson-Luster have meritorious claims, they were entitled to file a motion to dismiss addressing the lack of plausibility of claims and to state their conclusory nature.

reversing the summary judgment against her based on underlying mistakes by former counsel during discovery.

In the alternative, the Fifth Circuit could have remanded the matter back for completion of discovery; to take Ms. Johnson-Luster's deposition. It is a rare occurrence that the appellant's deposition has not been taken in her lawsuit and her testimony is not a part of the lower District court's proceedings [5].

B. What is the current Circuit jurisprudence on right to representation in civil matters?

i. Criteria To Appoint An Attorney for A Title VII Appeal:

Title VII litigation offers no unified direction on what District courts should consider, when deciding to accord a litigant court appointed status:

The Fifth Circuit argued that Ms. Johnson-Luster had not shown any court appointed attorney is warranted and cited two cases. See *Gonzalez v. Carlin*, 907 F.2d 573, 580 (5th Cir. 1990); see also *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir.1996) (en banc).

[5] Ms. Johnson-Luster's deposition proceeded without her. The resulting transcript is a few pages and amounts to a restatement of her absence. Her then attorneys (from Loyola Clinic) failed to reschedule her deposition or request more time on her behalf, despite Ms. Johnson-Luster's request to her attorneys. This was the reason Ms. Johnson-Luster changed them.

Those cases have however a very different application and lack uniformity with other Circuits. In comparison the Ninth Circuit has stated: "Unless the trial court's rulings were clearly in error or there has been an important change in circumstances, the court's prior rulings must stand." See, *United States v. Estrada-Lucas*, 651 F.2d 1261, 1263 (9th Cir.1980); *Smith v. United States*, D.C.App., 406 A.2d 1262 (1979).

Thus, the first concern of any Circuit court is always whether Ms. Johnson-Luster was granted court appointed attorney in the District Court, as part of the lower court record. Was the issue of Ms. Johnson-Luster's court-appointed attorneys' sufficient history-of-the case creating a vested right, under a history of the case, for her Circuit Court appeal?

In the same way that the District court's findings on summary judgment are a history of the case, the Fifth Circuit erred and contradicts the Ninth Circuit and DC circuit's own approach in viewing fact findings as "history of the case." See *United States v. Estrada-Lucas*, 651 F.2d 1261, 1263 (9th Cir.1980); *Smith v. United States*, D.C.App., 406 A.2d 1262 (1979).

Finally, any Circuit Court must seriously question its own *judicial discretion* in opposing the fact findings of a lower district court appointed attorney which were found in the District court and offer pointed reasons for doing so. It should offer a basis for its variance. The Fifth Circuit failed to do so here: to state why its legal mind appropriately substituted the Lower Court's mind nullifying Ms. Johnson-Luster's pauper status and invisible disability. Thus, this investigative inquiry and standard was not seriously considered by the Fifth Circuit in this matter. But instead, conclusory case notes were offered. Case notes which are largely irrelevant.

ii. Exceptional Circumstances Warranting Court Appointed Attorney

The Fifth Circuit in its Order, App. 41a, does not even discuss the legal standard of what constitutes exceptional circumstances under the *Cooper* case.

The Court should have referenced the standard for exceptional circumstances and rendered its decision by manner of comparison, but instead engaged in conclusory conclusions, with no factual support.

That was an error; separate from the Circuit split argument.

C. **Role of Supreme Court In Giving Direction and Leadership in Civil Rights Litigation, Including Title VII**.

The Supreme Court has held that under *Brown v. Western R. Co. of Alabama*, 338 U. S. 294, 296 (1949), "federal right cannot be defeated by the forms of local practice."

"First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court." Burnett,* 468 U. S., at 50 (emphasis added.)

"The central objective of the Reconstruction-Era civil rights statutes...is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett*, 468 U.S., at 55.

The Supreme Court has been at the heart and soul of civil rights litigation from its onset. Title VII claims are essentially civil rights within the context of employment. Those civil rights require serious direction and uniformity from the Supreme Court to create one "federal" law[6]. Court appointment of an attorney where vesture of rights,

[6] Not a disparate federal Law for Lousiana.

previously given to the appellant, in the District Court, later withdrawn by the Circuit court is a question of national importance because it goes to the root of what federal law is – one legal system, with no avenues for forum shopping.

When an appellant litigates in one circuit, they should expect the same treatment offered in the Ninth Circuit or the Second circuit, on the issue that they were previously granted Court Appointed Attorney. It should not boil down to an unlucky hand at the Fifth Circuit. *Barbara Johnson-Luster v. Wormuth*, 22-30422. (Fifth Circuit). But instead, a uniform directive from the Supreme Court that the law of the case, is applicable even on the issue of court appointed attorneys for a circuit appeal.

II. Law of the Case Doctrine and Issue Estoppel Supports Circuit Courts Following District Court's Court Appointment Decisions:

"Issue preclusion, also called collateral estoppel, means that a valid and final judgment binds the plaintiff, defendant, and their privies in subsequent actions on different causes of action between them (or their privies) as to same issues litigated and essential to the judgment in the first action. The four essential elements to decide if

issue preclusion applies are: 1) the former judgment must be valid and final; 2) the same issue is being brought; 3) the issue is essential to the judgement; 4) the issue was actually litigated"[7]. *Little v. Blue Goose Motor Coach Co.*, 346 Ill. 266, 178 N.E. 496 (Ill. 1931)

The exceptions noted by Judge Ginsburg, to mutuality of parties are irrelevant here because the parties in the District matter and in the fifth Circuit were the same when Ms. Johnson-Luster's request for a court appointed attorney was presented to the court. See, *Taylor v. Sturgell*, 553 U.S. 880 (2008)

Did the District court intend the issue of Ms. Johnson-Luster's request for court appointed attorney in the District matter to be final based on her *pauper* and extraordinary status?

Unequivocally, the answer is Yes. Could the defendant, the Army, have appealed that Order. The answer is, is also Yes. But the defendant never appealed when afforded such an opportunity.

Finally, should the Circuit court have respected these Lower court adjudicative and procedural observations as

[7] *Issue preclusion*, https://www.law.cornell.edu/wex/issue_preclusion. Retrieved December 8th, 2023.

meeting the elements of issue preclusion; the answer, is also Yes.

But the Fifth Circuit, in its Order App. 41.a, denying Ms. Johnson-Luster court appointed attorney, never did this nor make mention of Ms. Johnson-Luster's previous success at getting a court appointed attorney from the lower court; her invisible disability and the merits of her case in general. The issue was litigated anew on first impression. This was an error, squarely on issue estoppel and law of the case basis: the case's own precedent.

It was categorically a misapplication of the issue preclusion black letter law. Instead, the Fifth Circuit spoke in conclusory and short sentences: no more than a paragraph. This was not a serious discussion but a mere citation of what those three cited cases concluded, regardless of issue preclusion as a legal doctrine. Consequently, the resulting order was not legal but clerical in nature.

III. This Case is a Vehicle to Clarify Both the Main Circuit Split (When To Appoint Counsel on Appeal) and The Limits of Issue Estoppel.

The Supreme Court has held that:

> "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-467 (1952).

With Ms. Johnson-Luster's case, this Court can resolve the Circuit split regarding the application of issue estoppel regarding a court appointed attorney and bringing its direction to the circuit courts to be more in line with its criminal comparative, the Criminal Justice Act, which is more conclusive and unambiguous regarding criminal defendants. The lack of a civil statute dealing squarely with the issue means each District court and circuit court has its own jurisprudence on the issue. The Supreme court should however state the "core and unified," process necessary for Circuit court to remain unified on the issue (appointment of a court appointed attorney for an appellant at the circuit level when the District court has appointed such an attorney), in the absence of a statute like the CJA in terms of jurisprudence. This is not legislation of the bench but resolution of disparate and potentially unconstitutional circuit court decisions on the issue. Furthermore, such a decision by the Supreme Court will give notice to Congress to play its role in resolving this circuit conflict under the doctrine of separation of powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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