

23-7320

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
DEC 06 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

DARRIN ESPINOSA — PETITIONER
(Your Name)

vs.

CONTRA COSTA COUNTY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARRIN ESPINOSA
(Your Name)

193 COUNTRY CLUB LANE
(Address)

NAPA, CA, 94558
(City, State, Zip Code)

707 254-9300
(Phone Number)

QUESTION(S) PRESENTED

1. DOES A DISABLED PERSON HAVE THE RIGHT TO PERFORM A JOB EVEN THOUGH HE DOES NOT NEED ACCOMOCATIONS TO PERFORM ALL ESSENTIAL FUNCTIONS OF THE JOB?
2. IS TERMINATION AND WITHDRAWAL OF A CONDITIONAL OFFER OF WORK APPROPRIATE WHEN:
 - a. A WORKER'S COMPENSATION PHYSICIAN HAS NOTED LIMITATIONS THAT ARE PERMANENT AND STATIONARY, YET DO NOT IMPACT THE PERSON'S ABILITY TO PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB IN QUESTION. (THE PHYSICIAN RELEASE DID NOT STATE THAT MR. ESPINOSA COULDN'T CLIMB A LADDER).
 - b. MR. ESPINOSA WAS ABLE TO PERFORM ALL ESSENTIAL JOB FUNCTIONS OF BUILDING INPSECTOR FOR 2 YEARS SUBSEQUENT.
 - c. A PANEL OF PEOPLE WHO PERFORM THE JOB IN QUESTION, ALONG WITH THE INDIVIDUAL'S IMMEDIATE SUPERVISOR, QUESTIONED THE INDIVIDUAL AND REVIEWED A TWO-YEAR RECORD OF SATISFACTORY WORK PERFORMANCE AND THUSLY DETERMINED THAT HE WAS QUALIFIED AND ABLE TO PERFORM ALL ESSENTIAL FUNCTIONS OF THE JOB WITHOUT ACCOMODATION.
 - d. DESPITE A TWO-YEAR RECORD OF SAFELY CLIMBING LADDERS WHILE PERFORMING THE INDIVIDUAL WAS NEVER PROVIDED THE OPPORTUNITY TO PERFORM A FUNCTIONAL CAPACITY EXAMINATION.
 - e. TERMINATION OF THE INDIVIDUAL WAS BASED ON A PHYSICIAN'S REPORT WHO INTERPRETED A THIRD-PARTY SELF-REPORT QUESTIONNAIRE AND NEVER SAW OR SPOKE WITH THE PERSON IN QUESTION.
3. IS IT THE TEMPORARY EMPLOYEE'S RESPONSIBILITY TO TRACK THE NUMBER OF HOURS WORKED BY THE EMPLOYEE IN A TEMPORARY POSITION?
4. IS IT THE RESPONSIBILITY OF THE EMPLOYER TO TRACK THE NUMBER OF HOURS WORKED IN A TEMPORARY POSITION?
5. IS EXCEEDING THE NUMBER OF HOURS WORKED FOR A TEMPORARY POSITION CAUSE FOR TERMINATION?

6. IS EXCEEDING THE NUMBER OF HOURS WORKED FOR A TEMPORARY POSITION CAUSE FOR WITHDRAWAL OF A CONDITIONAL OFFER OF WORK?
7. DID EMPLOYER FAIL TO FOLLOW PROTOCOL FOR TEMPORARY POSITIONS, AND DID LIABILITY CONCERNS CAUSE THE COUNTY TO USE THIS ERROR AS A MEANS TO TERMINATE? (DISCRIMINATORY INTENT).

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APPENDIX A: Judgement – United States Court of Appeals for the Ninth Circuit

APPENDIX B: United States District Court - Northern District Court of California

APPENDIX C: Interactive Meeting Summary Re: Darrin Espinosa dated 4/19/2018

APPENDIX D: Notice of physician release identifying injury is permanent and stationary and states that Mr. Espinosa is “able to perform his usual and customary job duties of the position he held at the time of injury [Building Inspector]”. Attachment: Notice of Offer of Regular, Modified or Alternative Work dated 5/8/2018

APPENDIX E: Kaiser Permanente – Industrial Work Status Report by Dr. Carrie Chanson, dated 9/18/2018

APPENDIX F: Photographs of dog bite that caused initial injury taken 9/16/2016

APPENDIX G: Mr. Espinosa’s resume’ showing his professional certifications and work experience as a building inspector

APPENDIX H: Contra Costa County Letter of Recommendation as a Building Inspector dated 8/26/2014

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at SEPT 18 2023; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix 2 to the petition and is

reported at SEPT 8 2023; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

reported at JAN 10 2022; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the N-A court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPT 8 2023.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including JUNE 9 2022 (date) on MAY 9 2022 (date) in Application No. 1 A 1.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. 1 A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMERICA FOR DISABILITIES ACT:

1. MR. ESPINOSA IS A DISABLED PERSON UNDER THE STATUTES AS NOTED IN HIS PERMANENT AND STATIONARY LIMITATIONS NOTED IN HIS DOCTOR'S INDUSTRIAL WORK STATUS REPORT PREPARED BY CARRIE CHANSON 9/18/2018. (NO WHERE DID IT STATE HE COULDN'T CLIMB A LADDER).
2. MR. ESPINOSA SUFFERED AN ADVERSE EMPLOYMENT ACTION BASED ON HIS DISABILITY BY BEING TERMINATED FOR NO CAUSE.
3. MR. ESPINOSA WAS TERMINATED FROM HIS TEMPORARY POSITION AS BUILDING INSPECTOR 1 WITHOUT CAUSE, AND SUBSEQUENTLY HAD A CONDITIONAL OFFER OF EMPLOYMENT AS PERMANENT BUILDING INSPECTOR 1 WITHDRAWN.
4. MR. ESPINOSA, DESPITE HAVING FUNCTIONAL LIMITATIONS, PERFORMED ALL THE ESSENTIAL FUNCTIONS OF BUILDING INSPECTOR 1 WITHOUT ACCOMODATION FOR TWO YEARS POST INJURY.
5. THE DEFENDANT STATED IN THEIR CASE THAT HE COULD NOT PERFORM THE ESSENTIAL FUNCTIONS OF BUILDING INSPECTOR. DESPITE HIS DR'S RELEASE STATING HE COULD, AND THE FACT THAT HE PERFORMED THE JOB FOR TWO YEARS.
6. A PANEL OF BUILDING INSPECTORS AND MR. ESPINOSA'S IMMEDIATE SUPERVISOR CONCLUDED THAT MR. ESPINOSA HAS BEEN FOR TWO YEARS AND COULD CONTINUE TO PERFORM ALL ESSENTIAL FUNCTIONS OF BUILDING INSPECTOR 1 WITHOUT ACCOMMODATION. (SEE INTERACTIVE MEETING DATED 4/19/18).
7. MR. ESPINOSA WAS A QUALIFIED EMPLOYEE WITH A DISABILITY DUE TO HIS PERMANENT AND STATIONARY STATUS.
8. MR. ESPINOSA WAS TERMINATED FROM HIS TEMPORARY BUILDING INSPECTOR 1 POSITION AND HAD A CONDITIONAL OFFER OF WORK AS PERMANENT BUILDING INSPECTOR 1 WITHOUT ACCOMODATION. DESPITE THE FACT THAT HE COULD PERFORM AND HAD BEEN PERFORMING ALL ESSENTIAL FUNCTIONS OF JOB FOR TWO YEARS FOR NO CAUSE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CAL. F.E.H.A

1. MR. ESPINOSA IS A DISABLED PERSON UNDER THE STATUTES AS NOTED IN HIS PERMANENT AND STATIONARY LIMITATIONS NOTED IN HIS DOCTOR'S INDUSTRIAL WORK STATUS REPORT PREPARED BY CARRIE CHANSON 9/18/2018.
2. MR. ESPINOSA SUFFERED AN ADVERSE EMPLOYMENT ACTION BASED ON HIS DISABILITY BY BEING TERMINATED FOR NO CAUSE.
3. MR. ESPINOSA WAS TERMINATED FROM HIS TEMPORARY POSITION AS BUILDING INSPECTOR 1 WITHOUT CAUSE, AND SUBSEQUENTLY HAD A CONDITIONAL OFFER OF EMPLOYMENT AS PERMANENT BUILDING INSPECTOR 1 WITHDRAWN.
4. MR. ESPINOSA, DESPITE HAVING FUNCTIONAL LIMITATIONS, PERFORMED ALL THE ESSENTIAL FUNCTIONS OF BUILDING INSPECTOR 1 WITHOUT ACCOMODATION FOR TWO YEARS POST INJURY.
5. A PANEL OF BUILDING INSPECTORS AND MR. ESPINOSA'S IMMEDIATE SUPERVISOR CONCLUDED THAT MR. ESPINOSA HAS BEEN FOR TWO YEARS AND COULD CONTINUE TO PERFORM ALL ESSENTIAL FUNCTIONS OF BUILDING INSPECTOR 1 WITHOUT ACCOMMODATION. (SEE INTERACTIVE MEETING DATED 4/19/18).
6. MR. ESPINOSA PERFORMED OVER (8,000) INSPECTIONS POST-INJURY WITH NO COMPLAINTS, ACCIDENTS, OR SAFETY VIOLATIONS.
7. MR. ESPINOSA SUFFERED AN ADVERSE EMPLOYMENT ACTION BY BEING TERMINATED FROM HIS TEMPORARY BUILDING INSPECTOR 1 POSITION AND HAD A CONDITIONAL OFFER OF WORK AS PERMANENT BUILDING INSPECTOR 1 FOR NO CAUSE. DESPITE THE FACT THAT HE COULD PERFORM, AND HAD BEEN PERFORMING, ALL ESSENTIAL FUNCTIONS OF JOB FOR TWO YEARS

FACTS.

Appellate Darrin Espinosa was hired by Contra Costa County as a temporary Building Inspector on 9/16/2016 and was injured on his first day of work in a dog attack while attempting to perform his duties. Appellate's Direct Supervisor Garth Robertshaw was on-site and witnessed the attack. A workman's compensation claim was submitted for this injury. After healing Appellate's workman's compensation doctor (Dr. Chanson – Appellate's workman's compensation treating physician) imposed permanent work restrictions which limited the Appellate from reaching above his left shoulder for extended periods, and lifting, pushing, pulling with his left hand (reference Dr. Chanson's report dated 9/18/2018 for specifics).

Appellate returned to part-time work approximately two weeks later as he was, still having the dressing changed on his wounds every other day. Approximately two weeks after that he returned to full duty. Appellate commenced to work approximately 2 years as a temporary Building Inspector for Contra Costa County. During that time he completed inspections on a daily basis with no complaints, safety violations, or accidents.

While employed as a temporary Building Inspector Appellate twice applied for permanent employment as Building Inspector I. Appellate was provided with a conditional offer of work based on his ability to pass a functional capacity examination. The doctor who wrote the disqualifying report alleged that the limitations set by the Appellate's workman's compensation doctor meant that he could not climb a ladder safely and therefore he did not qualify for the classification of Building Inspector I. However, Appellate's workman's compensation doctor never stated that he could not limb a ladder. Even so, the County chose to withdraw the conditional offer of employment.

The Appellate returned to work and according to the County of Contra Costa he was to self-report if he was unable to perform his duties. Ct made no such report because he had no functional difficulty performing his duties as Building Inspector. Appellate followed all safety protocols for ladder climbing to include:

- Wearing safe shoes and clothing for the type of work expected to do
- Performed safety checks of the ladder prior to climbing
- Was mindful that the ladder was placed safely prior to climbing
- Maintained three-point contact with the ladder at all times
- Never climbed more than one rung at a time
- Did not over-extend or use too much force while climbing

There was an interactive meeting held on 4/19/2018 where the members of the Conservation and Development Department of Contra Costa County discussed the Appellate's ability to perform essential job functions without accommodations. It was determined by a panel of Building Inspectors that the Appellate was able to perform all essential functions of the job of Building Inspector [temporary]. The summary of this meeting was referenced in Dr Tom Gamsky's email sent on 7/12/2018 to Douglas Gorman and cc'd to Sue Madsen [Report of findings]. In this email Dr. Gamsky states, "there is an apparent conflict between the information reported in the 4/19/2018 interactive report and the essential functions which *I cannot resolve at this time.*"

Another interactive meeting was scheduled for September 20, 2018, but the Appellate's union representative was not available to make the time due to other engagements. (The County stated that Appellate refused to attend the meeting and that it was his responsibility to reschedule). The County formally withdrew their conditional offer of permanent employment on Oct 2, 2018. At

the same time the County terminated the Appellate's temporary employment stating that:

"Appellate has grossly exceeded the number of hours allowed for a temporary assignment."

Allow Appellate to resume working for Contra Costa County as a F/T classification Building Inspector I.

- Appellate was a qualified disabled person and was denied employment by Contra Costa County.
- Appellate
- Appellate was terminated from Contra Costa County as a direct result of the findings of his functional examination report prepared by Dr. Gamsky who never saw, nor spoke with Appellate.

REBUTTLE ARGUMENT

1. Appellate has shown that he is disabled via the work restrictions documented by the Appellate's Workman's Compensation treating physician (Dr. Chanson).
2. The County of Contra Costa failed to prove Appellate is NOT a qualified individual for the classification of Building Inspector I based on the following:
 - A. Dr. Gamsky assumed the Appellate's Workman's Compensation treating physician was his own Primary Care Provider with extended knowledge of the Appellate's health history.
 - B. Dr. Gamsky never saw, nor spoke with the Appellate. Instead, he relied on a self-report questionnaire with hand-written notes in the right-hand column that were penned by a Physician Assistant who actually performed the exam. The notes were based on the Physician Assistant's interpretation of the self-report questionnaire completed by the Appellate. Therefore, statement relative to the "self-report

questionnaire" should be null and void as they are not the thoughts/words of the Appellate.

- C. A panel of Building Inspectors discussed and reviewed the Appellate's case and determined that the Appellate had been, and continued to perform all essential functions of the Building Inspector I. According to the Appellate's Supervisor Appellate "Not only did his job, but he trained three other Building Inspectors."
- D. Appellate performed all essential functions of the classification of Building Inspector from one month after he was attacked by a dog up until his termination two years later. Not only did he perform these job functions, but he did so without complaint, safety violations, or accidents.

3. Appellate did suffer an adverse employment action [termination] based on his disability. Per the County, Appellate work grossly exceeded the time allotted for a temporary employee. Appellate was unaware that he had worked beyond the scope of his employment and neither his supervisors, nor Human Resources notified him of this error. Per the County, the Appellate's conditional offer of employment was officially withdrawn on the same date that the Appellate's "term of temporary employment" ended. It is obvious that the determination of Appellate not meeting the qualifications of the Building Inspector classification was directly linked to his termination of temporary employment.

REASONS FOR GRANTING THE PETITION

1. MR. ESPINOSA IS A DISABLED PERSON UNDER THE STATUTES AS NOTED IN HIS PERMANENT AND STATIONARY LIMITATIONS NOTED IN HIS DOCTOR'S INDUSTRIAL WORK STATUS REPORT PREPARED BY CARRIE CHANSON 9/18/2018. (NO WHERE DID IT STATE HE COULDN'T CLIMB A LADDER).
2. DECISION WAS BASED ON A 3RD PARTY INTERPRETATION OF SELF REPORT QUESTIONS DURING A POST-INJURY PHYSICAL
3. THE PHYSICIAN WHO WROTE THE DISQUALIFYING REPORT STATED I WAS NOT QUALIFIED TO DO THE JOB OF BUILDING INSPECTOR 1 NEVER PERFORMED AN IN-PERSON PHYSICAL OR SPOKE WITH ME DIRECTLY. THE PHYSICAL CONCLUDED THAT MR. ESPINOSA WAS UNABLE TO PERFORM THE DUTY OF CLIMBING A LADDER WITHOUT A FAILED FUNCTIONAL CAPACITY EXAMINATION OR CONSULTATION WITH MR. ESPINOSA OR HIS WORKER'S COMPENSATION PHYSICIAN.
4. I WAS NEVER GIVEN AN OPPORTUNITY TO TAKE AND/OR PASS THE FUNCTIONAL CAPACITY EXAMINATION. DESPITE A TWO-YEAR RECORD OF WORK PERFORMANCE WHICH INCLUDED CLIMBING LADDERS WITH NO ACCOMODATIONS, INJURIES, ACCIDENTS OR SAFETY ISSUES.
5. I ATTENDED AN INTERACTIVE MEETING BETWEEN MYSELF, MY IMMEDIATE SUPERVISOR, AND A PANEL OF BUILDING INSPECTORS. THE CONCLUSION OF THE PANEL WAS THAT EVEN THOUGH I HAVE A PHYSICAL DISABILITY I AM ABLE TO SAFELY COMPENSATE AND NEED NO ACCOMODATIONS TO PERFORM THE JOB DUTIES OF BUILDING INSPECTOR 1. THIS DECISION WAS BASED ON MR. ESPINOSA'S JOB PERFORMANCE OF THE PAST TWO YEARS (POST-INJURY) WHERE HE PERFORMED ALL ESSENTIAL DUTIES OF THE JOB WITH NO ACCOMODATION, COMPLAINTS, ACCIDENTS, OR SAFETY ISSUES.
6. CONTRA COSTA COUNTY STATED THAT MR. ESPINOSA DID NOT ATTEND A SECOND INTERACTIVE MEETING BECAUSE HIS UNION REPRESENTATIVE WAS UNABLE TO ATTEND. THE COUNTY STATES THAT IT WAS MR. ESPINOSA'S DUTY TO RESCHEDULE THE MEETING. MR. ESPINOSA WAS NEVER MADE AWARE OF THIS; AND AS THE COUNTY SCHEDULED THE FIRST TWO INTERACTIVE MEETINGS IT WAS NOT REASONABLE FOR HIM TO CONCLUDE IT WAS HIS RESPONSIBILITY.
7. CONTRA COSTA COUNTY THEN STATED THAT MR. ESPINOSA HAD "GROSSLY" EXCEEDED THE NUMBER OF HOURS ALLOWED AS A TEMPORARY EMPLOYEE. THIS WAS NOT THE FAULT OF MR. ESPINOSA,

BUT A FAILURE TO ACT BY CONTRA COSTA COUNTY HUMAN RESOURCES. CONTRA COSTA COUNTY UTILIZED THIS LOOPHOLE TO WITHDRAW THE CONDITIONAL WORK OFFER OF PERMANENT BUILDING INSPECTOR 1 AND TERMINATE HIS TEMPORARY EMPLOYMENT WITHOUT CAUSE. DESPITE PROVING HIS ABILITY TO PERFORM THE JOB, HIS WORK ETHIC, AND BEING A PRODUCTIVE MEMBER OF THE BUILDING INSPECTOR TEAM CONTRA COSTA COUNTY PERFORMED AN ADVERSE EMPLOYMENT ACTION BY TERMINATING A DISABLED EMPLOYEE WHO HAD BEEN PERFORMING HIS DUTIES TO THE FULLEST IN ORDER TO AVOID LIABILITY.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DARRIN RALPH ESPINOSA


Date: 12-6-2023