

# United States Court of Appeals For the First Circuit

No. 18-1255

MOLLY TSAI,

Plaintiff - Appellant,

v.

ROBERT WILKIE, Secretary of Veterans Affairs,

Defendant - Appellee.

Before

. Howard, Chief Judge.  
Lynch and Thompson, Circuit Judges.

## JUDGMENT

Entered: December 9, 2019

After carefully considering the briefs and record on appeal, we grant the motion for summary disposition and affirm.

Appellant filed suit alleging employment discrimination on the basis of race or national origin. See Ahmed v. Johnson, 752 F.3d 490, 494 (1st Cir. 2014) (discussing Title VII claims). The jury entered a verdict for Appellee. On appeal, Appellant argues that the evidence at trial was insufficient to support the verdict.

Below, Appellant did not file motions for judgment as a matter of law under Fed. R. Civ. P. 50(a)-(b) or for a new trial under Fed. R. Civ. P. 59. Under the circumstances, normally, this court will not consider the sufficiency of the evidence. See Fai gin v. Kelly, 184 F.3d 67, 76-77 (1st Cir. 1999). Appellant does not show that any exception is warranted in her case. See Id. The jury had ample evidence to conclude that she had been fired for performance deficiencies. See Magee v. BEA Const. Corp., 797 F.3d 88, 90-91 (1st Cir. 2015) (review is limited to whether an absolute dearth of evidence exists for the verdict).

Affirmed. 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Corinna Anna Ferrini

Thomas E. Kanwit Donald

Campbell Lockhart

Rayford A. Farquhar Eve

A. Piemonte

**APPENDIX-A**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

V.  
MOLLY TSAI,  
Plaintiff,

CIVIL ACTION NO. 15-11676-MBB

DAVID J. SHULKIN, SECRETARY,  
DEPARTMENT OF VETERAN AFFAIRS,  
Defendant.

**FINAL JUDGMENT**

**January 23, 2018**

**BOWLER, U.S.M.J**

The issues having been duly tried and a verdict rendered by a jury,  
it is **ORDERED** and **ADJUDGED** that plaintiff Molly Tsai take nothing and  
that this action be dismissed on the merits.

/s/ Marianne B. Bowler  
**MARIANNE B. BOWLER**  
United States Magistrate Judge

**APPENDIX-B**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MOLLY TSAI,  
Plaintiff,

v.

CIVIL ACTION NO.  
15-11676-MBB

ROBERT A. MCDONALD, SECRETARY,  
DEPARTMENT OF VETERANS AFFAIRS,  
Defendant.

**MEMORANDUM AND ORDER RE:  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOCKET ENTRY # 35);  
PLAINTIFF'S MOTION TO STRIKE (DOCKET ENTRY # 45)**

**August 16, 2017**

**BOWLER, U.S.M.J.**

Pending before this court is a motion for summary judgment filed by defendant Robert McDonald ("defendant"), Secretary of the Department of Veteran Affairs. (Docket Entry # 35). Plaintiff Molly Tsai ("plaintiff") opposes the motion (Docket Entry # 40) and also seeks to strike selected exhibits from the summary judgment record. (Docket Entry # 45). After conducting a hearing on May 16, 2017, this court took the motions (Docket Entry ## 35, 45) under advisement.

PROCEDURAL BACKGROUND

The parties' dispute arises out of plaintiff's employment with the Department of Veteran Affairs ("VA"). The three-count

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Trodella and Kane were better at their jobs. See Xiaoyan, 821 F.3d at 221, n.15. Similarly, an email dated November 8, 2010 from DeChambeau to the EEO investigator is admissible to show that DeChambeau had reason to believe plaintiff was performing deficiently and had reason to believe that Trodella and Kane were retained because they lacked performance deficiencies. Finally, exhibit eight includes a November 9, 2010 email from Saunders to the EEO investigator stating that plaintiff had performance issues whereas Trodella and Kane did not have performance issues. Because Saunders was the supervisor of plaintiff, Trodella, and Kane, and therefore has the requisite personal knowledge to give this explanation in response to plaintiff's EEOC contention that she was treated differently, the email is part of the summary judgment record.

#### CONCLUSION

In accordance with the foregoing discussion, defendant's motion for summary judgment (Docket Entry # 35) is **DENIED**. To the extent set forth above, the motion to strike (Docket Entry # 45) is **DENIED** in part and **ALLOWED** in part. The deadline to file summary judgment motions has passed and there will be no extensions. This court will conduct a status conference to set a trial date on August 22, 2017 at 2:30 p.m.

/s/ Marianne B. Bowler

**MARIANNE B. BOWLER**

United States Magistrate Judge

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