2-22-2017

Petitioner's Reply Brief. Riley v. Elkhart Community Schools, 137 S.Ct. 1328 (No. 16-533), 2017 U.S. S. Ct. Briefs LEXIS 593, 2017 WL 712023

Eric Schnapper
University of Washington School of Law, schnapp@uw.edu

Robin Remley

No. 16-533

IN THE

Supreme Court of the United States

JANET A. RILEY,

Petitioners,

v.

ELKHART COMMUNITY SCHOOLS,

Respondent.

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

PETITIONER'S REPLY BRIEF

ERIC SCHNAPPER
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

ROBIN REMLEY
LAW OFFICE OF
ROBIN REMLEY, LLC
270 N. Main Street, Suite A
Crown Point, IN 46307
(219) 961-5415

Counsel for Petitioner

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Briefs

Other Authorities

BLANK PAGE

This is not a case about technicalities. The Seventh Circuit's outside-the-protected-group requirement permits an employer to immunize itself from promotion or hiring discrimination claims by selecting a candidate of a particular race or gender, creating pervrse incentives when (as here) another applicant has previously complained about discrimination, or fails to conform to a racial or gender stereotype. That circuit's effective prohibition against the use of comparative qualifications evidence in promotion and hiring cases precludes discrimination victims from relying on what is usually the most important, often the only, evidence of illegality.

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING THE OUTSIDE-THE-PROTECTED-GROUP REQUIREMENT

1. The parties disagree only about the size of the circuit conflict regarding whether a prima facie case requires proof that the position at issue was filled by a person outside the plaintiff's protected group. Petitioner contends there is a 6-5 split (Pet. 11-21); respondent argues there is a 3-2 split. Br.Opp. 12. Either circuit conflict would warrant review by this Court.

Respondent does not disagree that there are reported decisions on this issue in a total of eleven circuits and does not dispute that reported decisions in six circuits approve of the outside-the-protected-group requirement, while reported decisions in five circuits reject that requirement. Respondent does not deny that the decisions in these eleven circuits are binding on the lower courts in those circuits. Respondent nonetheless

contends that some of these binding precedents do not "count[]" (Br.Opp. 1) and should be "exclud[ed]" from consideration (Br.Opp. 12) in determining the size of the circuit split. Respondent offers no persuasive reason to disregard any of these well-established lower court precedents.

None of the holdings at issue are dicta. In most circuits[1], this question has arisen in a case in which the plaintiff and the promotion winner were indeed members of the same protected group.[2] Even where that was not the case, the reported decisions still established binding precedents. What the courts of appeals have repeatedly and properly done in this area of the law is establish specific legal standards to govern future litigation. For example, the court of appeals below applied a four-part standard (Pet.App. 8a), based on a similar four-part standard in earlier Seventh Circuit precedents. *E.g., Jaburek v. Foxx,* 813 F.3d 626, 631 (7th Cir. 2016). This Court itself has on several occasions adopted multi-part standards governing the creation of a prima facie case in employment cases. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973) (racial discrimination in hiring); *O'Connor v.*

[1] See Brief Appendix 1a.

[2] Once a circuit imposes this requirement, it would be unusual for an attorney to file a case in which the promotion in question was awarded to a person in the same protected group as the plaintiff, since such a claim would be almost certain to fail. Thus it is not surprising that some decisions reiterating this standard are found in cases not presenting that type of claim.

Consolidated Coin Caterers, 517 U.S. 308, 312-13 (1996) (age discrimination in dismissal).

Respondent argues that a judicial decision establishing a multi-part legal standard is "dicta" to the extent that the plaintiff satisfies any part of that standard. So, respondent reasons, the circuit court decisions that include an outside-the-protected-group requirement are dicta in any case in which the promotion winner was a person outside that protected group. Br.Opp. 8-10. Judged by that standard, however, a large portion of all standard-setting lower court decisions, and of all the decisions of this Court, would be "dicta"; a decision would be non-dicta only if the plaintiff lost. Courts do not use the term "dicta" in that way. In *O'Connor*, this Court held that an age discrimination plaintiff challenging a dismissal can establish a prima facie case by showing that he or she was over 40 and that his or her position was given to someone substantially younger. On respondent's view, the holding in *O'Connor* would be dicta, because the plaintiff in that case met both requirements—he was 56 and his replacement was16 years younger. Yet respondent itself characterizes this holding in *O'Connor* as a "precedent." Br.Opp. 14.

The particular officially reported circuit court holdings which respondent seeks to dismiss as "dicta" have without exception been treated as binding precedent by the lower courts. The outside-the-protected-group requirement in the reported circuit court decisions which respondent urges this Court to disregard have been cited hundreds of times in district

court and appellate opinions. For example, the outside-the-protected-group requirement in *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763 (11th Cir. 2005) (per curiam), has been cited in 83 lower court decisions in the Eleventh Circuit. *Compare* Br.Opp. 9 *with* Brief Appendix 3a-9a.

Respondent argues that the holdings in all these cases, although binding on the lower courts, should be disregarded here because "[t]his Court reviews judgments, not statements in opinions." Br.Opp. 10 (quoting *California v. Rooney,* 483 U.S. 307, 311 (1987) (per curiam)) (internal quotation marks removed). *Rooney* holds only that where a party has won a favorable judgment below, that party cannot obtain review by this Court merely because it does not like the reasoning in the court of appeals opinion. 483 U.S. at 312-14. Such "statements," however, often establish controlling precedent, and when they do may provide a basis for a later grant of certiorari to the extent they conflict with precedent in other circuits. See *id.* at 313.

Respondent also asks the Court to disregard several precedential lower court opinions because the court of appeals also ruled for the prevailing party on a second, alternative ground. Br.Opp. 11. But controlling precedents are often established by appellate decisions that rest on several alternative grounds. The existence of such an alternative ground might have made those cases inappropriate vehicles for resolving this issue, but it in no way detracts from the precedential nature of those decisions. The lower courts have repeatedly cited the holdings in these cases, and the standard those

opinions establish undeniably is the rule of decision for cases in their respective circuits.

2. Respondent asserts that in cases in which a promotion was awarded to a member of the plaintiff's protected class, there is an "extreme scarcity of plaintiffs who persuaded a factfinder that discrimination had occurred in such circumstances . . . ." Br.Opp. 13. However, that assertion is based on a total of only *four* cases in which respondent identifies the ultimate outcome of the litigation. Among those four cases, none had gone to trial; two were settled, and two failed on other grounds. Br.Opp. 13. That limited analysis shows nothing at all about how factfinders do, or would, resolve these claims. It might be asserted with equal force (to wit, none at all), that amongst the cases identified by respondent there is an extreme scarcity of plaintiffs who were *un*able to persuade a factfinder that discrimination had occurred.

In the alternative, respondent acknowledges that there indeed are "meritorious . . . claims" involving promotions to protected-group members, but asserts that "[c]ritically" the Seventh Circuit might permit a plaintiff to proceed even though he or she was barred from establishing a prima facie case. Br.Opp. 15. A plaintiff could conceivably avoid dismissal, respondent argues, by adducing "direct evidence" (*id.*), such as proof that a discriminatory employer was so inept as to blurt out that it was hiring another African-American applicant because he or she was less "uppity." But this alternative method of proof is wholly illusory; biased officials are almost never that blatant, and respondent

cannot identify a single instance in which a district court or appellate decision in any of the six circuits applying the outside-the-protected-group requirement have permitted a claim to proceed on such a hypothetical alternative approach.[3]

Respondent is highly critical of the five circuits that reject the outside-the-protected-group requirement, objecting that the decisions in those circuits are "unwarranted . . . as a matter of precedent and common sense" and "inconsistent with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* . . . ." Br. Opp. 14. But all of those decisions were issued subsequent to this Court's decision in *O'Connor*, and two of them were joined by current members of this Court. Pet. 17-18. The circuit conflict is undeniable. If, as respondent contends, the rule to which it objects in the First, Third, Ninth, Tenth and District of Columbia Circuits indeed produces "bizarre results" (Br.Opp. 15), that is all the more reason for this Court to grant review.

Respondent asserts that, even if this Court rejects the outside-the-protected-group requirement, it will eventually prevail on remand. But the purpose of review by this Court is to decide the legal question regarding which the courts are divided, not to attempt

[3] Neither of the cases cited by respondent concerned a claim of discrimination in promotions. *See Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016) (discriminatory dismissal); *Arroyo v. Volvo Grp. N. Am., LLC,* 805 F.3d 278 (7th Cir. 2015) (discriminatory dismissal and denial of reasonable accommodation).

to resolve which party should win on remand. And in this instance, respondent's prediction that it will prevail on remand rests entirely on the Seventh Circuit's effective prohibition against the use of evidence of comparative qualifications, which is the subject of the second Question Presented. *See* Br.Opp. 16-17 (citing Pet.App. 11a-15a).

II. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING COMPARATIVE QUALIFICATIONS EVIDENCE

1. In *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006), this Court granted certiorari to address the issue of comparative qualifications evidence, and rejected the "slap in the face" standard that had been applied by the court of appeals in that case. 546 U.S. at 547. *Ash* noted that there remained several alternative legal standards used by the various courts of appeals, but did not undertake to decide which was the correct one. Respondent argues that "for the same reasons this Court declined to resolve the question in *Ash* . . . the second question is not cert-worthy today." Br.Opp. 19. But the Court in *Ash* did not conclude or intimate that there were no differences among the remaining lower court standards; it merely held that "[t]his is not the occasion to define more precisely the standard . . . ." *Id.* 458. The litigation in *Ash* was an inappropriate occasion for resolving those differences because the case was decided by this Court on the certiorari papers, and neither party had briefed that issue.

On several occasions since *Ash*, this Court has declined to address the question left unresolved by that

decision. But, as is common, the petitions in subsequent cases presented a number of problems. In several instances there were serious vehicle issues, including questions about whether the plaintiff was even qualified.[4] There were disputes about what standard the lower court had actually applied.[5] In at least one case, respondent did not dispute the existence of a conflict, but merely advised the Court to wait for an appeal that presented the issue more clearly.[6]

2. Respondent does not exactly deny the existence of a circuit conflict regarding comparative qualifications evidence; it merely disputes "the scope and importance of any split . . . ." Br.Opp. 24. Respondent contends that seven circuits apply essentially the same standard, but appears to acknowledge that a less demanding standard is used in four other courts of appeals. Br.Opp. 20, 22-24.

Respondent recognizes that in the Ninth Circuit "just any difference [in qualifications] will do." Br.Opp. 22. Respondent notes that in some of the Ninth Circuit cases the plaintiffs also had other evidence (*id.* 23), but

[4] *E.g., Ash v. Tyson Foods, Inc.*, Opposition to Petition for a Writ of Certiorari, 24-25, available at 2006 WL 3806381; 1-2, *Akers v. Hinds Community College,* Brief in Opposition to Petition for Writ of Certiorari, 1-2, available at 2012 WL 4842967; *Powercomm, LLC, v. Holyoke Gas & Electric Dept.,* Petitioner's Reply Brief, 8-10, available at 2012 WL 727246.

[5] *Baxter Healthcare Corp. v. White*, Brief in Opposition, 13-17, available at 2009 WL 924267.

[6] *Id.*, 12-13.

does not contend that the Ninth Circuit's legal standard requires the existence of such evidence. Respondent points out that the Eighth Circuit requires more than proof of "'similar[]' or 'relatively similar' qualifications." *Id.* (quoting *Cox v. First Nat'l Bank,* 792 F.3d 936, 939 (8th Cir.2015)). But that is the same as the Ninth Circuit rule that a plaintiff can rely on proof of greater (not merely equal) qualifications. Respondent points to an eleven-year-old Fourth Circuit decision requiring proof that the plaintiff was "demonstrably superior." Br.Opp. 23 (quoting *Heiko v. Colombo Sav. Bank, F.S.B.,* 434 F.3d 249, 261-62 (4th Cir. 2006)). But the adverb "demonstrably" has not been used by that circuit since 2006, and the current Fourth Circuit standard only requires proof of that the plaintiff was "better qualified." Pet. 28. The First Circuit attaches greater significance to objective differences in qualifications (Br.Opp. 22), but in the instant case that weighs in favor of petitioner, because she relies on objective evidence (years of actual teaching experience), while the respondent relies on subjective interviews.

Even among the seven more restrictive circuits, the legal standards are clearly different. Respondent argues that those circuits merely "us[e] different adjectives and adverbs." Br.Opp. 19. But "different adjectives and adverbs" are precisely the stuff of distinct legal standards. The divergent legal written standards obviously have different meanings. New England Patriots quarterback Tom Brady may be "significantly" better than the average NFL quarterback (the D.C. Circuit standard), but he is "overwhelming[ly]" better

than the average college quarterback (the Tenth Circuit standard), and clearly so much better than the average high school quarterback that it would be "irrational" to compare them (the Fifth, Sixth, and Eleventh Circuit standard). Respondent does not actually state that these different words have the same literal meaning. It argues only that these seven circuits "require . . . a non-trivial difference in qualifications . . . ." Br.Opp. 20. But these circuits disagree about how much *more* than a non-trivial difference is required.

In 2002, the Seventh Circuit explained that its standard was the same as the Fifth Circuit's "slap in the face" standard. *Millbrook v. IBP, Inc.*, 280 F.3d, 1169, 1179-80 (7th Cir. 2002). In opposing certiorari in *Millbrook*, the respondent asserted that the Fifth and Seventh Circuits were indeed identical.[7] In 2004, the Seventh Circuit reiterated that its standard was the same as the "slap in the face" standard. *Hudson v. Chicago Transit Authority*, 375 F.3d 552, 562 (7th Cir. 2004). In opposing certiorari in *Ash,* respondent asserted that the Eleventh Circuit's "slap in the face" doctrine was the same as the Seventh Circuit rule.[8] Respondent now characterizes that "slap in the face" standard as having "broke[]n radically from others already then in use." Br.Opp. 2; *see id.* 19 ("slap in the face" standard was "particularly . . . extreme"). But if

[7] *Millbrook v. IBP, Inc.*, Brief in Opposition, 17, available at 2002 WL 32134841.

[8] *Ash v. Tyson Foods, Inc.*, Brief in Opposition, 7-10, available at 2005 WL 3229086.

these statements are correct, the Seventh Circuit standard—unchanged since 2002--could not be the same as the "others . . . in use."

Several of the seven more restrictive circuits permit reliance on lesser differences in qualifications where a plaintiff offers significant other evidence of pretext. *See* Br.Opp. 22. Respondent asserts that the Seventh Circuit does so as well. *Id.* But the rule announced and applied by the Seventh Circuit in the instant case is an exceptionless bar to any use of comparative qualifications that does not meet that circuit's stringent standard. Pet.App. 13a. The Seventh Circuit decision cited in the brief in opposition did not permit such use of qualifications evidence; it completely disregarded the plaintiff's qualifications evidence because it did not meet the circuit's "no reasonable person" standard, and then separately examined only the "other direct [and] indirect evidence" of pretext. See *Fisher v. Avande, Inc.*, 519 F.3d 393, 404 (7th Cir. 2008); *see* Br.Opp. 22.

Respondent contends that the differences among the various standards utilized by the courts of appeals "have little practical import." Br.Opp. 24; *see* Br.Opp. 7 ("little real-world impact"). That is demonstrably incorrect. The petition set out every appellate decision applying the Seventh Circuit standard since it was adopted in 2002, and noted that in every instance the plaintiff's evidence of comparative qualifications could not meet the circuit's avowedly "high evidentiary bar." Pet.App. 13a, 48a-49a. Respondent is unable to identify a single case, reported or unreported, in which evidence of comparative qualifications satisfied the Seventh

Circuit standard. That standard is a quintessential example of a requirement that is "strict in theory, but fatal in fact." *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 237 (1995). The Ninth Circuit, on the other hand, has repeatedly held that a plaintiff's qualifications evidence met its far less demanding standard. Pet. 27 & n. 12.

This difference in legal standard clearly mattered in this case. The promotion at issue was to a position supervising and guiding high school teachers. Petitioner had far more teaching experience than those who were promoted, one of whom had never taught at all. That evidence would have satisfied the standard applied in the Ninth and other circuits. The court of appeals below did not find, and respondent did not offer proof, that teaching experience was unimportant to the job of a high school vice principal; the school district's written standards minimized only the weight given to seniority, not the importance of relevant experience. Pet.App. 12a. This case thus presents a sound vehicle for resolving the complex and deeply entrenched circuit conflict regarding comparative qualifications evidence.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. The Court should set this case for oral argument in tandem with *Lavigne v. Cajun Deep Foundations, L.L.C.*, No. 16-464.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

ROBIN REMLEY
LAW OFFICE OF
ROBIN REMLEY, LLC
270 N. Main Street, Suite A
Crown Point, IN 46307
(219) 961-5415

Counsel for Petitioner