19-7956

No. _____

ORIGINAL
Supreme Court, U.S.
FILED
MAR 09 2020
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MOLLY TSAI,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF U.S. DEPARTMENT OF VETERANS AFFAIRS

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit
for the District of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

MOLLY TSAI, *Pro Se*
155 Amory St.
Cambridge, MA 02139
mollytsai@hotmail.com

March 5, 2020

QUESTIONS PRESENTED FOR REVIEW

1. Did the First Circuit Judge erred and abuse her discretion in excluding evidence concerning a minority employee terminated during her probationary period?

2. Does the record reflect an absolute dearth of evidentiary support for the jury's verdict?

TABLE O F CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

Petitioner Statement

If the Courts do not set a precedent how, are these employee to receive justice if wrongly discriminated, The laws have been outlined, and the respondents do not have grounds for dismissal. The respondents ended Petitioner's employment based on race, and not job Performance.

I. JURISDICTIONAL STATEMENT

The First Circuit Court of Appeals and Distict Court erred when dismissing the case Molly Tsai vs Robert Wilkie, Secretary U.S Department of Veterans Affairs. Review is warranted because the outcome of the case that result in the unlawful conduct.

This matter raises questions arising under the statutes of the United States and therefore the United States District Court for the District of Massachusetts has Federal question subject matter jurisdiction over this action pursuant to 28U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). In particular, and of relevance to the present appeal, the First Amended Complaint asserts claims of unlawful discrimination arising under 42 U.S.C.§ 2000e-2(a)(l).

Personal jurisdiction is appropriate in the District Court because the claims asserted in the Amended Complaint arise from an employmeiit relationship centered in Massachusetts. Venue is appropriate in Massachusetts pursuant to 28 U.S.C. § 1391 and 28 U.S.C. § 1402, because the Petitioner resides in Massachusetts and a substantial part of the events giving rise to this action occurred in Massachusetts.

The Court of Appeals has jurisdiction over this appeal as the District Court has entered a final judgment. Petitioner's Appendix B, and pursuant to 28 U.S.C. § 1291, this Court has been conferred "jurisdiction of appeals from all final decisions of the district court of the United States . . ."

This Appeal is timely. The District Court entered its Finäl Judgment on January 23, 2018. [Addendum (Add.) at 1]. The Plaintiff-Appellant filed the Notice of Appeal on March 23,2018.

II. CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, provides inpertinent part:

It shall be an unlawful employment practice for an employer--

> **(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to her compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.**

III. STATEMENT OF THE CASE

A. Procedural Posture:

The Departmerit of Veterans Affairs ("the Respondent or the VA) terminated Molly Tsai ("the Petitioner " or "Tsai") from her former position as a Pharmacy Technician during her requisite 1-year probationary period. Following her termination, Tsai filed an equal employinent opportunity (EEO) complaint with the VA's Office of Resolution Management alleging that her termination was based on her race (Asian) and her national origin

(Taiwanese-born). [Docket (Dkt.) 13, Amended Complaint at 2, 8-9].[1] After the VA finished processing her complaint, Tsai requested a hearing before the Equal Employment Opportunity Commission (EEOC). [*Id.* at 2]. On April 19, 2011, an EEOC administrative judge (AJ) issued an order granting the VA's motion for summary judgment. *Id.* On April 17, 2011, the VA's Office of Employment Discrimination Complaint Adjudication accepted and implemented the EEOC AJ's ruling finding no discrimination. *Id.* In so doing, it provided Tsai with requisite information concerning her appeal rights to the EEOC's Office of Federal Operations (OFO). *Id.* On May 15, 2011, Tsai mailed a timely notice of appeal to the OFO address supplied by the VA. *Id.* After nearly 1 year, Tsai learned that the address for OFO provided by the VA was incorrect and that, as a result, OFO had never received or docketed her appeal. *Id.* On May 10, 2012, after learning

[1] The Appellant respectfully requests that this Honorable Court grant special leave permitting the Appellant's filing of the appendix to be deferred until after the parties' briefs have been filed. In support of this request for special leave, the Appellant states that, due to the voluminous record in this matter, permitting the deferred filing of the appendix will ensure that unnecessary material is not included therein. This brief contains references to the pertinent pages of the record that will be included in the appendix. The Appellant requests the Court's special permission to file a new copy of the brief, with appropriate citations to the appendix, after all briefing has been completed.

that OFO had never received her appeal, Tsai re-sent to OFO the notice of appeal. *Id.*

On April 25, 2013, OFO dismissed Tsai's appeal as untimely. [Dkt. 13, Amended Complaint at 3]. Tsai subsequently sought timely reconsideration of OFO's dismissal, arguing good cause for the untimely filing by asserting that, but for the VA's failure to provide her the correct OFO mailing address, her appeal would have been timely filed. *Id.*

On May 2, 2014, OFO issued a decision on Tsai's request for reconsideration. *Id.* Therein, OFO reopened its previous decision dismissing the appeal as untimely, finding that the dismissal of Tsai's appeal was improper because the VA had provided Tsai the wrong mailing address for OFO. *Id.* Then, OFO considered the merits of the EEOC AJ's dismissal of Tsai's complaint on summary judgment and adopted the AJ's finding. *Id.*

On June 2, 2014, Tsai timely filed with OFO a request for reconsideration of its May 2, 2014 decision. *Id.* On January 23, 2015, OFO denied Tsai's June 2, 2014 Request for Reconsideration and stated that its decision was final and that there was no further right of administrative appeal. The OFO further advised Tsai of her right to file a civil action within 90 days of OFO's decision. *Id.*

On April 22, 2015, Tsai timely initiated a civil action before the U.S. District Court for the District of Massachusetts. The VA subsequently moved for summary judgment of the case. On August 16, 2017, the presiding judge entered an order denying the VA's motion for summary judgment.

After a 5-day trial, a jury in the District of Massachusetts concluded that discrimination, based either on race and/or national origin, was not the "but for" cause or a motivating factor in the VA's decision to terminate the Appellant. [Add. at 1]. Tsai now appeals.

B. Statement of the Facts:

Molly Tsai was born in Taiwan and immigrated to the United States in 1973, at the age of 7. [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 1]. In 1991, Tsai became a United States citizen. *Id.* In 2002, Tsai became a licensed pharmacy technician. *Id.*

In 2009, Tsai applied for a Pharmacy Technician position with the Department of Veterans Affairs. *Id.* She was subsequently selected for the position from a list of eligible candidates and, on June 7, 2009, the VA hired Tsai for the position of GS-5, Pharmacy Technician, at an annual salary of approximately $34,500. *Id.*

As a new employee, Tsai was required to successfully complete a 1-year probationary period, commencing from her date of hire. For the entirety of her employment with the VA, Tsai was assigned to work in the inpatient pharmacy of the VA's Hospital in West Roxbury, MA and her direct supervisor was Shawn Saunders, a Caucasian, American-born male.[2] *Id.* at 2.

Around the time Tsai was hired by the VA, two individuals—Anthony Trodella and Marta Kane—were also hired to work as Pharmacy Technicians in the West Roxbury VA's inpatient pharmacy.[3] [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 2]. Like Tsai, both Trodella and Kane were required to serve 1-year probationary periods. Unlike Tsai, both Kane and Trodella are Caucasian and American-born.[4] *Id.* Moreover, unlike Tsai, neither Kane nor Trodella is licensed as a pharmacy technician. In apparent recognition

---

[2] The West Roxbury VA is part of the VA Boston Healthcare System, which is comprised of three main campus and six outpatient facilities in the Greater Boston area. [Dkt. 42, Affidavit of Molly Tsai in Opposition to Defendant's Motion for Summary Judgment, at 2].

[3] Trodella was hired approximately 3 months before Tsai. Kane was hired approximately 3 months after Tsai was hired. [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 5].

[4] Tsai was the only Asian employee working the first shift at the inpatient pharmacy at the West Roxbury VA. [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 5].

of Tsai's superior knowledge regarding the duties of a pharmacy technician, she was tasked with training both Kane and Trodella in certain aspects of the pharmacy technician job. *Id.*

The West Roxbury VA inpatient pharmacy technicians were tasked with four primary job assignments on any given day: filling patient cassettes with prescription orders; making delivery "runs" of filled orders to various hospital wards and clinics; completing ward stock; and preparing sterile solutions and admixtures for patient IVs. *Id.* at 2.

During Tsai's tenure at the VA, the inpatient pharmacy at the West Roxbury VA was chronically short-staffed. [Dkt. 91, Transcript (Trans.) of Jury Trial, Jan. 18, 2018, Tsai Testimony (Test.) at 67]. Despite this staffing shortage, Saunders, Tsai's direct supervisor, chose to assign his Caucasian employees additional special duties, thus taking away from their concentration on the four essential job assignments of a Pharmacy Technician, set forth above. Specifically, 3 months into Kane's probationary period, Saunders bestowed upon Kane the additional duty of inspectional safety officer, and 6 months into Trodella's probationary period, Saunders made him "lead pharmacy technician." [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 5]. Predictably, this created a "set-up to fail" situation for Tsai, as she became

responsible for not only completing her own assigned duties, but was also required to assume some of the primary tasks of the other pharmacy technicians.

Despite these challenging circumstances, Tsai continued to achieve an acceptable level of performance and earn the respect of her colleagues. For example, a coworker and fellow pharmacy technician, Hillary Dike, described Tsai as "hard-working, efficient, and very competent . . . ." [Dkt. 43, Affidavit of Hillary Dike in Support of in Opposition to Defendant's Motion for Summary Judgment].[5]

Per the VA's own policy, a supervisor has certain obligations relative to a probationary employee. Specifically, a supervisor must: observe the probationary employee's performance very closely, give the employee proper guidance, and offer assistance in the resolution of job-related problems as well as personal problems that impact job performance. [Dkt. 42, Exhibit A, Boston VA Policy]. Further, if the supervisor determines that the employee has failed to meet probationary requirements and termination is recommended, the Service Chief, Service Line Manager,

[5] Dike was assigned to the outpatient pharmacy at the West Roxbury VA during the period of time that Tsai worked in the inpatient pharmacy. Although they did not work side-by-side, Dike "interacted with [Tsai] on a daily basis and was able to observe how [Tsai] did her job." [Dkt. 43, Affidavit of Hillary Dike in Support of in Opposition to Defendant's Motion for Summary Judgment].

or equivalent, will send a recommendation to terminate the employee during probation to the Human Resources Management Service. Any such recommendation must "include specific incidents and [a] record of counselings." *Id.*

On August 11, 2009—only 2 months into Tsai's employment with the VA—Saunders sent an email to the West Roxbury VA Human Resources Director and upper level Management, stating his intention to terminate Tsai:

> Subject: "Termination"
>
> We have a recent hire (Molly Tsai, less than 3 months) that is not going to work out for the service. Please page me . . . with any questions or whatever is needed to begin the process.

[Trial Exhibit No. 7, August 11, 2009 Email from S. Saunders to J. Reis and W. Flanagan].

Saunders' August 11, 2009 email did not contain attachments or otherwise provide a record of any specific incidents or counselings, as required under VA policy when recommending the termination of a probationary employee. [*Id.*; Dkt. 42, Exhibit A, Boston VA Policy]. In response to this email and the apparent blatant lack of documentation supporting the termination request, upper level Management and HR instructed Saunders to begin documenting the performance problems he

for Tsai's termination—had terminated another minority employee 3 months into her employment during the same time period; and

2) the record reflects an absolute dearth of evidentiary support for jury's verdict.

A. Standard of Review:

Evidentiary rulings are reviewed under an abuse of discretion standard. Even if the ruling is error, it is harmless if it is highly probable that the ruling did not affect the outcome of the case. *McDonough* v. *City of Quincy,* 452 F.3d 8, 19-20 (1st Cir. 2006).

Where, as here, the Petitioner has not challenged the sufficiency of the evidence by either moving for judgment as a matter of law before the case was submitted to the jury and renewing that motion after the verdict. Fed. **R.** Civ. **P.** 50(a), (b), or moving for a new trial pursuant to Fed. **R.** Civ. **P.** 59, the lower Court nonetheless retains the discretion to inquire whether the record

alleged against Tsai. [Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 17].

Tsai was not fired as a result of Saunders unsupported August 2009 request to terminate. Instead, beginning in August 2009, Saunders began keeping a log, or a "summary" of Tsai's alleged performance deficiencies. According to Saunders, the goal of this "summary" was "to say what was the issue, what was done, and just to keep track, to make sure that [Tsai] was improving." [Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 21; 17].

However, Saunders' actions in the following months demonstrate that he did not, in fact, provide Tsai with any meaningful counseling regarding her performance or offer her any opportunity for training in the areas in which he believed she required improvement. Instead Saunders engaged in a pattern of malicious persecution of Tsai, designed to purge the workplace of a disposable minority employee he could not be bothered to train.

Saunders ultimately terminated Tsai on March 12, 2010, some 7 months after Saunders had originally sought HR's approval to terminate her. Saunders used utilized the intervening period as an opportunity to build a false narrative in support of a patently unjustified removal action.

reflects an absolute dearth of evidentiary support for the jury's verdict. *Faigin v. Kelly*, 184 F. 3d 67, 76 (1st Cir. 1999).

B. The judge erred in excluding evidence.

The judge committed an abuse of discretion by excluding relevant testimony regarding Saunders' firing of another minority employee during her probationary period. Specifically, Tsai's former counsel sought to introduce Tsai's testimony concerning her first-hand knowledge of Chevron Robinson, an African American woman who formerly worked with Tsai at the West Roxbury VA inpatient pharmacy as a pharmacy technician and who was fired during her probationary employment by Saunders.[6] At the outset of Tsai's testimony concerning Robinson's termination, opposing counsel objected and the following exchange concerning the objection was heard by the judge at the sidebar:

> Q. MR. HARRINGTON (former counsel for the Plaintiff/Appellant) And did she – what was her position?
> A. (Plaintiff/Appellant) She was also a pharmacy technician
> MR. KANWIT (counsel for Defendant-Appellee): Objection, may we be heard?
> THE COURT: Uh-huh (Affirmative). I'll hear you at sidebar.

[6] Tsai testified that Robinson was hired in October 2009 and was terminated in January 2010. [Dkt. 91, Trans. of Jury Trial, Jan. 18, 2018, Tsai Test. at 89-90]. Accordingly, Tsai's employment in the inpatient pharmacy started before and ended after Robinson's. Therefore, Tsai was in an optimal position to testify as to her first-hand understanding of the circumstances of Robinson's employment and termination.

(Discussion at sidebar)

MR. KANWIT: Your Honor, this employee is African American. It's not a comparator. Molly Tsai's claim is that she was discriminated against because she was Asian and born in Taiwan. I think it's inflammatory, and I also think it is particularly sensitive, given that we have an African American on the jury. So there is a 403 objection to it.

MR. HARRINGTON: My basis is because, in her EEO complaint, she asserts the last two people fired were minorities, and the VA response, with the last few probationary employees fired, is that they don't include this person, and I think it goes to the dishonesty of the response to [Tsai] that they did fire -- I can't say they prejudiced against her when they fired her. But she asked for the information, and they turned around and did not disclose that to the EEO even though she was fired a couple of weeks beforehand.

MR. KANWIT: I don't agree with the facts about that.

THE COURT: What is your version of the facts?

MR. KANWIT: We don't know because that name did not come up until the trial. We don't know when she was fired. I certainly don't trust the Plaintiff's recollection of that.

THE COURT: So, we have no official documentation as to when she was fired?

MR. KANWIT: No. Your Honor, nothing.

MR. HARRINGTON: I have nothing. I have nothing.

THE COURT: Okay. I will keep it out. While I have you here, how much longer? I'm trying to be able to tell--

[Dkt. 91, Trans. of Jury Trial, Jan. 18, 2018, at 90-91].

Based on the above record excerpt, it is unclear on what grounds the judge decided to exclude Tsai's testimony. Accordingly, each of the VA's objections is addressed, in turn, below.

First, the VA sought to exclude the testimony based on relevance. Namely, that Robinson's employment in an identical position as Tsai, at the

same inpatient pharmacy, during the same timeframe, under the same supervisor (Saunders) who terminated both women during their respective probationary periods, was irrelevant to Tsai's claim of discrimination because Robinson is African American, not Asian.

This argument is legally insufficient and is contrary to the spirit of anti-discrimination laws. The U.S. Supreme Court has long recognized that the primary purpose of Title VII of the Civil Rights Act of 1964 is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments *to the disadvantage of minority citizens*." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (emphasis added) (quoting *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). If permitted to present this evidence, Tsai could have demonstrated the jury that Saunders—the same individual who sought Tsai's termination within 3 months of her employment at the VA—had a practice of terminating minority employees within the first few months of their probationary period.[7]

[7] Tsai testified that Robinson was terminated approximately 4 months into her 1-year probationary period. [Dkt. 91, Trans. of Jury Trial, Jan. 18, 2018, Tsai Test. at 89-90].

Further, it is the well-settled law of this Circuit that evidence of "context" is generally admissible for the jury's consideration. *See, e.g.*, *United States v. McKeeve*, 131 F.3d 1, 13-14 (1st Cir. 1997). Moreover, a plaintiff is entitled to prove discrimination by circumstantial evidence, alone. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 46 (1st Cir. 2009). The testimony Tsai sought to introduce possessed relevancy as a means of demonstrating a pattern of discrimination in her workplace during the relevant timeframe, the treatment of those who (like Tsai) are members of a racial minority, and the VA's practice of utilizing personnel actions as a pretext for effecting invidious discrimination based upon race. *See Ahmed v. Johnson*, 752 F.3d 490, 497 (1st Cir. 2014), (quoting *Holland v. Gee*, 677 F.3d 1047, 1056 (11th Cir. 2012)), (adopting the standard that a plaintiff may present "a convincing mosaic of circumstantial evidence" to show that discrimination has occurred); *see also Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185-86 (4th Cir. 2001) (racial harassment both directed at the plaintiff, and not specifically directed at the plaintiff but part of the plaintiff's work environment, could be considered); *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997) (permitting the claim of an African American plaintiff to survive summary judgment based on racially offensive incidents

involving the plaintiff directly, as well as incidents of which he was aware involving other minority groups).

The result of the judge's erroneous ruling was to create a one-sided presentation of the evidence; while the VA was freely allowed to present evidence of its purportedly legitimate reason for removal, Tsai was effectively prevented from rebutting the VA's version of events, due to the improper exclusion of evidence demonstrating the VA's discriminatory motives. The judge's exclusion of evidence in this manner constitutes error and was harmful. To exclude evidence concerning the precise question of whether the supervisor responsible for Tsai's termination had also terminated another minority employee after similarly depriving that employee a sufficient opportunity to demonstrate her performance, irretrievably hindered Tsai's opportunity to prove that her removal was the product of discrimination. *See, e.g.*, *Bray v. Marriott Hotels*, 310 F.3d 986, 993 (3d Cir. 1997) (suggesting that Title VII should not be applied in a manner that ignores the sad reality that [discriminatory] animus can all too easily warp an individual's perspective to the point that he or she never considered the member of a protected class the 'best' candidate regardless of that person's credentials").

The VA's additional objection, made under Fed. R. Evid. 403, is that testimony concerning Saunders' termination of an African American employee during that employee's probationary period would be unfairly prejudicial because "an African American" sat on the jury. Honoring this grounds for objection requires accepting the flawed premise that an African American juror cannot hear evidence of discrimination against a member of that juror's own protected class, lest it would unduly prejudice his or her view of the case.

This argument is repugnant from a public policy standpoint as it presumes that minority citizens cannot serve as jurors in discrimination cases because their own minority status and experience makes them unable to render an impartial verdict. The unspoken corresponding premise is that only persons who are members of the majority classes are viable jurors in discrimination cases.

The single sense in which the testimony Tsai sought to introduce was "prejudicial" was that it tended to refute the VA's proffer of a legitimate, nondiscriminatory reason for Tsai's termination. However, "[t]he fact that a piece of evidence hurts a party's chances does not mean it should automatically be excluded. If that were true, there would be precious little left in the way of probative evidence in any case." *Faigin v. Kelly*, 184 F.3d

67, 82 (1st Cir. 1999), (quoting *Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987)). The proper question is whether the VA demonstrated that presenting evidence of discriminatory practices against an African American employee would be *unfairly* prejudicial. *See Faigin*, 184 F.3d at 82. Because the VA failed to even address the question of such "unfair prejudice" in this instance, much less demonstrate it, the testimony at issue should not have been excluded from the jury's consideration pursuant to Fed. R. Evid. 403.

Finally, the portion of testimony at issue concerned Tsai's recollection of what she personally observed with respect to Robinson's termination; accordingly, her testimony did not fall within the realm of hearsay. The absence of documentation in the record concerning the exact date of Robinson's removal is immaterial to Tsai's independent recollection of Robinson's employment and termination.

Moreover, the record reflects that the absence of documentation regarding the date of Robinson's termination was due to the VA's own failure to produce it during the VA's investigation of Tsai's EEO complaint. This circumstance should not have been utilized to prevent Tsai from testifying as to events she personally witnessed and which speak to her supervisor's pattern of firing minority employees early in their probationary

periods. Indeed, permitting the exclusion of evidence on this basis would reward an employer for failing to produce the evidence of its own discriminatory practices against minority employees.

The trial judge's snap decision to completely discount the value of Tsai's relevant, first-hand testimony illustrates again the manner in which Tsai was effectively prevented from presenting to the jury a "convincing mosaic" of circumstantial evidence in support of her claim of discrimination, while, at the same time, the VA was allowed to withhold potentially incriminating documentary evidence with impunity.

C. The record reflects an absolute dearth of evidentiary support for the jury's verdict.

Tsai concedes that, while this matter was before the District Court, she did not challenge the sufficiency of the evidence by either moving for judgment as a matter of law before the case was submitted to the jury and renewing that motion after the verdict, pursuant to Fed. R. Civ. P. 50(a), (b), or moving for a new trial, pursuant to Fed. R. Civ. P. 59.[8] Nonetheless, even

[8] The Appellant was represented by different counsel, Mr. William T. Harrington, when this case was before the district court. The instant appeal was filed on March 23, 2018, and Mr. Harrington withdrew as the Appellant's counsel on March 25, 2018. In April 2018, the Appellant retained the undersigned Law Firm to represent her in this appeal. By the time undersigned counsel was retained, the deadline to file a motion for a new trial, i.e., 28 days following the January 23, 2018 entry of judgment, had long passed.

in the absence of the filing of such motions, this Honorable Court retains the discretion to inquire whether the record reflects an absolute dearth of evidentiary support for the jury's verdict. *Faigin v. Kelly*, 184 F. 3d at 76, *La Amiga del Pueblo, Inc. v. Robles*, 937 F.2d 689, 691 (1st Cir. 1991). A court of appeals is obliged to accept a finding of the lower court unless that finding is clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). "A finding is `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In this case, no reasonable jury could have found support in the record evidence for a verdict in favor of the VA.

In order to find for the VA, the jury considered whether the VA had proffered a legitimate, nondiscriminatory reason for terminating Tsai's employment or whether the reason provided by the VA was pretext for discrimination. [Dkt. 78, Jury Instructions on Specific Claims, at 13]. Pretext for discrimination may be demonstrated through weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered explanation for its actions. *Billings v. Town of*

Grafton, 515 F.3d 39, 55 (1st Cir. 2008), (quoting *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998)).

As set forth above, the VA's entire record in support of its termination of Tsai was created *after* her supervisor, Saunders, had already determined that Tsai must be purged from the workplace in August 2009. [Trial Exhibit No. 7, August 11, 2009 Email from Saunders to J. Reis and W. Flanagan; Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 98].

In addition, notwithstanding the VA's claim that it made every possible effort to provide Tsai with an opportunity to improve her performance and, thus, retain her job, the record reflects that Tsai received no meaningful counseling regarding her performance or training prior to her termination. Moreover, although Saunders testified that he placed Tsai on a Performance Improvement Plan (PIP) on or about February 18, 2010, the record does not contain a copy of any such PIP.[9] [Trial Exhibit No. 9, February 18, 2010 Email from Saunders to Tsai].

In the Federal government workplace, a PIP is a formal document issued to an employee after the employee's performance has fallen below an

[9] Tsai testified that she did not meet with Saunders at any time on or around February 18, 2010. Tsai further testified that Saunders never placed her on a PIP, gave her a "plan of counseling," or otherwise communicated to her a performance deficiency in writing. [Dkt. 91, Trans. of Jury Trial, Jan. 18, 2018, Tsai Test. at 85-86].

acceptable level in one or more performance elements. In the PIP document, an agency is required to explain deficiencies to the employee and identify specific problems the employee must address in order to achieve a minimally acceptable performance rating. The PIP provides the employee the chance to attain an acceptable level of performance within a specific time period. The Merit Systems Protection Board, the quasi-judicial forum with jurisdiction over appeals of Federal employees removed by agencies for performance reasons, has held that a 30-day PIP satisfies an agency's obligation to provide an employee with a reasonable opportunity to demonstrate acceptable performance. *See Lee v. Environmental Protection Agency*, 115 M.S.P.R. 533 (2010). Here, only 22 days elapsed between the date Saunders purportedly placed Tsai on the PIP and the date he terminated her from Federal service. Assuming for the sake of argument that Saunders did place Tsai on a PIP, such a truncated improvement period (22 days), in contravention of the requirements of the law governing PIPs, would have failed to afford Tsai a meaningful opportunity to bring her performance into compliance with Agency's standards.

As previously noted, moreover, the fact that Saunders initially requested HR's permission to fire Tsai after observing her work for less than 3 months and, after being rebuffed in this attempt, ultimately fired Tsai a

7 months later, indicates that the intervening months were not used for the purpose of attempting to train and retain Tsai as an employee. The record instead demonstrates that Saunders used this time to enlist select staff against Tsai and soliciting statements to support his predetermined outcome of removal.

The VA asserts that Tsai's performance problems were well-documented, citing emails from various personnel within the West Roxbury VA which purportedly demonstrate errors made by her. Given that nearly all of these emails were generated only after Saunders had already determined Tsai's continued employment was "not going to work out," they instead provide further support for the inference that the alleged performance deficiency for which she was terminated was a mere pretext for discrimination. *See Xiaoyan Tang v. Citizens Bank*, 821 F.3d 206, 221–22 (1st Cir. 2016) (finding pretext when investigation into incident involving plaintiff began only after employee filed her sexual harassment claims).

Finally, Saunders repeatedly testified that when he raised allegations of poor performance with Tsai, she became "defensive."[10] [Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 84, 86, 98]. However, Saunders failed to give any consideration to information Tsai offered in her defense, or, indeed, to identify anything Tsai specifically said in response, "defensive" or otherwise, before simply adopting the characterization of her performance presented in the emails. For example, in describing one purported meeting during which he raised such allegations with Tsai, Saunders testified that, "There was no clear response [from Tsai]. There was nothing constructive . . . very defensive . . . Defensive. Just difficult to come to a resolution." [Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 98]. The very fact that Saunders categorized Tsai's response as "defensive" demonstrates that he accepted the emailed

[10] Tsai denies that Saunders ever brought to her attention the substance of any of the emailed complaints he allegedly received regarding her performance. Tsai first saw the emails citing her alleged poor performance when, after her termination, she filed a complaint with the Agency's Office of Equal Employment Opportunity. [Dkt. 42, Affidavit of Molly Tsai in Support of Opposition to Defendant's Motion for Summary Judgment, at 5]. Further, Saunders testified that he did not provide Tsai with copies of the emails complaining of her alleged performance and that he only produced those emails when he was asked to do so after Tsai filed a complaint of discrimination with the VA EEO office. [Dkt. 95, Trans. of Jury Trial, Jan. 17, 2018, Saunders Test. at 44-45].

usations as true without conducting any meaningful inquiry as to their legitimacy.

In light of this record, no jury could find that there was any legitimate and

nondiscriminatory reason for Tsai's termination.

VI. CONCLUSION

Based on the foregoing, the Petitioner, Molly Tsai respectfully requests that this Supreme Court grant the Writ of Certiorari and Reverse the judgement against Department of Veterans Affairs. As clearly stated in the laws above. The Petitioner has grounds for this race

crimination claim on the merit. The Petitioner also requests that Department of Veterans airs be amended, or abolished. Justice for all United States Citizens.

Respectfully submitted.

Molly Tsai, *Pro Se*

March 5, 2020

APPENDIX - TABLE OF CONTENTS