No. 19-586

In the Supreme Court of the United States

DEVONA HOLLINGSWORTH, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Merit Systems Protection Board's determination that the Department of Veterans Affairs had cause under 5 C.F.R. 353.209(a) to terminate petitioner's employment while she was a probationary employee on military leave.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 767 Fed. Appx. 1006. The decision of the Merit Systems Protection Board (Pet. App. 3a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2019. A petition for rehearing was denied on August 5, 2019 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on November 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, "to encourage noncareer service in the uniformed services by eliminating or minimizing

the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). To that end, USERRA grants certain rights to persons while they are "absent from a position of employment by reason of service in the uniformed services." 38 U.S.C. 4316(b). USERRA provides, for example, that such persons shall be entitled to such "rights and benefits not determined by seniority as are generally provided by the employer" to similar employees on leave. 38 U.S.C. 4316(b)(1)(B).

USERRA also grants certain rights to persons following their military service. It generally provides that such persons shall be "promptly reemployed" by their employers. 38 U.S.C. 4313(a); see 38 U.S.C. 4314-4315. And it protects such persons from discharge, "except for cause," for a certain period following their reemployment after military service. 38 U.S.C. 4316(c).

Congress authorized the Secretary of Labor to prescribe regulations implementing USERRA's application "to States, local governments, and private employers." 38 U.S.C. 4331(a). Congress authorized the Office of Personnel Management (OPM), by contrast, to prescribe regulations implementing USERRA's application to the federal government. 38 U.S.C. 4331(b)(1). Exercising that authority, OPM has promulgated a regulation providing that "[a]n employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause." 5 C.F.R. 353.209(a).

2. In October 2016, the Department of Veterans Affairs (Department) appointed petitioner to the position of Assistant Chief of Health Information Management Services at the Department's medical center in Bay Pines, Florida. Pet. App. 4a-5a. At the time, petitioner

was a master sergeant in the United States Air Force Reserves. *Ibid.*

Petitioner's appointment with the Department was subject to a one-year initial service period, often referred to as a trial or probationary period. Pet. App. 5a. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, expressly exempts probationary employees from its heightened procedural protections. See, *e.g.*, 5 U.S.C. 7511(a)(1)(B); *United States* v. *Fausto,* 484 U.S. 439, 450 (1988); Pet. App. 4a n.1. Thus, during petitioner's probationary period, the Department could terminate her employment without providing pre-termination notice and an opportunity to respond.

Within six weeks of petitioner's employment with the Department, her supervisor began observing performance issues. C.A. App. 2626. In November 2016, her supervisor issued a memorandum to petitioner, expressing concerns about her communications with staff and her ability to follow directions. *Id.* at 2626-2627; see Pet. App. 5a. The memorandum was prompted by reports that petitioner was using physical descriptions, rather than names, to refer to employees, C.A. App. 247-248, and that she had disregarded an instruction to delegate authority to another staffer, Pet. App. 26a-27a.

Around that same time, petitioner improperly released a veteran's medical records to a congressional office. Pet. App. 25a. She also emailed an employee's medical information to a union representative, in violation of hospital privacy protocols. *Id.* at 15a. When her supervisor directed petitioner to recall the email, petitioner refused to do so. *Ibid.*

In the months that followed, petitioner continued to have problems communicating with others and follow-

ing directions. She made a number of abrasive comments toward her supervisor during a conference call among Department staff. Pet. App. 21a-25a. She disregarded her supervisor's instructions on who should interview candidates to fill a vacancy. *Id.* at 20a-21a. She engaged in an aggressive email exchange with an administrative assistant over the approval of a request for 30 minutes of compensatory time. *Id.* at 17a-19a. And she failed to take 10 of the 12 training courses to which she was assigned. *Id.* at 19a-20a.

In March 2017, petitioner went on military leave. Pet. 8. In July 2017, while she was still on leave, the Department notified petitioner in writing that she was being terminated "due to conduct and unacceptable performance." C.A. App. 2575. The termination letter explained that during an employee's probationary period, "supervisors are required to study an employee's potential closely to determine whether s/he is suited for successful government work," and "[w]hen it becomes apparent that an employee's conduct, general character traits or capacity do not meet the requirements for satisfactory service, the supervisor is required to initiate action to separate the employee." *Ibid.* The letter further explained that petitioner's supervisor had "recommended that [petitioner] be terminated from [her] position for failure to qualify during [her] probationary period." *Ibid.* The termination file included emails and reports substantiating the various instances of "unacceptable performance" described above. *Ibid.*; see *id.* at 2572-2664.

3. Petitioner submitted a complaint to the Merit Systems Protection Board (Board), alleging that the Department violated USERRA when it terminated her. Pet. App. 4a; see 38 U.S.C. 4324(b).

After conducting an evidentiary hearing, Pet. App. 4a, an administrative judge denied petitioner's request for corrective action, *id.* at 3a-33a. As relevant here, the judge rejected petitioner's contention that the Department "violated 5 C.F.R. § 353.209 because it did not demonstrate it separated her 'for cause.'" *Id.* at 6a n.2 (citation omitted). The judge explained that petitioner's "termination letter clearly identifies that the [Department] separated her for 'conduct and unacceptable performance.'" *Ibid.* (citation omitted). And the judge found that the Department "had ample cause to terminate [petitioner] during her probationary period." *Ibid.*

In particular, the administrative judge found that petitioner had failed to delegate authority as instructed by her supervisor, Pet. App. 26a-27a; that she had "violated the [Department's] privacy policy by releasing [medical] information to the union," *id.* at 16a; that she had "failed to follow her supervisor's instruction" to "recall the email" containing the information, *id.* at 15a; that she had improperly released medical information to a congressional office, *id.* at 26a; that she had made "disrespectful" statements during a conference call with staff, *id.* at 24a; that her handling of the interviews for the vacant position had reflected "poor judgment," *id.* at 21a; that her "email exchange" with an administrative assistant regarding the approval of her compensatory time had constituted "conduct unbecoming a supervisor" and that petitioner had "employed exceedingly poor judgment in escalating the issue," *id.* at 18a-19a; and that petitioner's failure to complete her assigned training had "evidence[d] irresponsibility and apathy," *id.* at 20a.

The administrative judge also held that 5 C.F.R. 353.209(a) did not grant petitioner "procedural rights

similar to" those that the CSRA provides to tenured employees, such as pre-termination written "notice and an opportunity to reply." Pet. App. 6a n.2 (citing 5 U.S.C. 7503). Indeed, the judge was unware of any authority that did grant petitioner such rights. *Ibid.* The decision of the administrative judge became the final decision of the Board.

4. The court of appeals affirmed without opinion. Pet. App. 1a-2a. It then denied rehearing en banc. *Id.* at 34a-35a.

ARGUMENT

Petitioner contends (Pet. 12-15) that the court of appeals erred in upholding the Board's determination that the Department had cause to terminate petitioner's employment while she was a probationary employee on military leave. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly upheld the Board's determination that the Department had cause under 5 C.F.R. 353.209(a) to terminate petitioner's employment while she was a probationary employee on military leave. Pet. App. 1a-2a, 6a n.2.

a. Section 353.209(a) provides that "[a]n employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause." 5 C.F.R. 353.209(a). Substantial evidence supports the Board's determination that the Department had "cause" to terminate petitioner's employment while she was on military leave. Pet. App. 6a n.2; see 5 U.S.C. 7703(c)(3) (providing that the Board's factual findings may be set aside only if found to be "unsupported by substantial evidence"). Over a

short period of time as a probationary employee, petitioner had already committed two separate violations of the medical center's privacy protocols, Pet. App. 15a-17a, 25a-26a; exhibited poor judgment in communicating with other employees on a call, over email, and in person, *id.* at 5a, 17a-19a, 21a-25a; C.A. App. 247-248, 2626-2627; and disregarded her supervisor's instructions on multiple occasions, Pet. App. 15a, 19a-21a, 26a-27a. The Department was justified in deeming petitioner's performance "unacceptable" and determining that it warranted her separation from the job. C.A. App. 2575. Moreover, as the Board explained, Section 353.209(a) did not require that the Department provide petitioner pre-termination written notice and an opportunity to respond. Pet. App. 6a n.2. The Department's termination of petitioner's employment was therefore consistent with Section 353.209(a).

b. Petitioner's challenges to the Board's decision lack merit. She contends (Pet. 5-6) that the Board found USERRA inapplicable to probationary employees. That contention is incorrect. The Board applied Section 353.209(a), an OPM regulation implementing USERRA, to petitioner's termination. Pet. App. 6a n.2. And after reviewing the evidence of petitioner's job performance as well as the Department's termination letter, the Board determined that the Department had terminated petitioner "for cause," as required by the regulation. *Ibid.* (citation omitted). That factbound determination does not warrant this Court's review.

Petitioner contends (Pet. 7-8, 15) that the applicable standard for "cause" is found in a House committee report citing a D.C. Circuit decision, see H.R. Rep. No. 65, 103d Cong., 1st Sess. Pt. 1, at 35 (1993) (House Report) (citing *Carter* v. *United States*, 407 F.2d 1238, 1244

(D.C. Cir. 1968)), as well as a regulation promulgated by the Secretary of Labor applying USERRA's provisions to States, local governments, and private employers, see 20 C.F.R. 1002.248(a). That regulation, which tracks the language of the House Report, provides: "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." *Ibid.*; see House Report 35.

Petitioner's reliance (Pet. 7) on the definition of "cause" found in the Secretary or Labor's regulation is misplaced. That regulation implements USERRA only "as it applies to States, local governments, and private employers." 20 C.F.R. 1002.1; see 38 U.S.C. 4331(a) (authorizing the Secretary of Labor to prescribe regulations only "with regard to the application of [USERRA] to States, local governments, and private employers"). This case, however, involves the federal government. Moreover, the regulation concerns a different right under USERRA—not the right to protection against discharge *while on military leave*, but the right to protection against discharge for a certain period *following reemployment after military service*. See 20 C.F.R. 1002.247-1002.248 (addressing the latter right); see also 38 U.S.C. 4316(c) (same). Indeed, a separate regulation promulgated by the Secretary of Labor addresses "the employee's status with his or her civilian employer while performing service in the uniformed services." 20 C.F.R. 1002.149 (emphasis omitted).

Petitioner's reliance (Pet. 7-8, 15) on the definition of "cause" found in the House Report is likewise misplaced. That definition does not appear in the text of the statute

Congress enacted. And like the Secretary of Labor's regulation discussed above, both the passage in the House Report and the D.C. Circuit decision cited therein pertain to "the period of special protection against discharge" following reemployment after military service. House Report 35; see *Carter*, 407 F.2d at 1243-1244. Thus, neither the House Report nor the D.C. Circuit decision speaks to the right at issue here: the right to protection against discharge while on military leave.

In any event, the Department had "ample cause" to discharge petitioner, even under her preferred definition. Pet. App. 6a n.2. As explained above, the evidence in this case showed that petitioner had engaged in misconduct throughout her probationary period, *id.* at 15a-27a—making the decision to discharge her more than "reasonable," 20 C.F.R. 1002.248(a). The evidence also showed that, just six weeks into the job, petitioner received a memorandum from her supervisor, expressing concerns about her communications with staff and her ability to follow directions. Pet. App. 5a. That memorandum gave petitioner "notice," at least "fairly implied," that if she continued such conduct, as she did in the months that followed, "the conduct would constitute cause for discharge." 20 C.F.R. 1002.248(a). Petitioner's termination therefore satisfied her preferred definition of "cause," and petitioner makes no effort to explain why it did not.

2. Petitioner errs in contending (Pet. 13) that the court of appeals' decision in this case conflicts with the decisions of other courts of appeals. Only one of the decisions petitioner cites (*ibid.*)—*Rademacher* v. *HBE Corp.*, 645 F.3d 1005 (8th Cir. 2011)—involved the definition of "cause." *Id.* at 1012-1014; see *Serricchio* v. *Wachovia Secs. LLC*, 658 F.3d 169, 173 (2d Cir. 2011)

(claim that the employer failed to reemploy the employee promptly following military service); *Slusher* v. *Shelbyville Hosp. Corp.*, 805 F.3d 211, 215-217 (6th Cir. 2015) (claim that the employer denied the employee his right to reemployment following military service), cert. denied, 136 S. Ct. 1687 (2016); *Petty* v. *Metropolitan Gov't*, 687 F.3d 710, 713 (6th Cir. 2012) (claim that the employer failed to restore the employee to his former position following military service); *Petty* v. *Metropolitan Gov't*, 538 F.3d 431, 440-444 (6th Cir. 2008) (same), cert. denied, 556 U.S. 1165 (2009); *Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1192 (10th Cir. 1999) (finding the employee's statutory rights waived); *United States* v. *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1323 (11th Cir. 2012) (claim that the employer failed to immediately rehire the employee following military service). And because the employer in *Rademacher* was a private employer, see 645 F.3d at 1007, the Eighth Circuit applied the definition of "cause" set forth in the Secretary of Labor's regulation discussed above, *id.* at 1013 (citing 20 C.F.R. 1002.248(a)). As explained, that regulation does not apply here. See p. 8, *supra*. In any event, the Eighth Circuit concluded that the employer had the requisite "cause" to discharge the employee in *Rademacher*, and there is no indication that it would have reached a different outcome on the particular facts here. 645 F.3d at 1013-1014.

3. Finally, petitioner contends (Pet. 16-19) that the administrative judge erred in excluding evidence of her supervisor's own performance record, including her management of other employees. Such evidentiary issues, however, are beyond the scope of the questions presented in the petition for a writ of certiorari. Pet. i; see

Sup. Ct. R. 14(1)(a). In any event, petitioner's fact-bound challenges to the administrative judge's evidentiary rulings do not warrant this Court's review. The administrative judge did not abuse his discretion in determining that the evidentiary hearing should focus on the Department's reasons for terminating petitioner, rather than her supervisor's interactions with other employees or other alleged problems at the medical center. See, *e.g.*, C.A. App. 177 (finding evidence of other employees being treated "disrespectfully" by petitioner's supervisor "not relevant"); *id.* at 546-547 (finding evidence of "a back-log in scanning of medical records" at the medical center not relevant).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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