No. 19-586

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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The Petition addresses an important national issue at an important time. Many of the medical personnel at every level who are part of our unified effort to address current national needs are members of the uniformed services with rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq*. The Government's Response, like the underlying opinions, does not address the central provisions of USERRA, the applicable regulations, or applicable case law. The Government's positions fundamentally conflict with the Act and its regulations. This reply will run those positions against that controlling law.

The Government's statement (at 1) provides helpful, relevant information until paragraphs 2, 3 and 4. Except for the first paragraph of these paragraphs it then argues irrelevant and disputed issues of fact developed in a hearing conducted under the wrong standard which excluded relevant evidence, (compare Pet. 16-20).[1] The danger or design of this is that is obscures the critical legal issues which control this Petition. The relevant facts are that the Petitioner was terminated by a Federal Agency while on military service without consideration of whether there was cause for that termination. The first paragraph of paragraph 3 alleges that the Petitioner

[1] Petitioner's Title VII challenge to her termination has since survived a motion for summary judgment under a "but-for" standard. Prior to that, while her ability to obtain civilian employment was greatly impaired, her military command placed and has kept her in an activated status in various leadership roles.

filed a complaint with the Merit Systems Protection Board (MSPB) alleging a violation of her USERRA rights. Petitioner's complaint showed she had timely filed a claim with the Secretary that is a timely request for employment or reemployment. 5 C.F.R. § 353.211.

While we are confident that any Agency action that followed applicable law would have found termination unreasonable and considered the disputed evidence which was not considered and reached a different result, this Petition does not depend upon that confidence or those disputes, but rather on law.

ARGUMENT[2]

I. USERRA protections are and must be: (1) applicable to all employees serving in the uniformed services, and (2) co-extensive with the cause standard for discharge after reemployment, otherwise statutory reemployment rights become illusory.

Outside of statutory exceptions and affirmative defenses inapplicable to this case, an employee on leave in the uniformed services is entitled to reemployment rights and cannot be separated absent "cause". 38 U.S.C. §§ 4312, 4316. The employer has the burden of proof on cause and the exceptions and defenses. *Id.*; see also cases cited in Pet. 13-15. For federal employees who are on such leave, the Office of

[2] The Government's characterizations of Petitioner's arguments are often wrong. Rather than addressing each of those, Petitioner will focus on the material issues.

Personnel Management (OPM) expressly requires cause in 5 C.F.R. § 353.209. For non-federal employees, the Department of Labor (DOL) regulations provide that an employee's status while on leave in the uniformed services is "deemed to be on furlough or leave of absence" and it cannot be changed even if the employer characterizes him or her as "terminated." 20 C.F.R. § 1002.149; *see also* 38 U.S.C. § 4316(b)(1)(A). Thus, both regulatory schemes serve to protect federal and non-federal employees while on leave in the uniformed services to preserve their statutory reemployment rights that require "cause" before discharge or separation. *Id.*; 5 C.F.R. § 353.209; 20 C.F.R. § 1002.248 (defining "cause").

Given significance of cause to reemployment rights, USERRA makes no distinction between federal and non-federal employees as to who is entitled to cause. Under 38 U.S.C. § 4316(c) "cause" is required for all employees. USERRA also does not differentiate between employees and probationary employees; it covers them all. 38 U.S.C. § 4303(3), ("any person employed by an employer"); 20 C.F.R. § 1002.41. Significantly, the only potential statutory differentiation between employees as to their rights is the recognition that the standard protecting federal employees' rights must be "greater or additional" than the one for non-federal employees. 38 U.S.C. § 4331(b)(1).

The Government in its Response (at 8-9), however, urges that a federal employee is not entitled to the same "cause" standard at both the leave and reemployment stages as non-federal employees. If so, there exists a serious deficiency

in the regulatory scheme which would impermissibly lessen protections for federal employees. Under Section 4331(b)(1) "cause" for federal employees at both stages cannot be less than it is for non-federal employees. 38 U.S.C. § 4331(b)(1) requires consultation between the Secretary of DOL, Defense and the Director of OPM.[3] The federal government must lead, not follow, when providing protections to employees in the uniformed services. Therefore, the cause standard applicable to termination while serving in the uniformed services must be *at least* as strong as the protections provided by the DOL to non-federal employees The DOL prohibits any change in an employee's employment status while serving in the uniform services until reemployment. 20 C.F.R. § 1002.149. Once reemployment begins, absent exceptions and defenses, a non-federal employee can only be discharged for cause, whenever it occurred, within statutory periods. 38 U.S.C. § 4316. DOL defines cause as:

> 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.

20 C.F.R. § 1002.248.

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[3] "Secretary" in this section means the Secretary of Labor. 38 U.S.C. § 4303(11).

Consistent with that approach, OPM allows cause to be used at both stages. 5 C.F.R. § 353.209. This at least precludes an agency from claiming that other regulations or rules diminish reemployment protections while on military leave.[4]

In papering over the hole the petitioned decisions created in USERRA, the Government ignores the required statutory and regulatory consistency. Rather, it argues (at 8) that these are different regulatory schemes without the same protections where federal employees have less protection of their rights. The Government seems to accept that cause is defined for non-federal employees once they are eligible for reemployment rights. However, it obscures their full protection under 20 C.F.R. § 1002.149 while on leave before reemployment. Concerning federal employees, the

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[4] Viewed in the context of other regulations, federal employees may also receive, greater protections than non-federal employees under 5 C.F.R. § 353.209(a) because they can learn of Agency action sooner and invoke their reemployment rights by filing a claim for reemployment rights. This helps a federal employee take steps to preserve both their position and reemployment rights. If they are on military leave, they also have the ability to stay proceedings. *See e.g.*, 50 U.S.C. § 3936; *Brown v. U.S. Postal Serv.*, 106 M.S.P.R. 12, 18-19 (May 22, 2007) (a postal worker who was a military reservist, was entitled to rely on the predecessor statute, 50 U.S.C. § 526a to obtain a stay to file his appeal of MSPB decision). Thus, while neither federal nor non-federal employees can lose their reemployment rights while on leave in the uniformed services absent cause, Section 353.209(a) may allow a federal employee to raise her cause issue sooner.

Government (at 8-9) is certain that the DOL definition of cause cannot be applicable to federal employees at any stage without plainly saying why. Presumably, it is because OPM has not defined cause. However, the Government never addresses Section 4331(b)(1) or articulates its own cause standard. The Government even downplays the fact that the DOL's standard exactly matches language from case law defining cause quoted in the legislative history of USERRA.[5]

Read fairly and in context, the Government argues that for federal employers "cause" can become whatever an agency or the MSPB wants it to be. As this case shows, the Government's theory is that cause is whatever the Agency *could* have articulated as a basis to support a cause termination even though the Agency admittedly *never applied* such a standard, all while successfully objecting to evidence relevant to the USERRA cause standard. The Government's position conflicts with USERRA's regulatory consistency requirements, while sanctioning uncertainty and disparate treatment for federal and non-federal employees serving in the uniform services. All employers who take advantage of the Government's approach would be able to

[5] While the resort to legislative history has advocates and critics, here the legislative history is (1) in the same House Report attached to the Bill that was passed; and (2) is not simply comments by Congressmen, but is a quotation of legal authority defining "cause". It is hardly surprising that this same definition was later used by DOL, or that standard would be the minimum for federal employees.

terminate an employee without identifying "cause" at any point during employment, reasonably giving notice of dischargeable conduct, or even being required to address that at a subsequent hearing or trial. If the MSPB or a court upholds the termination without actually applying "cause," the Government will ask that decision be given deference. Again, the Government's position stubbornly refuses to even define cause while it passes USERRA protections to AJs willing to ignore cause or to make their own cause standard, as discussed below.

Still further, please note that with regard to reemployment rights USERRA places burdens of proof on the employer to show cause, an exception or affirmative defense. *See e.g.*, *Rademacher v. HBE Corp*., 645 F.3d 1005, 1012-13 (8th Cir. 2011). Not surprisingly, the Government fails to argue that the employer met its burden of proof or that the AJ even required it to meet its cause burden, because neither happened. Every single case citied on page 13-15 of the Petition and on pages 9-10 of the Response placed the burden of proof on the employer. None of those cases are consistent with any part of actions taken in this case, or the efforts to justify them.

II. The cause standard was not used by the Agency or the MSPB, and no deference can be given to the AJ's decision.

There is no dispute that the Agency failed to apply a cause standard to Petitioner's termination. Tracy Skala was delegated the authority by the Director to

make the decision on "probationary terminations." Skala repeatedly testified 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 Petitioner's military leave 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 the numerous secretly developed "reasons" from December to July 2017. She was never given notice that any of her conduct could lead to termination or given an opportunity to discuss it at any time prior to or after, her termination. Like Skala, DGH repeatedly testified Petitioner's termination was a probationary termination. DGH even provided an affidavit during the hearing reaffirming that fact.

At no point in the MSPB proceedings did any Agency official testify that Petitioner was terminated for cause. During the Agency's direct examination of Skala, she was only asked about probationary termination. No questions were even 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 bearing upon the reasonableness of the Agency's actions on the basis that was irrelevant because this was a probationary termination. At every stage, the Agency failed to identify the applicable standard for a cause termination and to submit evidence that satisfied that

standard. The AJ never required the Agency to meet any burden of proof as to cause.

The Government seeks refuge in the AJ's bare, conclusory statement that there was ample cause for termination during the probationary period. Pet. App. 6a,n.2. This "standard" not only *improperly* makes an employee's probationary status significant, it, like its resulting evidentiary rulings, rejects the critical components of the minimum definition of cause contained in 20 C.F.R. § 1002.248. To further underscore its rejection of the applicable cause standard, the footnote goes on to criticize Petitioner to the extent she is seeking procedural rights, including notice and an opportunity to reply similar to 5 U.S.C. § 7503. Pet. App. 6a,n.2. Of course, Chapter 75 does not apply to a probationary employee. However, probationary employees are employees under 5 U.S.C. § 2101, and this employee was seeking her USERRA rights.

The USERRA cause standard, including notice, was simply not applied and no facts directed to that standard were presented at the Agency level or by the Agency before the MSPB. Indeed, facts relating to cause and the reasonableness of the Agency's actions were successfully objected to by the Agency and excluded. Therefore, the Government's argument for deference to the MSPB decision allegedly finding sufficient ample cause for termination during the probationary period, is contrary to the Supreme Court's decision in *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, ___ U.S. ____, 138 S. Ct. 960,

967, (2018). Mixed questions are not all alike. The standard of review for a mixed question depends on whether answering it entails primarily legal or factual work. *Id.* Where applying the law to the historical facts "involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*." *Id.* (citations omitted). But where the mixed question requires immersion in case-specific factual issues that are so narrow as to "utterly resist generalization," the mixed question review is to be deferential. *Id.* (citations omitted).

The Agency and the AJ never applied the USERRA cause analysis to the facts of this case and facts supportive of the USERRA cause standard were never presented before the Agency or the AJ. "Cause for termination during the probationary period" is, *if anything*, an entirely new standard that violates USERRA and no deference should be given. It widens the hole created in the USERRA cause protections, because all employers could create similar categories of employees for which lesser, undefined protections could be argued to apply.

III. The MSPB cannot determine cause for the Agency.

While the Agency never alleged nor sought to prove it met the cause standard of 5 C.F.R. § 353.209(a), and the MSPB never required it meet that burden of proof, the Government (at 7) compounds the legal problems this case has created by claiming the MSPB effectively may have done so, or at least had facts by which it

could have done so. As shown, this never happened. Moreover, this argument is precluded by USERRA, OPM regulations, and this court's decision in *SEC v. Chenery*, 332 U.S. 194, 196 (1947). *Chenery* expressed a "simple but fundamental rule of administrative law":

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id.

In *Horne v. Merit Sys. Protection Bd.*, 684 F.2d 155 (D.C. Cir. 1982), the D.C. Circuit followed *Chenery*, vacated the decision of the MSPB and remanded the case back to the employer-agency, finding that the MSPB should not have affirmed the agency action based on how the agency might have acted had it followed proper procedures. Similarly, in *White v. Dep't of the Army*, 720 F.2d 209, 214 (D.C. Cir. 1983), the D.C. Circuit concluded that, where a statute mandated the application of "a preponderance of the evidence" standard, rather than a "substantial evidence" standard, it was reversible error for the Board to apply the substantial evidence test in reaching the decision. *White* precluded the application of the harmless error doctrine in a

case such as this where the AJ applied the improper standard.

Whatever "cause during the probationary period" means, it is not a uniform notion of cause, as required by USERRA and OPM, and a cause finding was not made, and facts were not developed by the Agency that met the cause standard. Moreover, the case should not be remanded to the MSPB for a new determination about the termination because the Agency, the employer, had the duty to make the cause determination. *See* 5 USC § 7703; *see also Horne*, 684 F.2d at 157-59; *Do v. Dep't of Hous. & Urban Dev.*, 913 F.3d 1089, 1094 (Fed. Cir. 2019) ("[T]he Board is limited to reviewing the grounds invoked by the agency and may not "substitute what it considers to be a better basis for removal than what was identified by the agency.") (quoting *O'Keefe v. U.S. Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002)).

CONCLUSION

Petitioner is just one person, but she represents many. We say we value their service especially at a moment like this when they are once again called upon by our country. Those called upon are entitled to the certainty of USERRA's protections, and they and their families need them. Congress has recognized this in 38 U.S.C. § 4301. This case is a very important case that needs this Court's review and judgment.

Respectfully submitted,

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