

In The
Supreme Court of the United States

Aubrey J. El,
Petitioner

v.

United States Department of Commerce,
Honorable Wilber Ross,
Secretary

Admiral David Score, officially and individually;
Captain Anne Lynch, officially and individually, et al.,
Respondents

2016-2071

2:15-cv-00532-RGD-DEM

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

**SUPPLEMENTAL PETITION FOR WRIT OF
CERTIORARI**

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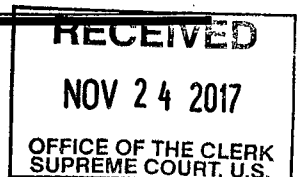


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QUESTIONS PRESENTED

Does a federal agency deprive a preference eligible trial period or probationary employee of a property interest in the procedures under the *Civil Service Reform Act of 1978* (CSRA) when he is or she is terminated without the mandatory procedures prescribed by the CSRA?

Does a federal agency deprive a preference eligible trial period or probationary employee of rights, property and liberty interest in continued government employment, protected by the *Due Process Clause of Fifth Amendment to the Constitution of the United States*, when said agency terminates the federal employee for misconduct without any evidentiary support for the allegation of misconduct?

Given the mandatory procedures for disciplinary actions promulgated by the federal Office of Personnel Management (OPM), does federal law, regulations or federal agency practices create a property interest for federal preference eligible excepted service employees serving a trial or probationary period that is protected by the *Due Process Clause of the Fifth Amendment to the Constitution of the United States*?

In the context of this case did the Courts below deprive Petitioner of his rights to due process in the courts of the United States, protected by the *Fifth Amendment to the Constitution* and other laws of the United States, when the

District Court impermissibly acted as a fact-finder in dismissing Petitioner's case pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure?

Does the statutory grant of general federal court jurisdiction pursuant 28 U.S.C. §1331 allow district courts to review adverse personnel actions taken against federal employees serving a probationary or trial period when those adverse personnel actions violate the federal employee's constitutional rights protected by the *Due Process Clause of the Fifth Amendment to the Constitution of the United States*; and/or other laws of the United States?

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INTRODUCTION

This case provides this Court with the opportunity to clarify the rights, property and liberty interests of probationary and trial period employees of the United States government, such as Petitioner Aubrey El, pursuant to the *Civil Service Reform Act of 1978*; and the protections afforded to said employees under the *Due Process and Equal Protection Clauses of the Fifth Amendment to the Constitution of the United States*.

This Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) stated that government employees who could only be terminated for cause had a "...property right in continued employment."¹ The Court of Appeals for the Fourth Circuit, through its February 27, 2017 per curiam decision, has allowed the District Court to dismiss El's claims to vindicate his rights, property and liberty interests pursuant to the *Civil Service Reform Act*; and protected by the *Fifth Amendment to the Constitution of the United States*.

In this case, the Department of Commerce, an agency of the United States government (Agency DOC) intentionally deprived Petitioner Aubrey El (a trial period employee) of his rights, property and liberty interests in continued employment under the *Civil Service Reform Act of 1978* (CSRA) and the Agency's own regulations; protected by the *Fifth Amendment to the Constitution* and other

¹ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 533 (1985)

laws of the United States. El was terminated from his employment with Agency DOC without cause and any notice calculated to provide him with evidence supporting the allegation of misconduct or a reasonable opportunity to respond to the allegation of misconduct. To date Agency DOC has not produced any evidence of the misconduct alleged of Petitioner El.

The *Civil Service Reform Act* was enacted to provide efficient and consistent management of civil service employees. The CSRA apparently does not sufficiently prescribe procedures to prevent deprivations and abuses of the constitutional and other legal rights of trial period and probationary employees, like Petitioner El, by federal management.

OPINIONS AND DECISIONS OF THE COURTS BELOW

The Court of Appeals for the Fourth Circuit's per curiam and other decisions are reported at 678 Federal Appx. 99, 4th Cir. (Va.) Feb. 27, 2017, rehearing and rehearing en banc denied (May 02, 2017). The District Court's dismissal order is reported at 2016 WL9113570. All of the Fourth Circuit's decisions and orders are included in the appendices @ Appx 1-4 and 8, as is the District Court's Dismissal Order @ Appx. 5.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this petition for certiorari pursuant to 28 *U.S.C. §1254(1)* in that Petitioner Aubrey El, the Plaintiff before the District Court, made his timely verified complaint and motion for injunctive relief to the United States District Court- Norfolk Division on December 16, 2015. The District Court granted El's motion to amend his initial complaint and filed Petitioner's amended verified complaint. See Appendix 6, page 1. (Appx. 6, pg. 1) The District Court entered an order dismissing El's amended complaint on July 19, 2016 due to lack of jurisdiction and failure to state a claim (Appx. 5, pg.1).

El made his timely appeal on September 19, 2016 to the United States Court of Appeals for the Fourth Circuit (Appx. 5, pg. 15). The Court of Appeal for the Fourth Circuit affirmed the Dismissal Order of the District Court without hearing on February 27, 2017 (Appx. 4, pg. 1). The Court of Appeals then denied El's timely petition for rehearing on May 2, 2017 (Appx. 3, pg. 1). The Court of Appeals mandate was made effective on May 10, 2017 (Appx. 1, pg. 1).

El makes his timely petition for certiorari to this Court.

STATEMENT OF THE CASE

Petitioner Aubrey J. El was hired by the National Oceanic and Atmospheric Administration under an excepted service appointment on September 9, 2013; and

reported for new employee orientation (NEO) at El's regular duty station Norfolk, Virginia on the same day (Appx. 6, pg. 3-4).

NEO consisted of, among other things, training on authorized uses of government travel cards with reference materials including the Department of Commerce Travel Card Handbook (Appx. 6, pg. 18 and Appx. 9). El was ordered by Agency DOC to an official travel status and temporary duty from about September 23, 2013 to November 13, 2013 (Appx. 6, pg. 4). Consistent with the travel card regulations El used his government travel card for hotel lodging² while at his temporary duty station during the period September 22-29 of 2013 (Appx. 6, pg.5 ¶34).

On December 12, 2013 El received a memorandum of termination dated December 11, 2013 from his supervisor LCDR Jennifer Pralgo. (Appx. 6, pg. 23) LCDR Pralgo expressed mailed the memorandum to El's residence.

The memorandum of termination stated that El was found unfit for continued federal employment because of his misuse of his government travel card and that his termination was effective December 13, 2013. (Appx. 6, pg. 23) The memorandum did not recite any facts as to how, when or where El misused his travel card. Agency DOC nor its employee LCDR Jennifer Pralgo provided El any evidence supporting the Agency's allegation of travel card misuse against El.

² Department of Commerce Travel Card Handbook.

Further, Agency DOC nor any of its employees provided El any document calculated to provide El any pre-deprivation notice of the allegation of the travel card misuse; and any opportunity to respond to the charge of travel card misuse consistent with the Office of Personnel Management regulations. Similarly, Agency DOC or its employees ever provided any evidence that El misused his government travel card as defined by the Department of Commerce Travel Card Handbook, (Appx. 9) other government statute or regulation.

Agency DOC nor its employees timely requested and obtained approval for El's termination via the mandatory 'Request for Personnel Action' (SF-52) (Appx. 6, pg. 35) nor the 'Notification of Personnel Action' (SF-50) (Appx. 5, pg. 36) until February 12, 2014, about two months after El's termination. El was not provided with the SF-52 or any opportunity to respond to the allegation of travel card misuse at any time prior to December 13, 2013, or at any time before or after. El did not receive an official copy of the SF-52 or SF-50 until on or about June 2014. El's Verified Amended Complaint recited the above allegations and others facts related to his termination.

Proceedings before the United States District Court-Norfolk Division

El's initial verified complaint was filed on December 16, 2015, in the United States District Court-Norfolk Division. El's complaint recited that the District

Court had authority to decide his case based upon the statutory grant of general federal question jurisdiction pursuant to 28 USC § 1331 (Appx. 6, pg. 3). The District Court eventually ordered El's Amended Verified Complaint to be substituted for his initial complaint (Appx. 5, pg. 15).

El's amended complaint recited various *Fifth Amendment* violations due to the Agency's failure to comply with the procedural and substantive requirements of the *Civil Service Reform Act of 1978* as well as other statutory violations by Defendant Agency DOC and various Agency employees. El's complaint also made claims for equitable relief pursuant to 5 USC § 702 and moved the District Court for injunctive relief.

Defendant DOC filed several motions to dismiss followed by El's responses and amended complaints. On July 19, 2016 the District Court issued its 'Dismissal Order' without a hearing. (Appx. 5, pg. 1) The District Court's Order found that it had no jurisdiction to hear El's claims because they were preclude by the *Civil Service Reform Act of 1978* and sovereign immunity; and that El failed to plead claims upon which relief could be granted pursuant to *Federal Rule of Procedure 12 (b) (6)*.

In ruling on the Defendants' motion to dismiss the District Court concluded that El's claims for damages and equitable relief against the Agency's constitutional violations were "...barred by sovereign immunity." (Appx. 5, pg. 8)

Further, the District Court concluded, in its Dismissal Order that it lacked jurisdiction because El's claims were precluded by the *Civil Service Reform Act* (Appx. 5, pg. 9).

The District Court went on to find that El's civil rights claims, pursuant to 42 U.S.C. § 1986, against Defendants Admiral Score and Captain Lynch failed to state claims because El's claims under 42 U.S.C. § 1985 insufficiently claimed that the conspiracy in Count I did not allege that the conspiracy was based upon class based discrimination (Appx. 5, pg. 10) and that further amendment of El's complaint would be futile in response to El motion to submit a second amended complaint (Appx. 5, pg. 12-13).

Proceedings before the United States Court of Appeal for the Fourth Circuit

El made his timely appeal on September 19, 2016 to the United States Court of Appeals for the Fourth Circuit. El's petition for appeal directed the Court of Appeals attention to the errors of law by the District Court, specifically the District Court's conclusions that El's complaint was precluded by the *Civil Service Reform Act of 1978*, sovereign immunity and failure to state claims upon which relief can be granted; and equitable relief was not available to El.

El presented cogent evidence and argument including citing cases of this Court in support of his informal petition for appeal. Specifically El recited the

facts and case law supporting the conclusions pertaining to the errors of law committed by the District Court in dismissing El's complaint.

The Court of Appeal for the Fourth Circuit affirmed the Dismissal Order of the District Court without opinion on February 27, 2017 (Appx. 4) and denied El's timely petition for rehearing without opinion on May 2, 2017 (Appx. 3). The Court of Appeals issued its mandate on May 10, 2017. Further, the Court of Appeals denied El's request for an opinion on it's *per curiam* decision on July 17, 2017 (Appx. 8, pg. 1).

REASON FOR GRANTING THIS WRIT

This petition for certiorari should be granted because this case addresses the issue of whether or not trial period or probationary employees have rights, property or liberty interests under the *Civil Service Reform Act* that are protected by *the Due Process Clause of the Fifth Amendment* or other laws of the United States when adverse personnel actions are taken against them by federal agencies.

The decision of the Fourth Circuit Court of Appeals to affirm, without explanation the District Court's July 19, 2016 Order of Dismissal of El's complaint, has permitted Agency DOC to deny Petitioner El (and other federal probationary or trial period employee) his rights and property interests in continued employment under the *Constitution of the United States* and the *Civil Service*

Reform Act 1978 while concluding that El's only remedy lies under the *Civil Service Reform Act* (Appx. 5, pg. 9) which provided no remedy.

There is no evidence that the Court of Appeals conducted a *de novo* review of the District Court's Order

There is no evidence in the record of this case that the Court of Appeals for the Fourth Circuit conducted the *de novo* review of the District Court's July 19, 2016 dismissal as required by law. The Court of Appeals' *per curiam* affirmation of the District Court's Order and decision has the effect of arbitrarily contradicting precedential decisions of this Court, as well as the Fourth Circuit's own decisions, interpreting constitutional as well as statutory mandates passed into law by the congress. Further, the Court of Appeals declined to provide an opinion explaining its affirmation of the District Court's decision (Appx. 8, pg.1). Therefore Petitioner El has no ability to determine the Court of Appeals' rationale for affirming a decision that is apparently contrary to law.

The Court of Appeals also allowed the District Court to dismiss the instant case using procedures that violate the *Federal Rules of Civil Procedure* in that the District Court impermissibly acted as a fact finder in ruling on the *Rule (b) (6)* motion of the Defendants. The District Court also did not make the permissible inferences favoring El, the Plaintiff before the District Court.

The Fourth Circuit in affirming the District Court's dismissal of El's case failed to give appropriate consideration to El's plea for equitable and injunctive

relief pursuant to federal statute. This Court and various federal circuit courts have ruled that federal employees have a cause of action under federal statute for constitutional claims against federal officers in their official capacities for equitable relief; that is not precluded by the *CSRA*.

The Fourth Circuit's affirmation was erroneous in that El pleaded sufficient facts, in conjunction with attached exhibits and documents included by reference, to raise the inference that Agency DOC and its employees committed the unconstitutional acts alleges in El's amended complaint.

Finally, the Court of Appeals per curiam affirmation of the District Court's July 19, 2016 dismissal, allows the District Court's ruling that the *Civil Service Reform Act of 1978* deprived the District Court of jurisdiction to hear El's complaint against Agency DOC and its employees for violations of his constitutional rights, property and liberty interests under *Civil Service Reform Act of 1978* and the *Due Process and Equal Protection Clauses of the Constitution of the United States*. The District Court's ruling and the Fourth Circuits affirmation is contrary to this Court's ruling that the *Civil Service Reform Act* does not preclude district court review of certain Agency adverse personnel actions. The *Constitution of the United States* certainly provides a remedy for federal employees like El for deprivations of rights and property interests conferred under the *Civil Service Reform Act of 1978*.

ARGUMENT

The Process Due to Trial Period and Probationary Employees

The *Civil Service Reform Act of 1978* created the Office of Personnel Management (OPM) to replace the Civil Service Commission. The OPM was, among other things, empowered to promulgate regulations for the efficient management of federal employment including procedures for adverse personnel actions.

Pursuant to regulations promulgated by the Office of Personnel Management, federal agencies "...must comply with...regulations issued by the Office of Personnel Management...the instructions...published in the Guide to Processing Personnel Actions..." 5 *C.F.R.* § 250.101. (Appx. 9)

The Chapter 4 of the OPM Guide to Processing Personnel Actions (Appx. 10, pg.)requires that the date of approval of a personnel action must be on or before the effective date of the personnel action (Appx. 10). The Guide and other federal regulations require that trial period employees like El receive notice of a charge of misconduct and the intended personnel action via a 'Request For Personnel Action' (SF-52) or similar notification; and an opportunity to respond at least on or before the effective date of the personnel action. The aforementioned requirements are codified under 5 *C.F.R.* § 315.804 which it states "...when an agency decides to terminate an employee serving a probationary or trial period

because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing...as to why the employee is being terminated...” and “...as minimum, consist of the agency’s conclusions as the inadequacies of his performance and conduct.”

Implicit in *5 C.F.R. § 315.804* is that the trial period or probationary employees terminated under this section can only be removed for cause and thereby must be given notice and evidence of the charges that constitute lack of fitness or qualifications. Further, *5 C.F.R. § 731.402 (a)* require that federal agencies “...must notify the applicant or appointee...in writing of the proposed action...the charges...and the availability for review...of the materials relied upon. The notice must set for the specific reasons for the proposed action and...the right to answer the notice in writing...the time limit for the answer. The regulation further requires that the notice of proposed action must be “...served the notice of proposed action...no less than 30 days prior to the effective date of the proposed action...” *5 C.F.R. § 731.402 (b)*.

In El’s case this would have required that Agency DOC provide El with the evidence supporting its charge of travel card misuse and some reasonable amount of time for El to respond to the charge. El’s supervisor, LCDR Jennifer Pralgo, notified El that the effective date of his termination was December 13, 2013

(Appx. 5, pg. 37). LCDR Pralgo or any other Agency personnel provided El of any evidence supporting a charge of travel card misuse. Further, El's termination was not requested until February 13, 2014 (Appx. 5, pg. 49) and El's termination was not approved until February 13, 2014 (Appx. 5, pg. 50). To date the Agency DOC has never produced any evidence that El misused his government travel card as misuse is defined in the Department of Commerce Travel Card Handbook or the Federal Travel Regulations.

The errors of law by the United States District Court-Norfolk Division

El pleaded sufficient jurisdictional facts to survive motion to dismiss

On appeal El brought to the Court of Appeals attention the errors of law committed by the District Court in dismissing El's claims. El directed the Court of Appeals' attention to El's jurisdictional statement and that El pleaded sufficient jurisdictional facts to survive the Defendants' motion to dismiss pursuant to *FRCP 12 (b) (1)*. See Petitioner's Informal Brief, Appx. 12. El's amended complaint recited that District Court had jurisdiction to hear El's claims under the statutory grant of general federal question jurisdiction pursuant to *28 USC § 1331* because Defendants "...intentionally violated..." El's constitutional rights (Appx. 6, pg. 3). This Court has ruled on numerous occasions that federal courts have jurisdiction to and decide constitutional claims pursuant to *28 U.S.C. § 1331*. See *Bush v. Lucas*, *462 U.S. 367, 374; 103 S.Ct. 2404, 2410* citing *Bivens v. Six Unknown Federal*

Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971); *Davis v. Passman*, 422 U.S. 228, 99 S.Ct. 2264 (1979).

Sovereign immunity does not bar El's claims for equitable relief
pursuant to 5 U.S.C. § 702

In ruling on the Defendants' motion to dismiss El's claims for damages due to the Agency's constitutional violations, the District Court ruled that El's claims were "...barred by sovereign immunity." (Appx. 5, pg. 8) El's complaint recited claims against Agency DOC and its employees in their official and individual capacities. This Court ruled in *Hafner v. Melo*, 502 U.S. 21; 112 S.Ct. 358 (1991) that government officials in their individual capacities are not immune from liability of intentional unlawful acts committed in their official capacities. El's claims against Defendants Admiral David Score and Captain Anne Lynch were for intentional violations of federal civil rights statutes in their individual capacities (Appx. 6, pg. 13 & 15). Further, the *ad damnum* clause in El's complaint pleads for equitable relief and pursuant to 5 U.S.C. § 702. The government has waived its sovereign immunity for claims for equitable relief.

The Civil Service Reform Act of 1978 does not deprive the District
Court of jurisdiction to hear El's claims

The District Court concluded, in its Dismissal Order that it lacked jurisdiction because El's claims were precluded by the *Civil Service Reform Act of 1978* (Appx. 5, pg. 9). This case and El's complaint is about how the Agency

denied El the protections of the *Civil Service Reform Act* and thereby violated the *Due Process and Equal Protection Clauses of the Fifth Amendment to the Constitution of the United States*. This Court ruled in *Webster v. Doe*, 486 U.S. 592, 604; 108 S.Ct. 2047, 2054 (1988) that the *CSRA* does not preclude claims for equitable relief by federal employees like El, especially as the *CSRA* excludes Merit System Protection Board review of adverse personnel actions against probationary and trial period employees.

El's civil rights claims sufficiently state claims for relief or are amendable

The District Court concluded that El's civil rights claims, pursuant to 42 U.S.C. § 1986, against Defendants Admiral Score and Captain Lynch because El's claims under 42 U.S.C. § 1985 insufficiently claimed that the conspiracy in Count I did not allege that the conspiracy was based upon class based discrimination (Appx. 5, pg. 10) and that further amendment of El's complaint would be futile in response to El motion to submit a second amended complaint (Appx. 5, pg. 12-13).

El's complaint, to withstand a motion to dismiss under *Federal Rule of Civil Procedure 12(b) (6)*, must allege sufficient facts to state a plausible claim for relief pursuant to the Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

While El's amended complaint does not overtly state that discriminatory animus was the underlying motivation behind the actions of Agency DOC and its

employees, the undisputed facts is that all of the Agency personnel cited in El's complaint were all white and that the letter sent to Admiral Score and Captain Lynch complained of unlawful discrimination and was attached as an exhibit to El's complaint (Appx. 6, pg. 29-34). For certain El's complaint contains sufficient factual matter to infer discriminatory animus supporting the civil rights and other statutory claims; or to allow amendment of El's complaint. Additionally, El submitted with petition for appeal to the Court of Appeals a prospective third amended verified complaint that made said allegations (Appx. 12).

El's motion for preliminary injunction

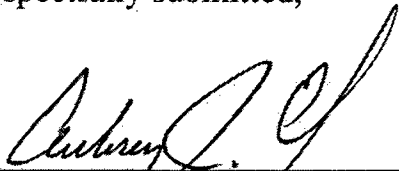
Finally, there was no legitimate government interest that provided justification for the adverse personnel action taken against El by Agency DOC, through its employees. El's motion for a preliminary injunction should be granted while this case is pending.

CONCLUSION

Petitioner Aubrey El respectfully moves this Court to grant this petition for certiorari because, as previously stated, the subject matter of this case relates to the rights, property or liberty interests of federal probationary and trial period employees conferred by the *Civil Service Reform Act of 1978* and other laws of the United States; and protected by the *Fifth Amendment to the Constitution of the United States*.

If this Court decides to hear this case and orders oral argument, El respectfully requests that counsel be assigned to assist.

Respectfully submitted,



Aubrey J. El, *pro se*