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IN THE  
**Supreme Court of the United States**

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MARALYN S. JAMES,

*Petitioner,*

*v.*

METROPOLITAN GOVERNMENT OF NASHVILLE  
AND DAVIDSON COUNTY NASHVILLE  
PUBLIC LIBRARY,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**BRIEF IN OPPOSITION**

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SUE B. CAIN

*Director of Law*

LORA BARKENBUS FOX\*

JEFF CAMPBELL

*Assistant Metropolitan Attorneys*

THE DEPARTMENT OF LAW OF THE

METROPOLITAN GOVERNMENT OF

NASHVILLE AND DAVIDSON COUNTY

Metropolitan Courthouse, Suite 108

P.O. Box 196300

Nashville, Tennessee 37219-6300

(615) 862-6341

\* *Counsel of Record*



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**STATEMENT OF THE CASE.<sup>1</sup>**

The Complaint in this matter was filed on April 30, 2002. (Jt. Apx. p. 18). The Complaint alleged discrimination under the Americans with Disabilities Act, under the Age Discrimination in Employment Act, and retaliation. *Id.* In June 2003, the Metropolitan Government was granted summary judgment on the disability and age discrimination claims. (Jt. Apx. pp. 47, 59) The retaliation allegations remained. (Jt. Apx. p. 59)

The jury trial on this matter was held regarding the retaliation allegations in May 2004. (Jt. Apx. pp. 69, 235). The jury rendered a partial verdict in favor of Petitioner (finding retaliation by defendant but not finding a hostile work environment or constructive discharge) and awarded compensatory damages in the amount of Forty Two Thousand (\$42,000) Dollars. (Petition, p. 3).

In December 2005, the Sixth Circuit set aside this verdict by reversing the district court's decision to deny

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<sup>1</sup> Petitioner Marilyn James will be referred to as "Petitioner." The Metropolitan Government of Nashville and Davidson County will be referred to as "Respondent" or the "Metropolitan Government." The Sixth Circuit Court of Appeals will be referred to as the "Sixth Circuit" or "Court of Appeals." The Petition for a Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred to as (Petition, Appendix \_\_). Citations to items not so included in the Petition will be made to the Joint Appendix on file with the Clerk of the Sixth Circuit and designated as (Jt. Apx. \_\_).

the Metropolitan Government's motion for judgment as a matter of law. *James v. Metropolitan Government of Nashville*, 159 Fed.Appx.686 (6<sup>th</sup> Cir. 2005) (Petition, App. 14) . On October 2, 2006, the U.S. Supreme Court granted the Plaintiff's petition for writ of certiorari in this case, vacating the judgment of the Court of Appeals for the Sixth Circuit and remanding it to the Sixth Circuit for further consideration in light of *Burlington Northern v. White*, 126 S.Ct. 2405 (U.S. 2006). (Petition, App. 13).

In June 2007, the Sixth Circuit ruled that, even in light of *Burlington Northern*, the District Court should have granted the Metropolitan Government's motion for judgment as a matter of law. (2007 WL 1786792 (6<sup>th</sup> Cir. 2007)) (Petition, App. 1).

### **RELEVANT FACTS**

The Metropolitan Government adopts the statement of the facts recited in the Sixth Circuit's June 19, 2007 opinion, which shows that this retaliation suit was brought by Petitioner against her employer, the Nashville Public Library (a department within the Metropolitan Government) after the Library finally insisted, after six years of poor performance evaluations and warnings, that she improve her job performance. (Petition, App. 3). The opinion shows that when she had not met the goals she had been given for improvement she was not disciplined, demoted or terminated. (Petition, App. 3) Instead, she was given more time to improve, was offered techniques to improve her output, and the Library accommodated her requests for assistance or changes in her seating and she was offered an alternative position to accommodate her claims of

stress. (Petition, App. 4) She applied for a disability pension and when that was denied, she took an early service pension. (Petition, App. 5-6).

### **REASONS FOR DENYING THE PETITION**

#### **A. There is no need to accept this Petition, as there is no conflict among the federal circuits.**

Petitioner has attempted to demonstrate the existence of a conflict between the Sixth Circuit and several other federal circuits in the wake of this Court's decision in *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). Petitioner has tried to demonstrate a conflict as to whether judges or juries should make the finding of the existence of an adverse employment action in a retaliation case. (Petition, p. 6). The Metropolitan Government submits that there is no conflict – the Supreme Court and the Circuits are in agreement that the role of a judge is to assure that – as a matter of law – there is a legally sufficient basis upon which a jury may base a verdict.

#### **B. This case involved the Sixth Circuit's reversal of the Trial Court's denial of a motion for judgment as a matter of law. There is no need to take this case to determine if judgment as a matter of law is a legal question.**

Judgment as a matter of law is a post-trial device, turning on the question whether a party has produced evidence “legally sufficient” to warrant a jury determination in that party's favor. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2510 (U.S. 2007)

Under Rule 50, a court should render judgment as a matter of law when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097, 2109 - 2111 (U.S. 2000) (*citing* Fed. Rule Civ. Proc. 50(a); *Weisgram v. Marley Co.*, 528 120 S.Ct. 1011 (2000)).

In this case, the Sixth Circuit held that, upon reconsideration in light of *Burlington Northern*, Petitioner did not present evidence sufficient, as a matter of law, for a jury to find in favor of her retaliation claim. (App. 12)

**C. The U.S. Supreme Court specifically ruled in *Burlington Northern* that judgment as a matter of law is a legal question for the court.**

*Burlington Northern* itself is a case involving the legal standard for evaluating whether to grant judgment as a matter of law. 126 S.Ct. 2405 (U.S. 2006) In that case, the Supreme Court determined that judgment as a matter of law was not appropriate where a plaintiff had been reassigned from forklift duty to standard track laborer tasks, and where she had been suspended without pay for thirty seven days. *Id.* at 2414 -2416 (U.S. 2006) The Court did not defer to the jury’s verdict – but instead reviewed it, in conformance with Rule 50, and determined as a matter of law that there was a sufficient evidentiary basis to support the jury’s verdict on the retaliation claim. *Id.*

**D. The Sixth Circuit cases cited are not at odds with the Supreme Court or the other circuits.**

Petitioners seek to demonstrate the existence of a conflict between the Sixth Circuit and several other federal circuits in the wake of this Court's decision in *Burlington Northern & Santa Fe Rwy. Co v. White*, 126 S.Ct. 2405 (2006). Petitioners try to show a conflict as to whether judges or juries should make the finding of the existence of an adverse employment action in a retaliation case. (*Petition for Writ of Certiorari p. 6*). Petitioner's theme is that the Sixth Circuit holds that judges retain that authority in conflict with several other federal circuits. (*Id.*). To support this argument Petitioner extracts passages from the Sixth Circuit's decisions in five recent cases and contrasts them with excerpts from decisions by the Second, Third, D.C., and Tenth Circuit Courts.

The Metropolitan Government submit that this "conflict" is more manufactured than real and that the cases fail to show any standard other than what is discussed above in parts 1 and 2 – judgment as a matter of law is a legal question. This is the same as the inquiry for resolving a motion for summary judgment pursuant to Rule 56. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000). A brief analysis of the cases relied upon by Petitioner illustrates why that is true.

Petitioner cites to the following Sixth Circuit cases: *McNeill v. U.S. Dept. of Labor*, 2007 WL 1880599 (6<sup>th</sup> Cir. 2007); *Michael v. Caterpillar Financial Service Corp.*, 2007 WL 2176220 (6<sup>th</sup> Cir. 2007); *Watson v. City of Cleveland*, 202 Fed. Appx. 844 (6<sup>th</sup> Cir. 2006); *Jordan v.*

*City of Cleveland*, 464 F.3d 584 (6<sup>th</sup> Cir. 2006); *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724 (6<sup>th</sup> Cir. 2006).

In *McNeil v. U.S. Dept. of Labor*, the Sixth Circuit decided a direct appeal from a Federal administrative agency, the Administrative Review Board. *McNeill*. at \*1. Thus it was a non-jury case, and the Sixth Circuit quite naturally did not have a jury determine whether there was an adverse employment action.

Similarly, by pulling quotes out of the context of the decision, Petitioner misstates the Sixth Circuit's action in *Michael v. Caterpillar Financial Service Corp.* The posture of the case in *Michael* was an appeal from a summary judgment in favor of the employer. The case had not gone to trial so there had been no jury involvement. The Sixth Circuit carefully explained that its task was to determine if there was a sufficient disagreement as to a material fact to warrant submission of an issue to a jury. *Michael* at \* 5. The Court found on two of the claims of adverse employment action that there were no genuine issues of material fact. There nothing in the opinion that can be reasonably construed to indicate that the Sixth Circuit intended to remove the issue of adverse employment impact from the jury, had it found a material issue of fact.

Petitioner's treatment of *Watson v. City of Cleveland* is practically identical. Once again the Sixth Circuit had to rule on an appeal arising out of a summary judgment. The case had not gone to trial so there had been no jury involvement. Once again the court explained that it had to determine if there was a sufficient issue of fact to allow

a jury to “return a verdict for the nonmoving party.” *Watson* at 853. (Internal citations omitted). The Court made the determination that there was no disputed issue of fact. There was no holding that the determination of an adverse employment action cannot be a jury question, assuming that there exists a material issue of fact.

It is likewise somewhat difficult to understand Petitioner’s problem with *Jordan v. City of Cleveland*. The Sixth Circuit affirmed the district court’s denial of the defendant’s Rule 50 motion, thus affirming the jury’s finding that the plaintiff had suffered an adverse employment action. As it did with the summary judgment cases, the Court stated the standard for its review of a denial of a judgment as a matter of law as determining whether there was an issue of material fact for the jury, and repeated the admonition that “credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Jordan* at 594. There is no mistaking that the basis for the court’s decision was the presence of a legitimate factual issue that mandated referral to the jury for a determination.

The holding of the last Sixth Circuit case cited by Petitioner, *Randolph v. Ohio Department of Youth Services*, also is not presented accurately. In *Randolph* the Court overturned an award of summary judgment to the defendant for, among other grounds, failure to carry her *prima facie* burden for the retaliation portion of her case. *Randolph* at 736-737. The case had not gone to trial so there had been no jury involvement. While it may appear that the Court decided that the plaintiff suffered an adverse employment action, the proof before

the Court – that defendant reinstated the plaintiff with back pay of 77% of her salary – was so similar to the adverse action against the plaintiff in *Burlington Northern & Santa Fe*, that the Court could find that there was an adverse employment action as a matter of law. *Id.* Thus the Sixth Circuit ruled that the plaintiff satisfied her *prima facie* burden and remanded the case for further proceedings. While it may be possible to characterize the ruling in *Randolph* as judicial action that removed a finding from the province of the jury, the particular circumstances do not support a claim that the Sixth Circuit does not permit juries, in appropriate circumstances, to determine the presence of an adverse employment action.

**E. The Second, Third, D.C., and Tenth Circuit cases cited are not at odds with the Supreme Court or the other circuits.**

Petitioners purported “conflicting” decisions show no conflict. Although Petitioners have quoted portions referring to the jury’s role, the cases recognize that the judge had the role of assuring there is a legally sufficient basis for the jury’s decision.

In *Hare v. Potter*, the Third Circuit reversed a summary judgment. 220 Fed. Appx. 120 (3<sup>rd</sup> Cir. 2007). The posture of the case and the ruling mirror the Sixth Circuit’s ruling in *Randolph, supra* – that the action at issue was an adverse employment action as a matter of law. *Id.* at 129. The Court determines that there is a legally sufficient basis to survive summary judgment and send the case to the jury. (“In light of *Burlington Northern . . .* we find Hare’s failure to be selected a

“materially adverse” action.”). *Id.* *Moore v. City of Philadelphia* is very similar – the Third Circuit reversed a summary judgment ruling by the Trial Court on similar grounds. 461 F.3d 331 (3<sup>rd</sup> Cir. 2006). In *Kessler v. Westchester County Dept. of Social Services*, the Second Circuit did the same thing – reversing summary judgment on a finding that there were issues of genuine fact for the jury to resolve. 461 F.3d 199 (2<sup>nd</sup> Cir. 2006). The Court never ruled that judges were stripped of their responsibilities as ‘gatekeepers’ for whether to send a case to a jury.

In *Velikonja v. Gonzales*, the D.C. Circuit reversed a summary judgment – finding that the prospect of an employer referring an employee to the Office of Professional Responsibility for investigation could constitute an adverse employment action – and therefore remanding for a jury trial. 466 F.3d 122 (D.C. 2006); *also* *Czekalski v. Peters*, 475 F.3d 360 (D.C. 2007) (genuine issues of material fact precluded summary judgment). Contrary to Petitioner’s assertions, these courts did not rule that juries are the sole decision makers for what can constitute an adverse employment action.

*Ridley v. Costco Wholesale Corp.*, involved a Rule 50 review of a jury verdict for the plaintiff. 217 Fed. Appx. 130 (3<sup>rd</sup> Cir. 2007). Petitioner characterizes this case as if the Court of Appeals deferred completely to the jury’s ruling, in contrast to the Sixth Circuit cases. To the contrary, the Court reviewed the evidence before the jury, consistent with its role under Rule 50, and concluded that the evidence was sufficient to find an adverse employment action. *Id.* at 136. This ruling is consistent with the Sixth Circuit cases, with *Burlington*

itself, and with the instant case. It does not create a conflict that must be resolved.

Similarly, *Zelnik v. Fashion Institute* is cited by Petitioner for the idea that the Second Circuit has held that adverse employment actions are to be determined by juries – but in that case summary judgment had been granted for the defendant at the trial level – and the Court of Appeals affirmed summary judgment (therefore keeping it from a jury) on the grounds that the alleged adverse employment action was de minimis as a matter of law. 464 F.3d 217 (2<sup>nd</sup> Cir. 2006).

And finally in *Williams v. W.D. Sports*, the Petitioners submit that this case holds that retaliation is to be determined by a jury. 497 F.3d 1079 (10<sup>th</sup> Cir. 2007). To the contrary, *Williams* articulates the standard that judges must follow before a case will pass the summary judgment stage to go to trial:

To warrant trial, therefore, we hold that a plaintiff need only show that a jury could conclude that a reasonable employee in Ms. Williams's shoes would have found the defendant's conduct sufficiently adverse. . . .

*Id.* at 1090. The requirement of a showing, which must be sufficient to get past a judge, is the same standard in the Sixth Circuit. *Watson v. City of Cleveland*, 202 Fed. Appx. 844 (6<sup>th</sup> Cir. 2006); *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724 (6<sup>th</sup> Cir. 2006). It is also consistent with the role given to judges in previous U.S. Supreme Court rulings. *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097 (U.S. 2000); *Burlington Northern,*

126 S.Ct. 2405 (U.S. 2006) (finding sufficient evidentiary basis to support the jury's verdict).

### CONCLUSION

Petitioner has tried to demonstrate a conflict as to whether judges or juries should make the finding of the existence of an adverse employment action against an employee in retaliation for that employee's assertion of a protected right. The Metropolitan Government submits that there is no conflict – the cases cited above from U.S. Supreme Court and the Circuits demonstrate that the courts already have a clear understanding of the role of a judge to assure that – as a matter of law – there is a legally sufficient basis upon which a jury may base a verdict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SUE B. CAIN  
*Director of Law*  
LORA BARKENBUS FOX\*  
JEFF CAMPBELL  
*Assistant Metropolitan Attorneys*  
THE DEPARTMENT OF LAW OF THE  
METROPOLITAN GOVERNMENT OF  
NASHVILLE AND DAVIDSON COUNTY  
Metropolitan Courthouse, Suite 108  
P.O. Box 196300  
Nashville, Tennessee 37219-6300  
(615) 862-6341

\* *Counsel of Record*