

NO. 17-8555

IN THE SUPREME COURT OF THE UNITED STATES

HARVEY ANDERSON

PETITIONER

VS.

VENTURE EXPRESS, INC.

RESPONDENT

On Petition for Writ of Certiorari
From the United States Court of Appeals for the 5th Circuit

**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY RULE 29(6)

Respondent, Venture Express, Inc. has no parent corporation and/or publicly held corporation owning 10% or more of its stock.

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INTRODUCTION

This is an employment discrimination case. The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment in favor of Respondent Venture Express, Inc. ("Venture Express") because the undisputed record evidence demonstrated that Petitioner Harvey Anderson ("Anderson") failed to establish a *prima facie* case of race and age discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, respectively, and because his retaliation claim failed as a matter of law. Anderson's Petition for Writ of Certiorari demonstrates that he simply disagrees with the Fifth Circuit's application of well-settled law. Anderson has not presented a single issue that is reviewable under United States Supreme Court Rule 10. His Petition should be denied.

Anderson's employment as a truck driver for Venture Express was terminated, effective September 13, 2011, due to his performance issues and insubordination when he was counseled about log violations, missing logs, and related issues, including a citation he received from the Alabama Department of Transportation ("D.O.T.") for violating federal regulations concerning hours of service. Anderson subsequently filed a Charge of Discrimination with the Equal Employment Opportunity Commission claiming he had been discriminated against because of his race and age. After receiving a notice of right to sue, Anderson filed this lawsuit, *pro se*, claiming the termination was discriminatory in violation of

Title VII and asserting retaliation and conspiracy¹ claims. Venture Express moved for summary judgment on all of Anderson's claims.

Based on the undisputed facts and well-settled law, the district court granted Venture Express's Motion for Summary Judgment because Anderson failed to establish a *prima facie* case of race discrimination, had essentially abandoned an age discrimination claim by failing to assert the same in the Complaint and by failing to provide support for the claim in briefing, and did not exhaust his administrative remedies for the retaliation claim. Resp. App'x. C. On June 16, 2017, the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling. Resp. App'x B. Anderson filed a petition for panel rehearing, which was denied on July 18, 2017. Resp. App'x. A.

Anderson now requests that this Court review the Fifth Circuit's decision. The request should be denied for multiple reasons. First, the questions presented by Anderson are not properly before this Court because the questions were neither decided by nor briefed before either the district court or the Fifth Circuit. Second, there is no compelling reason to review the Fifth Circuit decision because it does not conflict with other court of appeals decisions or with state court decisions, and the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. 10(a). Third, Anderson's proffered reasons for granting the petition, *e.g.* that Venture Express incorrectly decided that he violated governing regulations and company policy, that the federal motor carrier

¹ The conspiracy claim is not before this Court because Anderson failed to brief and/or provide support for the claim. Therefore, the claim was not considered by the Fifth Circuit.

regulations govern his discrimination claims, and that there is no proof that he violated said regulations, are simply insufficient to require review and are otherwise unsupported. Anderson's Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background.

Anderson was hired as a truck driver at Venture Express on May 24, 2004. In November 2010, Venture Express notified all drivers that it was changing practices and procedures and would match written logs with QUALCOMM tracking data, fuel receipts, and inspections to ensure the written logs were accurate. Venture Express also released a Compliance Policy that instructed drivers that they must follow company rules and federal regulations regarding driver logs and outlined the discipline policy for missing logs, audits, and log recording issues. Violations of company rules and federal regulations would result in counseling, suspension, and/or termination. Anderson testified that he received these policies. After the 2010 policy change, however, Anderson repeatedly violated company rules and federal regulations governing hours of service.

First, Anderson received a written warning from the safety department about continuing issues with his hours of service and log book. For example, on December 20, 2010, Anderson exceeded his hours of service by not taking his full 10 hour break and on January 4, 2011, Anderson received a 14 hour rule violation during an inspection by the Alabama D.O.T. Anderson had been previously counseled on these issues and was notified by letter that further infractions were “grounds for [Anderson's] immediate termination.” Second, Anderson was suspended for three

days in January 2011 for continued violations. Third, in July 2011, after his suspension, Anderson received a written warning about missing logs that were required by the federal regulations. Fourth, Anderson was counseled in August 2011 for failing to take a full 10 hour break as required by the federal regulations (he was only taking an 8 hour break). Venture Express terminated Anderson's employment, effective September 13, 2011, because of his repeated violations of company policy and federal regulations and his insubordination when questioned about the violations.

During his deposition, Anderson admitted that he received the correspondence regarding logging issues and violations, that he had received an Alabama D.O.T. violation, and that he had been suspended for the log issues. However, he disagreed that he had violated company policy or federal regulations.

B. *Procedural History.*

Anderson filed an EEOC Charge on November 14, 2011 claiming that he had been discriminated against because of his race in violation of Title VII and because of his age in violation of the ADEA. Resp. App'x D. He claimed he was “falsely accused . . . of committing log violations” and that “[s]imilar situated younger Whites who have committed violations . . . have not been disciplined or discharged.” *Id.* He identified Hugh Walker and Mack (LNU) as alleged comparators. *Id.* Ultimately, he received a notice of right to sue.

On April 5, 2012, Anderson filed this lawsuit, *pro se*, asserting a claim under Title VII of the Civil Rights Act of 1964. Resp. App'x E. He filed an Amended Complaint on May 18, 2012. Resp. App'x F. The Amended Complaint provides:

The firing was a conspiracy by all five parties involved because I would not agree to some violations that had not occurred. This was wrongful termination, discrimination, retaliation, failure to comply with D.O.T. rules and regulations and company rules.

Id. Venture Express answered the complaint, and the discovery process began. Venture Express filed its Motion for Summary Judgment and supporting memorandum on September 27, 2013. Anderson filed multiple documents that arguably related to the summary judgment motion. Consequently, the district court reviewed all of Anderson's filings prior to issuing its opinion on Venture Express's motion. *See* Resp. App'x C at 3.

The district court granted Venture Express's Motion for Summary Judgment. *Id.* The Fifth Circuit affirmed the district court's order on June 16, 2017. Resp. App'x B. The Fifth Circuit held that Anderson had not established a prima facie case of race discrimination because there was no evidence he was treated less favorably than other employees and there was no evidence that he was replaced by someone outside of his protected class. *Id.* at 4-5. The Fifth Circuit also held that the district court did not err in dismissing the retaliation claim because Anderson failed to exhaust his administrative remedies by not including the retaliation claim in his EEOC charge. *Id.* at 5-6. Finally, the Fifth Circuit concluded that Anderson had “wholly fail[ed]” to present any legal arguments or record evidence to support an age discrimination claim or to support any causal connection between his termination and his age. *Id.* at 7. The Fifth Circuit denied his petition for panel rehearing on July 18, 2017. Resp. App'x A. Anderson had until September 17, 2017 to file a Petition for Writ of Certiorari before this Court. After numerous attempts

to comply with this Court's filing requirements, Anderson's Petition for Writ of Certiorari was finally docketed on April 18, 2018.

C. Anderson's Claims.

A careful review of Anderson's petition and arguments on appeal demonstrates that Anderson simply disagrees with Venture Express's decision that he violated company policy and federal regulations governing hours of service. For example, with regard to missing logs, he testified that he disagreed that any logs were missing and believed he turned them all in:

Q: And your contention is that you had turned in all of these logs.

A: That is correct.

Q: So your disagreement is that you believe that they were incorrect in saying that you had not turned in the logs.

A: That is correct.

Q: But do you agree that the company has the right to inform you if they don't have a record of a log?

A: Yes. That's just part of the DOT rule and regulation.

With regard to the Alabama D.O.T. violation, he testified that the violation was caused by the dispatcher, claiming he was delayed in Canton. Anderson also contended Venture Express did not properly interpret the federal regulations. He testified: "I stopped talking to [Wade] right then because I knew he did not know what he was trying to enforce . . . I said 'I will not discuss this further with you, because I know you don't know what you're talking about.'" *See* Resp. App'x C at 8 n.3 (quoting Anderson's testimony).

In his Petition, Anderson continues to argue that Venture Express's decision that he violated company and federal rules was wrong. He incorrectly claims that Venture Express failed to present evidence to support its summary judgment motion and that federal regulations governing hours of service for motor carriers, *i.e.* “49 C.F.R.”, govern the employment discrimination issues in this case.

REASONS FOR DENYING THE PETITION

Anderson's Petition for Writ of Certiorari should be denied. The questions he identifies are not properly before this Court. Moreover, there is no compelling reason to review the Fifth Circuit opinion. The Fifth Circuit followed applicable law to reach its decision in this case.

A. The Questions Presented are not Properly Before This Court.

Anderson identifies the following questions presented in Section I of his Petition:

1. Does the 2nd Amendment have more authority than the 14th Amendment under the Constitution?;
2. Did the courts honor and enforce the complete law under 49 C.F.R based on the law and evidence?;
3. Does every naturalized citizen have the same rights under the 14th Amendment to a jury trial?; and
4. Does every naturalized citizen have the guaranteed rights and due process of the law under the equal protection claims of the 14th Amendment of the Constitution?

These questions are not properly before this Court.

As an initial matter, the questions have nothing to do with the employment discrimination issues in this case. The Second Amendment protects the right to

keep and bear arms, which is not an issue in this case. The Fourteenth Amendment protects a citizen by prohibiting a *State* from, *e.g.*, depriving any person of life, liberty, or property without due process of law or depriving any person of the equal protection of the laws. However, a State is not a party to this litigation. In addition, the constitutional questions presented were *not* the basis of the Fifth Circuit decision, the district court decision, or the Complaint. *See* Resp. App'x B, C, E and F. Simply put, neither the district court nor the Fifth Circuit considered or otherwise decided any Second or Fourteenth Amendment issue in this case. The questions presented are improper and should not be considered by this Court. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 602 (1984) (explaining that an issue that was never resolved or pressed in the district court was not properly before the Supreme Court); *see also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 n.4 (1982) (explaining that an issue was not properly before the court where it was not decided by the court of appeals); *The Blackwall*, 77 U.S. 1, 1869 WL 11499 (1869) (refusing to express opinion on a question that was not properly before the court).

In addition, Anderson's second question presented concerning the federal motor carrier regulations (49 C.F.R. §§ 395.1, 395.8) and the assertion in his Petition that said regulations govern the analysis of the employment discrimination issues in this case are misplaced. The regulations governing hours of service and driver logs simply have no bearing on Anderson's race and age discrimination claims. The Fifth Circuit properly decided this case based on the requirements of

Title VII, the ADEA, and Rule 56 of the Federal Rules of Civil Procedure. Anderson's Petition should be denied.²

B. There is No Compelling Reason to Review the Fifth Circuit Decision.

Rule 10 of the Rules of Supreme Court provides that a “petition for a writ of certiorari will be granted only for compelling reasons” and that a petition “is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Rule 10 further explains that compelling reasons to review a United States court of appeals decision include: (1) the decision conflicts with another court of appeals decision on the same matter, (2) the court of appeals decided an important federal question in a way that conflicts with a decision of a state court of last resort, or (3) the court of appeals decision has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the United States Supreme Court's supervisory power.

Anderson does not assert any of these reasons as a basis for granting his Petition. Instead, Anderson rehashes his disagreement with Venture Express's finding that he violated company policy and federal regulations governing hours of service. He claims that the disciplinary actions against him were wrong, that federal motor carrier regulations govern the discrimination issues in this case, and with no proof, he claims that other unidentified employees were not disciplined and/or terminated for similar violations. These are insufficient bases upon which to

² Even if the questions presented by Anderson were proper, which is denied, Anderson fails to address each question in his Petition or provide any support for granting the Petition based on such questions. *See generally* Anderson's Petition. This is yet another reason to deny the Petition.

grant the Petition. Regardless, the Fifth Circuit opinion does not conflict with another court of appeal decision or with a state court decision, and the decision does not depart from the accepted course of judicial proceedings.

C. The Fifth Circuit Correctly Held that Anderson Failed to Establish a Prima Facie Case of Race and Age Discrimination.

In the Complaint, Anderson claims that his employment at Venture Express was terminated because of his race in violation of Title VII. Although Anderson arguably abandoned an ADEA claim, the Fifth Circuit considered the issue. The Fifth Circuit properly analyzed both claims according to Title VII and the ADEA and held that both claims fail as a matter of law. There is no compelling reason to review the Fifth Circuit's decision.

a. Title VII.

Anderson's Title VII race discrimination claim must be analyzed under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Anderson must first establish a prima facie case of race discrimination by showing that: (1) he is a member of a protected group; (2) he was qualified to be a truck driver at Venture Express; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside of his protected group. *Id.* at 802. Venture Express then has the burden of producing an explanation to rebut the presumption – the burden of “producing evidence” that the employment decision was made “for a legitimate, nondiscriminatory reason.” *Id.* This is a burden of production, not persuasion. *Tex. Dep't of Comm'y Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The burden involves no credibility assessments. *Id.* Once Venture Express satisfies its burden,

Anderson must show the reason is a pretext for discrimination. *Burrell v. Dr. Pepper/ Seven Up Bottling Grp.*, 482 F.3d 408, 411-12 (5th Cir. 2007). He must show that the employer's proffered explanation is unworthy of credence. *See Burdine*, 450 U.S. at 256. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains ***at all times*** with the plaintiff." *Id.* at 253 (emphasis added).

The Fifth Circuit held that the Title VII race discrimination claim fails because no similarly situated comparator was treated more favorably. In his Petition, Anderson claims that Venture Express did not present any proof to support its position. Despite Anderson's contentions, Venture Express presented competent summary judgment evidence in the form of an affidavit and written discovery responses to support its statements that white employees were also disciplined and terminated for log violations. Venture Express also produced letters and an Alabama D.O.T. violation to support its position that Anderson was notified of his company policy violations and had violated federal regulations. The district court and Fifth Circuit both properly relied on this evidence. Anderson, on the other hand, did not present any contradictory competent summary judgment evidence. Thus, there is no need to review the Fifth Circuit's decision.

b. ADEA.

Throughout his Petition, Anderson claims that the hours of service regulations "govern" the ADEA claim and that Venture Express seemingly failed to prove that he violated federal regulations governing driver logs. *See generally* Anderson Pet. He also contends that he can prove an ADEA claim without proving

that age was the reason for his termination. *Id.* at 10-11. Anderson's contentions are not only incorrect, they are not compelling reasons to grant his Petition. *See* Sup. Ct. R. 10(a).

The ADEA makes it unlawful for an employer to terminate an employee “because of” that individual's age and is limited to individuals who are at least 40 years old. 29 U.S.C. § 623(a). To establish a prima facie case under the ADEA, the plaintiff must establish that: (1) he was discharged; (2) he was qualified for the position; (3) he was within a protected class at the time of the discharge; and (4) he was replaced by someone outside the protected class, replaced by someone younger, or that his discharge was otherwise because of his age. *Young v. City of Houston*, 906 F.2d 177, 182 (5th Cir. 1990). Age must be the “**reason**” that the employer decided to act; it must be the “but-for” cause of the termination decision. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (explaining that the claim “cannot succeed unless the employee's protected trait actually played a role in [the employer's decision making] process and had a determinative influence on the outcome “ (emphasis added))).

The Fifth Circuit followed well-settled precedent on ADEA claims, including *Gross*, to reach its decision in this case. Venture Express presented an uncontested affidavit explaining the person who replaced Anderson was an African American male who was over the age of 40. Anderson failed to present any contradictory

evidence or any evidence or argument that his age was the “but-for” cause of his termination.³ There is no compelling reason to review the Fifth Circuit's decision.

c. Federal Motor Carrier Regulations.

Anderson's Petition is replete with references to the federal regulations that govern hours of service. Despite Anderson's repeated efforts to conflate requirements for regulations governing hours of service with the requirements for Title VII and the ADEA, one does not prove the other. This is an employment discrimination case that must be decided based on the applicable employment discrimination laws. Anderson's efforts to divert this court's attention from Title VII and the ADEA to regulations governing hours of service in hopes of having his Petition granted is a red herring that should be rejected.

Further, even if Venture Express's conclusion that Anderson violated company policy and federal regulations governing hours of service was wrong, Anderson has no viable discrimination claim because “the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.” *McLendon v. Ingalls Shipbuilding, Inc.*, 2001 WL 650487, *4 (5th Cir. May 31, 2001) (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)). Anderson failed to present any evidence of intentional discrimination in this case. The Petition should be denied.

³ Anderson seems to contend that he is not required to present any proof of discrimination, but this is not accurate. The ADEA is clear that Anderson must prove that his age was the “but for” cause of his termination.

D. The Fifth Circuit Correctly Held that Anderson's Retaliation Claim Was Not Exhausted and Otherwise Failed.

Anderson contends that review is proper because his retaliation claim cannot be dismissed on a “mere technical defect in the pleading.” Anderson Pet. 11. Failing to exhaust administrative remedies is not a “mere technical defect,” it is essentially a jurisdictional prerequisite to filing a lawsuit pursuant to Title VII. In short, a plaintiff “must exhaust administrative remedies before pursuing claims in federal court.” *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002). Anderson did not allege a retaliation claim in his EEOC Charge. See Resp. App'x D. Additionally, the EEOC Charge was filed *after* Anderson's termination so an investigation of retaliation could not reasonably be expected to grow out of the initial EEOC Charge. See *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993). Further, for a retaliation claim, Anderson must establish a prima facie case by, in part, showing he participated in activity protected by Title VII and was terminated because of that protected activity. *McCoy v. City of Shreveport*, 492 F.3d 551, 556-57 (5th Cir. 2007). Anderson testified that he did not complain of discrimination while employed at Venture Express. Therefore, the Fifth Circuit's decision that Venture Express was entitled to summary judgment on Anderson's retaliation claim is proper and complies with applicable law.

CONCLUSION

For all of the foregoing reasons, Anderson's Petition for Writ of Certiorari should be denied. There is no compelling reason to review the Fifth Circuit opinion in this case.

This 8th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Brief in Opposition to Petition for Writ of Certiorari* was electronically filed with the Supreme Court's electronic filing system.

I further certify that a copy of the foregoing document has been served via Electronic Mail and First Class U.S. Mail, postage prepaid, to the following:

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This the 8th day of June, 2018.

s/Nakimuli O. Davis-Primer
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