No. 23-7400

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE J. REYNARD

Petitioner,

v.

WASHBURN UNIVERSITY OF TOPEKA

Respondent.

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

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Was the lower court's grant of summary judgment on Reynard's failure to accommodate proper ?

II. Was the lower court's ruling to limit the actionable discrete acts based on Reynard's failure to exhaust administrative remedies, which was asserted and preserved in Washburn's Answer to Reynard's First Amended Complaint and in the Pretrial Order, proper ?

## CORPORATE DISCLOSURE STATEMENT

Washburn University of Topeka is a municipal university and governmental entity.

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## STATEMENT OF THE CASE

This case revolves around Petitioner Leslie J. Reynard's (Reynard) grievances about two things: Respondent Washburn University of Topeka's (Washburn) implementation of performance improvement plans originating from faculty and student complaints about Reynard's behavior and the ADA interactive process for reasonable accommodations. The U.S. District Court for the District of Kansas found Reynard's claims meritless and granted Washburn summary judgment. The Tenth Circuit Court of Appeals affirmed the judgment of the lower court.

The Petition for Writ of Certiorari (Petition) should be denied for the following reasons: (a) the lower court applied the legal standard that Reynard asserts is applicable, so there is no compelling reason for review; (b) the lower court issued alternative rulings in favor of Washburn so the outcome does not change if the Petition is granted; and (c) the questions presented were not raised in response to Washburn's summary judgment and should not be first raised on appeal.

## STATEMENT OF FACTS

Washburn disagrees with several factual assertions in Reynard's Procedural Background and Petition. This statement includes only those misstated or necessary facts pertinent to the issues raised in the Petition.

On August 29, 2017, Reynard notified Washburn's Chair of the Communications Studies department that her classes were in Henderson Hall instead of Morgan Hall and stated, "This is a formal ADA request that my courses

and that my classes be assigned to Morgan Hall in future semesters unless there is a compelling reason why they cannot be."[1] Reynard's email did not mention light sensitivity, a request to utilize the classrooms assigned to the debate team or a request to teach her course on Washburn's online platform.

On December 4, 2019, Reynard filed her First Amended Complaint which demarcated her pre-2018 allegations "Washburn's Past Discrimination and Retaliation Against Plaintiff" and post-April 2018 allegations as "Washburn's Currently Actionable Discrimination and Retaliation".[2]

Washburn filed a motion to dismiss the First Amended Complaint, among other points, for Reynard's pre-2018 allegations for failure to exhaust her administrative remedies. The lower court denied the motion because Reynard had clearly noted in her response to the Motion to Dismiss that the amended complaint does not assert claims covering conduct before April 2018.[3]

On March 19, 2020, Washburn timely asserted that Reynard's claims were barred for failure to exhaust administrative remedies in its answer to Reynard's First Amended Complaint.[4]

In the April 5, 2022 Pretrial Order, Washburn preserved its defenses concerning the scope of actionable allegations to those occurring between April 2018

[1] Memorandum and Order, Doc. 160 at 7.
[2] First Amended Complaint, Doc. 31 at 5, 11.
[3] Plaintiff's Opposition to Defendant's Motion to Dismiss, Doc 41 at 5,16; Order, Doc. 51 at 3-4.
[4] Defendant's Answer to First Amended Complaint, Doc. 52 at 6.

and December 2019.[5] At the pretrial conference, Reynard was provided the opportunity to propose amended claims, which she elected not to submit.[6]

The Pretrial Order details Reynard's claims as follows:

1. Washburn took adverse employment actions against Reynard in violation of the ADA by discriminating against her based on a disability (Claim 1 on the complaint in 20-CV-02219).
2. Washburn failed to reasonably accommodate Reynard's disability in violation of the ADA. (Claim 1 of the complaint in 20-CV-02219).
3. Washburn retaliated against Reynard for engaging a protected activity in violation of Title VII, the ADA, and the ADEA. (Claim 2 of the complaint in 20-CV-02219).[7]

Washburn filed its Motion for Summary Judgment on April 20, 2022, which clearly asserted Reynard's failure to exhaust her administrative remedies.[8] Washburn included uncontroverted facts based on Reynard's email correspondence with Washburn staff which showed that the "classroom assignment" mix-up occurred in 2017, not 2018.[9]

Reynard filed her Motion for Leave to File a Second Amended Complaint on August 28, 2022, which did not raise issues of equitable tolling and continued

[5] Pretrial Order, Doc. 131 at 10.
[6] Pretrial Order, Doc. 131 at 13, FN.1.
[7] Pretrial Order, Doc. 131 at 13.
[8] Motion for Summary Judgment, Doc. 136. Defendant Washburn University of Topeka's Memorandum In Support of Its Motion for Summary Judgment, Doc 137 at 34-35.
[9] Defendant Washburn University of Topeka's Memorandum In Support of Its Motion for Summary Judgment, Doc. 137 at 27-29.

violations.[10] Rather, Reynard asserted that she was correcting the date of the classroom assignment mix-up from 2018 to 2017 and was not adding "new claims, new legal theories, new arguments, or new evidence."[11] She also noted that the parties had previously discussed her error during a telephone status conference many months prior.[12]

On August 29, 2022, District Court Judge Teeter's chambers emailed Washburn's counsel and Reynard requesting that Washburn's counsel confirm that the "correct date for the 'classroom episode' is 2017 and not 2018. Please confirm. If the parties do agree, she is inclined to deny Ms. Reynard's motion to amend as moot based on these representations."[13] Washburn's counsel confirmed that it agreed the alleged "classroom episode" occurred in 2017. Reynard did not respond to the email.

On August 29, 2022, the lower court denied Reynard's Motion for Leave to File a Second Amended Complaint as moot because the parties had used the corrected date long before Reynard's request to amend. The lower court noted that the "pretrial order – not the amended complaint – now controls the case. And, via email with the parties, Defendant agrees "the alleged 'classroom episode' occurred in 2017." Based on these reasons, Plaintiff has not shown a valid or necessary basis for filing a second amended complaint at this stage of the proceeding."[14]

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[10] Motion for Leave to File Second Amended Complaint Under F.R.C.P. 60, Doc. 153, with proposed amended pleading attached.
[11] Motion for Leave to File Second Amended Complaint under F.R.C.P. 60, Doc. 153 at 3.
[12] Motion for Leave to File Second Amended Complaint under F.R.C.P. 60, Doc. 153 at 3.
[13] Petition, Appendix J.
[14] Doc. 155 (text entry only).

On September 6, 2022, Reynard filed her Motion for Leave to File a Surreply in Opposition to Defendant's Motion for Summary Judgment. Then, on September 10, 2022, Reynard filed her surreply out of time.[15] The lower court denied Reynard's Motion for Leave as untimely and, alternatively, denied it on the merits because Washburn did not inappropriately raise new arguments in its reply brief.[16]

Reynard filed this Petition on April 12, 2024. On April 15, 2024, Reynard mailed a letter to the Office of the Clerk of the Supreme Court of the United States attempting to file a "corrected" Petition. The April 12, 2024 Petition was placed on the docket on May 7, 2024, to which Washburn responds in this Brief in Opposition. The April 15 corrected Petition has not been docketed. Washburn requests the opportunity to respond, if necessary, should the corrected Petition be docketed.

[15] Plaintiff's Motion for Leave to File a Surreply in Opposition to Defendant's Motion for Summary Judgment, Doc. 156; Plaintiff's Surreply Brief in Opposition to Defendant's Motion for Summary Judgment. Doc. 158.
[16] Memorandum and Order, Doc. 160 at 2.

## REASONS FOR DENYING CERTIORARI

### I. THE LOWER COURT'S DECISION APPLIED REYNARD'S REQUESTED LEGAL STANDARD SO THERE ARE NO COMPELLING REASONS FOR THIS COURT'S REVIEW.

Reynard's assertion that the lower court erroneously required adverse employment action is a misstatement. Nowhere in its opinion does the lower court require that Reynard suffer from an adverse employment action in its analysis of her Americans with Disabilities Act (ADA) failure to accommodate claim. Rather, the lower court correctly applied the proper standard – that (1) Reynard was disabled under the ADA; (2) she was "otherwise qualified"; and (3) she requested a "plausibly reasonable accommodation."[17]

Reynard also mistakenly asserts that her claims consist of three ADA violations and no Age Discrimination in Employment Act (ADEA) or Title VII of the Civil Rights Act (Title VII) violations.[18] This inaccuracy causes her arguments to be based on the faulty premise that the lower court "repeatedly confused the two sets of standards [ADA with ADEA and Title VII].[19] The Pretrial Order shows that Reynard claimed retaliation against her for engaging in protected activity in violation of Title VII, ADA, and ADEA.[20] The lower court correctly found that her ADA and ADEA

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[17] Memorandum and Order, Doc. 160 at 27 (citing *Punt v. Kelly Servs.*, 862 F.3d 1040, 1050 (10th Cir. 2017)).

[18] See Reynard's assertion that "the lower court found that Title VII discrimination had not been proven, even though Dr. Reynard's claims were and are solely for ADA discrimination, retaliation, and failure to accommodate." Petition at 4.

[19] Petition at 12.

[20] Pretrial Order, Doc. 131 at 13.

retaliation claims were not viable since Reynard only sought compensatory and punitive damages. Her claims for Title VII retaliation remained for consideration.[21]

The lower court properly analyzed Reynard's Title VII claim that Washburn retaliated against her for engaging in protected activity under the *McDonnell Douglas*[22] burden-shifting framework.[23] Under that framework, a plaintiff must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action during or after her protected activity, which a reasonable employee would have found materially adverse; and (3) there was a causal connection between the protected activity and the adverse action.[24] After analysis, the lower court found that Reynard failed to demonstrate she suffered an adverse employment action as required for a Title VII retaliation claim.[25]

Through the lens of her faulty assertions that she did not state a claim for Title VII retaliation and that the lower court's analysis imposed incorrect elements upon her prima facie case, Reynard asserts that this court must resolve a "split [in the circuits] on the issue of failure to accommodate claims." However, the lower court did not, as argued, "def[y] the clear authority" of the Tenth Circuit. Instead, the lower court correctly noted that "[f]ailure to accommodate claims are not analyzed under the *McDonnell Douglas* framework; rather the Tenth Circuit has developed a

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[21] Memorandum and Order, Doc. 160 at 16-17.
[22] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[23] *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 514 (10th Cir. 2015) (*McDonnell Douglas* burden-shifting analysis applies where a plaintiff only has indirect or circumstantial evidence of discrimination).
[24] *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1219 (10th Cir. 2013).
[25] Memorandum and Order, Doc. 160 at 18-20.

modified burden-shifting framework under which courts are to assess such claims."[26] The lower court examined Reynard's Title VII claim using the exact standards she now argues it should have used. There is no controversy for this Court to address and it should decline to do so.

Reynard argues that her petition should be granted because the issues presented are important to disabled pro se litigants. This case, however, is fact specific and was decided by the lower court on settled law, not on her misstated analysis of the lower court's decision. A decision here would not have the real-world impact that Reynard desires because any perceived split in the circuits has no bearing on the uncontroverted facts. More importantly, she would not be entitled to the relief she seeks because the lower court applied the legal standard that Reynard asserts is applicable, making her petition moot on this point. Consequently, there are no compelling reasons for review and this Court should decline Reynard's invitation to grant her Petition.

## II. THE LOWER COURT ISSUED ALTERNATIVE RULINGS IN FAVOR OF WASHBURN SO THERE WOULD BE NO CHANGE IN THE OUTCOME IF HER PETITION WAS GRANTED.

The questions presented by Reynard for this Court's consideration are based on the August 2017 classroom assignment mix-up. At summary judgment, the lower court ruled that the temporal scope of the case was limited to the actionable discrete acts occurring between October 18, 2017 and December 2019.[27] That ruling excluded

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[26] Memorandum and Order, Doc. 160 at 27 (citing *Punt v. Kelly Servs.*, 862 F.3d 1040, 1050 (10th Cir. 2017)).

[27] Memorandum and Order, Doc. 160 at 15 (citing *Al-Ali v. Salt Lake Cmty. Coll.*, 269 F. App'x 842, 846 (10th Cir. 2008)).

the classroom assignment mix-up as an actionable discrete act. Even so, the lower court analyzed Reynard's allegations regarding that classroom assignment mix-up as though it were actionable and still found that Reynard failed to meet her burden on her Title VII retaliation or failure to accommodate claims.[28]

In a Title VII retaliation claim, Reynard must meet three prima facie elements. Washburn did not dispute that Reynard engaged in protected activity. The lower court then analyzed the second element – whether Reynard had suffered a materially adverse employment action – and found that she did not. Then, "to assure Plaintiff it has fully considered the merits of her claims, the Court proceeds with the full *McDonnell Douglas* analysis."[29] The lower court then found that even assuming, *arguendo*, Reynard was able to establish she was subjected to a materially adverse employment action, she could not establish the third element of causation and her "retaliation claim fails for this alternative reason."[30]

The lower court then continued examination of Reynard's Title VII retaliation claim as though she had established a prima facie case. Because Washburn was found to have offered legitimate, nondiscriminatory reasons for its actions, Reynard then had the burden to show pretext.[31] The lower court then determined that Reynard failed to show that Washburn's proffered explanations were "more likely" pretexts for discrimination.[32] As to the "classroom assignment" issue, Reynard compared herself

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[28] Memorandum and Order, Doc. 160 at 15, FN 9.
[29] Memorandum and Order, Doc. 160 at 20.
[30] Memorandum and Order, Doc. 160 at 20-22.
[31] Memorandum and Order, Doc. 160 at 22.
[32] Memorandum and Order, Doc. 160 at 22 (citing *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007)).

to Schnoebelen in that his classrooms were moved more quickly than hers were in 2017. But she "offers nothing but speculation for the reason and fails to show that he and she are similarly situated."[33] In conclusion, the lower court found that "[p]laintiff has presented no evidence suggesting an issue of material fact exists about whether Defendant's actions were retaliatory in nature. And no reasonable jury could find in her favor on this record."[34]

Similarly, the lower court found that Reynard's failure to accommodate claim failed for untimeliness since it relied on allegations occurring prior to October 18, 2017. Just as with the Title VII retaliation claim, the lower court went on to analyze the claim as though the classroom assignment mix-up was an actionable discrete event. Again, the lower court found summary judgment was proper because the uncontroverted facts showed that Washburn made a good faith effort to identify and make a reasonable accommodation. Washburn made those good faith efforts to comply with the ADA not only in 2017 when it found a new classroom for Reynard but again in October 2018 and twice in 2019.[35]

Finally, the lower court determined that Reynard's failure to accommodate claim also failed because Washburn provided several actual accommodations to Reynard including an accommodation for the classroom assignment mix-up.[36]

In sum, the lower court alternatively analyzed Reynard's Title VII retaliation claim and her failure to accommodate claim and found that her claims failed as a

[33] Memorandum and Order, Doc. 160 at 24.
[34] Memorandum and Order, Doc. 160 at 25.
[35] Memorandum and Order, Doc. 160 at 28-29.
[36] Memorandum and Order, Doc. 160 at 29-30.

matter of law even though Reynard based those claims on the unactionable August, 2017 classroom assignment mix-up. As a result, Reynard's assertions of error to this Court are moot because the lower court made multiple alternative rulings that demonstrate summary judgment was proper. If granted, certiorari would not change the outcome here.

## III. THE QUESTIONS PRESENTED IN REYNARD'S PETITION MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Reynard did not raise her questions presented here in her response to Washburn's motion for summary judgment and now those issues should not be considered by this Court on appeal. It is the general rule that a federal appellate court does not consider an issue not passed upon below.[37] While the federal appellate court has discretion in what questions may be taken up and resolved for the first time on appeal, those are exercised on the facts of individual cases "when the proper resolution is beyond any doubt" or where "injustice might otherwise result."[38] The Tenth Circuit exercised such restraint on a similar question when it did not consider Reynard's arguments on the application of continuing violation and equitable tolling doctrines to remove the time bar from her claims.[39]

## IV. REYNARD'S ADDITIONAL MISSTATEMENTS OF LAW FURTHER DEMONSTRATE HER PETITION SHOULD BE DENIED.

In addition to those legal and factual misstatements noted above, Reynard makes misstatements of law that Washburn notes here in compliance with Rule 15.2.

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[37] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *EFLO Energy V. Devon Energy Corp.*, 66 F.4th 775, 792 (10th Cir. 2023).
[38] *Singleton*, 428 U.S. at 120.
[39] Order and Judgment, Document 010110930674 at 5; Petition, Appendix A at 5.

A. Reynard misstates the legal standards for a failure to accommodate claim.

Reynard asserts several erroneous legal standards, devoid of citation, in arguing why the Court should find that Washburn failed to accommodate. She declares the elements of a failure to accommodate claim are "1. A plaintiff show (sic) she is a qualified individual with a disability; 2. The covered employer must be aware of the plaintiff's disability; and 3. The employer failed to provide the requested reasonable accommodation."[40] Reynard continues, "these elements can be established through direct evidence; there is no need to use a burden-shifting analysis framework such as *McDonnell-Douglas"*.[41] Reynard concludes that "the only defense an employer can raise to the third element is that it would present undue hardship to the employer."[42]

Reynard's assertions are either misstatements or a misunderstanding of the Tenth Circuit's analytical framework for analyzing failure to accommodate claims discussed at length in *Punt v. Kelly Services*.[43] There, the Tenth Circuit explained the *McDonnell Douglas* burden-shifting analysis as inappropriate for failure to accommodate claims because "the purpose of [that] test is to determine whether a reasonable fact-finder could infer from the circumstantial evidence that the employer's motives were discriminatory, and in a failure-to-accommodate case there

[40] Petition at 5. Reynard restates these incorrect elements with some variation on page 7 as: "1. a qualified disabled employee requests reasonable accommodations; 2. that the employer is aware of the employee's disability and need to accommodate to manager(sic) her limitations on the job, and 3. the employer failed to provide the requested reasonable accommodation."
[41] Petition at 5.
[42] Petition at 8.
[43] 862 F.3d 1040 (10th Cir. 2017).

is no need for the employee to prove what the employer's motives were at all."[44] As noted above, the lower court applied the correct legal standard in analyzing Reynard's failure to accommodate claim.

B. Reynard contends her EEOC inquiry is the legal equivalent of an EEOC charge.

Reynard declares without legal authority that her EEOC inquiry is the legal equivalent of an EEOC charge. Her assertion is without merit. EEOC regulations are clear that an online inquiry and administrative charge are not one and the same.[45] Even if Reynard started an online inquiry, it was not signed or verified and does not identify the remedy sought from the EEOC.[46] Reynard failed to produce evidence showing she did anything more than file an online inquiry.[47]

[44] *Punt*, 862 F.3d 1040 at 1049.
[45] See *Gully v. District of Columbia*, 474 F. Supp. 3d 154, 165-66 (D.D.C. 2020) (comparing 29 C.F.R. § 1614.105 with 29 C.F.R. § 1614.106).
[46] See generally *Martinez v. Prairie Fire Dev. Group, LLC*, 2019 WL 3412264 at *3 (D. Kan. 2019) (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008)).
[47] See *Anderson v. AHS Hillcrest Med. Ctr., LLC*, No. 19-CV-468-TCK-JFJ, 2021 WL 3519280, at *6-8 (N.D. Okla. Aug. 10, 2021) (denying pro se plaintiff's claim that her inquiry constituted a Charge or that it should be equitably tolled).

## CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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