

IN THE
Supreme Court of the United States

RAYMOND ZDUNSKI,

Petitioner,

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS BOCES, *et al.*,

Respondents.

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

**RESPONSE TO MOTION TO FILE PETITION
FOR WRIT OF CERTIORARI OUT OF TIME**

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Preliminary Statement

Petitioner, RAYMOND ZDUNSKI is seeking an Order to direct the Clerk of this Court to accept the filing of a late Petition for a Writ of Certiorari for this matter of which the Court of Appeals affirmed the decision of the Hon. Geoffrey W. Crawford, J.S.C., granting Respondents, ERIE 2-CHAUTAUQUA-CATTARAUGUS BOCES, DAVID O'ROURKE, in his official capacity, JOHN O'CONNOR, in his official capacity, BRIAN LIEBENOW, LAURIE BURGER, and TRACY SMITH-DENGLER's (hereinafter referred to as "Respondents") Motion for Summary Judgment. *See* Petitioner's Notice of Motion. This Memorandum of Law is submitted in opposition to the Petitioner's Motion.

Statement of the Case

Respondents respectfully submit this Statement of the Case, setting forth what Respondents deem important to be considered. Petitioner never provided an affidavit identifying any specific reasons why it could not present facts essential to justify its opposition as required by Rule 56(d). Special Appendix SPA-8. Additionally, all prior discovery delays largely resulted from Petitioner's counsel joining a new law firm, undertaking an "extremely busy" schedule, and falling "woefully behind in meeting the agreed upon discovery deadlines." Special Appendix SPA-9; R. at A-128.

Petitioner's counsel was the sole reason discovery was not completed in the District Court action due to the willful failure to abide by the multiple Scheduling Orders, and the Petitioner counsel's attempt to cast blame upon the District Court and Respondents was misplaced and simply not true. Petitioner's counsel is now, again, placing the blame for her failure to timely file and initiate a legal proceeding, on persons other than herself.

It has been clearly and continuously documented and preserved in the prior proceedings that the Petitioner willfully disregarded the Scheduling Orders, numerous mailings, and telephone messages from Respondents regarding attempts to resolve discovery issues. In fact, the District Court astutely and correctly noted that Petitioner had the opportunity to confront the named witnesses in deposition, but no evidence was found that he ever attempted to do so. Special Appendix SPA-9 and 10. This finding was affirmed by the Court of Appeals.

Petitioner's counsel previously asserted that Respondents were precluded meaningful discovery in this case, and the District Court found that the Petitioner had not been deprived of discovery materials sufficient to support a delay in judgment because no evidence was proffered to show that the lack of meaningful and complete discovery was any party's fault other than the Petitioner. Special Appendix SPA-7 – 10.

After not having responded to numerous requests for Discovery Demand Responses, the District Court ordered a Discovery Schedule to be followed, which the Petitioner failed to adhere to. R. at A-127 – A-128; A-140 – A-142.

Petitioner was provided numerous opportunities to complete discovery, including taking the depositions of the Respondents. However, Petitioner failed to take any steps whatsoever to facilitate and/or complete discovery, including following multiple Scheduling Orders. As a result, Petitioner's repeated failure to adhere to the Scheduling Orders forced the District Court to decide as it did on the Petitioner's cross-motion to extend the time to complete discovery. The District Court also made its determination on the merits of the case.

There should be no question that the Petition for a Writ of Certiorari was due on June 11, 2023, which is 90 days from March 13, 2023. *See* Summary Order of the United States Court of Appeals for the Second Circuit for Raymond Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES, et al.

Courts have been continuously subjected to Petitioner's "unusual circumstances," which are no more than Petitioner's failure to accurately and appropriately calculate and adhere to the applicable deadlines.

Therefore, this Court should deny Petitioner's Motion for an Order of this Court to accept the filing of a late Petition for a Writ of Certiorari.

Lastly, Respondents are compelled to respond to Petitioner's inaccurate summation of the issue present in this case. Petitioner is seeking to hold Respondents liable for an alleged failure to provide Petitioner with an accommodation and his subsequent employment termination for willful noncompliance. *See* Petitioner's [Plaintiff-Appellant] Appeal Brief, pg. 9-10.

Title VII does not require Respondents to accommodate Petitioner's religious beliefs because the accommodation would impose an undue hardship on the employer's business operations.

Petitioner was advised that the training was necessary to teach all employees, regardless of their religious beliefs, the appropriate way to support and interact with that community.

All Respondents' employees were required to attend the mandatory training, and it was specifically noted in the New York State Division of Human Rights determination that the training was not religious but related to preventing discrimination in the workplace. R. at A-251, A-434.

Further, there is no evidence that other employees requested accommodations and whether those were granted or denied.

The process behind Petitioner's termination was in accordance with the termination proceedings followed by Respondents and documented in the previous pleadings. R. at A-357 – A-360, A-365.

Finally, the Court of Appeals properly affirmed that even drawing all reasonable inferences in Petitioner's favor, none of the facts alleged support the claim that his termination was tainted by an inference of unlawful discrimination. Special Appendix SPA-17.

Petitioner's Motion statement that his employment was terminated because he was a Christian are simply untrue and contradicted by the evidence that has been presented to all courts.

The District Court correctly dismissed Petitioner's Complaint, stating that unsupported factual allegations contained in a complaint are not evidence, and the Court of Appeals properly affirmed that decision. Special Appendix SPA-17 – SPA-19.

Argument

Point I

Petitioner's Application to File a Late Writ of Certiorari Must be Denied.

Pursuant to Rule 13 of the Supreme Court Rules, a Petition for a Writ of Certiorari to review a civil judgment in any case is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. *See 28 U. S. C. §2101(c).* Petitioner is jurisdictionally out of time in the instant matter and has, again, provided no reasonable excuse or good cause for this Court to grant the Order other than the Petitioner was unable to

calculate the filing date. The Petitioner was not late by one (1) or (2) days, but over three (3) weeks. *See Petitioner's Declaration in Support*, paragraphs 5-6. The Supreme Court Rules are regularly accessible, especially to an attorney of law. The Court of Appeals judgment was entered on March 13, 2023, so there is no question that Petitioner's Petition for a Writ of Certiorari was due on June 11, 2023.

As previously stated, 28 U.S.C. § 2101(c) requires that a Petition for Certiorari in a civil case be filed within 90 days of the entry of the judgment below. The 90-day limit is “mandatory and jurisdictional”, and the Court has no authority to extend the period for filing except as Congress permits. *Missouri v. Jenkins*, 495 U.S. 33 (1990). Respondents have no knowledge of any rule or regulation of Congress that would permit Petitioner's late Application.

Further, Rule 13.5 of the Supreme Court Rules acknowledges that an extension may be sought to file a late Petition for a Writ of Certiorari, but in that application the Petitioner must set out specific reasons why an extension of time is justified.

Respondents disagree with Petitioner's statement that their prayer for an Order is an “unusual circumstance,” as Respondents, and other courts, have been continuously subjected to these same types of “unusual circumstances,” which is essentially Petitioner's failure to accurately and appropriately calculate and adhere

to the applicable deadlines, and attempt to pass the blame on any other party or person for this failure.

Therefore, this Court should deny Petitioner's Motion for an Order of this Court to accept the filing of a late Petition for a Writ of Certiorari.

Point II

Petitioner's Continued Failure to Conduct Meaningful Discovery in the Previous Proceedings Requires this Court to Deny Petitioner's Application to File a Late Writ of Certiorari.

Previously, Petitioner argued that it was clear abuse of discretion for the District Court to deny discovery to Petitioner when the discovery deadline had not yet elapsed pursuant to the So-Ordered Discovery Schedule. *See* Petitioner's [Plaintiff-Appellant] Appeal Brief, pg. 8-9. It is well-settled a plaintiff's failure to seek any discovery in the time provided by a district court's scheduling order and failure to show good cause for a reopening or extension of that order, is not an abuse of discretion of the lower court in cutting off discovery. *Gray v. Darien*, 927 F.2d 69 (2d Cir. 1991). The Petitioner failed to provide any affidavits indicating why additional time was needed for the completion of discovery.

Rule 37 of the Federal Rules of Civil Procedure provides that if a party fails to obey an order to provide or permit discovery, the court where the action is pending may issue further just orders, including dismissing the action or proceeding in whole or in part. Courts have previously interpreted "willfulness," to refer to conduct that

is more than merely negligent or careless but is instead egregious and not satisfactorily explained. *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Constr., LLC*, 779 F.3d 182 (2d Cir. 2015).

Petitioner's Rule 26 Disclosures, which were dated July 7, 2021, included a list of individuals likely to have discovery information, internal BOCES human resources correspondence and documentation, BOCES policies and procedures, records of Petitioner's application for unemployment benefits, and extensive documentation from the prior proceedings before the New York State Division of Human Rights, which Respondents note contained the same affidavits submitted in support of Respondents' previously granted Motion for Summary Judgment. R. at A-287 – A-291. Further, this was all information that Petitioner's counsel had within her possession as the attorney of record for the prior administrative proceedings for this matter.

Petitioner's counsel failed to depose any witnesses within the set discovery schedule, having had ample time and opportunity to notice a deposition, and continually and willfully failed to abide by the multiple Scheduling Orders. Special Appendix SPA-10.

In fact, previously Petitioner's counsel argued their lack of communication with Respondents was because Respondents did not send correspondences via electronic mail ("email"), but at no point did counsel for Petitioner request

correspondence be sent via email only or that she was unable to be reached by postal mail. R. at A-115.

Point III

This Court Must Deny the Petitioner's Application to File a Late Petition for a Writ of Certiorari as all Previous Courts Have Found No Disputed Issues of Material Fact.

Respondents are compelled to respond to Petitioner's inaccurate summation of the issue present in this case.

Petitioner is seeking to hold Respondents liable for an alleged failure to provide Petitioner with an accommodation and his subsequent employment termination for willful noncompliance. *See* Petitioner's [Plaintiff-Appellant] Appeal Brief, pg. 9.

As set forth in Respondents' previous pleadings filed with the Division of Human Rights and our Motion for Summary Judgment, all which were decided in Respondents' favor, Title VII does not require Respondents to accommodate Petitioner's religious beliefs because the accommodation would impose an undue hardship on the employer's business operations. Respondents initiated the training as a District-wide response to changing cultural norms after it was brought to the attention of administration that an employee would be undergoing the process of transitioning. R. at A-432.

Petitioner was advised that the training was necessary to teach all employees, regardless of their religious beliefs, the appropriate way to support and interact with that community. R. at A-432. Petitioner has continually failed to provide any Court with factual or legal arguments to the contrary. There has been no evidence or argument provided that can show or demonstrate the subject training was going to undermine any type of religious beliefs, and that it was not merely going to provide information on how every employee can interact with a “transitioning” employee.

All Respondents’ employees were required to attend the mandatory training, and it was specifically noted in the New York State Division of Human Rights determination that the training was not religious but related to preventing discrimination in the workplace. R. at A-251, A-434.

The training was necessary to teach all employees the appropriate way to support and interact with that community. The substance of the training had been provided numerous times to the Petitioner, and then confirmed in the Division of Human Rights Decision, so there is no issue of material fact as to the substance of the training and how it satisfied the stated objectives for said training.

Further, there is no evidence that other employees requested accommodations and whether those were granted or denied. Specifically, two (2) other employees vocalized that they shared Petitioner’s view, but they attended the training because it was mandatory. R. at A-352.

Lastly, the process behind Petitioner's termination was in accordance with the termination proceedings followed by Respondents and documented in the previous pleadings. R. at A-357 – A-360, A-365. Petitioner was directed to attend the training sessions and when he did not attend, a counseling session took place with Petitioner and his Union Representative. Petitioner signed off on a Counseling Memorandum following the session, but then failed to appear for the make-up training session. Petitioner acknowledged that his refusal to attend the training would constitute insubordination and he could be terminated as a consequence. R. at A-357 – A-360, A-365. Petitioner has continually failed to provide any evidence or legally sound argument that he was not afforded any due process for his termination. Special Appendix SPA-25 – SPA-27.

Finally, the Court of Appeals properly affirmed that even drawing all reasonable inferences in Petitioner's favor, none of the facts alleged support the claim that his termination was tainted by an inference of unlawful discrimination. Special Appendix SPA-17. Rather, the facts alleged make clear that Respondents terminated Petitioner in response to his failure to comply with his employer's policy mandating anti-discrimination training, even after Petitioner was made aware that his misconduct could result in termination. Special Appendix SPA-17.

Given the ample evidence provided in the previous proceedings, the claim Petitioner was not afforded an accommodation, that the mandatory training violated

his religious beliefs, that he was not afforded proper process for his termination, and Petitioner's statement that his employment was terminated because he was a Christian are simply untrue and contradicted by the evidence that has been presented to all courts.

In sum, no facts support a finding that Petitioner was terminated because of his religion; rather, the overwhelming evidence supports Respondents' position that his termination was due to repeatedly refusing to attend mandatory employee training. R. at A-357 – A-360, A-365. The District Court correctly dismissed Petitioner's Complaint, stating that unsupported factual allegations contained in a complaint are not evidence, and the Court of Appeals properly affirmed that decision. Special Appendix SPA-17 – SPA-19; *See* Summary Order of the United States Court of Appeals for the Second Circuit for Raymond Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES, et al.

Conclusion

For all the foregoing reasons, it is respectfully requested that Petitioner's Motion for an Order to direct the Clerk of this Court to accept the filing of a late Petition for a Writ of Certiorari be denied and that the Court issue such other and further relief as may be just, proper, and appropriate.

Dated: Buffalo, New York
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