15-1206

NO. ____

In the Supreme Court of the United States

JILL CRANE,

Petitioner,

v.

MARY FREE BED REHABILITATION HOSPITAL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a race discrimination claim exists under 42 U.S.C. § 1981 where a nursing supervisor has been excluded from providing care or direction concerning care to a patient based solely on her race?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jill Crane (hereinafter "Petitioner"), respectfully petitions for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS

The Order Denying Petition for Rehearing en Banc in the United States Court of Appeals for the Sixth Circuit (App. at 48) is unreported. The Opinion in the United States Court of Appeals for the Sixth Circuit (App. at 1-21) is unreported. The Opinion and Order Granting Motion for Summary Judgment and Judgment in the United States District Court for the Western District of Michigan, Southern Division (App. 22-47) is unreported.

JURISDICTION

The Order Denying Petition for Rehearing en Banc in the United States Court of Appeals for the Sixth Circuit was entered on January 22, 2016 (App. at 48). Jurisdiction of this Court is invoked under 20 U.S.C. § 1254(1).

THE UNITED STATES STATUTE

The Civil Rights Act of 1866, 42 U.S.C. § 1981[1], states the following:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

This case raises an important question regarding the application of the Civil Rights Act under 42 U.S.C. § 1981 in the context of employment where a patient has requested not to be treated by a particular race of employees and the employer acquiesces to the request.

This case involves a nursing supervisor, who is African American, who was employed by Mary Free Bed. (App. at 2). Petitioner is a registered nurse with an associate, bachelor's, and master's degrees in nursing. (App. at 23). Mary Free Bed provides acute care rehabilitation for patients with brain and spinal

[1] Petitioner also asserted a Michigan Elliott-Larsen Civil Rights Act claim pursuant to Mich. Comp. Laws § 37.2201 *et seq.*. Claims under these two statutes are analyzed under the framework developed for claims brought under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. Since the analysis is similar, Petitioner is only submitting this petition as to her federal claim under 42 U.S.C. § 1981.

injuries. (App. at 2). As a supervisor, Petitioner directed RNs and nurse technicians as they cared for patients with traumatic brain injuries, spinal cord injuries, stroke affects and various pediatric conditions at Mary Free Bed Rehabilitation Hospital. (App. at 23). As a nursing supervisor, Petitioner was responsible for all of the patients on her shift. (App. at 8). This included responding to call lights and providing direct care to patients, if necessary.

In December of 2010, Petitioner was told by another supervisor that a patient's family requested no African American caregivers provide care for a patient. (App.at 2). Petitioner complained to the director of nursing and worked another shift while the patient was at Mary Free Bed. (App. at 3). Petitioner chose not to pick up extra shifts working as a nurse because she wanted to avoid the situation. (App. at 24).

The District Court determined that Mary Free Bed honored the patient's request for no African American caregivers. (App at 3). Mary Free Bed contended that even if the request was honored for no African American caregivers, Petitioner had the same work hours, responsibilities, duties, status, pay, and benefits after she was advised of the request. (App. at 3). Mary Free Bed did not have a policy to deny race-based requests and, according to the director of nursing, Mary Free Bed would grant such requests. (App. at 25). Indeed, after the Petitioner complained about the race-based-request being granted in this circumstance, Mary Free Bed implemented a policy that stated, "a patient or family member may request to receive care from a specific caregiver or to exclude a specific caregiver or caregiver group." (App at 25).

The District Court held, and the Sixth Circuit agreed, Petitioner could not bring a claim for race discrimination because the employment action was merely temporary.

ARGUMENT

The decision from the United States Court of Appeals for the Sixth Circuit is in conflict with decisions from the Seventh and Eleventh Circuit on the important matter of whether the Civil Rights Act is violated when a preference based on race is granted by an employer.

I. The Sixth Circuit Decision is in Conflict with the Seventh and Eleventh Circuit Courts That Have Held That the Civil Rights Act is Violated Where An Employer Makes an Assignment Excluding a Protected Class of Employees Based on Customer's or Patient's Preference.

In 2010, the Seventh Circuit decided the case of *Chaney v. Plainfield*, 612 F.3d 908 (7th Cir. 2010), which involved an African American certified nursing assistant who was prohibited from caring for a White resident. The White resident requested not to be attended to by African American caregivers. The Seventh Circuit rejected the defendant's assertion that its deference to the patient's expressed preference was "reasonable" as the Seventh Circuit held: "[i]t is now widely accepted that a company's desire to cater to the perceived racial preference of its customers is not a defense... for treating employees differently based on

race." *Id.* at 913.[2] See also *E.E.O.C. v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 370 (7th Cir. 2011) (allegation that plaintiff was assigned to a specific territory because of his race "falls squarely within [plaintiff's] allegation of discrimination and the 'terms and conditions' of employment").

In 1999, the Eleventh Circuit decided the case of *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 471 (11th Cir. 1999) involving a telephone marketing corporation that was hired to perform work for political candidates which would segregate employees, when requested by customers, by assigning separate calling areas and scripts according to race. The plaintiff in *Ferrill* brought a 42 U.S.C. § 1981 claim against the defendant. The Court found that the segregation of assignments based on race was direct evidence of intentional race discrimination in job assignments in violation of § 1981. *Id.* at 472.

The Sixth Circuit distinguished the *Chaney* and *Ferrill* cases stating the employees in those cases

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[2] Although *Chaney* involved a racial harassment claim under Title VII, race discrimination and harassment claims under Title VII are similar in that, "racial harassment in the course of employment is actionable under Title VII prohibition against discrimination in the 'terms, conditions, or privileges of employment.'" *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988). In *Chaney*, the Court found the work environment hostile or abusive in most part because the employer, "acted to foster and engender a racially-charged environment through its assignment sheet that unambiguously and daily reminded Chaney and her co-workers that certain residents preferred no Black CNAs. Unlike White aides, Chaney was restricted in the room she could enter, the care she could provide and the patients she could assist." *Id.* at 912.

endured race-based work assignments throughout their employment instead of the two eight-hour shifts that Petitioner worked. (App. at 9). The Sixth Circuit held that while an adverse employment action may be based on an employer's race-based assignment of duties even without a change in pay, benefits, prestige, or responsibilities, the impact on Petitioner was *de minimis* and temporary and, therefore did not constitute a materially adverse employment action. (App. at 8-11).

II. Plaintiff Was Subjected To An Adverse Employment Action By Being Denied The Opportunity To Perform Her Job Duties Based Solely On Race In Violation Of The Civil Rights Act.

The Sixth Circuit accepted the District Court's finding that while race-based assignments may be an adverse employment action, as to Petitioner, it wasn't because the employment action was merely temporary and as a supervisor she did not have assigned responsibility to care for the patient. (App. at 8-11). In other words, the lower court decisions suggest that even in the face of blatant, intentional discrimination based solely on race, Petitioner cannot bring a claim because the discrimination against her did not last long. Petitioner argued that regardless of the length of time that the discrimination lasted, as a supervisor and nurse, she had responsibilities to care for all patients under her supervision and being told she couldn't based solely on her race was a violation of her civil rights.

The Sixth Circuit has held to establish the existence of an adverse employment action, a plaintiff must point to a materially adverse change in the terms or

conditions of employment. *Kocsis v. Multil-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Examples of materially adverse changes include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, *or other indices that might be unique to a particular situation.*" *Id.* at 886 (emphasis added). This case presents circumstances which require an analysis of "other indices which might be unique to a particular situation."

The lower court decisions in this case conclude that there are circumstances in employment where race discrimination is legal as long as it is *de minimis*. The decisions are contrary to the Civil Rights Act, where there is no circumstance in which segregation based on race is valid regardless of time. In the Civil Rights Act of 1964, the legislation permitted discrimination as a bona fide occupational qualification, however, it was strictly limited to classifications on the basis of religion, sex, or national origin. 42 U.S.C. § 2000e-2(e). Notably, the exception does not apply to racial discrimination. *Miller v. Texas State Bd. of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980). The Petitioner argued in the Courts below that where an employer assigns employees based on race that a violation of the Civil Rights Act has occurred. Any other conclusion would be contrary to the very purpose of the Civil Rights Act. In a recent 2016 decision out of the Eastern District of Michigan involving the issue of a patient preference being recorded, the Court held, "even a temporary or brief (i.e. *de minimis*) abridgement of a plaintiff's rights under § 1981 is actionable." *McCrary v. Oakwood Healthcare, Inc.*, 2016 U.S. Dist. LEXIS 33688.

The case of *Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000), cited by the Sixth Circuit, which held *de minimis* employment actions are not materially adverse is distinguishable from the facts of this case. (App. at 10). The *Bowman* case involved action by the employer against an individual employee where the employer's reasons for such actions was not based on a protected reason, like the present case where it is undisputed that Petitioner was excluded from caring for a patient based solely on her race. In this case, the employer excluded an entire protected class of employees based on a patient's family's request. In a District Court case out of the Western District of Pennsylvania involving similar facts to the present, the Court concluded that even in the absence of monetary loss, job assignments based on race constitutes adverse employment actions, because such assignments affect the terms and conditions of employment. *Patterson v. UPMC S. Hills Health Sys. Home Health, L.P.*, 2005 U.S. Dist. LEXIS 47610.

The reassignment of Petitioner and other African American employees was made specifically because of their race. This type of segregation is prohibited under Title VII. 42 U.S.C. § 2000e-2(a)(2). The lower court decisions suggest it is lawful to segregate employees based on assignment under the Civil Rights Act, as long as the segregation is temporary and all other things are equal. This separate but equal rationale, which was set forth in *Plessy v. Ferguson,* 163 U.S. 537 (1896), has long been overruled by such cases as *Brown v. Board of Education*, 347 U.S. 43 (1954), which held that separate but equal does not mean there is no racial discrimination. Likewise, in the present case, where Petitioner, who is African American, was

explicitly told she was not to care for a patient based on race, the Civil Rights Act has been violated.

III. The Civil Rights Act Contemplates Race Discrimination Claims Where There May Not Be an Adverse Economic Impact.

In concluding there was no material change in Petitioner's terms and conditions of employment, the Sixth Circuit relied heavily on taking into account whether there was an adverse economic impact on the Petitioner, e.g., work hours, compensation, and benefits. (App. at 11). Highly qualified African American nurses, such as the Petitioner, were told they could not provide health care services to a patient, not because of skill, but based solely upon their race. This is the epitome of discrimination and constitutes an adverse employment action given the unique circumstances of this case.

The language of Section 1981a contemplates both noneconomic and punitive damages as a remedy for a violation. 42 U.S.C. § 1981a. This statutory language supports the Petitioner's position that Petitioner can recover for noneconomic damages for the emotional distress she suffered as a result of Mary Free Bed's blatant discrimination. It also provides for punitive damages where the defendant engaged "in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.*

The *Chaney* and *Ferrill* cases support the conclusion that even where there are no economic damages, a plaintiff who has been discriminated against based on

race due to a customer's or patient's preference has suffered damages and can bring a claim. In the *Chaney* case, *supra*, the Seventh Circuit noted that "[t]he hostility that *Chaney* described came from daily reminders that Plainfield was employing her on materially different terms than her white co-workers. Fueling this pattern was the racial preference policy, both a source of humiliation for Chaney and fodder for her co-workers . . . It was, in short, a racially hostile environment." *Chaney*, *supra* at 915. Further, in *Ferrill*, *supra*, the Eleventh Circuit noted that when faced with intentional race-based discriminatory staffing, a plaintiff may be compensated for intangible, psychological injuries as well as financial, property, or physical harms. *Ferrill* at 476. "Ferrill testified that she was humiliated by TPG's physical separation of employees on the basis of race and TPG's allocation of work and scripts according to race. Humiliation and insult are recognized, recoverable harms." *Id.*

Even where the plaintiff does not suffer an economic loss, noneconomic and punitive damages are available to compensate the victim of discrimination. Indeed, Petitioner was concerned about the "tension" and "division" created by the discriminatory request being granted. (App. at 30). Accordingly, Petitioner's claim under 42 U.S.C. § 1981 should not have been dismissed.

CONCLUSION

For the reasons stated more fully above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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