No. 01-249

In the
Supreme Court of the United States

DR. CARL BERNOFSKY,

Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,

Respondent.

CIVIL APPEAL TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

Reply to Brief in Opposition

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QUESTIONS PRESENTED

1. Whether the district court judge was required to recuse herself after she accepted, in the midst of litigation against Tulane University, a Tulane Law School summer teaching assignment in Greece with a stipend of $5500.00.

2. Whether a negative reference letter by an ex-employer is an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964.

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points raised in the Brief in Opposition.

I. The two issues of this case are important matters that have broad appeal across our nation and deserve the attention of this Court.

Tulane is not accurate in stating that the two issues for review by this court are fact-sensitive and relevant only within the confines of the unusual facts of this particular case. The issues presented are simply stated, and they are not fact-sensitive. The first issue for review by this court is whether a litigant in a case can pay the presiding judge to travel abroad while that judge is litigating the case. The second issue is whether a negative letter of reference by an ex-employer is an adverse employment action in a retaliation claim under Title VII.

These are issues that arise in many situations, and they are broad issues of interest to all. The recusal issue is of concern to all Americans who are interested in whether citizens are treated fairly by judges in the American judicial system. In fact, this particular case is so newsworthy that it appeared on the front page of The Times-Picayune after the Fifth Circuit issued its opinion with the dissent of Chief Judge Carolyn King.[1] Citizens of this country are very concerned whether their judges are acting with the appearance of propriety.

The second issue of whether a negative reference letter is an adverse employment action in a retaliation action under Title VII is of interest to every working American. The situation is a common one. It arose in the case of Robinson v. Shell Oil Co., 519 U.S. 337

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[1] "Judge finds herself on trial," The Times-Picayune, May 8, 2001, p. A-1.

(1997), before this Honorable Court. It also arose in Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) cert. denied, 118 S.Ct. 1803, 523 U.S. 1122. This issue is of concern to every employee who complains about illegal discrimination and leaves the company to seek employment elsewhere. The issue is so important that the district court judge asked the Fifth Circuit to revisit its position that adverse decisions that do not rise to ultimate employment decisions are not actionable for retaliation under Title VII. The Fifth Circuit made no decision on whether the negative reference letter itself was an adverse employment action.

II. Judge Berrigan was Paid and Not "Reimbursed."

Tulane misstates that Judge Berrigan was merely "reimbursed" for expenses up to $5,500.00, incurred in Greece in connection with the summer course she taught for the university. In Judge Berrigan's Financial Disclosure Report for Calendar Year 2000, she acknowledged that she received the entire $5,500.00 and classified it as "non-investment income" and not reimbursement for transportation, lodging, food and entertainment. See Appendix A-1.

III. Bernofsky sought recusal as soon as he was aware of the close ties of Judge Berrigan to Tulane.

On the issue of the timing of Bernofsky's request for recusal, Tulane suggests that Bernofsky sought Judge Berrigan's recusal because she granted Tulane's summary judgment in the first case. However, petitioner did not seek Judge Berrigan's recusal until after the appellate phase of that proceeding because he was unaware at the time that she was actively engaged in teaching and serving on the advisory board of a Tulane research center. Only after petitioner independently discovered Judge Berrigan's association with respondent, did he request her recusal. (U.S. Sup. Ct. Petition 99-372).

IV. The failed attempts by Bernofsky to recuse the district court judge prior to Tulane paying the judge $5,500.00 are irrelevant

to the issue of whether the judge should have recused herself because she was given $5,500.00 by Tulane while in the process of deciding Bernofsky's case in favor of Tulane.

Tulane dwells on the failed attempts by Bernofsky to recuse the district court judge and maintains that the prior decisions that Judge Berrigan was not required to recuse herself must not be disturbed. However, all of the prior rulings on recusal were only based on the trial judge being an adjunct professor at Tulane and her participation on the Board of Directors at the Amistad Research Center located on the Tulane campus.

The recusal issue now before this Court differs from the recusal issues of the past. Here, the Court should decide whether the trial judge is obliged to recuse herself in a case involving Tulane when Tulane has given her money to travel abroad. This recusal issue has not been ruled on by any court until the case at bar, where the Chief Judge of the Fifth Circuit has stated that the trial judge should have recused herself.

V. The district court ruled that a negative reference letter is not an adverse employment action.

Tulane is inaccurate in its conclusion that the district court did not rule on the issue of whether a negative reference letter can constitute an adverse employment action in a retaliation claim under Title VII. An examination of the district court's ruling shows that the district court did rule on this issue.

The district court framed the issue by stating Tulane's position that a negative reference letter alone does not constitute an adverse employment action. Petition, A-11. It then stated Bernofsky's position that the dissemination of a negative reference with discriminatory intent, and not the non-hiring by the prospective employer, qualifies as an adverse employment action, relying on Hashimoto v. Dalton, (9th Cir. 1999). Petition, A-11.

The district court in its ruling explained the Fifth Circuit holding in Mattern v. Eastman Kodak Company, 104 F.3d 702 (5th Cir. 1997) that an adverse employment action consists only of "ultimate employment decisions, not every decision made by employers that arguably might have some tangential affect upon those ultimate decisions." The Fifth Circuit, as pointed out by the district court judge in her ruling, identified ultimate employment decisions to include hiring, granting leave, discharging, promoting and compensating. Mattern at 706-707. Petition, A-11 and A-12.

The district court then cited a footnote in the case of Burger v. Central Apartment Management Inc., 168 F.3d 875, (5th Cir. 1999), in which the Fifth Circuit acknowledged that its narrow view of what constitutes an adverse employment action is the minority view throughout the country. Burger, 168 F.3d at 877, fn3. The district court went on to list the circuits holding the majority view to include the First, Ninth, Tenth, and Eleventh Circuits. The Eleventh Circuit has even stated that the Fifth Circuit view is "inconsistent with the plain language" of the statute. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998). The district court implied that it did not agree with the Fifth Circuit minority view when it stated, "This Court for one would welcome a revisiting of the issue by the Fifth Circuit. See Mattern (Dennis, J. dissenting)." Petition, A-12.

The district court then ruled on this issue by applying the Fifth Circuit minority position. "Being bound by Fifth Circuit jurisprudence, this Court concludes that the relevant adverse employment action here is the prospective employer's failure to hire, not the mere issuance of a negative reference letter or silence on the part of the former employer standing alone." Petition, A-12.

The district court went on to determine the issue, which it characterized as "formidable," of whether the issuance of the reference letter was a determinative factor in the failure of the University of Houston or Michigan Technological University to hire Bernofsky. Petition, A-13. This would not have been an issue under

the majority view of what constitutes an adverse employment action, which view was applied to a negative reference letter in Hashimoto v. Dalton, (9th Cir. 1999).

After discussing the likelihood of Bernofsky being hired at the two universities, the district court ruled that Bernofsky offered no proof that the reference was a determinative factor in his not being hired. Petition, A-14.

The district court went on to make an additional ruling on other grounds, assuming that the negative reference letter was a determinative factor in his not being hired. However, the district court did first rule that the reference letter was not an adverse employment action in Bernofsky's claim of retaliation under Title VII. This erroneous ruling influenced the decision of the trial judge, and this Court should overturn the dismissal of Bernofsky's case by the trial judge.

VI. Under Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), Bernofsky presented sufficient evidence to survive summary judgment on the issue of whether the reference letter was negative or retaliatory.

Tulane incorrectly states that Bernofsky failed to present sufficient proof for a reasonable juror to find that the reference letter was negative or retaliatory. Under the standard set in the Reeves case, the Court is not allowed to consider evidence presented by the moving party in a motion for summary judgment that is contradicted or presented by an interested witness. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses'." Reeves at 2110. The Court is required to view the evidence in the light most favorable to Bernofsky. The trial judge did just the opposite. She ignored the evidence of Bernofsky and used

impermissible evidence presented by Tulane witnesses in both the first case and the case at bar.

Bernofsky's evidence that the reference letter is negative, which was ignored by the trial judge and the court of appeals, is as follows: Tulane's witness Dr. Stjernholm testified that the statement in the reference letter that Bernofsky sued his previous chair of the department was a **red flag**. Dr. Stjernholm testified that, if he received a letter like the one Beal wrote, he would immediately throw out that application for employment. Also, Dr. Wolinsky testified that the negative reference letter was the **kiss of death** for any efforts of Wolinsky to help him find a position. Dr. Dalton, Bernofsky's expert witness, stated that the negative reference letter would be the **death knell** to any application for employment at an academic institution.

VII. By Seeking Employment Through Wolinsky and Campbell, Bernofsky Was Following Established Practices.

Tulane suggests that Bernofsky's attempt to get employment through two professors that he knew was improper. On the contrary, it is well known in academia and other professional circles that the best way of finding new employment is to enlist the assistance of working colleagues by informing them of one's availability and employment preferences. The rationale for this approach is simply that an individual's colleagues are in the best position to learn of new opportunities as they arise. They are already familiar with the candidate and would have immediate access to the persons and processes responsible for filling new positions.

In academia, openings continually arise as a result of retirements, departures, deaths, expansion of existing departments, and the creation of new ones, and Bernofsky was pleased to learn from Wolinsky that positions were either available or were about to come available. That Bernofsky did not pursue a publically advertised position at either the University of Houston or Michigan

Technological University in no way impugns the legitimacy of his search for employment at these universities.

Dr. Bernofsky knew Dr. Wolinsky and Dr. Campbell, but he was not close friends with them as suggested by Tulane. Wolinsky had overlapped with Bernofsky for one year while they were graduate students in Kansas, and Cambpell had once worked under Bernofsky in his laboratory in Minnesota. They pursued different areas of biochemistry and had no social or professional contact during the intervening years. Bernofsky only became aware of Wolinsky's whereabouts in 1996 through a publisher's brochure that advertised a new book by him on nutrition, and in 1997, when Bernofsky was exploring employment opportunities, Wolinsky was one of the 52 contacts to whom he directed an inquiry.

Bernofsky had a professional relationship with Campbell, who was hired by the Mayo Clinic in 1974 to work in Bernofsky's laboratory as a postdoctoral research fellow. After less than a year, Campbell left Mayo to pursue a different field of biochemistry, and Bernofsky had no further contact with him except for the publication of their research findings in 1979. In 1997, when Bernofsky was looking for employment opportunities, Campbell was one of the 52 leads to whom he directed an inquiry.

VIII. Tulane's Explanation of its Failure to Respond to Dr. Campbell's Inquiries Is False.

Tulane has taken the untenable position that it inadvertently lost Dr. Campbell's request for a letter of reference. Tulane's explanation of its failure to respond to any of Dr. Campbell's six letters of inquiry is blatantly false. Campbell's letter of May 27, 1997 to Dr. Karam read:

> Dr. Carl Bernofsky has applied to our Department for a position as an Adjunct Professor of Biochemistry. He provided your name as a

reference and I would be very pleased if you would provide me with a letter for him.

Yours truly,
s/ Wilbur H. Campbell

On May 30, 1997, Dr. Karam's administrative assistant, Ms. Carol Uhlich, sent the following memo to John [Beal]:

> From the desk of
> Carol Uhlich
> X5921
> 5/30/97
>
> John,
>
> Do you want to handle as before?
> Let me know if you want me to do anything.
>
> s/ Carol

During the discovery phase of these proceedings, both Campbell's letter to Karam and Uhlich's memo to John [Beal] were readily provided to petitioner as a unit, thus disproving Tulane's claim of "inadvertence."

CONCLUSION

The district court is required to recuse itself under circumstances in which a reasonable person might question the impartiality of the district court judge. It appears to the person on the street that a judge who takes money from the defendant in a case to travel abroad is not impartial toward deciding the case in favor of that defendant. Fundamental to the litigant is the right to a fair and impartial trial. Fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings

over which they preside. U.S. v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995). Public confidence in the impartiality of our judges will be shattered if this Court does not reverse the judgment and remand this case to a judge who appears to be impartial.

Of further significance for purposes of this writ application is the split in the circuits over whether a negative reference letter by a previous employer is an adverse employment action in a retaliation claim under Title VII. On this issue, there is a clear and distinct conflict between the holding of the Third and Ninth Circuit Courts of Appeal and the opinion of the district court, which was upheld by the Fifth Circuit in the present case. Resolution of this important conflict also merits the attention of this Court.

Finally, viewing all evidence in light most favorable to the petitioner, and using the standards in Reeves that are applicable to the review of evidence submitted for summary judgment, questions of material fact exist with regard to whether the reference letter was negative and/or retaliatory.

Respectfully submitted,

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10/18/01
DATE

APPENDIX

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Excerpt from Judge Berrigan's <u>Financial Disclosure Report for Calendar Year 2000</u>

III. NON-INVESTMENT INCOME

SOURCE AND TYPE

Tulane University (taught 3 week seminar in Greece - Summer School). *Stipend to cover all expenses - travel, housing, meals, etc.

GROSS INCOME

*5,500.00

IV. REIMBURSEMENTS

SOURCE

George Mason University School of Law

DESCRIPTION

Dec. 1-7, Tucson AZ -- Frontiers of Law & Economics: Norms & Culture Seminar (Transportation, Food & Lodging)