

IN THE SUPREME COURT OF THE UNITED STATES

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No. 19A\_\_\_\_\_

HANNAH P., APPLICANT

v.

JOSEPH MAGUIRE, ACTING DIRECTOR OF THE OFFICE OF  
THE DIRECTOR OF NATIONAL INTELLIGENCE

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APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, counsel for applicant Hannah P.<sup>1</sup> respectfully requests a 30-day extension of time, to and including October 23, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-33a) is reported at 916 F.3d 327. The judgment of the court of appeals was entered on February 19, 2019. A petition for rehearing was denied on June 25, 2019. App.,

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<sup>1</sup> Applicant was identified by her first name and last initial in the courts below, pursuant to a protective order entered in this case. App., infra, 6a n.1. We continue to follow that convention in this Court. See, e.g., Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013). Pursuant to Rule 35(1) of the Rules of this Court, Acting Director of National Intelligence Joseph Maguire has been substituted for his predecessor in office, who was the originally named defendant in this action.

infra, 34a-35a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 23, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. The forthcoming petition in this case will present an important and recurring question concerning the protections afforded by the Rehabilitation Act of 1973, which broadly prohibits disability discrimination "under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). In cases alleging discrimination in employment by a federal agency, the Rehabilitation Act incorporates the standards of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C § 12101 et seq. See 29 U.S.C. § 791(f); 29 C.F.R. § 1614.203(b). Under the ADA, an employer may not "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). As a general matter, an individual is "qualified" if "the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

2. In 2011, the Office of the Director of National Intelligence (ODNI) hired applicant to a five-year term of employment as an operations analyst. Shortly after applicant

was hired, she was diagnosed with depression. App., infra, 7a. For a time, applicant's depression did not affect her job performance. To the contrary, she "generally received glowing reviews from her supervisors," who characterized her as an "outstanding" and "high-performing employee." Ibid.

In November 2013, applicant was assigned to coordinate ODNI's response to Edward Snowden's unauthorized disclosure of classified materials, a demanding assignment that required her to work long and unpredictable hours pursuant to a flexible schedule without any set working hours each day. Applicant thus started and ended work later than traditional business hours. App., infra, 7a.

After the completion of the Snowden assignment, however, applicant's supervisors and co-workers began to register concerns regarding her work hours and unplanned absences. Applicant's supervisors found her demeanor to be "sad, very flat, and almost trance like," and applicant reported that she had recently changed the medication used to treat her depression. App., infra, 8a.

In March 2015, applicant met with her supervisors to develop a plan to reconcile her depression with ODNI's attendance expectations. That plan involved certain adjustments to applicant's work hours, as well as procedures for applicant to report to her supervisors that she would be late or absent.

Despite these efforts, applicant's supervisors continued to be dissatisfied with her attendance and reporting through early May 2015, at which point applicant took a four-week leave of absence to address her depression. App., infra, 8a-9a.

Just before applicant took her leave of absence, she applied for a permanent position with ODNI as a Program Mission Manager. Applicant interviewed for the position after her return from leave, and the interview panel recommended that she be hired. When applicant's application for employment was forwarded to ODNI's Chief Management Officer, however, he recommended that applicant not be selected, stating that her "recent performance [was] not consistent with a potentially good employee." App., infra, 10a. Applicant was informed in July 2015 that she had not been selected for the permanent position, and she thereafter completed her five-year term as an operations analyst in March 2016. Ibid.

3. After exhausting her administrative remedies, applicant filed suit in the Eastern District of Virginia, alleging that ODNI had violated the Rehabilitation Act and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. As is relevant here, applicant alleged that ODNI's refusal to hire

her for the permanent position constituted disability discrimination in violation of the Rehabilitation Act.<sup>2</sup>

The district court entered summary judgment against applicant. With respect to applicant's Rehabilitation Act claim for discrimination in hiring, the district court concluded that applicant's attendance and reporting issues provided a legitimate, non-discriminatory basis for ODNI's decision not to hire her. C.A. App. 763.

4. A divided panel of the court of appeals affirmed in relevant part. App., infra, 1a-22a.<sup>3</sup>

a. In addressing applicant's Rehabilitation Act claim for discrimination in hiring, the panel majority "assum[ed] that [applicant] established a prima facie case of discrimination," which includes a showing that "she is disabled" and is "otherwise qualified" for the permanent position she sought.

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<sup>2</sup> Separately, applicant alleged that ODNI had violated the Rehabilitation Act by failing to accommodate her depression, by creating a hostile work environment, by requiring her to submit to a medical examination, and by making unlawful use of her confidential medical information. Applicant further alleged that ODNI had violated the FMLA by interfering with her right to medical leave and by retaliating against her for invoking that right.

<sup>3</sup> The court of appeals also affirmed the district court's dismissal of the remainder of applicant's claims under the Rehabilitation Act and the dismissal of her FMLA retaliation claim. App., infra, 10a-16a, 21a-22a. The court of appeals reversed and remanded for further proceedings on applicant's claim that ODNI had unlawfully interfered with her right to medical leave under the FMLA. Id. at 19a-21a.

App., infra, 16a. The panel majority held, however, that ODNI's "proffered explanation" for its decision - which relied on applicant's issues with attendance and reporting - was "genuine, legitimate, and nondiscriminatory." App., infra, 17a.

The panel majority rejected applicant's argument that, because her attendance issues were caused by her disability, ODNI could not lawfully withhold an employment benefit on that basis. App., infra, 18a. The panel majority stated that it had "no doubt that [applicant's] struggle with depression was the cause of her attendance issues" (ibid.), and it did not conclude that those issues rendered her unqualified for the permanent position she sought. Instead, the panel majority invoked circuit precedent holding that "the Rehabilitation Act 'does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.'" Ibid. (quoting Vannoy v. Federal Reserve Bank of Richmond, 827 F.3d 296, 305 (4th Cir. 2016))).

In reliance on that precedent, the panel majority held that ODNI was "permitted to take [applicant's] attendance issues into account in its decision whether to hire her." App., infra, 18a. That conclusion conflicts with decisions of other courts of appeals holding that conduct attributable to a disability does not qualify as a legitimate, nondiscriminatory basis for taking an adverse employment action against an otherwise qualified

individual. See, e.g., Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29, 38 (1st Cir. 2000); McMillan v. City of New York, 711 F.3d 120, 129 (2d Cir. 2013); Dark v. Curry Cty., 451 F.3d 1078, 1084 (9th Cir. 2006); Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1088 (10th Cir. 1997).

b. Judge Gregory dissented in part. App., infra, 22a-33a. With respect to applicant's Rehabilitation Act claim for discrimination in hiring, Judge Gregory would have held that summary judgment was improper because applicant had raised triable issues of fact. In his view, a reasonable factfinder could have found that ODNI's proffered explanation for its refusal to hire applicant was a pretext for discrimination. Id. at 28a-29a.

5. The court of appeals subsequently denied a petition for rehearing, over the votes of Judges Gregory and King to grant rehearing en banc. App., infra, 34a-35a.

6. Counsel for applicant respectfully requests a 30-day extension of time, to and including October 23, 2019, within which to file a petition for a writ of certiorari. This case presents complex issues concerning the proper application of the Rehabilitation Act. Undersigned counsel of record, who is working on this case in a pro bono capacity in conjunction with the University of Virginia School of Law's Supreme Court Litigation Clinic, did not represent applicant below and needs

additional time to review the record and opinions below. In addition, counsel has been heavily engaged with the press of other matters before this Court and before other tribunals. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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