No. 00-760

In the Supreme Court of the United States

ALLEN MCDANIEL, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, compensatory damages are available to a job applicant who was not chosen for a vacant position, when the employer ranked the applicant below at least one other disappointed applicant as part of its selection process, and this ranking was not alleged to be discriminatory.

2. Whether the court of appeals erred in determining that petitioner had presented no relevant evidence regarding the existence of a retaliatory motive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 213 F.3d 193. The final judgment (Pet. App. A16-A17) of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. A petition for rehearing was denied on August 15, 2000 (Pet. App. A14-A15). The petition for a writ of certiorari was filed on November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Joel Arnold, and Bobby Maxwell worked for the Dallas Compliance Division of the Department of the Interior's Minerals Management Service (MMS), and applied for a single vacant position as a GS-14 Supervisory Auditor in the MMS's Oklahoma City office. All three men are white males, and all three were placed on a "best qualified" list for the position and referred to selecting official Gary Johnson, Chief of the Dallas Compliance Division. Pet. App. A4. Johnson interviewed the two candidates on the list who had the highest numerical evaluations. Those candidates were Maxwell and Pam Reiger, a woman of Asian descent. Johnson hired Reiger. *Ibid.*

Petitioner, Arnold, and Maxwell each separately filed a complaint alleging discriminatory selection. The complaints were consolidated for a hearing before an administrative judge of the Equal Employment Opportunity Commission (EEOC). The administrative judge issued a recommended decision finding discrimination on the basis of race, gender, and age. See Pet. App. A4. The MMS adopted the recommended finding of gender discrimination but denied discrimination on the basis of age or race. *Ibid.* The MMS stated that it would remedy the gender discrimination by conducting a new, nondiscriminatory selection process that included Reiger and the three complainants. *Id.* at A4-A5.

Reiger requested and received a transfer, thereby removing herself from the new selection process. Pet. App. A5. With the approval of his superior, Johnson then selected Maxwell, the second-highest ranking candidate for the original vacancy, to replace Reiger. *Id.* at A4-A5 & n.1.

After Maxwell was promoted, two other GS-14 Supervisory Auditors retired. Pet. App. A5. Consistent with an agency-wide downsizing, and after receiving the concurrence of his superior as well as the remaining Supervisory Auditors (including Maxwell), Johnson eliminated the two GS-14 positions instead of hiring successors. *Ibid.*

2. Petitioner, Arnold, and Maxwell brought suit against the MMS, alleging discriminatory promotion on the basis of race and gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioner and Arnold also alleged that elimination of the two GS-14 Supervisory Auditor positions constituted retaliation against them. *Id.* at A5.[*] With respect to the retaliation claims, the district court granted the government's motion for summary judgment, holding that Johnson's elimination of the two GS-14 positions did not constitute an adverse employment action and, in any event, the plaintiffs did not show they would have been selected for either position. See *Id.* at A5. With respect to the race and gender discrimination claims, the district court instructed the jury that if plaintiffs proved discrimination on the basis of race or gender, only Maxwell could recover compensatory damages, because only he could show that he would have obtained the job but for the discrimination. The proof to that effect was that Maxwell had the second-highest numerical ratings and was interviewed in the initial selection process, and was

[*] The plaintiffs also alleged age discrimination in violation of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (29 U.S.C. 621 *et seq.*), but did not pursue this claim at trial.

awarded the GS-14 position after Reiger's transfer. Pet. 6; Pet. App. A5-A6.

The jury returned a verdict in favor of the plaintiffs, finding that both gender and race were, more likely than not, motivating factors in the decision not to select any of the plaintiffs for the Supervisory Auditor position. See Pet. 5. The jury also specifically found that the agency did not prove that it would have made the same employment decision concerning each of the plaintiffs if the unlawful motives of gender and race had not been present. See Pet. 6. The jury awarded Maxwell compensatory damages, which the district court reduced to $300,000 pursuant to the damages cap of 42 U.S.C. 1981a(b)(3)(D). See Pet. App. A6. The district court awarded all plaintiffs costs and attorney's fees. *Id.* at A16.

3. Petitioner and Arnold appealed the district court's grant of summary judgment on their retaliation claims and the district court's ruling that compensatory damages were not available to them. The court of appeals affirmed. Pet. App. A1-A13. Regarding compensatory damages, the court of appeals noted that under 42 U.S.C. 2000e-5(g)(2)(B), damages are not available when the "respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e(g)(2)(B); see Pet. App. A9. Based upon that statutory language and decisions of other federal courts, the court of appeals held that "among multiple job applicants who fail to secure the position because of discrimination, only those who can prove that they would have gotten the position but for the discrimination can recover compensatory damages." *Id.* at A11. Neither petitioner nor Arnold would have been promoted to the GS-14 position because there was only one

open position, and it was undisputed that discrimination did not taint Johnson's selection of Maxwell over both petitioner and Arnold for this position. *Ibid.*

With respect to the retaliation claims, the court of appeals concluded that even if one assumed that eliminating two Supervisory Auditor positions was an adverse employment action against petitioner and Arnold, they had "present[ed] no evidence" to establish a causal link between the action and their protected activity under Title VII, as would be necessary to make out a retaliation claim. Pet. App. A12-A13.

The court of appeals denied a petition for rehearing and rehearing en banc. Pet. App. A14-A15.

ARGUMENT

The fact-specific decision of the court of appeals is consistent with the text of Title VII, and there is no conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. In pertinent part, Title VII prohibits an employer from "fail[ing] or refus[ing] to hire * * * any individual, or otherwise * * * discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2(a)(1); and from discriminating against a job applicant because he or she has opposed an unlawful employment practice or "made a charge, testified, assisted, or participated in any manner" in Title VII proceedings, 42 U.S.C. 2000e-3(a). Those provisions apply to federal employers. See 42 U.S.C. 2000e-16(a) (1994 & Supp. IV 1998); 42 U.S.C. 2000e-16(d).

In 1991, Congress amended Title VII to allow complainants to recover compensatory and punitive damages in addition to the existing remedies of rein-

statement, back pay, front pay, and declaratory and injunctive relief. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(1)). Both compensatory and punitive damages are limited to certain dollar amounts, based upon the size of the employer. 42 U.S.C. 1981a(b)(3). The Civil Rights Act of 1991 also amended Title VII to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). When the "respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor," however, remedies are limited to declaratory relief, injunctive relief, and attorney's fees and costs. Damages may not be awarded. 42 U.S.C. 2000e-5(g)(2)(B).

2. Both the district court and the court of appeals concluded that, absent gender and race discrimination, petitioner would not have been hired for the GS-14 Supervisory Auditor position because he was less qualified than Maxwell, another white male. Pet. App. A11. Petitioner accepts that he would not have been hired over Maxwell. See *ibid.* Nevertheless, petitioner argues that the government may not rely upon Section 2000e-5(g)(2)(B)'s bar to damages because the jury found that Johnson's decision to hire Reiger over petitioner was not motivated by factors other than race and gender. Pet. 11; see Pet. 6 (discussing jury verdict).

As the court of appeals correctly concluded, the jury's rejection of the government's mixed-motive defense with respect to the hiring of Reiger over petitioner, Arnold, and Maxwell did not establish that petitioner would have received the promotion over Maxwell

—it was undisputed that he would not. Nor did the jury's finding resolve the legal question whether petitioner could recover compensatory damages. Pet. App. A11-A12. "[I]t flies in the face of all reason that all three [white men] would have been chosen for only one position" (*id.* at A11), and petitioner does not contest that at least two facts—Johnson's selection of Maxwell to be interviewed during the first hiring process and his selection of Maxwell to assume the vacant GS-14 position after the second hiring process—showed that petitioner would not have received the position if the first hiring decision had been nondiscriminatory.

For similar reasons, there is no merit to petitioner's suggestion that the MMS could remove the taint of its discriminatory selection of Reiger only by "re-creat[ing]," after Reiger's reassignment, the initial hiring process. Pet. 11. Once again, as the court of appeals noted, neither petitioner nor Arnold has ever contended that an unlawful motivation tainted the selection of Maxwell, who had stronger evaluations than either petitioner or Arnold based upon objective criteria. Pet. App. A4, A11. Absent any evidence that the MMS's selection of Maxwell over petitioner was discriminatory, the court of appeals correctly held as a matter of law that the government proved—through the undisputed evidence that there was only one job, for which Maxwell was more qualified than petitioner —that the MMS "would have taken the same action" of denying petitioner the vacant GS-14 "in the absence of" race and gender discrimination. 42 U.S.C. 2000e-5(g)(2)(B).

Although petitioner does not suggest that the court of appeals' decision on the compensatory damages issue conflicts with any decision of this Court or of another court of appeals, he does allege inconsistency with

decisions issued by the EEOC. Pet. 13. Only one of the three EEOC decisions on which petitioner relies (*Harris* v. *Glickman*, Appeal No. 01966746, 1998 WL 897680 (EEOC Dec. 11, 1998)) analyzes the question whether compensatory damages are available to multiple employees who are denied a single position in a discriminatory selection process. See also *Miller* v. *Babbitt*, Request No. 05980293, 1999 WL 716389, *4 (EEOC Sept. 2, 1999) (relying upon *Harris*). As the court of appeals noted (Pet. App. A8 n.3), the EEOC held in *Harris* that compensatory damages were available to a non-selected employee only until the date on which an administrative judge found, using nondiscriminatory criteria, that another employee was better qualified for the position at issue. *Harris*, 1998 WL 897680 at *3. In this case, Johnson chose Maxwell to be interviewed in the initial selection process based upon Maxwell's superior numerical evaluations, and the ranking of Maxwell over petitioner was confirmed in the second hiring process. Pet. App. A4. Johnson's nondiscriminatory ranking of Maxwell over petitioner renders the unavailability of damages in this case entirely consistent with the limited damages award in *Harris*. In both cases, damages were unavailable after there was an untainted determination that the party claiming discrimination would not have received the position.

3. Finally, petitioner challenges (Pet. 14-18) the court of appeals' ruling that he and Arnold presented no evidence supporting a causal link between the protected activity of petitioner and Arnold and the elimination of two GS-14 Supervisory Auditor positions. Pet. App. A13. Petitioner does not contend that his claim involves any unsettled question of law, but rather that the courts below improperly evaluated the evi-

dence under Fed. R. Civ. P. 56. See Pet. 17 (citing *Reeves* v. *Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097, 2110 (2000)). Petitioner, moreover, does not dispute the key facts cited by the court of appeals: Johnson's decision to eliminate the two positions was consistent with an agency-wide downsizing and was made with the concurrence of Johnson's superiors and the remaining Supervisory Auditors. See Pet. App. A5, A12-A13. Nor does petitioner support his arguments that Johnson failed to follow MMS policies and that the court of appeals improperly "discredit[ed] or * * * ignore[d]" evidence submitted by petitioner. Pet. 17. In any event, none of those fact-bound questions has significance beyond this case and none warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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