No. 22-668

In the Supreme Court
OF THE
United States

NACHAIYA KAMA

Petitioner,

v.

MEMORIAL HERMANN HEALTH SYSTEMS, ET AL.,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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In the Supreme Court
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PETITION FOR REHEARING

Pursuant to Rule 44, of this Court Nachaiya Kama ("Petitioner") hereby respectfully petitions for rehearing of the Court's Order denying certiorari in this case on March 20, 2023.

INTRODUCTION

Title VII of the Civil Rights Acts of 1964 generally prohibits an employer from discriminating against an individual "because of such individual's race, color, religion, sex (sexual orientation, gender identity, and pregnancy), and national origin." 42 U.S.C § 2000 et seq. Also, under § 704(a) of Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment."

In *Marbury v. Madison,* 5 U.S. 137 (1803), this Court stated that "a law repugnant to the Constitution is void." (Pet. 37).

In *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986), this Court stated that "sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to the employer's liability." (Pet. 34).

In *Faragher v. Boca Raton,* 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998), this Court stated that "employers are

vicariously liable. . . employers are strictly liable for the loss of tangible employment opportunities e.g. firing or other job detriments," and "an employer is not entitled to Ellerth/Faragher's defense unless the employee unreasonably failed to utilize the corrective measures offered by the company's anti-harassment policy." (Pet. 35).

Also, in *Vance v. Ball State Univ*, 570 U.S. 421 (2013), this Court stated that "an employer is vicariously liable for a supervisor's harassment when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." (Pet. 34).

GROUNDS FOR REHEARING

This Court should grant this petition for rehearing because this Court's precedents support the issues presented in this case and because of the following:

A. The court of appeals decision is incorrect. The decisions of the lower courts in Pet. App.1a-5a and Pet. App.6a-12a conflicts with this Court's precedent in *Meritor, supra,* and *Marbury v. Madison*, 5 U.S. 137 (1803). (Pet. 34, 37).

B. The federal courts of appeals are divided on the question presented.

C. The case presents an issue of national importance. (Pet. 18-19).

D. The issue requires this Court's resolution concerning the equal protection laws under the Fourteenth Amendment to the U.S. Constitution. (Pet. 15, 37-40).

This court should address the question on grounds that the panel below held otherwise.

1. Whether under federal question jurisdiction, a litigant regardless of value of the claim, may bring a claim in federal court if it arises under federal law, including the U.S. Constitution.
2. Under federal employment discrimination law, (sex discrimination – sexual harassment) is the act of a manager or supervisor-employee not imputed to the employer, as the Third, Fourth, Seventh, Ninth, and Eleventh Circuits have held?

ARGUMENT

I. The court of appeals decision is incorrect.

The Fifth Circuit held that:

1. "Memorial Hermann Health System cannot be held liable under Kama's assault and battery claim.". . . "cannot be held liable for McLeod's intentional tort." (Pet. App. 2a). This contradicts this Court's holding in *Mertior, Supra.* In *Bouton v. BMW of North America, Inc.,* 29 F.3d 103, 107

(3d Cir. 1994), the Court held that "sexual harassment is outside scope of employment."

2. Memorial Hermann is not liable for sex discrimination - sexual harassment by supervisory personnel. (Pet. App. 4a). This panel conclusion contradicts this Court's holding in *Mertior, Supra.*
3. Kama's manager/supervisor (Clinical Nurse Manager John McLeod, the adverse actor) who hired Kama "had no power to hire or fire Kama and is therefore treated as a coworker". . . (Pet. App. 3a). This is incorrect. Kama was a subordinate and not a manager or supervisor as the district court explained that Kama "reported to John McLeod." (Pet. App. 8a). (Pet. 5, 13).
4. "Kama's race discrimination claim also fails"... "so she cannot bring this claim to federal court." (Pet. App. 4a). Kama asserts that the employer violated her rights under Title VII and the Equal Protection Clause of the U.S. Constitution in this case as she is a federal citizen. In *Arbaugh v. Y H Corp.,* 546 U.S. 500 (2006). This Court held that to properly invoke federal question jurisdiction, a complaint must allege a colorable claim arising under the Constitution or laws of the United States. In *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court held that race-based laws as suspect under the equal protection clause... "separate but equal" treatment of races is unconstitutional. This Court has also addressed similar facts in *Ricci v. DeStefano,* 557 U.S. 557 (2009). (Pet. 37-40).

5. A discriminatorily retaliatory adverse action was taken against Kama for engaging in a protected activity and protected speech. (Pet. 35-36). Kama complained about job discrimination to clinical nurse manager John McLeod (the adverse actor) and to clinical nurse manager Arit Nwagboso as (the district court explained), who failed to escalate the unwelcome sexual advances, request for sexual favors, verbal and physical harassment, sexual assault, offensive lewd remarks, racial profiling, and abusive work environment, to senior management - director Rebecca Thayer (the adverse actor who intentionally failed to take remedial action), Emerald Smart - HR (who also intentionally failed to take remedial action). (Pet. 9-13). The harassing conduct continued after termination and Kama still notified the employer's agents senior vice president and chief executive officer Jerry A. Ashworth, FACHE, chief nursing officer and chief operations officer Mary Ann Euliarte, and senior advisor, employee relations human resources HR Joyce Williams. The employer's agents failed to reinstate, take remedial action or remove the harasser/adverse actor. (Pet. 35-36).

In light of the clear holding and the precedent set by this Court as a bulletproof vehicle, this Court should address if Memorial Hermann is entitled to Ellerth/Faragher's defense after Kama took corrective opportunities provided by the employer and the questions presented above. (Pet. i).

As the district court noted, Respondent's claim of "poor performance" is an after-the-fact pretext for discrimination because, before Kama was fired for speech, she received an Employee Merit Statement which noted - "Meets Expectations." Therefore, it is axiomatic that Kama met Memorial Hermann's legitimate job performance goal at the time it took the adverse action against her on January 11, 2019. (Pet. 20-34).

II. The federal court of Appeals is divided on the question presented.

The lower court's decision in this case, conflicts with the standards that this Court has held in *Mertior, supra,* and other various circuit courts have held. In *Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986), (Pet. 34), this Court noted that "Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harasser results in tangible job detriment to the subordinate employee.[1] This is correct. In *Paroline v. Unisys Corp.,* 879 F.2d 100 (4th Cir. 1989), the court held that employee in supervisory position with significant control over hiring, firing, or conditions of employment can be held personally liable under Title VII.

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[1] *See* Craig v. Y Y Snacks, Inc., 721 F.2d 77, 80-81(CA3 1983); Katz v. Dole, 709 F.2d 251, 255, n.6 (CA4 1983); Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes, 755 F,2d 599, 604-606 (CA7 1985); Miller v, Bank of America, 600 F.2d 211, 213 (CA9 1979); Henson v. Dundee, 682 F.2d 897, 910 (CA11 1982)."

In light of the clear holding of this Court, Kama respectfully prays that a review by this Court is necessary to address the incorrect/conflicting views held by the lower court to secure or maintain uniformity of Court's decisions. The above-mentioned confirms the need for this Court's intervention. The only thing this Court should consider is the validity of the case laws that support this case and the U.S. Constitution as this Court has held, and as it is written in our nation's law books. This Court should vacate and reverse the judgment of the lower court.

Kama prays for any further relief as deemed proper by this Court.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for rehearing should be granted.

Respectfully Submitted,

Petitioner **Kama.** (*Pro Se*)

Date: April 10, 2023

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Nachaiya Kama.