

No. 18-942

In the Supreme Court of the United States

ASHIDDA FORGUS,

Petitioner,

v.

PATRICK M. SHANAHAN, Acting Secretary of Defense,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

REPLY BRIEF OF PETITIONER. 1

 A. Petitioner submitted the written transfer
 request required by her employer. 1

 B. Petitioner opposed dismissal of her
 retaliation claim, and thus did not waive
 appellate review. 5

CONCLUSION. 6

TABLE OF AUTHORITIES

CASES

Burlington N. & Santa Fe Ry. v. White,
548 U.S. 53 (2006) 5

Peterson v. Linear Controls, Inc.
(No. 18-1401) 6

STATUTE

42 U.S.C. § 2000e-16(a) 1

REPLY BRIEF OF PETITIONER

The government acknowledges that petitioner's legal argument is correct, but still counsels against granting certiorari. That view is based on a misapprehension of the facts leading to the denial of petitioner's request for a transfer. The record confirms that petitioner applied for the job transfer in accordance with her employer's demands, but was nonetheless denied. This case remains an appropriate vehicle to rule that a discriminatory or retaliatory denial of a job transfer is a "personnel action," even if purely lateral, and therefore cognizable under Title VII's federal-sector provision, 42 U.S.C. § 2000e-16(a).

A. Petitioner submitted the written transfer request required by her employer.

The record indicates that petitioner was a Business Process Analyst assigned to the Order Management (OM) branch of the Defense Logistics Agency (DLA). Pet. 4-5. Believing that she was subjected to race and gender discrimination in the denial of training and assignments, petitioner complained of discrimination in January 2011. Pet. 5. Petitioner then submitted a written application for a vacancy in the Inventory Management (IM) branch, in order to escape the discrimination. *Id.* Petitioner's new supervisor, Naomi Wilcox, informed her that instead of submitting an application, petitioner should submit a written transfer request. Pet. App. 13. Complying with that instruction, petitioner sent Ms. Wilcox an email on January 31, 2011 requesting transfer.

Erroneously, the government asserts: “Petitioner never submitted a written request to transfer. Instead she wrote an email to her supervisor” Opp. 4. The email, however, was petitioner’s “written request for transfer.” The full text of the email reveals that petitioner confided to Ms. Wilcox her “situation,” and the need for a transfer to the IM branch:

Naomi,

In regards to your request today, January 31, 2011, to provide you with written indication of my interest in working for in Order Management or Inventory Management, please be advised of the following –

I have an interest to work in both OM and IM branches. I am currently assigned to the OM branch, where I have outlined to you my issues. You indicated your understanding of my “situation” during discussions.

I would like to broaden my scope of experience in OM with other duties outside of those already assigned, in other focus areas.

I would also like to be considered for position openings in other areas that would provide me valuable experience and that would enhance the overall Aviation mission. If and when the openings become available – no different from any other employee doing the same. My concern is that now, I am asked to place my interest in writing despite an announcement being issued, while other employees have been moved between OM and IM at will, regardless of reason.

I have provided you examples of my assigned interfaces, the current activity statuses, of such and my familiarity of them. I have already provided you examples of my interest areas (I provided you a written copy of what I was assigned to interface-wise as well, during same prior meeting).

Is there additional information that you require of me?

I understand that as a new supervisor to OM, you require time to make your own assessments and provide your own 'game plan' for OM. I do believe, also, that you comprehend my situation, as well; therefore, I will continue to work within the confines of the existing management schema, with your understanding.

Sincerely,
Ashidda K. Forgas
Business Process Analyst
DSCR-BAOA (Order Fulfillment/OM)
DLA Aviation, Richmond, VA

C.A. App. 149-50.

Petitioner's request to be "considered for position openings in other areas" cannot be understood as anything other than a request to transfer from the OM branch to the IM branch, as the Business Process Support Directorate was divided into OM and the IM branches. By making Wilcox aware of her "situation," petitioner was asking to transfer since none of her workplace issues had been addressed. Petitioner's

January 31, 2011 email constituted a written transfer request, satisfying her employer's requirements.

Following receipt of the email, petitioner's superiors met twice with her in early February 2011. The District Court's Opinion summarized those two meetings as follows:

Wilcox again told Forigus she would have to submit a written request for the specific transfer, rather than utilize the application process. Nevertheless, Forigus told Wilcox to treat her application for Business Process Analyst as a written request. At one of these meetings, the selecting official said, "Well anyway, you're not getting the position, referring to the vacancy to which Forigus applied, a comment which Forigus describes as "caustic."

Pet. App. 14.

In response to the superiors' instruction that she submit a written request "for the specific transfer," petitioner suggested that the previously-submitted application serve as the "written request" – a reasonable request under the circumstances. But before her superiors could plausibly accuse petitioner of disregarding their instructions, one of them blurted out: "Well anyway, you're not getting the position." Pet. App. 14. The government's summary of facts left out this material statement, which is crucial in understanding that petitioner did everything in her power to apply for the transfer in the manner prescribed. Accordingly, she stated a claim for discrimination.

B. Petitioner opposed dismissal of her retaliation claim, and thus did not waive appellate review.

The Court of Appeals concluded that petitioner “failed to oppose” the dismissal of her retaliation claim “in any meaningful way” in the District Court, and accordingly “waived appellate review over” that issue. Pet. App. 6. In her Petition to this Court, petitioner argued that despite acting *pro se*, petitioner stated that she was denied a transfer in February 2011 mere weeks after complaining of race and gender discrimination in January 2011. Pet. 12-13. Thus, petitioner adequately opposed dismissal of her retaliation claim.

Notwithstanding the purported waiver of appellate review, the Court of Appeals went on to affirm dismissal of petitioner’s retaliation claim because it erroneously concluded that a lateral transfer could not constitute a materially adverse action under *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006). “We agree with the district court that none of the actions about which Forigus complains on appeal constitute materially adverse employment actions sufficient to support her retaliation claims.” Pet. App. 7. With the government now in agreement that denial of petitioner’s requested transfer can state a claim for

discrimination, and likely retaliation, the denial of her retaliation claim is suitable for review by this Court.¹

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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¹ Petitioner is aware that another Petition for Certiorari involving the same issue of the materiality of purely lateral transfers has recently been filed with this Court. *Peterson v. Linear Controls, Inc.* (No. 18-1401) is awaiting respondent's opposition, thus it will not be presented during the same conference as this case. The *Peterson* petition involves private-sector employment discrimination rather than federal-sector employment. Nonetheless, the appearance of the same issue in two separate cases demonstrate the need for this Court's review.