No. 12-532

In The Supreme Court of the United States

SGT. BILL BROWN, et al.,

Petitioners,

v.

CRYSTAL HENLEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

MARCI A. HAMILTON, ESQ.
Counsel of Record
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
hamilton.marci@gmail.com

REBECCA RANDLES, ESQ.
RANDLES MATA & BROWN, LLC
406 W. 34th Street, Suite 623
Kansas City, MO 64111
(816) 931-9901
Rebecca@rmblawyers.com

Counsel for Respondent Crystal Henley

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether constitutional claims brought against state or local government pursuant to 42 U.S.C. § 1983 are barred by the administrative procedural requirements of Title VII, which provides statutory rights against discrimination. 42 U.S.C. § 2000e-2(a).

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The United States Court of Appeals for the Eighth Circuit, 686 F. 3d 634, Appendix 1, held that Title VII was not the exclusive remedy for Ms. Henley's constitutional discrimination claims, and that she was authorized to bring this action under 42 U.S.C. § 1983, reversing the District Court. The U.S. District Court for the Western District of Missouri, unpublished, No. 10-1009-CV-W-GAF (April 29, 2011), Appendix 2, dismissed Ms. Henley's complaint for failure to state a claim. The District Court held that though she chose to bring suit under 42 U.S.C. § 1983, she could also have brought her claims under Title VII. Since Ms. Henley did not exhaust the administrative remedies under Title VII, her 42 U.S.C. § 1983 claims were barred.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, amend. XIV, § 1, cl. 4:

> That no state shall "deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> Every person who, under color of . . . any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 2000e-2(a) ("Title VII"):

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.

42 U.S.C. § 2000e-5(e)(1):

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.

STATEMENT OF THE CASE

In May 2005, Crystal Henley enrolled as a police officer trainee at the Kansas City Police Academy. Ms. Henley was ultimately forced to leave the academy after only six months, and was unable to complete her training as a police officer because of sexual harassment and gender discrimination. Ms. Henley alleged that throughout her time as a trainee, she was discriminated against, sexually harassed, and physically assaulted because of her gender. Four male trainers, Michael Throckmorton, Bill Brown, Dwight Parker, and an officer "John Conner" are alleged to have been the men responsible for the discrimination and assault against Ms. Henley. Ms. Henley's complaint included examples of the conduct she was exposed to during her training at the Kansas City Police Academy.

Ms. Henley alleges that she was treated more harshly than her male peers. She suffered physical injuries that required medical assistance, including tearing her quad muscle, suffering leg convulsions, developing a knot in her leg, dislocating her shoulder, damage to her eye from the high pressure carbon dioxide used to propel pepper spray as a result of it being discharged too close to her eyes. She also was viewed naked in the female locker room by Sgt. Brown, a male officer. Despite reporting the rough and unequal treatment she received, "the command staff did not listen." Complaint ¶ 24. She was also subjected to insults and harsh critiques for performance that exceeded her male counterparts, as well

as sexual comments and treatment, particularly focusing on her breasts.

She brought her civil action for violation of 42 U.S.C. § 1983 after being harassed, assaulted and unlawfully terminated from her position as a cadet in the police academy. Defendants Patrick McInerney, Alvin Brooks, Angela Wasson-Hunt, Lisa Pelofsky and Mayor Mark Funkhouser are acting members of the Board of Police Commissioners in Kansas City, Missouri and are sued only in their representative capacities. The Board of Police Commissioners is a state agency that has exclusive management and control of the policies and practices of the Kansas City Police Department including hiring, firing, and ensuring that members conduct themselves in a lawful manner in undertaking their duties.

Sgt. Bill Brown, Sgt. Conroy, Officer Throckmorton, Officer Parker, Officer John Connor and Officer John Doe were the individuals that perpetrated the acts of harassment, violations of bodily integrity, assault and unlawful termination in violation of Plaintiff's constitutional rights under 42 U.S.C. § 1983.

In the U.S. District Court for the Western District of Missouri, defendants moved to dismiss Ms. Henley's complaint under Rule 12(b)(6) for failure to state a claim on the theory that she had not exhausted her administrative remedies under Title VII. The District Court granted the motion to dismiss. The United States Court of Appeals for the Eighth Circuit reversed. The Court of Appeals held that Title VII was not the exclusive remedy for Ms. Henley, and she

could bring suit for her claims under 42 U.S.C. § 1983. Petitioners appeal that ruling.

ARGUMENT

THE FEDERAL APPELLATE COURTS ARE IN AGREEMENT THAT TITLE VII DOES NOT PROVIDE THE EXCLUSIVE REMEDY FOR EMPLOYMENT DISCRIMINATION CLAIMS WHEN AN EMPLOYER'S CONDUCT ALSO VIOLATES THE CONSTITUTION.

Every federal court of appeals is in agreement that a victim of constitutional violations by state or local government may not be precluded by Title VII, 42 U.S.C. § 2000e, from bringing a Section 1983 action. 42 U.S.C. § 1983. Accordingly, there is no split among the circuits and absolutely no reason for this Court to grant certiorari. Not only is there no split, the line drawn by the courts is supported by the statutes' language and history.

By way of background, Section 1983 provides a federal procedural vehicle for an individual to bring federal constitutional and/or federal statutory violations against state and local governments. 42 U.S.C. § 1983. Section 1983 may not be used against private actors. *Id.*; *Hafer v. Melo*, 502 U.S. 21, 31 (1991) (holding that state officers may be personally liable for damages under § 1983 only based upon actions taken in their official capacities). It is a federal statutory cause of action and does not establish administrative procedures.

Title VII is a substantive federal law that creates statutory rights for employees of private, federal, state and local governments to bring discrimination claims against their employers. 42 U.S.C. § 2000e. It does not provide a route for employees to bring constitutional claims against state and local governments. *Id*. Title VII imposes rigorous administrative procedures, and employs substantive theories unavailable under Section 1983. *Id*.

The Petition misleadingly confuses two types of cases. First, there are cases – like this one – where the plaintiff has claims under the Constitution and files to vindicate those claims under Section 1983. The plaintiff may not invoke Title VII at all, as in this case. *See Henley v. Brown*, 686 F.3d 634, 639 (8th Cir. 2012). *See*, *e.g.*, *Crutcher-Sanchez v. Cnty. of Dakota*, 687 F.3d 979, 982 (8th Cir. 2012); *Vulcan Pioneers of New Jersey v. City of Newark*, 374 F. App'x 313, 316 (3d Cir. 2010); *Gladwin v. Pozzi*, 403 F. App'x 603, 603-04 (2d Cir. 2010). Or the plaintiff can invoke both, and was found to have failed to abide by Title VII's administrative procedural requirements. *See*, *e.g.*, *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682-83 (10th Cir. 1988); *Keller v. Prince George's Cnty.*, 827 F.2d 952, 960 (4th Cir. 1987); *Trigg v. Fort Wayne Cmty. Sch.*, 766 F.2d 299, 302 (7th Cir. 1985). Either way, the Section 1983 claims were permitted to go forward on the merits.

Second, there are cases where the plaintiff's claim against state or local government is grounded in Title VII, and not the Constitution. In those cases, the courts have not permitted plaintiffs who failed

to abide by Title VII's administrative procedural requirements to get into court by invoking Section 1983. *Drye v. Univ. of Arkansas for Med. Sciences ex rel. Univ. of Arkansas Bd. of Trustees*, 4:09CV00922 JLH, 2011 WL 4434232 (E.D. Ark. Sept. 23, 2011 at *5 (Sept. 23, 2011); *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987) (stating that a plaintiff "may not circumvent Title VII's filing requirement by utilizing § 1983 as the vehicle for asserting his Title VII claims").

All federal circuit courts to address the issue agree with the Eighth Circuit in this case: the failure to abide by Title VII's administrative procedural requirements is no reason to bar plaintiffs from bringing their constitutional claims under Section 1983. *See Annis v. Cnty. of Westchester,* 36 F.3d 251, 255 (2d Cir. 1994) ("[A]n employment discrimination plaintiff alleging the violation of a constitutional right . . . is not required to plead concurrently a violation of Title VII."); *Bradley v. Pittsburgh Bd. of Educ.,* 913 F.2d 1064, 1079 (3d Cir. 1990) ("[T]he comprehensive scheme provided in Title VII does not preempt section 1983, and . . . discrimination claims may be brought under either statute, or both."); *Rivera v. P.R. Aqueduct & Sewers Auth.,* 331 F.3d 183, 192 n.7 (1st Cir. 2003) (same); *Keller,* 827 F.2d at 962 (same); *Carpenter v. Stephen F. Austin State Univ.,* 706 F.2d 608, 612 (5th Cir. 1983) (same); *Day v. Wayne Cnty. Bd. of Auditors,* 749 F.2d 1199, 1205 (6th Cir. 1984) (same); *Trigg v. Fort Wayne Cmty. Sch.,* 766 F.2d 299, 302 (7th Cir. 1985) (same); *Hervey v. Little Rock,* 787 F.2d 1223, 1233 (8th Cir. 1986) (same);

Roberts v. Coll. of Desert, 870 F.2d 1411, 1415-16 (9th Cir. 1988) (same); *Starrett v. Wadley,* 876 F.2d 808, 814 (10th Cir. 1989) (same); *Thigpen v. Bibb Cnty.,* 223 F.3d 1231, 1238-39 (11th Cir. 2000) (same).

The circuits' unity on this issue is undergirded by the legislative history of Title VII and its amendments. Title VII was intended to supplement available remedies, not to be an exclusive remedy. "(T)he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U.S., at 48. In particular, Congress noted "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rep. No. 92-238, p. 19 (1971), 1972 U.S.C.C.A.N. 2137, 2154; *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459 (1975).

In a case involving a petitioner who alleged discriminatory discharge from his place of employment in violation of Title VII, this Court held: "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander,* 415 U.S. at 48-49.

Petitioners place a lot of weight on a single case that is not on point. In *Brown v. General Services*

Administration, 425 U.S. 820 (1976), this Court held that Title VII is the sole remedy for victims of discrimination by the federal government. *Id*. at 835. Nowhere in that decision did this Court reference state and local governments, let alone imply that its reasoning would control cases involving state or local discrimination in violation of the Constitution. Moreover, Section 1983 was irrelevant to the case, because it does not apply to the federal government. There is not an iota of evidence within or beyond the *Brown* decision that indicates that Congress or the Court ever intended for Title VII to represent the exclusive remedy for victims of state or local employment discrimination. Accordingly, there is no analogy to be drawn from *Brown*'s holding about the federal government to state and local governments. That is likely why no federal court of appeals has ruled the way that the Petitioners suggest.

Petitioners and amicus curiae, State of Michigan and Fifteen Other States, are knocking on the wrong branch's door. The relevant Circuit decisions have been percolating for thirty-nine years, since the Second Circuit's decision in *Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Comm'n of City of New York*, 490 F.2d 387 n.1 (2d Cir. 1973) (noting that the legislative history of Title VII made it clear that "Congress did not intend thereby to limit plaintiffs' right to bring suits against state and municipal officers under 42 U.S.C. § 1983." Congress has never amended Title VII or Section 1983 in the meantime. Congress, effectively, has approved the courts' interpretation of the statute. *See*, *e.g.*, *Johnson v. Transp.*

Agency, Santa Clara Cnty., 480 U.S. 616 n.7 (1987) (stating failure to amend Title VII indicated congressional acquiescence in interpretation); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971."); *E.E.O.C. v. Sterling Jewelers, Inc.,* No. 08-CV-706, 2010 WL 86376 *6 n.9 (W.D.N.Y.) Jan. 6, 2010) (noting when Congress has not chosen to amend a statute in response to a court's interpretation, then presumably the legislative intent has been evaluated correctly). Petitioners apparently have failed to persuade Congress to amend either Section 1983 or Title VII in their favor and cannot use this Court to accomplish the legislative repeal they seek.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to DENY certiorari.

Respectfully submitted,

MARCI A. HAMILTON, ESQ.
Counsel of Record
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
hamilton.marci@gmail.com

REBECCA RANDLES, ESQ.
RANDLES MATA & BROWN, LLC
406 W. 34th Street, Suite 623
Kansas City, MO 64111
(816) 931-9901
Rebecca@rmblawyers.com

Counsel for Respondent
Crystal Henley