NO. 19-_____

In The
Supreme Court of the United States

DEVONA HOLLINGSWORTH,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA) provides reemployment rights to all employees serving in the uniformed services. *See* 38 U.S.C. §§ 4312-4318.

Congress delegated the responsibility to promulgate regulations protecting the reemployment rights of federal employees serving in the uniformed services to the Office of Personnel Management (OPM). *See* 38 U.S.C. § 4331(b)(1). In turn, OPM's regulations state that a federal employee may not be terminated while performing duty with the uniformed services except for cause. *See* 5 C.F.R. § 353.209.

The questions presented are:

1. Are USERRA's reemployment rights applicable to federal employees during their probationary period? If so, may an agency-employer terminate an employee during a probationary period without considering reasonableness of the termination for the conduct in question and providing fair notice that the conduct in question would be constitute case for discharge, despite OPM's regulations?

2. Whether the Merit Systems Protection Board committed harmful error by applying a legal standard to the reemployment rights of a probationary employee serving in the uniformed services that conflicts with USERRA and the corresponding regulations as promulgated by OPM?

PARTIES

The petitioner is Devona Hollingsworth.

The respondent is the Department of Veterans Affairs.

RELATED PROCEEDINGS

- *Hollingsworth v. Dep't of Veterans Affairs*, Nos. AT-4324-17-0315-I-2, AT-4324-18-0091-I-1, U.S. Merit Systems Protection Board, Atlanta Regional Office. Judgment entered May 10, 2018.
- *Hollingsworth v. Dep't of Veterans Affairs*, No. 2018-2100, U.S. Court of Appeals for the Federal Circuit. Judgment entered May 17, 2019.
- *Hollingsworth v. Dep't of Veterans Affairs*, No. 2018-2100, U.S. Court of Appeals for the Federal Circuit. Judgment entered August 5, 2019.

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to clarify the statutory framework and to correct a major deviation from the language and purpose of the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA), 38 U.S.C. §§ 4301 et seq., and the regulations implementing the Act. Congress created a statutory scheme that would ensure reemployment protections for all employees. *See* 38 U.S.C. §§ 4331(a), (b)(1). The Department of Labor (DOL) regulates non-federal employment, while the Office of Personnel Management (OPM) regulates federal employment. *See id.* Congress directed these two agencies to work together to ensure consistency regarding the rights of all employees. *See id.* However, consistent with Congress's recognition that the federal government should be a "model employer" in carrying out USERRA's provisions, *see* 38 U.S.C. § 4301(b), OPM could create greater or additional rights for federal employees. *See* 38 U.S.C. § 4331(b)(1).

As a result, since its enactment, USERRA has protected all employees from termination while on leave in the uniformed services absent a showing of "cause' by the employer, outside of statutory exceptions and affirmative defenses inapplicable to this case. *See* 5 C.F.R. § 353.209; 20 C.F.R. § 1002.248. That showing requires proof of two criteria: (1) that it was reasonable to discharge the employee because of the conduct in question; and (2) that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. *See* 20 C.F.R. § 1002.248; *see also* H.R. Rep. No. 103-65, at 2468 (1993).

In this case, the Department of Veterans Affairs (the Agency) terminated Petitioner without ever considering cause. The Merit Systems Protection Board (MSPB) refused to apply the applicable cause standard and upheld Petitioner's termination without cause as a "probationary termination." *See* App. 6a n.2. The Federal Circuit affirmed the MSPB's decision per curiam without an opinion. App. 1a-2a.

At the current time, federal employees on uniformed services leave face inexplicably differing standards of proof depending on whether they are labeled a "probationary" employee. The decisions of the courts below in this case expose federal employees to other non-statutory exceptions to the USERRA's express protections. They also create issues for all non-federal employees whose employers may seek to copy the federal-employee model and create their own categories of "probationary" or "right-to-work" employees who could ostensibly be fired without cause while on uniformed services leave.

Petitioner Devona Hollingsworth respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered on May 17, 2019 and resolve these disparities.

OPINIONS AND ORDERS BELOW

The May 17, 2019 judgment of the Court of Appeals, which has not been designated for publication, is reproduced at pp. 1a-2a of the Appendix. The May 10, 2018 decision of the MSPB, which is also unreported, is reproduced at pp 3a-33a of the Appendix. The August 5, 2019 order of the Court of Appeals denying Petitioner's petition for rehearing

and rehearing en banc is reproduced at pp. 34a-35a of the Appendix.

JURISDICTION

The Court of Appeals entered judgment on May 17, 2019. App. 1a-2a. The Court denied a timely petition for rehearing and rehearing en banc on August 5, 2019. App. 34a-35a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. § 4331(b)(1) provides that "the Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights."

In 5 C.F.R. § 353.209, OPM provides the following:

Retention protections

> (a) During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.) He or she is

> not a "competing employee" under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.
>
> (b) Upon reemployment. Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment, an employee reemployed under this subpart may not be discharged, except for cause—
>
> (1) If the period of uniformed service was more than 180 days, within 1 year; and
>
> (2) If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.

In 20 C.F.R. § 1002.248, the DOL provides the following:

> **What constitutes cause for discharge under USERRA?**
>
> The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
>
> (a) In a discharge action based on conduct, the employer bears the burden

> of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
>
> (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

STATEMENT OF THE CASE

This case presents questions of fundamental importance to all employees on leave in the uniformed services.

The primary question presented by this case is whether USERRA's reemployment rights are applicable to federal employees during their probationary period. As discussed below, USERRA's provisions and the corresponding regulations prohibit an agency-employer from terminating an employee during a probationary period without considering cause.

In the present case, the Merit Systems Protection Board applied a legal standard to the reemployment rights of a probationary employee serving in the

uniformed services that that did not consider cause, as defined by the regulations and legislative history.

A. LEGAL BACKGROUND

USERRA's statutory language, as well as its legislative history, reflect Congress's intention to protect the reemployment rights and benefits of all persons serving in the uniformed services. *See* 38 U.S.C. § 4312(a) ("any person"); H.R. Rep. No. 103-65, at 2457-2474 (1993). ([Section 4312] applies with equal force to employees of private employees, state and local governments and the Federal Government.") The protections are subject to certain express exceptions and affirmative defenses, none of which are inapplicable here. *See id.* Congress wanted to ensure equal treatment of all persons serving in the uniformed services, whether they were in federal, state or local government, or private employment. *See id; see also* 38 U.S.C. § 4331(b)(1). Congress authorized the Department of Labor (DOL) and the Office of Personnel Management (OPM) to prescribe regulations implementing USERRA's provisions providing non-federal and federal employees, respectively, the same protections. *See* 32 U.S.C. § 4331(b)(1). ("Such regulations [applicable to Federal executive agencies] shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.").

The legislative history makes clear Congress's intention to require cause for termination of an employee entitled to reemployment rights. *See* H.R. Rep. No. 103-65, at 2468 (1993). Congress also wanted

the federal government to lead the way in providing the "model" of how those in military service would be treated. *See* 38 U.S.C. § 4301(b); *see also* H.R. Rep. No. 103-65, at 2474 (1993); 38 U.S.C. § 4331(b)(1).

OPM prescribed regulations to implement the reemployment provisions of USERRA. In pertinent part, 5 C.F.R. § 353.209 provides that a federal employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (emphasis added)

Cause is not further defined in OPM's regulations. However, cause is addressed in both USERRA's legislative history for all employees, *see* H.R. Rep. No. 103-65, at 2468 (1993), and in the Department of Labor's regulations for non-federal government employees. *See* 20 C.F.R. § 1002.248(a). In pertinent part, 20 C.F.R. § 1002.248(a) provides that, in a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or could be fairly implied, that the conduct would constitute cause for discharge.

The legislative history and the DOL regulation rely upon the holding of *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), which involved a federal employee and is discussed in H.R. Rep. No. 103-65, at 2468 (1993). In *Carter*, the D.C. Circuit stated the following:

> We think a discharge may be upheld as one for 'cause' only if it meets two criteria

> of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.

407 F.2d at 1244. USERRA and its legislative history also make clear that, as for federal employees, the same rules must be consistent for all employees. *See* 38 U.S.C. § 4331(b)(1); H.R. Rep. No. 103-65, at 2474 (1993).

B. FACTUAL BACKGROUND

Petitioner is a fourth-generation combat veteran and her family's first female. She started her service in the Army, but was at all times material to this case a master sergeant in the Air Force Reserves, an Armed Force pursuant to 38 U.S.C. § 4303(16) and 5 U.S.C. § 2101(2), (3). Petitioner is also highly educated having, *inter alia,* a doctorate in education.

It is undisputed that the Agency terminated Petitioner while she was on leave in the uniformed services (hereinafter also referred to as "military leave"). *See* App. 6a n.2 ("It is undisputed that the appellant was terminated from the agency while serving military duty."). Her military leave began on March 13, 2017. She was terminated by a letter dated July 18, 2017, sent by the Chief of Human Resources, Tracy Skala. The subject and first two paragraphs of the letter plainly state it was a "Termination during Probationary Period".

Tracy Skala was delegated the authority by the Director to make the decision on "probationary terminations." Skala repeatedly testified in this case that Petitioner's termination was a probationary termination. She also testified that she did not know Petitioner had filed USERRA complaints or a hostile work environment complaint and that Hollingsworth's military service did not play any role in her decision.

A memorandum requesting Petitioner's termination "during probationary period" was prepared by Donna Griffin-Hall (DGH), the Service Chief of the Business Office (BOS). Petitioner was never shown or orally told about the memorandum, let alone given any opportunity to discuss it at any time prior to her termination. Like Skala, DGH repeatedly testified Petitioner's termination was a probationary termination. DGH provided an affidavit during the hearing reaffirming that. She also testified her memorandum was not a final proposed termination when it was prepared in December 2016, because it could have been rescinded depending on what happened later. The termination file contains several bases dated after the memorandum, including bases from January, February, March, April, June, and July 2017. Some of these bases related to disputes surrounding military leave and were raised while Petitioner was on military leave. Again, it is undisputed that the Agency terminated Petitioner while she was on military leave. *See* App. 6a n.2 ("It is undisputed that the appellant was terminated from the agency while serving military duty."). It is also undisputed that Petitioner was never told about the bases for her termination or given any opportunity to discuss them at any time prior to her termination. The

Chief of Employee and Labor Relations opposed Petitioner's termination. After he was removed as Chief, the file was sent to Skala, who then made the July 18, 2017 probationary termination decision.

C. PROCEEDINGS BELOW

Petitioner commenced this action with the MSPB, alleging that the Agency violated USERRA when, *inter alia*, it terminated her while she was on military leave. The MSPB had jurisdiction over the action pursuant to 38 U.S.C. § 4324(b), (c). *See Wilson v. Dep't of Army*, 111 M.S.P.R. 54 (2009).

At no point of the MSPB proceedings did any Agency official involved in the termination maintain that Petitioner's was terminated for cause. During the Agency's direct examination of Skala, she was only asked about probationary termination. No questions were asked about the termination file or whether Petitioner knew or should have known her conduct would or even could result in her termination. At the hearing, Agency counsel successfully objected to questions seeking explanation of the reasonableness of the Agency's actions on the basis that this was a probationary termination. At every stage, the Agency failed to identify the standard applicable to and necessary for a cause termination and to submit evidence that satisfied the standard.

1. The Administrative Judge's (AJ's) Order

The AJ's Order dismisses the issue of cause in a footnote. App. 6a n.2. It turns 38 U.S.C. § 4302(a) on its head and criticizes Petitioner's reference to the need for cause – as the AJ did during the hearing – as

seeking remedies afforded by other statutes (i.e., 5 U.S.C. § 7503) inapplicable to the termination of a probationary employee. *See id.* Although the employer did not consider cause, the AJ decided that "the Agency had ample cause to terminate the Appellant during her probationary period," without Agency consideration of that issue or a full presentation of such evidence at the hearing. *Id.*[1]

2. The Federal Circuit

On appeal, Petitioner argued that the AJ has erred in several respects, including the issues

[1] There is no basis to suggest that the word "employee" appearing in the applicable regulations, e.g., 5 C.F.R. § 353.103, required Petitioner to meet the definition of "employee" under 5 U.S.C. § 7501(1). *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (holding that "employees" in § 704(a) of Title VII of the Civil Rights Act of 1964 includes former employees). USERRA's provisions are applicable to "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services." 38 U.S.C. § 4312(a); *see also* 38 U.S.C. § 4314(a) (providing that a person entitled to reemployment by the Federal Government under Section 4312 shall be reemployed in a position of employment as described in Section 4313). Under USERRA, an "employee" is any person employed by an employer. 38 U.S.C. § 4303(3). An "employer" is any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including, *inter alia*, the Federal Government. 38 U.S.C. § 4303(4)(A). If a person believes an employer has refused or failed to comply with USERRA and that their rights have been violated, they have a right to submit a complaint to the MSPB against federal employers, *see* 38 U.S.C. § 4324(b), or an action in U.S. district court against non-federal employers. *See* U.S.C. § 4323. To the extent that any other definition is applicable, it would be found in 5 U.S.C. § 2105(a). Petitioner was appointed by individuals who were employed under 5 U.S.C. § 2105(a)(1)(D) and is, therefore, an employee under Title 5 of the U.S. Code.

presented by this petition. The Federal Circuit had jurisdiction over the judicial review of the MSPB's Order pursuant to 38 U.S.C. § 4324(d)(1), 5 U.S.C. § 7703(b)(1)(A), and 28 U.S.C. § 1295(a)(9). The Federal Circuit affirmed the decision of the MSPB per curiam without an opinion. *See* 1a-2a. The Federal Circuit then denied Petitioner's timely petition for panel rehearing or rehearing en banc. *See* App. 34a-35a.

REASONS FOR GRANTING THE WRIT

At the current time, federal employees on uniformed services leave face inexplicably differing standards of proof depending on whether they are considered a "probationary" employee. The decisions in this case by the MSPB and the Federal Circuit expose federal employees to other non-statutory exceptions to the USERRA's express protections. As the Federal Circuit has exclusive jurisdiction over judicial review of MSPB cases under USERRA. *see* 38 U.S.C. § 4324(d)(1), this Court should resolve the issue.

I. The AJ committed reversible error by failing to require cause for Petitioner's termination while she was on military leave.

The reemployment provisions of USERRA and OPM's regulations require the Agency to show "cause" for terminating an employee during uniformed service. *See* 5 C.F.R. § 353.209. Cause is to be liberally construed in favor of those in the service of their country. *See Johnson v. Michigan Claim Service, Inc.,* 471 F. Supp. 2d 967, 972 (D. Minn. 2007) (and cases cited therein).

Here, the Agency decided to terminate an employee on military leave without considering or providing her with cause. That decision was upheld by the MSPB and per curiam affirmed by the Federal Circuit without an opinion. *See* App. 6a n.2; App. 1a-2a. Those actions have created substantial uncertainty for all such employees in an area where courts had uniformly required cause, absent proof of a statutory exception or defense.

The decisions of the MSPB and Court of Appeals below conflict with the following decisions of the other circuits: *Rademacher v. HBE Corp.,* 645 F.3d 1005 (8th Cir. 2011) (discussing cause in USERRA reemployment cases); *Petty v. Metropolitan Government of Nashville & Davidson County,* 538 F.3d 431 (6th Cir. 2008) (finding the employer liable for not carrying its burden on affirmative defenses in reemployment cases), *cert. denied*, 556 U.S. 1165 (2009); *Petty v. Metropolitan Government of Nashville & Davidson County,* 687 F.3d 710 (6th Cir. 2012) (same) *Serricchio v. Wachovia Securities, LLC,* 658 F.3d 169 (2nd Cir. 2011) (same); *U.S. v. Alabama Dept. of Mental Health and Mental Retardation,* 673 F.3d 1320 (11th Cir. 2012) (same); *Slusher v. Shelbyville Hos. Corp.,* 805 F.3d 211 (6th Cir. 2015) (finding the employer carried its burden on an affirmative defense); *Whitehead v. Oklahoma Gas & Elec. Co.,* 187 F.3d 1184 (10th Cir. 1999) (same).

The authority requiring cause discussed throughout this petition was presented to the AJ, whose response during the hearing and in his Order, App. 6a n.2, was that Petitioner was asking for "adverse action rights" pursuant to 5 U.S.C. § 7503, such as notice and opportunity to respond, that were

inapplicable. *See* App. 6a n.2. However, Petitioner was asking for application the cause requirements under USERRA's reemployment provisions that did apply.

Analysis of cause was found to be appropriate for an "at will" employee in *Rademacher v. HBE Corporation,* 645 F.3d 1005, 1012-13 (8th Cir. 2011). In *Rademacher*, the court held that the employer had the burden of proving the termination was reasonable and that Rademacher had notice that his conduct would be cause for discharge. 645 F.3d at 1012-13. While the employer was able to carry that burden in *Rademacher,* neither Skala, the Agency, nor the AJ ever considered cause, let alone found the Agency's burden had been met. The only testimony about notice came from Petitioner, who gave unrebutted testimony she was never put on notice her conduct would lead to discharge.

USERRA's statutory reemployment guarantees would be illusory in a right-to-work state, for example, if an employer could claim that they had the right to terminate for any reason, while simultaneously denying the termination was because of military service. *Compare U.S. v. Nevada,* 817 F. Supp. 2d 1230, 1246 (D. Nev. 2011) (requiring cause in a right-to-work state). In order for Congress's desire for consistent treatment of all employees serving in the uniformed services under USERRA, cause must also be required for termination of so-called probationary employees. In fact, the DOL regulations explicitly say that the same rights apply probationary and part-time employees. *See* 20 C.F.R. § 1002.41 ("USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position."). Probationary federal

employees are entitled to at least the same rights. *See* 38 U.S.C. § 4331(b)(1). In sum, an employer must establish that its termination was reasonable and that the employee knew she would be terminated if she engaged in conduct that allegedly justified termination.[2]

Petitioner was on military leave. She was given a probationary termination. The termination was not for cause as defined by 20 C.F.R. § 1002.41, the legislative history, and *Carter,* and it must be overturned. Petitioner should be reinstated pursuant to 38 U.S.C. §§ 4312-4318 with any lost pay and benefits. Probationary employees are entitled to the same protection as other employees when it comes to termination during uniformed services. The AJ's decision should be reversed.

II. The AJ committed reversible error by applying the wrong standard and

[2] As further support it should be noted that burdens of proof before the Board are governed by two federal regulations. 5 C.F.R. § 1201.57 applies to USERRA cases "in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311." 5 C.F.R.§ 1201.57(a)(3). Section 1201.56, on the other hand, applies to USERRA reemployment cases. *See* 5 C.F.R. § 1201.56(a) (applying to cases not covered by Section 1201.57). *See also Clavin v. U.S. Postal Serv.,* 99 M.S.P.R. 619, ¶¶ 5-6 (2005). Under 5 U.S.C. § 7701(c)(1), and subject to the affirmative defenses in 5 C.F.R. § 1201.56(c), the Agency bears the burden of proof and its action must be sustained only if supported by a preponderance of the evidence. S*ee also Clavin,* 99 M.S.P.R. 619, at ¶¶ 5-6. These would also be applicable to cases addressing statutory affirmative defenses such as those litigated in the cases cited like *Rademacher* et al. on page 8, *supra*.

excluding evidence relating to reasonableness of management's action, notice, and unlawful animus

USERRA's cause standard was simply not applied and no facts related to cause were presented at the Agency level or by the Agency before the MSPB. In a footnote, the Order merely finds there was "ample cause to terminate appellant during her probationary period." App. 6a n.2. The Order did not address reasonableness or notice This was harmful error and not in accordance with the law. *See* 5 U.S.C. § 7703(c)(1).

The AJ excluded evidence relating to DGH's conduct with employees and her role in creating backlogs, inefficiencies and conflict within the BOS. This evidence goes to the reasonableness of managements' actions and bias and is clearly relevant.

The AJ also excluded compelling evidence of unlawful animus as set forth in the Petitioner's pre-hearing submission. Management's actions must be reasonable and that has to start with being legitimate. During the hearing, the AJ indicated he wanted to determine if the events were true or not true. Setting aside that was not the applicable standard, one must look at the surrounding circumstances to understand the truth and their impact on the reasonableness of actions taken, as well as upon credibility and bias. The broad exclusion of evidence prevented consideration of unlawful animus and was additional harmful error. *See Whitmore v. Dept. of Labor,* 680 F.3d 1353, 1368-69 (Fed. Cir. 2012);

Sharpe v. Dept. of Justice, 916 F.3d 1376, 1379-80 (Fed. Cir. 2019).[3]

The excluded evidence would have shown that managers, Associate Director Kris Brown and DGH, had other illegitimate reasons for terminating Hollingsworth. Brown was in the upper echelon of the Bay Pines VAHCS, which has had an extensive history of retaliation cases against employees. *See, e.g.*, *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012). Since *Gowski*, there have been roughly 20 cases against the facility that were either successful at an administrative hearing or settled, including during trial, for significant amounts. Several of those cases settled for six-figure amounts, with one settlement of seven figures.

Nevertheless, no meaningful disciplinary action has been taken against any of the responsible management officials at Bay Pines. DGH was previously the service chief of Health Administration Services. She had created so many problems that an Administrative Investigation Board issued a scathing report recommending administrative action. According to the former Chief of Employee and Labor Relations, under consideration were DGH's termination or a significant suspension without pay and a demotion. However, DGH had defended the facility against claims by employees who disclosed they were ordered to avoid the electronic waiting list on over 1,500 veterans who were listed as being in a

[3] This issue is presented here on its merits and to caution against reliance upon the Order's unfair description of the Petitioner, who has a lifetime of stellar educational, military, and employment assessments.

clinic. These allegations came up at the time of the incidents, including deaths, at the VA facilities in Phoenix, Arizona in 2013 and 2014. Congressional and other investigations were going on around the country. The Tampa Bay Times ran a front-page story about evidence which had been presented during the *Gowski* trial that management officials, including Brown, had created a virtual calendar system which hid their waiting list. DGH had filed an EEO against the facility which alleged retaliation and animosity to black managers. Two weeks after the Times article, DGH's EEO case was settled, and DGH was paid considerable money, given an excellent performance rating, and was made chief of the business service at the same GS-level.

Within the business service was an outstanding employee, Rosa Sly, who recently been the employee of the year. Sly was a black manager who had gotten her position through EEO action and provided affidavits against Brown in a case where Brown had denied another black employee a promotion to a position for which the employee was extremely well-qualified. Sly's affidavits were filed shortly before and after DGH was placed in the business office. Subsequently, DGH harassed the managers above Sly and targeted Sly using pretextual bases Brown and other managers had used in other cases. One, backlogs, was even noted in *Gowski*. In Sly's case, positions under her were not filled, equipment was not repaired or replaced, longtime processes were unilaterally changed by DGH, and the resulting backlogs were used to target Sly. Petitioner was also a black manager who had been hired by someone under DGH. When DGH found out, she was upset with the hire. DGH became more upset with

Petitioner when Petitioner supported Sly against DGH's actions. These are facts from an ongoing case in the Middle District of Florida: *Sly v. Wilkie, Sec'y, Dep't of Veterans Affairs*, No. 8:17-cv-01868-AAS. More facts are alleged in the pleadings in that case.

Obviously, this evidence is relevant not only to DGH's credibility, but also to the reasonableness of the actions taken against Petitioner. Instead of considering any of this evidence, the MSPB AJ declared it all inadmissible. He focused only on the issue of probationary termination.

Petitioner's termination is deeply troubling. She had an outstanding career in the military and now has a termination on her civilian record. She is highly educated and very professional according to individuals who worked directly under her and all of the witnesses in this case other than DGH. DGH even falsely accused Petitioner, behind her back and at the hearing, of using black street language. While that might have appealed to Brown, it was untrue and demeaning to someone with Petitioner's history, professionalism, and education. Petitioner has not been able to obtain employment in the civilian world. However, her performance in the military was so strong that she was reinstated to her old positions within the military. Military personnel serving with Petitioner have also followed her case. Many are upset about the effect the ruling in her case will have on others serving in the uniformed services. This case involves one probationary employee, but it has significant implications for all military personnel.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Federal Circuit Court of Appeals.

Respectfully submitted,

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