

No. 17-1690

Supreme Court of the United States

Joseph Cooney,

Petitioner,

v.

Barry School of Law a/k/a Dwayne
O. Andreas School of Law,

Respondent.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44, Petitioner respectfully petitions for rehearing of the Court's October 1, 2018 denial of Petition for Writ of Certiorari based on the merits of this case.

REASONS FOR GRANTING REHEARING

Petitioner's Writ of Certiorari should be granted based on the merits of this case and I humbly request petition for rehearing of this case before a full Nine Member Court to recognize the injustice petitioner has been subjected to and will be irreparably harmed as a result of the finality of petitioner's case.

The decisions below in this case in both the Federal court and the 11th circuit deeply contradict the ADA and the Rehabilitation Act of 1973. The standard for a motion for summary judgment is so deeply strayed from in this case that it is as if the Federal Rules of Civil Procedure don't even apply. The abuse of judicial discretion from the beginning to the finality of this case reaches the highest level and Petitioner's Writ of Certiorari is review worthy in every aspect of the laws violated by the respondent.

Petitioner was Discriminated Against Based on Disability in Violation of The ADA

The evidence directly supports the fact that the respondent willfully denied Petitioner extended probation. The emails directly state that Petitioner was dismissed because of his physical difficulties, being blind in my right eye. The evidence clearly

states that the respondent changed the reasoning of the dismissal to a generic form to “save them from a Lawsuit.” This was directly written in emails by the head decision maker to the other panel members from Petitioner’s hearing. This is easily be construed as direct evidence of discrimination in violation of the ADA and on a lesser scale easily satisfies the requirement for circumstantial evidence that satisfies the requirement for a Prima Facie case of discrimination.

From the 11th Circuit opinion:

“It is true that the initial draft of the Committee’s reasons for denial suggested that the Committee believed that plaintiff, suffering as he did with the eye problem, would not be likely to achieve a 2.0 GPA if given the opportunity of another semester.”

The 11th Circuit clearly stated that respondent suggested they dismissed Petitioner because of being disabled. This in itself contradicts and undermines the ADA of 1990 and Section 504. This suggestion would display the discriminatory animus that is clear in this matter and would require reversal and remand.

The evidence displays that petitioner was dismissed because of being blind in one eye, much more than a mere suggestion. The head decision makers even stated it in a series of emails and in deposition even after stating that the school doesn’t consider disabilities.

Original email:

Mr. Cooney had eye surgery in 2005 resulting in an interior ocular implant. Unfortunately, the implant became dislocated and he has been suffering with blindness in his right eye since March 2011. Between an uncooperative surgeon and no insurance, the problem still exists. He has found insurance and the problem will be fixed in another month or two.

...

Because of his physical difficulties and his lack of concern about advice for succeeding, the Committee did not approve his petition.

Professor Schiavo agreed that Professor Bitatkis was “absolutely right” about removing any reference to Cooney’s “physical disability.” He then circulated a “completely revised” letter and thanked Professor Bittakis for “for saving us from a lawsuit.” The revised letter completely excised any description of Cooney’s condition—including that he was “suffering from blindness in his right eye”—and removed the phrase “physical difficulties” as well as any suggestion that Cooney’s petition was denied because of his “physical difficulties.” . Indeed, the letter literally replaced the actionable “Because of his physical difficulties” with the anodyne “Because of the deficiencies in his petition.” . This remarkable evidence manifestly establishes that, at a minimum, there is a genuine factual dispute over whether Barry employed pretextual reasons for denying my petition and dismissing me from

school rather than imposing probation. "The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be." See Danzer v. Norden Sys., Inc., 151 F.3d 50, 56 (2d Cir.1998)

From head decision maker professor Schiavo deposition:

Q: But the feeling was prior to the final report, If I'm, If I'm correct, is that my eye was a factor in not receiving extended probation?

Schiavo Answer: It could've been, yes

Petitioner Was Immediately Denied Accommodation Upon Request

Petitioner requested an accommodation and was immediately denied with no discussion or any type of alternative offer to address the request. The Professor submitted an affidavit that she has never given an accommodation to any student, yet in her syllabus it states that extra time may be given for a valid reason. Becoming blind in one eye was not a good enough reason for this professor to consider or have any type of discussion in regard to my accommodation request. An interactive process or offer of another accommodation is required under the ADA, but the professor gave a narrow and immediate denial and directly informed petitioner to get out of her office; this reflects her sworn affidavit that she has never nor is willing to give anyone an accommodation

regardless of the situation. No alternative means were discussed or even considered. Respondent has created an impermissible standard in not granting any students with disabilities an accommodation for submitting Appellate briefs. *See Samson v. Federal Express Corporation*, No. 12-14145 (11th Cir. Mar. 26, 2014) The Fifth Circuit held that Institutions should engage in interactive process to determine reasonable accommodations. *Cuttrera v. Board of Supervisors of LSU*, 429 F.3d 108 (5th Cir. 2005)

The discriminatory acts of the respondent, Barry School of Law violates the ADA and mandatory precedent of every US Circuit Court and this Court, The United States Supreme Court of the United States.

The Standard of a motion for Summary judgment is for the evidence to be considered as true in favor of the non-moving party and for the courts not to weigh the evidence. As stated in detail in my petition for writ of certiorari, the 11th Circuit directly weighed the evidence in their opinion and order in dismissing petitioner's appeal. This violates mandatory precedent of every US Circuit Court and this Court, The United States Supreme Court of the United States.

Summary Judgment motions are not to be tried by the trial court or the appellate courts, only material facts in dispute need to be displayed for a motion for summary judgment to be defeated, which is exactly is what occurred in this case. The Federal Court misapplied overturned law to grant defendant's motion *See Fed. R. Civ. P. 52(a)(6)* and the 11th circuit stretched to alternative theories in an erroneous manner to affirm the Federal Court

Middle District erroneous granting of Defendant/respondent's motion for summary judgment. Courts must "avoid weighing conflicting evidence or making credibility determinations," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); "We view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and may not weigh conflicting evidence or make credibility determinations." See *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1303 (11th Cir. 2016)

Petitioner was Denied Access to the Academic Success Program Director in Violation of Sec 504

Access to the Academic Success Director is listed as part of the Academic Success Program, that is supposed to be available to all students. The availability of this academic program was conveyed to plaintiff when I first entered Barry school of Law, and plaintiff received a pamphlet stating "the director of academic success is available to meet individually with any student who is seeking to improve his or her study skills"

Once a student receives notice they are on mandatory academic probation, they must meet promptly with the Director of the academic Success Program, who shall determine what measures may improve the student's academic performance." When Cooney went to see Kirscht, she told him not to come back in a very unprofessional and agitated

manner. Dean Witherspoon stated that the director of the academic Success Program will instruct students to meet with the them on a regular basis, and students have been cited for not meeting with the academic success program director on a regular basis. Inconsistencies are blatant in regard to how many times a student must meet with the academic success program director.

Abuse of Judicial Discretion

The Federal Court misapplying overturned law in regard to the ADAA of 2008 to grant respondent's motion for summary judgment, and knowingly doing it is the highest level of abuse of judicial discretion. Petitioner made intricate legal reference to the ADAA of 2008 in my opposition to respondent's motion for summary judgment, yet the Federal Court cited overturned pre-ADAA cases to grant the MSJ, even after receiving petitioner's opposition that stated these cases were in fact overturned law. The Federal Court would have to have granted the motion for summary judgment with the direct knowledge that they were in fact utilizing overturned law as their legal precedence to grant the dispositive motion. Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. See *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010) *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)

A district court abuses its discretion when:

District court does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See Jeff D. v. Otter, 643 F.3d 278 (9th Cir. 2011) (citing Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004) Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993) The appellate court must accept the trial court's findings unless a mistake has been committed." Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982)

Petitioner also submitted a motion for sanctions against respondent for their non-stop unethical defense tactics throughout discovery. The Federal Court sending out a supplemental order instructing counsel for respondent to supply an affidavit after they had already submitted their opposition papers to my motion for sanctions. Why was the court instructing the respondent how to defend their case and giving them instructions of what was needed? I would call on the phone as a Pro Se litigant and be told that they could not give me legal advice when I was in fact calling in regard to court procedure. This was again another evident display of abuse of judicial discretion. Courts, judges and court personnel systematically discriminate against litigants who appear *pro se* or *in propria persona*, often dismissing their petitions or motions out of hand, regardless of their merits. That is abuse of judicial discretion

Petitioner requested hearings on the motion to compel, motion for sanctions, motion to amend the complaint and the opposition of respondent's motion for summary judgment and the trial court denied all hearing/oral argument requests, yet the respondent

made a phone call to chambers and had a phone hearing scheduled within one day for a motion to compel an affidavit from Joshua Erwin, who was told by respondent that disabled students don't belong in law school. There is absolutely no just reason that respondent should have received a hearing instantaneously and petitioner was denied every hearing request especially in regard to opposing respondent's dispositive motion of Summary judgment. All these issues were in Petitioner's appellate briefs with the 11th circuit and all these issues were completely ignored by the 11th circuit. The 11th circuit rubber stamped the abuse of judicial discretion that went on in the Middle District of Florida District Court.

The 11th Circuit even after receiving respondent's Appellate briefs, were still acting as if they were on the fence about this matter at oral argument and in their decision. When Petitioner argued count two at oral argument, the three-judge panel gave petitioner a cold bench and the only thing the judges would say was "you have 2 minutes, you have one minute and 30 seconds, you have one minute, you have 30 seconds left. The attorney appointed to do oral argument and the respondent's attorney did not receive a cold bench nor were they given a countdown every 30 seconds like I the petitioner, Joseph Cooney.

11th Circuit Court of Appeals ignored Count Two and everything Petitioner stated at Oral Argument

The decision by the 11th circuit had no mention of count two or any of petitioner's other arguments presented in my briefs, and who has ever seen a 10-

page decision without even one case cited to support a court's decision? Not One. Why? Because their decision was so off the scales of justice in regard to the ADA and discrimination that they could not cite any cases to support their erroneous application of the law. "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." ; see also In re Korean Air Lines Co., Ltd., 642 F.3d 685, 698 n.11 (9th Cir. 2011). A manifest abuse of discretion is an abuse of discretion that is obvious or clearly apparent.

Abuse of discretion occurs when a court does not apply the correct law or if it bases its decision on a clearly erroneous finding of a material fact. A court may also abuse its discretion when the record contains no evidence to support its decision. Abuse of discretion is one of the reasons a court of appeals may use to reverse the trial court judgment.

There is a glaring need for an updated case law precedent in regard to ADA cases involving discrimination as there are no cases that support the protected class of the disabled in the Supreme Court since the ADAA of 2008 was instituted and that was a decade ago. There is also a lack of ADA cases as a whole for a long period of time addressing disability discrimination with this court. This case has factual evidence that would support a precedence to protect those with disabilities in schools and as a whole with those suffering from disabilities, whether they be permanent or if someone contracts a serious health condition that lasts more than a transient period of time. This would assist and contribute to the

enforcement of the rights of the disabled community in America under the ADA and the ADAA of 2008 as amended, and the Rehabilitation Act of 1973. It would also curtail federal courts from possibly utilizing overturned case law on this subject matter as what occurred in the petitioner's case.

This case satisfies all of the Court's criteria for review. Whether or not respondent properly addressed petitioner's request for an extension of time for submitting the writing assignment under the ADA's reasonable accommodation requirements. Whether the 11th Circuit overstepped the boundaries of weighing the evidence in a Motion for Summary Judgment. Whether there was an abuse of judicial discretion in the U.S. Federal Court Middle District of Florida by applying overturned law to grant respondent's dispositive motion and Abuse of judicial discretion again occurring in the 11th Circuit by not considering count two claiming violation of the Rehabilitation Act of 1973 and all attached arguments, the non addressment of any of the Petitioner's appeal arguments on the motion for sanctions and the denial of submitting a third amended complaint from information revealed during discovery. *See Liu v. Northwestern University*, 78 F. Supp. 3d 839 (N.D. Ill. 2015). The court allowed a case by a former law student with health conditions to proceed on issues of due process. See Also the abuse of discretion standard. *Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 493 (11th Cir. 1993).

Girard v. Lincoln College of New England, 2014WL2766075 (D. Conn. 2014). Summary judgment was precluded because fact issues remained about whether the student's auditory processing

impairments were a disability and whether denial of reasonable accommodations violated Section 504. The merits of this case clearly display that petitioner was denied an accommodation and the respondent refused to give any consideration or discussion in regard to the request, as the denial was instantaneous. Petitioner was denied access to the academic success program director in violation of section 504.

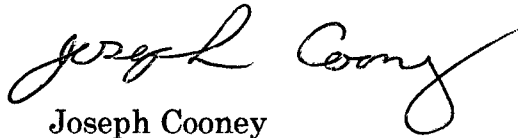
Petitioner was denied extended probation and dismissed because of being blind in the right eye, the 11th circuit clearly weighed the evidence in an arbitrary manner violating US supreme Court precedence in the application of a motion for summary judgment and there was a clear and egregious display of an abuse of judicial discretion by both the trial court and the 11th circuit appellate court.

This case is a pinnacle vehicle to establish a modern updated statement for the disabled community of the United States. The United States Supreme Court can also make a statement that they protect and provide justice for those who suffer discrimination to institutions or any entity required to abide by the ADA of 1990 as amended, The ADAA of 2008 and the Rehabilitation Act of 1973, Section 504.

For the foregoing reasons, the petition for rehearing should be granted.

October 24, 2018

Respectfully submitted

A handwritten signature in black ink, appearing to read "Joseph Cooney". The signature is fluid and cursive, with the first name "Joseph" written in a more compact, stylized manner and the last name "Cooney" written more fully.

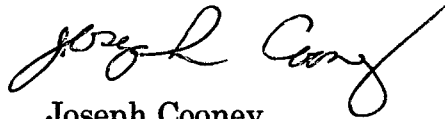
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CERTIFICATE OF PRO SE PETITIONER

As I am the self-represented Pro Se Petitioner in this
Petition, I hereby certify that this petition is
presented in good faith and not for purpose of delay.

October 24, 2018

Respectfully submitted

A handwritten signature in black ink, appearing to read "Joseph Cooney", written in a cursive style.

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