

ORIGINAL

No. 23-3253

24-5518

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

AUG 12 2024

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MARK E. BROWN — PETITIONER  
(Your Name)

VS.

USD 501 SCHOOL DISTRICT RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

MARK E. BROWN  
(Your Name)

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## QUESTIONS PRESENTED

### WAS APPELLANT/PLAINTIFF REQUIRED TO FILE \$1981 CLAIM OPPOSED TO \$1983 CLAIM

Employment Discrimination Cases usually proceed under Title VII and other statutes as well as 42 U.S.C. Sec 1981 that allows an individual to sue public employees under both which prohibits employment discrimination. The Defendant's attorney as well as the District Court failed to consider the 1991 Amendment of 42 U.S.C. §1981 and the inclusion of remedy provisions in the new §1981 (a) which explains the scope of the statute to include an instant action. This Court should find the §1981 as supplement §1981 (a) has its own basis for recovery. The 1991 Amendment of 42 U.S.C. §1981 outlines a clear intention of damages remedy under §1981 that does not require a Plaintiff to refer to §1983 remedies to obtain relief or state a claim. The Amendment clearly provide for a claim and remedies against a state actor. As indicated on Page 10 , Paragraph 3 of the District Court Memorandum And Order under 2-Section 1981 claims the Defendant USD 501 is a state actor. This Court should also be informed that according to the Legislative History of the 1991 Amendment it list the following regular purposes:

- 1.) To provide appropriate remedies for intentional discrimination and unlawful harassment in the work place
- 2.) To expand the scope of relevant Civil Rights Statutes in order to provide adequate protection to victims of Discrimination 42 U.S.C. §1991 Sec 3 Purposes (Pub. L. 102-166 Nov. 21 1991, 105 Stat. 1071 Civil Rights Act of 1991 )
- 3.) Provides the right to recover Compensatory Damages

In another perspective as to viewing Discrimination and Retaliation as it relates to this case is that first Mr. Brown is asserting that the treatment he has received past and present constitutes improper discrimination under Title VII and 42 U.S.C. §1981. Second, the continued rejection of Mr. Brown's employment applications by USD 501 constitutes retaliation in violation of these same laws. The analysis of the discrimination and retaliation claims is essentially the same under both §1981 and Title VII. It should also be noted that a Plaintiff can show discrimination by way of of direct evidence or with circumstantial evidence. *Sanders v. Southwestern Bell Tel. LP* 544 F. 3d 1101, 1105 (10<sup>th</sup> Cir 2008 ) If a Plaintiff relies on circumstantial evidence the Court will have to analyze the claim using the McDonald Douglas burden shifting analysis citing *McDonald Douglas Corporation v. Green* 411 U.S. 792 (1973 ) Also, any Federal Claims presented by the Plaintiff will reference 42 U.S.C. §1981 and these claims will merge with §1983 claims and will not be dismissed. *Carleton v. City of Phila* 2007 WL 633279 at (ED PA March 30, 2004 ) The legitimate non-discriminatory reason given by the USD 501 Administration not to have Mr. Brown rehired simply has no merit and the

Administration own admission they continued to grant Mr. Brown contract renewal for 16 years.

## **PARTIES**

The Petitioner is Mark E. Brown

The Respondent is Unified School District USD 501

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## **APPENDIX**

Appendix A, Opinion Memorandum And Order of United States District Court filed on November 30, 2023

Appendix B, Opinion United States Court Of Appeals For Tenth Circuit filed on August 1, 2024

Appendix C, Kristi Reynolds Excerpts Deposition Pages November 8, 1991

Appendix D, Mr. Joe Zima former USD 501 School District Attorney Letter Dated January 4, 2003

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## **PETITION FOR A WRIT OF CERTIOARI**

Petitioner Mr. Mark E . Brown respectfully petitions for a Writ Of Certioari to review the judgment of the United States Court Of Appeals For The Tenth Circuit

### **OPINIONS AND ORDERS BELOW**

This case is an Employment Discrimination Case based upon Retaliation against the Defendant USD 501 School District fr failure to rehire Plaintiff Mr. Mark E. Brown. The Defendant's Motion For Summary Judgment was granted by the District Court and filed on 11/30/2023. The District Court found that Plaintiff failed to uphold his burden of showing Retaliation and Pretext for the Defendant's unlawful discrimination as indicated in the District Court Memorandum And Order dated 11/30/2023. Plaintiff also alleges that USD 501 retaliated against him for filing previous complaints/lawsuits against the Defendant. Plaintiff asserts claims against USD 501 pursuant to 42 U.S.C.1981 and Title VII 42 U.S.C. 2000E et seq

### **JURISDICTION**

The Judgment of this Tenth Circuit Court Of Appeals was entered on July 10, 2024 and this court has Jurisdiction under 28 U.S.C \$1297

## STATEMENT OF CASE

### A.) Legal Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion, or other impermissible grounds 42 U.S.C. § 2000e. Under the Title VII structure an aggrieved employee first file a charge with the Equal Employment Opportunity Commission. In general the EEOC notifies the employer, investigates the charge and may seek to conciliate the dispute. After the EEOC has an opportunity to investigate and if any attempt of conciliation fails either the government or charging party may file a civil action. This case is an employment discrimination case based on retaliation against the Respondent/Defendant.

1. The District Court committed error as a matter of law and abused its discretion that Plaintiff's Title VII claim is time barred, unsupported by the evidence, improperly filed and alternatively fail on the merits.

As a general regarding discrimination and retaliation under federal law Mr. Brown is asserting that the treatment he has received constitutes improper discrimination under Title VII and 42 U.S.C. § 1981. Mr. Brown is also contending that USD 501 constant and continuous rejection to be rehired constitutes retaliation in violation of these same laws. The analysis of discrimination and retaliation claims is essentially the same under both § 1981 and Title VII. Neither of Mr. Brown's claims are time barred or unsupported by the evidence for earlier judgment can be advanced by subsequent courts ( *McKinze v Union Pac R.R.* 2009 U.S. Dist. Lexis 3309 10-11 D. Kan. Apr. 16 2009 ). Mr. Brown's claims are new and timely for Mr. Brown filed this action after offered/accepted a substitute teaching position with USD 501 for the 2021-2022 school year then 10 minutes later Mr. Brown received a phone call back from the same person who made the offer informing Mr. Brown that her supervisor told her to tell Mr. Brown that the school district is not hiring any new substitute teachers. This Court should know that this is not true for it is indicated in the 2/28/2022 Topeka Capital Journal Newspaper that USD 501 hired 60 new substitute teachers for the 2021-2022 school year. This Court should also know that the school district made 4 job postings for substitute teachers needed for the 2021-2022 school year which are dated 6/9/2021 10/25/2021 11/18/2021 and 1/12/2022. The refusal to rehire Mr. Brown for substitute teaching position as well as any other position that he is certified/qualified for constitutes direct acts of discrimination/retaliation.

The Supreme Court has held that discrete acts such as termination, failure to promote, denial of transfer or refusal to hire are each incidents of discrimination and such retaliatory adverse employment decision constitutes a separate actionable "unlawful practice" ( *Nat'l R.R. Passenger Corp v Morgan* 536 U.S. 101, 113 (2002) ). Each refusal to hire is a separate act which starts a new clock. Given the fact that Mr. Brown first worked for USD 501 as a substitute teacher during the 1976-77 school year should be in support of his new timely claim for the courts have held that the statutes do not bar an

employee from using background evidence in supporting a timely claim (Martinez v Porter , 347 F3d 1208, 1211 10<sup>th</sup> Cir N. M. 2003 ) citing Morgan 536 U.S. at 113 Furthermore, with the 4 job posting by the USD 501 Administration seeking to hire substitute teachers for the 2021-2022 school year then with Mr. Brown being told that the school district mis not hiring anymore substitute teachers is a discrete act of discrimination . Mr. Brown timely filed his claims of discrimination and retaliation under Title VII and 42 U.S.C. §1981

II. The District Court committed error as a matter of law and abused its discretion in allowing hearsay information to be used in Defendant's Motion For Summary Judgment

The Defendant wants to use Mr. Ned Nussbaum (Former Topeka High School Principal) 4/27/1989 Documented Summary which contains sexual allegations that Mr. Brown has been unjustly accused of to keep Mr. Brown from being rehired. This memo is "Hearsay" that contains a lot of direct inconsistencies as well as contradictions that damages the credibility of the allegations made within the Documented Summary. Also, this Court should know that on 5/18/1989 (Thurs.) at 4 PM Mr. Brown and his attorney at that time Mr. Tim Phelps met with Mr. Nusbaum and school district attorney Mr. Joe Zima about the Documented Summary. We were informed by Mr. Nusbaum that the Documented Summary has nothing to do with Mr. Brown's employment with the school district and this matter is a closed subject. It is evident that this statement made by Mr. Nusbaum is not true for as of this date the Defendant is using the 4/27/1989 Documented Summary in denying Mr. Brown employment. Furthermore, on the date of 9/23/1991 Mr. Ned Nusbaum gave deposition testimony that the documented summary does not belong in Mr. Brown's personnel file. This Court should also know that the documented summary has never been placed in Mr. Brown's personnel file but whenever Mr. Brown bring litigation against the school district the Defendant will bring out the documented summary to be used against Mr. Brown. This case can very well be viewed as an "Adverse Employment Action" being conducted by the Defendant towards Mr. Brown. With Mr. Brown having over 20 years of teaching/coaching experience and failure to rehire him when he is clearly qualified is an "Adverse Action" (Annett v Kansas 371 Fd 1232, 1239 10<sup>th</sup> Cir. Kan 2004 ) The 4/27/1989 Documented Summary centers around Kristi Reynolds who gave deposition testimony on 11/8/1991 pertaining to Case NO. 91-4011-R where she denied every sexual allegations in Mr. Nusbaum Documented Summary that Mr. Brown has been unjustly accused of. Again, Mr Ned Nussbaum 's 4/27/1989 Documented Summary is a Memo of "Hearsay" that contains a lot of direct inconsistencies as well as contradictions that damages the credibility of the allegations made within the Documented Summary which Mr. Brown has been unjustly accused of . The law is clear that only admissible evidence may be considered in Summary Judgment and "Hearsay" cannot be considered in Summary Judgment (Jenkins v Winter F3d 742, 748 (8<sup>th</sup> Cir. 2008 )

III. The District Court committed error in weighing the nature and amount of Plaintiff's evidence and finding it to be insufficient to demonstrate pretext sufficient to deny entry of summary judgment.

Sufficient evidence for Pretext is the last prong of the McDonnell Douglas burden shifting test. Plaintiff only needs to show sufficient evidence that a reasonable jury would be able to infer Pretext from the Defendant's action to go to trial. The District Court failed to consider the amount of evidence presented by the Plaintiff for Mr. Brown submitted sufficient evidence to demonstrate that the Defendant reason to not rehire Mr. Brown are unworthy of credence and is a sham.

In general a Plaintiff demonstrates Pretext by providing evidence of such weaknesses, implausibilities, inconsistencies and/or contradiction in the employers proffered legitimate reasons for it's actions that a reasonable fact finder could rationally find them unworthy of credence and infer that the employer did not act for the asserted non-discriminatory reasons (Sanders 544 F3d at 1106 citing Jaramillo v Colo Judicial Dept 427 F3d 1303, 1308 ) USD 501 has stated there reason for not rehiring Mr. Brown is because he has poor skills along with Mr. Ned Nusbaum's 4/27/1989 Documented Summary that centers around Kristi Reynolds and sexual allegations that Mr. Brown has been unjustly accused making to her. Kristi Reynolds gave deposition testimony on 11/8/1991 denying every sexual allegations in Mr. Nusbaum's Documented Summary that Mr. Brown has been unjustly accused of. Also, the USD 501 Administration have given inconsistent and/or conflicting testimonies pertaining to the many years that Mr. Brown worked for USD 501 which does not match with there actions of Mr. Brown not to be rehired. These inconsistent/conflicting testimonies are of the following:

1.) On 4/18/2018 Mrs. Carla Nolan former USD 501 Human Resource Director gave deposition testimony that she informed current Superintendent Dr. Tiffany Anderson that Mr. Brown is on the list of individuals who are not eligible for rehire but on 6/7/2018 Dr. Anderson gave deposition testimony that she does not recall Mrs. Nolan ever telling her that she does not recall Mrs. Nolan ever telling her that there is a list of ineligible individuals for hire.

2.) In the Aug. 27, 2001 letter Mrs. Lynn King former USD 501 Human Resource Director indicates that she was advise by Dr. Robert McFrazier former USD 501 Superintendent that you (Mr. Brown) will not be considered for rehire but on 7/28/2005 Mrs. Lynn King gave deposition testimony that the Superintendent does not get involved in the hiring of individuals

3.) In Mr. Joe Zima former USD 501 School District Attorney letter dated Jan. 4, 2003 he indicates that "No Documents exists in Mr. Brown's personnel file denying Mr. Brown re-employment" but Mrs. Carla Nolan informed Dr. Anderson that Mr. Brown is on the non-eligible list to be rehired but Dr. Anderson gave deposition testimony that she does not recall Mrs. Nolan giving her a list of individuals who are not eligible for rehire ( Mr. Joe Zima letter dated Jan. 4, 2003 )

4.) On July 28, 2021 Mrs. Nancy McCarter who is the Substitute Teacher Service Manager for USD 501 had informed Mr. Brown that the school district is not hiring any new substitute teachers for the 2021-2022 school year but according to the 2/28/2022

Topeka Capital Journal Newspaper Article USD 501 hired 60 new people to do substitute teaching for the 2021-2022 school year. It is also indicated in the 4 job postings that USD 501 is still seeking to hire substitute teachers for the 2021-2022 year. These job postings are dated 6/9/2021 10/25/2021 11/18/2021 1/12/2022

5.) Mrs Carla Nolan former USD 501 Human Resource Director gave deposition testimony on 4/18/2018 that Mrs. Lynn King former USD 501 Human Resource Director that Mr. Brown is not eligible for re-employment due to job performance but Mrs. Carla Nolan gave deposition testimony that if the school district could have demonstrated cause for non-renewal it would have done so but did not.

6.) According to Mr. Ned Nusbaum former principal at Topeka High School 4/27/1989 Documented Summary he has unjustly accused Mr. Brown of making sexual comments to Kristi Reynolds but Mr. Nusbaum gave trial testimony that Head Girls Basketball Coach Mr. Charles Myers told him (Mt. Nusbaum) that he never observed Mr. Brown making inappropriate comments to any of the girls on the basketball team

7.) Mr. Wilfred Nicklin former head boys basketball coach at Topeka High School gave deposition testimony on 10/25/1991 that he has heard no negative comments of Mr. Brown coaching girls basketball at Topeka High School.

8.) The Issue of Pretext plays a key part and is relevant to this case for the information as well as evidence that has been mentioned and listed by Mr. Brown are direct contradictions to the proffered reasons given by USD 501 refusal to rehire Mr. Brown . The undisputed fact that Mr. Brown has continually been granted contract renewal along with the Administration own admission on Jan. 4, 2003 letter to Mr. Brown indicating that there are no documents in Mr. Brown's personnel file denying him re-employment is a positive aspect of Mr. Brown's record. Again, a Plaintiff must demonstrate Pretext by showing weaknesses , inconsistencies or contradictions of the employer ( Richmond v Oneok Inc 120 F3d 205, 209 (10<sup>th</sup> Cir 1997 ) The alleged legitimate non-discriminatory reasons given by USD 501 in denying Mr. Brown re-employment is Pretext.. The statement made by the District Court on Page 8 Paragraph 5 of the Memorandum And Order saying "Plaintiff has no evidence of pretext " is incorrect for Mr. Brown has met the evidentiary requirement for a Prima Facie Case of Pretext;

IV. The district Court committed error in ruling as a matter of law that Plaintiff's claims under Title VII 42 U.S.C. §1981 and Right To Sue was barred by the Statute Of Limitations

Title VII provides a time limit for actions brought there under (EEOC V W.H..Braun Inc 347 F3d 1192, 1197-98 ( 10<sup>th</sup> Cir. 2003 ) In Kansas which is a deferral state Plaintiff must file his/her charge within 300 days after the alleged unlawful employment practice occurred 42 U.S.C. §2000(e) (5)(1) the Plaintiff then has 90 days after receiving the Right To Sue Letter to file a Federal Complaint. The Kansas 2 year statute of limitations applies to 1981 claims (Cross v. Home Depot 390 F3d 1283, 1288 (10<sup>th</sup> Cir 2004 ) Ware

v Union Pac R.R. Co. Omaha 278 F. Supp 2d 1263, 1266-67 (D. Kansas 2003 ) where Mr. Brown's current claim is based on his 9/5/2022 online application that he submitted for a substitute teaching position for the 2022-2023 school year. Mr. Brown's current claim arose on 1/28/2022 simply meaning that the statute of limitations does not expire until 1/28/2024. Mr. Brown filed his complaint with the District Court on 12/13/2022 which is clearly within the two year period. Mr. Brown's \$1981 claim was timely and the District Court should be reversed so that the Plaintiff can present his claim to a jury. Simply put, the District Court failed to acknowledge the Kansas 2 year Statute Of Limitations. On Page 4, Paragraph 1 under Title VII Claims in the Memorandum And Order the District Court mentions that "Plaintiff did not file suit within ninety days of receiving a Right To Sue" The District Court is incorrect because Mr. Brown received his Right To Sue Letter on 9/16/2022 which pertains to this present case. The 90 days from 9/16/2022 will expire on 12/15/2022. Mr. Brown filed this present lawsuit on 12/13/2022 which is under 90 days making this present lawsuit filed on time. On Page 5, Paragraph 2 of the Memorandum And Order where the District Court mentions "Plaintiff filed his EEOC Charge on August 20 and the EEOC issued a Right To Sue on Oct 28. The Appellate Court should know that the District Court is incorrect on this because first of all the District Court does not mention the year, just the dates Aug 20 and Oct 28 (no year) Mr. Brown's records show that he filed a retaliation charge on Aug. 6, 2021 vs. USD 501 and received a Right To Sue Letter on Nov. 1, 2022 pertaining to that particular charge . Here again the District Court is incorrect with it's information for Mr. Brown did not use the Right To Sue Letter that he received on Nov. 1, 2022 On Page 6 under Letter B January 2022 E-Mail Paragraph 4 the District Court mentions "Plaintiff did not reapply for a job in January or interview for it- Page 7 The Appellate Court should know that the District Court is incorrect on this because on the date of 9/5/2022 Mr. Brown submitted his online application for a substitute teaching position for the 2022-2023 school year. Here again, Mr. Brown did reapply for job in January 2022.

## **ESTABLISHING RETALIATION**

In order to establish a Prima Facie Case of Retaliation a Plaintiff must show a Protected Activity, An Adverse Employment Action and a Casual Connection between the two (Duncan v Manager Dept Of Safety 397 F3d 1300, 1314 ) USD 501 does not dispute that Mr. Brown's first trial was a protected activity. USD 501 does not dispute that Mr. Brown's Oct. 1981 KCCR Charge was a protected activity nor does USD 501 contend that failing to not rehire Mr. Brown establishes an adverse employment action. This Court should also know that on 5/18/1989 Mr. Brown and his attorney at that time Mr. Tim Phelps were told by Mr. Ned Nusbaum principal at Topeka High School at that time that the 4/27/1989 Documented Summary has nothing to do with Mr. Brown's employment status with the school district and this matter is a closed subject. Mr. Phelps indicated this on Page 2 Paragraph 6 of his 4/27/1993 Affidavit. This can be viewed as an Adverse Employment Action for as of this date the Documented Summary is being used by the Administration to keep Mr. Brown from being rehired. Also, this can be viewed as an Adverse Employment Action for Dr. Robert McFrazier former USD 501 Superintendent

gave deposition testimony on 7/28/2005 "that he believes Mr. Brown is attempting to set up the school district for a lawsuit and he does not want to be held liable for rehiring Mr. Brown." The statement made by the District Court on Page 8 Paragraph 4 of the Memorandum And Order saying "thus fails to establish a Prima Facie Case of Retaliation is incorrect for Mr. Brown has met the evidentiary requirements for a Prima Facie Case

### **PRIMA FACIE CASE**

In order to establish a Prima Facie Case/Claim of Retaliation a Plaintiff must show a Protected Activity, Adverse Employment Action and a Casual Connection between the two. *EEOC v PVNF, LLC*, 487 F.3d 790, 803 (10<sup>th</sup> Cir 2007) *Ducan v Mgr Dept of Safety*, 397 F.3d 1300, 1317 (10<sup>th</sup> Cir 2005). USD 501 does not dispute Mr. Brown's past and present legal actions were protected activities. The many years that Mr. Brown worked for USD 501 he continued to be granted contract renewal and not to be rehire him for positions that he is qualified for clearly qualifies as an Adverse Employment Action. Mr. Brown can show a Casual Connection because first of all the fear of litigation in regards to Mr. Brown clearly exists for every letter sent to Mr. Brown was also sent to the school district attorney. Second, Dr. Robert McFrazier former Superintendent gave deposition testimony on 7/28/2005 that he believes Mr. Brown is attempting to set up the school district for a lawsuit and he does not want to be held liable for rehiring Mr. Brown. Third, Mr. Joe Zima former school district attorney provided Mr. Brown with his Jan. 4, 2003 letter indicating "No such documents exists in Mr. Brown's personnel file denying Mr. Brown re-employment". All of the correspondence and discussions with USD 501 legal counsel indicates a strong fear of litigation and the school district acted upon those fears when refusing to rehire Mr. Brown. A Prima Facie Case/Claim for Retaliation has been established by Mr. Brown and that USD 501 proffered reasons for not considering Mr. Brown for re-employment is Pretextual.

### **CASUAL CONNECTION**

Mr. Brown can establish a Casual Connection by relying on other evidence (*Hysten v Burlington Northern & Santa Fe Ry* 167 F. Supp. 2d 1239, 1246 (D. Kan.2001) Aff'd 269, F.3d). Mr. Brown has worked for USD 501 for many years and has been required to file complaints of racial discrimination as well as retaliation due to the treatment Mr. Brown has received in employment matters with USD 501. It is not disputed that USD 501 unlawfully discriminated against Mr. Brown in Oct. 1981 in regards to a basketball coaching position at Topeka West High School. This Administrative Charge of Litigation was worked out/settled. It should be known that my Oct. 1981 KCCR Complaint started Mr. Brown battles vs. USD 501. In April 1989 Mr. Brown was unjustly accused by Mr. Ned Nusbaum principal at Topeka High School at that time of making inappropriate sexual comments to Kristi Reynolds who was a member of the girls basketball team. At that time Mr. Brown was the number one assistant coach to Head Coach Mr. Charles Myers and the next person in line to become the head coach when Mr. Myers resigns. This Court should also know that Mr. Brown had a Administrative



Charge pending with the KCCR when this matter was going on. Mr. Brown's past and present experience of battling the school district can be relied on to show a Casual Connection ( Hysten v Burlington Northern and Santa Fe Ry 167 F. Supp 2d, 1239, 1246 (D.Kan. 2002 ) Obviously, there is some frisk to USD 501 in this present litigation for there will be no difficulty showing that Mr. Brown was treated so poorly by the USD 501 Administration and by Mr. Nusbaum in particular. The issue of credibility is a key factor in this present litigation and that the fact that the Administration has treated Mr. Brown so poorly does not bode well with the Defendant

### **THE AUGUST 27, 2001 LETTER**

The Defendant wants to use the August 27, 2001 letter from Mrs. Lynn King informing Mr. Brown that he will not be considered for rehire which has become the standing order by the school district but USD 501 neglects one outstanding fact. It is undisputed that Mr. Brown's contract was continually granted renewal by the Administration for 16 years and during this time frame Mr. Brown was never put on Disciplinary Status, Probationary Status or Suspension Status. This is a discriminatory act by the Defendant especially when Mrs. Lynn King (former USD 501 Human Resource Director ) and Mrs. Carla Nolan (former USD 501 Human Resource Director) and Dr. Robert McFrazier (former USD 501 Superintendent ) have never observed Mr. Brown. The standing order in this present case by the Defendant is not applicable due to the fact Mrs. Carla Nolan gave deposition testimony on 4/18/2018 "that if an individual last performance evaluation is marked renew contract that particular individual is eligible for employment. Mr. Brown's last evaluation dated 4/19/1995 is marked "Renew Contract" Dr. McFrazier former Superintendent for USD 501 is the person responsible for the standing order to not have Mr. Brown rehired. A misrepresentation such as this by Dr. McFrazier is a clear indication that USD 501 is looking for some type of reason to keep Mr. Brown out of the running to be rehired and shows even further that the proffered reason for USD 501 refusal to rehire Mr. Brown can be that of pretext

### **POLICY VIOLATION**

In according to the USD 501 Professional Agreement Policy Handbook Article 19 pertaining to Employee Personnel Files it is indicated "A master file of all materials relating to a employee shall exists at the District Department Of Personnel Services. All materials placed in the employee's file and originating with the school district shall be available to the employee at his/her request for inspection in the presence of the person (s) responsible for keeping the files. Materials which is derogatory to the employee's conduct , service , character or personality shall not be placed in an employee's file unless the employee has had an opportunity to read the material. The employee shall acknowledge that he/she has read such material by affixing his/her signature on the actual copy to be filed. Such signature does not indicate agreement with the material. The employee shall have the right to answer any material to be filed and his/her answer shall be attached to the official copy. For the Defendant's attorney along with USD 501

employees Mrs. Debbie Ramburg and Mrs. Nancy McCarter to say that Mr. Ned Nusbaum's documented summary is in Mr. Brown's personnel file is in violation of their own policy. Mr. Brown's signature and/or initials are not and have never been placed on the documented summary. Again, USD 501 is in violation of its own policy for the documented summary is being used to have Mr. Brown not to be rehired and is not in Mr. Brown's personnel file and has never been in Mr. Brown's personnel file. Furthermore, Mr. Ned Nusbaum gave deposition testimony on 9/23/1991 that the 4/27/1989 documented summary does not belong in Mr. Brown's personnel file. Defendant's attorney, the District Court and the Tenth Circuit Court of Appeals disregarded this policy

### **HEARSAY MEMO DOCUMENT**

The Defendant's Attorney and the District Court wants this Court to believe that Mr. Ned Nusbaum's 4/27/1989 Documented Summary is not a "Hearsay Memo Document which cannot be used for a Motion For Summary Judgment. Rule 56 of the FRCP states that a Motion For Summary Judgment must be supported by citing the usage of Depositions, Requests For Admissions, Interrogatories, Affidavits or other materials FRCP 56(c)(1)(A) The Defendant's and the District Court disregarded the deposition testimonies given by the USD 501 Administration which disputes the Documented Summary. It should also be noted that whatever materials are used it must constitute admissible evidence and disputed testimonies cannot be presented in the form as admissible evidence. FRCP 56(c)(2)

### **DEFENDANT USD 501 OWN ADMISSIONS**

The fact that Mr. Brown has been continually been granted contract renewal during the many years that he worked for USD 501 will dispute the school district reasons to not rehire him for the lack of consideration not to rehire Mr. Brown can be viewed highly suspect as well as pretextual. Mr. Brown has met the evidentiary requirements that USD 501 argument not to rehire Mr. Brown should fail. Mr. Brown has provided more than adequate information to demonstrate the showing of discrimination. The USD 501 Administration Own Admissions are of the following:

- 1.) By there own admission the Defendant USD 501 has admitted that the many years Mr. Brown worked for USD 501 he was continually granted contract renewal. Mrs. Carla Nolan 4/18/2018 deposition testimony
- 2.) By there own admission the Defendant USD 501 has admitted that if a person's last evaluation indicates renewal of contract that person will be eligible to come back to work the next year. Mrs. Carla Nolan 4/18/2018 deposition testimony
- 3.) By there own admission the Defendant USD 501 has admitted that if an individual

final evaluation reflect renew contract that person would continue to remain eligible for employment.. Mrs. Carla Nolan 4/18/2018 Deposition Testimony

4.) By there own admission the Defendant USD 501 has admitted that Mr. Brown's final evaluation dated 4/19/1995 indicates that he is eligible for contract renewal. Mrs. Carla Nolan 4/18/2018 Deposition Testimony

5.) By there own admission the Defendant USD 501 has admitted that Mr. Brown's teaching assignment for 1996-1997 will be at Lundgren Elementary school. The Administration provided Mr. Brown with a letter dated 5/24/1996 indicating this assignment

6.) By there own admission of current Superintendent Dr. Tiffany Anderson has admitted that she does not recall Mrs. Carla Nolan ever telling her that there is a list of ineligible individuals not to be hired at USD 501. Dr. Tiffany Anderson 6/7/2018 deposition testimony

7.) By the admission of former USD 501 Human Resource Director Mrs. Lyn King has admitted that Superintendent Of Schools do not get involved in the hiring of individuals . Mrs. Lynn King deposition testimony on 7/2005

8.) By the admission of Kristi Reynolds she has admitted denying every sexual allegation in Mr. Ned Nusbaum former Topeka High School principal 4/27/1989 Documented Summary that Mr. Brown has been unjustly accused of. Kristi Reynolds deposition on 11/8/1991

9.) By the admission of former head boys basketball coach at Topeka High School Mr. Wilfred Nicklin has admitted that he has heard no negative comments of Mr. Brown coaching girls basketball at Topeka High School. Mr. Wilfred Nicklin 10/25/1991 deposition testimony

10.) By the admission of Mr. Ned Nusbaum former Topeka High School principal has admitted in trial testimony that former Head Girls Basketball Coach Mr. Charles Myers never observed Mr. Brown making inappropriate comments to any of the girls. Mr. Ned Nusbaum trial testimony Page 227 Lines 17 to 20 Case No 91-4011-R

11.) By the admission of Mr. Joe Zima former USD 501 School District Attorney has admitted in his Jan. 4, 2003 letter to Mr. Brown that "No such documents exists in Mr. Brown personnel denying Mr. Brown re-employment"

12.) By there own admission the Defendant USD 501 has admitted and not disputed that the school district unlawfully discriminated against Mr. Brown in Oct. 1981 which was worked out/settled by the Administration. Mr. Brown was placed on Teacher Contract

Status once this matter got resolved.

13.) By her own admission Kristi Reynolds gave trial testimony that her deposition was taken in the office of Mr. Wendell Betts. Kristi Reynolds Trial Testimony Page 630 Lines 15 to 25 Case No 91-4011-R

14.) By her own admission Mrs. Barbara Davis former principal at Linn Elementary School provided Mr. Brown with a letter dated September 11, 1989 that Mr. Brown has exhibited a high level of professionalism

15.) By there own admission the Defendant USD 501 has admitted to hiring 60 new Substitute Teachers for the 2021-2022 school year as indicated in the 2/8/2022 Topeka Capital Journal Newspaper Article

16.) By there own admission the Defendant USD 501 has admitted that there are no plans to fire Mr. Brown from the school district. Mr. Ned Nusbaum deposition testimony on 9/23/1991

This is another indicator of pretext for the District Court failed to acknowledge the Defendant's Own Admissions which contradicts there proffered reason not to rehire Mr. Brown as well as keeping him out of consideration for any other positions that he is certified /qualified for. Richmond vs. Oneok Inc 120 F3d 205, 209 (10<sup>th</sup> Cir 1997 )

Furthermore, the District Court failed to acknowledge that Dr. McFrazier (African American )at no time did an observation of Mr. Brown nor considered his personnel file when making the decision not to have Mr. Brown rehired is another indicator of pretext for if the Defendant could demonstrate non-renewal of Mr. Brown's contract it would have done so but did not. Richmond vs. Oneok Inc 120 F3d 205, 209 (10<sup>th</sup> Cir. 1997 )

The other African American Mr. Barbara Davis former principal at Lin Grade School who the District Court failed to acknowledge Mrs. Davis 9/11/1989 letter of praise to Mr. Brown stating that Mr. Brown shows a high level of professionalism is another indicator of pretext that contradicts the school district's proffered reason not to rehire Mr. Brown. Richmond vs. Oneok Inc 120 F3d 205, 209 (10<sup>th</sup> Cir.1997 )

## **B. FACTS AND PROCEDURAL HISTORY**

Plaintiff Mr. Mark E. Brown is a African American Male who is certified to teach Physical Education (K-12 ) Health (K-12) Special Education /LD (7-12) The many years that Mr. Brown taught school for USD 501 he has never been placed on Disciplinary Status, Probationary Status, Suspension Status and has never been Terminated from the school District. Every year that Mr. Brown worked for USD 501 he has been continually granted contract renewal. Mr. Joe Zima former USD 501 school district attorney informed Mr. Brown in his Jan. 4, 2003 letter "No Documents exists in Mr. Brown's personnel file denying Mr. Brown re-employment" Mr. Brown is indicating that USD 501 has unlawfully retaliating against him because he has made previous complaints/lawsuits against the school district regarding acts of discrimination . Mr. Brown first worked for the USD 501 School District as a Substitute Teacher during the 1976-77 school year and has received evaluation marked as satisfactory and/or excellent. The many years that Mr. Brown has worked for USD 501 he has been required to file complaints of Racial Discrimination as well as Retaliation due to the treatment that Mr. Brown has received in employment with USD 501. It is not disputed that USD 501 unlawfully discriminated against Mr. Brown in Oct 1981 in regards to a basketball coaching position at Topeka West High School. This charge of discrimination/litigation was worked out/settled by the Administration. It should be known that the Oct. 1981 KCCR Complaint started Mr. Brown's battles vs. USD 501. For the 1982-83 school year Mr. Brown was placed on Teacher Contract Status and was continually granted contract renewal. In April 1989 Mr. Brown was unjustly accused by Mr. Ned Nusbaum principal at Topeka High School at that time of making inappropriate sexual comments to Kristi Reynolds who was a member of the girls basketball team. At that time Mr. Brown was the number one assistant coach to Head Coach Mr. Charles Myers and the next person in line to be the head coach when Mr. Myers resigns. This Court should also know that Mr. Brown had a Administrative Charge pending with the KCCR when this matter was going on. This Court should also know that Kristi Reynolds gave deposition testimony on 11/8/1991 denying every sexual allegation in Mr. Ned Nusbaum's 4/27/1989 documented summary that Mr. Brown has been unjustly accused of.. On July 28, 2021 Mrs. Nancy McCarter who is the Substitute Teacher Service Manager for USD 501 had informed Mr. Brown that the school district is not hiring any new substitute teachers for the 2021-2022 school year but according to the 2/28/2022 Topeka Capital Journal Newspaper Article USD 501 hired 60 new people to do substitute teaching for the 2021-2022 school year. It is also indicated in the 4 job postings that USD 501 is still seeking to hire substitute teachers for the 2021-2022 school year. These job postings are dated 6/9/2021 10/25/2021 11/18/2021 1/12/2022

Title VII provides a time for actions to brought thereunder (EEOC V. W.H.Brau Inc 347 F3d 1192, 1197-98 ( 10<sup>th</sup> Cir. 2003 ) In Kansas which is a deferral state Plaintiff must file his/her charge within 300 days after the alleged unlawful employment practice occurred 42 U.S.C. §2000(e)(5)(1) the Plaintiff then has 90 days after receiving the Right To Sue Letter to file a Federal Complaint. The Kansas 2 year statute of limitations

applies to 1981 claims ( Cross v Home Depot 390 F3d 1283, 1288 (10<sup>th</sup> Cir 2004) Ware v Union Pac R.R. Co. Omaha 278 F. Supp 2d 1263, 1266-67 (D. Kan 2003) Where Mr. Brown's current claim is based on his 9/5/2022 online application that he submitted for a substitute teaching position for the 2022-2023 school year. Mr. Brown's current claim arose on 1/28/2022 simply meaning that the statute of limitations does not expire until 1/28/2024. Mr. Brown filed his complaint with the District Court on 12/13/2022 which is clearly within the two year period. Mr. Brown's \$1981 claim was timely and the District Court should be reversed so that the Plaintiff can present his claim to a jury. Simply put, the District Court failed to acknowledge the Kansas 2 year Statute Of Limitations. On Page 4 Paragraph 1 under Title VII Claims in the Memorandum And Order the District Court mentions that "Plaintiff did not file suit within 90 days of receiving a Right To Sue" The District Court is incorrect because Mr. Brown received his Right To Sue Letter on 9/16/2022 which pertains to this present case . The 90 days from 9/16/2022 will expire on 12/15/2022. Mr. Brown filed this present lawsuit on 12/13/2022 which is under 90 days making this present lawsuit filed on time On Page 5, Paragraph 2 of the Memorandum And Order where the District Court mentions "Plaintiff filed his EEOC Charge on Aug. 20 and the EEOC issued a Right To Sue on Oct. 28 This Court should know that the District Court is incorrect on this because first of all the District Court does not mention the year, just the dates Aug 20 and Oct 28 (no years ) Mr Brown records show that he filed a retaliation charge on Aug 6, 2021 vs. USD 501 and received a Right To Sue letter Nov. 1, 2022 pertaining to that particular charge. Here again, the District Court is incorrect with its information . Mr. Brown did not use the Right To Sue Letter that he received on Nov 1, 2022. On Page 6, under Letter B January 2022 E-Mail Paragraph 4 the District Court mentions Plaintiff did not reapply for a job in January or interview or interview for it- Page 7 This Court should know that the District Court is incorrect on this because on the date of 9/5/2022 Mr. Brown submitted his online application for a substitute teaching position for the 2022-2023 school year. Here again, the District Court is incorrect with its information for Mr. Brown did reapply for a job in January 2022. One of the telling pieces of evidence showing pretext is that if USD 501 felt that Mr. Brown was unqualified to perform the duties required by the District it would not have continued to renew Mr. Brown contract for 16 years. Mr. Brown believes that anyone who familiarizes themselves with the details of this case will see it as retaliation due to Mr. Brown 's filing of previous complaints/lawsuit against the school district.

## REASONS FOR GRANTING THE WRIT

This case presents a recurrent questions on which the Tenth Circuit Court Of Appeals are persistent conflicts.

Employment Discrimination Cases usually proceed under Title VII and othe statutes as well as 42 U.S.C. Sec. 1981 that allows an individual to sue public employees under both which prohibits employment discrimination. The Defendant's attorney as well as the District Court failed to consider the 1991 Amendment of 42 U.S.C. §1981 and the inclusion of remedy provisions in the new §1981(a) which explains the scope of the statute to include an instant action. This Court should find the §1981 as supplement §1981(a) has its own basis for recovery. The 1991 Amendment of 42 U.S.C. §1981 outlines a clear intention of damages remedy under §1981 that does not require a Plaintiff to refer to §1983 remedies to obtain relief or state a claim. The Amendment clearly provide for a claim and remedies against a state actor. As indicated on Page 10, Paragraph 3 of the District Court Memorandum And Order under 2-Section 1981 claims the Defendant USD 501 is state actor. This Court should also be informed that according to the Legislative History of the 1991 Amendment it list the following regular purposes:

- 1.) To provide appropriate remedies for intentional discrimination and unlawful harassment in the work place
- 2.) To expand the scope of relevant Civil Rights Statutes in order to provide adequate protection to victims of Discrimination 42 U.S.C. §1991 Sec. 3 Purposes (Pub. L. 102-166 Nov21 1991, 105 Stat. 1071 Civil Rights Act of 1991 )
- 3.) Provide the Right to receive Compensatory Damages

Mr. Ned Nusbaum former principal at Topeka High School 4/27/1989 Documented Summary is a "Hearsay Memo Document " that as of this date is being used to keep Mr. Brown from being rehired . In accordance to Rule 56 of the FRCP it clearly indicates that a Motion For Summary Judgment must be supported or opposed by citing the usage of Depositions, Requests For Admissions, Interrogatories , Affidavits or other materials FRCP 56(c)(1)(A). The Tenth Circuit Court Of Appeals as well as the District Court completely disregarded the deposition testimonies given by the USD 501 Administration and other individuals connected with USD 501 which was submitted by Plaintiff Mr. Brown that disputes the 4/27/1989 Hearsay Memo Document. Disputed testimonies cannot be presented in the form of admissible evidence FRCP 56 ©) (2) The law is clear that only admissible evidence may be considered in Summary Judgment Jenkins v Winter F3d 742, 748 (8<sup>th</sup> Cir 2008 ) Also, in accordance to Rule 32 Using Depositions in Court Proceedings under Impeachment and Other Uses it is indicated that any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness or for any other purpose allowed by the Federal Rules Of Evidence. It is also

indicated Rule 32 Using Depositions in Court Proceedings under Depositions Taken in an Earlier Action it is indicated that A deposition lawfully taken and if required filed in any federal or state court action may be used in a later action involving the same subject matter between the same parties or their representatives or successors in interest, to mthe same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules Of Evidence

Also, in accordance to Federal Rules Of Evidence 804 (b)(1) it indicates that former testimony given under oath at another hearing whether in the case, a different case or in a deposition may be admissible in the current proceeding provided. It should also be noted that if the deponent does not sign his/her deposition transcript within 30 days the court reporter will state on the record the signature was wal ved and the deposition may be used as if it were signed.

The District Court and the Tenth Circuit Court Of Appeals completely disregarded the deposition testimony given by the USD 501 Administration and the other individuals associated with USD 501 which disputes the Hearsay Memo Document as well as showing conflicting testimonies among themselves;

This information/evidence of conflicting /contradictory deposition testimonies on the part of the U.S.D. 501 Administration have been pointed out in Mr. Brown 's Appellant and Reply Briefs. The evidence submitted by Mr. Brown is sufficient enough to raise a jury question of whether Discrimination , Retaliation or both would be done in keeping Mr. Brown from being rehired.

If USD 501 felt that Mr. Brown was unqualified to perform the duties required by the District it would not have continued to renew his contract for 16 years.

Mrs. Carla Nolan former USD 501 Human Resource Director gave deposition testimony on 4/18/2018 "If the school district could have demonstrated cause for non-renewal of Mr. Brown's contract it would have done so, but did not



## CONCLUSION

For the foregoing reasons this court should grant this petition and issue a Writ Of Certiorari to review the judgment and opinion of the Tenth Circuit Court Of Appeals

Respectfully submitted,

*Mark E. Brown*

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