

No. 05-770

In the Supreme Court of the United States

EUGENE CAVICCHI, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND
SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's causes of action are barred by res judicata.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

<i>Angel v. Bullington</i> , 330 U.S. 183 (1947)	7
<i>Burlington Northern & Santa Fe Ry. v. White</i> , cert. granted, No. 05-529 (Dec. 5, 2005)	7
<i>Federated Dep't Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981)	7

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 <i>et seq.</i>	2, 3
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	2, 3, 5, 6, 7
Family and Medical Leave Act of 1993, 29 U.S.C. 2601 <i>et seq.</i>	2, 3
Privacy Act of 1974, 5 U.S.C. 552a	3
Rehabilitation Act of 1973, 29 U.S.C. 701 <i>et seq.</i>	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is *re-printed in* 154 Fed. Appx. 189. The opinion of the district court (Pet. App. 3a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2005. The petition for a writ of certiorari was filed on December 12, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Eugene Cavicchi was employed by the Bureau of Customs and Border Protection as a salary grade GS-11 Senior Inspector in Miami, Florida. Pet.

App. 7a. In October 1997, citing illness, petitioner opted to work part-time and, in 1998, he took leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, to care for his mother. Pet. App. 7a-8a. In 1999, the Office of Internal Affairs (IA) initiated an investigation of petitioner based on allegations of extortion, failure to follow verbal orders, insubordination, favoritism, and association with individuals engaged in criminal activity. *Id.* at 8a.

In 2000, petitioner applied for a job as a part-time inspector at Port Canaveral, a downgrade from his GS-11 position. Pet. App. 9a. Two women younger than petitioner were selected to fill the position on a full-time basis. *Ibid.* According to the selecting officer, petitioner was not selected for the position because the open IA investigation precluded petitioner from passing the necessary expanded background check. *Id.* at 38a-39a.

In February 2001, petitioner filed an Equal Employment Opportunity (EEO) complaint challenging his non-selection for the Port Canaveral position. Pet. App. 39a. In March 2001, and again in August 2002, IA investigators met with petitioner. *Ibid.* At the August 2002 interview, petitioner claims that “the agents took his gun, which he kept locked away in a locker, and that this was humiliating and insulting.” *Id.* at 24a. The government stated that the second interview was necessary to “close out” the IA investigation. *Id.* at 25a. Petitioner filed a second EEO complaint regarding the IA investigations. Pet. 8.

2. On August 2, 2001, petitioner filed his first law suit. Pet. App. 5a (*Cavicchi I*). That suit alleged (1) race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; (2) age discrimination in violation of the Age Discrimination

in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*; (3) disability discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; (4) a violation of the FMLA; and (5) retaliation. Pet. App. 39a-40a. On September 3, 2003, the district court entered summary judgment in favor of the government on all of petitioner's claims. *Id.* at 54a-64a.

In a lengthy, unreported opinion, the court of appeals affirmed. Pet. App. 34a-49a. The court held that the district court had properly dismissed petitioner's age, gender, and disability discrimination claims for lack of evidence that the government's stated reason for its hiring decision—the ongoing background investigation—was pretextual. *Id.* at 43a-44a. The court also upheld the district court's rejection of petitioner's related hostile work environment claim because the allegations did not rise to the level of a hostile work environment. *Id.* at 43a n.4. The court further affirmed the dismissal of the retaliation claim on the ground that the IA interview of March 2001 was not an "adverse employment action" within the meaning of Title VII. *Id.* at 46a. Finally, the court affirmed the dismissal of the FMLA claim on the ground that the FMLA does not provide federal employees a private right of action. *Id.* at 47a. Petitioner did not seek further review of the court of appeals' decision.

3. On June 30, 2003, while *Cavicchi I* was still pending in the district court, petitioner filed a second lawsuit against the same defendants named in *Cavicchi I*. Pet. App. 6a (*Cavicchi II*). The complaint raised a claim of retaliation, violations of the Privacy Act of 1974, 5 U.S.C. 552a, and violations of the ADEA. Pet. App. 11a, 27a-29a. After the court of appeals affirmed the district court's dismissal in *Cavicchi I*, the district court entered

summary judgment in favor of the government on all of petitioner's claims in *Cavicchi II*. *Id.* at 3a-33a.

In dismissing petitioner's *Cavicchi II* claims, the district court relied primarily on res judicata principles. Pet. App. 13a-18a. The district court stated that res judicata bars a plaintiff from re-litigating an action where there was a final judgment on the merits, the parties were identical in both suits, and the prior and present causes of action are the same. *Id.* at 13a. The court concluded that the first two requirements were met because "[i]n *Cavicchi I*, the district court entered summary judgment against" petitioner and the "Eleventh Circuit affirmed," and "the parties were identical in both *Cavicchi I* and the instant case." *Id.* at 14a. Accordingly, the court ruled that res judicata barred re-litigation of the claims actually decided in *Cavicchi I*. *Id.* at 15a.

Petitioner's claim in *Cavicchi II* that he was subjected to retaliation at the August 2002 IA interview was not actually resolved in *Cavicchi I*. The district court noted, however, that res judicata not only bars re-litigation of claims that were resolved in earlier litigation; it also bars claims "that could have been raised" in the earlier litigation. Pet. App. 14a (citation omitted). Applying that standard, the court held that petitioner's challenge to the August 2002 interview "should be barred." *Id.* at 17a-18a. The court explained that because petitioner's second IA interview "occurred one month after [petitioner] filed his second amended complaint in *Cavicchi I*, and one full year before the district court's granting summary judgment [in *Cavicchi I*] in September 2003," petitioner could have raised his challenge to the August 2002 interview in *Cavicchi I*. *Ibid.*

The district court went on to reject on the merits petitioner's claim that the August 2002 interview constituted actionable retaliation. Pet. App. 19a-27a. The court concluded that the interview was not an adverse employment action and that petitioner had failed to show that the government's reasons for conducting the IA interview were pre-textual. *Id.* at 25a. Finally, the court rejected petitioner's Privacy Act claim because, *inter alia*, the Privacy Act does not contain a harassment provision. *Id.* at 27a-29a.

4. The court of appeals affirmed in an unreported, per curiam opinion. Pet. App. 1a-2a. The court noted that the "instant case is closely related to a previous suit brought by [petitioner] against the same defendants." *Id.* at 2a. The court further noted that the "district court granted summary judgment in the previous case, and this Court affirmed in an extensive unpublished opinion." *Ibid.* The court then concluded that "many, and possibly all, of the claims brought in the instant suit are barred by *res judicata*." *Ibid.* For the "few claims that may not be barred," the court of appeals affirmed "for substantially the reasons set out by the district court." *Ibid.*

DISCUSSION

Petitioner contends (Pet. 17-24) that certiorari should be granted to resolve a conflict in the circuits on the question whether an internal affairs investigation constitutes an adverse employment action for purposes of stating a retaliation claim under Title VII. That question, however, is not properly presented here.

The Eleventh Circuit addressed the question whether an interview can be an adverse employment action in *Cavicchi I*. There, the court of appeals held

that the IA interview conducted in March 2001 was not an “adverse employment action” within the meaning of Title VII. Pet. App. 46a. Petitioner, however, did not file a petition for a writ of certiorari from the judgment in *Cavicchi I*, and the time for petitioning from that judgment expired long ago.

Instead, petitioner has filed a petition from *Cavicchi II*. In *Cavicchi II*, the court of appeals did not address the question whether an investigation could constitute an adverse employment action for Title VII purposes. Instead, the court of appeals simply held that “many, and possibly all, of the claims brought in the instant suit are barred by *res judicata*,” and that the “few claims that may not be barred by *res judicata*,” are without merit for the reasons stated by the district court. Pet. App. 2a. Because petitioner’s challenge to the August 2000 investigation could have been brought in *Cavicchi I*, it is clearly barred by principles of *res judicata*. *Id.* at 17a-18a. It is not one of the few claims that “may not be barred by *res judicata*.” *Id.* at 2a.

Accordingly, while the court of appeals did not separately describe the claims that it was affirming on *res judicata* grounds, and those that it was affirming on the merits, petitioner’s challenge to the IA investigation clearly falls into the first category. Because the court of appeals correctly applied *res judicata* principles in rejecting petitioner’s challenge to the investigation, the question whether such an investigation constitutes an adverse employment action is not properly presented here.¹

¹ Even if the court of appeals had affirmed the district court’s holding that an investigation does not constitute an adverse employment action, that question would not be properly presented here. In that event, *res judicata* would still operate as an independent

For the same reason, there is no reason to hold this case pending the resolution of *Burlington Northern & Santa Fe Railway v. White*, cert. granted, No. 05-259 (Dec. 5, 2005) (to be argued April 17, 2006). In that case, the Court granted a petition for a writ of certiorari to consider the proper standard for determining what type of conduct by an employer constitutes actionable retaliation under Title VII. Because the decision below depends on the application of res judicata principles and not on what conduct constitutes actionable retaliation, the decision in *Burlington* cannot affect the proper disposition of the petition in this case.

Indeed, petitioner will not be able to rely on any future developments in Title VII law to revive his retaliation claim. The “res judicata consequences of a final” judgment on the merits is not “altered by the fact that the judgment may” have “rested on a legal principle subsequently overruled in another case.” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (citing *Angel v. Bullington*, 330 U.S. 183, 187 (1947)). Thus, regardless of any developments in Title VII law that may arise out of *Burlington Northern*, the *Cavicchi I* ruling operates as a bar on future litigation of petitioner’s retaliation claim.²

ground for affirmance, and petitioner could not benefit from a ruling on whether an investigation constitutes an adverse action.

² The other issues that petitioner seeks to raise in the petition plainly do not warrant review. The court of appeals did not pass on those issues in any detail in its summary per curiam decision. In addition, the issues do not implicate any conflict of authority that would warrant this Court’s review, but instead, involve fact-bound applications of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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