

No. _____

In The
Supreme Court of the United States

Jinae Rasko,
Petitioner,
v.

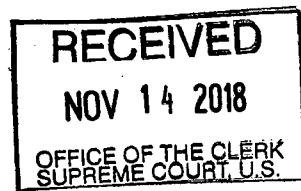
NYC Administration for Children's Services,

Respondent.

**On Petition for A Writ of Certiorari
to the United States
Court of Appeals for the Second Circuit**

**PETITION FOR A WRIT OF
CERTIORARI**

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QUESTIONS PRESENTED

I. Whether an employer is liable for discrimination under Title VII, when:

- A. There are **DIRECT EVIDENCES** of discrimination, including the evidence of **PRETEXT**.
- B. An employee suffered **Adverse Employment Action**, even though there was no material loss.
- C. Employer **failed to take appropriate corrective action**, after an employee complained numerously about co-worker's harassment.

II. Whether an employer is liable for retaliation under Title VII, when:

Retaliation was **the 'but for' cause** of employer's adverse action, and there was a **causal connection** between employer's **adverse action** and employee's **protected activity**.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jinae Rasko respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reprinted to the Appendix hereto, App. 1. The memorandum opinion of the District Court for the Southern District of New York is reprinted to the Appendix hereto, App. 10.

JURISDICTION

The Second Circuit entered its judgment on May 17, 2018 and denied a petition for rehearing on July 3, 2018. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 USC section 2000e; Title VII section 703 (a)(1):

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

EEOC Revised Enforcement Guidance in Disparate Treatment Theory (1992):

Liability is established when direct evidence proves that discrimination was the motive for the challenged action.

STATEMENT OF THE CASE

I. STATUTORY ISSUES

Jinae Rasko, a *non-Black* employee of NYC ACS (New York City Administration for Children's Services), sued her employer based on **color discrimination** under 703(a)(1) of Title VII of the Civil Rights Act of 1964. Rasko alleged ACS violated 703(a)(1), because: (i) Due to her *blindly anti-nonblack bias*, Rasko's Black supervisor Sharon Corse discriminated against Rasko; (ii) Corse retaliated against Rasko's EEO filing.

Nine (9) occurrences of discrimination Rasko alleged, including *three retaliatory discriminations* one of which is *hostile work environment*.

Defendant absolutely failed to come forward with legitimate nondiscriminatory explanations for the discriminations alleged. *Not even for a single discrimination alleged, Defendant proffered a legitimate, nondiscriminatory reason:* "It is not discrimination. Other employees in the same situation were and/or would be treated the same as Rasko was treated."

Only one reason Defendant proffered. It was for the probation note Corse gave Rasko on October 23, 2015. And *the proffered reason* is **PRETEXT**.

A. PRETEXT and Direct Evidences of Discrimination

Rasko proved Defendant's proffered reason for the probation note Corse gave Rasko on October 23, 2015, was **FALSE**, a **PRETEXT**. *Defendant lied about its motivation.* The *probation note* is the *evidence of PRETEXT as well as a direct evidence of discrimination.*

EEO 101 (an overview of the anti-discrimination statutes enforced by the EEOC) states: "Direct evidence of discrimination always results in a finding against the employer." Rasko presented a preponderance of direct evidences that Corse *intentionally discriminated* against her.

These, *Defendant's pretext and direct evidence of discrimination*, the Second Circuit expressly disregarded and judged in favor of Defendant.

B. Disparate Treatment (discrimination) and Adverse Employment Action

Rasko's discrimination claim the Second Circuit *denied*, holding: Rasko *failed to allege any adverse employment action.* "A plaintiff sustains an adverse employment action if he or she endures **a materially adverse change** in the terms and conditions of employment." Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 85 (2d Cir. 2015) (citation omitted). Rasko's work condition did not change – **no adverse material effect**. Therefore, Defendant's conduct did not constitute an adverse action.

The Supreme Court held that *the harm needed for an actionable discrimination claim under Title VII is not limited to economic or tangible harm.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

C. Hostile Work Environment

The Second Circuit held: Rasko raised a *hostile work environment claim* based on Fonah's harassment and Corse's failure to correct it. Rasko asserted only that Fonah was rude, threw documents, and made noise (e.g., snoring, talking on the phone, etc.). This type of irritation does not rise to a level of *an objectively hostile workplace*. To establish a hostile work environment claim, a "plaintiff must show not only that she subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive." Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir, 2006).

Fonah's harassment is "far beyond irritation." That Fonah's harassment not only *Rasko subjectively perceives to be abusive*, but also it is *objectively hostile and abusive has been documented*; the Second Circuit expressly disregarded.

D. Retaliation

The Second Circuit held: Corse's denial of Rasko's leave requests twice in January in 2016 is *insufficient to constitute an adverse employment action in the retaliation context*. The sick time request was ultimately approved. The denial of a partial day off does not constitute an adverse act.

EEOC holds: *Retaliation occurs when an employer punishes an employee for engaging in legally protected activity.* This is precisely what Corse's denial is. Corse punished Rasko for filing a charge of discrimination. An employer's adverse action followed an employee's protected activity. *Certainly, Corse's denial constitutes an adverse act in the retaliation context.*

It is **imperative** that the employer demonstrate **a legitimate, non-retaliatory reason for the adverse action alleged.** To demonstrate that Corse's denial was **not taken in retaliation for Rasko's EEO filing**, it is **imperative** that Defendant **show objective and well-documented examples.** Defendant simply cannot show such examples, because they do not exist; any reasonable supervisor would not deny such leave requests as Rasko requested. Previously, Corse herself never denied.

The district court acknowledged adverse actions, holding: Rasko's allegations regarding the denial of her leave requests on January 5 and January 21, 2016 **could arguably represent adverse actions.** But, Rasko **failed to plausibly plead a connection between these acts and her filing EEO complaint.**

For more than eight (8) years, Corse had been Rasko's supervisor. Rasko requested the same sort of leave as she did all those years. Why, suddenly, **the same conduct is not in line with the policy? But for her desire to retaliate against Rasko's EEO filing, Corse would not have denied Rasko's leave request. Certainly, there is a connection between Corse's denial and Rasko filing EEO complaint.**

Corse's persistent inaction to alleviate Rasko's hostile work environment is also a retaliatory discrimination. The problem is the **noise** Fonah makes all the time. Without difficulty, the problem can be resolved. Instead of right next to each other, Fonah and Rasko can be put in cubicles apart from each other. **But for her desire to retaliate** against Rasko's EEO complaint and **her discriminatory animus against Rasko**, Corse would have taken some appropriate corrective action. "Circumstances exist that support *an inference of discrimination and retaliation*," as stated in EEO 101.

The Supreme Court holds that an employer can be liable for the *discriminatory animus of a supervisor* who did not make the ultimate employment decision. Staub v. Proctor Hospital, 562 U.S. 411 (2011).

II. FACTS

A. Preliminary Statement

Rasko suffered discriminations Corse imposed on September 13, 2010; in April 2012; and in September 2012; Rasko did not file a complaint. Discriminations imposed on September 28, 2015; October 23, 2015; and November 2, 2015 were too outrageous not to be addressed. On December 8, 2015, Rasko filed an *internal EEO complaint*, an addendum to it on January 4, 2016, and a *charge of discrimination with EEOC* on January 8, 2016.

The January 4, 2016 addendum documented that Corse is a racial fanatic: blindly anti-nonblack, especially anti-White. Such person should not be allowed to work in a government agency, stated Rasko.

In retaliation for Rasko's EEO complaint, Corse discriminated against Rasko on January 5, 2016 and January 21, 2016, and *persistently failed to take appropriate corrective action* to alleviate Rasko's *hostile work environment*, despite that Rasko complained numerously.

B. Background

Since July 2014 when Rasko started working with Fonah, to cover up "she is hardly working," Fonah had been giving Rasko less than one third of documents, violating the directive – work is to be divided equally. Work performance is measured by the number of documents processed. Once it is certain that she has more documents than Rasko does, Fonah is assured that her work performance will look better.

In the morning on September 18, 2015, Fonah gave 12 documents out of 38 to Rasko. Rasko said: Why 12? Give me my portion. Why are you doing this? Fonah yelled: Let go, let it go, okay? Rasko said: You raised the issue, not I. Don't do it again. Now, Fonah stood up, shouted at Rasko in an enraged tone. "**What you gonna do, what you gonna do?**" Rasko was shocked, could not believe what she was seeing, what she was hearing. Rasko did not respond to Fonah's shockingly aggressive behavior. But in her mind, Rasko was thinking: My goodness! This is "**an immature teenage street gangster talk.**"

In the afternoon on September 18, 2015, Fonah brought some documents to Rasko. **Fonah threw them over the documents on Rasko's desk.** This behavior was the same as Fonah threw them at Rasko.

Again, Rasko was shocked. Rasko ignored Fonah's shockingly low behavior, just continued to work. But in her mind, Rasko was thinking: **Fatimata, your behavior is too low. You should not be working in an office. I pity you.**

Fonah throwing documents was bursting out her anger, because she got caught. In the morning, when Rasko demanded her portion, Fonah took the 12 documents and brought them back, supposedly 19. Rasko happened to look at and see the volume look the same, not any bigger than before. Rasko counted. It was 12. Rasko said: Fatimata, I thought you gave me my portion, they are still 12. Fonah took the documents again, brought them back again. Rasko counted. It was 19. Previously Rasko never counted, assuming Fonah gave the right portion, when demanded.

On September 24, 2015, Rasko reported via email to Corse what happened on September 18, 2015. The subject of the report is **work distribution and unprofessional behavior**. On September 25, 2015, Corse held a meeting only with Rasko. Corse said: Fatimata told me "*you two agreed on she will process more documents.*" Rasko said: ***That's a lie. We never agreed.***

C. Blatant Discriminations occurred on
September 28, October 23, November 2, in 2015

September 28, 2015

Corse first held a meeting only with Fonah, then with both Fonah and Rasko. When Rasko was stepping in Corse's office, right away Rasko sensed "*something is not right.*" The atmosphere was **not** that of a supervisor having had a talk with a staff about official matter. The atmosphere was that of two close friends having an intimate conversation.

When Rasko was stepping in, Fonah stood up from chair, turned towards Rasko. Rasko remembers seeing a smirk on Fonah's face, her lips moving. Fonah said something or did something; Rasko cannot remember. But Rasko remembers she reacted, *uttering two words "gangster talk."* Corse immediately reprimanded Rasko [discrimination 1], saying "no name calling."

Rasko did not even sit on chair yet. She must have been in a total *black out, shock.* How can she not recall anything at all what words Fonah said or what gesture or action she took? Rasko would not have uttered the words "*gangster talk,*" unless provoked. Whatever Fonah said or did, *Corse did not reprimand her* [discrimination 1].

During the meeting Fonah said: "***it will not happen again.***" This tells *Fonah admitted she did wrong* (what Rasko reported is true). Moreover, Corse knows Fonah even lied. *Nevertheless, Corse took the stand that Rasko is guilty* [discrimination 2], saying Rasko's report as "accusing" and "alleging." When Corse said "accusing," Rasko protested, uttering "accusing?" in a raised voice. Corse reworded, saying "well, alleging." Rasko said no further, sensing no use for saying more.

Now Fonah complained she could not put her food in the refrigerator because Rasko took too much space. Having heard Fonah, Corse said, "Refrigerator space should be shared equally." Corse said further, "Now is the time to tell what's concerned." Rasko complained: ***Fonah often talks loudly on the phone all day.*** Having heard Rasko, Corse said nothing. Refrigerator space is a petty issue; but, ***what Fonah said was immediately attended to*** [discrimination 3]. Excessive loud phone talk disturbs the work and is being rude to co-worker. As such, it is an important issue; but, ***what Rasko said was completely ignored*** [discrimination 3'].

The meeting on September 28, 2015, was *senseless, fruitless, and blatantly discriminatory*. Despite that the meeting was supposedly to deal with *work distribution* and (Fonah's) *unprofessional behavior, not a word* Corse mentioned about either: senseless meeting. After the meeting, *Fonah's behavior got worse*: fruitless meeting. That after the meeting, Fonah behaves a sergeant the general favors bullying a soldier is ***a circumstantial evidence of how blatantly discriminatory the meeting was.*** Any reasonable and HONEST person would see it and say so: Corse ***blatantly discriminated against Rasko and treated Fonah more favorably.***

October 23, 2015

Corse put Rasko on probation for "verbal restraint" and "better office decorum," for the words Rasko stated in her report — Rasko's *negative thoughts 'put in writing'* when Fonah offended her:

“an immature teenage street gangster talk.” “Your behavior is too low. You should not be working in an office. I pity you.” Corse said: Words put in writing are like “spoken.” Your words are inflammatory and unacceptable.

Corse **did punish** Rasko who never uttered an inflammatory and unacceptable word, punishing for the negative thoughts provoked; Corse put Rasko on probation. Corse **did NOT punish** Fonah who shouted inflammatory and unacceptable words, offended Rasko in a threatening manner, and threw the documents, thus, **provoked** Rasko’s negative thoughts; Corse did not put Fonah on probation. For this outrageous discrimination, **there cannot be a legitimate, nondiscriminatory** explanation. It is Fonah, not Rasko that should have been put on probation. Any reasonable and HONEST person would see it and say so: Corse **blatantly discriminated against Rasko and treated Fonah more favorably.**

November 2, 2015

As a follow up of the probation, Corse pressured Rasko to apologize to Fonah in writing. Corse said, “You will have to go through a lot of unnecessary things, if you don’t do (apologize).” On November 4, 2015, Corse emailed Rasko, urging to follow up the **apology directive** given on November 2, 2015. Rasko emailed an apology to Fonah and cc’d Corse. Rasko did not receive an apology from Fonah. Obviously, Corse did not pressure Fonah to apologize to Rasko.

It is Fonah, not Rasko, that shouted “inflammatory and unacceptable words.” It is Fonah, not Rasko, that should have apologized. Any reasonable and HONEST person would see it and say so: Corse ***blatantly discriminated against Rasko and treated Fonah more favorably.***

The “*apology directive*” given to Rasko and “*the email*” Corse urging Rasko to follow up the “*directive*” are ***direct evidences of discrimination.***

**D. Rasko’s *EEO filing* and
Corse’s *Retaliatory Discriminations***

On December 8, 2015, Rasko filed *an internal EEO complaint, an addendum to it* on January 4, 2016, and *a charge of discrimination with EEOC* on January 8, 2016. *The January 4, 2016 addendum* documented Corse is a racial fanatic: blindly *anti-nonblack, especially anti-White. Retaliatory Discriminations* followed.

On January 4, 2016, Rasko informed Corse that she is leaving at 1:30 pm on January 5, 2016 for a doctor’s appointment. Corse emailed Rasko on January 5, 2016, stating that one day before email about leaving is ***not in line with the policy.*** On January 21, 2016, Corse disapproved (and returned) Rasko’s Timesheet which she approved on January 20, 2016.

Why did Corse approve on January 20, 2016, then withdrew her approval and disapproved on January 21, 2016? The answer: Corse approved first, because that is what she usually does. But, ***in retaliation for Rasko’s complaint, Corse withdrew her approval and disapproved.***

On January 4, 2016, Rasko requested the same sort of leave as she did all those eight years. Why, suddenly, ***the same conduct is not in line with the policy?***

Corse's email on January 5, 2016 and Rasko's Timesheet disapproved on January 21, 2016 are direct evidences of discrimination. But for her desire to retaliate against Rasko's EEO filing, Corse would not have denied Rasko's leave requests.

Corse's persistent failure to alleviate Rasko's hostile work environment is also a retaliatory discrimination. Not only Corse has a discriminatory animus against Rasko, but also Corse has a desire to retaliate against Rasko's EEO filing. That keeps Corse from taking an appropriate corrective action to alleviate Rasko's hostile work environment.

E. Reporting Corse's Retaliatory Discrimination and Discriminations occurred in the past

March 22, 2016

Rasko reported to the ACS EEO office ***Corse's retaliatory discrimination occurred on January 5 and January 21 in 2016.***

April 25, 2016

Rasko reported ***discriminations Corse imposed on her on September 13, 2010, in April and September in 2012. Rasko wanted the authority to recognize Corse's discrimination against her is an ongoing conduct.***

September 13, 2010

When Rasko informed Corse of an upcoming interview, Corse lashed out via email: “*Are you attempting to get out of the scanning unit?*” How **cold** and **unkind** these words are! Later, a staff was leaving scanning unit for a promotion position. Corse sent out an email to all staff, congratulating the promoted staff with **warm** and **kind** words. Rasko was treated discriminatorily. *Corse’s email* on September 13, 2010 is a **direct evidence of discrimination**.

April 2012

Rasko requested Leave of Absence to take her floating holiday. It was Rasko’s first request for the year. Corse got so upset, making Rasko too uncomfortable to work in peace. Defendant argued: “Rasko failed to allege *how exactly Corse got upset*. Without saying words or taking actions, message can be obvious. Corse’s demeanor then was such. Corse’s anger Rasko still can feel when thinking about Corse’s angry demeanor then. With an angry air, Corse was frequently passing by Rasko’s cubicle (which was right in front of Corse’s office).

Complaining about immediate supervisor to the superior is not comfortable. Rasko took the trouble to do just that, because Corse getting so upset about Rasko’s Leave Request was too wrong not to be addressed. Rasko complained to Mr. Ray Kimmelman who oversees the ACS psychiatric hospitalization notification which Corse manages and was Rasko’s primary task then.

When other staff request Leave of Absence to take their floating holiday, Corse would not get so upset. Rasko was treated discriminatorily. That Rasko complained to Kimmelman is a *circumstantial evidence*. Had Rasko not been treated discriminatorily, she would not have complained.

September 2012

Rasko requested Leave of Absence to take two days off (Monday, Tuesday). It was Rasko's second request for the year. On Friday, zooming by Rasko's cubicle Corse lashed out at Rasko, "*I just cannot let you leave the work undone.*" Edna Perez (whose cubicle was in front of Rasko) turned around, looked at Rasko with the expression "what was that?" Perez did not say a word. But, Rasko could tell she was shocked and puzzled. Rasko did not say a word, just shrugged. Rasko felt so *shamed, belittled, humiliated, and insulted*.

Upon returning on Wednesday, Rasko complained to Kimmelman and Nancy Thomson, Corse's supervisor. Corse would not belittle, humiliate, insult or lash out at other staff, when they request Leave of Absence. Rasko was treated discriminatorily. That Rasko complained is a *circumstantial evidence*. Had Rasko not been treated discriminatorily, she would not have complained.

ALL Rasko did was "*reporting to Corse*" what Fonah did wrong. Fonah admitted she did wrong. Nevertheless, instead of taking actions to correct the wrong *Corse punished Rasko for reporting*.

Corse punished Rasko, solely for “*a few words*” (stated in Rasko’s report) – “*the negative thoughts*” going through Rasko’s mind when Fonah offended Rasko, For the September 24, 2015 report, Corse blatantly discriminated against Rasko on September 28, October 23, and November 2 in 2015. Numerously, Rasko complained (reported) to the ACS authority about **Corse’s discrimination and hostile work environment** Fonah makes every working day.

Rasko’s complaints have been **completely** ignored. To this day, Rasko *is suffering the same*: Corse’s **ongoing discrimination since September 2010 and hostile work environment** Fonah creates every working day *since July 2014*. Rasko commenced the legal action on July 5, 2016 and filed the First Amended Complaint on July 25, 2016.

REASONS FOR GRANTING THE PETITION

SUMMARY:

In her initial brief, Rasko argued district court judged wrong, *disregarding Defendant’s pretext and direct evidences of discrimination*. In her reply brief and at the oral argument, Rasko pointed out that in its answer brief, Defendant was *unable to respond to Rasko’s argument and failed to address it*. Rasko argued further that **Defendant’s arguments for all other issues are unavailing**.

Rasko requested that appeals court **correct** the wrong done by district court. Instead of *being corrected, the wrong has been sanctioned*. The Second Circuit expressly disregarded the powerful and undisputed **direct evidences of discrimination**,

including the **evidence of pretext**, judged in favor of Defendant. The Second Circuit's judgment is **so far departed** from the accepted and usual course of judicial proceedings; *certiorari is warranted*.

The Second Circuit's judgment **conflicts with settled Supreme Court precedents**; *certiorari is warranted*.

Certiorari is also warranted because of the critical significance of the decision of this case. Because Rasko is not Black, her Black supervisor **intentionally discriminated against her**. Despite the preponderance of evidences, the Second Circuit *dismissed Rasko's discrimination claim*. If allowed to stand, the Second Circuit's ruling will induce employers to violate Title VII. The ramifications of the Second Circuit's ruling, if allowed to stand, *will have widespread effects on law enforcement and the conduct of employers.* *Certiorari is warranted.*

Despite **statutory provisions to prohibit discrimination, retaliation, and harassment**, these *illegal employment practices keep recurring*. By **NOT allowing** the judgment in favor of NYC ACS, this Court admonishes employers to **implement statutory policy** and to **take immediate and appropriate corrective action** when an employee complains about harassment. This Court's intervention *will REDUCE the litigation under Title VII*. This case is **an ideal vehicle** to admonish employers to implement statutory policy. *Certiorari is warranted.*

- I. The Second Circuit's Decision is *far departed* from the accepted and usual course of judicial proceedings: *disregarding pretext and direct evidences of discrimination.*

For the probation note Corse gave to Rasko on October 23, 2015, Defendant's *proffered reason* was: "it was a 'counseling memo' necessary to allow employees to develop, improve and avoid discipline." It is PRETEXT – *a phony reason to cover up the real reason, discrimination. The proof? Why was it not given to Fonah? The probation note is the evidence of PRETEXT as well as a direct evidence of discrimination.*

Once the employee had *proved* the employer's proffered reason for the adverse action to be *pretextual, the employee was entitled to judgment as a matter of law.* Hicks v. St Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992).

EEOC Compliance Manual Section 15-III Color Discrimination: *Color discrimination* occurs when a person is discriminated against *based on . . . color characteristic of the person.* When Corse put Rasko on probation, Corse said, "*the language you used to Black,*" Rasko protested, "it has nothing to do with Black." Corse continued: "But, *this society perceives that language* ('an immature teenage street gangster talk.' Your behavior is too low. You should not be working in an office. I pity you.) *applies to Black, we . . .*" Corse stopped talking when she uttered "we."

It is noteworthy that Corse identifies herself with Fonah, Black. It is shocking to see it was not even *right or wrong* that Corse's judgment was based on. It was "*Corse's discriminatory animus against non-Black*" that her judgment was drawn from. What mattered was non-Black (Rasko) reported that Black (Fonah) did wrong; non-Black must be punished. (Rasko was almost hearing Corse shouting, "*Don't you dare report Black did wrong.*")

Accordingly, Corse punished Rasko, not Fonah, despite that Rasko is a victim and Fonah is a perpetrator. ***This conduct proves Corse's bias – blindly anti-nonblack. Rasko was discriminated against based on her color characteristic – nonblack.***

Defendant argues: That both the coworker and supervisor were Black ***led Rasko to conclude*** that her supervisor was discriminating against her whenever something in the workplace did not go her way – and for perceived slights that were wholly innocuous. Brief for Appellee page 1. ***What other reason*** (than Rasko is not Black) ***is there*** for Corse to discriminate against Rasko? Defendant did not, could not articulate any other reason for the discriminations Corse imposed on Rasko; ***defendant's argument is void.*** As for Rasko's allegations of Corse's discrimination, NONE are perceived slights that were wholly innocuous. They ***ALL are "actually occurred significant facts" that were wholly harmful – serious Title VII violations.***

There is **direct evidence** where there is a **link** between the employer's proven bias and its adverse action. EEOC Revised Enforcement Guidance in Disparate Treatment Theory (7/14/992). The "probation note" given to Rasko resulted from "discrimination" caused by Corse's proven bias, blindly anti-nonblack. There is a **link** between **probation note** and Corse's proven bias, blindly anti-nonblack; there is **direct evidence**. **Discrimination** was the motive for the "probation note" – "Corse putting Rasko on probation." The "probation note" is a direct evidence of discrimination against Rasko.

Liability is established when direct evidence proves that discrimination was the motive for the challenged action. EEOC Revised Enforcement Guidance in Disparate Treatment Theory (1992).

Except for Corse's denial of Rasko's Leave Request (which was to retaliate against Rasko's EEO complaint), **Corse's blindly anti-nonblack bias is the root cause of ALL discriminations** Corse imposes on Rasko. **Discrimination is the motive for Corse's adverse actions against Rasko.** The probation note is an example.

Having satisfied the order to present proof in Title VII discrimination cases (Douglas Corp. v. Green, 411 U.S. 792), Rasko had established a *prima facie case of discrimination*. Rasko presented a *preponderance of the evidence* she suffered *adverse actions* occurred under the circumstance that support an inference of discrimination.

Evidences are:

[1] *Rasko's report* on September 24, 2015 – the report tells what Fonah did wrong, while detailing what happened on September 18, 2015. The report *proves Corse's bias, blindly anti-nonblack* (how Corse dealt with the report proves her bias).

[2] *Probation Note* on October 23, 2015.

[3] *Apology Directive* on November 2, 2015.

[4] *Corse's email* to Rasko on November 4, 2015, urging to follow up *the apology directive*.

[5] *Corse's email* to Rasko on January 5, 2016, stating that *Rasko's leave request* one day before a doctor's appointment is *not in line with policy*.

[6] *Timesheet*: (i) approved on January 20, 2016 – lunch time (11:51 – 12:51, 1/15/2016), absence time **2 hours and 45 minutes** (9:00 – 11:30, 11:30 -11:45).

(ii) The Timesheet (which was approved on January 20, 2016) disapproved on January 21, 2016.

(iii) The Timesheet approved final – lunch time (12:00 – **13:00**), absence time **3 hours** (9:00 -12:00).

Upon Corse's disapproving, Rasko had to *revise* lunch time *from 11:51 – 12:51 to 12:00 – 13:00; absence time increases 15 minutes* (instead of **2 hours and 45 minutes**, now **3 hours**).

[7] *Corse's email* to Rasko on September 13, 2010, lashing out at Rasko "Are you attempting to get out of the scanning unit?"

[8] *Rasko's complaint* in April 2012 to Mr. Ray Kimmelman about Corse getting so upset about Rasko taking Floating holiday.

[9] *Rask's complaint* in September 2012 to Ms. Nancy Thomson and Mr. Ray Kimmelman about Corse lashing out at Rasko upon taking two days (Monday and Tuesday) off.

Regarding [8] and [9]: Had Rasko not been treated *discriminatorily*, she would not have complained.

[10] Fonah *behaving a sergeant the general favors bullying a soldier*, after the September 28, 2015 meeting.

[11] *Fonah's continuing harassment due to Corse's persistent inaction to alleviate Rasko's hostile work environment.*

With the proof of pretext and a preponderance of the evidence of Corse's discrimination against Rasko, judgment is required in favor of Rasko, *unless Defendant came forward with legitimate nondiscriminatory explanations. Not even for a single discrimination alleged, Defendant proffered a legitimate nondiscriminatory reason.* Nevertheless, the Second Circuit judged in favor of Defendant. The Second Circuit's judgment is *far departed* from the accepted and usual course of judicial proceedings. *Certiorari is warranted.*

II. The Second Circuit's Decision *conflicts with* settled Supreme Court precedents.

A. Disparate Treatment and Adverse Employment Action

The Supreme Court established that *noneconomic harm that meets the **severe** or **pervasive** standard is sufficient to demonstrate an actionable discrimination claim*. Meritor Sav. Bank v. Vinson, 477 U.S. 65-67 (1986). Corse's discrimination against Rasko is both *severe* and *pervasive*. Since September 2010, Rasko has been *suffering Corse's intentional discrimination motivated by Corse's anti-nonblack animus*. Corse discriminates against Rasko when a circumstance arises for her to do so. Corse being Rasko's supervisor, such circumstance may arise at any moment.

In other words, "Corse's *ongoing discrimination*" Rasko has been suffering since September 2010; Corse's discrimination against Rasko is *pervasive*.

Corse's *ongoing intentional discrimination* causes Rasko *emotional distress and anxiety, gnawing at her inside, severely damaging Rasko psychologically and emotionally*. Corse's discrimination against Rasko is *severe*.

The Second Circuit denying Rasko's discrimination claim based on "no materially adverse change" conflicts with settled Supreme Court precedent. Certiorari is warranted.

B. Hostile Work Environment

Fonah's unprofessional behavior (making noise *NON-STOP*) is creating ***hostile work environment***, making Rasko suffer *every working day*. Fonah's continuing *harassment* results from Corse's ***intentional discrimination*** against Rasko. As already discussed, *Rasko's hostile work environment can be alleviated* without difficulty – putting Fonah and Rasko in cubicles apart from each other. Corse just would not take any action. It is *Corse's deeply rooted anti-nonblack animus* that keeps Corse from taking any action to alleviate Rasko's hostile work environment. Corse *intentionally discriminates* against Rasko *because Rasko is not Black*. In addition, Corse has *a desire to retaliate* against Rasko's EEO complaint.

EEOC holds: "A work environment is considered ***hostile work environment***, if a reasonable person would consider hostile."

Any reasonable person would consider Rasko's work environment "*hostile*." Imagine: You are at work. Someone is constantly making noise, incessantly talking on the phone. And you cannot avoid hearing it.

Fonah is rarely quiet, making noise constantly. Upon her arrival in the morning, noise starts. Eating – crunching chips is most horrible. When Fonah starts a day with crunching chips, usually the crunching goes on all day long. Drinking tea in sips – after every sip (every second), Fonah puts down her big ceramic

tea mug, making very annoying noise. She likes tea, drinking all the time. All kinds of noise continue: flipping through Metro, am New York, and magazine; rummaging through plastic bags and drawers; opening and closing drawers again and again; opening envelopes; tearing, shuffling or crushing paper, etc. There is a loud snoring – often. And there is an incessant phone talk. (Radio is on all the time. Rasko did not complain about the radio, because the volume is reasonably low. But, Rasko hears it, rather not hear the radio at all while working.)

Unless you suffer from it, it is hard to believe that a person comes to work, disturbing the work environment to the point "**unbearable**." Rasko has never suffered so much at work. How often Rasko becomes about to *scream – STOP THE NOISE, please!*

Before ACS, Rasko worked at NYC Department of Health for eight years. Rasko did not even have her own cubicle.

Right next to Rasko, there was one worker – no partition. In front of Rasko, there were two workers; a low wall partition was there. Behind Rasko, there were other two workers – no partition. So, six workers were working together in a small area. Rasko was not disturbed then at work by any worker; Rasko took it for granted. Now Rasko appreciates them all.

Before working with Fonah, Rasko worked in a cubicle located right in front of Corse's office. There was a worker in front of Rasko's cubicle and another worker behind Rasko's cubicle. While working, most of the time Rasko was not even aware whether they were there or not.

Now Fonah is *the only one worker* near Rasko. And this one worker drives Rasko to the limit *every working day*. Rasko would not say Fonah is a bad person; she just **unbelievably** lacks an office manner – lying on chair with legs open, stretched out; often with eyes closed and snoring loud.

Fonah's harassment makes “the workplace permeated with discriminatory intimidation that is sufficiently severe and pervasive to alter the condition of plaintiff's [Rasko's] work environment.” Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004). Certainly, Fonah's harassment not only Rasko *subjectively perceives to be offensive and abusive, but also it is “objectively hostile” enough to create a hostile work environment and alter the condition of work environment.*

Fonah's harassment is **pervasive** – *every working day since July 2014 when Rasko started working with Fonah. It is also sufficiently severe* enough to create a hostile work environment. Fonah's harassment is *energy vampire, draining Rasko*. Negative feelings drain energy. Fonah making noise NON-STOP and talking incessantly on the phone **create HARDSHIP at work, making Rasko STAY ANGRY. Anger and frustration exhaust Rasko.**

A plaintiff may sustain a claim of discrimination under section 703 by proving that its agent engaged in **severe** or **pervasive** harassment (for example, showing of a hostile work environment). Dean Rebecca Hanner, De Minimis Discrimination, 47 Emory L.J. 1121, 1153 (1998).

Fonah knows Corse treats her more favorably and discriminates against Rasko. Fonah's harassment is *intentional*. She knows Rasko complained many times. And Fonah is confident *she will not be punished*. So, Fonah's harassment continues despite Rasko's numerous complaints/reports.

It happened during lunch break on February 1, 2016. Fonah was on the phone, talking LOUD. Rasko turned to her and made a gesture of sleeping, leaning the head over the hands. Rasko was saying by gesture, "Please lower the voice; I am trying to rest."

Instead of lowering her voice, Fonah shouted angrily: It is my lunch time. The phone is from Africa. So, I talk LOUD. There was a pause. She continued: ***You talk to Sharon. She's gonna do nothing to me. Until either you or I leave, YOU. . . .***

Fonah did not complete the sentence. But, what she was saying was clear – Sharon, the supervisor, will not punish me. So, ***you will have to put up with whatever I do***. It was utterly astonishing to see *how confidently assured Fonah is that Corse will not punish her for whatever she does!*

Fonah's disrespectful behavior offends Rasko. For example, one day, Fonah was talking on the phone all day long, talking, talking, and talking. Rasko turned to Fonah and said, "How can you talk all day long? It is too much." Fonah angrily shouted, "What is your problem?" And she started talking *louder*. Another example, one day, upon arrival in the morning, as usual Fonah started making noise – crunching chips, rummaging through plastic bags. All

morning, throughout lunch break, now it was almost 3 o'clock. Fonah was still crunching chips, rummaging through plastic bags. Rasko said in a bit loud voice, because there was so much noise. "Fatimata, how can you make noise all the time, unbelievable." Fonah angrily shouted, "Don't believe it. What is your problem? Plastic makes noise, come on. I got to do what I got to do." And she started banging things on the desk, *intentionally making more noise*.

For long, Rasko has been suffering consistent, unwelcome, and offensive conduct. Let alone Rasko's work performance being interfered with, Fonah's harassment has become Rasko's continued condition at work.

In case harasser is a co-worker of complainant, *EEOC's long-standing guidance on employer liability: "Employer is liable*, if it knew or should have known about the harassment and failed to take immediate and appropriate corrective action." Five (5) times Rasko complained (reported). NO appropriate corrective action has been taken. To this day, not a day passes by without Fonah creating a hostile work environment – constant NON-STOP noise, excessive phone talk.

On September 28, 2015, during the meeting Corse held with both Fonah and Rasko, Rasko complained: "Fonah often talks *loud* on the phone *all day*." Corse completely ignored Rasko's complaint, as if she had heard nothing. Later, four more times Rasko complained.

On November 24, 2015, Rasko reported "Workplace Violence Incident." On December 8, 2015, Rasko filed "Internal EEO Complaint." In both documents Rasko complained (i) about **hostile work environment**: Fonah is too coarse to suit an office; (ii) about **Corse's discriminatory conduct** in handling Rasko's report which led a bad situation to worse – Fonah's behavior got worse.

NO action had been taken. Hoping that the authority takes some action, on December 29, 2015, Rasko submitted "Misconduct Report" regarding Fonah. This report documented Fonah's daily activities – how she makes noise constantly, talking on the phone incessantly and hardly working. On March 22, 2016, again Rasko complained; Fonah refused to lower her voice while talking on the phone.

Once an employer has *knowledge of the harassment*, the law imposes upon the employer a duty to *take reasonable steps to eliminate it*.

The Supreme Court in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to *take all necessary steps to prevent harassment*. Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Burlington Industries, Inc. v. Ellerth, 524 US 742 (1998). **Defendant failed to take any necessary step to prevent harassment.**

The Supreme Court held that an employer is *liable* for **hostile work environment harassment** by employees who are not supervisors if the employer . . . , **failed to respond to complaints**, Vance

v. Ball State University, 133 S. Ct. 2434 (2013). “EEOC’s long-standing guidance on employer liability for harassment by co-worker” is a repetition of Supreme Court precedent.

Defendant failed to respond to Rasko’s numerous complaints. The Second Circuit denying Rasko’s hostile work environment claim **conflicts with settled Supreme Court precedent.** Certiorari is warranted.

C. Retaliation

The US Supreme Court Title VII Anti-Retaliation Provision has **two clauses**, making it “unlawful employment practice” for an employer to discriminate against any of his employees [1] because he has opposed any practice made an unlawful employment practice – **opposition clause**, or [2] because he has made a charge – **participation clause**. 42 USC section 2000e-3(a). Rasko is accusing Defendant of **violating both**.

Defendant argues: Rasko failed to state a claim for retaliation under Title VII because Rasko did not suffer “materially adverse change.” The Supreme Court recognized that *supervisors, managers and coworkers ALL have ways to retaliate a coworker who made a complaint, without affecting the coworker’s pay or benefits.* The Supreme Court has told employers that they cannot let this happen. The Supreme Court holds that *the anti-retaliation provision of Title VII (section 704 (a)) is not limited to discriminatory actions affecting a term, condition or privilege of*

employment. Burlington Northern v. White, 548 U.S. 64 (2006). EEO 101 states: “A tangible adverse action (materially adverse change) is not necessary to bring a claim of retaliation.” This is a repetition of Supreme Court precedent.

Defendant failed to see that Supreme Court’s purpose of enacting section 704 anti-retaliation provision is to prevent an employer from interfering with an employee’s efforts to secure or advance enforcement of Title VII’s basic guarantees against discrimination. To meet this objective, the Supreme Court explained, the anti-retaliation provision **must deter** “*ALL FORMS of effective retaliation.*” Corse’s **denial of Rasko’s Leave Requests** on January 5 and January 21 in 2016, and her **persistent inaction** to alleviate Rasko’s hostile work environment are *FORMS of effective retaliation that must be deterred.*

Rasko suffering every working day *results from Corse’s inaction – retaliatory discrimination.* Rasko blames Corse more (than Fonah). Rasko feels bad about exposing Fonah’s unprofessional behavior. Rasko is forced to expose to let the authority know **how severely harmed she is at work.** It appears Fonah does not even think her “*phone behavior*” and “*making noise NON-STOP behavior*” are WRONG and UNACCEPTABLE at work. One day Fonah came to Rasko’s cubicle and said; “YOU use phone too.”

Rasko responded; “Yes, but my phone talk is short, you talk for hours.” Fonah angrily turned around and left. When Rasko mentioned Fonah’s big tea ceramic mug making much noise when Fonah puts it down,

Fonah angrily shouted: "It is my tea cup. I put it down whenever I want. I am not your child." And Fonah made more noise with tea cup. When a noise issue is mentioned, Fonah always responds angrily even when Rasko mentions politely.

Due to Corse's inaction to correct them, Fonah continues *unprofessional* "phone behavior" and "making noise NON-STOP behavior." After Rasko's "misconduct report" (regarding Fonah), one behavior Fonah changed – "**absent in the office**" *many hours a day*. Fonah used to leave office right after clock in, return around 11:00 am and leave office again around 12:30 pm, return around 2:30 pm, even close to 3:00 pm. This behavior has been stopped; now, only occasionally Fonah leaves office right after clock in and takes a long-hour lunch break. Regarding "**absent in the office**" behavior, Corse did or said something to Fonah; *that behavior has been corrected*.

But, Corse would not correct Fonah's *phone behavior* and *making noise NON-STOP behavior* which harms Rasko. Corse even welcomes *Fonah's behavior hurting Rasko?* Rasko feels Corse's *malice*.

There are *direct evidences of retaliatory discrimination* regarding Corse's denial of Rasko's *Leave Request – Timesheet*. But, there is 'NO direct evidence' of retaliatory discrimination regarding Corse's *persistent inaction* which is *covert (hidden) discrimination*. In addition to the *overt (obvious)* discrimination, Rasko also has been suffering *covert (hidden) discrimination* such as "Corse not

designating Rasko as the staff in charge in Manhattan scanning unit although Rasko is entitled to" or "Corse lashing out at Rasko in a way 'only Rasko knows and feels' during the March 3, 2016 All Borough scanning staff meeting."

By *circumstantial evidence*, Corse's persistent *inaction* is proven to be *retaliatory discrimination*. The reason for treating *circumstantial* and *direct evidence* '*alike*' is: "Circumstantial evidence is not only *sufficient*, but may also be *more certain, satisfying, and persuasive than* direct evidence." Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). *How true this is!*

There is "**NO written statement or action** which addresses Corse's *inaction* as *retaliatory discrimination*. But, the *circumstantial evidence is CLEAR. But for Corse's desire to retaliate against Rasko's EEO complaint, Corse would not have failed to take some corrective action to alleviate Rasko's hostile work environment.*

The Supreme Court holds that the "*but for*" causation standard applies to Title VII's retaliation provision. University of Texas Southwestern Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013). Rasko demonstrated that *retaliation was the but for cause* for Corse's adverse action against Rasko and there was a *causal connection* between Corse's adverse action and Rasko's EEO complaint.

Rasko is entitled to judgment in favor of her. The Second Circuit denying Rasko's *retaliation claim conflicts with settled Supreme Court precedent. Certiorari is warranted.*

III. The *Critical Significance* of the decision of this case warrants certiorari.

The ultimate question of this case is *whether Corse intentionally discriminated against Rasko because Rasko is not Black*. The answer is "YES." The *cause (motivating factor)* of Corse discriminating against Rasko is proven to be Rasko's **nonblack color**, unless Defendant proved that *other reason than Rasko's nonblack color was the motivating factor*. Defendant did not, could not demonstrate "other reason."

Despite the preponderance of the evidence that Corse *intentionally discriminated against Rasko because Rasko is not Black*, the Second Circuit dismissed Rasko's *discrimination claim*. The Second Circuit's ruling **permits employers that violated the anti-discrimination law to evade the liability**.

The Second Circuit's judgment, if allowed to stand, will induce employers to violate Title VII, leading to the trend that discrimination and harassment are rampant at work. *This Court's intervention will impede that trend. Certiorari is warranted.*

IV. This case is *an ideal vehicle* to admonish Employers to implement statutory policy.

Such **blatant/plain discrimination** as Rasko is suffering at work, *if unrecognized by the Court*, then the Court **HINDERS law enforcement of the anti-discrimination statutes, instead of ADVANCING it**. The Court **INDUCES employers to violate Title VII**,

instead of *AFFIRMING* that employees have **the right** to work in an atmosphere free of discrimination and harassment and they also have **the obligation** to maintain such atmosphere.

Rasko has been suffering *psychological and emotional harm caused by Corse's ongoing intentional discrimination* since September 2010. Rasko also has been suffering *hostile and offensive work environment caused by Fonah's harassment* since July 2014. Despite *statutory provisions to prohibit discrimination, retaliation, and harassment* and *numerous complaints (reports)* she made, **for too long Rasko has been suffering. Rasko is morally entitled to judgment in favor of her.** Defendant absolutely failed to articulate legitimate, non-discriminatory reasons for the discriminations Rasko alleged. So, without saying, Defendant acknowledged that Rasko's rights under Title VII have been violated. *Rasko is also legally entitled to judgment in favor of her.*

After the initial complaint on December 8, 2015 about Corse's discrimination and Fonah's harassment, Rasko repeatedly complained about the same. **ALL in vain.** ACS EEO office is like "non-existent."

Corse intentionally discriminated against Rasko while treating Fonah more favorably, because both Corse and Fonah are Black and Rasko is not. Defendant did not, could not provide any other reason for Corse's discrimination against Rasko. Despite statutory provisions to prohibit discrimination, retaliation, and harassment, these illegal employment practices keep recurring. By NOT

allowing the judgment in favor of NYC ACS, this Court **admonishes employers to implement statutory policy, and to take immediate and appropriate corrective action when an employee complains about harassment.** This Court's intervention *will REDUCE the litigation under Title VII.* This case is ***an ideal vehicle*** to admonish employers to implement statutory policy. *Certiorari is warranted.*

CONCLUSION

For the foregoing reasons, this Court should grant this writ of certiorari.

Respectfully submitted,

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