No. 13-1118

In The
Supreme Court of the United States

SARA C. DEBORD,

Petitioner,

v.

MERCY HEALTH SYSTEM OF KANSAS, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is this case an appropriate vehicle for considering whether an employee's statements to others can be protected opposition under section 704(a) of Title VII of the Civil Rights Act of 1964 where (1) that issue was immaterial to the McDonnell Douglas pretext analysis employed by the lower courts; (2) the alleged "sharply divided" split among the circuits is illusory; and (3) the outcome of this case would not change?

CORPORATE DISCLOSURE STATEMENT

Respondent Mercy Health System of Kansas, Inc. states that it is now known as Mercy Kansas Communities, Inc. Its parent company is Mercy Health Southwest Missouri/Kansas Communities, Inc., a Missouri not-for-profit corporation. No publicly held company directly or indirectly owns more than 10% of its stock.

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INTRODUCTION

Respondent Mercy Health System of Kansas, Inc. ("Mercy" or "respondent") respectfully submits this brief in opposition to the petition for certiorari ("petition") filed by Sara Debord ("Debord" or "petitioner").

The petition should be denied for three compelling reasons. First, the case below turned on the court's analysis of pretext under the *McDonnell Douglas* framework[1] rather than protected opposition as petitioner suggests. As a result, *petitioner's question presented, i.e., whether statements to others can be protected opposition under section 704(a), is not implicated.*

Second, *there is no split among the circuits*, much less one that is "sharply divided" as petitioner alleges. Petitioner's claimed split depends upon mischaracterizations of the holdings in her case and another from the Fourth Circuit. Absent petitioner's mischaracterizations, the alleged circuit split evaporates, proving to be illusory.

Third, *this case is an inappropriate vehicle* to consider petitioner's question presented because, in addition to the case not implicating the question presented and the alleged split being illusory, *the outcome of this case would not change*. Both lower courts determined that petitioner had no evidence that her employer's proffered reasons, namely petitioner's

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

undisputed dishonesty and disruptive behavior, were pretextual. Accordingly, even if the question presented were answered most favorably to petitioner, the outcome of this case would not change.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case misstates, omits or mischaracterizes important facts in this case. For example, petitioner omits the all-important fact that resolution of her retaliation claim turned on the lower court's analysis of pretext under the *McDonnell Douglas* framework – not protected opposition as she suggests. Petitioner simply glosses over many facts that were relevant to the courts' pretext analyses. These facts, taken from the Tenth Circuit's opinion, are set forth as follows.[2]

Early on July 6, 2009, Leonard Weaver ("Weaver"), Debord's supervisor, criticized Debord's work. Angered, Debord logged on to her Facebook and posted:

> (At 9:00 a.m.) Sara DeBord [sic] loves it when my boss adds an extra $600.00 on my paycheck for hours I didn't even work . . . awesome!!

[2] Unless otherwise noted, facts that follow appear in the Tenth Circuit's recitation of facts at pp. 2a-7a of the appendix to the petition. Those appearing on other pages of the opinion are cited by the specific page number in the appendix.

> (At 1:37 p.m.) Sara Debord is sooo disappointed . . . can't believe what a snake my boss is . . . I know I know everyone warned me :(
>
> (At 2:53 p.m.) Oh, it's hard to explain . . . basically, the MRI tech is getting paid for doing MRI even though he's not registered and myself, nor the CT tech are getting paid for our areas . . . and he tells me 'good luck taking it to HR, because you're not supposed to know that' plus he adds money on peoples checks if he likes them (I've been one of them) . . . and he needs to keep his creapy [sic] hands to himself . . . just an all around-bag!!

Co-workers saw the posts and showed them to Weaver. Upset, Weaver took the posts to Eric Ammons ("Ammons"), the hospital's H.R. Director, who coincidentally was meeting with Debord. Ammons asked Debord if she authored the posts. She denied making the posts. Weaver retrieved his laptop to show Ammons exactly what the posts said. Even though they appeared on Debord's Facebook page, Debord again denied making them.

After Weaver left the meeting, Ammons asked Debord about the posts indicating she had been paid extra. Debord claimed that Weaver had added extra money to her paycheck around Thanksgiving in 2006 or 2007. Ammons indicated he would investigate this overpay allegation.

Ammons met again with Debord on July 8. He again asked if she made the posts and she denied

doing so a third time. Ammons encouraged her to confess. She then confessed that she made the posts from her cell phone, while at work. Ammons suspended her for a day for failing to conduct herself in a "manner consistent with a high degree of personal integrity and professionalism."

Ammons then asked Debord what she meant by the creepy hands comment in the posts. Debord told him Weaver touched her and other women in the department with his cold hands. She denied that the touching was sexual harassment. Nonetheless, Ammons told Debord he would ask Lana Brewster ("Brewster"), Mercy's Risk Manager, to separately investigate the matter "to see if there was any potential for sexual harassment." Meanwhile, he would continue investigating the overpay issue.

Brewster interviewed Debord the next day, July 9, about the alleged touching. Debord again denied that any conduct was sexual harassment and specifically stated she did not want to make a formal complaint against Weaver.

Ammons completed his overpay investigation by July 13, concluding that the overpay allegation was false. This belief was one reason Ammons cited for why he considered Debord to have been dishonest. Pet. App. 24a. Ammons had also learned by the 13th that Debord was sending text messages to other employees in which she accused Weaver of destroying the overpay evidence. These text messages read: "[Weaver] emptied out the drawer where all the

callback papers were kept at work. Guilty as charged! . . . . To get rid of them. He's being investigated . . . but he doesn't know it. [Ammons] will be calling the techs . . . asking about his conduct. . . ." Pet. App. 29a. Ammons was troubled by these texts because he had previously told Debord that the overpay evidence was in his, not Weaver's, possession. Also by this time, Ammons had learned that Debord's comments about the overpay and the investigation into it had disrupted the work day for many hospital employees. Accordingly, on July 13, after consulting with Mercy's CEO and COO, Ammons terminated Debord for disruption, inappropriate behavior and dishonesty.

Debord subsequently filed suit against Mercy for sexual harassment (hostile work environment) and retaliation in violation of Title VII and for assault and battery against Weaver. Weaver counterclaimed for defamation.

The district court granted summary judgment on all claims. Pet. App. 35a-73a. With respect to petitioner's retaliation claim, the district court determined that Debord had no direct evidence of retaliation (and she argued none),[3] thus, making analysis under the *McDonnell Douglas* framework proper. Pet. App. 43a. The district court assumed,

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[3] Plaintiff Sara Debord's Memorandum In Opposition To Defendant's Motion For Summary Judgment; *Debord v. Mercy Health System of Kansas, Inc., et al.*, Nos. 12-3072 and 12-3109 (10th Cir., March 21, 2012) (Appellant's Separate Appendix 394, 399-404).

without finding, that Debord established the first prong of the *McDonnell Douglas* framework – a *prima facie* case. Pet. App. 44a. The court's analysis then moved to Mercy's proffered reasons, dishonesty and disruptive conduct, which the court found undisputed. Analysis then moved to the final pretext prong. Pet. App. 44a. After discussing each of Debord's pretext arguments, the district court held "[b]ecause no facts justify an inference that Ammons harbored any retaliatory motive, summary judgment is warranted on Plaintiff's claim of retaliation." Pet. App. 47a.[4]

Debord appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed summary judgment in Mercy's favor on both the harassment and retaliation claims. Pet. App. 1a-30a. The Tenth Circuit also applied the *McDonnell Douglas* framework to analyze Debord's retaliation claim, finding that Debord had no direct evidence of retaliation. Pet. App. 22a. The Tenth Circuit also assumed, without finding, that Debord established a *prima facie* case of retaliation. Pet. App. 22a. The Tenth Circuit also concluded that Mercy had legitimate reason for terminating Debord and that:

> Debord does not dispute these charges. She admits posting inflammatory material about her supervisor on the internet, sending text

[4] The district court also granted summary judgment in Mercy's favor on Debord's sexual harassment claim. Pet. App. 47a-62a.

> messages to co-workers, bad-mouthing her supervisor (unrelated to the alleged sexual harassment), discussing the overpay and harassment investigations with others, knowingly pocketing overpayment in 2007, and thrice lying about posting information on Facebook while at work.

Pet. App. 23a.

The Tenth Circuit then considered six different arguments advanced by Debord to establish pretext. Pet. App. 24a-30a. After disposing of each, the court held: "[N]o reasonable jury could find pretext." Pet. App. 23a.

Contrary to petitioner's suggestion otherwise, the Tenth Circuit's decision, and also the district court's, turned solely and properly on analysis of pretext under *McDonnell Douglas*.

REASONS FOR DENYING THE WRIT

Compelling reasons exist for denying the petition for certiorari.

I. This Case Does Not Implicate The Question Presented In The Petition

Debord's question presented is whether a worker's statements made to someone other than an employer or a governmental agency are protected opposition under section 704(a) of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (hereinafter "statements to others"). Debord's fundamental problem here is that resolution of her retaliation claim below did not turn on the answer to her question. Instead, her retaliation claim was resolved on analysis of pretext under the third prong of the *McDonnell Douglas* framework. Thus, contrary to Debord's assertion, the Tenth Circuit's opinion did not address her question. It is devoid of any precedential value whatsoever regarding the scope of protected opposition under section 704(a).

Both the Tenth Circuit and the district court determined that petitioner had no direct evidence of retaliation; therefore, following well-established law, both courts applied the *McDonnell Douglas* framework. Pet. App. 22a and 43a. Petitioner agreed with the application of the *McDonnell Douglas* analysis to her retaliation claim and, in fact, utilized it herself in both of the lower courts. Pet. App. 22a and 43a; Appellant's Main Brief 43-52, *Debord v. Mercy Health System of Kansas, Inc.,* Nos. 12-3072 and 12-3109 (10th Cir., June 14, 2012).

The first step under the *McDonnell Douglas* framework requires the plaintiff to establish a *prima facie* case. Both lower courts assumed Debord had established a *prima facie* case. Pet. App. 22a and 44a. Protected opposition is an essential element of a

prima facie case.[5] Thus, the courts' assumption of a *prima facie* case includes an assumption that petitioner engaged in protected opposition. Any need to separately consider what conduct is protected opposition was obviated by the assumed *prima facie* case.[6]

After assuming a *prima facie* case, the lower courts turned their focus to the second and third steps under *McDonnell Douglas*, namely Mercy's proffered legitimate reasons for terminating petitioner and petitioner's evidence of pretext. Pet. App. 22a and

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[5] *Arnett v. Univ. of Kansas*, 371 F.3d 1233, 1237 (10th Cir. 2004) (essential elements of a *prima facie* case are protected opposition, adverse employment action and a causal connection between the two).

[6] Thus, Debord's categorical statements at pp. 11 and 12 of her petition, that "the Tenth Circuit held that neither the Facebook post about alleged sexual harassment nor the text message or discussion about that harassment were protected opposition," simply are not so. Conspicuously absent from her petition is any quoted language from the Tenth Circuit's opinion setting forth the alleged holdings. (There is none.) Moreover, note 11, which appears to support the purported holding, does nothing more than identify one of Mercy's summary judgment arguments, which neither court below considered.

Similarly, it also is inaccurate for Debord to suggest that the courts below determined that her Facebook posts and text messages were "about harassment" as she categorically asserts. *Id.* Determinations whether these communications were "about harassment" was unnecessary because both courts assumed the existence of protected opposition as part of the *prima facie* case. Furthermore, the facts demonstrate that Debord's Facebook posts and text messages primarily focused on her overpay allegation and Weaver's alleged destruction of the evidence. *See*, Counterstatement of the Case, *supra*, at p. 2 and 4-5.

44a. Both courts found that Mercy's proffered reasons for terminating Debord – inappropriate, disruptive behavior and her dishonesty – were legitimate. Pet. App. 23a and 44a. With respect to these reasons, the Tenth Circuit noted:

> Debord does not dispute these charges. She admits posting inflammatory material about her supervisor on the internet, sending text messages to co-workers bad-mouthing her supervisor (unrelated to the alleged sexual harassment), discussing the overpay and harassment investigation with others, knowingly pocketing overpayment in 2007, and thrice lying about posting information on Facebook while at work.

Pet. App. 23a (parenthetical in original).

The courts then analyzed petitioner's evidence of pretext. Having failed at this step in the district court, Debord added a new pretext argument in the Tenth Circuit, namely that she was terminated because Mercy considered her Facebook posts to be "too 'disruptive' as to qualify as protected opposition." Appellant's Main Brief, *Debord v. Mercy Health System of Kansas, Inc.,* Nos. 12-3072 and 12-3109 (10th Cir, June 14, 2012) at p. 49. Mercy objected because this was an entirely new argument and because:

> No facts support her contention that Mercy considered her alleged complaint to be so disruptive that she should be denied Title VII protection . . . [I]t is pure conjecture. . . . Moreover, the undisputed evidence shows

> that instead of considering Debord's comments that Weaver had "creepy hands" and was a "perv" too disruptive, they raised sufficient concern in Ammons that he independently inquired into their meaning and initiated Mercy's investigation.

Appellee/Cross-Appellant's Principal and Response Brief, *Debord v. Mercy Health System of Kansas, Inc.*, Nos. 12-3072 and 3109 (10th Cir., July 18, 2012) at p. 33-34.

Over Mercy's objection to this new *pretext* argument, the Tenth Circuit examined it and stated: "[C]iting *Kasten* [*v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011)] . . . Debord argues that terminating her for her post on Facebook was *per se* unlawful because that was her way of reporting sexual harassment." Pet. App. 25a (citation omitted). The court continued:

> *Kasten* held that the antiretaliation provision of the [FLSA], protects oral as well as written complaints. . . . Under the logic of *Kasten*, Debord's . . . Facebook post falls short. Her Facebook post was not in accordance with Mercy's otherwise flexible reporting system for sexual harassment complaints, and the post, by itself did not provide notice to Mercy. Only when Weaver himself brought the post to Ammons' attention did Mercy learn that, among many other complaints, Debord disliked Weaver's 'creepy hands.' And even then, Debord thrice denied authoring the post. No jury could conclude

> that Mercy's management acted unreasonably in response to Debord's Facebook post.

Pet. App. 25a-26a.

Notably, contrary to Debord's assertion, the Tenth Circuit *does not state*, much less hold, that Debord's Facebook post was not protected by section 704(a) because it was a statement to others. Thus, even this snippet from the Tenth Circuit's opinion does not implicate petitioner's question presented.

Whether Debord's statements to others were protected opposition simply was not relevant to the court's pretext analysis. Because the Tenth Circuit's focus is on pretext, the opinion has no precedential value whatsoever with respect to whether statements to others constitute protected opposition under section 704(a). Petitioner is simply attempting to manufacture a legal issue fit for this Court's review.

II. There Is No Conflict Among The Courts Of Appeals

The primary reason advanced by Debord warranting this Court's review is an alleged "sharply divided" split among the circuits. However, upon even a cursory examination of the Tenth and Fourth Circuit opinions allegedly demonstrating this split, the alleged split simply evaporates, proving to be entirely illusory.

Debord maintains that the Tenth and Fourth Circuits do not protect statements to others whereas the

First, Second, Third, Fifth, Sixth and Ninth Circuits do. Pet. 17. Debord, however, seriously mischaracterizes the holdings in the Tenth and Fourth Circuit opinions as *neither opinion holds that statements to others are not protected opposition under section 704(a)*. Thus, there is *no split at all*, much less one that is "sharply divided."

The only Tenth Circuit case petitioner identifies is her case below. Pet. 18. As discussed in Section I, her case was decided on the basis of the pretext prong under the three-step *McDonnell Douglas* framework, not upon whether her statements to others constituted protected opposition. Her case demonstrates no split.

Debord also mischaracterizes the holding in the Fourth Circuit's unreported decision, *Pitrolo v. Cnty. of Buncombe, N.C.*, 2009 WL 1010634 (4th Cir., Mar. 11, 2009). Debord contends that "[t]he Fourth Circuit held that Pitrolo's complaint about discrimination was not protected opposition under section 704(a) because she had made her statement to her father, *not to her prospective employer*." Pet. 19 (emphasis added). Once again, this simply is not so. She has misstated the court's holding.

Pitrolo learned that there was opposition to hiring her because of her gender. 2009 WL 1010634 at *1. Pitrolo informed her father of this information and he later contacted the prospective employer. *Id.* Following rejection of her application, Pitrolo filed suit for retaliation claiming that her statement to her

father was protected opposition under section 704(a) and that her application was rejected because of these statements. *Id.*

Unlike Debord's case which turned on pretext, Pitrolo's case did, in fact, turn on whether Pitrolo's statement to her father was protected opposition. The Fourth Circuit found that it was not. However, and importantly here, the Fourth Circuit's decision *did not* turn on whether Pitrolo's statement was made to someone *other than her prospective employer*. 2009 WL 1010634 at *3. Rather, the Fourth Circuit examined the facts surrounding Pitrolo's statement to her father to see if it qualified as protected opposition. It concluded: "[t]here is no evidence that Pitrolo intended for her father to pass along her complaints to Defendants. . . . Pitrolo did not communicate her belief to her employer and was not attempting to bring attention to the alleged discriminatory conduct." *Id.* Thus, the Fourth Circuit found that Pitrolo's statement was not protected opposition, not because it was made to her father, but rather because it was not purposive conduct. *Id.*, *see Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tennessee*, 555 U.S. 271, 281-82 (2009) (Alito, J., concurring) (protected opposition under section 704(a) requires active and purposive conduct).

Accordingly, contrary to petitioner's assertion, the Fourth Circuit did not declare that statements to others may never be protected opposition. Instead it held under the facts unique to that case, that Pitrolo's particular statement was not protected. The Fourth

Circuit simply did not make the holding petitioner asserts it did.

Debord also misstates *Pitrolo*'s precedential effect. She alleges that *Pitrolo* has been repeatedly applied by district courts in the Fourth Circuit for the proposition that statements to others cannot be protected opposition. Pet. 20. However, neither of the two Fourth Circuit cases citing to *Pitrolo* cite to it for the reason petitioner advances.

In *DeMasters v. Carilion Clinic*, 2013 WL 5274505 (W.D.Va. Sept. 17, 2013), the Western District of Virginia cited *Pitrolo* as support for its holding that the plaintiff's communications were not protected because they "were not purposive communications." 2013 WL 5274505 at *7-*8. In *Harris-Rogers v. Ferguson Enterprises*, 2011 WL 4460574 (E.D.N.C. Sept. 26, 2011), the Eastern District of North Carolina cited to *Pitrolo* as support for its holding that the plaintiff's inadvertent mass email was not protected opposition because it was not sent to voice opposition or bring attention to the employer's discriminatory conduct. 2011 WL 4460574 at *7. In other words, it was not sufficiently purposive to be protected opposition. Accordingly, neither case holds, as petitioner suggests, that statements to others may never be protected under section 704(a). Rather, their holdings turn on analysis of whether under the unique facts of each case the statements were purposive as required by *Crawford, supra*. *Pitrolo* simply does not have the precedential effect petitioner alleges.

For purposes of this submission, Mercy will not dispute the First, Second, Third, Fifth, Sixth and Ninth Circuit holdings that statements to others may be protected *in certain circumstances*. *Pitrolo,* and even this case for that matter, are consistent with that rule, not a departure from it.

In short, Debord's alleged "split" is illusory. She has demonstrated no conflict among the circuits, much less a "sharply divided" one, that would necessitate this Court's intervention.

III. This Case Is A Poor Vehicle To Consider Whether Statements To Others Are Protected Under 704(A)

This case is an inappropriate vehicle for considering the question presented. First and foremost, as discussed in Section I, the Tenth Circuit simply did not make the holding that Debord asserts it did. Specifically, the Tenth Circuit did *not hold* that any of Debord's statements were unprotected *because they were made to others.* Instead, having assumed a *prima facie* case, the Tenth Circuit decided her retaliation claim on the basis of pretext.

Second, this case is an inappropriate vehicle for considering the question presented because, as discussed in Section II, there is no split among the circuits on petitioner's question presented, much less one that is "sharply divided." Contrary to Debord's assertion, this case did not create a split with other

circuits because the court below simply did not make the holding that petitioner claims it did. Pretext, and not protected opposition, was the crux of the Tenth Circuit's decision. Debord's alleged "split" is illusory and presents no compelling reason for this Court's review.

Finally, but equally important, this case is an inappropriate vehicle for considering the question presented because, even if the question were answered most favorably to petitioner, *the outcome of this case would not change*. Petitioner has conceded, never objected to or argued otherwise, that the *McDonnell Douglas* analysis applies to this case. Petitioner herself adopted the *McDonnell Douglas* analysis in both the Tenth Circuit and the district court. In applying *McDonnell Douglas*, the courts assumed petitioner established a *prima facie* case, which includes within it an assumption that petitioner engaged in protected opposition. Pet. App. 22a and 44a. Having assumed that a *prima facie* case exists, the precise nature of petitioner's alleged protected opposition simply did not matter. Rather, given the theory of the case, what mattered to the courts' analyses was whether Debord had sufficient evidence of pretext to overcome Mercy's legitimate reasons of dishonesty and disruptive behavior. The lower courts carefully analyzed each of Debord's arguments regarding her asserted pretext evidence, and, under the

well-established law of the Tenth Circuit and this Court, found each of her arguments wanting.[7]

Given the profusion of legitimate, undisputed reasons for discharge, namely thrice lying about making the Facebook posts, falsely accusing her boss of stealing and destroying hospital records, and Ammons' undisputed belief that Debord's overpay allegation was also false, the lower courts had no difficulty finding that Mercy had established legitimate reasons for Debord's termination. This determination of legitimate reason would remain unchanged under the newly established but-for causation standard announced in *University of Texas Southwestern Medical Center v. Nassar,* 133 S.Ct. 2517, 2533 (2013) (but-for causation requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action of the employer). As two courts have already concluded, there simply is no evidence that a desire by Mercy to retaliate was the but-for cause of Debord's termination. Rather, the evidence overwhelmingly and conclusively establishes

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[7] Petitioner suggests in her final paragraph on page 35 of the petition that she not only is requesting this Court to consider the broad issue of whether statements to others can be protected opposition, but rather she is requesting this Court to declare that her specific statements to others were in fact protected. This determination would require this Court to review the factual record. Because both courts below have carefully considered each of petitioner's pretext arguments, this Court's re-review of the facts is unwarranted.

that petitioner was terminated for her dishonesty and disruptive behavior.

As a result, this case is not a proper vehicle for petitioner's question presented because, even if the question were answered most favorably to petitioner, the outcome of this case would be unchanged.

CONCLUSION

For the foregoing reasons, Mercy respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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