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

REPLY BRIEF

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I. THE COURT OF APPEALS DECIDED THAT DEBORD'S FACEBOOK POST, TEXT MESSAGE AND DISCUSSION ABOUT SEXUAL HARASSMENT WERE NOT PROTECTED ACTIVITIES

(1) The litigation below presented two separate and independent termination claims rooted in distinct protected activities; the Question Presented concerns only one of those claims.

First, the court of appeals understood Mercy to have dismissed Debord at least in part because of her Facebook post, text message and discussion about sexual harassment, communications that were directed to co-workers rather than to Mercy itself. The parties disagree about whether these statements by Debord were protected from retaliation by section 704(a) of Title VII. This claim presents a pure question of law, which is the subject of the Question Presented.

Second, Debord contended in the courts below that she had also been dismissed for another reason, her complaints to company officials (Ammons and Brewster) about the harassment. Mercy did not dispute that statements to company officials are protected by section 704(a), but denied that it had dismissed Debord because of those complaints to the company. Debord argued that the other justifications given by Mercy for the disputed dismissal were pretexts to cover up an intent to retaliate against her for the complaints to the company itself. This claim presented a question about the sufficiency of the evidence.

The petition seeks review only of the court of appeals' resolution of the first claim; the brief in opposition is directed largely at the second claim.

(2) The court of appeals expressly recognized that Debord contended that her Facebook post, text message, and discussion with co-workers about sexual harassment were protected activity under section 704(a). "Debord[ ] ... argu[es] ... that Ammons could not lawfully terminate her for using Facebook to air her complaints ... [and that] Ammons could not lawfully terminate her for communicating with others about the pending investigations." (Pet.App. 24a; see *id.* at 25a n.6 (noting that Debord relied on several cases as "show[ing] that 'similar complaints on Facebook ... deserve protection.' ") (quoting Appellant's Brief)). Debord's briefs repeatedly asserted these actions were protected activity.[1]

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[1] *E.g.,* Appellant's Main Brief, 48 ("Ms. Debord's complaints [should not be denied] the protection of Title VII" (capitalization omitted), 48 ("[s]ound policy reasons support allowing employees to complain of discriminatory practices on social media such as Facebook"), 48-49 ("Ms. Debord's Facebook complaints ... qualify as protected activity"), 49 n.3 ("[t]wo recent decisions held ... that similar complaints on Facebook ... deserve protection"); Appellant's Response and Reply Brief, 20 ("this Court should hold that her complaints on Facebook were 'protected activity' "), 16 ("the hospital does not deny it punished Ms. Debord for texting her co-worker"), 22 ("the grounds for termination include engaging in protected activity").

The court of appeals also correctly understood that Mercy's own professed reasons for the termination included these assertedly protected activities. The court described the employer's "stated reasons" as including charges that Debord had "post[ed] inflammatory material about her supervisor on the internet," material which included the complaint about sexual harassment, and "discussing the ... harassment investigations with others...." (Pet.App. 23). Mercy does not disagree with the Tenth Circuit's account of its explanations for the dismissal. The brief in opposition twice quotes with approval the appellate court's summary of the charges it leveled against Debord (Br.Opp. 6-7, 10), and characterizes that list as "Mercy['s] ... legitimate reason for terminating Debord" and as "Mercy's proffered reasons for terminating Debord." (Br.Opp. 10).

Because Mercy's own reasons for firing Debord included the Facebook post, text message and discussion about sexual harassment, the Tenth Circuit had to, and clearly did, decide whether those actions were protected activity. The opinion noted that Debord advanced six arguments related to her termination. The court of appeals numbered those arguments (1) to (6) (Pet.App. 24a), and then addressed each of those contentions in a similarly numbered section of its analysis. (*Id.* 24a-30a). The Tenth Circuit's analysis of what it denoted Debord's argument (2) – that Mercy "could not lawfully terminate her for using Facebook to air her complaints" (*id.* 24a) – is set out in the portion of the opinion beginning "*Second*." (*Id.* 25a-26a)

(emphasis in original).[2] The Tenth Circuit's analysis of what it denoted Debord's argument (5) – that Mercy "could not lawfully terminate her for communicating with others about the pending investigations" (*id.* 24a) – is set out in the portion of the opinion beginning "*Fifth*." (*Id.* 29a-30a) (emphasis in original).

(3) Mercy incorrectly asserts that the court of appeals decided nothing except the issue of "pretext." (Br.Opp. 7, 12, 16, 17). But the pretext issue relates only to Debord's separate claim that she was fired in retaliation for having complained directly to the company. Pretext is irrelevant to Debord's claim that she was dismissed in retaliation for her Facebook post, text message and discussion with co-workers about sexual harassment, because the court of appeals correctly understood those actions to be among Mercy's own asserted justifications for the dismissal. Debord claimed, not that Mercy's reliance on the Facebook post, text message and discussion of sexual harassment were a pretext to cover up some *other* illicit motive (e.g., firing her for complaining to the company itself), but that Mercy "could not lawfully terminate her" for those reasons at all. (Pet.App. 24a). If, as Debord contended, any of those actions

[2] Mercy describes the portion of the opinion that begins "Second," and relates to the Facebook post, as deciding a "pretext argument." (Br.Opp. 10, 11). But the "argument" addressed by this portion of the opinion is that the company "could not lawfully terminate her for using Facebook to air her complaints" (Pet.App. 24a), not a contention about pretext.

was protected activity under section 704(a), that would without more mean that Mercy had acted for an unlawful purpose.

Mercy asserts that the court of appeals never decided Debord's claim that the hospital "could not lawfully terminate her" for the Facebook post, text message or discussion of sexual harassment. (Br.Opp. 1, 2, 9 n.6, 12, 13). But manifestly the reasoning in the sections of the opinion that begin "*Second*" and "*Fifth*" (Pet.App. 25a, 29a) (emphasis in original) was intended to resolve the corresponding Debord contentions "(2)" and "(5)." Given the Tenth Circuit's understanding of Mercy's own proffered reasons (including the Facebook post, text message and discussion of sexual harassment), and its recognition that Debord contended those specific reasons were unlawful, there is simply no way the appellate court *could* have resolved Debord's appeal without deciding that clearly identified contention. Although the court of appeals concluded that there was insufficient evidence to support Debord's claim that she was fired because of her direct complaints to the company, it still had to (and did) decide Debord's separate claim that the hospital "could not lawfully terminate her" because of her Facebook post, text message or discussion with co-workers about sexual harassment. (Pet.App. 24a).

Mercy argues that the lower courts could have determined the "pretext" issue without also resolving whether the Facebook post, text message and discussions about sexual harassment were protected activity. "[T]he courts assumed petitioner established a

prima facie case, which includes within it an assumption that petitioner engaged in protected opposition.... Having assumed that a *prima facie* case exists, the precise nature of petitioner's alleged protected opposition simply did not matter." (Br.Opp. 17).[3] But this argument fails to distinguish between Debord's two distinct claims. "[T]he precise nature of petitioner's alleged protected opposition" *did* matter, because if the Facebook post, text message or discussion about sexual harassment were protected opposition, that would be sufficient without more to establish the existence of an unlawful purpose; there was no issue of pretext regarding those actions, because the court of appeals understood Mercy to have relied on those very "stated reasons." Whether those three actions were themselves protected activity was irrelevant only to Debord's other, separate claim, that Mercy had acted with a covert purpose to retaliate for a fourth action, Debord's complaints to the company itself.

Mercy's contention that the court of appeals did not decide whether the post, text message and discussion with co-workers were protected activity is belied by its acknowledgement that the court of appeals found that these reasons for dismissing Debord were "legitimate." "The Tenth Circuit ... concluded that Mercy had legitimate reason for terminating Debord

[3] "[T]he 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." (Br.Opp. 9).

... : ... 'posting inflammatory material about her supervisor on the internet, ... [and] discussing the ... harassment investigation[ ] with others....'" (Br.Opp. 6-7 (quoting Pet.App. 23a); see *id*. at 10 ("[court of appeals] found that Mercy's proffered reasons for terminating DeBord ... were legitimate.")). A "legitimate reason" is by definition a reason that is lawful. "The burden [is on] the defendant ... to ... produce evidence that [it acted] for a legitimate, nondiscriminatory reason." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). In the retaliation context, a "legitimate" reason is one that does not rest on protected activity. A holding that Mercy's objection to Debord's Facebook post, text message and discussion about sexual harassment was a "legitimate" reason to fire Debord is necessarily a holding that none of those actions was protected activity under section 704(a).

II. THE CIRCUITS ARE DIVIDED REGARDING WHETHER SECTION 704(a) PROTECTS STATEMENTS TO NON-EMPLOYERS

The brief in opposition characterizes the decisions of the other circuits in vague language that ignores the quite specific holdings in other courts of appeals and thus obscures the clear circuit conflict.

Mercy describes the Fourth Circuit decision in *Pitrolo v. Cnty. of Buncombe, N.C.,* 2009 WL 1010634 (4th Cir., March 11, 2009), as holding merely that protected activity must be "purposive," as if that

opinion had ruled out only such oddities as the inadvertent disclosure of a worker's confidential diary. "[T]he 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. [2009 WL 1010634 at *3], 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)." (Br.Opp. 14). But virtually all statements to co-workers or family have *some* purpose, such as seeking advice; the opinion in *Pitrolo* would be unintelligible if it denied protection only to purposeless speech.

It is crystal clear that the term "purposive" in *Pitrolo* refers to and requires a narrow and very specific purpose, an intent that a statement be received by a worker's employer. *Pitrolo* held that "*Crawford* does not extend to cases where employees do not communicate their views *to their employers* through purposive conduct. *Crawford*, 129 S.Ct. at 855 (Alito, J., concurring)." 2009 WL 1010634 at *3 n.6 (emphasis added). Under *Pitrolo*, a statement to a non-employer would be protected only if the worker intended that the person to whom the statement was made would act as an intermediary, like the United States Postal Service, conveying the statement to the employer. The controlling fact in the Fourth Circuit was that "[t]here is no evidence that Pitrolo intended for her father to pass along her complaints to Defendants." 2009 WL 1010634 at *3. The decision in

Pitrolo is not, as Mercy suggests, merely a fact-bound standardless resolution of "unique" facts; rather, it establishes a specific, generally applicable legal limitation on the scope of section 704(a).

The Fourth Circuit based this distinction on Justice Alito's concurring opinion in *Crawford,* which used "purposive" in that particular manner. "The question whether the opposition clause shields employees who do not communicate their views to employers through purposive conduct is not before us in this case; ... I do not understand the Court's holding to reach that issue here." 555 U.S. at 283; see *id*. at 282 ("An interpretation of the opposition clause that protects conduct that is not active and purposive would ... open the door to retaliation claims by employees who never expressed a word of opposition to their employers.").

Lower court decisions applying *Pitrolo* correctly understand it to require that a statement must have been made with the purpose of communicating (directly or through another individual) with the worker's employer. Mercy asserts that in *DeMasters v. Carilion Clinic,* 2013 WL 5274505 (W.D.Va. Sept. 17, 2013), the court only "cited *Pitrolo* for its holding that the plaintiff's communications were not protected because they 'were not purposive communications.' 2013 WL 5274505 at *7-*8." (Br.Opp. 15). But the court in *DeMasters* was actually much more specific about the standard established by *Pitrolo.* It quoted and applied the ruling in *Pitrolo* that "*Crawford* does not extend to cases where employees do not communicate their

views to their employers through purposive conduct." (*Id.* *8). "DeMasters' ... communications ... were not purposive communications to DeMasters' employer. As such, these private communications do not constitute protected oppositional conduct." (*Id.*).

Mercy contends that in *Harris-Rogers v. Ferguson Enterprises,* 2011 WL 4460574 (E.D.N.C. Sept. 26, 2011), the court only "cited *Pitrolo* as support for its holding that the plaintiff's ... email was not protected opposition because it was not ... sufficiently purposive to be protected opposition." (Br.Opp. 15). *Harris-Rogers* actually cited *Pitrolo* as "holding that plaintiff's complaints to her father did not qualify as protected activity where there was no evidence that she intended him to relay the complaints to her employer." 2011 WL 4460574 at *7. The court in *Harris-Rogers* held that the fatal defect in the claim of the plaintiff in that case was that there was no evidence she "had intentionally sent the [assertedly protected] email to [her] supervisors." (*Id.*).

Mercy incorrectly dismisses the decisions in the First, Second, Third, Fifth, Sixth and Ninth Circuits as only announcing vaguely that "statements to others may be protected *in certain circumstances*." (Br.Opp. 16) (emphasis in original). In fact, as the petition makes clear, those decisions are quite specific about the circumstances in which a statement to persons other than an employer is protected from retaliation. Decisions in all of these circuits hold that a statement to a non-employer is always protected, so long as the content of the statement would have been protected if it had been made instead to the worker's employer. (Pet. 20-25).

III. THE OTHER JUSTIFICATIONS ADVANCED BY MERCY CAN BE CONSIDERED ON REMAND

Mercy appears to contend that it is certain to prevail in this litigation so long as at least one or more of its reasons for dismissing Debord was lawful.

> Given the profusion of legitimate ... reasons for discharge, namely thrice lying about making the Facebook posts, falsely accusing her boss of stealing and destroying hospital records, and Ammons' ... belief that Debord's overpay allegation was ... 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 accounted in *University of Texas Southwestern Medical Center v. Nassar,* 133 S.Ct. 2517, 2533 (2013).

(Br.Opp. 18).

But the mere existence of a legitimate reason for a disputed adverse employment action, or even a "profusion of legitimate ... reasons," is not sufficient to mandate the rejection of a retaliation or discrimination claim. Section 704(a) does not require a plaintiff to show that an unlawful retaliatory purpose was the *sole* reason for the employment action complained of. A plaintiff need only demonstrate that an unlawful purpose was among the reasons for an employer's action, and that the action in question would not have occurred but for that illegal intent. The courts below

did not decide, or even consider, whether a reasonable jury could conclude in this case that the disputed Facebook post, text message, or discussion with co-workers about sexual harassment were but-for causes of Debord's dismissal. If Mercy contends that a rational jury would have to find that Debord would have been dismissed even in the absence of this protected activity, it will be free to advance that argument on remand.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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