

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MYOUNGCHUL SHIN, SEONGMIN CHO, and
YONGSEON KIM

Petitioners,

v.

UNI-CAPS, LLC, SANG H. KIM, and KYU SANG SHIM

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should reject the Ninth Circuit's interpretation of "retaliation" under the FLSA, which treats a showing of any non-discriminatory reason for termination as sufficient to defeat a claim of retaliation, and is in conflict with the *McDonnell Douglass* test for retaliation provided by this Court.

2. How the Court should resolve the conflict between the Ninth Circuit's interpretation of "employer," which excludes high-level executives who do not interact with employees on a day-to-day basis or direct their work activities during their shifts, and the economic realities test for an employer-employee relationship provided by this Court, which considers the circumstances of the whole activity between the parties.

3. Whether the Court should reject the Ninth Circuit's finding that a supervisor is not an employer merely because he does not maintain personnel files/payroll records or have the unilateral power to terminate an employee, which conflicts with this Court's holding that an employer-employee relationship does not depend on isolated factors, but rather, the circumstances of the whole activity.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioners Myoungchul Shin, Seongmin Cho, and Yongseon Kim, and Respondents Uni-Caps, LLC, Sang H. Kim, and Kyu Sang Shim. There were no parties to the proceeding other than those named in the caption of the case.

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PRAYER

Petitioners Myoungchul Shin, Seongmin Cho, and Yongseon Kim pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit issued on October 23, 2017.

OPINIONS BELOW

On October 23, 2017, the United States Court of Appeals for the Ninth Circuit entered its judgment and opinion partially affirming, partially vacating, and partially remanding the district court's decision to grant summary judgment in favor of Respondents Uni-Caps, LLC, Sang H. Kim, and Kyu Sang Shim on Petitioners' federal claims. A copy of that opinion is attached as Appendix A. A transcript of the district court's order granting summary judgment in favor of Respondents on Petitioners' federal claims is attached as Appendix B. The Ninth Circuit's Denial of Petitioners' Petition for Panel Rehearing is attached as Appendix C.

JURISDICTION

The date of the judgment for which Petitioners seek review was issued on October 23, 2017 by the California Court of Appeal. On November 6, 2017, Petitioners timely filed a Petition for Panel Rehearing. On November 21, 2017, the Ninth Circuit filed its Order Denying Petitioners' Petition for Panel Rehearing. This petition is filed within 90 days of the denial of the rehearing, pursuant to the Rules of the United States Supreme Court, Rules 13.1, 13.3, and 29.2. S. Ct. R. 13.1; 13.3; 29.2. Jurisdiction has been conferred on this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

The issues involved in this case are based on the federal Fair Labor Standards Act ("FLSA"), which prohibits an employer from discharging, discriminating against, or retaliating against an employee because the employee has complained of or objected to the employer's violation of the FLSA. 29 U.S.C. §§ 215 and 218(c). The FLSA states that the

definition of “Employer includes “any person acting directly or indirectly in the interest of an employer in relation to an employee” 29 U.S.C. § 203.

STATEMENT OF THE CASE¹

This is an employment litigation case involving three factory workers who were terminated because they exercised rights protected by the FLSA.

Respondent Uni-Caps, LLC (“Uni-Caps”) manufactures and sells soft gel capsules nationally and internationally. *See* Plaintiffs/Appellants’ Excerpts of Records, Docket Nos. 10-1–10-12 (“E.R.”) 219. Respondent Sang H. Kim (“Respondent Kim”) is the president and founder of Uni-Caps. E.R. 220. Sky and Sea Corp, which is owned by Respondent Kim and his wife, and Suheung Capsule each own 50% of Uni-Caps. *Id.*; E.R. 1816.

Petitioner Seongmin Cho (“Petitioner Cho”) began working at Uni-Caps in 2009. E.R. 1777. Petitioner

¹ All references are to the combined Record on Appeal as constituted before the Court of Appeals.

Myoungchul Shin (“Plaintiff Shin”) and Petitioner Yongseon Kim (“Plaintiff Kim”) started working at Uni-Caps in 2007. E.R. 1787, 1797. Petitioners came to Uni-Caps as part of a group of Korean employees from Suheung Capsule that included Uni-Caps General Manager, Respondent Kyu Sang Shim (“Respondent Shim”), between 2007 and 2008. E.R. 220–21.

Respondent Kim was behind every management decision that affected Uni-Caps employees’ working conditions based on his ultimate authority as the founder, significant shareholder, and president of Uni-Caps. *See* E.R. 2163–5, E.R. 1815–21.

Respondent Shim supervised the entire Production Department at Uni-Caps, including Petitioners. Respondent Shim could directly hire and fire employees, set schedules, and make managerial recommendations to Respondent Kim. *See* E.R. 2167–9, E.R. 1973 (Respondent Kim’s instructions to Respondent (“Bujang Shim”), E.R. 1687–9, E.R. 1820–1.

Petitioner Cho worked for Uni-Caps from March 2009 until he was terminated on March 6, 2014. E.R. 331, 1777. Petitioner Shin worked for Uni-Caps from 2007 until he was terminated on March 6, 2014. E.R. 331, 1777. Petitioner Kim worked for Uni-Caps from 2007 to the end of 2010; from January 2011 to July 2013; and from August 2013 until his termination on March 6, 2014. E.R. 331, 1777.

At Uni-Caps, Petitioners performed manual work as operators and worked on 12-hour shifts, but Respondent Uni-Caps never paid overtime. E.R. 1966–71. Since at least 2009, Petitioners requested that Uni-Caps management change their work schedules so they could have weekends off. E.R. 1662; E.R. 1679–87. Uni-Caps did not accommodate their requests. *Id.* On January 2nd and 3rd, 2014, Petitioners requested employment records from Uni-Caps through their attorney under California Labor Code Section 226. E.R. 1951.

Just a few weeks later, in late January, Uni-Caps brought in employees Chun Taek Oh, Jin Geun Song, Jong Wan Kim,

and Se Chang Jang, from their South Korean parent company Suheung. These Suheung employees performed the same job duties as Petitioners, on the same shifts. E.R. 1676, 1812, 1821, 1912.

On February 19, 2014, Petitioners notified Uni-Caps that they would no longer work on weekends. E.R. 323. Thereafter, Petitioners filed a complaint with the California Department of Fair Employment and Housing (“DFEH”) on February 21, 2014. E.R. 1930–49.

Petitioners were terminated two weeks later on March 6, 2014. E.R. 331.

Petitioners filed a complaint against Respondents on August 28, 2014 in the U.S. District Court in the Central District of California. E.R. 2266–320. Petitioners brought thirteen claims against Respondents. *Id.* There were two Federal FLSA claims; the claim against Respondents for unpaid overtime and wages, and an FLSA retaliation claim. *Id.* The remaining 11 claims were state claims.

During the pre-trial conference on December 7, 2015, the district court ordered Respondents to file a motion for summary judgment on the Federal Claims, about two months after the motion filing cut-off. E.R. 162:13–18. The court indicated that it would refuse to exercise supplemental jurisdiction on the state claims for the first time since the case was initiated in 2014. E.R. 140:1–8. On January 20, 2016, the court granted Defendant’s motion for summary judgment on the federal claims and also declined to exercise supplemental jurisdiction over the state claims. E.R. 5–6; App. B at 6b–9b. On February 9, 2016, Petitioners timely filed a Notice of Appeal. E.R. 30.

On October 23, 2017, the United States Court of Appeals for the Ninth Circuit entered its judgment and opinion partially affirming, partially vacating, and partially remanding the district court’s decision to grant summary judgment in favor of Respondents. *See* App. A at 3a. The Court of Appeals affirmed the district court’s grant of summary judgment for Respondents on Petitioners’

retaliation claim, stating: “Even assuming that Plaintiffs had engaged in FLSA-protected activity, Defendants had a legitimate, nondiscriminatory reason for terminating [Petitioners]: their refusal to work on weekends as assigned.” *Id.* at 2a. The Court of Appeals also affirmed the district court’s holding that Uni-Caps President, Respondent Kim, was not Petitioners’ employer because “he had little to no contact with Plaintiffs on a day-to-day basis, and he did not direct their work activities during their shifts.” *Id.* Additionally, the Court of Appeals affirmed the district court’s holding that Respondent Shim was not Petitioners’ employer because “he did not maintain their personnel files or payroll records, nor did he have the unilateral power to terminate them.” *Id.*

On November 6, 2017, Petitioners timely filed a Petition for Panel Rehearing. On November 21, 2017, the Ninth Circuit filed its Order Denying Petitioners’ Petition for Panel Rehearing. *See* App. C at 1c.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit’s Interpretation of “Retaliation” Conflicts with this Court’s *McDonnell Douglas* Test for Retaliation

Retaliation claims are evaluated under the *McDonnell Douglas* burden-shifting framework. *See generally McDonnell Douglas v. Green*, 411 U.S. 792 (1973). This framework has three stages. Initially, a plaintiff must establish a prima facie entitlement to relief. *Id.* Next, the defendant must articulate a legitimate, non-discriminatory reason for the adverse action. *Id.* And finally, the plaintiff must be given the opportunity to demonstrate that the non-discriminatory reason offered by defendant was a pretext. *Id.*

Contrary to the *McDonnell Douglas* framework provided by this Court, in Petitioners’ case, the Ninth Circuit stopped short of the full three-stage process, and ended its analysis at stage two. Upon finding what it deemed to be a “legitimate, nondiscriminatory reason” for terminating Petitioners, the Ninth Circuit prematurely ended consideration of the

evidence and granted summary judgment in favor of Respondents. *See generally* App. A.

However, even if Respondents were able to prove their non-discriminatory reason was true, in stage three of the *McDonnell Douglas* test, Petitioners need only show that retaliation was a motivating factor for their termination.

In this case, the close timing of Petitioners’ protected activity and their subsequent termination, a mere one and a half months, supports an inference of causation. *See Bowen v. M. Caratan, Inc.*, 142 F.Supp.3d 1007, 1023 (E.D. Cal 2015) (“timing alone may demonstrate causation, so inferred when a Defendants has taken adverse actions closely following the protected activity”). Here, the Respondents claimed that the termination of Petitioners had nothing to do with the fact that they all had pending labor claims against Uni-Caps. E.R. 1930–49. Yet, the choice of Respondents to aggressively attempt to fire the group as a whole, just one and a half months after they received notice of the protected activity, raises another issue of material fact—that the pending

complaints were a motivating factor in their terminations. E.R. 1951–55 (notices to Uni-Caps dated January 2 and 3); *See Bowen*, 142 F. Supp. at 1023.

The Ninth Circuit’s decision to stop short of stage three of the *McDonnell Douglass* framework, and ignore compelling evidence demonstrating that the non-discriminatory reason offered by Respondents was a pretext, is in direct conflict with the interpretations of “retaliation” under *McDonnell Douglass*, as provided by this Court. Furthermore, it renders the FLSA’s prohibition of retaliation nearly ineffective, as any showing by an employer of a legitimate motive for termination could defeat a claim of retaliation.

2. The Ninth Circuit’s Limited Interpretation of “Employer” Enables High-Level Executives to Avoid Liability Under the FLSA by Simply Delegating Day-to-Day and Direction of Work Duties to Others

The term “employer” is broadly defined to include “*any* person acting directly or indirectly in the interest of an employer in relation to an employee” 29 U.S.C. § 203(d) (West 2016) (emphasis added). The FLSA similarly “defines the verb ‘employ’ expansively to mean ‘suffer or permit to work.’” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (U.S. 1992).

A person is an employer under the meaning of FLSA if this person meets the requirements of an “economic reality” test. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961). This Court has stated that the employer-employee relationship does not depend on “isolated factors but rather upon the circumstances of the whole activity” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

In cases “[w]here the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.” *Rutherford Food Corp.*, 331 U.S. at 729.

Here, the Ninth Circuit overlooked a totality of circumstances indicating that Respondent Kim was an employer. He was behind every management decision that affected employees’ working conditions based on his ultimate authority as the founder, significant shareholder, and president of Uni-Caps. *See* E.R. 2163–5, E.R. 1815–21.

The Ninth Circuit’s holding that Respondent Kim was not Petitioners’ employer because he had little to no contact with Petitioners on a day-to-day basis and did not direct their work activities during their shifts conflicts with the expensive definitions of the term “employer” and the verb “to employ” provided by the FLSA. It fails to consider Respondent Kim’s relationship with the Petitioners in its totality and relies solely on “isolated factors,” in opposition to the approach provided by this Court.

Further, it ignores the reality that in many large corporations, high-level executives may have infrequent contact with some staff members, despite having the power to hire and fire them, supervise or control their work schedules and employment conditions, determine the rate and method of their payment, and update and alter their employment records.

If the Ninth Circuit's decision is undisturbed, it allows high-level executives to avoid liability under the FLSA by simply delegating day-to-day duties and direction of work activities to other employees. This is contrary to the expansive definition of what it means to "employ" someone as provided by the FLSA and recognized by this Court, and fails to consider the circumstances of the whole activity between the parties.

3. The Ninth Circuit's Finding that Supervisors are not "Employers" Unless They Maintain Personnel Files or Have Unilateral Termination Power Conflicts with the Expansive Definition of "Employer" Provided by the FLSA

As stated above, the employer-employee relationship is evaluated by "the circumstances of the whole activity" and not solely based on isolated factors. *Rutherford*, 331 U.S. at 730).

The Ninth Circuit ignored compelling evidence demonstrating that Respondent Shim was also an employer under the FLSA. Respondent Shim supervised the entire Production Department, directly hired and fired employees, set employee schedules, and made managerial recommendations to Uni-Caps President, Respondent Kim. See E.R. 2167–9, E.R. 1973 (Respondent Kim's instructions to Defendant ("Bujang Shim"), E.R. 1687–9, E.R. 1820–21.

In finding that Respondent Shim was not Petitioners' employer because "he did not maintain their personnel files or payroll records, nor did he have the unilateral power to

terminate them,” the Ninth Circuit again acts in direct conflict with *Rutherford* by ignoring the totality of circumstances regarding Respondent Shim’s control over Petitioners in the workplace.

The Ninth Circuit’s holding fails to acknowledge the fact that the maintenance of personnel files and payroll records are often delegated to separate departments. Further, the Ninth Circuit has not identified any authority that considers the “unilateral” ability to terminate employees a requirement for status as an “employer.”

Limiting the definition of “employer” to only those who maintain personnel files and payroll records and have the unilateral ability to terminate employees shrinks rather than expands the interpretation of “employer,” and interferes with the broad definitions of “to employ” and “employer” provided by the FLSA.

CONCLUSION

For the foregoing reasons, Petitioners Myoungchul Shin, Seongmin Cho, and Yongseon Kim pray that this Court grant certiorari and reverse the judgment of the Ninth Circuit on Petitioners' claims of retaliation, and Respondents' status as employers.

Date: February 19, 2018

Respectfully submitted,



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