No. 17-370

In The
Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, *et al*.,

Respondents.

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

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

1. Petitioner Jameka Evans filed a *pro se* complaint against "Georgia Regional Hospital at Savannah," Charles Moss, Lisa Clark, and Jamekia Powers (the "named respondents") in the United States District Court for the Southern District of Georgia. Compl., *Evans v. Ga. Reg'l Hosp.*, No. 4:15-cv-103 (S.D. Ga. Apr. 23, 2015), ECF No. 1 (Compl.). Her complaint indicated that she brought the action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, for employment discrimination arising out of her former employment as a security officer. Compl. at 1-3.

The district court referred the matter to a magistrate judge, who granted Evans' motion to proceed *in forma pauperis* (IFP). Pet. App. 56a. Then, before issuing or serving process on any of the named respondents, the magistrate judge "screen[ed]" the case *sua sponte* under 28 U.S.C. § 1915(e)(2)(B)(ii). Pet. App. 57a; *see* 28 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in [IFP] cases."); *id.* § 1915(e)(2)(B)(ii) (district court "shall" dismiss an IFP complaint "at any time" if it "fails to state a claim on which relief may be granted"). On September 9, 2015, the magistrate judge issued a report and recommendation recommending dismissal with prejudice of all of Evans' claims. Pet. App. 56a-67a.

2. After Evans objected to the magistrate judge's report and recommendation, the Lambda Legal Defense and Education Fund asked the district court for

leave to file an *amicus curiae* brief in support of her objections, which the court granted. *Id.* at 55a. At that point, the named respondents were not participating in the case because process had not been served on any of them. After granting Lambda leave to file its brief, the district court reviewed the record *de novo*, including the *amicus* brief, and then concurred with the report and recommendation. *Id.* The court dismissed the case with prejudice and appointed counsel from Lambda to represent Evans on appeal. *Id.*

3. Represented by counsel, Evans appealed the *sua sponte* dismissal of her complaint to the Eleventh Circuit Court of Appeals. On appeal, Evans filed a principal brief and a supplemental brief, and the Equal Employment Opportunity Commission filed a brief in support of Evans. *Id.* at 2a, 7a. Because the named respondents had not been served with process and had not participated in the proceedings below, their counsel informed the court of appeals by letter that they did not intend to file a brief in that court. *See id.* at 2a n.1; Dec. 23, 2015 Letter from Counsel for Ga. Reg'l Hosp., *et al.*, *Evans v. Ga. Reg'l Hosp.*, No. 15-15234 (11th Cir. Dec. 24, 2015).

The court of appeals then heard oral argument from counsel for Evans and counsel for the EEOC as *amicus curiae* in support of Evans. The named respondents did not participate in oral argument. *See* Dec. 15, 2016 docket entry in *Evans v. Ga. Reg'l Hosp.*, No. 15-15234.

4. On March 10, 2017, the court of appeals issued a decision affirming in part, vacating in part, and remanding. *First*, the court held that a claim for "discrimination based on gender nonconformity is actionable," but that "Evan[s'] *pro se* complaint nevertheless failed to plead facts sufficient to create a plausible inference that she suffered discrimination." Pet. App. 9a-10a. The court vacated the portion of the district court's order dismissing Evans' gender nonconformity claim with prejudice and remanded "with instructions to grant Evans leave to amend such claim." *Id.* at 11a. *Second*, the court held that "binding precedent foreclose[d]" any "claim under Title VII . . . alleging that she endured workplace discrimination because of her sexual orientation." *Id.* The court thus affirmed "the portion of the district court's order dismissing Evan[s]'s sexual orientation claim." *Id.* at 16a.

Judge William Pryor filed a concurrence to address arguments by the EEOC and the dissent. *Id.* at 19a-26a. Judge Rosenbaum concurred in part and dissented in part, explaining that she would have permitted Evans to amend her complaint to state a claim for discrimination based on sexual orientation. *Id.* at 27a-54a.

5. The court of appeals denied Evans' petition for rehearing and rehearing *en banc*. *Id.* at 68a-69a.

6. In the proceeding on remand to the district court, Evans has filed an amended complaint. Am. Compl., *Evans v. Ga. Reg'l Hosp.*, No. 4:15-cv-103 (S.D. Ga. Sept. 11, 2017), ECF No. 28 (Am. Compl.). The

amended complaint includes Title VII claims against Georgia Regional Hospital at Savannah, and claims under 42 U.S.C. § 1983 against Lisa Clark in her official capacity and Charles Moss in his "personal capacity." *Id.* at 10. To the best of counsel's knowledge, the amended complaint has not been served on any of the named defendants as of the date of this filing.

7. Evans filed a petition for a writ of certiorari on September 7, 2017. On October 4, 2017, counsel for the named respondents submitted a letter to the Court explaining that the named respondents had not been served with process in the action below, had not appeared or participated at any stage below, and "do not intend to participate in the matter now that it is pending before the Court." Oct. 4, 2017 Letter from Counsel for Ga. Reg'l Hosp., *et al.*, *Evans v. Ga. Reg'l Hosp.*, No. 17-370 (U.S.). Counsel for Evans filed a letter in response on October 10, 2017, and this Court called for a response from the named respondents on October 16, 2017.

DISCUSSION

The named respondents provide this response at the Court's direction. The named respondents take no position on whether this Court should grant the petition for a writ of certiorari.

Having never been served with process, the named respondents have not been subjected to the jurisdiction of any court in this case and are not parties to the case

required to take action in that capacity. *See, e.g.*, *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure. . . ."); *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Moreover, absent service, appearing and participating in the case on the merits would have risked (and still risks) waiving certain defenses otherwise available to the named respondents. *See, e.g.*, *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 996-97 (1st Cir. 1983) (defense of lack of personal jurisdiction waived "by formal submission in a cause, or by submission through conduct" (quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939))); *Stansell v. Revolutionary Armed Forces of Colom.* (*FARC*), 771 F.3d 713, 746 (11th Cir. 2014) (citing *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976) (party's voluntary appearance "waived any potential defects founded on service or venue problems")). Accordingly, the named respondents have not participated in this action in any court in any way, except to inform the court of appeals and this Court that they do not intend to participate. Having never appeared in this case, filed any pleadings or briefing, provided argument, or otherwise participated at any stage of this case, and also unwilling to waive potential defenses in this ongoing litigation, the named respondents do not

intend to participate in the case (for the first time) in this Court.

Absent the usual adversarial process, there may well be unplumbed issues that could pose impediments to deciding the question presented or show that the question is not outcome-determinative in this case. For example, the district court, adopting the magistrate judge's report and recommendation, dismissed Evans' claims against the three individual defendants, explaining that "Title VII permits suits only against a plaintiff's *employer*, not against co-employees or supervisors in their individual capacity." Pet. App. 66a (citing *Bryant v. Dougherty Cty. Sch. Sys.*, 382 F. App'x 914, 916 n.1 (11th Cir. 2010) and *Fulst v. Thompson*, 2009 WL 4153222, at *3-4 (S.D. Ohio Nov. 20, 2009)) (emphasis in original).[1] There may also be a similar issue with respect to the remaining named respondent, Georgia Regional Hospital at Savannah. *See Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375, 1377 (S.D. Ga. 2001) ("Georgia Regional Hospital is not a legal entity capable of being sued. . . .").

[1] Evans did not object to the magistrate judge's dismissal of the individual defendants in her objections to the report and recommendation. *See* Objection to Report & Recommendation, *Evans v. Ga. Reg'l Hosp.*, No. 4:15-cv-103 (S.D. Ga. Oct. 23, 2015), ECF No. 9 (Objection). Nor did she raise the issue on appeal. Appellant's Brief, *Evans v. Ga. Reg'l Hosp.*, No. 15-15234 (Jan. 7, 2016). Correspondingly, her amended complaint filed on remand in the district court has dropped any Title VII claims against those individuals (and has added claims under section 1983 against two of them). *See* Am. Compl. at 8-12.

In light of the Court's request for a response in this case, the named respondents bring these potential issues to the Court's attention. They decline, however, to risk waiving potential defenses for any of the named respondents in this case, part of which is still pending on remand in the district court, by weighing in on the merits of these issues or others.[2]

In submitting this response, the named respondents reserve any and all defenses that may be available to them in this action, including but not limited to any defenses based on a lack of personal jurisdiction and insufficient service of process.

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[2] Notably, the allegations set forth in the amended complaint expose at least one of the individual respondents named in that complaint to potential personal liability for monetary damages. *See* Am. Compl. at 10, 12-13 (suing Charles Moss in his "personal capacity" under section 1983 and seeking money damages).

CONCLUSION

The named respondents take no position on whether this Court should grant the petition for a writ of certiorari. If certiorari is granted, they do not intend to participate in the case.

Respectfully submitted.

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November 9, 2017