

No. 17-1481

In The
Supreme Court of the United States

RONALD L. GREEN,

Petitioner,

v.

STEVEN T. MNUCHIN, SECRETARY,
DEPARTMENT OF THE TREASURY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR REHEARING

RONALD L. GREEN, J.D.
Petitioner, *In Proper Person*
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PETITION FOR REHEARING

Petitioner Ronald L. Green, a disabled veteran and a former employee of the Respondent, respectfully submits this Petition for Rehearing of the June 11, 2018 Order of the Court denying his petition for a writ of certiorari.

Introduction

At great expense, and in spite of our chronic emotional disability, we have struggled from the administrative phase until now to prosecute this Title VII complaint of unlawful discrimination based on race and disability and retaliation for protected activity because we wanted to help deter our former employer from such unlawful activity in the future. So far, we have not been successful.

The Court's June 26, 2018 decision in *Trump v. Hawaii*, in Case No. 17-965, and the opinions expressed therein, clearly demonstrate the issues raised in our earlier petition are timely and significantly important, and the Court should reconsider whether our petition for writ of certiorari should be granted.

Our petition for writ of certiorari was based on our claims that the courts below, in adjudicating and deciding our employment discrimination case, did not follow controlling law, including but not limited to Executive Order No. 5396.

Astonishingly but true, the courts below also failed to adhere to this Court's precedents, the Federal Rules

of Civil Procedure and the Federal Rules of Evidence. We contend these judicial lapses, *inter alia*, unlawfully violated this Petitioner's 5th Amendment rights to due process under the U.S. Constitution.

Executive Orders

From Wikipedia, we now know that "an executive order is a directive issued by the President of the United States that manages operations of the federal government and has the force of law . . . Article Two of the United States Constitution gives the president broad executive and enforcement authority to use their discretion to determine how to enforce the law or to otherwise manage the resources and staff of the executive branch . . . Like both legislative statutes and regulations promulgated by government agencies, executive orders are subject to judicial review and may be overturned if the orders lack support by statute or the Constitution." (https://en.wikipedia.org/Executive_order).

This Court held in *Trump v. Hawaii* that Executive Order 13769, Executive Order 13780 and Proclamation No. 9645 ("travel ban") were proper exercises of the authority granted the President under 8 U.S.C. §§ 1182(f) and 1185(a) in spite of the anti-Muslim comments made by the President and others during the 2016 campaign and afterwards.

In the proceedings below, we argued unsuccessfully that the Respondent did not have a legitimate, nondiscriminatory reason ("LNDR") for demanding

Mr. Green's disability-related and confidential medical records in order to process his request for sick leave because Executive Order No. 5396 mandated that his request be granted.

In addition, in our petition for writ of certiorari, we presented the following question for review:

4. Can a supervisor under the *Ellerth/Faragher* framework create a hostile work environment for a disabled veteran, and violate Executive Order (No.) 5396 and the Rehabilitation Act of 1973, when the supervisor repeatedly demands disability-related disclosures under threat of possible termination, allegedly necessary to process a request for sick leave?

(Petition for Writ of Certiorari, Case No. 17-1481).

Executive Order No. 5396, in its entirety, provides as follow:

"With respect to medical treatment of disabled veterans who are employed in the executive service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law . . . shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating. The granting of such leave is contingent upon the veteran's giving prior notice of definite days and hours of absence required for medical

treatment in order that arrangements may be made for carrying on the work during his absence.”

(Executive Order No. 5396, signed by President Herbert Hoover on July 17, 1930).

Although Executive Order No. 5396 does not cite the authority under which it was issued, the President has general authority in personnel matters pursuant to Title 5 of the United States Code.

Executive Order No. 5396 remains in full force and effect. Nevertheless, neither the Respondent nor the district court nor the Ninth Circuit considered whether the demands for Mr. Green’s disability-related and confidential medical records contravened the protections provided disabled veterans like him in Executive Order No. 5396, that has the same power as a federal law.

However, in light of the Court’s discussion in *Trump v. Hawaii* regarding the power of the president to issue executive orders, the fourth question presented in our petition for writ of certiorari can now be answered in the affirmative.

As the supervisory officer to this disabled veteran, Mr. Green’s supervisor was mandated to comply with Executive Order No. 5396 and simply grant his request for sick leave, no matter how long. His supervisor did not have a LNDR for demanding Mr. Green’s disability-related medical records because he had no authority to do so and those actions could not be job-related

and consistent with business necessity for the same reason.

Accountability

In his concurring opinion in *Trump v. Hawaii*, the Honorable Justice Kennedy stated:

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects . . . It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions . . . An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

(*Trump v. Hawaii*, Case No. 17-965 (June 26, 2018) (Kennedy, J., concurring)).

In addition, in the closing paragraph of her dissenting opinion in the case, the Honorable Justice Sotomayor stated:

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.

(*Trump v. Hawaii*, Case No. 17-965 (June 26, 2018) (Sotomayor, S., dissenting)).

With respect, we humbly suggest that our Constitution also demands, and our country also deserves, a Judiciary willing to hold *itself* to account when it too defies our most sacred legal commitments.

Gravely Wrong Decisions

President Franklin Roosevelt established concentration camps for Japanese-Americans during World War II using Executive Order No. 9066. In *Korematsu v. United States*, 323 U.S. 214 (1944), Japanese-Americans brought suit but lost.

According to the Court, “that morally repugnant order . . . (t)he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority . . . *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – ‘has no place in law under the Constitution.’ 323 U.S., at 248 (Jackson, J., dissenting).” (*Trump v. Hawaii*, Case No. 17-965, Opinion of the Court dated June 26, 2018). The *Korematsu* decision is now overruled.

In the instant case, more than two years after the Selecting Official (“SO”) first stated under oath that he did not select this Petitioner for promotion in Vacancy 889 because he was not the top-ranked candidate on the Best-Qualified list, over Mr. Green’s objections that it violated his due process rights, the Equal Employment Opportunity Commission (“EEOC”) Administrative Judge (“AJ”) allowed the SO to testify for the first

time and without prior notice or any evidence whatsoever that he did not select Mr. Green in Vacancy 889 because he was allegedly under investigation for misconduct. (Petition for Writ of Certiorari Appendix ("App.") 42).

The SO testified he became aware of the alleged investigation because an unnamed investigator told him. Under cross-examination, the SO could not provide the date he allegedly spoke to the unnamed investigator, he did not know when the alleged investigation began, he did not know when or if it had concluded and he did not know what, if any, the findings were. (Ninth Circuit Excerpts of Record "ER" at US00973 and US00975). Green was never charged or even disciplined for any alleged misconduct.

Nevertheless, the AJ found the SO articulated a LNDR for not selecting Green in Vacancy 889, (he was allegedly under investigation), and she also found, in spite of Green's First Amendment rights, that the issues surrounding his sick leave were "self-inflicted" based on his repeated objections to his supervisor's repeated demands for his confidential medical records.

In subsequent proceedings before the district court, the Respondent continued to rely on the SO's incredulous testimony from the administrative hearing. The Respondent never produced or otherwise identified the unnamed investigator, never provided any date for when the SO allegedly spoke to him, when the alleged investigation began, when or if it had concluded and what, if any, the findings were.

We argued that the Respondent failed to meet its *McDonnell Douglas* burden to articulate a LNDR for failing to promote Mr. Green, an African-American, in Vacancy 889 because the assertions made by the SO were inadmissible as required by Rule 56 of the Federal Rules of Civil Procedure and Rules 802 and 1002 of the Federal Rules of Evidence regarding hearsay (Fed. R. Evid. 802) and the best evidence rule (Fed. R. Evid. 1002).

We cited *Burdine* where this Court clearly stated, "To (articulate a LNDR), the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection . . . and frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." (*Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981); Fed. R. Civ. P 56(c)(1)(B) and 56(c)(2); Fed. R. Evid. 802 and Fed. R. Evid. 1002).

Hearsay is inadmissible under the Federal Rules of Evidence because it is unreliable and unverifiable, thus, hearsay can never "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."

Nevertheless, the district court determined the issue of admissibility was irrelevant. Even though the district court found "Plaintiff argues that evidence of the investigation would be inadmissible hearsay and therefore, no evidence of the non-discriminatory reason exists. However, the issue is whether the proffered

reason is a pretext for actual discrimination.” (App. 13).

Essentially, even though the district court apparently recognized that the Respondent failed to articulate a LNDR through the introduction of admissible evidence, the district court nevertheless required this Petitioner to show that the alleged LNDR was a pretext for discrimination. However, under *Celotex* and *St. Mary's Honor Center*, and as argued below, this Court holds that when an employer fails to articulate a LNDR for the acts alleged to be discriminatory, the employee is entitled to judgment as a matter of law. (*Celotex v. Catrett*, 477 U.S. 317, 322 (1986) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 528 (1993)).

We attribute the district court's oversight to the fact that the court failed to include the Respondent's burden to articulate a LNDR as even an issue for its consideration. (App. 9).

In addition, notwithstanding our earlier discussion regarding Executive Order No. 5396, we also argued that the Respondent violated the Rehabilitation Act of 1973 when it made disability-related inquiries in connection with our request for sick leave that were not job-related and consistent with business necessity.

Under 29 C.F.R. § 1630.4, “(i)t is unlawful for (the Respondent) to discriminate on the basis of disability against a qualified individual with a disability in regard to . . . (e) Leaves of absence, sick leave, or any other leave.” (29 C.F.R. § 1630.4).

The Respondent never asserted and the district court never considered whether the Respondent's disability-related inquiries were job-related and consistent with business necessity, as required by *Walton v. U.S. Marshals Service*, 492 F.3d 998, 1003 n.1 (9th Cir. 2007), as well as by 29 C.F.R. § 1630.7, 29 C.F.R. § 1630.13 and 29 C.F.R. § 1630.14, even though this Petitioner specifically raised and argued they were not.

Nevertheless, the district court also determined erroneously that the Respondent articulated a LNDR for his supervisor's additional demands for Mr. Green's disability-related medical information.

According to the court, "(HM) explained that he had never encountered a sick leave request that was as lengthy as (Mr. Green's) request. In an effort to make an informed decision, HM turned to the Labor Relations Division and an FOH doctor for guidance . . . From that point on, HM merely followed the guidance of the Labor Relations Division and an FOH doctor in processing Plaintiff's request." (App. 16).

With that determination, the district court once again defied one of our legal system's most sacred commitments, that of *Ignorantia juris non excusat* (Latin for "ignorance of the law excuses not"). In doing so, the district court ensures henceforth willful blindness will be a LNDR for an employer's allegedly discriminatory acts and therefore a basis of exculpation for invidious discrimination.

Nevertheless, it remains our contention that making disability-related inquiries based solely on the

amount of time in a request for sick leave, as the Respondent did here, is a per se violation of the Rehabilitation Act because only qualified individuals with disabilities, by definition, require lengthy sick leave and would be the only ones adversely impacted.

Accordingly, because the district court did not have the authority to effectively exempt the Respondent (accused of the invidious discrimination Congress seeks to eradicate) from the Federal Rules of Civil Procedure, the Federal Rules of Evidence and this Court's binding precedents, and the decision also contravened Executive Order No. 5396 that specifically protects disabled veterans like this Petitioner from undue scrutiny, the district court's 2014 decision in this case was also "gravely wrong the day it was decided" and should be overruled.

On appeal to the Court of Appeals for the Ninth Circuit ("Ninth Circuit"), the three judge panel's Memorandum concluded that this Petitioner did not establish a prima facie case for the position the SO chose not to fill despite our citing specific cases where this Court held, even when a position is left vacant, a plaintiff can still establish a prima facie case of race discrimination. (App. 2; see also *Teamsters v. U.S.* 431 U.S. 324, 358 n.44 (1977)).

As discussed in our Petition for Writ of Certiorari, to justify its position that Mr. Green allegedly did not satisfy the prima facie case for the unfilled position, the panel stated:

The district court properly granted summary judgment on Green's racial discrimination claim relating to an unfilled position because Green failed to raise a genuine dispute of material fact as to whether, "after his rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)."

(App. 2). However, there can be no clearer example of why a quote should not be taken out of context.

In *McDonnell Douglas*, this Court actually said:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This **may** be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [13] (emphasis added) (The Ninth Circuit's extracted quote is underlined for clarification).

In footnote [13], the Court specifically stated:

The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from (the employee) is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 and footnote 13 (1973).

Thus, the panel's Memorandum was also gravely wrong because it appears the panel selected only that portion of *McDonnell Douglas* that would support its conclusion and omitted those portions that were in apparent opposition. In addition, contrary to representations in the panel's Memorandum, a simple reading of the Plaintiff-Appellant's Opening Brief clearly shows Mr. Green "specifically and distinctly raised and argued" that the Respondent's asserted nondiscriminatory reasons for its actions were pretextual and, when the Appellee's Answering Brief argued that he could not prove pretext, Mr. Green was justified in arguing otherwise in Plaintiff-Appellant's Reply brief.

CONCLUSION

To paraphrase Justices Sotomayor and Kennedy, our Constitution demands, and our country deserves, a Judiciary willing to hold itself to account when it defies our most sacred legal commitment to Due Process.

The Ninth Circuit is unwilling to hold its three-judge panel to account and the three-judge panel is unwilling to hold the District Court to account. However, this Court still can.

Accordingly, this Petitioner respectfully asks the Court to reconsider and vacate the June 11, 2018 denial of certiorari, grant certiorari and remand the case

for further consideration in light of Executive Order No. 5396, *Texas Dep't of Cmty. Affairs v. Burdine*, *Celotex v. Catrett*, *St. Mary's Honor Center v. Hicks*, Rule 56 of the Federal Rules of Civil Procedure, and Rules 802 and 1002 of the Federal Rules of Evidence.

RESPECTFULLY SUBMITTED this 6th day of July, 2018.

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

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