

No.

17.767

11/20/17

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIENNE McADORY,
Petitioner,

v.

VAIL TECHNOLOGIES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Butler v. Drive Automotive Indus. Of Am.*, 793 F.3d 404, 414 (4th Cir. 2015) the Fourth Circuit attempted to simplify the “hybrid” test of the common-law test and the economic realities test used to identify an employee employer relationship where none should exist established by the Supreme Court in *Nationwide Mut Ins. Co. v. Darden* 503 U.S. 318 (1992). Instead, the imprecise language of the Fourth Circuit's nine-factor “hybrid” test created a confused rendering by the District Court regarding the Petitioner's inability to prove a case for joint employment. The question presented is:

1) Should the “hybrid” test established by *Nationwide v. Darden* be simplified to be consistent with mature full-time equivalency labor laws and employer's recourse to use non-discriminatory human resources disciplinary actions where the same work parameters exist for non-employees?

In order to participate in the Small Business Administration's (SBA) 8A business development program for members of a protected class, a member of said protected class must relinquish their right to Title VII protections by operating their business full-time for no less than two (2) years. This requirement provides the government proof the business could be a viable concern and can show past performance in providing services or products to government agencies. The question

presented is:

2) Should members of the protected class be required to choose between relinquishing their legal protection against discrimination or business opportunities with the federal government?

The Petitioner approached two attorneys familiar with labor cases before proceeding Pro Se. Both attorneys informed the Petitioner if she was able to prove the establishment of an employer employee relationship based the common-law test, a highly unlikely prospect, damages are limited by the Federal and State Courts to actual wages lost. The question presented is:

3) Have the protections of Title VII been effectively eliminated by the lack of material consequences hiring parties face even if they are found to have violated the law?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at ecf.vaed.uscourts.gov, case 1:16-cv-00886-LMB-TCB; vaed ECF 108 and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is reported at ecf.vaed.uscourts.gov, 1:16-cv-00886-LMB-TCB; vaed ECF 85.

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Law and Authority

Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 2000e-2(h) [Section 703(h)] of this title shall be interpreted to permit otherwise.

STATEMENT OF THE CASE

The Petitioner was the sole owner and sole employee of ALM Group, Inc. (ALMG) from February 2004 – June 10, 2015. She met the owners of Vail Technologies (VAIL), Mr. Rick Hudnall and Mr. Andrew Schaaf in 2008 and 2010 respectively while working with them in the United

States Department of the Army Office of Business Transformation (OBT), formerly known as the Army Business Mission Area. On 27 May 2014, the Petitioner's company ALM Group, Inc. (ALMG) and Vail Technologies (VAIL) entered into a Sub-Contract agreement for VAIL contract W15QKN13D0029 with the OBT for a period of performance from 28 May 2014 to 27 May 2015 at a rate of \$100 per hour with a funding ceiling of \$192,000. The specific tasks to be provided as stated in the sub-contract were:

“ALM will perform as a member of VAIL's team providing Enterprise Architecture consulting support to the United States Army, Office of Business Transformation, within the Arlington, Virginia and Pentagon areas. Ms. Adrienne McAdory is deemed key personnel and will perform all support from ALM, and can only be replaced with personnel that meet qualification requirements of the position and are approved by VAIL. ALM may not subcontract out any work on this order without the prior written approval by VAIL.”

VAIL issued a work stoppage to ALMG on 2 June 2015 because VAIL indicated the OBT had not completed the process of issuing a new task order (TO). On 10 June 2015 at 11:44 pm, ALMG received another TO for VAIL contract

W15QKN13D0029 with the OBT from Mr. Rick Hudnall, President of VAIL, for a period of performance from 11 June 2015 to 10 October 2015 at a rate of \$102 per hour with a funding ceiling of \$65,280. (vaed ECF, 1-7) The specific tasks remained the same. The document was signed by Mr. Hudnall.

On 11 June 2015 at 6:16 am the Petitioner sent a modification of the contract W15QKN13D0029 back to Mr. Hudnall with an email that noted the Petitioner's concern she would be without work two months before her delivery date and indicated she had updated and signed the TO. The new terms entered were for a period of performance from 11 June 2015 to 10 July 2016 at a rate of \$102 per hour with a funding ceiling of \$195,840. The only sections of the sub-contract that were modified were the "Hours and rates:" section and the signature pages which contained missing letters from Mr. Hudnall's last name listed below the signature due to changes by Adobe PDF when the document was converted by the Petitioner to Word and then back to PDF, and the addition of the Petitioner's signature. There were no markings to signify the changes made to the "Hours and rates:" section. (vaed ECF, 1-8)

On 11 June 2015, at approximately 11am, Mr. Andrew Schaaf, Project Manager for VAIL contract W15QKN13D0029 Co-owner of VAIL indicated VAIL did not accept the terms of the

modified contract the Petitioner's company provided indicated he would require the return of the Petitioner's badge and security access card and escorted the Petitioner from the Polk building at 2521 S Clark St. Suite 1010 Arlington, VA 22202.

On 11 June 2015 at 11:33am, the Petitioner emailed LTG Thomas Spoehr, Mr. Robin Swan and Mr. Cyrus Dotivala informing them as the leadership of the OBT that she believed she had been removed from the project due to her objection to the VAIL contract which would leave her unemployed 2 months before her due date.
(vaed ECF, 1-4)

On 12 June 2015 at 8:25am, Mr. Robin Swan responded that it was his understanding the Petitioner had refused VAIL's offer and suggested the Petitioner had some areas of recourse which included reconsidering the offer and entering into a negotiation with VAIL. (vaed ECF, 1-15)

On 12 June 2015 at 8:34am, the Petitioner sent an email to Mr. Hudnall stating "I have considered my situation and I am not in a position to turn down work. Are you willing to revisit your offer?" (vaed ECF, 1-9)

On 15 June 2015 at 2:48pm, the Petitioner received the following response from Mr. Hudnall indicating no services were required and thanking the Petitioner for returning the computer

equipment provided to the Petitioner by VAIL:
(vaed ECF, 1-9)

“Adrienne, We do not need additional consulting services at this time. Thanks for getting the apple notebook back to us. I believe VAIL owes you a payment for your consulting hours worked on 1 & 2 June, as we closed out last year's task order. Please send a final time sheet for those hours to Dean anytime at your convenience. v/r Rick”

On 25 January 2017 (vaed ECF 26-1) VAIL submitted the following answer to the Petitioner's interrogatories indicating they did indeed hire a male employee to perform the services the Petitioner would have performed.

“After June 2, 2015, VAIL Technologies was awarded several other government contracts for work at the Office of Business Transformation, including a one - year term contract number W15KQN13D00290006 beginning on June 11, 2015. . VAIL hired Mr. Marco Temaner to perform the services that would have been performed by ALM Group, had VAIL

continued to be a customer of ALM Group via a subcontract.”

On 12 July 2016, when the Petitioner filed her Complaint with the District Court, Contract W15QKN13D0029 was still in effect between the OBT and VAIL and Mr. Marco Temanar was still an employee of VAIL working at the OBT.

The Petitioner argued in the informal opening brief to the Fourth Circuit (ca4, ECF 11), the District Court referenced evidence, specifically Delivery Orders the OBT provided to VAIL, in their opinion to support the Court granting the Respondent's dispositive motion. The only evidence provided to the Court to support assertions about the Delivery Orders and the responsibilities of the Petitioner expected by the OBT were written statements by the Respondent's owners (vaed, ECF 66-6 and 66-10). The Petitioner requested copies of these documents during Discovery (vaed, ECF 19) and throughout the proceedings but the Court denied all but three of the Petitioner's subpoenas. (vaed, ECF 28)

The Court denied a crucial subpoena to the OBT's Contracting Officer's Representative (COR)(vaed, ECF 45, 51), Mr. Timothy Hunnicutt, whose testimony would have proven the Respondent's assertions were either misleading or not correct. The Court subsequently decided the documents requested by the Petitioner were relevant as expressed by the Respondent's owners

in their declarative statements when granting the dispositive motion despite referencing *Dulaney v. Packaging Corp. of Am.* 673 F.3d 323, 324 (4th Cir. 2012) and the requirement for the Court to view the record “in the light most favorable to the non-moving party”.

The Petitioner argued in her Opposition to the Defendant's Motion for Summary Judgment she provided evidence for 14 of the 15 standards for the hybrid test had been met. (vaed ECF, 76-1). These factors were based upon the hybrid test summarized by the Supreme Court in *Nationwide Mut Ins. Co. v. Darden*. Instead of analyzing the evidence provided by the Petitioner, the District Court chose to analyze the case using the nine-factor “hybrid” test written by the Fourth Circuit in *Butler v. Drive Automotive Indus. of Am.*

The Petitioner did not apply for a rehearing of this case by the Fourth Circuit because the Petitioner is arguing the Fourth Circuit's simplified interpretation of the hybrid test is imprecisely written. The Petitioner's focus in this writ is not the particulars of her case because there are far more egregious cases of poor jurisprudence than those that occurred in the Petitioner's case. The only question the Petitioner would provide to the Supreme Court if the District Court's behavior was the focus of this Petition is: “Is it possible for a Court known by the pseudonym “Rocket Docket” to adequately adjudicate cases?” In theory, the “Rocket Docket” approach could be no more than an

abrogation of the lower court's responsibility which then transfers the responsibility to the higher courts. The result could be more work for the higher courts or the lack of access to the courts for those who cannot afford protracted legal proceedings. The Petitioner has no data to support this assertion and therefore the focus of this Petition is answering the broader questions raised by the Petitioner's experience in this case.

REASONS FOR GRANTING THE PETITION

I. Courts have revised the "hybrid" test to avoid confusion.

The Petitioner provided evidence for the following factors (vaed, ECF 76-1) addressed in *Atkins v. Computer Sciences Corp.*, 264 F.Supp.2d 404 (E.D. Va. 2003).

(1)The work does not require a high level of skill or expertise; (2)The employer furnishes the tools, materials, and equipment; (3) The work is performed on the employer's premises; (4) There is a continuing relationship between the worker and the employer; (5) The employer has the right to assign additional projects to the worker; (6) The employer sets the hours of work and the duration of

the job; (7) The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job; (8) The worker does not hire and pay assistants; (9) The work performed by the worker is part of the regular business of the employer; (10) The employer is in business; (11) The worker is not engaged in his/her own distinct occupation or business; (12) The employer provides the worker with benefits such as insurance, leave, or workers' compensation; (13) The worker is considered an employee of the employer for tax purposes; (14) The employer can discharge the worker; (15) The worker and the employer believe that they are creating an employer-employee relationship.

Oddly, the Respondent's council used the fifteen (15) factors from *Atkins* in their initial offer letter to the Petitioner on 17 January 2017 but offered the following nine (9) factors from *Butler v. Drive Automotive Indus. Of Am.*, 793 F.3d 404, 414 (4th Cir. 2015) in their dispositive motion (vaed, ECF 66-1).

(1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative

employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and truces; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship.

In this case as is the case for other sub-contractors, working in highly skilled positions, the sub-contractors were indistinguishable from the W-2 employees. The OBT contract required personell to work onsite at government facilities from 8am-5pm and use government furnished. VAIL provided the Petitioner with a laptop and informed the team they needed to be at the premises from 8:30am - 5pm but these factors like the factors related to the payment of taxes and benefits are mere pro forma and do not address the primary problem with workplace discrimination. W-2 employee's and 1099

sub-contractors work to maintain their livelihood. The cessation of income is the issue at hand.

The hybrid test as currently administered creates a much higher burden of proof for sub-contractors who are working under the same work parameters as a W-2 employee. The Respondents used the following rationale as evidence no employee employer relationship existed between the Petitioner and VAIL. The Petitioner's ownership of another business despite having records from the Petitioner since the inception of the business showing the business generated no revenue and only expenses. Should W-2 employee's lose their Title VII protection if they open another business and work it part-time?

The Courts have decided there was not employee employer relationship simply because no taxes or benefits were paid by the employer. In *v. Wachovia Bank of North Carolina*, 259 F.3d 309, 313 (4th Cir, 2001) six of the seven factors the court found more significant than others referred to the lack of a paid salary, no taxes being withheld, the lack of employee benefits, the lack of income taxes filed on the Petitioner's behalf, the existence of a sub-contract and that the Petitioner did not work exclusively for the Respondent. These requirements do not pass the common sense test. Few hiring parties would pay the taxes and fringe benefits of a sub-contractor because there is no benefit to the hiring party, only increased cost and complexity. The more likely scenario is the one which occurred in this case where the Respondent asked the

Petitioner to perform tasks beyond the scope of the sub-contract such as on-boarding employees and obtaining OBT office equipment.

Courts have substantiated the easily understood pro forma claims presented by hiring parties for the hybrid test rather than focusing on the loss of livelihood. The Petitioner's Mother works as a subcontractor with many contracts no one of which will cause the loss of her livelihood if one were to end. The Petitioner's accountant works as a subcontractor with many clients, no one of which would cause the loss of livelihood if that one client was lost. The Petitioner's case and the case of other sub-contractors working in the same fashion as W-2 employees is not the same.

The Petitioner approached the Department of Labor Wage and Hour division about this matter and was told the division only handles violations against employees earning less than \$100,000 per year. There seemed to be a lack of concern for "highly paid" individuals. The Petitioner would offer that she spent years building a career and reputation in one particular Army office, the OBT, and worked for the Army in related tasks on three separate occasions over eleven years. As a result of this incident, the Petitioner can no longer work for this office. It is also ironic because the Respondent received their contract with the OBT in part based upon their designation as a Service Disabled Veteran owned business, another protected class.

In this case, the Respondents have inadvertently managed to remove a future potential competitor.

The District Court's opinion in this case is confused because it presents a circular argument by insisting the Petitioner is claiming to have been an actual employee of the Respondent. The subsequent analysis of a situation that did not exist nor did the Petitioner ever state that she was an actual employee of the Respondent. The Petitioner simply provided facts to support the existence of an employee and employer relationship that should not have existed but was created by the actions of the Respondent. The facts provided by the Petitioner which were never analyzed by the Court address the hybrid rule.

The Petitioner would ask the Supreme Court to reconsider the hybrid test in light of the very mature labor laws governing fulltime employment and mature human resources (HR) progressive discipline processes most employers have instituted to ensure their HR processes regarding performance reviews and involuntary separation are administered without bias.

II. The 8A Program designed to promote business development by members of protected classes offers no Title VII protection.

The Federal government has one major program designed to help women and minorities

become entrepreneurs and business owners. A participant in the 8a program must not be an employee of another company and must work at least 40 hours a week at their business and must show at least two years of success before being eligible to apply for the 8a program.

For 10 years the Petitioner blithely work building her business with every confidence that her rights were protected with regard to sex discrimination due to pregnancy. Certainly ignorance is not a defense and the Petitioner should have conducted more research yet the Petitioner has spoken to many people since the advent of this case who are equally surprised the rights of working women and minorities are not protected from discrimination if they are contractors.

The inadvertent message being conveyed to women is that business ownership is a much riskier prospect and since you are now aware you have no protection under the law, you should be content to be a W-2 employee. Fortunately many members of a "protected" class never learn they have been lured by the "poison apple" 8a business development program into giving up their protections under Title VII and have been helped tremendously by this program. The Court's revision of the hybrid test could enable the 8a program to meet the intended goals of Title VII and increased business ownership for women and minorities.

III. Without material consequences for violators, Title VII offers no protection to members of Protected Classes from discrimination.

The Petitioner's experience speaking with two employment attorneys about this case suggest the Court does not see many of these cases because the Courts have limited damages for employment discrimination to demonstrable damages based on loss of wages and most individuals find other employment. Few members of a protected class are in a position to pay an attorney to fight this type of issue out of altruism for the betterment of a working person's condition.

It would seem the courts have decided to keep this matter from bogging down the court schedule by denying people access to fight their case by limiting damages to a minimal amount that keeps attorneys from taking these cases without huge retainers upfront and an emphasis to their clients that the case will be hard to win. This is false reasoning because material consequences would lower the incidences of discrimination thus achieving the goals of the law and freeing the Court for other emerging legal matters.

CONCLUSION

One final question remains for the Petitioner. Does the Supreme Court need Congress to pass another anti-discrimination law to protect the livelihood of women and minorities working as contractors in the same capacity as employees?

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: _____

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