5/6/19

No. 18-1409

In The
Supreme Court of the United States

SAIED EMAMI,

Petitioner,

V.

JIM BRIDENSTINE, Administrator of the National Aeronautics and Space Administration (NASA),

and KENNETH ROCK, Individually; UNITED STATES OF AMERICA

Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions arise from employment discrimination and retaliation under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e § et seq. ("Title VII"), concerning several errors of law that compounded and perpetuated throughout the pleadings and eventually impacting the trial that culminated to "procedural due process violation" of the petitioner's 5th Amendment. Aside from the Respondant's three counsels and magistrate judge, two other district judges whose legal findings and decisions were vital in the petitioner's case, contributed to the petitioner case. A senior district judge, who had reviewed the magistrate judge's findings and legal contentions, wrote an "Opinion" on March 10, 2017 and a corrected legal findings and legal contentions of the magistrate judge. Additionally, the senior judge wrote a detailed "AMENDED RULE 16(b) SCHEDULING ORDER" on April 10, 2017. The other district judge was a trial judge who appointed to preside over the trial just a month before the trial date on August 1, 2017. Trial started about two years and six months after the petitioner's complaint was filed in the district court.

Whether the Respondent's counsel that failed to comply with the District Court Scheduling Order necessarily violate procedural due process rights of the petitioner such that the petitioner is barred from

presenting substantive admissible direct material evidences and calling witnesses to show not only that the Respondent is dissembling in the pretext stage of trial, but also the proposing official to remove the petitioner from Federal Service was acting in concert with two others in a calculated scheme of the invidious discrimination having legal elements of conspiracy under 42 U.S. § 1985(3).

Whether the magistrate judge that effectively vacated the reviewing District Court judge's Scheduling Order, by denying the petitioner's imposition of sanctions pursuant to petitioner motion in accords to Rule 16(f) and Rule 37(b)(2)(A)(i)-(vii), necessarily violates the petitioner's procedural due process to the detriment of the petitioner case.

Whether the Magistrate judge that denies the effectuation of the District Court Scheduling Order, necessarily engages in abuse of discretion that leads in violation of the petitioner's procedural due process rights causing the petitioner not to be able to introduce admissible probative material evidence that also include sham affidavit during trial that directly contradicts the employer's legitimate assertions and shifting narratives in justifying employee termination.

Whether the District Court's trial judge that denies the petitioner motion for the effectuation and implementation of the District Court Scheduling

Order in accords with the aforementioned Opinion of the senior District Judge for introducing evidence contrary to the Respondent's claims and defenses, necessarily prevents and prejudices the petitioner of a fair hearing during petitioner's evidentiary presentation in trial before jury, thus violating the petitioner procedural due process.

Whether the trail judge that reduces the trial days from the requested 5 days, which was previously approved verbally by District Court, to 2 days, necessarily interfered with petitioner's procedural due process by indirectly pressuring the petitioner to rush through lots of scientific technical nuances embedded in the evidentiary proof.

Whether the trial judge that dismisses the petitioner's internationally recognized expert witness from testify, necessarily substituted his own technical competency of technical issues with that of technical expert witness and, thus, adversely interfered with the petitioner's procedural due process in the presentation of material facts in his case before jury.

Whether the trial judge that grants Respondent's Rule 50(a) motion as matter law that a reasonable jury would not have a legally sufficient basis to find for the petitioner in his title VII discrimination and retaliation case, necessarily needs to explain or memorialize his mental process with sufficient reasoning as to how he evaluated tier of facts and

arrived in reaching his conclusion to grant Respondent's 50(a) motion to enable to petitioner to accurately appeal trial judge mistake(s).

Whether the trial judge that discards the aforementioned Opinion and Order of senior judge specifying that the petitioner also have a retaliation count for the trial, necessarily harbors an improper view or misconception of the appropriate legal standard by avoiding to mention in his final order "what happened to petitioner's retaliation count", and, thus, trial judge violated petitioner's procedural due process to administer a fair unbiased trial.

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RULES

Dr. Saied Emami respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION AND ORDERS BELOW

The following describes the chain of events in the descending order. The February 5, 2019 Order of the U.S. Court of Appeals for the Fourth Circuit denying petitioner's Petition for Rehearing (Pet. APP. A95) that proceeded from appellant's Petition for Rehearing (Pet. App. A143). The November 19, 2018 unpublished Opinion (Pet. App. A1) and dismissal Judgment (Pet App. A3) of the U.S. Court of Appeals for the Fourth Circuit that proceeded from appellant's Informal Brief (Pet. App. A96). The Opinion (Pet. App. A4) and Order (Pet. App. A10) of Trial Judge of the United States District Court for the Eastern District of Virginia (Richmond Division) denying the Petitioner/Plaintiff's motion on June 19, 2018. The March 10, 2017 Opinion, and April 10, 2017, Order of the honorable Chief Judge of the United States District Court for the Eastern District Virginia, Norfolk Division (Pet. App. A11 and Pet. App. A42), Proceeding from Report and Recommendation of the Magistrate Judge of the United States District Court for the Eastern District of Virginia, Norfolk Division, on December 20, 2016 (Pet. App. A45 and Pet. App. 69).

JURISDICTION

This Court has jurisdiction because Petitioner seeks review of a final order of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254 and Rules 12 and 13 of the *Rules of the Supreme Court of the United States* and the petition is timely filed within 90 days of the February 5, 2019 Circuit's Court Order on Rehearing.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2000e § et seq. ("Title VII").

STATEMENT OF THE CASE

1. Facts

The facts presented below are base on the pleadings, proof as presented in depositions, answers to interrogatories, admissions, affidavits, pleadings, admitted evidence, as well as documents that all are part of the record in the district court.

On June 11, 2012 the Petitioner objected to his direct supervisor, Rock, for the rating neutral rating of "fully successful" on his yearly performance close-out for 2011-2012. The Petitioner requested his supervisor to reconsider his performance rating during the 2011-2012 performance cycle. Rock refused. The Petitioner conveyed to Rock that the his career had suffered because of his discriminatory practices for many year while he had promoted other employees, who are outside the Petitioner's protected class in the branch, with the different promotion standard and all most of them had promoted either long ago, while the Petitioner was still GS-13 after so many years with neutral rating of fully successful.

On July 12, 2012, the Petitioner sent, via the Email, a letter of discrimination complaint to Rock and Smith who is representative of the Office of Human Capital Management (OHCM). Part of the petitioner's letter to Rock and Smith, reads as follows:

"However, the laws of Equal Employment Opportunity (EEO) protecting an individual could be violated when the foregoing promotion standards/methods are used selectively to promote the interest of all employees in the branch while at the same time excluding another employee from the same standard of promotion. The exclusion could take place either consciously in an unnoticeable manner by ignoring the contribution, and failing to recognize the excluded individual year after year. As it is in my case, if a branch supervisor makes an arbitrary, and subjective decision not to signify an employee's achievements, the employee's career progression can suffer for many years to come."

On August 1, 2012, the Petitioner sent the same letter of discrimination complaint's letter to the Smith representative of OHCM, and also forwarded the letter to Bynum who was representative of the Office of Equal Opportunity Program (OEOP). The Petitiner requested 2nd level review of his discrimination complaint. The petitioner stated to Smith that:

"I request to submit my plea for performance reconsideration' to proceed for 2nd level of review. Because I have shared my past concerns to the Bynum in the Office of Equal Opportunity Program (OEOP) in the past, I am including her in my e-mail for her awareness."

On July 19, 2012, Rock assigned the petitioner a Performance Plan for the 2012-2013 Period. Under the Critical Element #1 in the petitioner's Performance Plan, Rock required the following from the Petitioner:

"Support Research in the Isolator Dynamics Research Lab (IDRL) to obtain a very highly resolved and highly accurate characterization of the isolator flow-field (both temporal and mean)"

Petitioner objected to Rock for assigning him a task that would be impossible to deliver data from a lab that had been under budgeted and under construction since 2010, and the lab was suffering from problems that included operational and functionality of test apparatus (i.e. flawed design). Problems inherent with assembly of various test sections, operational, and test apparatus in the Lab were never part of petitioner's responsibility throughout the project. Petitioner drafted a letter and sent it via email to Rock on July 19, 2012 and requested to attach it to his Performance Plan for 2012-2013. In his email, the Petitioner wrote in part that:

"I do not desire to set myself to fail, I do not desire to sign your proposed plan." and "further I will be working in an environment where 'ownership of processes' is not under my control"

The same day on July 19, 2012, the Petitioner requested verbally from Rock to set up a mediation meeting with his supervisor, Damadar Ambur, Deputy Director of the Research Directorate (RD) in order the Petitioner raises his concerns. Rock ignored the petitioner request. At that time, the Petitioner conveyed to his supervisor that he would do everything within realm of his capability to prepare all measuring devices and installing all of sensors whenever the facility would be ready for actual research.

It is notable to mention that Ambur RD Deputy Director served in capacity of the Decision Official to to remove the Petitioner's from the Federal Service.

After the Petitioner was terminated, about a year and 9 Months after July 19, 2012, during the sworn Deposition of Ambur on April 11, 2014, as Decision official he made reference back a discussion he had with Rock as it related to Petitioner's Performance Plan during 2012-2013. The following testimony was recorded:

Q. And you said as a branch head Mr. Rock would give you periodic feedback on the employees under his supervision. At what point did [Kenneth E. Rock] discuss with you any issues with [Dr.] Emami's performance? When did [Kenneth E. Rock] first discuss with you any kind of performance issues with you?

A. Performance issues, I think the first time [Kenneth E. Rock] talked with me was along the way where, you know, [Kenneth E. Rock] can and mentioned - - it must have been in the August [2012] kind of time frame that he mentioned that, there are issues pertaining to his not fulfilling what is actually capture in the performance plan, and [Kenneth E. Rock] asked me for my advice as what – you know, what I should be doing because I am there to provide the, guidance and advisement because I'm the mentor for the branch heads. In that context I suggested to [Kenneth E. Rock] to talk to OHMC and OCC and seek their advice as to what the next steps are to be.

Q. For the record could your tell the court reporter what those acronyms stand for.

A. The Office of Human Resources Management and the second once is the Office of the Chief Counsel.

Q. Could you tell us the nature of some of those discussions that Mr. Rock had with you concerning Mr. Emami's performance?

A. No. I think I Just - - [Kenneth E. Rock] asked me and normally I don't really go too deep with those discussions. I advise them, you know, to go to Office

of Human Resources and the Office of the Chief Counsel for that guidance.

Q. Okay. So [Kenneth E. Rock] didn't really detail on any specific performance problem with you at that time?

A. No, not that I can recall.

On July 28, 2016, Jeffrey Balla addressed problems of the IDRL facility in his sworn deposition testimony Mr. Balla who was determined to be similarly situated[1] with respect with the Petitioner (Pet. App. A36)-A41), stated that:

Q. So a couple of questions about what you were doing in 2012, 2013: Did you -- did you provide

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[1] Shared Similarities between Emami, Middleton, Balla, Witte, and Baurle include the same job title "Aerospace Engineer"; members of the same Research Directorate (RD); assigned to the same newly built lab under construction known as "Isolator Dynamics Research lab (IDRL)"; subject to the same LMS-OP-7831 standard set forth by the Research Directorate requiring each researcher must have a Research Plan and a Test Plan; have to follow the same final research publication standard; reported to the same Branch Manager Rock, and the same Decision Official Damador Ambur.

written documentation of any kind of preliminary data analysis to your supervisor in 2012, 2013?

A. Since there was not data, there was no data to analyze; and therefore, there was no documentation required.

Q. The IDRL had problems, correct?

A. Yeah, had a lot of problems.

Q. Could somebody create scientific-level data during that time period?

A. No.

Diego Capriotti's sworn deposition testimony on July 28, 2016, agrees with Jeffrey Balla's testimony.

Q. Has the IDRL project been a success?

A. Absolutely not. It's languished horribly. We're hoping that maybe by the end of this calendar year, we will get some reasonable data out of it.

The above testimonies reveal that Rock developed a premeditated scheme by first assigning the Petitioner an impossible task, namely to "produce

highly resolved and highly accurate characterization of the isolator flow-field", during 2012-2013 performance plan on July 19, 2012, and then Rock immediately reached Deputy Director Ambur, to secure or manufacture consent from his superior to contact Office of Chief Counsel (OCC) and Office Human Capital Management in order to set in motion the removal of the Petitioner from Federal Service starting on August 2012, right after assigning the Petitioner an impossible task.

On January 18, 2013, citing unacceptable performance. Rock and his administrative assistant placed the Petitiner on a Performance Improvement Plan ("PIP"), requiring the Petitioner to submit quarterly reports on certain aspects of his work. The Pettioner submitted quarterly reports on February 15, 2013, and February 28, 2013. On March 8, 2013, the Plaintiff also gave Rock further submissions in an effort to comply with the PIP. On April 12, 2013, claiming that the Petitoner's work under the PIP was unacceptable. Rock issued a Notice of Proposed Removal to the Petitiner. On June 21, 2013, Deputy

Director Ambur affirmed the Petitioner's termination.

Ambur testified during his sworn deposition that most of element Rock had demanded from the Petitioner in the PIP would be satisfied by a well-written Test Plan. Ambur said that he was unaware that the Petitioner wrote a Test Plan. Ambur further testified that Rock should have provided the Petitioner's Test Plan to him "if it was there for consideration to assess performance during PIP period.

Documented evidence shows that Rock and Rock's administrative assistant, Fereleman, and human resource representative, Smith were aware and in possession of the petitioner test plan and worked in concert together knowingly and falsely claiming the Petitioner did not produce Test Plan for Ambur evaluation during PIP.

2. PROCEDURAL HISTORY

The Petitioner filed his Complaint on January 23, 2015 and Amended Complaint on April 1, 2015. The Respondent filed its 1st Motion and Memorandum

for Summary Judgment on June 15, 2015. Petitioner filed his Motion and Memorandum in opposition on July 20, 2015. Honorable Chief Judge District Court filed a Memorandum Order denying the Respondent's motion for summary Judgment on January 29, 2016. Chief Judge in her Memorandum stated that the case needs "the technical experts testimony on the 'highly specialized, technical, and scientific nature'" Further Chief Judge in her Memorandum Order emphasized that plaintiff has also a Title VII retaliation case.

The Petitioner searched and hired two technical experts, one who had prior engineering managerial skill with NASA, and the other was a renown Physics' Researcher with the Jefferson Lab and Professor with Hampton University. Each of them wrote reports and submitted to the District Court.

On January 15, 2016, It was also about a year after the Petitioner Complaint against the Respondent Rock individually, that Rock, individually never answered the Petitioner's complaint. On February 8, 2016, the Petitioner requested and filed for entry of default as to Rock, individually. On February 9,

2016, the Respondent, Agency, filed Motion and Memorandum for extension of time to file answer. Finally, on March 30, 2016, the District Court granted the Agency Motion to dismiss case against Rock, individually for lack of jurisdiction and court found the alleged conduct by the Respondent Rock, individually, occurred within the scope of his employment for NASA and United States substituted for the Respondent Rock. The foregoing judgment was made without ever the petitioner has the benefit of discovery in order to show the culpability of Rock if he had illegal intention to use levelers of law for purpose of securing illegal results.

Initial jury trial scheduled was set to commence on November 1, 2016.

However, prior to initial jury trial date, the Petitioner filed Second Motion and Memorandum in support to Compel *Answer and Production of Documents* on September 21, 2016. On October 5, 2016, Respondent responded in opposition to second Motion to compel.

Respondent filed its second Motion for Summary Judgment and Memorandum in Support on September 29, 2016. Petitioner responded on October 12, 2016. The Respondant replied on October 17, 2016.

In addition, Respondent filed Motion to Exclude Plaintiff's Expert Witnesses and Memorandum in Support on October 6, 2016. Plaintiff Responded on October 20, 2016. The Respondent replied on October 26, 2016.

Further, the Respondent filed Motion in Limine and Memorandum in Support on October 12, 2016. Plaintiff Responded on October 25, 2016. The Respondent replied on October 31, 2016.

Because of sudden foregoing Motions and Memorandums in support by the Respondent, the Jury trial set to commence on November 1, 2016, was postpone.

In light of sudden initiation of various rush of Motions by Respondent in close proximity of time to each other because of significant nature of the raised in the Respondent's Motions, the Magistrate Judge

directed the Petitioner's 2nd Motion to Compel *Answer and Production of Documents* as moot.

The Court referred the above motions to Magistrate Judge to provide Report and Recommendation to the Chief Judge of the District Court. On December 20, 2016, Magistrate Judge provided the Chief Judge of the District Court two briefs – one a Report and Recommendation on the Respondent's 2nd Summary Judgment Motion and Motion in Limine (Pet. App. A69-A94), and the other Report and Recommendations on Motion to Exclude the Petitioner's Technical Experts (Pet. AP. A45-A68).

The District Court Chief Judge wrote an OPINION (Pet. APP. Pet. A11-A41) on March 10, 2017, and an AMENDED 16(b) SCHEDULE ORDER (Pet. APP. A42-A44) on April 6, 2017 and filed April 10, 2017. District Court Chief Judge OPINION stated that Petitioner has a retaliation case, and a discrimination case based on disparate treatment with four similarly situated comparators.

The Petitioner implemented the District Court Chief Judge's Scheduling 16(b) Order point by point and

wrote several Emails to Respondent's counsel before he travels to the office of counsel in Norfolk Virginia. The following is the Petitioner's last Email to Respondent's counsel on June 6, 2017.

"Civil Action No.: 2:15-cv-00034 - re. (12(A)(3) and 26(A)(3))

From: kaandm <kaandm@aol.com>

To:Virginia.vanvalkenburg <virginia.vanvalkenburg@usdoj.gov>

Cc: kaandm <kaandm@aol.com>

Thu, Jul 06, 2017 01:20 pm Hide Details

Ms. Van Valkenburg,

On July 7. 2017, when We are planning to discuss 12(A)(3) and related 26(A)(3) in accords with the Court Order, I am planning to bring you a USB computer drive with all of my proposed pretrial exhibits on It in PDF format for the stipulation and your objections (FRE). I will also bring you a tabulated list (tables) that would briefly describe the each PDF file on the USB computer drive for your easy reference and entering your stipulation choice next to the file description (i.e, objection).

I can stay there as long as you wish and we go through your and my pretrial exhibits. Another

alternative is that I leave the USB Drive and table for you to go through at your own time of choosing. If you choose the latter, you can copy, scan and send me your stipulation/objections through emails to me later on.

Please If you don't mind, I would like also to have PDF files of your trial exhibits either on readable uncryptic CD or USB drive with a table for my objections.

Regards.

Saied Emami (plaintiff - pro, se)"

The Petitioner traveled to the Respondent's counsel office on July 7, 2017 in accords with the instructions specified in 16(b) scheduling order. The Respondent baldly failed to comply and refused to engage in reviewing the pretrial disclosure required by Rule 26(a)(3), preparing stipulations, and marking the exhibits to be included in the final pretrial order outlined in paragraph 3 of the 16(b) Scheduling Order. The Petitioner was in the Respondent's counsel office about 25 minutes. In accords with his foregoing email, and before the

Petitioner leaves the counsel office, he offered his USB computer drive to any one of the three respondent's counsels who were present in the meeting. Stored on the drive, were the Petitioner's the pretrial disclosures and a table describing each of the Petitioner's pretrial disclosure for the Respondent's objection and stipulation. Respondent's counsels ignored the Petitioner's offer. Moreover, just before the Petitioner leaving the counsel office, he requested that the lead counsel for the Respondent to endorse and date a paper copy of the Petitioner's pretrial disclosure that shows the description of each document on the USB Computer Drive with a table for the Respondent's counsel stipulation and objection.

In her Amended Rule 16(b) Scheduling Order, The honorable Chief Judge of District Court set the trial date once more to commence on August 1, 2017 – about 9 Months later from the November 1, 2016.

On July 14, 2017, the Petitioner moved and filed a Motion in the Clerk of District Court for imposition of sanction pursuant to Rule 16(f) as specified by the Chief Judge Amended 16(b) Scheduling Order (Pet.

App. A44). The Petitioner in his motion for imposition of sanction stated in part the following verbatim excerpt from his Motion and Memorandum: "If the court does not interfere and stop the [Respondent] defendant from designing it own pretrial final conference disclosure, the [Petitioner] plaintiff case would be nothing but a 'Swiss Cheese' ... [Petitioner] Plaintiff is well knowledge[able] that during the trial, in addition to retaliation (i.e., time proximity, and several EEO contacts) he has to prove pretext, satisfying employer legitimated job expectations, and the plaintiff is similarly situated with respect to others individuals in the lab. Therefore, the plaintiff desperately needs his own recent version of the stipulated pretrial disclosure exhibits and witnesses incorporated in the proposed final draft."

On July 14, 2017 during final pretrial conference that did not last more than an hour and a half, Magistrate Judge ignored to impose Rule 16(f) sanctions on the Respondent and order the Respondent to comply with OPINION and

AMEMDED RULE 16(b) or implement any of the Rule 37(b)(2)(A)(ii)-(vii).

Magistrate Judge asked for paper copies of all evidences. The Petitioner offered his USB computer with all of the Petitioner's pretrial disclosure on it. Magistrate Judge's chamber was not equipped with any computer or printer. Magistrate Judge pulled out an outdated Final Pretrial Order in which the Petitioner objected and did not sign. The date on page 48 of the outdated Final Pretrial Order was "This 20th day of October, 2016" that Magistrate Judge scratched off and instead wrote "July 14, 2017". On Page 40 of the outdated Final Pretrial Order was stated that "WE ASK FOR THIS:" was the name of Adam Harrison who served as counsel to the plaintiff only up to the latter part of October 2016. On July 14, 2017, Plaintiff was his own "pro se" counsel. The use of an outdated Final Pretrial Order stating on it "20th day of October, 2016" is also nonsensical because, as state in detail above, the Respondent filed several Motions including its 2nd Motion for Summary Judgment on September 29, 2016.

Additionally, On July 18, 2017, the Petitioner also filed a pleading and appealed to the trial judge, correcting the Magistrate Judge abuse of discretion and effectuating the honorable Chief Judge Amended Rule 16(b) Scheduling Order (Pet. App. 42). Trial Judge was assigned about a Month prior to trial date to preside over the Petitioner case,

Excerpt from August 1, 2017 trial transcript[2], and from the Trial Judge's Opinion and Order on June

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[2] THE COURT: Wait a second. Why are we concerned with Middleton?
DR. EMAMI: Because the case here, there are five people assigned, Your Honor, to the facility. One of – the characteristic of facility is common to all of the five researchers.

THE COURT: Did they do the same kind of research?

DR. EMAMI: Yes.

THE COURT: They had five people doing the same experiment?

DR. EMAMI: Similar type of work. One was using laser. I was using –

THE COURT: What was Middleton doing?

DR. EMAMI: Middleton had static pressure measurement.

THE COURT: He had a what?

DR. EMAMI: Using static pressure.

THE COURT: Static pressure measurement?

THE COURT: What did you do?

DR. EMAMI: I was using high frequency pressure measurement then with the sensor. Mr. Jeff Balla has five

19, 2018 (Pet. APP. A4) and (Pet. App. A10) reveal that the Trial judge was unaware of the appropriate legal standard present in the Petitioner case written and had not the Opinion of the honorable Chief Judge of the District Court on March 10, 2017 (Pet. APP. A11). Trial Judge's questions from plaintiff witness and relying on the Defendant for proper answers[3] during trial were Not reflective that the

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experiments, supposedly be able to -- supposedly work in the facility to using particular velocity symmetry and using the lighter, kind of different technique.

THE COURT: Are you going to ask this gentleman to compare your work to each one of those five people?

DR. EMAMI: Well, that's the actual key. The key is

Mr. Jeff Balla didn't do anything in the facility. Neither has the test planner, neither has the research planner. That was the key.

THE COURT: Let me just ask you: Are they all comparable to you?

DR. EMAMI: Yes. Of course.

[3] THE COURT: You all have any objection to that?

The defense?

MS. VAN VALKENBURG: We do not believe they are comparable.

THE COURT: Well, okay. Doesn't he have to lay a foundation?

MS. VAN VALKENBURG: Yes, Your Honor.

THE COURT: What foundation does he have to lay? MS. VAN VALKENBURG: Well, he has to show that they are similar in all relevant respects. He has to show that these people have the same supervisor.

THE COURT: Has he shown that?

Trial Judge was well versed in the basics elements of discrimination law set forth by this Court in the *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).* Moreover, the Trial Judge in his June 19, 2018 Opinion (Pet. APP. A4) did not address what happened to the fate of the Petitioner's "retaliation count" as was addressed by the Chief Judge Opinion on March 10, 2017 (Pet. APP. A19 and A23-A34).

A day or two before July 25, 2017, the Petitioner received an unsolicited a conference call from the the the Respondent's Counsel and the Trial Judge on phone. Trial Judge expressed to the Petitioner that he is planning to cut short the Petitioner's trial days from 5 days to two days. On July 25, 2017, the Petitioner immediately filed a Motion and Memorandum for Procedural Protection for 5 Trial Days, wherein the Petitioner prayed for five (5) trial days to present his case, that by then involved two and a half years of history. Further, on July 31, 2017, evening before the trial, the Petitioner

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MS. VAN VALKENBURG: No, Your Honor.

THE COURT: Then why aren't you objecting?

MS. VAN VALKENBURG: Your Honor, I had earlier – I had filed a motion and the judge had determined that it's a **jury issue as to whether they are comparators or not.**

received an email from the trial Judge's chambers basically informing Petitioner that the Court was limiting the number of days that the Petitioner would have to present his case (Pet. APP. A132-A133).

The Petitioner used the Chief Judge Opinion as template to establish and prove his case in the trial. The evening before the trial, the Petitioner wrote and sent to the Trial Judge via the Email a list of 68 questions that the Petitioner were planning to answer while testifying on his own behalf during the trial. The answer to each question was in support of his assertion claims and defenses to satisfy and comport mainly with the Prima Facie stage of his discrimination and retaliation calims. *id. 411 U.S. 792.* In his Email to the Trial Judge, the Petitioner made reference to 48 Trial Exhibits in the Respondent's Final Pretrial Exhibits in support his testimonies. (i.e. ironically dubbed Undisputed Exhibits in Final Pretrial Order in which the petitioner objected on July 14, 2017 during the final pretrial conference). The Petitioner also selected each exhibit with the aim quashing the defendant

post hoc rationalizations and objections during the trial. The Petitioner evidence of his Email to the Trial Judge was filed with the District Court Clerk. During the trial the Trial Judge substituted his own technical competence for that of Dr. Goity who is a Physics Professor and a renown Researcher with Jefferson Lab claiming cumulative testimony in accords with FRE 403. Considering that the Petitioner was removed from his Federal Position because of alleged "Unacceptable Performance" and Chief Judge emphasized in her response to the Respondent's first Summary Judgment the requirement for Technical Experts, the Trial Judge prejudiced the Petitioner Procedural due process of a fair hearing.

On August 2, 2017, after a chaotic display of showmanship by the Respondent, with the help of the Trial Judge who was not well versed with elements of the discrimination and retaliation, the trial Judge dismiss the jury and grant the Respondent 50(a) Motion.

The Petitioner was intended before to Appeal his case to file for Rule 59(e) with the District Court,

and toll the time for Appeal. Unfortunately, the Petitioner missed the Appeal period by one day and the Appeal Rules did not allow the Petitioner to toll the time. The Petitioner was under the impression that he would have extra 3 days because he received his mails and orders from District Court by Mail Rule 5(b)(2)(C). The forgoing rule did not apply to 59(e). On September 1, 2017, the Petitioner exercised diligence and immediately filed a Motion to Alter Judgment or Amend Judgment and attached all Exhibits that the Petitioner was intended to introduce under April 10, 2017 of the Chief Judge Order that neither the Respondent nor Magistrate Judge respected and adhered.

On June 19, 2018, about 9 Months later, the Trial Judge John Gibney issued an Opinion (Pet. App. A4) and an Order (Pet. APP. A10) denying the Petitioner Motion to Alter or Amend Judgment for New Trial.

The Petitioner appealed the June 19, 2018 of the District Court Opinion and Order to the Court of Appeal for the Fourth Circuit on time with an Informal Brief (Pet. App. A96). The Court of Appeal

for the Fourth Circuit issued a Dismissal (Pet. APP. A1) and an Order (Pet. APP. A3).

The Petitioner narrowed the issues and filed his Petition for Rehearing (Pet App. A143) on time on January 3, 2019 with the Court of Appeal for the Fourth Circuit denied the Petitioner's Petition (Pet. APP. A95).

REASONS FOR GRANTING THE PETITION

1. Review by This Court is Necessary to Correct the Injustice Caused by the Counsel for the Respondent, Who is Employed under the Power and Majesty of the Federal Government, Failed to Comply With the Chief Judge of the District Court Order (Pet. APP. A42) that would Benefitted the Petitioner to Present Evidences of Pretexts, Direct Evidence of Invidious Discrimination and Sham Affidavit in his Trial, Resulting Violation of the Petitioner Procedural Due Process.

The Rule 1 of Federal Civil Procedure in part states that the procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding," and this Supreme Court's approach to Title VII in McDonnell Douglas and its progeny stated that to offer a prima facie case of discrimination under the indirect method, the plaintiff's burden is "not onerous." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 253 (1981).

Agency Bad Faith: The Petitioner filed his title VII complaint against the Agency and the Rock, individually on January 23, 2015. Rock never answered the complaint against him until on January 15, 2016 the Petitioner was Ordered to show cause by the Chief Judge why court should not dismiss the action against Rock. On February 8, 2016, the Petitioner made request for entry of default as to Rock. On February 9, 2016 the Respondent Agency decides to file Motion for Extension Time to Answer. On February 10, 2016, the Court lifts the Clerk's entry of default. On March 30, 2016, Respondent Complaint against Rock dismissed for lack of jurisdiction. The Court finds the alleged conduct by the Defendant Rock occurred within the scope of his employment for NASA and the Westfall Act certification is proper.

It is over 50 years that Organization and Agency that Respondent' Counsels work for have experience with Title IIV. It is contrary to Rule 1 and smooth litigation of title IIV to isolate and insulate the Proposing Official, in this case Rock from answering

his complaint for over one year, and Defendant Agency suddenly to interfering to claim qualified immunity for Rock. The forgoing is reflective of a strategy to exhaust not only resources of the Petitioner, but also Respondent/ Defendant look forward that the Petitioner/Plaintiff would eventually give up to pursue his case.

In this case, the trial was initially set to commence on November 1, 2106. The Respondent suddenly introduces Motion to exclude Petitioner Expert witnesses, Motion in Limine, and Motion for 2nd Summary Judgment comprised of different narrative than 1st summary Judgment about two years later. At the same period, the Petitioner/Plaintiff has a second Motion pending with the Court to Compel *Answer and Production of Documents.*

The honorable Chief Judge of District Court, who has scientific and technical background, finally addresses the Respondent various Motions in a Opinion and an Order. Then the Respondent fails to obey scheduling order and create a post hoc rationalization by concocting a plausible story that the Petitioner/Plaintiff demanded to reset the discovery. Evidence filed with the Court suggests contrary to what the Respondent/defendant were claiming. Further, the Defendant waived to object to Magistrate Judge finding excluding the Plaintiff technical Experts. Because the Defendant waived to object to the Plaintiff technical experts, Chief Judge who has scientific technical background did not review the Defendant Motion. However, later on, on July 14, 2017, during Pretrial Final Conference, Magistrate Judge decided to eliminate Professor

Goity as cumulative. Considering that the Plaintiff removed from his Federal Position because of the alleged claim of "unacceptable performance", the Court must be very eager to hear from Professor Goity. If Plaintiff must eliminate one of the expert witnesses, Plaintiff would not eliminate the Professor Goity who is a renown scientist with Jefferson Lab who evaluates many Proposals for National Science Foundation. It is also questionable and Plaintiff objected that why none of the Plaintiff Expert's Reports written in favor of the Plaintiff did not find its way to the trial Exhibits.

2. If the Application of Law is the same for Each Party, Review by This Court is Necessary to Correct the Injustice Caused by Magistrate Judge for Abuse Of Discretion, that Caused Violation of the Plaintiff Procedural Due Process.

The Amended Rule 16(b) scheduling Order of the Chief Judge of the District Court on April 10, 2017 was not obeyed by the defendant and Magistrate Judge failed to impose sanction on the Defendant that was Magistrate abuse of discretion. The Court must consider the following factors: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct committed by its attorney, recognizing that Courts seldom dismiss claims against blameless clients; (3) prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar

conduct in the future; and (6) the public interest. *United Sates V. Shaffer Equip. Co., 11 F.3d 450, 462-63 (4th Cir. 1993).*

The foregoing numerated items the "prejudice to victim" is the most significant.

The petitioner must show pretext during the trial. To meet this burden, the Petitioner must "identify such weaknesses, implausibilities, inconsistencies, or contradictions" in the Agency asserted reason "that a reasonable person could find [it] unworthy of credence." *Coleman v. Donahoe,* (7thCir. 2012).

The evidence of direct discriminatory intent that would show invidious discrimination significant in pretext stage of discrimination intent

3. Review by This Court is Necessary to Correct the Trial Judge Error Who Were Relying on the Defendant to Guide Him as to the Comparators in the Plaintiff Case Causing Violation of the Plaintiff Procedural Due Process of a Fair Hearing.

   The following Are Excerpt from the Trial Transcript that Reflects Colloquy Between Trial Judge and the Defendant Counsel, Mr. Shean. It Shows that the Trial Judge Unprepared and was Unaware of the March 10, 2017 Opinion of the District Court Chief Judge (Pet. APP. A11) .

THE COURT: Tell me, who do you agree are valid comparators in this group?

MR. SHEAN: Your Honor, we would concede that Troy Middleton is a valid comparator based on the Court's ruling in the prior orders in this case. **Judge Smith basically said that it was a jury question as to whether David Witte, Robert Baurle and Jeffrey Balla were valid comparators in this case.**

THE COURT: How does he establish whether they were valid comparators?

MR. SHEAN: How would Dr. Emami establish whether they were valid comparators?

THE COURT: Yes.

MR. SHEAN: I don't think they have.

THE COURT: Now, what does he have to do?

MR. SHEAN: We submitted an instruction on that, and it states that a comparator has to be established similar in all relevant respects and work under the same supervisor.

THE COURT: All right. Well, does Mr. Witte work under Mr. Rock?

MR. SHEAN: At the time he did work under Mr. Rock.

THE COURT: Did he do experiments?

MR. SHEAN: He did do experiments at that time.

THE COURT: What does he do now?

MR. SHEAN: I'm sorry, Your Honor. I'm looking back at my notes. I'm not sure exactly what he does right now, but as a GS-15 he served as a project lead and has some quasi-supervisory responsibility as kind of a technical authority.
THE COURT: Well, does he have to do reports to Rock?

MR. SHEAN: He did not have to do quarterly reports to Rock, but he was required to have a research plan. He did not have a test plan at the time because he wasn't conducting tests.

THE COURT: He wasn't doing testing?

MR. SHEAN: He wasn't doing testing during that time. I apologize for the confusion.

THE COURT: That's okay.

MR. SHEAN: There are three different comparators.

I'm trying to sort out all the differences in my mind.

Jiminez v. Mary Washington College (4th Cir. 1995) stated that "Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges."

The honorable Chief Judge of the District Court correctly recognized the need for Technical Experts testimonies in this case in her Opinion denying the grant of the 1st Summary Judgment to the Respondent/Defendant.

Contrary to *Jiminez v. Mary Washington College* (4th Cir. 1995), the Trial Judge dismissed and deprived the jury from the testimonies of the Professor Goity. Thus, violating procedural Due Process of the Petitioner and depriving of his right to a Jury Trial without explaining or detailing his mental process to grant 50(a) motion as matter of law to the Defendant.

This Court in Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct.(1978) stated that "The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment."

Coleman v. Donahoe, (7thCir. 2012) states that "But this misses the point of the common supervisor factor. While we have sometimes phrased the question ambiguously as whether the comparators 'dealt with the same supervisor,' the real question is whether they were 'treated more favorably by the same decisionmaker.' ('A similarly situated employee must have been disciplined, or not, by the same decisionmaker who imposed an adverse employment action on the plaintiff.'). This point follows logically from the cause of action itself, which requires proof 'that the decisionmaker has acted for a prohibited reason.'"

In the Petitioner case, Jeffery Balla was a comparator with 5 experiments in which he testified by deposition, "he did not have a Test Plan, and a Research Plan, and no data" because the Lab was not working".

CONCLUSION

The Petitioner respectfully requests the Court for the Writ of Certiorari.

Respectfully Submitted,

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