No. 11-1055

IN THE
Supreme Court of the United States

REBECCA ATTARD,

*Petitioner,*

v.

CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Rebecca Attard, Petitioner, through her attorney, hereby replies to points made in Respondent's brief in opposition to Attard's petition for writ of certiorari.

1. Respondent accuses Petitioner of taking "liberties with the record." In fact, however, this is a case that plaintiff lost because of a Second Circuit precedent that allows the district court to take liberties with sworn facts if a union member cannot show "new evidence not before the tribunal [,]or that the impartiality of the proceeding was somehow compromised." Collins v. N.Y.C. Transit Auth., 305 F.3d 113, 119 (2d Cir. 2002).

2. In the Second Circuit, if the arbitrator makes a finding, that finding is conclusive in a subsequent discrimination action, unless the plaintiff overcomes the practically insurmountable barrier proposed by Collins. Anecdotal evidence suggests that unsuccessful arbitration participants are very rarely able to make this showing. If one does a Shepard's search for Collins, one finds that it has been cited 301 times in the Second Circuit and distinguished only five times. In two of those five times, the plaintiff was able to get to the jury. Stampf v. Long Island R.R. Auth., 2010 U.S. Dist. LEXIS 121329 (E.D.N.Y. Nov. 16, 2010); Petrovits v. N.Y. City Transit Auth., 2003 U.S. Dist. LEXIS 18347 (S.D.N.Y. Oct. 12, 2003). Stampf, Petrovits, and one other case, Coleman v. S. Cent. Conn. Reg'l Water Auth., 2009 U.S. Dist. LEXIS 10586 (D. Conn. Feb. 12, 2009), are the only cases, reported electronically or otherwise, that Petitioner has found wherein an unsuccessful arbitration

participant has gotten to the jury in a subsequent discrimination action in the Second Circuit. This is not scientific evidence, but certainly, anecdotal, circumstantial evidence that – to paraphrase Gardner-Denver – "the weight accorded to the arbitral decision is" *not* being "left to the discretion of the trial court." Rather, the iron rule of Collins is doing away with the vast majority claims of unsuccessful arbitration participants on a regular basis, even in those cases, like Ms. Attard's, wherein the question of discrimination was not a question before the arbitrator.

3. Collins not only disregards Gardner-Denver, but also perverts the parties' well-understood standing at summary judgment. If a district court has license to *assume* that the arbitrator's findings are true absent evidence of bias or new "strong evidence," then the Court need not accept the non-movant's testimony as true. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.") Most, if not all of the cases citing Collins also invoke the Matsushita mantra, as both courts did in this case. App.A.3; App.B.11. However, those inferences are made through the restrictive lens of Collins. The plaintiff's opinion is not weighed against the arbitrator's findings with a view toward the plaintiff's version; rather, the plaintiff is given every opportunity to make her case to prove the bias of the arbitrator, or "new," "strong evidence" that the arbitrator was wrong, two effectively impossible hurdles.

4. Petitioner does not ask this Court, as Respondent insultingly suggests, "to review claims of erroneous factual findings." Resp. Br. at 5. Petitioner

only asks that the Circuit split be resolved and that a fair, uniform standard be applied for *assessing the facts* in a discrimination case where a prior arbitration has decided against the plaintiff.

5. Although there are many others, Petitioner proffers one example as to how Collins allows the district court to adopt the Respondent's version of the facts as they pertained to Petitioner's thirteenth unsuccessful evaluation over a period of two years. Petitioner testified that at her very last post-observation meeting conference, she meekly tried to defend herself because she believed evaluator was not being objective or accurate. She testified that

> At one point during the [critique], I tried to show [Ramos] student work that had been achieved and argue my case. I knew that the school's calling in a regional supervisor was the last roller on the conveyor belt toward my termination, and [Ramos] even admitted it, stating, in response to my defense, 'It doesn't matter, I'm here to give you an unsatisfactory,' at which I promptly left the room in tears.

JA.1023-24. The district court, on the other hand found the following: "Attard interrupted Ramos shortly after she began giving her critique. 'Listen,' Attard said. 'I know you are here to give me an unsatisfactory. Do what you want.'" Then she walked out of the meeting." App.B.9. In fact, the Respondent's interpretation of that encounter was even *milder* than the district court found. The Respondent's verbatim characterization of that meeting was "Ms. Ramos testified that, after asking plaintiff what she thought of the lesson, plaintiff said: 'I thought it was satisfactory, but I know that you're going to say it's unsatis-

factory, so I'm not going to stay,' and [plaintiff] left the room[.]" and did not return." JA.51. While marginally different – the Respondent's version reads objectively whereas the District Court's version reads like dialogue in a novel – the district court's finding on summary judgment as to this point was nonetheless marginally more favorable to the Respondent than the Respondent had advocated. Under Gardner-Denver, the arbitral decision is one fact to be weighed among many. It does not, however, give license to the district court to adopt the facts found by the arbitrator, or weigh them in favor of the moving party. Collins, however, does. [1]

6. Interestingly, Respondent does very little to defend Collins, except to note an out-of-context portion of the Tenth Circuit decision that refused to follow Collins, creating the Circuit split. Respondent notes that "[w]hat Petitioner overlooks is the Tenth Circuit's recognition that the Collins decision actually recognized a Court's discretion to accord weight to an arbitral decision on a case by case basis, as articulated in Gardner-Denver." Resp. Br. at 3. In fact, Pe-

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[1] Respondent discusses statistics that the Circuit characterized as evidence of intentional discrimination. App.A.6. The district court's statistical discussion concerned the Petitioner's expert report. App.B.18-20. Plaintiff's having withdrawn the impact claim, that report is irrelevant. The statistics themselves, however, were extracted from Respondent over a period of years. JA.1103-05. They are admissible to the question of intentional discrimination. Bazemore v. Friday, 478 U.S. 385 (1986); Stratton v. Department for the Aging, 132 F.3d 869 (2d Cir. 1997). The fact that this collection of statistics that took years to compile did not qualify as "new," "strong evidence" to present *a question of fact* that the arbitral decision was wrong underscores how hard it is for any plaintiff to get to the jury under Collins.

titioner overlooked no such thing. The statement Respondent refers to in the Tenth Circuit decision includes, in its entirety, "*before* articulating its 'strong evidence' standard," the Second Circuit paid homage to Gardner-Denver. Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199, 1212 (10th Cir. 2011) (emphasis added). In other words, the Tenth Circuit was expressing confusion as to how Collins turned out as it did – the Second Circuit seemed to be following Gardner-Denver until, at the very end of the decision, it adopted the "strong evidence" standard and disregarded Gardner-Denver. Additionally, as Respondent does not deny, a district judge in the Ninth Circuit has used the word "disregarded" in evaluating Collins' respect for Gardner-Denver. Lanahan v. S. Nev. Health Dist., 2009 U.S. Dist. LEXIS 11991 (D. Nev. Feb. 17, 2009), p*20. On the other hand, as noted in Petitioner's brief at 15, district courts in the Third Circuit have come to apply the iron hand of Collins, which wrongly purports to derive its authority from Gardner-Denver. Uniformity in the application of Gardner-Denver in all courts in this country calls for the grant of the writ.

7. Respondent notes that the "but for" requirement imposed on ADEA cases in Gross v. FBL Fin. Servs, 557 U.S. 167 (2009) is strict. This is true, but a plaintiff who happens to be governed by a Collective Bargaining Agreement that does not require the arbitration of discrimination claims should not be held to an even *stricter* standard than everyone else. Petitioner would be happy to have her case remanded to be assessed without the "strong evidence" standard, which few plaintiffs can ever overcome. Perhaps since Respondent does almost nothing to defend the "strong evidence" reasoning in Collins, or explain how

"strong evidence" can be derived from Gardner-Denver, a summary reversal will resolve the Circuit split with little fuss.

8. However, it cannot be denied that Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011) gives this Court an opportunity to reaffirm Gardner-Denver, and is further basis for granting the writ. Respondent does not attempt to explain how Staub is consistent with Collins. Respondent does argue that the facts of Staub are not identically analogous to the facts in Attard, and notes my uncertainty as to whether an arbitrator can be considered "an agent." Resp. Br. at 4. However, Respondent then goes on to note that both sides pick the arbitrator. Id. This is true; thus the arbitrator is the agent of both sides, including the employer.

9. Whatever the answer to the agency question, Respondent does not deny that this Court found in Staub that a discrimination plaintiff can get to the jury where a biased subordinate intends to affect the outcome of an unbiased decision maker. 131 S.Ct at 1192. That is the argument plaintiff made in this case and Collins is completely inconsistent with the primary holding in Staub: that biased third parties who supervise the plaintiff can influence an unbiased decision maker. The Respondent notes needlessly at the end of its brief that the Department of Education had no choice but to implement the arbitrator's decision. Resp. Br. at 6, n.1, citing N.Y. Educ. Law § 3020-(a)(4)(b). This is true but immaterial. Petitioner's point is that the Respondent's discretionary acts, motivated by age bias, to pillory her with vituperative evaluations after 20 years of faithful service, then bring her up on charges before the arbitrator

were adverse actions but for which she would still have her job. The Department of Education constructed a case to present to the arbitrator and he ruled against Petitioner. Under Staub, Petitioner had the right – unrecognized by Collins – to argue a theory of cat's paw liability. Under Gardner-Denver, Petitioner had the right – unrecognized by Collins – to have the arbitrator's decision be just *one factor* in deciding whether the plaintiff has made a case for discrimination.

10. Collins negates the spirit and holding of both Gardner-Denver and Staub. More importantly, Collins, which determined the outcome of this case, is the subject of a Circuit split. The writ of certiorari should therefore be granted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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