No. 24-49

IN THE
Supreme Court of the United States

JAMES E. HITCH,

Petitioner,

v.

THE FRICK PITTSBURGH,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Third Circuit correctly determine that, where the operative complaint asserting claims of retaliation pursuant to the Americans with Disability Act sets forth only conclusory allegations that Petitioner engaged in protected activity under the Act, the District Court properly dismissed the retaliation claim pursuant to Fed. R. Civ. P. 12(b)(6), under the well-settled precedent of *Iqbal* and *Twombly*?

RULE 29.6 STATEMENT

The undersigned counsel of record hereby certifies that Respondent, The Frick Pittsburgh, has no parent corporation or publicly held company that owns 10% or more of is stock.

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INTRODUCTION

Petitioner identifies no compelling basis calling for this Court's review of the Third Circuit's decision to affirm the District Court's dismissal of his retaliation claims. Rather, he seeks to relitigate the sufficiency of his pleadings below.

Respondent, Frick Art and Historical Center, Inc., *improperly named as* The Frick Pittsburgh (*hereinafter* "the Frick"), is a 501(c)(3) non-profit charitable organization which operates a set of museums and historical buildings located in Pittsburgh, Pennsylvania. The Frick's collections include Renaissance, Baroque and medieval works, as well as the former family residence of Henry Clay Frick, industrialist, philanthropist, and art collector.

Respondent employed the Petitioner, James L. Hitch, as an operations manager until his termination in February 2021. Thereafter, Petitioner filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") (hereinafter collectively referred to as "the administrative charge"), alleging discrimination in his employment on the basis of a disability, and retaliation for requesting reasonable accommodation for the same. Petitioner filed a subsequent lawsuit, which Respondent removed to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1441(a). After multiple amendments to his Complaint, the District Court dismissed Petitioner's claims in their entirety, with prejudice, including the retaliation claim, holding that Petitioner failed to plead sufficient facts to state a claim for retaliation upon which relief could

be granted. A unanimous three-judge panel of the United States Court of Appeals for the Third Circuit affirmed the dismissal, applying the well-settled precedent of *Iqbal*, *Twombly*, and binding precedent outlining the contours of a retaliation claim.

Petitioner now seeks to convince this Court that the Third Circuit erred in affirming the District Court's dismissal, though he fails to articulate a valid basis for the issuance of a writ of certiorari. Petitioner's entire argument is a recitation of his belief that he adequately pleaded a claim for retaliation under the ADA and PHRA below, which certainly does not warrant an exercise of this Court's discretionary review.

Indeed, this matter presents no compelling reason to grant certiorari. Instead, Petitioner treats his request as yet another attempt to plead his retaliation claim. In the absence of any other grounds for this Court's review, certiorari must be denied.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Petitioner began working as an operations manager for Respondent in December 2020. *See* Pet. App. 2a. Petitioner alleges that he slipped on black ice at work on February 4, 2021, sustaining injuries to his back, legs and spine. *Id.* He alleges that Respondent terminated his employment shortly after his injury. Pet. App. 17a. Two months after his termination, in April 2021, Petitioner filed an administrative charge of discrimination with the EEOC and PHRC. Pet. App. 3a.

PROCEDURAL BACKGROUND

The PHRC issued a right-to-sue letter with respect to Petitioner's claims, and he subsequently filed suit in the Court of Common Pleas of Allegheny County, Pennsylvania. Pet. App. 16a. Petitioner alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (*hereinafter* "ADA" or "the Act"), and the Pennsylvania Human Relations Act, 43 Pa. Stat. § 955(d) ("PHRA"), including discrimination on the basis of disability, and retaliation for protected activity under the Act. Pet. App. 12a-13a. Respondent removed the action to the U.S. District Court for the Western District of Pennsylvania, and subsequently moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Pet. App. 12a. Petitioner amended his Complaint as a matter of course, and Respondent moved to dismiss the Amended Complaint pursuant to 12(b)(6). Pet. App. 2a. Petitioner filed a Second Amended Complaint with *nunc pro tunc* leave of court, and Respondent once again moved to dismiss. *Id.*

Initially, the District Court granted in part and denied in part Respondent's motion to dismiss. Pet. App. 2a. The court dismissed Petitioner's disability discrimination claims under the ADA and PHRA, determining that Petitioner failed to plead facts establishing that he had a qualifying disability under the statutes. Pet. App. 13a; 3a. However, despite acknowledging that Petitioner had pleaded no facts to establish that he engaged in protected activity, the Court denied Respondent's motion with respect to the retaliation claim, reasoning from the attached right-to-sue letter that Petitioner had filed a charge of discrimination, which would have provided Respondent notice of the same, and that this was

sufficient to establish the requisite protected activity to state a claim for retaliation. Pet. App. 3a.

Respondent moved for reconsideration of the Court's partial denial of the Rule 12(b)(6) motion, attaching Petitioner's PHRC charge and its associated certificate of service, which demonstrated that the charge of discrimination had been filed months *after* the termination, and thus could not constitute the requisite protected activity prior to or contemporaneous with the adverse employment action (termination) to sustain the retaliation claim. Pet. App. 3a; 22a. The District Court agreed, granting the motion for reconsideration and dismissing the retaliation claim on this basis, together with a determination that no other factual allegations, if credited, would establish protected activity prior to – or contemporaneous with – his termination. Pet. App. 22a. Thus, the District Court determined that Petitioner failed to state a claim for retaliation pursuant to the ADA and PHRA. *Id.*

Petitioner appealed the dismissal of his retaliation claim to the U.S. Court of Appeals for the Third Circuit,[1] which affirmed, holding that Petitioner's retaliation claim was premised upon conclusory assertions devoid of any factual substantiation. Pet. App. 6a-10a.

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[1] The Third Circuit properly held that Plaintiff did not present any argument challenging the District Court's Order dismissing the discrimination claims, and thus forfeited any such appeal. *See* Pet. App. 3a., n. 2 (noting that Petitioner's principal brief was exclusively devoted to his retaliation claims, "save for one sentence listing the elements of a discrimination claim," and that any such challenge was forfeited, because the reference to the discrimination claim was, at best, "a passing reference without any developed legal argument").

REASONS FOR DENYING THE PETITION

1. Petitioner's Question Presented Does Not Warrant Review.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. A compelling reason includes conflict between circuits on the same issue of law; conflict between the circuit and a state court of last resort; a court's departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"; an important question that should be resolved by this Court; or conflict with this Court's precedent. *Id.*

No such compelling reason is present here. Petitioner merely asserts his disagreement with the Third Circuit's decision to affirm the District Court's dismissal of his retaliation claim, and fails to identify any legitimate grounds calling for this Court's review. Furthermore, the Third Circuit's decision is in accord with those of other circuits and the opinions of this Court, consistent with the accepted and usual course of judicial proceedings, and present no novel question of law requiring this Court's consideration and answer. As such, no compelling basis as identified in Sup. Ct. R. 10 exists to warrant issuance of a writ or certiorari.

A. Petitioner merely disagrees with the Third Circuit's application of well-settled precedent.

It is clear that Petitioner seeks to merely relitigate the dismissal of his disability retaliation claim. Rather than articulating a compelling argument for granting certiorari, Petitioner instead

takes the opportunity to note his disagreement with the lower courts' decisions and attempts to rehash his legal claims before this Court.

Sup. Ct. R. 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." However, that is precisely the basis upon which Petitioner now seeks to appeal. The entirety of Petitioner's two-page argument is devoted to insisting that he adequately pled his disability retaliation claim under the applicable standards, while seeking to reassert, and add to, his factual allegations.

As set forth in Rule 10, Petitioner bears the responsibility to identify a compelling basis, other than asserting a mere misapplication of law or fact, warranting the issuance of a writ of certiorari. However, Petitioner does not even attempt to articulate any such grounds.

Rather, Petitioner's insistence that his pleadings satisfied the elements of an ADA and PHRA retaliation claim, and that the lower courts erred in dismissing the same, places this petition squarely within the category of cases specifically identified by Rule 10 as those almost always unworthy of review by this Court.

B. The Circuits and States are Not Split on the Issues Presented for Review.

In this case, the Third Circuit applied this Court's well-settled precedent as set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It did so in a manner consistent with the application of this

Court's binding precedent by other circuit courts of appeal.[2] Thus, there exists no circuit split in need of resolution, and certiorari is unwarranted.

Nor does the Third Circuit opinion reveal a split between the state and federal judiciaries that this Court ought to address, as the decision was premised upon federal rules and pleading standards. The *Twombly–Iqbal* standard, by which the District Court dismissed Petitioner's Second Amended Complaint, is an application of the Federal Rules of Civil Procedure.

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[2] *See, e.g.*, *Guifoile v. Shields*, 913 F.3d 178, 186–87, 194 (1st Cir. 2019) (reversing dismissal because plaintiff pleaded sufficient facts to meet elements); *Buon v. Spindler*, 65 F.4th 64, 76 (2d Cir. 2023) (reversing dismissal in part, because plaintiff pleaded sufficient facts to meet elements); *Kashdan v. George Mason Univ.*, 70 F.4th 694, 700 (4th Cir. 2023) (affirming dismissal where there were insufficient pleaded facts to meet elements); *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018) (affirming and reversing in part dismissal as sufficient facts were pleaded to meet some elements); *Bright v. Gallia Cnty.*, 753 F.3d 639, 652 (6th Cir. 2014) (affirming dismissal because insufficient facts were pleaded as to one element); *KAP Holdings, LLC v. Mar-Cone Appliance Parts Co.*, 55 F.4th 517, 523–24 (7th Cir. 2022) (affirming dismissal because insufficient facts were pleaded as to one element); *Delker v. Mastercard Int'l, Inc.*, 21 F.4th 1019, 1024–25 (8th Cir. 2022) (reversing dismissal where sufficient facts were pleaded as to all elements); *Turner v. City & Cnty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (affirming dismissal as not enough facts were pleaded to support one element); *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1195 (10th Cir. 2018) (affirming dismissal where plaintiff failed to allege any facts relevant to a claim); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1347–48 (11th Cir. 2016) (affirming dismissal because plaintiff failed to plead sufficient facts to support two elements of claim); *Sanchez v. Off. of the State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (affirming dismissal where plaintiff pleaded insufficient facts to support the elements of any claim).

See Twombly, 550 U.S. at 555; *Iqbal*, 556 U.S. at 670; *see also* Fed. R. Civ. P. 8(a), 12(b)(6). The Federal Rules apply to proceedings before federal district courts. Fed. R. Civ. P. 1.

Furthermore, the Third Circuit analyzed the sufficiency of Petitioner's allegations under the well-established framework for a prima facie case of retaliation under the ADA. Petitioner makes no argument that the District Court or Third Circuit diverged from the settled principles of federal disability law in analyzing and dismissing his retaliation claim. Nor has Petitioner identified a relevant discrepancy among different jurisdictions' interpretation and application of the provisions of the ADA, specifically with respect to unlawful retaliation, such that this Court's review is warranted. Rather, the Third Circuit's analysis was a straightforward application of the widely accepted elements of an ADA relation claim. *See* Pet. App. 5a-6a.

There is thus no critical jurisdictional split to warrant the exercise of this Court's review and resolution.

C. There is no Important Question of Federal Law Presented.

Certiorari may be proper where the lower court answered a question of federal law that this Court should settle, or where its resolution conflicts with this Court's precedent. S. Ct. R. 10(c). Neither is presented in this case, as evidenced by the "Question Presented" as framed by Petitioner.

The Third Circuit did not decide, as a matter of first impression, any question of federal law in its disposition of Petitioner's appeal. Rather, the Third

Circuit applied its well-settled precedent in determining that Petitioner's complaint was insufficient to survive Respondent's challenge pursuant to Fed. R. Civ. P. 12(b)(6). *See generally*, Pet. App. 12a-23a.; Pet. App. 4a, n.3. The Third Circuit engaged in the well-established *Twombly-Iqbal* analysis and concluded that Petitioner had failed to set forth any non-conclusory allegations to establish the elements of an ADA retaliation claim. *See* Pet. App. 5a-10a. Far from deciding a novel issue of federal law, the lower courts' decisions involved nothing more than a standard application of firmly established legal precedent and procedural rules.

As this matter does not present an important question of federal law calling for review and resolution by this Court, the petition for a writ of certiorari should be denied.

D. The Third Circuit followed the accepted and usual course of judicial proceedings.

This Court states it may grant certiorari where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). No such departure has occurred, and the writ should be denied.

When this Court has granted certiorari pursuant to its supervisory power, it has been to correct grave errors. This Court has exercised its supervisory authority to ensure federal judicial proceedings are conducted "in a manner consistent with basic notions of fairness." *Young v. United States*, 481 U.S. 787, 789 (1987). This includes the appointment of counsel for the beneficiary of a court order to prosecute violations of that order; a district

court's discriminatory residency requirement for admission; and the admission in a criminal trial of confessions obtained in violation of federal law. *See id.* at 789; *Frazier v. Heebe*, 482 U.S. 641, 645–46 (1987); *McNabb v. United States*, 318 U.S. 332, 341–42 (1943).

Petitioner here identifies no aspect of the proceedings alleged to have diverged the "accepted and usual course." Furthermore, the procedural history of this case is profoundly distinct from any instance in which this Court has exercised its supervisory authority to correct such grave errors. *See* Statement of the Case, *supra*. Petitioner filed a complaint that was removed to federal court. After the complaint was twice amended, Respondent moved to dismiss. The District Court dismissed two counts initially and later dismissed the third upon Respondent's motion to dismiss and subsequent motion for reconsideration. On appeal, the Third Circuit properly applied a *de novo* standard of review and concluded that the District Court committed no legal error in dismissing Petitioner's retaliation claim. Each step taken by the courts below complied with the applicable federal rules. At no point did the District Court or the Third Circuit depart from the accepted and usual course of judicial proceedings.

2. Petitioner's Question Presented Misconstrues the Issue Resolved by the Third Circuit.

The sole question presented by Petitioner asks whether Petitioner has "proven" his retaliation claim under the "but-for" test for causation. Notwithstanding the fact that this matter has never proceeded past the pleading stage, and thus no "proof"

was demanded by the Court at the Rule 12(b)(6) stage, Petitioner's question presented mistakes the very basis for the dismissal of his retaliation claim. Neither the Third Circuit nor the District Court addressed the causation element, as each determined that Petitioner failed to plead any non-conclusory facts establishing that he engaged in protected activity prior to his termination. *See generally*, Pet. App. 1a-23a.

As recognized by the Third Circuit and District Court, to successfully plead a claim for retaliation under the ADA or PHRA, Petitioner's allegations, taken as true for the purpose of resolving the Rule 12(b)(6) motion, must establish that (1) he engaged in protected activity; (2) Respondent took adverse action against him after or contemporaneously with the protected activity; and (3) there was a causal connection between the protected activity and the adverse action. *See* Pet. App. 15a (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997)); Pet. App. 6a (citing *Canada v. Samuel Grossi & Sons*, 49 F.4th 340, 346 (3d Cir. 2022)). Notably, causation is contingent upon establishing the first two elements.

The District Court aptly recognized that the facts asserted in the operative pleading and attachments thereto identified only one protected activity: the filing of the administrative charge. *See* Pet. App. 22a. Petitioner failed to plead any facts to show that Respondent "took adverse action—terminating his employment—after or contemporaneous with" Petitioner filing the charge. *Id.* Thus, the question of causation was never reached. *See generally id.*

On appeal, the Third Circuit affirmed, concluding that "after excluding the conclusory allegations, [Petitioner] failed to state *any* facts showing that he engaged in protected activity." Pet App. 7a-8a. Similarly, the Third Circuit did not even reach the element of causation.

In fact, the Third Circuit specifically distinguished the instant case from an opinion relied upon by Petitioner, noting that the cited case addressed the element of causation, which is distinct from Petitioner's failure to establish protected activity. *Id.* (citing *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188–89 (3d Cir. 2003)). Thus, the Third Circuit explicitly distinguished the basis for its holding from the question of causation.

Thus, Petitioner's question presented, whether he "proved" the element of causation, is wholly irrelevant to the instant matter, as Petitioner's retaliation claim was dismissed on entirely distinct grounds related to his failure to sufficiently plead protected activity. The petition for a writ of certiorari presents a transparent attempt to relitigate the merits of his case before this Court, which were correctly decided by the Third Circuit. Accordingly, the writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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