

No. 19-344

IN THE
Supreme Court of the United States

Ms. QIHUI HUANG

Petitioner,

v.

Mr. AJIT VARADARAJ PAI

Chair, Federal Communication Commission,

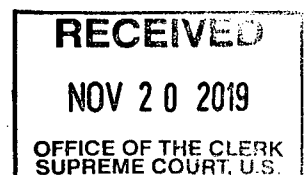
Respondent

Petition for Rehearing on Petition for Writ of
Certiorari to United States Court of Appeals
for the District of Columbia Circuit

REQUEST FOR RECONSIDERATION OF
PETITION FOR A WRIT OF CERTIORARI

Qihui Huang, M.S.
P.O. Box 34014
Bethesda, MD 20827
(240) 423-0406
qhh@hotmail.com
Petitioner, Pro Se

November 15, 2019



QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court -- whose analyses the Circuit Court opinion adopted -- erred as a matter of law by analyzing that Ms. Huang failed to exhaust administrative remedies against her concerning denial of her "step increase," where all concede that Huang already had two complaints with the FCC's Office of Workplace Discrimination.

Where OWD knew that denial of a step increase was part of the same events, may one's complaint be dismissed because the employer *narrowly interprets* the administrative complaint as not already including the FCC's denial of a step increase.

2. Whether the lower courts erred as an abuse of discretion, against the weight of evidence, where they concede that Ms. Huang sent emails to OWD, but the District Court ignored from the record that Ms. Huang's emails were *about* her request for assignment of an OWD counselor to initiate a third administrative complaint. The District Court found fatal that Ms. Huang did not amend her two (2) prior complaints but ignored that Ms. Huang was attempting to file a third.
3. Whether the lower courts erred as a matter of law in not treating exhaustion of administrative remedies as futile where Huang requested the initiation of a third administrative complaint, but the OWD never responded.

4. Whether the lower courts erred as a matter of law where the District Court dismissed Huang's claims of workplace discrimination in denying her request to be transferred to another position to avoid the stress and severe high blood pressure from interacting with the new Branch Chief who had discriminated against her.
5. Whether the lower courts erred where the District Court dismissed Huang's claims of a hostile working environment by refusing to transfer her to another position to avoid the stress of reporting to a new Branch Chief who insulted her as unqualified.
6. Whether the lower courts erred in determining that Huang did not make out a *prima face* case of Title VII discrimination shifting the burden to the employer to demonstrate a non-pretextual explanation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-5 (1973).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	<i>i</i>
TABLE OF AUTHORITIES	5
OPINIONS AND ORDERS ENTERED BELOW.....	Overflow Section
JURISDICTION	Overflow Section
STATUTES (PROVISIONS) INVOLVED	Overflow Section
PARTIES TO THE PROCEEDING ...	Overflow Section
DECISION OF THE D.C. CIRCUIT BELOW	Overflow Section
REASONS FOR GRANTING THE WRIT	8
I. Huang's Two Administrative Complaints Were Adequate to Cover Discrimination in Her In-Grade Step Increase (Error 1)	8
II. Courts Below Abused Discretion Mis- representing Unspecified "Emails" (Error 2)	10
III. OWD's Failure to Assign an EEO	

Counselor, a Prerequisite to a Discrimination Complaint, Constitutes Exhaustion of Remedies (Error 3)	11
IV. Refusal to Transfer Huang to Accommodate Health Risks and Dangers (Error 4)	12
V. Hostile Working Environment of Hostile Supervisor (Error 5)	13
VI. <i>Prima Facie</i> Case of Discrimination Shifting Burden to Employer to Prove explanation that is not a Pretext (Error 6)	15
CONCLUSION.....	15
APPENDIX	previously filed

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	1
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 678 (2009)	1
<i>Baloch v. Kempthorne</i> , 550 F.3d 1191, 1201 (D.C. Cir. 2008)	14
<i>George v. Leavitt</i> , 407 F.3d 405, 416 (D.C. Cir. 2005)	14
<i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17, 21 (1993)	14
<i>Nat'l R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101, 113 (2002)	12
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 802-5 (1973)	15
<i>Park v. Howard Univ.</i> , 71 F.3d 904, 907 (D.C.Cir.1995)	10
<i>Payne v. Salazar</i> , 619 F.3d 56 (D.C. Cir.,	10

2010

Statutes

Rehabilitation Act of 1973	8, 13, Overflow 2nd page
28 U.S.C. §1331	Overflow 1st page
28 U.S.C. § 1291	Overflow 1st page
28 U.S.C. § 2107	Overflow 1st page
29 U.S.C. §§ 701-796/	13
29 U.S.C. § 794	Overflow 2nd page
42 U.S.C. § 2000e et seq.	Overflow 2nd page
Age Discrimination in Employment Act of 1967 (“ADEA”)	Overflow 2nd page

Rules

Federal Rules of Appellate Procedure Rule 4(a)(1)(A)	Overflow 2nd page
Federal Rules of Civil Procedure Rule 12(b)(6)	1, 13, Overflow 1st page
Federal Rules of Civil Procedure Rule 56	1
Title VII of the Civil Rights Act of 1964 (“Title VII”)	5, 9, 10, 12, Overflow 2nd page

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Course of Proceedings

Allegations in Ms. Huang's Complaint are taken as true relating to the dismissal of her claims under Federal Rules of Civil Procedure Rule 12(b)(6), including all implied facts and inferences in favor of Plaintiff reasonably drawn from the allegations. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Ms. Huang's claim of discrimination in the denial of a within-grade step increase was dismissed on summary judgment, which requires no material facts genuinely in dispute. FRCP Rule 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Huang's material allegations, unless retracted or clearly disproven, must be considered true or there would be a genuine dispute of a material fact.

Stating much of the facts and procedural history as conceded by and uncontested by Appellee FCC --

"Huang filed her complaint in this action on February 29, 2016, and amended it on June 28, 2016." Appellees' Combined Opposition To Motion For

Summary Reversal And Motion For Summary Affirmance ("Opp. Reversal"), Page 2 (Docket #1748557, USCA Case #17-5290, August 31, 2018).

"Huang alleged that she had been employed at the FCC for 23 years, had been in the same branch and division as a GS 15 for ten and a half years, held two masters degrees, and had been recognized for her work on a Nobel Prizewinning project." Opp. Reversal at 4.

"Before November of 2014, Plaintiff never recieved a 'fail' in her performance evaluations, in her about 23 years worked at the FCC, and more than 10 years worked at the same Branch and Division, before Doczkat became the branch chief." Huang's Complaint at 6 (Docket #1, District Court Case 1:16-cv-00398-JEB, February 29, 2016).

"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. at 19. During her long and successful career at the agency, she amassed several performance awards and was repeatedly promoted through competitive job postings. Huang eventually reached the GS-15 level as a senior electronics engineer in the FCC's Office of Engineering 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 agrade. Id. at 19-20; ECF No. 1 (Complaint) at 9." Memorandum Opinion, District Court, Judge Boasberg, App. at 9a-10a.

"She alleged that she "was in [a] GS-15 Step 7 [position] for about 3 years and should [have] receive[d] [a] step increase to Step 8 around the end of February of 2015, absent discrimination or retaliation. [She] should [have] receive[d] a few thousand dollars more in her salary if there was no discrimination or retaliation." " Opp. Reversal at 6

Prior to the departure of Branch Chief, Robert Weller, around April 1, 2014, Weller assigned Ms. Huang to conduct a study and report of wireless microphone technologies. Complaint at 2-4.

During the course of this project, Huang worked closely with Weller, and "modified her draft[] report according to Weller's instructions," yet "Plaintiff did not receive negative comment from former branch chief Weller...." Complaint at 2. Huang submitted her final report to Weller at the beginning of July 2014 and "Plaintiff did not receive any negative comment on the final report until Weller left FCC...." Complaint at 2.

However, departing Branch Chief Weller was replaced by Acting Branch Chief Martin Doczkat, Complaint at 3, who himself had been a grade GS-15 only for 5 months compared to Huang's 10.5 years. Complaint at 5. Doczkat had been Acting Branch Chief for only about one month when Doczkat concluded that Plaintiff's bad performance meant she was disqualified for a GS-15 level position. *Id.*

Doczkat singled out the wireless microphone study for adverse personnel action against Huang. Complaint at 2-3. Huang implies that his focus only on that study, atypical of her FCC career, demonstrates a pretext.

Huang alleged that when she was sick with hypertension and high blood pressure for 7 months, no one else was assigned to the project, Complaint at 4, confirming that the project was not a Congressional or FCC priority. *Id.*

"Specifically, Mr. Doczkat made suggestions regarding the formatting of the report's table of contents, to comments about whether Huang had actually followed her former supervisor, Mr. Weller's, suggestions about the utility of the wireless technology, to Mr. Doczkat's own specific concerns about whether Huang's calculations were correct." Opp. Reversal at 5.

"Huang alleged that "none of Doczkat'[s] about 83 comments on [her] and Weller's report could support his conclusions" that she "disqualified for a GS-15 position; and [her] bad performance."" Opp. Reversal at 5. See ECF Document # 28-3, District Court case 1:16-cv-00398-JEB, email Qihui Huang to Martin Doczkat, October 3, 2014.

The actual content of Doczkat's 83 comments reveals unmistakably that the negative review is a pretext and reveals the discrimination. *Id.*; ECF Document ## 28-5, 28-2.

Huang alleged in her Complaint that Doczkat consented by silence. Her Complaint implies -- amplified by her exhibits which state it explicitly -- that Doczkat gave no answer to Huang's responses to each of Doczkat's 83 comments. Huang argues that Doczkat's failure to respond indicates that Doczkat's objections were without merit. Complaint at 3, ECF Document # 28-4, District Court case 1:16-cv-00398-JEB, email from Huang to Doczkat, October 7, 2014.

Doczkat quickly gave Huang a bad performance appraisal, declared her unqualified for work at the GS-15 level, and denied her a step increase "solely based on the study report." Complaint at 2.

The core of Huang's *prima facie* case of discrimination in violation of Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-5 (1973) is that for 23 years she received positive performance appraisals, including from Branch Chief Weller, but suddenly when Doczkat became Acting Branch Chief in Weller's place, within one (1) month she was given a failed performance appraisal and declared by Doczkat to not be qualified for her job as a GS-15 electronics engineer.

"Plaintiff showed and told Defendants the *McDonnell Douglas* burden shift framework: (1) Plaintiff is a member of statutes protected group. Plaintiff is an Asian American, foreign-born, old woman." Complaint at 10.

"Defendants failed to provide a legitimate and non-discriminatory reason for [] they disparately and adversely treated Plaintiff. Wherefore, under the *McDonnell Douglas* burden shift framework, Plaintiff has established the *prima facie* of Defendant's intentional discriminations and retaliations, based on she is the member of statutes protected group." Complaint at 10.

Huang further alleged extensively that after Doczkat declared that she was not qualified for her

job the stress of being around him triggered her high blood pressure. Complaint at 6-7.

"Plaintiff requested to transfer to working with other supervisors, but was denied." Complaint at 7. Huang submitted medical orders from her doctors and nurses that being in such stressful situations created a significant risk of harm or death. Complaint 6-10. See letters at ECF # 51-1, District Court.

The District Court Decision Below

"By Memorandum Opinion issued on October 19, 2016, the District Court dismissed all but one of Huang's claims and allowed discovery on the remaining claim of whether Huang had exhausted her administrative remedies concerning the denial of a step increase in February 2015. R. 24." Opp. Reversal at 3.

"Appellees moved for summary judgment on the remaining claim (R.63), and Huang opposed (R.68). Ultimately, the District Court granted Appellees' motion, finding that Huang had failed to exhaust her administrative remedies and, even if that were not a basis for summary judgment, which it is, the District Court also found in the alternative that Huang failed to show that Appellees intentionally discriminated or retaliated against her on account of any protected

characteristic or prior EEO activity when it denied her a within grade salary increase based on her recent lackluster performance. R. 87." Opp. Reversal at 3

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REASONS FOR GRANTING THE WRIT

I. Huang's Two Administrative Complaints Were Adequate to Cover Discrimination in Her In-Grade Step Increase (Error 1)

The core of the District Court's dismissal of Huang's Title VII discrimination complaint concerning denial of her in-grade step increase is the FCC's strained attempt to interpret a single, unitary

sequence of discrimination as totally *unrelated* individual actions. The District Court and D.C. Circuit erred by adopting this strained legal concept.

While conceding that Huang filed her administrative discrimination complaint with OWD concerning the discriminatory events, the courts below quibbled over whether Huang explicitly included the denial of her step increase. For purposes of exhaustion of administrative remedies, Huang's administrative complaint necessarily included all of the events directly involved. Individual aspects could not be irrationally separated into different slices.

Payne v. Salazar, 619 F.3d 56 (D.C. Cir., 2010) clarified that an administrative complaint includes a charge "'reasonably related" to a filed charge under that doctrine, it must "[a]t a minimum ... arise from the administrative investigation that can reasonably be expected to follow the charge of discrimination.'" " And "unfiled "Title VII claims must arise from the administrative investigation that can reasonably be expected to follow the charge of discrimination." *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C.Cir.1995)) (quotation marks omitted).

Here, if investigation of Huang's administrative complaints of a negative performance report would naturally lead to examining the denial of her step

increase, the latter is legally included for exhaustion analysis. *Id.*

In *Payne*, the D.C. Circuit considered the idea that exhaustion is required for "each discrete element" of discrimination but instead applied the "reasonably related" test. This has been

As a matter of law, the courts below erred in allowing an arbitrary and irrational subdivision of the discriminatory conduct. Thus, Huang did not fail to exhaust her administrative remedies and certainly did not "abandon" her claim. Huang's complaint of discrimination includes the step-increase denial.

II. Courts Below Abused Discretion Misrepresenting Unspecified "Emails" (Error 2)

After Huang filed two administrative complaints with OWD, Huang requested that OWD assign a counselor for her to open a third explicitly about the step increase. See dispositive emails collectively at ECF Docket # 78-1, District Court, particularly email March 2, 2015 ("I asked for EEO counsel several times already. I send EEO manager an email this morning. I did not receive her response." and "I requested EEO counsels, for about 3 issues. Please give me EEO Counsels as soon as possible (ASAP).")

On summary judgment, the courts below erred as abuse of discretion by merely noting that Huang sent "emails" without considering the actual substance of those emails as being Huang's attempt to pursue administrative remedies concerning the step increase, which was frustrated by FCC's failure to respond.

Thus, the courts below abused their discretion by suggesting that Huang "abandoned" her discrimination claim with regard to the step increase. The courts below noted that Huang declined to amend her previous administrative complaints, but failed to note that Huang was attempting to file a new administrative complaint on the step increase, but was prevented from doing so. This was abuse of discretion and against the weight of the evidence.

III. OWD's Failure to Assign an EEO Counselor, a
Prerequisite to a Discrimination Complaint,
Constitutes Exhaustion of Remedies (Error 3)

Concerning Title VII claims, federal law requires a plaintiff to exhaust his administrative remedies so long as resort to the agency is not obviously futile. *Sohm v. Fowler*, 124 U.S.App.D.C. 382, 365 F.2d 915 (1966)

Assignment of an assigned counselor to a case by OWD is a necessary prerequisite for filing an EEO

discrimination complaint. Thus, the OWD's failure to assign a counselor prevented Huang from pursuing a third, new complaint about the step increase. exhaustion of administrative remedies futile. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)

In emails in the record, the OWD did inform Huang in her first two complaints that the FCC had 180 days to complete administrative review, after which Huang could file suit. ECF Document #78-1, Email from Linda Miller to Qihui Huang, March 2, 2015, "FCC have 180 days to complete processing your complaints." Thus, on the expiration of 180 days without the FCC meeting its deadline, any exhaustion of administrative remedies would be futile, as FCC's deadline had expired.

IV. Refusal to Transfer Huang to Accommodate Health Risks and Dangers (Error 4)

The District Court dismissed Huang's claim under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796l, that she was denied a transfer for health reasons to a less stressful office than the supervisor who declared her unqualified, under FRCP Rule 12(b)(6), for failure to allege exhaustion of administrative remedies.

However, the District Court erred in mis-applying the law under *Spinelli v. Goss*, 446 F.3d 159, 162 (D.C. Cir. 2006)." The District Court analyzed that "she readily admits that she failed to pursue any formal complaint with the EEOC or MSPB in regard to her request for a transfer."

However, there is no requirement that a "formal" complaint be filed directly with the EEOC rather than with an agency's own EEO office, here FCC's OWD. Neither is there any requirement to plead allegations of exhaustion of remedies if it actually occurred.

V. Hostile Working Environment of Hostile Supervisor (Error 5)

Federal antidiscrimination laws make it unlawful to "requir[e] people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). "[A] plaintiff must show that his employer subjected him to discriminatory conditions 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008).

Here, Huang alleged severe and pervasive life-threatening high blood pressure and hypertension triggered by working with a supervisor who insulted and ridiculed her qualifications. She submitted in the record medical warnings that the stress might actually kill her.

VI. *Prima Facie* Case of Discrimination Shifting
Burden to Employer to Prove explanation that
is not a Pretext (Error 6)

Huang clearly established a *prima facie* case of workplace discrimination. She worked 23 years with all positive job performance appraisals. On her final project on wireless microphones she received positive feedback from her then supervisor Weller. But suddenly she was given a negative job performance on the exact same project when Weller was replaced by Doczkat, after only one month of Doczkat's supervision.

Courts below mis-interpreted Huang's lawsuit as depending upon prior supervisor Weller being part of the discrimination, when in fact it is the sharp contrast between Huang's successful job performance under Weller to Doczkat then replacing Weller which proves discrimination.

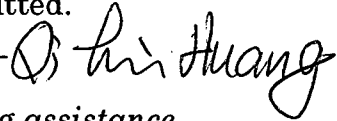
Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-5 (1973), Huang pled a *prima facie* case. The problem was obviously not with Huang's work for 23 years with positive performance appraisals. What changed was that Doczkat replaced Weller, who had approved Huang's interim work on the study. Doczkat claimed the exact same study was so incompetent that Huang was not qualified to be at a GS-15 grade level and her performance appraisal was a failure. When Huang responded to the 83 items, Doczkat offered no follow-up or direction. See ECF Documents ## 28-2, 28-3, 28-5, District Court case 1:16-cv-00398-JEB, email Qihui Huang to Martin Doczkat, October 3, 2014.

CONCLUSION

A writ of certiorari should be granted or the case remanded for proceedings consistent with precedent.

Respectfully submitted.

/s/ Qihui Huang



Qihui Huang, M.S.
P.O. Box 34014
Bethesda, MD 20827
(240) 423-0406
qhh@hotmail.com
Petitioner, Pro Se

*Pro Se receiving assistance
of Jonathon Moseley, Esq.*
3823 Wagon Wheel Lane
Woodbridge, VA 22192
(703) 656-1230
Contact@JonMoseley.com

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Additional Section Proposed
in Excess of Word Limits

Qihui Huang, M.S.
P.O. Box 34014
Bethesda, MD 20827
(240) 423-0406
qhh@hotmail.com
Petitioner, Pro Se

November 15, 2019

OPINIONS AND ORDERS ENTERED BELOW

On April 16, 2019, in Appeal No. 17-5290, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued its Opinion (App. 1) ordering summary affirmance of the dismissal of Ms. Huang's causes of action by the U.S. District Court for the District of Columbia ("District Court"). The short opinion merely adopted the analyses of the District Court because "The merits of the parties are so clear as to warrant summary action." App. at 3a.

In the District Court, the Honorable James E. Boasberg's October 19, 2016 Memorandum Opinion (App. at 7) dismissed individual Defendants and Plaintiff's claims for failure to state a claim, except for Ms. Huang's Title VII claim of denial of a within grade step increase. Boasberg's September 15, 2017 Memorandum Opinion (App. at 38a) granted summary judgment on the step increase for failure to exhaust administrative remedies but in the alternative for not alleging workplace discrimination.

JURISDICTION

The District Court had jurisdiction by 28 U.S.C. §1331. The D.C. Circuit had jurisdiction by 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to 28 U.S.C. § 2107 and Federal Rules of Appellate Procedure Rule 4(a)(1)(A). This appeal is from a final order that disposed of all claims.

STATUTES (PROVISIONS) INVOLVED

Ms. Huang asserts violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq. ("ADEA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794."

PARTIES TO THE PROCEEDING

1. Appellant / Plaintiff Qihui Huang

Ms. Qihui Huang was employed by the Federal Election Commission (FEC) for 23 years as a GS-15 senior electronics engineer. She filed *pro se*.

2. Appellee / Defendant FCC

FEC is a federal agency in the District of Columbia. At the time that Ms. Huang filed her Complaint, the Chair of the FCC was Tom Wheeler. The new FCC Chair was Ajit Varadaraj Pai was substituted for Tom Wheeler. Ms. Huang also sued Division Chief Walter Johnson and Branch Chief Martin Doczkat.

The Decision of the D.C. Circuit Below

The D.C. Circuit upheld the District Court on summary affirmance primarily on failure to exhaust administrative remedies. App. at 3a. The D.C.

Circuit's opinion did not materially depart from the District Court's explanations. App. at 3a-5a.

Incredibly, the D.C. Circuit accepted the FCC's assertion that Huang had "abandoned" her claim of discrimination in denying an in-grade step increase. App. at 5a. The D.C. Circuit accepted the District Court's decision to apply only the Rehabilitation Act to Huang's claim of discrimination in the refusal to transfer her to a less-stressful supervisor to avoid severe health reasons, but ultimately argued that Huang did not allege discriminatory treatment. App. at 3a-5a. Incredibly the D.C. Circuit upheld the District Court's analysis "that appellant failed to raise a material issue of disputed facts that appellee's legitimate, non-discriminatory reasons for denying appellant's pay step increase were pretextual and that appellee's discriminated against her."

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PETITION FOR REHEARING on Petition for
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Certificate

Petitioner Qihui Huang certifies that, the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented, based on her best knowledge and understanding. This petition were assisted or conducted by different persons, (a lawyer). Petitioner also certifies that the petition for rehearing is presented in good faith and not for delay. Rule 44.2. All stated facts will have evidences.

 Qihui Huang, M.S.
P.O. Box 34014
Bethesda, MD 20827
(240) 423-040