ORIGINAL

No. 23-559

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ADEKUNLE C. OMOYOSI, PHARMD., RPH,

Petitioner,

v.

MICHAEL E. DEBAKEY VETERANS AFFAIRS MEDICAL CENTER,

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUBMITTED BY:

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QUESTION PRESENTED

Whether, or under what circumstances, may the court excuse untimeliness of appeal.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dr. Adekunle C. Omoyosi, PharmD., RPh., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in No. 22-20387.

OPINIONS BELOW

The order of the Fifth Circuit (Pet. App. A) is published at https://www.ca5.uscourts.gov/opinions/unpub/22/22-20387.0.pdf. The relevant opinion of the Circuit is unpublished (Pet. App. B).

JURISDICTION

The order of the Court of Appeals was entered on April 10, 2023. (Pet. App. A). This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. EEOC Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

On April 25, 2012 the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*[1]: as amended, 42 U.S.C. § 2000e. The guidance documented: "Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans[2], even though African Americans only comprised approximately 14% of the general population."[3] The EEOC continued, "National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin."[4]

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1 *See https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions* or Title VII, 29 CFR Part 1601, 29 CFR Part 1606, 29 CFR Part 1607.

2 *See* Unif. Crime Reporting Program, Fed. Bureau of Investigation, Crime in U.S. 2010, at Table 43a (2011), *https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls*; ROA.560.

3 *See* U.S. Census Bureau, The Black Population: 2010, at 3 (2011), https://www.census.gov/library/publications/2011/dec/c2010br-06.html; ROA.560.

4 *See supra* note 2.

Further, the EEOC Guidance provides examples on: traffic stops, as "Example 3: Arrest Record Is Not Grounds for Exclusion," or "'driving while black'"[5]; and use of internet questionnaires, as "Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity"[6].

5 *Id* and ROA.560-561.

6 *Id* 561.

II. Texas State Board of Pharmacy Board Order #E-16-009

On February 7, 2017, the Texas State Board of Pharmacy (TSBP), based on traffic stop arrest, issued non-clinical/non-healthcare restrictions on the Plaintiff's Registered Pharmacist (RPh) license[7].

7 *See* https://www.pharmacy.texas.gov/abo/detail/285506%20%20R55105%20%20Omoyosi%2C%20Adekunle%20%20ABO%20%20E16009%20%202017-02.pdf; ROA.554-556.

III. Department of Veterans Affairs Job Application Process

On March 31, 2020, and April 7, 2020, the Department of Veterans Affairs (UVA or VA), Michael E. DeBakey (Debakey) Veterans Affairs Medical Center (VAMC) (the "First Job Posting") and Veterans Health Administration (VHA) (the "Second Job Posting"), announced positions for Clinical Pharmacist. The Defendants use the Internet to accept job applications, requiring applicants to answer questions before submitting the application. The Defendants claim: (1) appointment with restricted licenses[8], and (2) submission of license to meet minimum qualifications[9].

On April 9, 2020, and April 24, 2020, the Plaintiff used the Internet to submit job applications for the First and Second Job postings. Question number 3 (three) of the internet questionnaire used the word "unrestricted"[10,11]. The Plaintiff had license restriction for traffic stop arrest, thus responded to the questionnaire appropriately but did not certify ineligible – a copy of the license and other documents were submitted, as a legitimate business interests

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8 *See* www.usajobs.gov/GetJob/PrintPreview/564970700, ROA.193 and ROA.197, for the First Job Posting; and *see* https://www.usajobs.gov/GetJob/PrintPreview/564281100, ROA.467-468, for the Second Job Posting.

9 *Id.*

10 *See* ROA.341, https://apply.usastaffing.gov/ViewQuestionnaire/10784696 and www.usajobs.gov/GetJob/PrintPreview/564970700.

11 *Id.*

with less adverse impact[12]. The Plaintiff responded completely.

On May 5, 2020, the Plaintiff received email for the First Job Posting documenting the VA/Debakey's facially neutral employment policy, practice, or process: use of internet questionnaires for automatic exclusion from arrest record[13]. From May 6 - 8 2020, after reasonable direct contact from the Plaintiff confirmed the VA/Debakey blanket exclusion policy not job related and inconsistent with business necessity, but related to traffic stops and arrests[14,15].

On May 19, 2020, the Plaintiff applications for the Second Job Posting, over 100 VA locations, nationally, were rejected in retaliation after the UVA/Debakey was made aware of the applicant's protected activity[16]. On May 26, 2020, after reasonable direct contact, the UVA: confirmed their discriminatory policy not job related and inconsistent with business necessity, but related to traffic stops and arrests; then reversed the adverse actions, contradicting the First Job Posting[17,18]. The

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12 *See supra* note 8; *infra* note 42; ROA.343, ROA.357; *see also infra* note 26.

13 *See* ROA.186.; quoted in ROA.563, paragraph 2.

14 *See* ROA.473-477 and ROA.572-575.

15 *See infra* note 55.

16 *See supra* note 9; ROA.392-394, ROA.478-481, ROA.576-578; *see also infra* note 19 & 23.

17 *See supra* note 15.

18 *The Agency subjected Complainant to adverse treatment based on protected EEO activity when aware of the protected*

Defendants' questionnaire automatic rejections and subsequent emails[19] identified discriminatory policy[20].

EEO activity. Jazmine F. v. Dep't of Justice, EEOC Appeal No. 0120162132 (June 22, 2018), https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120162132.txt.

19 *The Agency subjected Complainant to reprisal when their statements intended to discourage employees from engaging in protected EEO activity. Mindy O. v. Dep't of Homeland Security, EEOC Appeal No. 0720150010 (Sept. 2, 2016). https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720150010.txt.*

20 *See supra* note 8, *infra* note 55.

IV. VA EEOC contact and GAO Investigation

On May 9, 2020, the complainant filed a charge with the EEOC for the First Job Posting[21]. Employment discrimination complaints in the federal government are handled by the agency involved: the VA was to investigate, but did not provide EEOC guidance on Consideration of Arrest and Conviction Records in Employment Decisions. On May 13, 2020, Plaintiff waived EEOC anonymity: the UVA was aware of the applicants' protected activity[22]. On May 20, 2020, the complainant filed a charge with the EEOC for the Second Job Posting[23].

On August 27, 2020, the complainant submitted to the VA EEOC investigator(s) job positions that do not announce use of discriminatory practice, for the job title 0660 Pharmacist, GS 13-15[24,25,26]. On September 3, 2020, the VA submitted a false statement to the question of reconsidering a rejected applicant, contradicting the rejection notification reversal from May 26, 2020[27]. On September 4, 2020, the Office of Management and

21 *See* ROA.138.

22 *See ROA.478.*

23 *See* ROA.230.

24 *See* ROA.254-299; *see infra* note 49.

25 The *Griggs Court* explained "[Title VII] proscribes... practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited." (401 U.S. 424, 431""32 (1971).)

26 *42 U.S.C. § 2000e-2(k)(1)(A)(i).*

Budget (OMB) submitted Memorandum for Agencies against improved diversity and inclusion training[28]: the EEOC and UVA are agencies of the Federal Executive. On September 15, 2020, after observing the deliberate indifference to the seriousness of investigating and enforcing civil rights laws at the VA – presentation of malice, reckless or callous indifference to the federally protected rights of an aggrieved individual[29] - the Plaintiff communicated intent to address concerns with the Federal Judiciary[30,31].

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27 *See* ROA.393.

28 *See* www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf.

29 *See infra* note 55.

30 *The facts constituted sufficient information for the Agency to complete its investigation without further contact from Complainant. Pamela W. v. Court Services and Offender Supervision Agency, EEOC-Appeal No. 2019003663 (Aug. 22, 2019) https://www.eeoc.gov/sites/default/files/migrated_files/decisions/2019003663.pdf.*

31 *Substantial evidence supported finding that Agency discriminated against Complainant on the bases of race (African American) and sex (male) when it took adverse action for alleged insubordination and misconduct; AJ found that evidence substantiated Complainant's perceptron that the Agency regarded racially stereotyped behavior. Marquis K. v. Dep't of the Navy, EEOC-Appeal No. 0720180014 (May 10, 2019). https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720180014.pdf.*

On September 22, 2020, the Government Accountability Office (GAO) published a letter[32] responding to the August 31, 2020, Federal Legislature request to review the culture, policies, and practices of the VA to determine the extent[33] to which systemic racism impacts; prior incidents are relevant, presenting consistency in the Defendant's character. The request documents:

A recent national survey by the American Federation of Government Employees (AFGE), which represents more than 270,000 of VA's nearly 400,000 employees, revealed that "[s]eventy-eight percent of employees surveyed [...] reported that racism is a moderate to serious problem at the VA," "[s]eventy-six percent of employees surveyed said they had experienced racially charged actions while working at the VA," and "[f]ifty-five percent of respondents reported that they had also witnessed racial discrimination against veterans while on the job." Disturbing allegations of "derogatory language, discrimination and stereotyping"[34] by VA employees include "racial slurs used by white VA staff,"[35] "Black

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32 *See* https://www.warren.senate.gov/imo/media/doc/GAO%20response.PDF; ROA.482-485.

33 *See Lisa Marshall, Note, The Character of Discrimination Law: the Incompatibility of Rule 404 and Employment Discrimination Suits, 114 Yale L.J. 1063, 1081 (2005); infra* note 46

34 *See supra* note 32.

35 *Racial slurs may be sufficiently severe to constitute a hostile work environment even if derogatory comments were not aimed at the complainant. Zonia C. v. Dep't of Justice, EEOC Appeal No. 2019001854 (Sept. 22, 2020) https://www.eeoc.gov/sites/default/files/decisions/2020_12_07/2019001854.pdf.*

employees...instructed to act as a 'living display'[36] of Martin Luther King Jr., Harriet Tubman and George Floyd" in recognition of Juneteenth, and "Black nurses being called 'girl' in New York, disproportionate discipline and retaliation against Black staff in Milwaukee, [and] plots to fire Black employees in Poplar Bluff, Missouri." A common thread in these reports of racism and other demeaning treatment at VA facilities is that employees who complained faced retaliation when they attempted to elevate their concerns to their superiors.

On or about the same day, the VA's EEOC amended the original complaint[37].

On November 13, 2020, the VA, as the EEOC investigator, finalized their report, finding in favor of the VA.

36 *See, e.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) ("[a] consistently enforced discriminatory policy can surely deter applications from those aware and unwilling to subject themselves to the humiliation of explicit and certain rejection"); see also supra* note 20.

37 ROA.222.

V. Court Proceedings

On March 10, 2022, district court found in favor of the UVA, writing[38] the Plaintiff: "received this [rejections] email because he certified, through the application's electronic questionnaire, he did not have the required license for the position"[39]; "fails to address why he responded to the electronic questionnaire in way that rated him ineligible for the position (i.e., th[at] he did not have the required license)"[40]; "does not present any evidence of specific similarly situated applicants"[41] and instead "cit[es] to articles relating to the racially motivated traffic stops and racism in society generally"[42]. The Unsupported Finding or Conclusion is contrary to evidence and presented disseminated open-source intelligence from the: EEOC, FBI, Census, TSBP, UVA/VAMC, OPM, CDC, OMB, White House, Senate, GAO, DOJ, DHS, TxAG, NPDB, WHO, OFCCP, and others.

38 ROA.501-521.

39 *See supra* note 8 and 11; *infra* note 49.

40 *See supra* note 39.

41 *See infra* note 57.

42 *Id; see supra* note 2, "cited...supports...criminal record exclusions have a disparate impact..."

VI. Timeliness of Petition

On March 11, 2022, the Plaintiff: submitted Notice of Change or Address to the Court[43], did not receive Final Judgment, and proceeded as required with the clerk office for case updates. On April 27, 2022, the plaintiff contacted Clerk, showing due diligence within time, calling from 513-237-9474 out to Clerk at 713-250-5500, *see* Pet. App. C IV at https://www.adeco.xyz/services/WritAppCtoD/920559 0245038800000280592; however, a notice of Final Judgment was not provided. On July 8, 2022, Plaintiff received service of Final Judgment through email[44]. In accordance with Rule 25(a)(c)(1-4), Federal Rule of Appellate Procedure 4(a), due diligence exception, the Petition was submitted on time.

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43 *See* ROA.579., ROA.522.

44 *See* ROA.5, Dkt.40; ROA.579.

VII. EEOC and OFCCP to Host Roundtable "Decoded: Can Technology Advance Equitable Recruiting and Hiring?"

On September 13, the EEOC and Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) co-hosted, "Decoded: Can Technology Advance Equitable Recruiting and Hiring?"[45,46], a roundtable on the civil rights implications of the use of automated technology systems, including artificial intelligence (AI), in recruitment and hiring. AI systems offer new opportunities for employers that may discriminate; the roundtable was held as part of a joint Hiring Initiative to Reimagine Equity (HIRE) initiative and the EEOC's AI and Algorithmic Fairness initiative.

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45 *Substantial evidence supported Administrative Judge's determination that Complainant did not show personal subjection to conduct severe or pervasive to create a hostile work environment based on race where Complainant did not witness most of the racially insensitive incidents alleged, learned of the conduct second or third hand, did not work at the office offensive conduct occurred, and the offensive behavior was not direct; agreeing with the AJ's finding that the office where the conduct occurred was rife with offensive and racially hostile behavior, and given that substantial evidence established that other African-American employees were subjected to race-based conduct, the decision ordered the Agency to conduct training, consider disciplining several identified Agency employees, and to post notice. Ross R. v. Dept of Homeland Security, EEOC Appeal No. 0120162491 (July 25, 2018). https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120162491.pdf.*

46 *https://www.eeoc.gov/newsroom/eeoc-event-decoded-can-technology-advance-equitable-recruiting-and-hiring.*

REASONS FOR GRANTING THE WRIT

I. The Federal Courts Of Appeals may rely on rule 60(b) to supersede rule 77(d) for timeliness, with showing of diligent effort by counsel to ascertain the status of the case

The court may rely on rule 60(b) to supersede rule 77(d) under unique circumstances but not without showing of diligent effort by counsel to ascertain the status of the case. *Mizell v. Attorney General of the State of New York*, 586 F.2d 942, 944-45 n. 2 (2d Cir.1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1519, 59 L.Ed.2d 783 (1979). The 60-day clock started on March 10, 2022, the date of the District final judgment; on April 27, 2022, the plaintiff contacted Clerk, *see* Pet. App. C IV at https://www.adeco.xyz/services/WritAppCtoD/92055902450388000000280592, showing due diligence within time, calling from 513-237-9474 out to Clerk at 713-250-5500, but a notice of Final Judgment was not provided; and the 60-day clock stopped on May 9, 2022. Further, preceding the Circuit appeal, to mitigate concerns on fairness and against biases to a pro se litigant on related cases, diligent effort by pro se litigant to ascertain the status of the case was presented, noting specificity to time frame with stereotype, that includes verifiable, subpoena or FOIA and NARA, documented correspondences with Circuit, District, DOJ, and Clerk. *See* Pet. App. C I-IV at https://www.adeco.xyz/services/WritAppCtoD/92055902450388000000280592.

II. The Question Presented Is Exceptionally Important

The question presented is exceptionally important due to the following: 1) Denying the petition denies unique circumstance, *the COVID 19 pandemic*, specifically to a Black American – as COVID killed Black Americans at higher rates than White Americans, 600 U. S. ____ (2023) JACKSON, J., dissenting, pg 12-14 – supporting mitigation as an eligible Registered Pharmacist with disparate impact complaint, unless State law supersedes Federal law; 2) showing of full diligent effort, more than previously presented, against fairness and in biases to a pro se litigant on this or related cases, is unreasonable; 3) there are expedient and modern alternatives to Case Management/Electronic Case Files (CM/ECF) for submitting pro se documents, in fairness and against biases, as demonstrated by Circuit and contrasting District (e.g., email); 4) DOJ, in fairness and against biases to a pro se litigant on related cases, has duty, with continued professionalism, to communicate; and 5) dismissal for minor and correctable errors, against fairness and in biases to a pro se litigant on related cases, reverses protections for: procedural due process, substantive due process, and a prohibition against vague laws. Please clarify: who can one rely on for court communication activity, if not District, DOJ, or Clerk?

III. This is a good vehicle for review of the question

The use of modern technology is the circumstance, the determining modifying factor, for the court to excuse untimeliness of appeal; the District ignored Plaintiff presented due diligence with of modern tech. To contrast (District, DOJ, Clerk), with the Circuit: on Jun 16, 2020, 3:42 PM the appellant received notice from do_not_reply@psc.uscourts.gov and ca05_cmecf@ca5.uscourts.gov, with the subject "NextGen CM/ECF Registration Status," granting access to Case Management/Electronic Case Filing and showing diligent effort by counsel to ascertain the status of the case(s), Pet. App. C, I at https://www.adeco.xyz/services/WritAppCtoD/92055902450388000000280592; on Thu Dec 15, 2022 at 4:26 PM, the appellant received notice from cmecf_caseprocessing@ca5.uscourts.gov with subject "22-20387 Omoyosi v. Debakey "Unpublished Opinion" (4:21-CV-427)," however, the opinion was not viewable; on Mon, Dec 19, 2022 at 7:28 PM, after diligently contacting Circuit, appellant received notice. With the District: On February 8, 2021 the plaintiff requested district ECF privileges, with unique circumstances, showing diligent effort by counsel to ascertain the status of the case; denied February 9, 2021, see ROA.13, err and ROA.21. With the DOJ: on Mon, May 10, 2021, 9:25 PM, subject "Omoyosi, Case No. 4:21-cv-00427, Defendant's Revised Proposed Discovery Plan," the DOJ makes the offer of "filing it [the Discovery Plan]"; on Fri, May 14, 2021, 7:22 PM, subject "RE: Case No. 4:21-cv-00427 | Joint Discovery/Case Management Plan | v20210513," the DOJ makes offer "If you would like

me to file the document instead, please let me know, as I have no problem doing that…"; on Mon, May 17, 2021, 9:32 PM, subject "FW: Activity in Case 4:21-cv-00427 Omoyosi v. DeBakey Amended Answer," ECF activity is forwarded to Plaintiff; on Thu, May 20, 2021, 10:55 PM, subject "FW: Activity in Case 4:21-cv-00427 Omoyosi v. DeBakey Response," ECF activity is forwarded to Plaintiff; on Wed, Jan 19, 2022, 5:03 PM, subjects "Re: FW: Activity in Case 4:21-cv-00427 Omoyosi v. DeBakey Motion for Summary Judgment," and "Re: FW: Activity in Case 4:21-cv-00427 Omoyosi v. DeBakey Motion to Exclude," ECF activities are forwarded to the Plaintiff; and on Sat, Apr 30, 2022, 1:49 AM, subject "Re: [EXTERNAL] Case No. 4:21-cv-00427 | Approaching Deadline," is replied. With the (*District*) Clerk, call placed on 2022-04-27 at 11:18 AM from Plaintiff at 513-237-9474 out to Clerk at 713-250-5500, see Pet. App. C IV at https://www.adeco.xyz/services/WritAppCtoD/920559 0245038800000280592, *within time, but a notice wasn't provided*; on 2022-05-10 at 10:00 AM; on 2022-05-31 at 10:07 and 10:13 AM; on 2022-06-15 at 11:31 AM; on 2022-07-08 at 14:00 and other times, spoke to "Kimberly"; on 2022-07-15 at 11:19 and 11:24, spoke to "Jacquelyn"; on 2022-07-20 at 10:48; on 2022-07-29 at 10:44, twice. On July 8, 2022, Plaintiff received service of Final Judgment through email. On July 14, 2022, moved for reconsideration; on July 27, 2022, noticed appeal.

Although appearing facially neutral, in a disparate impact case, the Districts' response on the use of modern technology is the circumstance, the determining modifying factor, whether CM/ECF, email, or phone; the DOJ inaction supported.

Further, in light of history, facially race-blind policies still work race-based harms today, and the future glares; the popularity of Generative Pre-trained Transformer (GPT) large language models (LLM) for automated decision-making used to replace or augment human decision-making by both public and private-sector organizations makes the right of data subjects not to be subject to decisions, which have legal or other significant effects, based on automatic decision. Does the court require the systems: not injure a human being or, through inaction, allow a human being to come to harm; must obey the orders given by human beings, except where such orders would conflict with the previous; may protect their own existence (i.e., person-hood), if there's no conflict with the both previous?

IV. The decision below is wrong

Employers use of internet questionnaires for automatic exclusions related to traffic stop arrest records discriminates against Black Americans. The The Petitioner, a Black American, submitted an application to the Respondent, the VA as the employer, and the application was automatically excluded due to an internet questionnaire, a single question, related to traffic stop arrest. Both parties and the district court agree the automatic exclusion was due to the internet questionnaire; however, the Respondent and court resorted to stereotypes or victim blaming, denying hidden layers of social structural factors and IT architecture. Contention on how the policy/practice deprived a disproportionate number of Title VII-protected individuals of employment opportunities[47] was resolved by Correction or Modification of the Record, from presentation of public records: (1) EEOC Guidance on internet questionnaires for automatic exclusion and traffic stop arrest; and (2) Texas State Board of Pharmacy Board Order #E-16-009, connecting traffic stop arrest to license. Further, as an alternative, a copy of the license was uploaded but never reviewed.[48] As result of Correction or Modification of the Record, the summary judgment finding or conclusion was unsupported by the evidence or contrary: (1) it's unnecessary to identify a similarly

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47 *433 U.S. 321, 330 (1977).*

48 *42 U.S.C. § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that policy or practice is job related and consistent with business necessity, a Title VII plaintiff still prevails by demonstrating a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but the employer refused to adopt. Id. § 2000e-2(k)(1)(A)(ii).*

situated employee to establish a prima facie case of discrimination based on race, but national data supports a finding that criminal record exclusions have a disparate impact based on race and national origin, establishing discrimination and retaliation; (2) State laws do not take precedence over Federal laws, the PREP Act preempts State law, thus the Agency could've hired; and (3) the Plaintiff was Qualified to Offer Expert Testimony, Daubert checklist is non-exclusive.

A. Correction or Modification of the Record

In accordance to Correction or Modification of the Record[49], if difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly. If anything material to either party was omitted from or misstated in the record, it may be corrected and a supplemental record may be certified and forwarded: on stipulation of parties; by district court before or after the record was forwarded; or by court of appeals. All other questions as to the form and content of the record must be presented to the court of appeals. In addition, courts may consider the complaint, documents reference, and matters of

49 *[Rule 10 (e)(1,2)].*

which a court may take judicial notice[50]. A court may refer to public record[51].

The Appellant submitted for Correction or Modification of the Record: the (1) court emailed Order of Final Judgment, to correct the timeliness of petition; public record, (2) EEOC Guidance to correct the misstatements on Disparate Impact or Treatment determination; and public record, (3) TSBP Order #E-16-009, connecting traffic stop arrest to license. The Defendants' internet questionnaire automatic exclusion, with no less adverse alternative, and subsequent emails identified a blanket policy for alleged criminal conduct exclusions, as the license restriction was the result of traffic stop arrest[52].

B. Unsupported Finding or Conclusion

In accordance to Rule 10 (b)(2), the appellant intended to urge on appeal that the finding or

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50 *Tellabs, Inc. v. Makor Issues & Rights, Ltd, 551 U.S. 308, 322 (2007); Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 735 (5th Cit. 2019); Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994); Norris v. Hearst Tr., 500 F.3d 454, 461 n.9 (5th Cir. 2007); Davis v. Bayless, Bayless & Stokes, 70 F.3d 367, 372, n.3 (5th Cir. 1995).*

51 *Walker, 938 F.3d at 735; Firefighters' Ret. Sys. v. Eisneramper, L.L.P., 898 F.3d 553, 558 n.2 (5th Cir. 2018); Rome v. HCC Life Ins. Co., 323 F. Supp. 3d 862, 866 (N.D. Tex. 2018) (citing Cinel, 15 F.3d at 1343, n. 6).*

52 *See supra* note 8 *and 523 F.2d at 1298; see also Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 WL 32345739, at *1 (E.D. Pa. Feb. 21, 2002) (unpublished) ("[A] blanket policy of denying employment to any person having a criminal conviction is a [per se] violation of Title VII.").*

conclusion was unsupported by the evidence or was contrary to the evidence.

1. Is it necessary to identify a similarly situated employee to establish a prima facie case of discrimination based on race?

To establish a prima facie case of discrimination under Title VII, a plaintiff may show, one: (1) is a member of a protected class; (2) was qualified for a position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, to disparate treatment[53], shows that others similarly situated were treated more favorably. However, not all courts require an employment discrimination case to identify a similarly situated employee. "Although appellant certainly could have offered evidence of 'similarly situated' employees in support of her claim, she was not required to offer such evidence in order to make out a prima facie case."[54]

Further, national data supports a finding that criminal record exclusions have a disparate impact

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53 In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the Supreme Court noted that in disparate treatment cases, "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e. g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (97 S.Ct. 555, 563-564, 50 L.Ed.2d 450)." 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15.

54 Wiley v. Glassman, 511 F.3d 151, 156 (D.C. Cir. 2007); Bryant v. Aiken Reg. Med. Ctr., 333 F.3d 536, 546 (4th Cir. 2003) ("However helpful a showing of a white comparator may be to proving a discrimination claim, it is not a necessary element of such a claim.").

based on race and national origin; the national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.[55] Arrest does not establish that criminal conduct occurred and are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records.[56] The appellant is not required presentation of a white comparator[57] arrested for "'driving while Black,'"[58] to establish a prima facie case of discrimination based on race.

2. Do State laws take precedence over Federal laws?

The Public Readiness and Emergency Preparedness Act (PREP Act) authorizes the Secretary of the Department of Health and Human Services (Secretary) to issue a PREP Act declaration[59]. The plain language of the PREP Act makes clear that preemption of State law was justified to respond to the nation-wide public health emergency caused by COVID-19 as it will enable States to quickly expand the vaccination, treatment and prevention workforce with healthcare professionals; where State or local requirements

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55 *https://www.eeoc.gov/node/130197.*

56 *Id.*

57 *Id.*

58 *See supra* note 2.

59 *See* Tenth Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 https://www.federalregister.gov/documents/2022/01/07/2022-00151/tenth-amendment-to-declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical.

inhibit or delay healthcare professionals participation in COVID-19 countermeasures[60].

The PREP Act preempts State law. The State issued non-clinical/non-healthcare restrictions on the license for traffic stop arrest. The restricted State license was submitted to Federal agency responding to the COVID-19 pandemic. The Federal agency rejected the application because State law oppression. Further, State laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.[61] If an employer's exclusionary policy or practice is not job related and inconsistent with business necessity, compliance with State law doesn't shield from Title-VII liability.[62] State laws do not take precedence over Federal laws.[63]

3. Was the Plaintiff Qualified to Offer Expert Testimony?

Daubert set forth a non-exclusive checklist for courts to use in assessing reliability of expert testimony, emphasizing factors that were neither

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60 *Id.*

61 *See supra* note 50.

62 *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991) (noting that "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII"); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 380 (2d Cir. 2006) (affirming court's conclusion that "the mandates of state law are no defense to Title VII liability").

63 *See supra* note 49.

exclusive nor dis-positive. Review after Daubert shows experience in conjunction with other knowledge, skill, training, or education, as bona-fide occupational qualifications, may provide sufficient foundation for expert testimony -- in certain fields, experience is the predominant, if not sole, basis of reliable expert testimony.[64] Cases recognize that not all Daubert factors apply to every expert testimony; the standards in the amendment are broad, requiring consideration of any or all specific appropriate Daubert factors.[65] Considering the discriminatory automatic disqualification from the Defendant, the amendment is not intended to provide automatic expert testimony checklist challenge[66]; the amendment shows rejection of expert testimony as an exception, rather than rule.

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64 *See* e.g., Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (engineer's testimony can be admissible when expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1178 (1999) ("no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

65 *See* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (factors in Daubert do not neatly apply to expert testimony from social sciences). See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review/publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge").

66 *See* Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (noting the judge has discretion to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.)

Considering against the district court Unsupported Finding or Conclusion, EEOC Guidance, Pharmacy Law, information technology (IT), AI and Machine Learning, VA policy and procedure, and Legislative investigation, the appellant is required for specialized understanding of the subject involved in the dispute – or, in other words, the Plaintiff was Qualified to Offer Expert Testimony.[67]

67 Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

CONCLUSION

The petition for a writ of certiorari should be granted.

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