Supreme Court, U.S.
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No. ______

In the
Supreme Court of the United States

SHARON MACY,
Petitioner,

v.

HOPKINS COUNTY BOARD OF EDUCATION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 25, 2007

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QUESTION PRESENTED

When a Summary Judgment is sought by an employer, upon discrimination claims alleged by an employee, under the American Disabilities Act, 42 U.S.C. § 12112(a) or the Rehabilitation Act, 29 U.S.C. § 794(a), the Court should apply the "motivating factor" test, as opposed to the "sole" factor test in determining if the discharge of employment was due in part to an employee's actionable disability.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff - Appellant and Petitioner: Sharon Macy

Defendant - Appellee and Respondent: Hopkins County School Board of Education, also referred to as Hopkins County School Board of Education by the 6th Circuit Court of Appeals.

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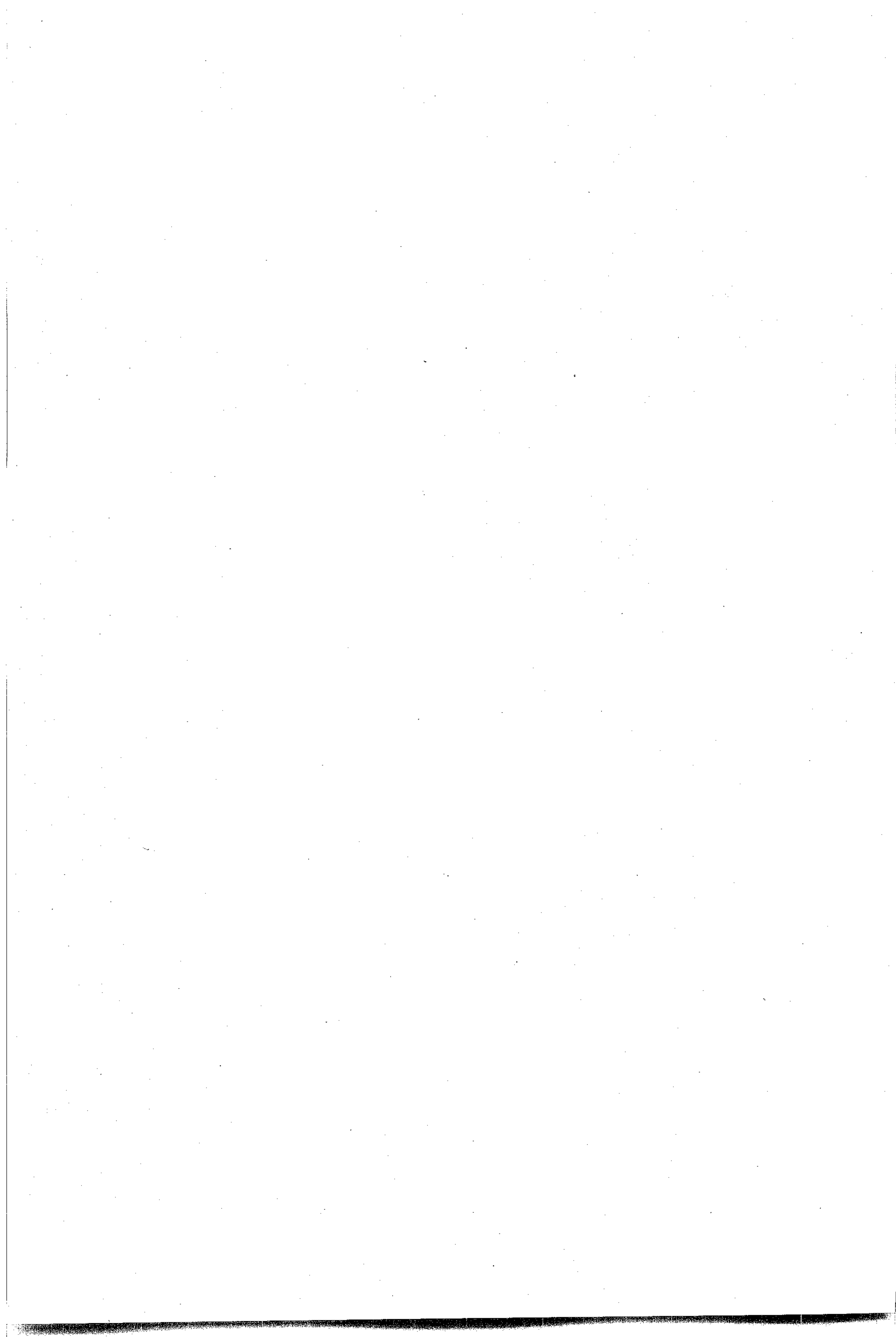

PETITION FOR WRIT OF CERTIORARI

Sharon Macy respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Sixth Circuit, dated April 12, 2007, is officially reported at *Macy v. Hopkins County School Board of Education* , No. 06-5722, 2007 U.S. App. LEXIS 8382 (6th Cir. Apr. 12, 2007), and is reproduced at App. A, 1a-26a.

The Memorandum Opinion and Order of the U.S. District Court for the Western District of Kentucky, Owensboro Division, dated May 1, 2006, is officially reported at 429 F. Supp. 2d 888, and 2006 U.S. Dist. LEXIS 28035 and is reproduced at App. B, 27a-54a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 12, 2007. The Petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C.§ 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 42 U.S.C. § 12112(a) of the American Disabilities Act and 29 U.S.C. § 794(a) of the Rehabilitation Act. The relevant statutory provisions are reproduced at App. C, 55a.-56a.

STATEMENT OF THE CASE

This action arises from the employment termination of the Petitioner, Sharon Macy ("Macy"), a disabled teacher, by the Respondent, Hopkins County Board of Education ("Board"), on November 30, 2000.

The issues in this Petition arise from the granting of a Summary Judgment upon Macy's claims by the U.S. District Court in favor of the Hopkins County School Board of Education.

The U.S. District Court applied the U.S. Court of Appeals for the Sixth Circuit "sole factor" test in determining whether or not the Board had been pretextual in their termination of Macy's employment based upon her disability as opposed to applying the majority rule of other U.S. Courts of Appeal, which is the "motivating factor" test so as to avoid a summary judgment in favor of the employer.

Macy was clearly a disabled person under the provisions of the American Disability Act, 42 U.S.C. § 12112(a) ("ADA") and the Rehabilitation Act, 29 U.S.C. § 794(a), and was on a "504 Individualized Accommodation Plan", as a result of a closed head injury sustained in 1987 and exacerbated in 1995, having been diagnosed with "post concussive syndrome".

Macy had filed numerous complaints as to the Board's failure to carry out said 504 Plan, to include filing an Equal Employment Opportunity Complaint in February 2000.

Macy was terminated on November 30, 2000, after having allegedly disciplined several unsupervised members of the middle school's boys' basketball team, by the use of language reported as threatening to kill them, which Macy vehemently denied. Subsequent to her termination, she was convicted of a Class A misdemeanor, Ky. Rev. Stat. Ann. § 508.080, Terroristic Threatening.

The District Court reasoned that Macy's termination was not based solely on her disability and that no probative evidence was submitted to establish pretextual termination. Macy appealed to the U.S. Court of Appeals for the Sixth Circuit which affirmed the order and judgment of the District Court. The Sixth Circuit held that it was bound by its holding in *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) and *Hedrick v. W. Reserve Case Sys.*, 355 F.3d 444 (6th Cir.); *cert. denied*, 543 U.S. 817 (2004).

Macy petitions this Court for review of the Sixth Circuit's decision holding that an employee may recover under the ADA only if the sole factor relied upon by the employer is the employee's disability and its holding that pretextual action was not established in her prima facie case of disparate treatment.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER AN EMPLOYEE MAY RECOVER UNDER THE AMERICAN DISABILITY ACT IF THE EMPLOYEE'S DISABILITY WAS A "MOTIVATING FACTOR" IN THE EMPLOYER'S DECISION AND THAT THE EMPLOYEE SHOULD NOT BE REQUIRED TO ESTABLISH THAT THEY WERE FIRED "SOLELY" BECAUSE OF THEIR DISABILITY.

The U.S. Sixth Circuit opinion states it is the only Federal Circuit Court, save one, which requires a fired employee to prove that they were fired "solely" because of their disability, as opposed to permitting a recover if the disability was a "motivating factor" in the employer's decision. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1063-1065 (9th Cir. 2005); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2nd Cir. 2000); *Baird v. ex rel Baird vs. Rose*, 192 F.3d 462 (4th Cir. 1999); *Foster v. Arthur Anderson, LLP*, 168 F.3d 1029 (7th Cir. 1999); *Newberry v. East Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996) *cert. denied*, 520 U.S. 1228 (1997); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300 (8th Cir. 1995)

The U.S. Sixth Circuit opinion acknowledges its minority view on this issue, as being bound by its own past holding in *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) and *Hedrick v. W. Reserve Case Sys.*, 355 F.3d 444 (6th Cir.), *cert. denied*, 543 U.S. 817 (2004), and relies on the procedural requirement to apply reported panel opinions on

subsequent panels "...whether the reasoning set forth in those opinions were correct or not."

The District Court was also bound by the U.S. 6th Circuit's prior opinions. In appealing from the District Court's Summary Judgment this issue was presented as part of the de novo review, that the factors to be considered constituted a fact question for the jury as to what the motivating factors were in terminating her employment, and that Macy's disability was not the "sole" factor but rather her American Disability Act protected disability status was a "motivating factor" in her firing. This issue was thus preserved on appeal and not waived as a federal question.

Uniformity of interpretation and application of a federal statute is a principle tenant of the Doctrine of Equal Protection under the law. Macy should not be denied her opportunity to be heard in a District Court of the U.S. 6th Circuit when she would have been heard in the other vast majority of U.S. Circuit Court of Appeals.

It is time that the majority reasoning so widely adopted by other U.S. Circuits also be applied in the 6th Circuit, in ADA claims for wrongful termination of employment.

II. SUMMARY JUDGMENT WAS INAPPROPRIATE WHERE QUESTIONS OF MATERIAL FACT EXISTED UPON THE QUESTION OF WHETHER MACY'S TERMINATION OF EMPLOYMENT WAS PRETEXTUAL IN NATURE.

When a question of fact exists as to the motivating factors behind the termination of employment of a disabled worker,

it is inappropriate and reversible error to grant a Summary Judgment.

A prima facie case of disparate treatment had been established by Macy and was acknowledged by the 6th Circuit in its opinion. However, the 6th Circuit applied its "sole factor" criteria in finding that, in their opinion, reasons other than Macy's disability were legitimate, non-discriminatory and non-pretextual, based upon its minority view set forth in *Monette*, *ibid.*

Upon remand to the District Court for trial, with instructions that the majority view standard of "motivating factor" test be applied, Macy will be able to submit her theory of her case to the jury wherein they will determine if her disability was a motivating factor in the Hopkins County Board of Education's decision to terminate her employment and if so, to what extent she should be compensated for wrongful termination.

Certainly reasonable minds could conclude that the allegations of threats to children were only that (since the allegations had been vehemently denied by Macy) and no judicial finding had yet been made as of the date of termination, and that the firing of Macy was based on her actionable disability, resulting in a recovery of damages for Macy.

The Board's explanation for terminating Macy's employment was pretextual in nature. Pretext is established by showing that the Board's non-discriminatory reason (1) had no basis in fact, (2) did not actually motivate the Board's challenged conduct; or (3) was insufficient to warrant the challenged conduct. *Dews vs. A. B. Dick Co.*, 231 F.3d 1016, at 1020 (6th Cir. 2000)

Macy produced sufficient evidence from which a jury may reasonably reject the Board's explanation. *Manzer vs. Diamond Shamrock Chemical Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)

If Macy can demonstrate the Board's proffered non-discriminatory reason is pretextual, a trier of fact may infer discrimination. *Dews*, *ibid*, at 1021.

If Macy had subsequently been acquitted of the criminal charges (there being the presumption of innocence on the date of her termination) then, the Board's termination of Macy as a teacher would have been reasonably interpreted as discriminatory and/or retaliatory under her theory of her causes.

The District Court, acting with the knowledge of the disposition of the criminal charges, but not acting solely with the facts known to the Board on November 30, 2000, committed further error by equating allegations of criminal conduct to "...posing a direct threat to the students..." precluding the need for reasonable accommodations. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

As of the date of Macy's discharge, there was no evidence that she was a significant risk to the health or safety of others that would not be eliminated by reasonable accommodation. 42 U.S.C. § 12111(3). In fact, the record shows that the Board continued her employment after their initial investigation on November 3, 2000, until November 30, 2000.

A fact question exists as to whether the Board's explanation as to the grounds for termination were made in good faith, or to only comply with the holding in *Celotex*

Corp. v. Catrett, 477 U.S. 317 (1986); *Walsh v. United Parcel Service*, 201 F.3rd 718, 724 (6th Cir. 2000). Macy had never been placed on any corrective action plan for any alleged violations during the entire period of her employment with the Board.

When genuine issues of material fact are unresolvable on the record, an appropriate trial to determine the facts is required. *Board of Education, et al. v. Department of Health, Education & Welfare, et al.*, 532 F.2d 1070 (6th Cir. 1976)

The doctrine of issue preclusion should not effect the decision in this case.

Ms. Macy asserts that the Hopkins County Board of Education wrongfully terminated her employment based upon (1) her ADA protected status, or (2) her EEOC complaint or (3) retaliation for numerous complaints to the Board about her ADA 504 Plan or (4) a combination of one or more of the three.

Issue preclusion is a legal doctrine which prohibits issues which were adjudicated in a previous lawsuit from being relitigated in a subsequent lawsuit. It is distinguished from claim preclusion which requires same identity of parties, same identity of causes of action and that the action was resolved on the merits. *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970)

Issue preclusion has four essential elements: (1) the issue in the record case is the same as in the first case (Restatement (Second) of Judgments § 27 (1982), (2) the issue must have been actually litigated, (3) even if the issue was actually litigated in a previous action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action and (4) for issue preclusion to operate as a bar, the

decision on the issue in the prior action must have been necessary to the Court's judgment. *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998)

Issue preclusion does not apply in this case because the factual and legal issues involved are not identical to the ones addressed in the misdemeanor case or in the other judicial and administrative proceedings. At no time have Ms. Macy's present claims been actually litigated to finality.

The law asks the question whether uncontroverted facts existed at the time of a parties' action, which are relative to the disposition of the pending causes of action, and if material and relevant facts are in issue, then a fact finder must be impaneled to decide what the facts actually are and whether the laws, when applied to those facts, supported the Board of Education's termination of Macy's employment or whether they support Macy's claims that her 19 years of exemplary employment were terminated as a retaliatory act.

Congress has expressed an intent not to allow preclusion in Title VII claims. *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S. Ct. 3220, 3225 (1986). The standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of a Title VII complaint. *Burlington Northern, et al. v. White*, 126 S. Ct. 2405 (2006). ADA claim should be treated the same.

At the time of Macy's termination of employment, on November 30, 2000, the Board did not have any legal determination of the alleged underlying conduct; so it is reasonable to find that its actions were based upon her protective status and as a retaliatory act.

The Trial Court's application of the doctrine of issue preclusion constitutes reversible error.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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