Appendix – A (App. A)

USCA Case #17-5290Document #1783157Filed: 04/16/2019Page 1 of 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5290 September Term, 2018
1:16-cv-00398-JEB
Filed On: April 16, 2019
Qihui Huang,
Appellant
v.
Ajit Varadaraj Pai, Chairman of Federal Communications Commission (FCC), et al.,
Appellees
BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s/
Ken Meadows Deputy Clerk

Appendix B (App. B)

USCA Case #17-5290 Document #1771030 Filed: 01/30/2019 Page 1 of 3

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5290 September Term, 2018
1:16-cv-00398-JEB
Filed On: January 30, 2019
Qihui Huang,
Appellant
v.
Ajit Varadaraj Pai, Chairman of Federal Communications Commission (FCC), et al.,
Appellees

BEFORE: Henderson, Rogers, and Wilkins, Circuit Judges

ORDER

Upon consideration of the motions for summary reversal, the response, the reply, and the supplements thereto; appellees' motion for summary affirmance and the response thereto; the motion to refer for criminal prosecution and the supplement thereto; the motion for jury trial and the supplement thereto; the motion for leave to seek damages under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and the supplement thereto; the motion for stay, which is construed as a motion to defer consideration of certain claims, and the supplement thereto; appellant's brief and

appendix; and appellant's remaining submissions, which are construed as supplements to the motions for summary reversal, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed for lack of jurisdiction appellant's claims against her individual supervisors. See Jarrell v. U.S. Post Office, 753 F.2d 1088, 1091 (D.C. Cir. 1985) ("the head of the agency is the only proper defendant in a Title VII action"). Dismissal of appellant's claims arising under criminal law and her request for criminal punishment of the appellees was also proper because appellant lacks standing to enforce the criminal law. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

The district court construed appellant's claim of discrimination based on appellees' failure to transfer her to a new management team as arising under the

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Rehabilitation Act and properly dismissed that claim for lack of jurisdiction because appellant failed to exhaust her administrative remedies. See Spinelli v. Goss, 446 F.3d 159, 162

(D.C. Cir. 2006). The court also correctly dismissed for failure to state a claim appellant's claims of discrimination and retaliation arising from her supervisor's responses to a draft report she prepared, the failing rating on her performance review, the requirement of additional documents in support of her request for sick leave, and her placement on a Performance Improvement Plan. See Stewart v. Ashcroft, 352 F.3d 422, 426 (D.C. Cir. 2003) (to state a Title VII claim, a "plaintiff bears the burden of showing tangible employment action evidenced by firing, failing to promote, a considerable change in benefits, or reassignment with significantly different responsibilities"). Dismissal of appellant's claims of hostile work environment and constructive termination was also proper. See Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (a plaintiff alleging hostile work environment "must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'") (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)) (additional citations omitted); Steele v. Schafer, 535 F.3d 689, 694-95 (D.C. Cir. 2008) (conduct giving rise to a constructive termination claim must be even more severe than what is required for a hostile work environment claim).

The district court properly granted summary judgment for appellees on appellant's claim arising from the denial of her in-grade pay step increase. While the failure to exhaust that claim could be excused on equitable grounds, see Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), appellant has shown no error in the district court's conclusion that she abandoned her claim. Further, the district court correctly held that appellant failed to raise a material issue of disputed fact that appellee's legitimate, non-discriminatory reasons for denying appellant's pay step increase were pretextual and that appellees discriminated against her. See, e.g., Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 496 (D.C. Cir. 2008). It is

FURTHER ORDERED that the motion to refer for criminal prosecution, the motion for jury trial, and the motion to defer consideration be denied. Appellant has shown no entitlement to the requested relief. It is

FURTHER ORDERED that the motion for leave to seek Bivens damages be denied. See Brown v. GSA, 425 U.S. 820, 835 (1976) (Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5290 September Term, 2018
of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App.
P. 41(b); D.C. Cir. Rule 41.
Per Curiam
Page 3

Appendix – C (App-C)

Case 1:16-cv-00398-JEB Document 23 Filed 10/19/16 Page 1 of 1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

QIHUI HUANG,

Plaintiff,

v. Civil Action No. 16-398 (JEB)

TOM WHEELER, Chairman, Federal Communications Commission,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1) Defendant's Motion to Dismiss is GRANTED IN PART and DENIED IN PART;

2) The Case is DISMISSED except for Plaintiff's claims regarding the 2015 denial of her within-grade step increase; and

3) Defendant shall file its Answer by November 2, 2016.

SO ORDERED.

Date: October 19, 2016

/s/ James E. Boasberg

JAMES E. BOASBERG

United States District Judge

Appendix – D (App-D)

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 1 of 21

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

QIHUI HUANG,
Plaintiff,
v. Civil Action No. 16-398 (JEB)
TOM WHEELER, Chairman, Federal Communications Commission,
Defendant.

MEMORANDUM OPINION

Some people have experienced the daily struggle of toiling under a supervisor who makes their blood boil. Plaintiff Qihui Huang – who worked as an electronics engineer at the Federal Communications Commission – asserts that she suffered a more literal form of this metaphorical malady. According to Huang, her supervisors at the FCC treated her so unfairly that the mere mention of their names caused her high blood pressure to rise to near-fatal heights. She thus brings this pro se action against her supervisors and the FCC, alleging that they created a hostile work environment, and discriminated and retaliated against her in violation of numerous federal and state laws. The FCC now files a Motion to Dismiss, contending that all of the claims in her Amended Complaint suffer from terminal defects. As the Court largely agrees with the agency's assessment, it will grant the Motion for the most part.

I. Background

The Court, as it must at this stage, draws the facts from Plaintiff's Complaints and her

Opposition to the Motion to Dismiss. See Brown v. Whole Foods Market Gr., Inc., 789 F.3d 146, 152 (D.C. Cir. 2015) (holding district court must consider all pro se litigant's allegations

1

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 2 of 21

when considering a motion to dismiss, including those found in plaintiff's opposition). It notes that Huang has not made this an easy task, however, because her pleadings contain only vague and cursory factual allegations. Where she does allege facts, for example, they mostly lack dates and critical details. The Court nevertheless attempts, as best it can, to describe the facts she has provided in the light most favorable to her.

Plaintiff is an Asian-American sexagenarian with two advanced degrees in electrical engineering

and physics. See ECF No. 17 (Opposition) at 24. Her work has even contributed to a Nobel Prize in physics. Id. In 1991, she joined the FCC as a

computer specialist. Id. at 19. During her long and successful career at the agency, she amassed several performance awards and was repeatedly

promoted through competitive job postings. Id. Huang eventually reached the GS-15 level as a senior electronics engineer in the FCC's Office of Engineering Technology in 2004 and, over the next decade, continued to receive praise in that role from two different supervisors as she rose to a GS-15, Step 7 pay grade. Id. at 19-20; ECF No. 1 (Complaint) at 9.

Her smooth sailing at the agency ran into a squall, however, in 2014. In April of that year, her supervisor, Robert Weller, asked her to write a report on "wireless microphones systems in the U.S. market." Compl. at 2. Huang strove diligently on the task over the summer. Id. Weller left the agency in July 2014 without having commented on her work. See Opp. at 20-

21. His replacement as Branch Chief, Martin Doczkat, requested the report shortly thereafter and gave it back to her several weeks later with 83 comments attached. Id. at 21-22. Huang was shocked by the extensive nature of these comments and an accompanying email indicating that, as a GS-15, she "should know" certain facts that she had not included in the report. Id. She subsequently demanded that Dozckat clarify both whether he believed that she was unqualified for her GS-15 position and whether she should take his comments to mean that she had

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 3 of 21

performed the task poorly. Id. Considering his subsequent silence an admission to both, Huang simmered under what she believed was the unjustified nature of these critiques, given that she had merely been following the instructions provided to her by Weller in crafting the report. Id. at 22-23.

Huang's health deteriorated under the weight of this criticism from her supervisor. Id. at 27. She became afraid of Dozckat and her Division Chief, Walter Johnson. Id. When either of the men contacted (or suggested they might contact) her at work, her blood pressure would rise to dangerously high levels, putting her in fear for her life. Id. Huang sought relief in two ways. She first asked for help from a nurse at the FCC, who recommended that she request a supervisor swap before her hypertension did her in. Id. Then, on October 20, 2014, Huang pursued counseling at the agency's Equal Employment Opportunity office, claiming that Doczkat's comments on her report were discriminatory and created a hostile working environment. See ECF No. 14 (Motion to Dismiss) at 3.

A month later, in November 2014, Doczkat gave Huang a failing grade on her midterm performance review. See Opp. at 26. She immediately responded by calling for a meeting with her union representative. Id. At that meeting, Doczkat represented that he had given her the poor rating due to her failure, among other things, to complete required trainings that she now claims she had in fact completed. Id. Frustrated, Huang quickly initiated EEO counseling in regard to this review and also filed a formal EEO

discrimination complaint on December 19, 2014,

alleging that Dockzat's earlier negative comments on her report were motivated by discriminatory animus and created a hostile working environment. See Mot. at 3.

Huang's health continued its decline that winter, however, and, in early 2015, she was forced to request medical leave to deal with her hypertension. Id. Before approving her request,

3

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 4 of 21

Doczkat asked that she provide additional medical verification of her condition. Id. This demand, too, caused Huang's blood pressure to spike to dangerously high levels, and so she warned him that she would file another complaint with the EEO office if he did not grant her request. See Opp. at 27.

She nevertheless provided the requested paperwork, and Dozckat retroactively granted the

medical leave as promised. Id.; Compl. at 4 (noting she was out on sick leave from early February 2015 through August 2015); Mot. at 22-23. He also periodically approved her requests for sick leave for the next six months. See Mot. at 22-23. In February 2015, however, he did not approve Huang's scheduled increase to a new pay step within the GS-15 band. See Opp. at 27.

Huang finally returned to work in August 2015. Id. At that time, she submitted a formal request to the FCC's Office of Workplace Diversity for a

transfer to another management team as a reasonable accommodation for her high blood pressure. See Opp. at 12. She asserted that she would die from her condition if the agency forced her to continue to interact with Johnson and Dozckat. See ECF No. 14, Exh. D (Letter from the Office of Workplace Diversity) at 1. According to Huang, by this time, even the mention of their names caused her blood pressure to spike to near-fatal levels. Id. She also attached two letters from her long-term doctor discussing her history of severe hypertension, as well as similar statements from two nurses and an acupuncturist. Id. at 2-3. The OWD denied the request, though, because she "refused to participate in identifying modifications or adjustments that would be effective" at accommodating her disability, such as allowing an intermediary to pass assigned work to her. Id. at 4-5; Am. Compl., ¶¶ 5, 8.

Around this time, the agency also placed Huang on a Performance Improvement Plan. See Am. Compl., ¶ 9. A PIP "precedes the proposal of a reduction in grade or removal for

4

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 5 of 21

unacceptable performance, and an employee has not less than thirty calendar days to demonstrate acceptable performance pursuant to her supervisor's identification of the core competency for which performance is unacceptable." Mot. at 23 n.13 (quotation marks omitted). In Huang's case, she was given 90 days to improve her performance or face termination. See Am. Compl.,

¶ 9. Huang decided instead to retire in January 2016 at the age of 64. Id. at 9-10; Mot. at 2. Before doing so, however, she sought to complain to the OWD about several of the latter actions taken against her – e.g., the PIP and the initial denial of sick leave – but she received no response from that office and never filed a formal EEO complaint in regard to these grievances. See Opp. at 10-11 n.9.

Huang did, however, file, this federal lawsuit on February 29, 2016, against the FCC, Doczkat,

and Johnson, alleging that they had discriminated against her on the basis of her age, sex, national origin, and disability. See ECF No. 1 (Complaint). After seeking leave for an extension of

time to file a response, the FCC moved to dismiss that Complaint on June 6, 2016. See ECF No. 8. The Court denied that motion without prejudice when it granted Huang's subsequent motion for leave to "amend or correct her complaint

by adding counts (claims)." See Am. Compl.; 6/30/2016 Minute Order. Now read together with her original Complaint, Huang's Amended Complaint asserts numerous counts of

discrimination and/or retaliation against the FCC based on various federal and state laws, specifically:

I) the FCC discriminated against

her and created a hostile work

environment when Doczkat intimated that

she was unqualified for a GS-15 position and performed poorly on drafting her microphone report; II) Dozckat discriminated and retaliated against her

when he gave her a "fail" on her November 2014 midterm performance evaluation; III) Dozckat

discriminated and retaliated against her when he did not approve her sick leave; IV) Dozckat and Johnson discriminated and retaliated against her

5

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 6 of 21

when they denied her scheduled step increase; V) the FCC discriminated and retaliated against her when it placed her on the PIP; VI) the FCC discriminated against her when it did not approve her requests for a transfer as a reasonable accommodation for her hypertension; VII) the FCC committed various criminal acts through its discriminatory employment actions; VIII) the FCC forced her to resign as a result of its discrimination; and IX) the FCC, through all of the above actions, created a hostile working environment. The FCC's Motion to Dismiss this Amended Complaint is now ripe.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action where a

complaint fails "to state a claim upon which relief can be granted." In evaluating Defendant's Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)) (citation omitted); see also Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1250 (D.C. Cir. 2005). The pleading rules are "not meant to impose a great burden upon a plaintiff," Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005), and she must thus be given every favorable inference that may be drawn from the allegations of fact. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584 (2007).

Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, id. at 555, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). The Court need not accept as true, then, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in

the Complaint. Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan

v. Allain, 478 U.S. 265, 286 (1986) (internal quotation marks omitted)). For a plaintiff to survive a 12(b)(6) motion even if "recovery is very remote and unlikely," the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555-56 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). While pro se pleadings are held to "less stringent standards than formal pleadings drafted by lawyers, [they] must nonetheless plead factual matter that permits [the Court] to infer more than the mere possibility of misconduct." Brown, 789 F. 3d at 150 (internal quotations and citations omitted).

The standard to survive a motion to dismiss under Rule 12(b)(1), though, is less forgiving. Under this Rule, Plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear her claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). A court also has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). For this reason, "'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." Id. at 13-14 (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987) (alteration in original)). Additionally, unlike with a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether

to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens, 402 F.3d at 1253; see also Venetian Casino Resort, L.L.C. v. E.E.O.C., 409 F.3d 359, 366 (D.C. Cir. 2005) ("given the present posture of this case – a dismissal under Rule 12(b)(1) on ripeness grounds – the court may consider materials outside the pleadings").

7

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 8 of 21

III.Analysis

In considering Defendant's Motion to Dismiss, the Court first briefly discusses Plaintiff's

claims that must be dismissed under Rule 12(b)(1) for threshold jurisdictional defects. It then moves on to separately address what remains of Huang's suit under Rule 12(b)(6)'s more lenient pro se standard, taking each count in turn. In this analysis, the Court treats Huang's initial Complaint, her Motion to Amend that Complaint, and all of the factual statements found in her Opposition to the Motion to Dismiss as covered under the umbrella of her Amended Complaint.

A. Jurisdictional Defects (Counts VI and VII)

The Court need not spill much ink over two of Huang's claims, as they suffer from basic jurisdictional defects. First, to the extent that her

Amended Complaint seeks to assert criminal

charges in Paragraph 4 (Count VI), under either state or federal law, she lacks standing to bring these causes of action. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (holding "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). Huang also may not pursue her federal employment-discrimination claims against Johnson and Dockzat as individuals. See, e.g., Jarrell v. U.S. Postal Serv., 753 F.2d 1088, 1091 (D.C. Cir. 1985) ("[T]he head of the agency is the only proper party defendant in a Title VII action."). The sole appropriate Defendant in this action is the Chairman of the FCC, Tom Wheeler, who is tasked with defending the agency under the relevant employment-discrimination laws. See id. The Court, accordingly, must dismiss all of Plaintiff's claims as asserted against Doczkat and Johnson.

The same fate befalls the claims found in Paragraphs 5 and 8 of her Motion to Amend (Count VII). In these portions of the Amended Complaint, Huang alleges that the FCC discriminated against her under the Americans with Disabilities Act when it refused her

8

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 9 of 21

hypertension-based requests to transfer to a different chain of command. See Am. Compl., ¶¶ 5, 8. But the relevant provisions of the ADA do not apply to federal agencies like the FCC. See Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 11 n.1 (1st Cir. 2004) (explaining that "the ADA is not available to federal employees").

Her disability-related claims instead arise under the Rehabilitation Act. Id. As such, this Court has subject-matter jurisdiction over them only if she first exhausted her administrative remedies with regard to the denial of this request for an accommodation. See Spinelli v. Goss, 446 F.3d 159, 162 (D.C. Cir. 2006) (explaining that Rehabilitation "Act limits judicial review to employees 'aggrieved by the final disposition' of their administrative 'complaint'") (citing 29 U.S.C § 794a(a)(1)); Mahoney v. Donovan, 824 F. Supp. 2d 49, 58 (D.D.C. 2011) (failure to exhaust administrative remedies for Rehabilitation Act claim is jurisdictional defect).

The FCC points out that Huang has not alleged that she exhausted such remedies, and she readily admits that she failed to pursue any formal complaint with the EEOC or MSPB in regard to her request for a transfer. See Opp. at 10-11 n.9. While she nevertheless asks this Court to excuse her failure, the jurisdictional nature of this requirement prevents such an exception. See Spinelli, 446 F.3d at 162. This disability-related count must therefore be dismissed as well.

B. Report Comments (Count I)

In her first count, Huang alleges that

Dozckat discriminated against her and created

a hostile working environment when he provided negative comments on her 2014 report. See Compl. at 2. She is particularly unhappy about an email he sent, which insinuated that she was not qualified for her job and that she had performed the task poorly. Id. at 2-4; Opp. at 22. In essence, Huang

argues that an inference can be drawn that the substantive comments on the report were motivated

by discriminatory animus because: 1) Doczkat failed to recognize the role

9

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 10 of 21

played by her former supervisor in crafting the report's content; 2) Doczkat was less qualified than she was to be a GS-15; and 3) previous supervisors gave her performance awards for over a decade before Dozckat criticized her work. See Compl. at 2. Huang finds further support for her claim in Dozckat's failure to assign someone else to work on the report while she was out on sick leave and in Weller's original decision to assign her the report since most of her work came directly from Congress or the FCC Chairman. Id. at 3-4. The

latter allegation is somewhat confusing, of course, given that Huang does not otherwise allege that Weller discriminated against her in any way during his time at the agency. She nevertheless

seems to assert that these facts indicate that her supervisors concocted the report as a made-up assignment to find fault with her performance on the task. Id. at 4.

This count, as the FCC correctly argues, fails to state either a viable discrimination or hostile-work-environment claim. For the former, a plaintiff must allege that she suffered an adverse employment

action because of her race, color, religion, sex,

national origin, age, or disability. See Baloch v.

Kempthorne, 550 F.3d 1191, 1196 (D.C. Cir. 2008) (laying out basic elements of discrimination

claim under Title VII, ADEA, and

Rehabilitation Act). The alleged employment action must be "tangible" as evidenced by "firing, failing to promote, a considerable change in benefits, or reassignment with significantly different responsibilities." Stewart v. Ashcroft, 352 F.3d 422, 426 (D.C. Cir. 2003) (citations and quotation marks omitted). Huang never alleges, however, that Dozckat's negative comments affected her employment in any such tangible way. Taylor v. Small, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003) ("[F]ormal criticism" is not actionable adverse action unless it "affect[s] the [employee's] grade or salary."). At best, she complains only that she found the insinuation that she was unqualified for her job offensive and unfair. But a "bruised ego will not suffice to make an employment action adverse." Stewart,

10

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 11 of 21

352 F.3d at 426 (quoting Stewart v. Ashcroft, 211 F. Supp. 2d 166, 173 (D.D.C. 2002)). Without more, then, Huang has not stated a viable discrimination claim on the basis of Doczkat's comments and conclusions alone.

This count likewise falls well shy of establishing a hostile work environment. The Supreme Court has held that federal antidiscrimination laws make it unlawful for an employer to "requir[e] people to

work in a discriminatorily hostile or abusive environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). To prevail on such a claim, however, "a plaintiff must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Baloch, 550 F.3d at 1201 (quoting Harris, 510 U.S. at 21). "The Supreme Court has made it clear that [such] 'conduct must be extreme to amount to a change in the terms and conditions of employment.'" George v. Leavitt, 407 F.3d 405, 416 (D.C. Cir. 2005) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)). By adhering to these standards, the Court "ensure[s] that Title VII does not become a general civility code" requiring courts to police "the ordinary tribulations of the workplace." Faragher, 524 U.S. at 788 (citation and internal quotation marks omitted).

It is plain that Huang alleges no more than the ordinary tribulations of the workplace in this count. She makes no attempt to characterize Dozckat's comments as objectively severe, offensive, abusive, or even repeated, much less pervasive.

Huang does not contend, for example, that the comments picked on (or even mentioned) her age, race, sex, disability, or national origin. Nor does she argue that Dozckat repeatedly ridiculed or taunted her with these comments. In fact, her Amended Complaint states that Dozckat refused to further discuss his editing of the report and, instead, remained silent when she asked him whether the comments indicated that she

was unqualified for her job. See Compl. at 3-5. On these facts, then, Huang has not sufficiently pled a hostile-work-environment claim. The Court must, accordingly, dismiss this count.

C. Midterm Performance Evaluation (Count II)

In her next count, Huang alleges that Dozckat discriminated and retaliated against her when he gave her a "fail" on her 2014 midterm performance evaluation. See Compl. at 6. To support this claim, Huang states that she never received a failing grade in her previous decade in that position or in the 23 years that she otherwise served at the agency. Id. It is understandable, then, that this reversal of fortunes must have come as quite a blow.

As explained above, however, to establish a viable claim for discrimination, Huang must do more than point to the subjective impact that this evaluation had on her. She must also plead that the poor review had a tangible effect on the terms or

conditions of her employment.

Stewart, 352 F.3d at 426. Under this standard, "poor performance evaluations are" not actionable adverse actions unless they "affect[] the [employee's] grade or salary." Taylor, 350 F.3d at 1293; Russell v. Principi, 257 F.3d 815, 819 (D.C. Cir. 2001) (recognizing performance evaluations are

likely to be interlocutory or mediate decisions having no immediate effect upon employment). Huang makes no claim that this midterm evaluation

had such an effect. In fact, she does not object to the FCC's description of this evaluation as merely a preliminary review. As such, the Court has no grounds upon which to conclude that this evaluation tangibly affected the terms or conditions of her employment, and she has thus not sufficiently stated a discrimination claim.

Huang similarly fails to plead a viable retaliation claim on this count. To do so, she must assert that she suffered a materially adverse action because she brought or threatened to bring a discrimination claim. See, e.g., 42 U.S.C. § 2000e-3(a). While the "'adverse action' [element]

12

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 13 of 21

in the retaliation context encompass a broader sweep of actions than those in a pure discrimination claim," Huang must nevertheless

plead an adverse action that would have "dissuaded a reasonable worker from making or

supporting a charge of discrimination." Baloch, 550 F.3d at 1199 n.4. A midterm performance evaluation that has no binding effect on an employee's salary, bonus, leave, or other benefits does not qualify even under this more lenient standard. Id. at 1199 (noting "performance reviews typically constitute adverse actions only when attached to financial harms" and holding review did not qualify as adverse action in retaliation context

even when accompanied by other letters of

reprimand and counseling); accord Weber v. Batista, 494 F.3d 179, 185 (D.C. Cir. 2007)

(holding performance evaluation to be materially adverse where it resulted in employee's not receiving a cash award). As a result, the Court will dismiss Huang's second count as well.

D. Denial of Sick Leave Request (Count III)

Count III alleges that Dozckat discriminated and retaliated against her when he failed to immediately approve her request for sick leave in February 2015. See Compl. at 8-9. While apparently conceding that he did eventually grant the request, she maintains that his demand for further paperwork was unjustified because she supported her initial request with a doctor's notes. See Opp. at 27; Compl. at 7. Huang, moreover, contends that she suffered an attack of hypertension as a result of this demand, which put her in serious jeopardy of death. Id. Doczkat, according to her, only granted the leave because she threatened to file another discrimination complaint with the OWD, and he realized then that he was in the wrong. Id.

This count, however, cannot survive for the same reason as the last two. Sick leave that is

eventually granted – even after the imposition of restrictions such as a demand for additional documentation – does not constitute the sort of adverse action necessary for a retaliation or

discrimination claim. Baloch, 550 F.3d at 1198 (holding imposition of sick-leave restrictions

requiring a physician to repeatedly certify the health problem and treatment plan did not amount

to materially adverse action for retaliation claim where leave was eventually granted). This count gains no traction.

E. Denial of Step Increase (Count IV)

In her fourth count, Huang alleges that Doczkat, Johnson, and other unnamed FCC supervisors discriminated and retaliated against her when they denied her automatic step-increase in February 2015. See Compl. at 9. This resulted in her receiving a few thousand dollars less in her salary. Id. This fact means that, unlike her other claims just discussed, Huang has adequately supported this count by alleging a viable adverse employment action.

The FCC nevertheless argues that this count should be dismissed because Huang did not file an administrative complaint challenging this action before seeking relief in this Court. It is axiomatic that federal employees may file a Title VII or ADEA action in federal court only after exhausting their administrative remedies. Payne v. Salazar, 619 F.3d 56, 65 (D.C. Cir. 2010) (affirming dismissal of Title VII retaliation claim for failure to exhaust); 42 U.S.C. § 2000e-16(c) (Title VII exhaustion requirements); 29 U.S.C. § 633a(b)-(d) (ADEA exhaustion requirements). These exhaustion requirements, however, are not jurisdictional. Artis v. Bernanke, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011) (citing Menominee Indian Tribe of Wis. v. United States, 614 F.3d 519, 527 (D.C. Cir. 2010)). "Because untimely exhaustion of [Title VII] administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving it," rather than the

plaintiff. Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997) (citation omitted and emphasis added). As a result, unless the Court transforms the Motion into one for summary judgment, it is typically difficult for defendants to prevail at this

stage. In this case, however, Huang concedes that she did not file an administrative complaint with regard to this adverse action, see Opp. at 10-11, so the Court need not resort to such a conversion to dismiss the claim here.

Huang nevertheless protests that the exhaustion requirement should be excused because she complained to the OWD about other adverse actions and attempted to complain about this action, too, but received no response to her emails. Id. at 11-13. She further alleges that the acting director of the OWD treated her unfairly, and, as a result, she could not respond to OWD emails or communications without risking death due to her high blood pressure. Id. Finally, she argues that she did not need to exhaust her administrative remedies here because exhaustion is not required for claims brought under Section 1981 or Section 1983. Id. at 13-14 (citing 42 U.S.C. §§ 1981, 1983).

Most of Huang's arguments are insufficient as a matter of law to excuse her admitted failure to exhaust this claim. Taking the last one first, Section 1983 does not apply to federal officials acting under the color of federal law. Settles v. U.S. Parole Com'n, 429 F.3d 1098, 1104 (D.C. Cir. 2005). Section 1981 likewise provides a federal remedy against discrimination in private employment, Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454, 459-60 (1975) (emphasis added), and, consequently, also does not apply to a federal agency like the FCC. To the extent that Huang means through her Opposition to re-plead this count under those provisions, then, the Court must dismiss the count under Rule 12(b)(1) for want of jurisdiction. Settles, 429 F.3d at 1105 (explaining assertion of Section 1983 claim against federal entity presents jurisdictional defect going to sovereign immunity of United States).

The Court similarly rejects Plaintiff's assertion that her failure might be excused on the

basis of her two previous EEO

complaints that were made in regard to Doczkat's comments on

15

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 16 of 21

her report and the low performance evaluation. An employee must exhaust the administrative process for each discrete action for

which she seeks to bring a claim. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113, 122 (2002); Coleman-Adebayo v. Leavitt, 326 F. Supp. 2d

132, 137 (D.D.C. 2004); Martinez v. Potter, 347 F.3d 1208, 1211 (10th Cir. 2003). The Supreme Court in Morgan noted that "each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" 536 U.S. at 114. As the court in Coleman-Adebayo further elaborated:

The key to determining whether a claim must meet the procedural hurdles of the exhaustion requirement itself, or whether it can piggy-back on another claim that has satisfied those requirements, is whether the claim is of a "discrete" act of discrimination or retaliation or, instead, of a hostile work environment. "Discrete acts such as termination, failure to promote, denial of transfer,

or refusal to hire" are individual acts that "occur" at a fixed time. Accordingly, plaintiffs alleging such discriminatory action must exhaust

the administrative process regardless of any relationship that may exist between those

discrete claims and any others. 326 F. Supp. 2d at 137-38 (quoting Morgan, 536 U.S. at 114). As a matter of law, Huang'sallegation that she filed other EEO complaints does not state a potential avenue to relief from theexhaustion requirement on this count.

The same cannot be said, however, of Huang's factual recitations that appear to go to whether the FCC's OWD office prevented her from filing a complaint or misled her as to what would be required to pursue her claim in district court. See Opp. at 10-11 n.9. Because the "filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, . . . [it] is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). At least one Circuit has held that an "equitable exception to the exhaustion requirement is available when an EEOC representative misleads the plaintiff concerning his claim." Josephs v. Pac. Bell, 443 F.3d 1050, 1061 (9th Cir. 2005). This

16

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 17 of 21

relief may be granted to a plaintiff who: "(1) diligently pursued [her] claim; (2) was misinformed or misled by the administrative agency responsible for processing [her] charge; (3) relied in fact on the misinformation or misrepresentations of that agency, causing [her] to fail to exhaust [her] administrative remedies; and (4) was acting pro se at the time." Id. (quoting Rodriguez v. Airborne Express, 265 F.3d 890, 902 (9th Cir. 2001)). Whether or not Huang can ultimately meet such a standard is more appropriately resolved at summary judgment. For now, under the generous pro se pleading standard, she has alleged sufficient facts to create a plausible right to such relief, and this count thus survives.

F. Placement on Performance Improvement Plan (Count V)

Huang makes only passing reference to her placement on a PIP prior to her retirement from the agency as another potential basis for this suit. See Am. Compl., ¶ 9. She does not indicate when this occurred, nor who made the decision to place her on the PIP. Regardless, this fact alone does not meet the standard required for an actionable adverse action unless it results in a change in pay or grade. Taylor, 350 F.3d at 1293, 1296 (holding placement on PIP did not constitute adverse employment action as required to establish discrimination or retaliation claim, absent evidence such conduct caused change in grade or salary); Chowdhury v. Bair, 604 F. Supp. 2d 90, 96 (D.D.C. 2009). Huang, again, does not allege that the PIP resulted in such a change. The Court, accordingly, dismisses this claim.

G. Constructive Discharge (Count VIII)

Huang also alleges that the above actions forced her to retire from the agency in January 2016,

several years before she intended to do so. See

Compl. at 10-11; Am. Compl., ¶ 10. In essence, this is a constructive-discharge claim. The constructive-discharge doctrine considers "an

employee's reasonable decision to resign because of unendurable working conditions . . . to

17

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 18 of 21

[be] a formal discharge for remedial purposes."

Penn. State Police v. Suders, 542 U.S. 129, 141 (2004). Constructive-discharge claims are therefore designed to address situations in which employers coerce employees to resign by creating intolerable working conditions. Id.

To support such a claim in the discrimination context, Huang must allege "that [she] was discriminated against by [the FCC] to the point where a reasonable person in [her] position would have felt compelled to resign." Green v. Brennan, 136 S. Ct. 1769, 1777 (2016) (describing elements for constructive-discharge claim under Title VII). These conditions must go beyond "ordinary" discrimination. Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997). The conduct, in fact, must amount to more than that

required to support a hostile-work-environment claim so that the plaintiff's resignation qualifies as a fitting response to the discrimination. Steele v. Schafer, 535 F.3d 689, 694-95 (D.C. Cir.

2008). In other words, in a run-of-the-mill hostile work environment, an employee is expected

to "mitigate damages by remaining on the job unless that job presents such an aggravated

situation that a reasonable employee

would be forced to resign." Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981) (quotation

marks omitted). An employee's decision to retire is thus insufficient where driven only by

concern for the effect of the job's normal tasks on her health. See, e.g., Spence v. Maryland Cas.

Co., 995 F.2d 1147, 1156 (2d Cir. 1993)

("[T]he fact that an employee develops stress-related ill health from the demands of his voluntarily undertaken position or from criticisms of his performance, and as a result determines that health considerations mandate his resignation, does not normally amount to a constructive discharge by the employer."). Likewise, a failure to promote, a change in job duties, a transfer, criticism, pressure from a supervisor, or being ignored by co-workers are not the sort of "aggravating factors" necessary to support a constructive-discharge claim. Veitch v. England, 471 F.3d 124, 131 (D.C. Cir. 2006).

18

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 19 of 21

Suffice it to say, the allegations in Huang's Amended Complaint fall far short of this standard. Even considering every factual allegation she provides as part and parcel of this claim, she has only asserted stress from working for a critical or difficult supervisor. At no point does she point to an aggravating factor sufficient to support a reasonable employee's decision to involuntarily retire. She never alleges any derogatory comments made about any of her protected characteristics. Nor does she describe any contact from her supervisors that could be considered as outside the ordinary contact expected from a superior. Huang, consequently, has not stated a viable constructive-discharge claim.

H. Hostile Work Environment (Count IX)

Although Plaintiff does not explicitly enumerate a hostile-work-environment count based on the combination of the above-mentioned actions taken against her by Johnson and Dozckat, her pro se pleading may fairly be construed to allege such a claim. In particular, she repeatedly asserts that her supervisors created a hostile work environment by, inter alia, "deliver[ing] documents to her, talk[ing] to her, communicat[ing] with her, email[ing] her, call[ing] her, knock[ing] her office door, forcibly open[ing] her office door, and etc., more," when they knew that "their . . . actions frequently or always caused Plaintiff's blood pressure [to] promptly raise[] . . . up to 223 mmHg." Compl. at 6-7; Am. Compl. at 2-3. She thus contends that they knowingly and willfully placed her at substantial risk of death through these actions. Id. Because the hostile-work-environment standard is somewhat lower than that required for constructive discharge, out of an abundance of caution, the Court addresses this claim separately. Yet, even considering in concert all of the factual allegations made throughout the Amended Complaint, the Court still finds the count wanting.

19

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 20 of 21

As indicated above, to establish a hostile work environment, Huang must allege "harassing behavior sufficiently severe or pervasive to alter the conditions of [her] employment." Suders, 542 U.S. at 133 (quotation marks omitted). The "discriminatory intimidation, ridicule, and insult,"

moreover, must be "sufficiently severe or pervasive [so as] to alter the conditions of the victim's employment and create an abusive working environment.'" Baloch, 550 F.3d at 1201; George, 407 F.3d at 416 (holding conduct must be extreme).

Looking at "all the circumstances" here – including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably

interferes with an employee's work performance" – Dozckat and Johnson's conduct cannot fairly be said to state a plausible ground for relief. Morgan, 536 U.S. at 116 (quoting Harris, 510 U.S. at 23). Huang has instead alleged only the

ordinary contact required for a supervisor to oversee his employee. She does not point to any inappropriate or abnormal conduct

inflicted upon her by either Johnson or Doczkat. She offers no allegation, for example, that her supervisors sought to increase their contact with her to induce or aggravate her hypertension. At most, Doczkat and Johnson may have given her unjustified criticism on her work product and unfairly denied her a scheduled increase in pay. This is not the sort of conduct that is necessary to support a hostile-work-environment claim.

20

Case 1:16-cv-00398-JEB Document 24 Filed 10/19/16 Page 21 of 21

IV. Conclusion

For the reasons stated above, the Court will

dismiss all of Plaintiff's claims against Johnson .

and Doczkat. It will also dismiss all of her claims against the FCC with the sole exception being that regarding the denial of her within-grade step increase in February 2015. A contemporaneous Order will issue to this effect.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge
Date: October 19, 2016

Appendix E (App. E)

Case 1:16-cv-00398-JEB Document 85 Filed 09/15/17 Page 1 of 1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 16-398 (JEB)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendant's Motion for Summary Judgment is GRANTED;
2. Plaintiff's Motion for Summary Judgment is DENIED;
3. Plaintiff's Motion for Honorable Judge to Take Actions Against Crimes of Defendant is DENIED;
4. Plaintiff's Motion for Jury Trial and Opposition of Summary Judgment is DENIED;
5. Plaintiff's Motion to Also Rule Defendant Violated 42 U.S.C. § 1981 is DENIED; and
6. Judgment is ENTERED in favor of Defendant.

SO ORDERED.

Date: September 15, 2017

/s/ James E. Boasberg

JAMES E. BOASBERG

United States District Judge

Appendix – F (App. F)

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 1 of 19

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

QIHUI HUANG,
Plaintiff,
v. Civil Action No. 16-398 (JEB)
AJIT PAI, Chairman,
Federal Communications Commission,
Defendant.

MEMORANDUM OPINION

Plaintiff Qihui Huang is an "Asian American, foreign-born" woman over sixty years old. See ECF No. 1 (Complaint) at 1, 5. After an almost 25-year career at Defendant Federal Communications Commission, Huang brought this *pro se* suit, alleging a host of discriminatory and retaliatory actions by her supervisors. Defendant previously filed a Motion to Dismiss, which the Court granted except as to one claim: the Agency's allegedly improper denial of Huang's within-grade pay increase. See Huang v. Wheeler, 215 F. Supp. 3d 100, 114 (D.D.C. 2016). The parties have now filed Cross-Motions for Summary Judgment on this remaining issue. Because the Court finds that Huang did not exhaust her administrative remedies — and would lose on the merits even if she had — it will grant Defendant's Motion.

I. Background

As the prior Opinion thoroughly detailed the factual history of Plaintiff's tenure at the FCC, id. at 103-106, the Court here sets forth the facts (in the light most favorable to Huang) only as they relate to her pay-increase denial.

1

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 2 of 19

A. Factual History

Huang began at the FCC in 1991 as a GS-12 computer specialist. See Def. Opp., Exh. 1 (Response to Pl. Statement of Facts), ¶ 13. In 2004, after several promotions, she became a GS- 15 senior electronics engineer in the Technical Analysis Branch of the Office of Engineering and Technology. See Def. MSJ, Exh. 2 (SOF), ¶ 2. GS-15 engineers are "considered senior expert consultants and subject matter experts in one or more areas of engineering or communications." ECF No. 82 (Report of Investigation) at 203. They "conduct[] the most difficult types of technical studies and/or direct[] special project teams on matters pertaining to various phases of electromagnetic wave propagation." Id. at 215. Senior engineers, accordingly, must "exercise[] a high degree of originality, initiative and sound judgment." Id.

Huang's first ten years as a GS-15 seem to have been smooth sailing; she received "pass" performance-review ratings every year and even performance awards in several years. See Def. Response to Pl. SOF, ¶¶ 30-34. Robert Weller, TAB Chief, was Huang's supervisor during much of this time. On April 21, 2014, he assigned her a wireless-microphone-study report, which would cause her great difficulty. The assignment tasked Huang with "identify[ing] current wireless microphone operating parameters and analyz[ing] several spectrum options for possible use by wireless microphones." Pl. MSJ, Exh. E at 2 (Apr. 1, 2014, Mem. from Weller to Huang). Weller outlined nine specific areas that she was to research and analyze and requested that she "provide a type-written report with appropriate tables and charts . . . by May 1, 2014." Id. Plaintiff did not submit a first draft until July, which Weller reviewed page by page, providing a list of areas that needed clarification or improvement. He noted multiple "formatting[,] . . . spelling and grammar errors," and he also had concerns regarding Huang's analysis. Id. at 6. At some point, she submitted another draft, which Weller noted was "an

improvement." Id. at 4. He observed, however, that several areas still needed additional shoring up, including incorrect calculations and "gaps and inconsistencies in the data." Id. at 5. Huang had not completed the report by the time Weller left the Agency in late July 2014.

When Weller departed, it appears he took the wind in Huang's sails with him. Martin Doczkat, also a GS-15 senior engineer, became the new TAB Chief, and Huang sent him what she deemed the final version of the report on August 26, 2014. See ROI at 236. Like Weller, Doczkat was not satisfied with the report, but he was more direct in his criticism. On September 11, 2014, he returned the 31-page draft report to Huang with 83 comments. Id. at 40-70. In addition to critiquing the "numerous typos, some quantitative errors, lack of citations[, and] copyright issues," id. at 179, Doczkat noted that the report was incomplete "in that it seems to overlook many of the tasks initially assigned by" Weller. Id. at 235. He further noted that, "[a]s a GS-15 electronics engineer," Huang was "expected to . . . conduct difficult and highly complex technical analyses" as well as "conduct original studies." Id. The draft report, by contrast, used simple models that appeared to have been copied from Wikipedia and heavily relied on other data sources without adjusting them to fit the task. The original May 1, 2014, deadline had "far since passed," but Doczkat encouraged Huang to "keep at it, as there may be other opportunities in the future if th[e] paper can be sufficiently improved." Id. He suggested an extended deadline one month in the future for Huang to complete her revisions and submit a final report and offered to meet with her "separately on a weekly basis if that may be helpful to work to a more complete and original quality work product." Id.

The two emailed back and forth about the project through the end of September with reasonable civility. Shortly thereafter, however, the ship ran aground. Doczkat emailed Huang on October 2, 2014, in an attempt to schedule a meeting to discuss her progress, to which she

replied that she preferred to communicate through email rather than meet face to face. Id. at 262-63. Huang then responded to each of Doczkat's 83 comments and asked that he respond to her notes. Without that feedback, she told him, she was unable to work on the study. Id. at 284, 287. Although Doczkat again reiterated his offer to discuss the project with her in advance of the fast-approaching deadline, id. at 283, communication between the two ceased, and Huang never submitted another draft of the report. See Pl. Opp., Exh. 1 (Opp. to Def. SOF), ¶ 26.

On November 20, Huang had a midterm-progress-review meeting with Doczkat's boss, Walter Johnston. (Johnston would not normally conduct these reviews, but Huang refused to meet with Doczkat in person.) In written follow-up comments provided to her after the meeting, Johnston "reminded [her] that as a GS-15 engineer [she is] expected to work with minimal supervision on complex engineering matters," and her submitted work product should be acceptable "with minimum modifications." ROI at 222. In addition to the never-completed wireless-microphone-study report, Johnston also evaluated her refusal to work on an additional assignment involving a TV study. Id. at 162. Based on those two reports — Plaintiff's only assignments during the review period — Johnston concluded that her "work was not accomplished in an effective or efficient manner." Id. at 226. He warned Huang that her work over the last 90 days did "not me[e]t our expectations for work performance at [her] grade level" and gave her 90 days

to improve. Id. at 228. It was critical for Plaintiff to meet her performance expectations during this period because she would be eligible on February 26, 2015, for a within- grade step increase from GS-15, Step 7 to GS-15, Step 8 only if her performance was "at an acceptable level of competence." Def. MSJ, Exh. E (Basic Negotiated Agreement) at 58. In other words, she needed to receive a "pass" level on her performance-rating form. On December 5, 2014, Doczkat sent Huang a notice that it was possible she would not receive a pass rating.

4

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 5 of 19

The notice outlined the areas in which he felt she was deficient and concluded that at that time her "overall performance [wa]s not at the Pass level." Id. at 8. On January 29, 2015, Plaintiff received a "fail" rating for that period. See ROI at 221. As such, she did not receive her within- grade pay increase when she became eligible in February.

B. Procedural History

Based on Doczkat's September 11, 2014, comments on the report, Plaintiff made an informal Equal Employment Opportunity complaint on October 23, 2014, alleging that her supervisors had "intentionally discriminated against [her] based on [her] race, sex, national origin, age, and/or color" by describing her work as not representative of a GS-15. See ROI at 28. The FCC EEO counselor provided Huang with a notice of right to file a discrimination complaint on December 18, 2014, and she filed her formal complaint the next day. Id. at 3. On February 4, 2015, Plaintiff filed a second complaint, alleging that the Agency had retaliated by denying her sick leave and giving her a fail rating.

On March 30, 2015, Huang emailed the FCC's Office of Workplace Diversity manager Linda Miller to file a new complaint. See Def. MSJ, Exh. H at 28. In this third complaint, she asked to add a claim that she did not receive

her step-up increase in February because of discrimination and/or retaliation. Miller did not reply to the email. At the beginning of September 2015, however, Plaintiff and Katherine Bankhead, the EEO investigator assigned to her case, communicated about the first two complaints via email. Huang tried again to add her pay-increase denial and other claims, but Bankhead told her that she needed to contact Miller to amend her complaint. See ROI at 349. Huang then replied that she did not want to amend her complaint, to which Bankhead confirmed that "the additional issues [she] raised will not be investigated," including her within-grade-increase denial. See ROI at 347. As such, the EEO

5

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 6 of 19

investigated three issues relating to the alleged discrimination against Plaintiff: (1) Doczkat's comments that her work product did not meet the standards of a GS-15 engineer; (2) the January 29, 2015, fail rating; and (3) the denial of her sick-leave request. The EEOC completed the ROI, and Huang accepted the record on December 1, 2015. See ECF No. 84 (Final Agency Decision) at 2.

In lieu of amending her complaint to include the step-up pay-increase claim in her ongoing EEO complaint, Huang filed a grievance through her Union's negotiated grievance process. On September 17, 2015, she requested that the Agency rescind her fail rating and award her a GS-15, Step 8 salary. See Def. MSJ, Exh. F (Step 1 Grievance Decision). The grievance was denied on October 19, 2015, and Huang did not administratively appeal. Id. at 6.

Plaintiff next filed this civil action on February 26, 2016, alleging discrimination, retaliation, and a hostile work environment by the FCC, Doczkat, and Johnston. The Agency, consequently, dismissed her EEO complaint. Id. at 8; 29 C.F.R. § 1614.107(a)(3) (An "agency shall dismiss an

entire complaint . . . [t]hat is the basis of a pending civil action in a United States District Court in which the complainant is a party."). Construing her Complaint and Amended Complaint liberally, the Court divined nine claims of discrimination and/or retaliation, including a count alleging a hostile work environment. The Court first dismissed Doczkat and Johnson as improper Defendants and then, in a lengthy Opinion, dismissed all of her counts against the FCC except the within-grade-increase denial. Huang, 215 F. Supp. 3d at 114. Although Plaintiff conceded that she had not exhausted this claim before bringing her suit, the Court found that the count survived a motion to dismiss because she had alleged sufficient facts showing that her failure to exhaust could be excused under equitable doctrines. Id. at 112. More specifically, Huang alleged that Miller's lack of response to the March 30 email thwarted her attempt to add

6

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 7 of 19

the pay-increase claim. Id. at 111. The parties then conducted discovery and have now brought Cross-Motions for Summary Judgment on that one count.

II. Legal Standard

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986); Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. See Liberty Lobby, 477 U.S. at 248; Holcomb, 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See Scott v. Harris, 550 U.S. 372, 380 (2007); Holcomb, 433 F.3d at 895. "A party asserting that a fact

cannot be or is genuinely disputed must support the assertion" by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

When a motion for summary judgment is under consideration, "[t]he evidence of the non- movant is to be believed, and all justifiable inferences are to be drawn in his favor." Liberty Lobby, 477 U.S. at 255; see also Mastro v. PEPCO, 447 F.3d 843, 850 (D.C. Cir. 2006); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*). On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." Czekalski v. Peters, 475 F.3d 360, 363 (D.C. Cir. 2007).

The non-moving party's opposition, however, must consist of more than mere unsupported allegations or denials, and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial.

7

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 8 of 19

See Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The non-movant, in other words, is required to provide evidence that would permit a reasonable jury to find in her favor. See Laningham v. U.S. Navy, 813 F.2d 1236, 1241 (D.C. Cir. 1987).

III. Analysis

The Agency's denial of Huang's within-grade step increase to GS-15, Step 8 is the sole count still afloat. Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e- 2(a), or "because he has made a charge . . .

or participated in any manner in an investigation" of employment discrimination. See 42 U.S.C. § 2000e-3(a). The Age Discrimination in Employment Act adds age discrimination to the mix. See 29 U.S.C. § 623. Plaintiff contends that Defendant discriminated against her based on her age, sex, race, and national origin and retaliated against her in response to her EEO complaints. According to Huang, because of this discrimination and retaliation, she received a fail rating, which, in turn, was the cause of her pay- increase denial. Defendant retorts that this claim has not been administratively exhausted and is nonetheless meritless because the Agency had a legitimate, non-discriminatory reason for denying the increase. Even taking all of the facts in the light most favorable to Huang, the Court agrees with Defendant on both scores.

A. Exhaustion

"Before filing suit, a federal employee who believes that her agency has discriminated against her in violation of Title VII must first seek administrative adjudication of her claim." Payne v. Salazar, 619 F.3d 56, 58 (D.C. Cir. 2010) (citing Scott v. Johanns, 409 F.3d 466, 468 (D.C. Cir. 2005)). An FCC employee alleging discrimination can file a complaint either through

8

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 9 of 19

the Union's negotiated grievance procedure or through the EEOC, "but not both." Basic Negotiated Agreement at 115. Whichever process the employee timely initiates first is deemed to be her elected procedure. Id. The record is a bit murky as to which process Huang chose, but, as explained below, under either route her pay-increase claim is not exhausted.

1. *EEO Complaint*

Title VII "'specifies with precision' the prerequisites that a plaintiff must satisfy before

filing suit." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)). When an employee believes that her employer has violated Title VII, she must first contact the agency's EEO counselor to initiate an informal complaint. If the counselor's attempts at resolution are unfruitful, the employee can lodge a formal complaint, which must be filed within 180 days from the date on which the alleged discriminatory act occurred. See 42 U.S.C. § 2000e-5(e)(1). "Each discrete discriminatory act starts a new clock for filing charges alleging that act." Morgan, 536 U.S. at 113. The agency then investigates the claim, after which the employee can request an administrative hearing or a summary decision. See 29 C.F.R. § 1614.108(f). Either route ultimately culminates in a final order, at which point the claim is exhausted. If the employee is not satisfied with the agency's final decision, she can file a federal lawsuit. Properly exhausted claims encompass those that the complaint and its accompanying documents detail with "'sufficient information' to put the agency on notice of the claim and to 'enable the agency to investigate' it." Crawford v. Duke, No. 16-5063, 2017 WL 3443033, at *4 (D.C. Cir. Aug. 11, 2017) (quoting Artis v. Bernanke, 630 F.3d 1031, 1034 (D.C. Cir. 2011)).

Each part of the administrative process is governed by statutory filing deadlines. These time periods are "subject to equitable doctrines such as tolling or estoppel," which are to be

"applied sparingly." Morgan, 536 U.S. at 113; see Josephs v. Pac. Bell, 443 F.3d 1050, 1061 (9th Cir. 2006) (excusing exhaustion when EEOC representative misled plaintiff regarding his claim); Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1368 (D.C. Cir. 1998)

(applying equitable estoppel when employer affirmatively misled employee to believe that grievance would be resolved in employee's favor); Broom v. Caldera, 129 F. Supp. 2d 25, 26-28 (D.D.C. 2001) (excusing non-exhaustion where administrative law judge misinformed complainant about proper procedures); Koch v. Donaldson, 260 F. Supp. 2d 86, 90-91 (D.D.C. 2003) (equitably tolling filing period given EEO office's fax-machine malfunction). Defendants have the burden to prove a failure to exhaust, but a plaintiff who concedes that she has not exhausted her claim has the burden to show "facts supporting equitable avoidance of the defense." Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997).

Huang filed two timely EEO complaints relating to 1) Doczkat's feedback on her wireless-microphone-study report and 2) her January 2015 fail rating. (The second complaint also included a claim of retaliation for denial of sick leave, but the EEOC dismissed that claim because Huang's leave was ultimately approved.) She did not, however, file a complaint regarding her pay-increase denial. Although she admits this omission, Plaintiff argues that the Court should nonetheless allow this claim to go forward because the Agency's EEO manager, Linda Miller, never responded to Huang's March 30, 2015, email attempting to add it to the ongoing EEO investigation. At the motion-to-dismiss stage, the count survived because it was unclear whether (or to what extent) "the FCC's [Office of Workplace Diversity] prevented her from filing a complaint or misled her as to what would be required to pursue her claim in district court." Huang, 215 F. Supp. 3d at 112. Now, with the benefit of discovery and a more robust record, the Court finds no equitable considerations that excuse non-exhaustion.

10

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 11 of 19

Although Miller did not responded to Huang's email, Plaintiff's conversations with the EEO investigator, Bankhead, show that she affirmatively decided not to amend her EEO complaint to add the step-increase denial. When Bankhead told Plaintiff that she could not "add additional issues" through her affidavit and would need to contact Miller to amend her complaint, see ROI at 349, Huang replied that she did not want to "amend [her] complaint at this moment." Id. at 347. Bankhead then confirmed that "the additional issues [Huang] raised will not be investigated in this complaint," including the pay-increase denial. Id. Huang does not address this exchange with Bankhead or argue why, in light of it, any equitable considerations apply here.

Given such an unequivocal decision not to amend, Huang cannot somehow maintain that her within-grade-increase claim was "reasonably related to" exhausted claims in her formal EEO complaint and should be considered. See Poole v. Gov't Printing Office, No. 16-494, 2017 WL 2912401, at *5-6 (D.D.C. July 7, 2017) (noting that this Circuit has not decided whether the "reasonably related" doctrine for claims that happened after the initiation of an EEO complaint survives Morgan). Huang's email to Bankhead meant that the Agency was put on notice that her within-grade-increase denial was not at issue, and it would go against the purpose of the exhaustion requirement to allow her to belatedly add it now. See Loe v. Heckler, 768 F.2d 409, 417 (D.C. Cir. 1985) (exhaustion requirements "ensure[] that the agency ha[s] notice of [the complainant's] grievance, and a fair opportunity to provide full redress or to attempt an informal accommodation"); Final Agency Decision at 2 n.4 (noting that denial of step increase "[wa]s not before the Agency as Complainant did not raise it in either of her complaints and it was not raised within 45 days of the alleged incident"); compare Coleman v. Duke, No. 15-5258, 2017 WL 3480705, at *7-8 (D.C. Cir. Aug. 15, 2017) (holding that plaintiff exhausted retaliation

claim that was included in formal complaint but not EEOC's acceptance letter), with Hamilton v. Geithner, 666 F.3d 1344, 1350 (D.C. Cir. 2012) (finding that claim that was presented to EEO counselor but never included in formal EEO complaint was not exhausted). A plaintiff who voluntarily abandons a claim during the administrative process cannot revive it in federal court. See Katz v. Winter, No. 07-3481, 2008 WL 5237252, at *1 (3rd Cir. 2008); Harris v. United States, 919 F. Supp. 343, 346 (S.D. Cal. 1996). The Court thus finds that equitable considerations do not excuse Plaintiff's failure to exhaust.

2. *Negotiated Grievance Process*

Evaluating Huang's claim under the negotiated grievance process leads to the same result. If the employee chooses this alternative, it proceeds in three steps. See BNA at 117. First, the employee submits the written grievance to her immediate supervisor, who must respond within a certain timeframe. If the employee is dissatisfied with the outcome of Step 1, she may appeal the grievance to the Chairman within 10 working days. If, after Step 2, the employee is still aggrieved, she has 21 days to appeal the decision to arbitration. Id.

Huang did begin this process by filing a Step 1 grievance on September 17, 2015. Doczkat issued a denial decision on October 19, 2015, but Huang never appealed that decision to the Chairman. She does not provide any explanation and thus has no defense for her inactivity. As Plaintiff never completed the administrative process, the Court finds that she did not exhaust her claim, and it must be dismissed.

B. Merits

Even if the Court were to treat Plaintiff's step-increase claim as exhausted, it nevertheless fails on the merits. For Huang, Doczkat's September 11, 2014, comments on her wireless-

microphone-study project are evidence of his discrimination and the seed from which the pay-

12

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 13 of 19

increase denial sprouted. See Pl. Opp. at 4. Defendant counters that Plaintiff's fail rating was solely attributable to her poor work performance.

Title VII prohibits an employer from both 1) directly discriminating against an employee because of her race, sex, color, religion, or national origin and 2) retaliating against an employee for opposing discriminatory employment practices. The ADEA forbids employers from discriminating against employees over 40. See 29 U.S.C. § 623. As both sides agree that there is no direct evidence of discrimination or retaliation, the Court moves directly to the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802- 05 (1973). Under this framework, the plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. "If the plaintiff meets this burden, '[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason' for its action. If the employer succeeds, then the plaintiff must 'be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext' for unlawful discrimination. Chappell-Johnson v. Powell, 440 F.3d 484, 487 (D.C. Cir. 2006) (quoting McDonnell Douglas, 411 U.S. at 802, 804). When, however, "an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not-and should not-decide whether the plaintiff actually made out a prima facie case under McDonnell Douglas." Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). The Court's sole task in such cases is to "resolve one central question: Has the employee produced

sufficient evidence for a reasonable jury to find that the employer's asserted non- discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" Id. The plaintiff must "present[] enough evidence to allow a reasonable trier of fact to conclude that the

13

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 14 of 19

employer's proffered explanation is unworthy of credence." Desmond v. Mukasey, 530 F.3d

944, 962 (D.C. Cir. 2008) (citation and internal quotation marks omitted). If, even crediting the employee's evidence as true, no reasonable jury could find that the employer's legitimate, non- discriminatory reason for the decision was pretextual, the Court must grant the Defendant summary judgment. See Guajacq v. EDF, Inc., 601 F.3d 565, 570 (D.C. Cir. 2010).

The Agency's denial of Huang's within-grade increase is undisputedly an adverse action, as she suffered a direct diminution in pay. See Douglas v. Donovan, 559 F.3d 549, 553 (D.C. Cir. 2009). Defendant, however, proffers a simple business reason for the denial: Plaintiff's work was unacceptable for an engineer of her level. To support this contention, the Agency provided her infamous wireless-microphone-study report draft (complete with Doczkat's 83 comments); sworn statements from Weller, Johnston, and Doczkat attesting to Huang's poor performance; a GS-15 position description that details the expectations for a senior engineer; and various formal and informal performance reviews from 2014 and 2015 where Doczkat and Johnston express to Huang their perceived deficiencies in her work. See Def. MSJ, Exhs. B-H; ROI 40-70, 124-244. In response, Plaintiff marshals evidence of her own in an attempt to show pretext. She points out, for example, that the majority of

Defendant's evidence comes from Doczkat and Johnston — the very individuals she claims are responsible for the discrimination. Huang urges the Court instead to look at her background and history with the FCC, and she provides evidence of her two master's degrees, achievement and performance awards, personal recommendations, and all of her previous performance evaluations from the Commission. See Pl. MSJ, Exhs. A-E. Huang correctly points out that she never had a fail rating until Doczkat became her supervisor, and, while Weller did provide extensive feedback on her report, the record does not contain any suggestion that he ever told Huang she was underperforming.

14

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 15 of 19

At the summary-judgment stage, the Court's role is not to weigh the evidence or make credibility determinations but to draw reasonable inferences in the light most favorable to the non-moving party. See Robinson v. Pezzat, 818 F.3d 1, 9 (D.C. Cir. 2016). That is, if the parties present "directly contradictory evidence," the plaintiff gets the benefit of the doubt. Tolan v. Cotton, 134 S. Ct. 1861, 1867 (2014); see Robinson, 818 F.3d at 9. Particularly given Huang's background and more than 20-year satisfactory run at the Agency, the temporal proximity of her EEO complaint and unsatisfactory performance reviews may give a reader pause. Jones v. Bernake, 557 F.3d 670, 680 (D.C. Cir. 2009) ("[A]n adverse action following closely on the heels of protected activity may in appropriate cases support an inference of retaliation."). The undisputed evidence, however, shows that Plaintiff did not meet the requirements for a within- grade increase.

To be eligible for such a salary bump, Huang must: 1) complete the required waiting period; 2) not have received an equivalent pay increase during the waiting period; and 3)

perform "at an acceptable level of competence . . . as documented in the most recent rating of record," ROI at 323 — *i.e.*, a "pass" rating. Defendant concedes that Huang met the first two requirements; the fail rating was the only reason it denied her pay increase. See Def. MSJ, Exh. F (Step 1 Grievance Decision) at 21.

A pass rating indicates that an FCC employee "successfully performed his/her duties and responsibilities in furthering the mission and goals of the Federal Communications Commission." ROI at 82 (Employee Review Form). As a GS-15 TAB engineer, Huang's responsibilities included originally and thoughtfully engaging with complex, high-level electromagnetic-spectrum concepts and data. Engineers in that role serve "as a senior expert consultant, special project director, and advisor to the Branch Chief and to the Division and

Deputy Chief" on a host of radio-communication subjects. Id. at 214 (Position Description). They conduct "the most difficult types of technical studies" that require them to "originat[e] and evaluat[e] . . . theoretical and empirical data of electromagnetic wave propagation on all frequencies to provide the [FCC] with basic information and technical recommendations." Id. at 215. GS-15 engineers, accordingly, are expected to work "under the general supervision of the Branch Chief" but exercise "a high degree of originality, initiative, and sound judgment" in fulfilling their role. Id.

No reasonable jury could conclude that Huang satisfied these criteria. She had only two assignments during the applicable review period: the wireless-microphone-study report and a TV Study report. Neither was ever completed. Drafts of the former were not timely submitted, and what Huang deemed as her "final" report is riddled with spelling, formatting, and grammar errors. Even providing her some leeway given that

English is not her first language, she does not contest that there were still several errors in the technical analysis. Weller noted "gaps and inconsistencies in the data," and he was unable to reproduce several of Huang's calculations.

See Pl. MSJ, Exh. E at 4-5 (Weller letter to Huang). The draft on which Doczkat commented was submitted in September – four months after Weller's original deadline. Huang never further revised the report and, by her own account, ceased doing any work for the Agency, including the TV Study. See Pl. Opp. to Def. SOF, ¶¶ 26-27. She also seemingly acknowledges that her work product was lacking. See Pl. MSJ at 1 ("In [*sic*] the surface, Defendant could possibly show some Plaintiff's unacceptable performed [*sic*]."). Huang, moreover, cannot rely on the timeline to show pretext. While her fail rating (and the preceding poor reviews) "followed closely on the heels," Jones, 557 F.3d at 680, of her protected activity, it also occurred right after Doczkat's

16

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 17 of 19

September 11 comments on the report, and she has not presented any evidence for a jury to attribute causation to the former as opposed to the latter.

Plaintiff's proffered reasons why she should have received a pass rating notwithstanding her objectively poor work product all founder. First, she quotes language from the Basic Negotiated Agreement between her Union and the FCC, which states that "the supervisor shall assume full responsibility for [his] instructions if they are carried out in the manner prescribed by the supervisor." Pl. MSJ, Exh. E (BNA) at 10. To Huang this means that, once she responded to Weller's comments, he was on the hook for the report. Yet the key point here is that Huang did not carry out her supervisors' instructions "in the manner prescribed." Id.

Both Weller and Doczkat noted that her report failed to address certain areas in the assignment and that the Agency could not use it for its intended purpose.

Second, Plaintiff's argument that she tried to work on the report but Doczkat never responded to her does not undercut the legitimacy of Defendant's reason for her step-increase denial. Many of Doczkat's comments related to formatting, grammar, and spelling errors and should not have needed additional discussion or clarification to fix. While Doczkat could have been more responsive to her raising particular issues concerning the technical analysis, a GS-15 engineer like Huang is expected to "exercise[] a high degree of originality, initiative and sound judgment." ROI at 215.

Finally, Huang contends that Doczkat's allegedly discriminatory treatment caused near- fatal increases in her blood pressure that prevented her from working. See Pl. MSJ, ¶ 2. To the extent Plaintiff is attempting to support a Rehabilitation Act claim, that count was dismissed in the prior Opinion. See Huang, 215 F. Supp. 3d at 107-08. If Huang's argument is simply that her hypertension prevented her from satisfactorily completing her work, — and that she was

17

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 18 of 19

unjustly punished for that — such a claim is not actionable under Title VII. At the end of the day, Huang produces no evidence showing pretext, leaving the Court with the Agency's legitimate, non-discriminatory reason for not giving her a step-up increase: poor performance.

***

In addition to her Motion for Summary Judgment, Plaintiff also filed two Motions

requesting the Court to relay Defendant's alleged crimes to a prosecuting authority. See ECF No. 75 (Motion for Honorable Judge to Take Actions Against Crimes of

Defendant); ECF No. 76 (Motion for Jury Trial and Opposition of Summary Judgment). Even if such a Motion were appropriate in this civil matter, the Court is not aware of evidence of criminal conduct here. Plaintiff also filed a Motion asking the Court to adjudicate her claims under 42 U.S.C. § 1981, see ECF No. 81, but that count was previously dismissed since the statute applies only to private employers. See Huang, 215 F. Supp. 3d at 111. The Court therefore denies these Motions.

IV . Conclusion

Plaintiff clearly had difficulty adjusting to a new supervisor, and the Court does not doubt that she may have been taken aback by Doczkat's comments and subsequent fail rating after receiving more than 20 years of satisfactory performance reviews. She, however, concedes that she did not exhaust her within-grade-pay-increase-denial claim before the Agency, and the Court finds no equitable considerations excuse her failure. Exhaustion aside, no reasonable jury could find that Defendant's reason for denying her within-grade pay increase was pretextual. The Court will therefore grant Defendant's Motion for Summary Judgment. A separate Order consistent with this Opinion will be issued this day.

/s/ *James E. Boasberg* JAMES E. BOASBERG

18

Case 1:16-cv-00398-JEB Document 87 Filed 09/15/17 Page 19 of 19

Date: September 14, 2017

United States District Judge

19

Appendix G (App. G)
Petitioner's Brief, on June, 28, 2018

TABLE OF CONTENTS pages

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[2] Because of: (a) limited space, (b) Appellant was and is very sick, and could not work more on it; otherwise, Appellant plans or might file more, if is allowed by proceedings and by her healthy.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
BRIEF OF APPELLANT

Qihui Huang, Plaintiff-Appellant

v.

Ajit Varadaraj Pai, *et al.* Defendants-Appellees

Appeal No. 17-5290, September Term, 2017

June 28, 2018.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:16-cv-00398-JEB (Hon. James E. Boasberg, Judge)

P.O. Box 34014

Bethesda Maryland, 20827

E-mail: qhh@hotmail.com
Phone: 240-423-0406

TABLE OF AUTHORITIES (Authority.)
pages

Authority.(a) 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 18, 20

(a).1 United States Supreme Court

Kernan v. Hinojosa, U.S. Supreme Court, May16, 2016 136 S.Ct. 16032016WL2842454 15-833:

"..., this presumption was adopted because silence implies consent, not the opposite. 28 U.S.C.A. § 2254. 9 Cases that cite this headnote." "We adopted this presumption because "**silence implies consent, not the opposite—and courts generally behave accordingly, affirming *1606 without further discussion when they agree**, not when they disagree, with the reasons given below." *Id.*, at 804, 111 S.Ct. 2590."

Ylst v. Nunnemaker, U.S. Supreme Court, June 24, 1991 501 U.S.797 111 S.Ct. m,2590 90-68;

"The maxim is that **silence implies consent**, not the opposite-and **courts generally behave accordingly, affirming without further discussion when they agree**, not when they disagree, with the reasons given below. The essence of unexplained orders is that they **say nothing**."

(a).2 Tweleve (12) United States Court of Appeals quoted, followed and pursued above U.S Supreme Court's rulings:

Bledsue v. Johnson, United States Court of Appeals, Fifth Circuit, August 31, 1999 188 F.3d 250 1999 WL 675097 97-11195.

Brecheen v. Reynolds, United States Court of Appeals, Tenth Circuit. October 14, 1994 41 F.3d 1343 1994 WL 562159 94-7084

Grueninger v. Director, Virginia Dept. of Corrections, United States Court of Appeals, Fourth Circuit. February 09, 2016 813 F.3d 5172016 WL 502939 14-7072.

Guilmette v. Howes, United States Court of Appeals, Sixth Circuit, October 21, 2010 624 F.3d 286 2010 WL 4117281 08-2256.

Nicolas v. Attorney General of Maryland, United States Court of Appeals, Fourth Circuit. April 27, 2016 820 F.3d 124 2016 WL 1660204 15-6616.

Serrano v. Fischer, United States Court of Appeals, Second Circuit, June 20, 2005 412 F.3d 292 2005 WL 1427298 03-2670.

Steward v. Cain United States Court of Appeals, Fifth Circuit, July 20, 2001 259 F.3d 374 2001 WL 826686 00-30931.

Sweet v. Secretary, Dept. of Corrections, United States Court of Appeals, Eleventh Circuit. October 23, 2006 467 F.3d 13112006 WL 3000958 05-15199.

Tower v. Phillips, United States Court of Appeals, Eleventh Circuit; November 17, 1993 7 F.3d 2061993 WL 441294 90-4038.

Wilson v. Warden, Georgia Diagnostic Prison United States Court of Appeals, Eleventh Circuit. August 23, 2016 834 F.3d 12272016 WL 4440381 14-10681.

Woodfolk v. Maynard, United States Court of Appeals, Fourth Circuit. May 23, 2017 857 F.3d 531 2017 WL 2240221 15-6364.

Serraano v. Fischer, United States Court of Appeals, Second Circuit, June 20, 2005 412 F.3d 292 2005 WL 1427298 03-2670.

(a).3 **About twenty (20) United States District Courts** quoted, followed, and pursues above two rulings of U.S. Supreme Court, in paragraphs ¶ (a)1.

Alvarez v. Straub, United States District Court, E.D. Michigan, Southern Division. August 30, 1999 64 F.Supp.2d 686 1999 WL 684149 97-CV-71822-DT.

Blackwell v. Garcia, United States District Court, E.D. California. June 03, 2005 Not Reported in F.Supp.2d 2005 WL 1367054 CIV S02-0821FCDCMKP.

Boulds v. Thaler, United States District Court, S.D. Texas, Houston Division. August 01, 2011 Not Reported in F.Supp.2d 2011 WL 3325854CIV.A. H-10-1799.

Dennis v. Mitchell, United States District Court, N.D. Ohio, Eastern Division. October 01, 1999 68 F.Supp.2d 863 1999 WL 781702 1:98-CV-1155.

Clavelle v. Secretary, Florida Department of Corrections, United States District Court, M.D. Florida, Jacksonville Division. May 02, 2018 Slip Copy 2018 WL 2047276 3:16–CV–781–J–39PDB.

Crawford v. Quarterman, United States District Court, S.D. Texas, Houston Division. March 03, 2009 Not Reported in F.Supp.2d 2009 WL 579501CIV.A. H-07-2385.

Dhaity v. Warden, United States District Court, D. Connecticut. March 20, 2014 5 F.Supp.3d 215 2014 WL 1089265 3:07-CV-1810 CSH.

Dickey-O'Brien v. Yates, United States District Court, E.D. California. June 12, 2013 Not Reported in F.Supp.2d 2013 WL 2664418 2:07-CV-1241 WBS CKD.

Dunaway v. Dir. of Dept. of Corr., United States District Court, W.D. Virginia, Roanoke Division. May 26, 2010 Not Reported in F.Supp.2d 2010 WL 21631657:10-CV-00120.

Ferguson v. Shewalter, United States District Court, N.D. Ohio, Eastern Division. April 26, 2011 Not Reported in F.Supp.2d 2011 WL 2711415 1:10 CV 496.

Gardner v. Secretary, Florida Department of Corrections, United States District Court, M.D. Florida, Jacksonville Division. April 20, 2018 Slip Copy 2018 WL 1898756 3:16–CV–602–J–39PDB.

Grant v. Sheldon, United States District Court, N.D. Ohio, Western Division. August 15, 2012 Not Reported in F.Supp.2d 2012 WL 34941941:11CV942.

Hartley v. Senkowski, United States District Court, E.D. New York. March 18, 1992 Not Reported in F.Supp. 1992 WL 58766 CV-90-0395.

Kernan v. Hinojosa, —— U.S. ——, 136 S.Ct. 1603, 1605–606, 194 L.Ed.2d 701 (2016) (per curiam) (adopting the presumption **silence implies consent**,"

Lee v. Shepherd, United States District Court, E.D. California.
January 16, 2007 Not Reported in F.Supp.2d 2007 WL 135671 CIVS03-2197 LKK KJMP.

Martinez v. Paramo, United States District Court, C.D. California.
September 09, 2016 Not Reported in Fed. Supp. 2016 WL 5662046 CV 14-8348-CAS (AGR).

May v. Ryan, United States District Court, D. Arizona. March 28, 2017 245 F.Supp.3d 1145 2017 WL 1152812 CV–14–00409–PHX–NVW.

Moore v. Secretary of Florida Dept. of Corrections, United States District Court, M.D. Florida, Jacksonville Division. March 30, 2010 Not Reported in F.Supp.2d 2010 WL 1257688307-CV-117-J-34MCR.

Steven R. Baker, Petitioner, V. Secretary, Department Of Corrections, Et Al., Respondents. United States District Court, M.D. Florida. June 18, 2018 Slip Copy 2018 WL 3019960 3:16-CV-1243-J-39JRK

San–Miguel v. Secretary, Florida Department of Corrections, United States District Court, M.D. Florida, Jacksonville Division. May 11, 2018 Slip Copy 2018 WL 2183887 3:16–CV–891–J–39PDB "Recently, in Wilson v. Sellers, —— U.S. ——, 138 S.Ct. 1188, 1194, —— L.Ed.2d —— (2018), the Supreme Court concluded there is a "look through" presumption in federal habeas law, as **silence implies consent.**

Schneider v. Davis, United States District Court, W.D. Texas, Austin Division. June 12, 2017 Slip Copy 2017 WL 2562232 A-16-CA-0468-LY-AWA.

(a).4 **More:**

Beattie v. Gardner, District Court, N.D. New York. January 01, 1871 4 Ben. 479 4 N.B.R. 323.

Billman v. Alley *Associates*, District Court of the Virgin Islands, Division of St. Croix. May 03, 1983 Slip Copy 1983 WL 952745 CV 79/197, CV 81/122.

"Thus, the first essential element of equitable estoppel, a representation by the party to be estopped, may consist of some express verbal statement or consent, an act or conduct which implies consent or acquiescence, an admission, or silence when there is a duty to speak."

Hardy v. U.S., Supreme Court of the United States January 06, 1964 375 U.S. 277 84 S.Ct. 424112:

"According to counsel, the Federal District Court, pursuant to a 'tacit' understanding, usually **grants unopposed motions** for a complete transcript."

Authority.(b) CASE

Arriva Medical LLC v. United States Department of Health and Human Services, United States District Court, District of Columbia. March 09, 2017 239 F.Supp.3d 2662017 WL 943904 CV 16-2521-JEB) 23

Geleta v. Gray, United States Court of Appeals, District of Columbia Circuit. June 17, 2011 645 F.3d 408 2011 WL 2417142 10-7026 17

Reversed and remanded. Headnotes:

"Shifting and inconsistent justifications for an adverse employment action are probative of pretext. "21 Cases that cite this headnote"

United States Court of Appeals, District of Columbia Circuit. June 23, 2015 791 F.3d 65 2015 WL 3851919 13-7043, 791 F.3d 65, No. 13–7043.

Price Waterhouse v Hopkins, Supreme Court of the United States May 1, 1989490 U.S. 228109 S.Ct. 1775104 L.Ed.2d 268

University of Texas Southwestern Medical Center v. Nassar, U.S. Supreme Court June 24, 2013 570 U.S. 338 133 S.Ct. 2517 12-484, headnotes.

Wheeler v. Georgetown University Hospital, United States Court of Appeals, District of Columbia Circuit. February 12, 2016 812 F.3d 1109 2016 WL 556705 14-7108. 23

Authority.(c) STATUTES, LAWS AND REGULATIONS 3, 6, 7, 18

1. U.S. Constitution Amendment I, V, and XIV.
2. NO FEAR ACT.
3. All laws related to employment discriminations and retaliations.
4. Evidence Appellees' intentional discriminations and retaliations by:

(a,b) U.S. Supreme Court established burden shift frameworks

(a) *McDonnell Douglas*

(b) *Price Waterhouse*

Price Waterhouse v Hopkins, Supreme Court of the United States May 1, 1989490 U.S. 228 109 S.Ct. 1775 104 L.Ed.2d 268;

University of Texas Southwestern Medical Center v. Nassar, U.S. Supreme Court June 24, 2013 570 U.S. 338 133 S.Ct. 2517 12-484, headnotes.

(c) Discriminatory Motivations; 42 U.S.C.A. § 2000e-2, Unlawful employment practices.

5. Fed.Rules Civ.Proc.:

(a) Rule 36, (3), (4); and etc.

(b) Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings.

MD Criminal law, § 3-204 Reckless endangerment;

"**Prohibited** (a) A person (Appellees) may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another (Appellant); ...".

MD Criminal Law, § 9-307 Impairment of verity or availability of physical evidence.

18 U.S.C.A. Chapter 13 Civil rights, § 249 Hate crime acts.

"Offenses (of Appellees) involving actual race, or national origin.— Whoever (Appellees), **whether or not acting under color of law,** willfully caused bodily injury to any person (Appellant) or, ... or incendiary device, attempted to cause bodily injury to any person (Appellant), because of the actual race, or national origin of any person (Appellant)".

18 U.S.C.A. §1512, (b) (2) (B) (ii).

I. JURISDICTIONAL STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 28(a)(4) and Circuit Rule 28(a), Appellant states concerning jurisdiction. For District Court Jurisdiction -- This case is an action brought to complain discriminations and retaliations against chairman and supervisors of Federal Communications Commission (FCC), based on Appellant's race, sex, national origin, age, disabilities, complained discriminations and retaliations, and is a member of statutes protected class. Accordingly, the United States District Court for District of Columbia had subject matter jurisdiction of Appellant's discrimination and retaliation complaints. For Court of Appeals Jurisdiction -- This Court has jurisdiction of the appeal from the final decision of the District Court, which issued a final Order and dismissed Appellant's case on October 23, 2017, Appendix.20.

II. FEDERAL COURT PROCEEDINGS and THE DISTRICT COURT DECISION

The United States of District Court for District Court Judge James E. Boasberg ordered to dismiss the suit on October 23, 2017, Appendix.20. Appellant timely filed notice of Appeal, Appendix.1.

III. STATUTES AND REGULATIONS

The relevant statutes, laws and regulations are set forth in the separate "Table of Authorities" to this Brief.

IV.THERE IS NO ARGEMENT FOR "ARGUMENT" and "SUMMARY ARGUMENT",

BETWEEN APPELLANT AND APPELLEES NOW.

Appellees "consent and do not opposite" (see Authority(a)):

(a) Multiple and all conclusions of district court erred in dismissing this suit, and erred in multiple actions;

(b) All conclusions of Appellees intentionally discriminated and retaliated against Appellant; which support above ¶ IV.(a);

(b) All material facts, physical evidences, arguments, statements of Appellees intentional discriminations and retaliations; which support above ¶ IV.(a).

(d) More [3].

V. ISSUES PRESENTED FOR REVIEW

Appellant respectfully request Honorable Judge to review following issues, although Appellant already "consent and do not oppose" (Authority(a)) all following conclusions. [4], [5], [6].

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[3] Because of: (a) limited space, (b) Appellant was and is very sick, wherefore, she could not work more on it. Appellant wishes, plans or might, to file more, if is allowed by proceedings and by her healthy.

[4] Appellant respectfully requests Honorable Judges to understand that there are so many issues represented to review, because district court judge erred in many things, and Appellees consented and do not oppose all of there issues, see Authority.(a)).

[5] Would Appellant and/or honorable Judges thank Appellees and their lawyers, by or because they recently improved their behaves of not continually to "alter, destroy, mutilate, or conceal an object with intent to impair the integrity or

V.(a)Appellant respectfully request Honorable Judge to review, which Appellees already "consented and do not oppose" (Authority(a)) all conclusions of District Court erred in the following.

See evidenced in Appeldix.8, 9, 10, 11, 12, 13 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 -- Appellant filed motions and Appellees "consented and do not oppose" all her motions, (Authority.(a))

(a)(1) District court judge erred in "concealed or removed physical evidences", which reasonable jury could find Appellees' unlawful actions, (MD Criminal Law, § 9-307; 18 U.S.C.A. § 1512,(b)(2)(B)(ii), Authority.(a),(c).

Appellees: consent _, oppose_, unknown_

(a)(2) District court erred in depriving Appellant's constitutional "rights of trial by jury" (U.S. Constitution, Amendment VII), because of her race, sex, national origin, age, disability.

Appellees: consent_,oppose_, unknown_

(a)(3) District court erred in dismissing Appellant's "most (except one) and important claims before any jurisdictional discovery were take", and this honorable court generally reversed it in such situation.

Appellees: consent _, oppose_, unknown_

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availability of the object for use in an official proceeding"; (18. U.S.C.A. § 1512, (b) (2) (B) (ii)).

[6] To save honorable Judges' times to only focus on Appellees disputed facts, laws, statements, and conclusions, Appellant here let Appellees to show their standings.

(a)(4) District court erred in failure to provide reasonable accommodations to Appellant with "impaired hearing or communication disabilities" at court's teleconference, as regulated in "guide to judiciary policy"; and caused injures to her.

Appellees: consent _, oppose_, unknown_

(a)(4) District court erred in disparately and adversely treated and ruled against Appellant, based on her race, sex, national origin, age, disability, and is a member of statutes protected class; and failed to present a legitimate reason for it, under the *McDonald Douglas* burden shift frameworks.

Appellees: consent _, oppose_, unknown_

(a)(5) District court erred in dismissing this suit.

Appellees: consent _, oppose_, unknown_

(a)(6) And more, [FN1].

V.(b) Appellant respectfully request Honorable Judge to review, which Appellees already "consented and do not oppose" (Authority(a)) all conclusions, facts and statements of Appellees' discriminations and retaliations in the following.

See evidenced in Appeldix.8, 9, 10, 11, 12, 13 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 -- Appellant filed motions and Appellees "consented and do not oppose" all her motions, (Authority.(a))

These reviewing will further approve district court erred in dismissing this suit, and improperly acted in multiple places.

Based on Appellant's race, sex, national origin, age, disabilities, complained discriminations and

retaliations, Appellees discriminated and retaliated against her on many happenings.

See U.S. Supreme Court's two identical rulings, and consistently followed by about twelve (12) U.S. Court of Appeals and 22 U.S. District Courts, (see Authority.(a)). Federal court's rulings rule and conclude that Appellees firmly and repeatedly "**consent, and do not opposite**" followings:

(1) material facts, physical evidences, arguments, statements, and more of Appellees intentionally discriminated and retaliated against Appellant,

Appellees: consent _, oppose_, unknown_

(2) **conclusions** of Appellees intentionally discriminated and retaliated against Appellant, in their following actions:

Appellees: consent _, oppose_, unknown_

(2)(A) Appellees concluded Appellant disqualifying for GS-15 position;

Appellees: consent _, oppose_, unknown_

(2)(B) Appellees "willfully caused bodily injury to Appellant" (18 U.S.C.A § 249) at work place;

Appellees: consent _, oppose_, unknown_

(2)(C) Appellees knowingly "created many substantial risks of death ... to Appellant" at work place (MD Criminal Law § 3-204);

Appellees: consent _, oppose_, unknown_

(2)(D) Appellees deprived Appellant's constitutional rights of life;

Appellees: consent _, oppose_, unknown_

(2)(E) Appellees denied Appellant's within grade GS-15 step increase;

Appellees: consent _, oppose_, unknown_

(2)(F) and more [FN1].

Appellees: consent _, oppose_, unknown_

VI.STATEMENT OF THE CASE for district court erred,

Appellees "consent and do not opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a) that, DISTRICT COURT ERRED in:

(a) "Concealed or removed physical evidences" in his rulings, which reasonable jury could find Appellees unlawfully acted, (MD Criminal Law, § 9-307; 18 U.S.C.A. §1512,(b)(2)(B)(ii));

(b) Deprived Appellant's constitutional "rights of trial by jury" (U.S. Constitution, Amendment VII), because of her race, sex, national origin, age, disabilities;

(c) Dismissed Appellant's "most (except one) and important claims before any jurisdictional discovery were take", and this honorable court generally reversed it in such situation;

(d) Failed to provide reasonable accommodations to Appellant with "impaired hearing or communication disabilities" at court's teleconference, as regulated in "guide to judiciary policy";

(e) Failed to follow U.S. Supreme court established *McDonnell Douglas* burden shift frame work to present a legitimate reason for disparately and adversely treated and ruled against Appellant, based on her race, sex, national origin, age, disabilities;

(f) dismissed this suit;

(g) and more, [FN1].

VI.(a) District Court "concealed or removed physical evidences" in its rulings, which could evidence unlawful actions of Appellees, (MD Criminal Law, § 9-307; 18 U.S.C.A. §1512,(b)(2)(B)(ii), **Authority.(c).** See Appendix.22, 23, 26.

(a).1 On 5/22/2018, Appellant filed "motion for clarification of district court's factual findings, which concealed or removed physical evidences (MD Criminal Law, § 9-307) on Appellees discriminatory conclusions of Appellant disqualifying for GS-15 position".

See Appendix.22.

(a).2 On 5/25/2018, Appellant filed "motion for clarification of district court's factual findings and rulings, where "concealed or removed physical evidences" (MD Criminal Law §9-307) of Appellees knowingly "created many substantial risks of death ... to Appellant" at work place (MD Criminal Law §3-204). Appellees caused Appellant could not work because to avoid her death, and deprived her constitutional rights."

See Appendix.23.

(a).3 On 6/4/2018, Appellant filed "motion to clarify district court's factual findings and rulings on Appellees denied Appellant's within grade step increase. Evidences of Appellees caused Appellant's "failure of exhaust administrative remedies" were "concealed or removed" (MD Criminal Law, § 9-307).

See Appendix.26.

(a).4 Until now (6/28/2018), Appellant did not receive any opposition for above three motions from Appellees. Wherefore Appellees "consent and do not

opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a)) that aforementioned "district court's factual findings and rulings, where 'concealed or removed physical evidences' of ..." (MD Criminal Law § 9-307; and 18 U.S.C.A. § 1512, (b)(2)(B)(ii), Authority.(c)).

(a)(5) Appellees had no any fact and no any law to oppose aforementioned facts and laws of "district court's factual findings and rulings, where 'concealed or removed physical evidences' of ..." (MD Criminal Law § 9-307; 18 U.S.C.A. § 1512, (b)(2)(B)(ii), Authority.(a)).

(a)(6) See more in following ¶ X.

VI.(b) District Court Erred in depriving Appellant's constitutional "rights of trial by jury" (U.S. Constitution, Amendment VII), because of her race, sex, national origin, age, disabilities. See Appendix.25.

(b).1 On 6/1/2018, Appellant filed "motion for reverse and vacate district court's dismissing this suit; where deprived Appellant's constitutional "rights of trial by jury" (U.S. Constitution, Amendment VII), because of her race, sex, national origin, age, disability."

See appendix.25.

(b).2 Until now (6/28/2018), Appellant did not receive any opposition from Appellee. Appellees had no any fact and no any law to oppose, but they "consent and do not opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a)) aforementioned district

court deprived Appellant's constitutional rights of trial by Jury (U.S. Constitution Amendment VII).

VI.(c) District Court Erred in dismissing Appellant's "most (except one) and important claims before any jurisdictional discovery were take", and this honorable court generally reversed it in such situation.

See Appendix.28.

(c).1 On 6/7/2018, Appellant filed "motion to reverse and vacate district court's rulings of dismissing, -- based on Appellant's "most (except one) and important claims were dismissed before any jurisdictional discovery were take", and this honorable court generally reversed it."

See Appendix.28.

(c).2 Until now (6/28/2018), Appellant did not receive any opposition from Appellees. Appellees had **no** any fact and **no** any law to oppose, but they "consent and do not opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a)) aforementioned district court erred in dismissing the suit before many and important claims before discovery, and this court generally reversed it.

VI.(d) District Court erred in failures to provide reasonable accommodations to Appellant with "impaired hearing or communication disabilities" at court's teleconference, as regulated in "guide to judiciary policy". See Appendix.30, 31.

(d).1 On 6/11/2018, Appellant filed "motion to clarify facts of district court failed to provide reasonable accommodations to Appellant with "impaired hearing or communication disabilities" at court's teleconference, (as regulated in "guide to judiciary policy"); and caused injures to her."

See Appendix.30.

(d).2 On 6/11/2018, Appellant filed "motion to reverse and vacate district court's rulings of dismissing, -- based on it failed to provide reasonable accommodations to Appellant with "**impaired hearing** or communication disabilities" at court's teleconference, (as regulated in "guide to judiciary policy"); and caused injures to her.

See Appendix.31.

(d).3 Until now (6/28/2018), Appellant did not receive any opposition from Appellees. Appellees had **no** any fact and **no** any law to oppose, but they "consent and do not opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a)) aforementioned district court erred in failure to provide reasonable accommodations to Appellant with "**impaired hearing** or communication disabilities" at court's teleconference, (as regulated in "guide to judiciary policy"); and caused injures to her.

VI.(e) Based on her race, sex, national origin, age, disabilities, and is a member of statutes protected class, District Court erred in failures to pursue U.S. Supreme Court established *McDonnell Douglas* burden shit framework, by:

(1) failed to present a legitimate reason for it disparately and adversely treated and ruled against Appellant; and

(2) dismissed the case when she has established the *prima facie* of Appellees' intentional discriminations and retaliations.

See Appendix.9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

VI.(e)(1) District court failed to present a legitimate reason for it disparately and adversely treated and ruled against Appellant.

(e)(1) (A) Appellant-Plaintiff filed multiple motions and stated the facts that district court judge disparately and adversely treated and ruled against her, based on her race, sex, national origin, age, disabilities. See Appendix.9,10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

Appellees: consent _, oppose_, unknown_

(e)(1)(B) U.S. Constitutions and many Laws protect Appellant's rights to seek her equal rights.

Appellees: consent _, oppose_, unknown_

(e)(1)(C) District court judge failed to present a legitimate reason for he disparately and adversely treated and ruled against Appellant. See district court judge's order, Appendix.20. Appellees: consent _, oppose_, unknown_

(e)(1)(D) Under U.S. Supreme Court established *McDonnell Douglas* burden shift framework, have peoples established the *prime facie* of the district court's intentional discriminations or not? Appellees: consent _, oppose_, unknown_

(e)(1)(E) See more in following ¶ X.

VI(e)(2) District court erred in dismissing the case when Appellant had

established the *prima facie* of Appellees' intentional discriminations and retaliations.

Appellees: consent _, oppose_, unknown_

(e)(2)(A) Appellees disparately and adversely treated Appellant as exampled in above paragraphs.

Appellees: consent _, oppose_, unknown

(e)(2)(B) Appellees failed to present a legitimate, non-discriminatory and non-retaliatory reason for they disparately treated Appellant.

Appellees: consent _, oppose_, unknown_

(e)(2)(C) Under *McDonnell Douglas* burden shift framework, Appellant has established the *prima facie* of Appellees' intentional discriminations and retaliation.

Appellees: consent _, oppose_, unknown_

(e)(2)(D) When Appellant has established the *prima facie* of Appellees' intentional discriminations and retaliations under *McDonnell Douglas* burden shift framework, district court judge dismissed her suit. Why?

Appellees: consent _, oppose_, unknown_

VI(f) District Court erred in dismissing this suit. See all Appendix.

Appellees: consent _, oppose_, unknown_

Any one, more, or all aforementioned facts and laws suffice for Honorable Judges here to: (1) conclude that the district court erred in dismissing this suit; and (2) vacate or reverse district court's rulings.

Appellees: consent _, oppose_, unknown_

VI.(g) and more, [FN1]. See more in following paragraph ¶ X.

VII. STATEMENT OF THE CASE for

Appellees – who "consent and do not opposite" (U.S. Supreme Court's two identical rulings, and consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, see Authority.(a)) **that, APPELLEES intentionally discriminated and retaliated against Appellant, by their following actions:**

(a) Concluded Appellant disqualifying for GS-15 position;

(b) "Willfully caused bodily injury to Appellant", (18 U.S.C.A § 249) at work place;

(c) Knowingly and "not recklessly created many substantial risks of death ... to Appellant" at work place, (MD Criminal Law § 3-204);

(d) Deprived Appellant's constitutional rights of life (U.S. Constitution Amendments I, V, XIV, and etc.);

(e) Denied Appellant's within grade GS-15 step increase; and

(f) More; [FN1].

Appellees consented and did not oppose (Authority.(a)) all their following actions were their intentional discriminations and retaliations. These facts further prove district judge erred in dismissing this suit against Appellant.

VII.(a) Appellees discriminatorily concluded Appellant disqualifying for GS-15 position. See Appendix.21, 22.

(a).1 About 23 years worked at FCC, Appellant has all good records of her performance, including ten and half years performed at GS-15. Only few days Appellee Doczkat non-competitively appointed as

acting branch chief, he discriminatorily concluded [7] she disqualifying for GS-15. Facts showed Appellees' discriminatory motivations.

(a).2 Appellees' conclusions [FN5] replied on reasons and pretexts of Appellant did not do some things. These Appellees pretexted reasons were **not** in the written job assignment to Appellant, and former supervisor **never** instructed her to do things. Facts showed Appellees' discriminatory motivations.

(a).3 Appellant completely performed according former supervisor's instructions. Government multiple rules and Agreement between FCC and Union regulated that her former supervisor must fully respond all reports, but not Appellant's responses. Appellees erred and discriminated in their conclusions [FN5] against Appellant, but not former supervisor. Facts showed Appellees' discriminatory motivations.

(a).4 Appellees used about 83 comments for their conclusions [FN5]. Appellees undisputed and consented (U.S. Supreme court's rulings, Authority.(a)) that none of their 83 comments could support their conclusion [FN5] against Appellant. Facts showed Appellees' discriminatory motivations.

(a).5 Appellant worked under multiple supervisors including chiefs of OET, FCC. Appellees must first conclude all her former supervisors disqualifying for SES and GS-15, based on they all failed to find and conclude Appellant disqualifying for GS-15 for ten

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[7] About 9/11/2014, Appellees concluded Appellant disqualifying for a GS-15 position, on a study report of wireless microphones.

and half years. While appellee Doczkat only in GS-15 few months and acting branch chief few days, found and concluded [FN5] it. Facts showed Appellees' discriminatory motivations.

(a).6 Appellees' work assignment on Appellant purposed for them fabricating pretexts and stepped to fire her, if they could not evidence they were not

VI.(b)(c)(d): Appellees Intentionally Discriminated and Retaliated against Appellant, by they:

(b) "willfully caused bodily injury to Appellant", (18 U.S.C.A § 249) at work place;

(c) knowingly and not "recklessly created many substantial risks of death ... to Appellant" at work place (MD Criminal Law § 3-204); and (d) deprived Appellant's constitutional rights of life (U.S. Constitution Amendments I, V, XIV, and etc.).

See Appendix.23, 24.

(b,c,d).1 Appellant was healthy and her blood pressures were normal even without medicine, before Appellees' discriminatory conclusions [FN5].

(b.c.d).2 Since and after their discriminatory conclusions [FN5], Appellees caused that, -- when they contacted with Appellant, her blood pressures uncontrollably and promptly raised to about 180 mmHg, (highest was 223 mmHg). Honorable district court judge admitted above phenomenon.

(b,c,d).3 Peoples' with common senses know that blood pressures about 180 mmHg are life threaten (doctor's notes), and have "substantial risks of death or serious physical injures" (MD Criminal Law,§ 3-204).

(b,c;d).4 Appellees "willfully caused bodily injury to Appellant", (18 U.S.C.A § 249) at work place; and willfully "engaged in conduct that created many substantial risks of death or serious physical injures on Appellant" at work place, (MD Criminal Law,§ 3-204,App.7). Appellees knowingly, continually, and not recklessly "created many (not one) substantial risks of death to Appellant", much more worse than regulates in MD Criminal Law, § 3-204.

(b,c,d).5 Appellees escaped their liabilities which were because they caused and "created many substantial risks of death to Appellant" at work place, (MD Criminal Law,§ 3-204).

VI.(e) Appellees discriminatorily and retaliatorily denied Appellant's within grade GS-15 step increase. See Appendix.26, 27.

(e).1 Around end of 2/2015, Appellees denied Appellant's within grade (GS-15) step increase, which never happened for about 23 years she worked at the FCC.

(e).2 Appellees argued in court on complaint of step increase that Appellant's "failure of exhaust administrative remedies".

(e).3 District court judge accepted Appellees' arguments of "failure of exhaust administrative remedies", ruled against Appellant and dismissed the case.

(e).4 Facts are Appellees did not respond Appellant's multiple e-mails and requests for EEO counselors, when she initiated her Complaints around end of 1/2015 to following a few months. Facts are Appellees' "no response and no action" on

her e-mails and requests for EEO counselors caused:

(1) Appellant could not go any further of her complaints;

(2) Appellees did not start "administrative remedies" in fact;

(3) Appellant could not and did not fail to exhaust the not- started and not-existed "administrative remedies"; and

(4) Appellees have duty but they failed to instruct Appellant how she exhausts a non-existed "administrative remedies".

(e).5 Appellant talked with an honorable EEOC judge face to face at EEOC building regarding her complaint; went through, undergo, and experienced the EEOC processing. Appellant qualified for further actions after EEOC.

(e).6 Appellees' "no response and no action" only happened on Appellant. Appellees failed to present a legitimate, non-discriminatory and non-retaliatory reason for they disparately and adversely treated Appellant.

(e).7 Based on above facts, this lawsuit should not be dismissed by Appellees' arguments of "failure of exhaust ...". Facts showed Appellees lied and their lawyers misconducted in court.

(e).8 Other than the "failure of exhaust administrative remedies", if there was or is any other reason, explanation, or justifications, (it happened at district court), Appellees and district court judge's "shifting and inconsistent justifications for an adverse employment action are probative of

pretext", Geleta v. Gray, U.S. D.C Circuit.

VI.(f) and more; [FN1].

VIII. CONCLUSIONS

Appellant with her thousands supporters (Appendix.3) respectfully request Honorable Judges to:

(a) Consistently and firmly follow U.S. Supreme Court two identically ruled, consistently followed by about 12 U.S. Court of Appeals and 22 U.S. District Courts, (Authority.(a)) that:

Appellees' "silence implies their consent, not the opposite-and **courts generally behave accordingly, affirming without further discussion when they agree**, not when they disagree, with the reasons given below. The essence of unexplained orders is that they **say nothing**."

See and quote *Ylst v. Nunnemaker,* U.S. Supreme Court, June 24, 1991 501 U.S.797 111 S.Ct. m,2590 90-68; and *Kernan v. Hinojosa,* U.S. Supreme Court, May16, 2016 136 S.Ct. 16032016WL2842454 15-833.

(b) Rule in favor of Appellant.

IX. RELIEF REQUESTS

Appellant with her thousands supporters (Appendix.3) respectfully requests Honorable Judges to follow U.S. Supreme Court two identically ruled, consistently followed about 12 U.S. Court of Appeals and 22 U.S. District Courts, Authority.(a),that: **"Appellees' silence implies their consent, not the opposite, courts generally behave accordingly, affirming without further discussion when they agree**, not when they disagree," to rule in favor of

Appellant on:

IX.(a) **District court erred in:**

(a)(1) District court judge erred in "concealed or removed physical

evidences", which reasonably jury could find Appellees unlawfully acted. (MD Criminal Law, § 9-307; 18 U.S.C.A. § 1512,(b)(2)(B)(ii), Authority (c);

(a)(2) District court erred in depriving Appellant's constitutional "rights of trial by jury" (U.S. Constitution, Amendment VII), because of her race, sex, national origin, age, disability;

(a)(3) District court erred in dismissing Appellant's "most (except one) and important claims before any jurisdictional discovery were take", and this honorable court generally reversed it in such situation;

(a)(4) District court erred in failure to provide reasonable accommodations to Appellant with "impaired hearing or communication disabilities" at court's teleconference, as regulated in "guide to judiciary policy"; and caused injures to her;

(a)(5) District court erred in failure of following U.S. Supreme Court established *McDonnell Douglas* burden shift frameworks, disparately and adversely treated and ruled against Appellant, based on her race, sex, national origin, age, disabilities;

(a)(6) District court erred in dismissing this suit;

(a)(7) And more, [FN1].

IX.(b) **Appellees intentionally discriminated and retaliated against Appellant, in their following actions**:

(b)(1) Appellees concluded Appellant disqualifying for GS-15 position [FN5];

(b)(2) Appellees "willfully caused bodily injury to Appellant" (18 U.S.C.A § 249) at work place;

(b)(3) Appellees knowingly "created many substantial risks of death ... to Appellant" at work place (MD Criminal Law § 3-204);

(b)(4) Appellees deprived Appellant's constitutional rights of life;

(b)(5) Appellees denied Appellant's within grade GS-15 step increase;

(b)(6) and more [FN1].

IX(c) Further court proceedings in favor of Appellant:

Based on Appellees consent and do not oppose facts, laws, and conclusions of they acted unlawfully, Appellant requests a Jury trail for **jury to decide the compensations, including the money amounts, for Appellees compensate Appellant.**Appellees: consent _, oppose_, unknown_

IX(d) Other further court proceedings.

X. WHETHER DISTRICT COURT JUDGE ERRED IN HIS PATTERN OF CONCEALING FACTS, WHEN RULED ON DISCRIMINATIONS, ESPECIALLY FOR ASIAN AMERICAN COMPLAINANTS?

Appellees: consent _, oppose_, unknown_

Above facts and laws should suffice for Honorable Judges to rule in favor of Appellant, based on Appellees consented and do not oppose all facts, laws, and conclusions, and U.S. Supreme Court and many court ruled in Authority.(a)). Appellees: consent _, oppose_, unknown_

Additional to that, Appellant would bring an issue for Honorable Judges to review, that: Whether district court judge erred in his pattern of concealing facts, when ruled on discriminations, especially for Asian American complainants ? Appellees: consent _, oppose_, unknown_

X.(I) FACTS

(I).(a) Appellant tried and searched, but failed to find one case which the district court judge ruled in favor of Asian American plaintiffs for discrimination complaints.

Appellees: consent _, oppose_, unknown_

(I).(b) Pattern of district court judge concealing facts, when ruled on discriminations, especially for Asian American complainants.

(b)(1) Case 1 showed the pattern of Judge James E. Boasberg is Appellant's suit – discrimination complaints.

Appellant's suit, see above stated and evidenced facts and conclusions.

(b)(2) Case 2 showed the pattern of James E. Boasberg is Wheeler V. Georgetown University Hospital – discrimination complain.

(2)(A) Brief of Plaintiff-Appellant

"Patricia Wheeler, Plaintiff-Appellant,

v.

Georgetown University Hospital, Defendant-Appellee.

No. 14-7108.

July 31, 2015.

On Appeal from the United States District Court for

the District of Columbia in Case No. 1:10-cv-01441-JEB (Hon. **James E. Boasberg**, Judge)

"ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in granting summary judgment by improperly weighing or disregarding admissible evidence from which a reasonable jury could have inferred that the Appellee's purported reasons for its decisions were pretextual and that the real motivation for its decisions was race discrimination.

II. ...

III. Whether the District Court erred in not viewing the evidence in a light most favorable to the Appellant."

(2)(B) **Honorable Judges of this court revered district court judge James E. Boasberg's rulings:**

Wheeler v. Georgetown University Hospital United States Court of Appeals, District of Columbia Circuit. February 12, 2016 812 F.3d 1109 2016 WL 556705 14-7108

Background: African-American nurse brought action against university hospital alleging that she was terminated because of her **race**, in violation of Title VII. Hospital moved for summary judgment. The United States District Court for the District of Columbia, **James E. Boasberg,** J., 52 F.Supp.3d 40, granted motion. Nurse appealed.

Holding: The Court of Appeals held that genuine issue of **material fact** existed as to whether hospital's proffered reason for terminating nurse was pretext for racial **discrimination**.

Reversed and remanded."

Appellees: consent _, oppose_, unknown_

(b)(3) Case 3 showed the pattern of James E. Boasberg is Harris v. District of Columbia Water, and Sewer Authority – discrimination complain.

(3)(A) Brief of Plaintiff-Appellant

"United States Court of Appeals,
District of Columbia Circuit.
Anthony S. Harris, Appellant,
v.
District of Columbia Water, and Sewer Authority
Appellee.
No. 13-7043.
May 29, 2014.
Appeal from the United States District Court for the District of Columbia
Order Granting Motion to Dismiss 1:12-cv-01453
Honorable **James E. Boasberg**

"B. Statement of Issues Presented for Review

The only issue presented for review is whether the District Court erred in granting judgment on the pleadings to Defendant-Appellee District of Columbia Water and Sewer Authority, thereby dismissing Mr. Harris' Federal claims for retaliation discrimination."

(3)(B) **Honorable Judges of this court revered district court judge James E. Boasberg's rulings:**

Harris v. District of Columbia Water and Sewer Authority

United States Court of Appeals, District of Columbia Circuit. June 23, 2015 791 F.3d 65 2015 WL 3851919 13-7043 791 F.3d 65

No. 13–7043.

Argued Nov. 12, 2014.Decided June 23, 2015.

"Synopsis

Background: Employee brought action against his former employer, the District of Columbia Water and Sewer Authority (WASA), alleging, inter alia, that he was terminated in **retaliation** for opposing racially discriminatory employment practices in violation of § 1981, Title VII, and District of Columbia law. Former employer filed motion to dismiss. The United States District Court for the District of Columbia, James E. Boasberg, J., 922 F.Supp.2d 30, granted motion, and employee appealed.

Holding: The Court of Appeals, Garland, Chief Judge, held that employee's complaint alleged **sufficient facts** going to causation to render his Title VII retaliation claim plausible.

Reversed."

Appellees: consent _, oppose_, unknown_

(b)(4) Case 4 showed the pattern of James E. Boasberg is:

Arriva Medical LLC v. United States Department of Health and Human Services, United States District Court, District of Columbia. March 09, 2017 239 F.Supp.3d 2662017 WL 943904 CV 16-2521-JEB)

"Synopsis

...The United States District Court for the District of Columbia,

James E. Boasberg, J., 854 F.Supp.2d 83, denied contractors' motion for preliminary injunction, and, 901 F.Supp.2d 101, granted FEC's motion for summary judgment. **On appeal, the Court of Appeals, 717 F.3d 1007, vacated district court's orders and remanded** case to district court to make appropriate **findings of fact** and certify those facts and relevant constitutional questions to Court of Appeals. Appellees: consent _, oppose_, unknown_

X.(b) CONCLUSIONS

(1) Facts showed that district court judge James E. Boasberg's pattern of concealing facts, when ruled on discriminations, especially for Asian Americans.

Appellees: consent _, oppose_, unknown_

(2) When Honorable Judges of this court reversed similar district court Judge James E. Boasberg's dismissing, Appellant -- and Asian American woman and victim of Appellees' intentional discriminations and retaliations, respectfully requests honorable Judges to rule in her favor also, as they ruled in above cases (2,3,4) by reversed same district court judge Boasberg's dismissing.

Appellees: consent _, oppose_, unknown_

Respectfully submitted

Qihui Huang, *pro se,* Appellant, _/s/_
P.O.Box 34014, Bethesda MD 20827
Phone: 240-423-0406;
Date: June 28, 2018 Email: qhh@hotmail.com

XI. CERTIFICATE WORD, PAGES, AND SERVICE

Based on Appellant's knowledge, there are about 4,720 words and 25 pages, and met regulations of Local Rules.

Appellant certifies that the copy of the above document is served to Appellees through their attorneys by Court's Electronics Filing Computer System, on June, 28 2018. Qihui Huang ___/s/____

Affidavit

Appellant, undersigned, states that under the penalty of perjury, her statements here are true, based on her best memories, knowledge, and experience. Qihui Huang ___/s/____More statements: [8] , [9].

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[8] Appellees did not oppose Appellant recently filed all about 12 motions on different facts. Appellant thinks they will oppose this Brief, as their lawyer said, but she does not know if they will oppose or not.

[9] Appellees is very sick and she submitted doctor's note to this honorable court. She filed motion for extension to fie brief, but did not receive any ruling on it. Appellant does not want to miss court scheduled deadline. She worked on the brief, under the status of she is very sick.

APPENDIX H (App. H)

Following is a list of organizations, which support and concern Qihui Huang's lawsuit against FCC Chairman's discriminations, retaliations, and more unlawful actions. Herein, [N] is for national, [O] is for organization, [I] is individual head of organization, [M] is media, [W] is for Wechat, [C] is for company.

No	Names of organizations	Website	Estimate Persons / Members Numbers
1	President, Attorney, and Chair of National Council of Chinese Americans (NCCA)	http://www.myncca.org	> 3,000, [N,I].
2	Director and Executive Director of the	http://www.ucopo.org	> 5,000, [N,I]. It leads and

	Union of Chinese American Professional Organizations (UCOPO)		represents about 28 organizations.
3	Chairman, Association of Greater Washington DC Chinese American Organizations		> 3,000 [I]
4	Chairman, Minnesota Chinese American Association		> 2,500 [I]
5	Northwestern Chinese American Association of Greater Washington DC	http://www.ncaagw.org	> 1,650, [O]
6	National American Gansu Friendship Association	http://www.gansudc.org	> 1,400, [N,O]
7	American Gansu Friendship	http://www.gansudc.org	> 750, [O]

	Association of Great Washington DC		
8	ShangHai Chinese American Association of Great Washington DC	http://newworldtimes.us/shanghainesedc/	> 850, [O]
9	Shaanxi Chinese American Association of Great Washington DC		> 650, [O]
10	President, Chinese Association for Science & Technology, USA Washington-DC Chapter (CAST-DC) & Network Society (CAST-NS)	http://www/castdc.org	> 250, [O]
11	China Overseas Exchange Association	http://www.coea.org.cn	> 200, [N,O]
12	American Chinese School	http://www.acsdc.org	> 330, [O]
13	President of		> 250, [I]

	Coalition of Asian Pacific Americans of Virginia		
14	President of Asian Pacific American Veterans Association		> 120, [I]
15	United Nations Woman Development & Promotion Committee		> 170, [O]
16	World Harmony Alliance		> 180, [O]
17	United Nations Painting;		> 140, [O]
18	UN World Religious Harmony Foundation;		> 150, [O]
19	The Committee of Advocacy and training in UN Procurement		> 150, [O]
20	Republican Party Asian American New York Association		> 240, [O]

	Headquarter.		
21	US-Chinese Education and Cultural Exchange, Inc.		> 10
22	Multiple Owners, Managers, and/or Journalists		> 5, [M]
23	Greater Philadelphia Chinese Association of Protecting Rights		> 420, [O]
24	MDGOP-APA council		> 150, [O]
25	U.S. Suits for Protecting Rights		> 15, [W]
26	Employed Women for Equal Rights		4, [W]
27	1441 Manufactured-Home Residents Association		> 800, [W]
28	Ace Mortgage Corporation		> 10 [C]

29	Aeda Realty		11 [C]
30	www.2us4love.com	media	>5 [M]
31	Alliance Cultural Media, Inc.	Medium www.acmedia360.com	> 50 [C], >195,000 subscribers
Total	About 31 organizations		> 22,455 persons, and medium has more than 195,000 subscribers.

Appendix I (App. I) Constitutions and Statutes Involved

App. H.1 -- United States Constitution, Amendment 1, provides, in relevant part: "Congress shall make no law respecting an establishment of ... prohibiting the free exercise thereof; or ..., and to petition the Government for a redress of grievances."

App. H.2 -- United States Constitution, Amendment 5, provides, in relevant part: "No person shall be held to ..., nor be deprived of life, liberty, or property, without due process of law; ...".

App. H.3 -- United States Constitution, Amendment 14, provides, in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

App. H.4 -- 18 U.S. Code § 249. Hate crime acts, provides, in relevant part: "(a)In General.— (1) Offenses involving actual or perceived race, ..., or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, ... attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—".

App. H.5 -- Maryland Criminal Law, §3-204. Reckless endangerment, (a) Prohibited. - A person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious

physical injury to another; or ..."

APP. H.6 -- 42 U.S.C. § 2000 e-2. Unlawful employment practices "(a) Employer practices

"It shall be an unlawful employment practice for an employer— .....because of such individual's race, color, religion, sex, or national origin; or ..."

App. H.7 "... silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree," – rulings of U.S. Supreme court in *Kernan v. Hinojosa,* 2016, 136 S.Ct. 1603; *Ylst v. Nunnemaker,* 1991 501 U.S. 797 111 S.Ct. 2590; and about 33 U.S. courts cited and complied it.