11-23-2016

Reply Brief. Lavigne v. Cajun Deep Foundations, L.L.C., 137 S.Ct. 1328 (2017) (No. 16-464), 2016 WL 9443770

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No. 16-464

IN THE

Supreme Court of the United States

TERRANCE J. LAVIGNE,

Petitioner,

v.

CAJUN DEEP FOUNDATIONS, L.L.C.,

Respondent.

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

REPLY BRIEF

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Respondent expressly concedes that there is a circuit conflict regarding the first question presented, and does not dispute the existence of such a conflict regarding the second question. The brief in opposition argues that, even if this Court were to conclude that the Fifth Circuit erred on both issues, respondent would ultimately prevail on other grounds not yet decided by the court of appeals.[1] But the other grounds raised by respondent are matters that would be addressed in the first instance by the court of appeals on remand, and are no bar to review by this Court of the issues that were decided by the Fifth Circuit below.[2]

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A PLAINTIFF CLAIMING DISCRIMINATORY TERMINATION MUST PROVE THAT HE OR SHE WAS REPLACED BY A PERSON OUTSIDE HIS OR HER PROTECTED GROUP

Respondent candidly concedes that "there is a split among the circuits relating to the elements of a *prima facie* case applied to Title VII wrongful termination cases . . . ." Br.Opp. 15. The brief in opposition describes the same circuit court alignment set out in the petition. *Compare* Br.Opp. 15 *with* Pet. 9-17. Respondent contends that "the test applied by the

[1] Br.Opp. 23 ("The granting of the petition for certiorari will not change the outcome of this case.")(capitalization omitted).

[2] Respondent asserts that if this Court were to grant certiorari to decide the questions presented, it "would be forced" to address (and resolve in its favor) these other contentions. Br.Opp. 12. It is not this Court's practice to address issues that were not decided by the court below.

Fifth, Fourth, Sixth, Ninth, and Eleventh circuits [is] correct . . . ." Br.Opp. 15. Respondent agrees that the standard applied by the Fifth Circuit in this case was established by long-standing Fifth Circuit precedent. Br.Opp. 10, 16.

Respondent acknowledges that in this case the court of appeals rejected Lavigne's discrimination claim because it "determin[ed] that [Lavigne] failed to establish a *prima facie* case of discrimination in termination[ ]." Br.Opp. i. The Fifth Circuit decision in this case rested solely on its conclusion that Lavigne had failed to establish a prima facie case because he could not prove that he had been "replaced by someone outside his protected group." Pet.App. 15a (quoting *McCoy v. City of Shreveport,* 492 F.3d 551, 556 (5th Cir. 2007)).[3] Under the decision below, applying decades of Fifth Circuit precedent, replacement by an individual outside the protected group is one of the four essential elements that "a plaintiff must show" in order to establish a prima facie case of discrimination. Pet.App. 15a. Respondent itself insists that whether a plaintiff was replaced by someone outside of his protected group

[3] Respondent "suggests" that the district court applied, not the Fifth Circuit standard, but the very different standard adopted by a majority of the other circuits. Br.Opp. 17-18. But the court of appeals in this case clearly applied the Fifth Circuit's own standard. Pet.App. 15a-16a. Respondent urges the Court to resolve the question presented in "a case that only applied the test of which Petitioner complains." Br.Opp. 18. But in this case the Fifth Circuit "only applied" the replacement test, and it is the standard applied by the court of appeals that matters.

"goes to the heart of the claim[ ]." Br.Opp. 16.[4] Indeed, respondent contends that the Fifth Circuit was required by this Court's decisions to impose that very replacement requirement. Br.Opp. 14-15. [5]

Respondent contends that, even if this Court were to reject the Fifth Circuit replacement requirement and hold that Lavigne had established a prima facie case, plaintiff's claim would still fail because he has insufficient evidence of intentional discrimination. Br.Opp. 13, 23-24.[6] But the court of appeals below never reached that issue, and instead rejected Lavigne's claim solely because it concluded that he had not established a prima facie case. Respondent does not deny that the Fifth Circuit decision rested solely on the asserted lack of a prima facie case; respondent merely

[4] In one passage respondent characterizes this factor as merely "relevant" to whether there is a prima facie case. Br.Opp. 16. But in the instant case, and in all of the 34 Fifth Circuit decisions quoted in the petition, Pet. App. 66a-72a, that factor is clearly a distinct and necessary element of a prima facie case, in the absence of which a claim will fail regardless of any other evidence.

[5] Respondent asserts that in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993), this Court held that a prima facie case of discriminatory termination requires proof that the plaintiff's position "was ultimately filled by someone outside his protected class." Br.Opp. 14-15.

[6] In a number of passages, the brief in opposition suggests that Lavigne's discriminatory termination claim was actually tried. Br.Opp. 10, 12. But, as respondent elsewhere makes clear, that claim was actually dismissed at summary judgment on the ground that the plaintiff had not established a prima facie case.

contends that at some point in the future it would be entitled to prevail on this other ground. Respondent's alternative argument was never addressed by the court of appeals, and can be raised on remand. This Court routinely grants review of cases in this posture.[7]

The brief in opposition points to evidence which respondent claims supports its contention that Lavigne's dismissal was not the result of intentional discrimination. Br.Opp. 2-6, 11-12. But those very arguments highlight the importance of the question presented.[8] Under the Fifth Circuit standard, a court dismisses a case for want of a prima facie case without having to consider whether the evidence in the case

[7] Respondent suggests that the Court "wait" for a case in which a defendant asserted the plaintiff lacked a prima facie case, but did not contend (as does respondent) that the plaintiff lacked sufficient evidence of unlawful motive to survive summary judgment. Br.Opp. 12. There are no such cases; in practice, defendants which challenge the existence of a prima facie case *always* argue as well that the plaintiffs lack such evidence. No sensible defendant would concede that a reasonable jury could find unlawful discrimination, and argue only that there was no prima facie case.

[8] Respondent suggests that whether a plaintiff established a prima facie case should be irrelevant once, as occurred here, a defendant articulates a nondiscriminatory reason for the disputed action. Br. Opp. 13 (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). But the Fifth Circuit *does* require a plaintiff to establish a prima facie case in those circumstances. Pet.App. 15a, 66a-72a; see *Hague v. University of Texas Health Science Center at San Antonio,* 560 Fed.Appx. 328, 334-35 (5th Cir. 2014); Petition for Writ of Certiorari, *Paske v. Fitzgerald*, No. 15-162, 2015 WL 4651685.

would support or even compel a finding of invidious discrimination. Thus in the instant case, the court of appeals never addressed the conflicting evidence offered by the parties. Respondent insists it fired Lavigne in part because he "concealed" his driving record (Br.Opp. 4); Lavigne, on the other hand, swore that he had disclosed the relevant information to his supervisors. Pet. 3. Lavigne asserts that his supervisors had made a number of discriminatory remarks, and that he reported this to management (*id.*); respondent insists that it has no written record of such an internal complaint. Br.Opp. 5. The court of appeals never discussed those conflicting accounts, because under the controlling Fifth Circuit standard, in the absence of a prima facie case, it is irrelevant whether respondent's justification for the dismissal was a palpable fabrication.

As the circumstances of this case make clear, the Fifth Circuit replacement requirement is not merely a procedural detail; that requirement effectively defines, and sharply narrows, the protections of Title VII. An employer which fires a worker on the basis of race, national origin, gender or religion can immunize itself from liability simply by hiring a replacement of the "right" race, national origin, gender or religion. Any employer of ordinary ingenuity could resort to that tactic if it suspected that a dismissed employee was going to file a discrimination suit. And that is precisely the posture of this case. Respondent knew that in the past Lavigne had complained to his supervisors about discrimination (Pet. 3), and it hired a black replacement for Lavigne shortly after Lavigne first contacted EEOC.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A TITLE VII CHARGE MUST IDENTIFY ALL OF AN EMPLOYER'S UNLAWFUL MOTIVES

Respondent does not actually dispute the existence of a circuit conflict regarding whether a Title VII charge must identify all of an employer's unlawful motives. The brief in opposition describes the same Fifth, Seventh and Tenth Circuit decisions imposing that requirement that are set out in the petition. *Compare* Br.Opp. 18-19 *with* Pet. 22-24. Respondent does not deny that the contrary rule is applied in the First, Third, Eighth and Eleventh Circuits. Pet. 25-28. And respondent does not disagree that in the Third, Fourth and Ninth Circuits, a lawsuit may include any type of violation that was actually investigated by the EEOC, even if it had never been raised in the original or any amended administrative charge. Pet. 27-30.[9] The brief in opposition, having described the rule in the Fifth, Seventh and Tenth Circuits, simply fails to address the standard in the remaining circuits.

Respondent does not deny that the court of appeals in this case dismissed Lavigne's retaliation claim on the ground that retaliation and discrimination are different

[9] In the court below, respondents conceded that the EEOC's Houston office had investigated Lavigne's termination and retaliation claims. Pet.App. 24a. The brief in opposition objects that there was no EEOC investigation of these claims. Br.Opp. 7. But this assertion concerns the inaction of the EEOC New Orleans office which, as we explained, did not conduct any investigation at all. Pet. 4.

"legal theor[ies]." Pet. App. 17a. To the contrary, the brief in opposition describes the same Fifth Circuit precedent establishing that rule that is summarized in the Petition. *Compare* Br.Opp. 18-19 *with* Pet. 22-23.

The primary argument advanced by respondent is that the courts below should never have considered Lavigne's termination claim at all, because that termination claim—specifically asserted in the amended charge--was not related to the particular discriminatory acts set out in the original charge. Br. Opp. 21-23. But the district court expressly rejected that objection to consideration of the Lavigne's termination claim. Pet. App. 37a-38a.[10] The court of appeals did not disturb

[10] The district court concluded that the termination claim was related to the original administrative charge because respondent had justified dismissing Lavigne on the ground that he was on probation at the time that the company discovered his alleged concealment of his driving record, and the original charge had asserted that the probation itself was the result of discrimination. Pet.App. 38a. The trial court also reasoned that the inclusion in the original charge of a general allegation of discrimination was sufficient to encompass the termination claim. *Id.*

At page 22 of the brief in opposition, respondent insists that Lavigne's termination claim was not "relate[d] in any way" to the specific events referenced in the original charge. See *id.* (termination claim is "unrelated to the prior events"). But at pp. 4-5 of the brief in opposition, respondent justified the dismissal of Lavigne on the ground that he was on probation when the driving record issue arose, the very disputed probation complained about in the original charge. And at p. 1, the brief in opposition describes the claims that were actually tried—the accident-discipline-probation and wage claims that were set out in the original

that portion of the district court opinion, and respondent has not sought review of that action by the appellate court. At most this is an issue that respondent might[11] be able to raise on remand if this Court were to reject the Fifth Circuit rule.

The merits arguments advanced in the brief in opposition highlight the importance of this question to the administration of Title VII and other statutes by the EEOC. Respondent objects to the wording of the amendment (Br.Opp. 21), and to the seven month delay between the original and amended charge (Br.Opp. 7); but it was the EEOC which drafted that amendment, and it was the failure of the EEOC's New Orleans office to act on the original charge that resulted in the delay. Pet. 4. These arguments would penalize a charging party for the manner in which the Commission handled his or her charge. Respondent argues that the absence in a charge of a check mark on any box (indicating a particular type of unlawful motive) should be deemed a *denial* by the charging party that that type of unlawful motive was present. Br. Opp. 7; see Br.Opp. 8 (claim of retaliation "contradicted" by failure to check retaliation box in original charge). But it is the EEOC itself that

charge—as "include[ing] facts relating to [Lavigne's] previously dismissed . . . termination and retaliation claims."

[11] Respondent could not pursue this issue on remand if this Court were to adopt the standard in the Third, Fourth and Ninth Circuits, which permit a plaintiff to file suit about any claim that was in fact investigated by the EEOC. Pet. 28-30. Respondent conceded below that in this case the EEOC did investigate Lavigne's retaliatory termination claim. Pet.App. 24a.

fills out these forms (Pet. 4), and interpreting in this way the absence of a checked box could force the EEOC to rewrite its forms. The EEOC understandably objects that the "new legal theory" rule seriously interferes with the Commission's ability to administer Title VII and other statutes. Pet. 33-34.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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