

No. 18A1280

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IN THE SUPREME COURT UNITED STATES

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XIAO-YING YU,  
*Petitioner*

v.

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL, and  
MARYLAND DEPARTMENT OF BUDGET & MANAGEMENT,  
SECRETARY DAVID BRINKLEY,  
*Respondent*

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**Application For Stay And Injunctive Relief During The U.S. Fourth  
Circuit's Pending The Reconsideration Of Recalling The Mandate Of The  
Judgment, Pending Filing And Disposition of A Petition For Certiorari**

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DIRECTED TO THE HONORABLE  
JOHN G. ROBERTS, Jr. CHIEF JUSTICE OF THE  
SUPREME COURT AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

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July 22, 2019

**PARTIES TO THE PROCEEDINGS  
AND RULE 29.6 STATEMENT**

There are no parties to the proceedings other than those listed on the caption. ( Fourth Circuit is pending their reconsideration of recalling the mandate of the judgment which was directed by the panel judges Motz, Keenan, and Floyd). Petitioner has no corporate affiliations. To the best of Petitioner's knowledge, Respondents Maryland Department of Health ("MDH") and Maryland Department of Budget and Management ("MDBM") are Maryland State Government Agencies. Respondents Mr. Robert R. Neall, is Secretary of MDH, and Mr. David Brinkley, is Secretary of the MDBM. MDH does not have an authority for approval of an Epidemiologist III Position Identification Number for Petitioner except the MDBM; When Petitioner's application for using her friend's donated employee's leave (during the interactive accommodation) was rejected by MDH HR, Petitioner was directed to file appeal to the MDBM. Clearly, to the extent of employment relationship, the MDBM has certain control to certain extent.

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Appendix 1.1

App 1

FILED: April 22, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 18-1889  
(1:17-cv-03260-JKB)

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XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

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ORDER

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Upon consideration of the motion to recall the mandate and to vacate decision on appeal, the court denies the motion.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

Appendix 1.2

App. 2

May 6, 2019  
Patricia S. Connor, Clerk and Chief Judge, Robert L. Gregory  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA. 23219

Re: Case No. 18-1889, Xiao-Ying Yu v. Robert Neal (1:17-cv-03260-JKB),  
Plaintiff's motion for publication of unpublished opinions and reconsideration of Court's  
4/22/2019 order

Dear Clerk Connor and Chief Judge Gregory:

Following filing my consequential documents including application for suspension, motions to recuse, and letter to you addressing about intentional and constant alteration of docket records and concealment of the evidence, recent civil rights request and motion to recall the mandate, I am respectfully submitting the motion for publication of unpublished opinions, (which directed the Court's judgment and orders between 1/22/2019 and 4/22/2019), and for reconsideration of the Court's 4/22/2019 order denying my request that Court recall the mandate under Fed R. App. P. 34 (a)(2), (b), Rule 27, Local Rule 36(b), USC 28, Chap. 21 § 455, Fed R. App. P. 41 (b)&(c); 42 U.S.C. §1983, "Due Process" and "Equal protection" clauses of Fourteenth Amendment and Congressional enforcement power for depriving a person of rights or privileges "secured or protected" by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100).

The related Appendix and certificate of service and compliance are enclosed.

Respectfully submitted,



Xiao-Ying Yu, *pro se*

Mailing address: P.O. Box 293,  
Abingdon, MD 21009

No. 18A1280

APPLICATION FOR STAY AND INJUNCTIVE RELIEF DURING  
THE U.S. FOURTH CIRCUIT'S PENDING THE RECONSIDERITION  
OF RECALLING THE MANDATE OF THE JUDGMENT, PENDING  
FILING AND DISPOSITION OF A PETITION FOR CERTIORARI

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of  
the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rule 22 and 23 of this Honorable Court's rules, as well as 28 §  
§1651 (a) and 2101 (f), Petitioner ("applicant" or "plaintiff" when referred  
statements from previous lower courts' docket records), Xiao-Ying Yu, *pro se*,  
respectfully requests a stay and injunctive relief of exercising the Supreme Court's  
power of intervention and supervision in the current pending reconsideration  
(Appendix-1) of recalling the mandate (Appendix-2) of the judgment at Fourth  
Circuit, dated January 24, 2018, (Appendix-3), pending the filing and deposition of a  
petition for writ of certiorari (by the deadline August 23, 2019 based on this Court's  
approval of her application for extension).

The Fourth Circuit (via judgment directed by the circuit opinion which the  
panel-leading Judge Motz prepared) affirmed the Federal District Court of  
Maryland's dismissal of Petitioner's claim regarding the termination of Petitioner's  
employment without mediation or hearing caused by the retaliation against her  
prior charges filed with EEOC under Title VII of the Civil Rights Act of 1964 ("Title  
VII"), The American with Disabilities Act Law ("ADA") and The Age Discrimination  
in Employment Act ("ADEA") (Appendix-4). As described below, despite

acknowledging that Respondents (Maryland Department of Health, "MDH", Secretary, Robert Neall, and Maryland Department of Budget and Management, "MDBM", Secretary, David Brinkley, or "Defendants" when referred previous statements from the lower courts' docket records) did not provide evidential prior-mediation of termination and failed to provide any legitimate non-retaliatory reasons for the adverse actions under the McDonnell Douglas Scheme, the panel judges directed Fourth Circuit's denial of Petitioner's rehearing en banc and affirmed deprivation of the Petitioner's property right, Due Process and Equal Protection of constitutional rights (Appendix-5). This judgment conflicts with decisions from other circuit court of Appeals and this Court and is inconsistent with the Fourth Circuit's own previous judgment. It also represents a violation of clear instruction from the Congress. For reasons explained below, there is a significant probability that the honorable Court will grant certiorari, and if certiorari is granted, there is also reasonable possibility that the judgment below will be reversed or vacated. A stay and injunctive relief pending this Court's further review is also necessary to prevent Petitioner from suffering irreparable injury and serves the public interests under Congressional power of enforcement and the integrity of justice.

## INTRODUCTION

### **I Important questions raised due to extraordinary inequality**

This case raises critically important questions of Federal law and constitutional rights:

1. Did the Fourth Circuit err by refusing to consider EEOC's right-to-sue letter regarding her Title VII, ADA and ADEA charge, Petitioner's letters to the District Court's clerk along with the complaints, and the statement in "Plaintiff's Response to Defendants' Motion to Dismiss" as part of Petitioner's pleadings and factual bases under Fed. R. Civil P. 7(a) and 15(d), and thereby affirming the District Court's dismissal reason "lack of subject-matter jurisdiction" and dismissing Petitioner's appeal?

2. Did the Fourth Circuit erroneously affirm the District Court's dismissal of Petitioner's claim based on State's sovereign immunity to her claim, even though they acknowledged Congressional abrogation of State's Eleventh Amendment immunity to ADA suit and that the Respondents waived its sovereign immunity due to the receipt of Federal CDC funding under the Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b)?

3. Did the Fourth Circuit erroneously affirm the District Court's dismissal of Petitioner's claim based on her failure to state claim despite acknowledging that Respondents failed to prove evidential mediation prior to termination; and did not provide any legitimate non-retaliatory reason for the Respondents' adverse actions under the McDonnell Douglas Scheme?

4. Did the Fourth Circuit erroneously affirm the District Court's dismissal and closure of Petitioner's claim without pre-direction, and support the District Court's rejection of her motion for clarification and reconsideration, and her second amendment of her claim, (that added evidence from EEOC records obtained via

Freedom of Information Act), in violation of Fed. R. Civil P. 15, 60 and 28 U.S.C. § 1291 by alleging that Petitioner's amendment would not cure the defects of lack of subject matter jurisdiction and State's immunity?

5. Did the Fourth Circuit erroneously hold up the judgment depriving Petitioner's property right, and violating Due Process and Equal Protection the two clauses of the Fourteenth Amendment to U.S.C. and Congressional power of enforcement by pending Petitioner's motion to reconsider recalling the mandate which was issued in the absence of prior denial of Petitioner's motion to stay the mandate under Fed. R. App. P 41(b) and by neglecting evidence and prejudicial prevention of Petitioner from presenting disputed issues (exhaustion of administrative remedies, State's waiver of immunity and relief for retaliatory termination without mediation) through an oral argument and rehearing en banc?

## II. Prejudicial proceedings and opinions

### A. *Federal District Court's prejudicial dismissal of Petitioner's claims without pre-direction constitutes denial of Petitioner's Due Process right.*

Per EEOC's (10/16/2017) right-to-sue letter, Petitioner filed claims under Title VII, ADEA, ADA, 42 U.S.C. §1983 and Fair Labor Standards Act et al with Federal District Court of Maryland regarding the workplace discrimination and retaliation initiated by her supervisor Ms. Sara Barra, and tolerated and supported by MDH and MDBM, which caused the termination of her job under seniority system without mediation. Petitioner submitted letter along with her filing Complaint (11/2/2017, Appendix-6) and an Amended Complaint (12/8/2017) with 39

exhibits (collectively referred to as the "Complaint") to the District Court clerk requesting to amend new evidence when she receives it from EEOC's recording file (Appendix-7).

Also, Petitioner filed "Plaintiff's response to Defendants' motion to dismiss" and related exhibits which contains EEOC 10/16/2017 right-to-sure letter, EEOC filing form and Petitioner's rebuttal filed with EEOC (Appendix-8&9). In these pleadings, *pro se* demonstrated that willful underpayment, unequal payment, biased rejection of accommodation and request to use employee's leave donated by her friend, Human Resources' constructive discharge and deprivation of her seniority job and wrongful termination without mediation are caused by discrimination and retaliation based on ethnicity/national origin, age and disability.

In addition to her complaint, Petitioner responded to Respondents' motion to dismiss on March 22 and May 11, 2018, which concerned Congressional abrogation of state's Eleventh Amendment immunity and State's waiver sovereign immunity under Section 504 of Rehabilitation Act as their receipt of CDC funding. (COA4-doc#4, ECF No. 20&30, Exhibit #3) (ECF No. 4, exhibit#9, 21,22&26).

The District Court's decisions without pre-direction under 28 U.S.C. § 1291 denied her claims, closed her case, and deprived her civil and property rights without a trial or a hearing. These faulty reasons are: dismissal due to lack of subject matter jurisdiction under Rule 8(a) and 12(b)(1) without prejudice; dismissal by failure to state a claim upon which relief can be granted based on Rule 8(a) and

Rule 12(b)(6) with prejudice; and dismissal because of State's immunity to ADA complaint. The District Court rejected Petitioner's request for a second amendment of her claim by falsely stating that Petitioner's amendment would not cure deficiencies of lack of subject matter jurisdiction and State's immunity to Petitioner's claim (Appendix-10: district court's 6/26/2018 memorandum and order).

*B. Prevention of Petitioner from presenting the disputes about the evidence of exhaustive administrative remedies, State's waiver of its immunity, and retaliatory termination without mediation at oral argument and hearing deprives Petitioner's property, Due Process and Equal Protection rights in Fourth Circuit:*

Petitioner's motion for relief (via clarification and reconsideration) and motion for leave to file a second amendment with the newly discovered evidence of Respondents' interference with EEOC's investigation obtained from EEOC via Freedom of Information Act ("FOIA") (Appendix-11&12) under Fed. Civil P. 60 and 15 (within 28 days from the District court's 6/26/2018 judgment) were returned by the District court, and her notice of appeal, which was filed in a timely manner on July 26, 2018, was also returned, but part of it (without exhibits) was transmitted to Fourth Circuit twice on August 2, and 6, 2018 (Appendic-13). This series of inappropriate denials and confused actions hampered the review of Petitioner's appeal. Within 30 days of submitting her notice of appeal, Petitioner filed a motion for leave, and also wrote a letter (based on the clerk's instruction) requesting the Fourth Circuit to intervene and correct the mistakes in the docket records and the prejudicial actions of the District Court as described above, Fourth Circuit's docket record, "COA4-doc" #5&7).

Yet, the inconsistent, incorrect and incomplete COA4 docket records influenced by the District Court's biased actions were not corrected. Instead, there were additional alteration and deletion in the Fourth Circuit docket for transmitted records from the District Court during 18 days after Petitioner filed an informal brief (Appendix-14, COA4-doc #17&25). The Petitioner received a letter from the Fourth Circuit addressing the denial of newly discovered evidence (affirmed by EEOC-FOIA on 7/6/2018) regarding Ms. Barra's interference with EEOC's investigation and MDH Ms. Delinda Johnson's unlawful rejection of the accommodation, which Petitioner had requested to amend since 11/2/2017 when she filed her initial complaint with the District Court (Appendix#15, COA4-doc #7&8). Petitioner requested oral argument<sup>1</sup>. But, she never received Fourth Circuit's notification of oral argument under Fed. R App. P. 34 (b), which was also alleged by Respondents (Appendix-16, COA4-doc #12).

In addition, on January 24, 2019, the Fourth Circuit (via curiam opinion which panel-leading judge Motz prepared) denied any reversible errors made by the District Court; affirmed the reasons of District Court's dismissal of her claims (lack

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<sup>1</sup> After Petitioner addressed necessity and importance to have oral argument in her (10/1/2018) informal brief, Respondents filed motion to anticipate no oral argument to be granted and stated there had not been scheduled oral argument on Oct. 11, 2018 when was prior to the panel judges' receipt of Respondents' informal response brief, Petitioner's informal reply brief and supplemental informal brief and related exhibits. Petitioner re-emphasized the need of oral argument to be permitted on Oct. 15, 2018 in response to Respondents' (10/11/2018) motion, there was no clarification regarding Respondents' allege or response to Petitioner's informal brief and motion for oral argument from the Fourth Circuit.

of subject-matter jurisdiction, failure to state claim and State's immunity to ADA suit); and mooted her motion for concerns about the alterations and deletions of the court's docket records. Also, the panel-leading judge used a statement of local rule 34(a)(2)(c) as an excuse to dispense Petitioner's oral argument request, (see footnote #1), and denied Petitioner's petition for rehearing en banc under local Rule 35(b)<sup>2</sup> despite acknowledging District Court's receipt of EEOC right-to-sue letter (part of pleadings), and Respondents' failure to provide an evidence of prior mediation for termination or/and any legitimate non-retaliatory reasons for their adverse actions under the McDonnell Douglas Scheme.

Petitioner filed a timely motion to stay the mandate and its related amendment, which was not denied, yet she received the mandate (Appendix-2.1&2.2, COA4-doc#36&40). Furthermore, Petitioner's application for recalling the mandate under Fed. R. App P. 41(b) and Congressional power of enforcement was also denied per the direction of the panel judges (Appendix 2.3&1, COA4, docket#43&44) although Petitioner previously filed application for the disqualified panel-leading judge to recuse herself as well as an application for suspension of the Fourth Circuit's denial of her rehearing en banc and her request for an intervening action to control and stop the obstruction of equal justice by the panel-leading judge's prejudicial actions and alteration and deletion of the Fourth Circuit docket

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<sup>2</sup> Fourth Circuit was directed to deny Petitioner's rehearing en banc because none of three of panel judges made a poll even one of them required taking a poll as a pre-condition for determination of granting Petitioner's rehearing en banc opportunity under local Rule 35 (b), but wrongfully stated their prejudiced denial under Fed. R. App. P. 35 instead of local Rule 35 (b) (Appendix 5.2)

records. (Appendix 17, COA4-doc #38). Moreover, Petitioner requested protection of her constitutional rights on 4/16/2019 in responding to the Fourth Circuit's notice under local Rule 40(d) to block Petitioner's requests for suspending the denial of rehearing and recusing the panel-leading judge (Appendix-18, COA4-doc#39&41).

On May 6, 2019, Petitioner filed motion for reconsideration of the Fourth Circuit's order denying her application to recall the mandate and request for publication of their unpublished opinion (Appendix1.2, COA4-doc#45). Petitioner checked with the Fourth Circuit on May 29, 2019 regarding this issue but has not received Fourth Circuit's answer regarding the status of their recalling of the mandate.

### **III. A stay and injunction are warranted for the relief from the damages.**

Petitioner could not obtain relief from the District Court and Fourth Circuit that would have been granted if they were to consistently apply federal civil and appeal rules and procedures and were to follow the instructions of Congress, and if their decision did not conflict with the decisions of another United States Court of Appeals and this Supreme Court on the same important matter including deprivation of Petitioner's property right without mediation and hearing caused further damages.

The irreparable damages to Petitioner's health and life are evidenced by her complaints and informal brief and related exhibits. Additional suffering brought to her will continue by that both District Court and the Fourth Circuit panel of judges neglect the evidence, federal laws and constitution, and perform prejudicial actions

without merits if the stay and injunctive relief as well as certiorari are not granted. The consequence of this prejudice without justification in the judicial process is that American people will lose trust in the ability of nation to ensure equality of the working environment, and freedom from retaliation against employee's charge filed with EEOC, and will lost confidence in equal justice in federal courts under Due Process and Equal Protection of Fourteenth Amendment U.S.C.. In contrast, granting a stay will impose no harm on the Respondents' employees and organization because granting of equal justice can only support the working conditions within an organization.

Moreover, this Court is likely to grant certiorari based on the convincing evidence of Petitioner's exhaustive administrative remedies, the conflicts of Fourth Circuit's judgment with the decisions of other appellate courts and Supreme Court, and the Congressional power of enforcement. Additionally, this Court will likely reverse lower court's opinion if the Congress has clear instruction. *Chevron USA v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842, 104 S.Ct, 2778, 81 L.Ed. 2d 694 (1984), and also because the U.S. Supreme Court had decision in the relevant case (details please see "Reasons for granting the stay").

## BACKGROUND

- I. Petitioner was in a protected class and she was qualified for an advanced position within her workplace.**

It is undisputed based on Petitioner's complaint filed with District Court that Petitioner was the only employee who was Asian American, born in a foreign

country and over 60 years old working as an epidemiologist for 5 years (between 2009 and 2014 in the Center of Chronic Disease Prevention and Control (“CCDPC”) of MDH (notably, Petitioner worked well and got along with her co-workers or customers without any complaints)<sup>3</sup>.

**II. Petitioner provided fair notice to the Respondents and both District Court and Fourth Circuit that she engaged in protected activities.**

*A. Petitioner reported to internal managers regarding discriminatory deprivation of the reclassification to Epidemiologist III as previously approved by both Departments MDH and MDBM and willful underpayment and unequal payment:*

Petitioner demonstrated in her complaint that she was subject to unlawful and discriminatory employment practices and she reported these practices to the office director, MDH secretary and MDBM Employee Regulations between March 2012 and February 2014. Both MDH and MDBM had initially approved a new position (a new Epidemiologist III position and position identification number with corresponding salary increase) specifically for Petitioner’s reclassification due to her increased job responsibilities in March 2011, but the approved position identification number for Petitioner was unlawfully given to Ms. Barra, because she is caucasian, younger than Petitioner by approximately 20 years and came to work in the CCDPC one and half year later than Petitioner in January 2012. As a result,

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<sup>3</sup> Formal CCDPC Director, Dr. Audrey Regan highly evaluated Petitioner’s work and applied for reclassification of Epidemiologist III in 2010, which was approved by MDH and MDBM in March 2011. Petitioner received satisfactory or outstanding performance evaluations during 5 years of her service in MDH except June 9, 2014 when Ms. Barra generated “unsatisfactory” evaluation with false reasons (COA4, docket#4, ECF No. 4, exhibit#24).

Petitioner was not paid according to the new approved reclassification position even though she had already been performing the increased job duties since January 2010. Instead, the salary and title of the job were given to Ms. Barra.

Despite Petitioner's reports to MDH manager (March 2012) and secretary (February 2014) as well as MDBM Employee Relations (August 2013), the situation described above was not corrected. Petitioner's salary was not raised to an equivalent level as other epidemiologists with similar experience (who had post doctoral training and over 20 years of working experience) in MDH during the period of her employment as both MDH and MDBM approved for her in March 2011. Furthermore, Petitioner's Amended Complaint indicated that all of her colleagues had a salary matching their education and years of work experience plus medical and other benefits except her (Appendix-19, COA4-doc#4, ECF No. 4, exhibit#9). This was the initial basis for claims of willful underpayment and unequal payment due to racial and age discrimination.

*B. Petitioner filed initial charge of age and racial discrimination and retaliation with EEOC in Nov. 2013 due to Ms. Barra's interference with her seniority job retaliated against her internal reports about discriminatory deprivation of her reclassification and underpayment.*

Petitioner indicated that after her initial report to the office director regarding the discriminatory deprivation of her reclassification, she was placed under Ms. Barra's direct supervision in December 2012. Within two weeks, required Petitioner to sign a pre-completed annual evaluation form and downgraded Petitioner's performance evaluation from previous year's "outstanding" to

“satisfactory” with a warning memorandum requiring Petitioner to improve judgment, follow directions, and polish up writing. However, Human Resource (“HR”) had clear instructions about such memorandum, which was issued only for employee with performance evaluation of “unsatisfactory”. Ms. Barra never meet and discuss about annual performance evaluation privately with Petitioner as she had done with other employees she supervised and as required by HR for all supervisors. In addition, Ms. Barra deprived Petitioner of seniority rights within the CDC’s supported position and responsibilities by forbidding Petitioner to access database, to attend the office program meetings, CDC officer’s site visit and CDC funding program telephone conference. Within Seven months, Ms. Barra changed Petitioner’s job description on HR MS-22 form in July 2013. In doing so, Ms. Barra deleted all of Petitioner’s responsibilities for chronic disease projects, restricted Petitioner’s internal and external communication, changed her annual performance evaluating standards from “professional skills” to “English writing”. Ms. Barra refused Petitioner’s request (in verbally and by email) to be treated equally without explanation for such changes. Petitioner reported to office director (next level manager), MDH Union, HR and OEOP and MDBM managers, filed internal grievance and appeals between March 2012 and Feb. 2014 (Appendix 7.2&7.3, COA4, docket#4, see ECF No. 4, *id.* p2-3, exhibits #1, 12, 20-24). The violation was not resolved, but On Oct 10, 2013, Ms. Barra created another internal consulting memorandum (as the first required step by HR for making disciplinary action) to forbid Petitioner’s protected activities by seeking help from next level of manager. It

led to six of disciplinary actions within 4 months (February 2014 and June 2014). Petitioner filed her first charges of age, racial harassment, discrimination and retaliation (discriminatory and adverse events between January 2013 and November 2013) with EEOC on November 12, 2013 (COA4-doc#4, ECF No. 4, *id.* p. 2-5, Exhibit #1-16). Then she was subject to further unlawful retaliation and harassment and discrimination by Ms. Barra tolerated and supported by MDH and MDBM.

**III. Petitioner indicated that retaliation caused her health condition and diagnoses of workplace stress, major anxiety, major depressive disorder and posttraumatic stress disorder were confirmed through work ability evaluation by a State Medical Director and two other health professional services which made Petitioner become eligible to FMLA and accommodation and that she filed second charge with EEOC under ADA, Title VII and ADEA.**

Petitioner demonstrated that her mental health condition (obtained FMLA in June 2014) was caused and worsened by escalating hostility in her working environment and the retaliation exacted by Ms. Barra because Ms. Barra interfered with her seniority job; prevented her from seeking next level of manager's help; created 6 disciplinary actions within four months, and exposed disciplinary suspension of Petitioner in the calendar which were able to see by co-workers to bully and harass Petitioner. The documented disabilities and the accommodation for Petitioner to work under other supervisor were recommended by State Medical Director, Dr. Robert Toney and other two Psychiatrist and mental health institution (between June and October 2014, Appendix-20). Petitioner applied another epidemiologist III position and was evaluated as "Best Qualified" by MDH in June

2014 and she also requested Office of Equal Employment Program (“OEOP”) officer Ms. Johnson’s consideration of accommodation to allow her return to work either in the position she applied for or to reassign her to work with other co-worker (who also worked for CDC funding 1305 program) together under office Medical Director’s supervision on July 21, 2014. Yet, she did not get any help from Ms. Johnson in August 2014, except a requirement for her to continue work under Ms. Barra’s supervision in the absence of equal working condition and lack of any official control of Ms. Barra’s harassment and retaliation. MDH OEOP Ms. Johnson biased actions led to further disability discrimination and harassment. Petitioner filed her second charge with EEOC for disability, ethnic and national origin and age discrimination and retaliation under ADA, Title VII and ADEA on September 2, 2014. This charge dealt with the disability discrimination and retaliation retaliated against Petitioner’s internal appeals and first charge of age and racial discrimination and retaliation filed with EEOC between Dec. 2013 and Aug. 2014 (Appendix 6&9, ECF No. 4, p 6-10, exhibit #17-31). And consequent adverse events were also provided to EEOC for amendment with charge.

**IV. Petitioner further demonstrated the disability-retaliatory termination without mediation against her EEOC charge under ADA as part of the causal connection between her engagement in protected activities and the adverse employment actions.**

Petitioner indicated that she received Defendants’ adverse actions such as unwarranted disciplinary actions which began on the day (2/3/2014) immediately after she reported to OEOP director, Ms. Keneithia J. Taylor (2/2/2014) about Ms. Barra’s new discrimination at ethnicity/National Origin behavior because Ms. Barra

sent Petitioner a warning email after 7:00 p.m. with false reason on the Chinese New Year Eve although Ms. Barra had previously approved her request to take half the day off (1/31/2014) (Appendix 21, ECF#4, COA4-doc#4). Additionally, Ms. Yu also reported to Ms. Taylor on 2/2/2014 that Ms. Barra retaliated and interfered with her job including block of her submission of abstract for office program/projects on the deadline (1/15/2014) (COA4-doc#4). It was within two months from the date of her filing first charges under Title VII and ADEA with EEOC (COA4-doc#4, ECF No. 4, *id.* p.5-9, Exhibit 17-28). She also experienced progressive disability retaliatory actions due to her second charge with EEOC (9/2/2014). These actions included rejection of accommodations by pretext “undue hardship” without any explanation required by ADA, rejection of her request of using employee’s leave time donated by Petitioner’s friend during the interactive accommodation process, and blocking her access to office email on 9/3/2014, the next day immediately after Respondent (MDH OEOP officer Ms. Johnson) received the Petitioner’s EEOC charge on September 2, 2014 (Appendix-12, COA4-doc#4, ECF#4). Consequently, Respondents HR issued constructive discharge (10/10/2014) motivated by Ms. Barra requiring Petitioner to resign or retire prior to OEOP Ms. Johnson’s response (10/15/2014) to the accommodation recommended by State Medical Director (10/8/2014); Ms. Johnson made pretext of “undue hardship” (in August 2014 in response to Petitioner’s attorney’s accommodation and requesting letters sent to HR between June and July 2014 and OEOP on July 21, 2014). It is indicated by change of the CCDCP office structure (October 2014), change of office Medical Director’s job

description from “supervision” to “non-supervision” (7/21/2014) and prevent Petitioner from returning to work under a different supervisor in a less hostile environment, which, even though was recommended by the State Medical Director for the accommodation (Appendix-20). This action led to unlawful termination without mitigation (11/3/2014) by alleging that Ms. Yu is “an individual with disability who, with a reasonable accommodation, cannot perform essential functions of the position” (Appendix 7&4, COA4-doc#4, ECF#4). However, Petitioner was never given the opportunity to work with an accommodation. The continued the retaliation through Ms. Barra’s interference with EEOC’s investigation for Petitioner’s protected activities (COA4-doc#4, ECF No. 4, *id.* p.9-12, Exhibit #17-40) demonstrated by new discovery evidence from EEOC’s recording file (EEOC investigator’s hand notice on 4/19/2017) via FOIA request (Appendix-11). Petitioner further indicated that both Departments, including the MDH Union manager (who participated in the decision of termination lack of pre-mediation without informing Petitioner), tolerated and supported Ms. Barra’s harassment and discriminatory and retaliatory behavior and actions, violating Petitioner’s constitutional rights under Title VII, ADEA and ADA, 42 § 1983 U.S. Code and National Labor Regulation Act (“NLRA”).

Petitioner filed her complaint with the Federal District Court with 39 exhibits and EEOC’s 10/16/2017 right-to-sue letter, EEOC charge form and Petitioner’s rebuttal filed with EEOC. All of the evidence described above and stated in her pleadings was omitted, or misrepresented or misinterpreted.

Petitioner's complaint was prejudicially dismissed and the case was closed on June 26, 2018 without pre-direction by false reasons and affirmed by the Fourth Circuit panel-leading judge who directed judgment to dismiss Petitioner's appeal without allowing her to have an oral argument and a hearing on January 24, 2019. These prejudicial actions violated Federal civil and appeal rules and procedures and deprived her property, Due Process and Equal Protection rights of two clauses under Fourteenth Amendment to U.S. Constitution.

### **JURISDICTION**

The final judgment of the Fourth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and the Petitioner did not receive a response regarding the status of the motion to reconsider recalling the mandate (which was filed on May 6, 2019 and is pending) from the Fourth Circuit. This Court therefore has jurisdiction to entertain and grant a request for a recall and stay of the mandate pending filing of a petition for certiorari under 28 U.S.C. § 2101(f). Additionally, this Court has jurisdiction to entertain and intervene the Fourth Circuit's pending recalling mandate of their judgment (1/24/2019) pursuant to its authority in aid of its jurisdiction under 28 U.S.C. § 1651(a) and the Congressopnal power of enforcement.

### **REASONS FOR GRANTING STAY AND INJUNCTIVE RELIEF**

Because the panel-leading judges chose unpublished opinion to affirm the District Court's dismissal of Petitioner's claims, Petitioner requested to make their unpublished opinion public. As this is still pending, Petitioner has to make her

argument based on a few sentences of the curiam opinion combined with the reasons made by District Court's memorandum and affirmed by the panel-leading judge to direct Fourth Circuit's judgment.

**I. The existence of clear and convincing evidence of retaliation and prejudice indicates there is a reasonable probability that Certiorari will be granted.**

*A. Petitioner's pleadings of EEOC's right-to-sue letter and related reports were refused for consideration as the part of pleadings and factual bases leading to the Fourth Circuit panel judges leader's affirmation (via Curiam Opinion) of the reason of "lack of subject-matter jurisdiction" stated by District Court to dismiss Petitioner's appeal.*

**1. Facts:**

Petitioner wrote to District Court (11/2/2017) that "I received EEOC's conclusion and letter for right to sue for my second charge (dated 10/16/2017)" (see Appendix-6, COA4-doc#4, ECF#1). She updated reports to District Court (12/8/2017) that she held EEOC's permission letter because she requested EEOC to reconsider their conclusion and she also requested to file second amendment with newly discovered evidence upon receiving EEOC recordings on 3/19/2018, and 3/22/2018 (Appendix #7.1&22) 5/11/2018. Then, she provided the clear and convincing evidentiary pleadings to District Court with EEOC's 10/16/2017 right-to-sue letter, EEOC charge form as well as her rebuttal filed with EEOC through "Plaintiff's response to defendants' motion to dismiss" after she received EEOC's rejection of reconsideration following her filing complaints (Appendix-8, COA4-doc#4, ECF#20, related exhibit#1).

However, the District Court (6/26/2018) falsely stated in the order that “Plaintiff’s statutory employment discrimination claims arising solely from her alleged September 2, 2014 charge of discrimination, or based on claims not presented to the Equal Employment Opportunity Commission at all are dismissed pursuant to Rule 8 and Rule 12 (b)(1) for lack of subject-matter jurisdiction”. Some of these related records (Exhibit#3,4&5) transmitted by District Court were missing and some records were altered in the Fourth Circuit docket records (COA#4, 15&23). The questions related to “Due Process of Law” during judicial proceedings and concerns about the deletion and changes in the docket records were addressed in “Supplemental Informal Brief” (Appendix-14.2, filed 1/16/2019, COA4-doc#25) in addition to her letter on 9/4/2018 (COA#7), “Informal Brief”(COA#10), and “Motion for Concerns of the Docket Records” with exhibits (10/22/2018, COA#17). Petitioner did not receive a response for this motion under Fed. Rules of Appellate Procedure Rule 27, yet, she was denied as moot for this motion as stated in the Curiam opinion in spite of that this motion and related exhibits were referred and stated in her “Informal Reply Brief” and “Supplemental Informal Brief” (Appendix-23&25, COA4-doc#23&25). The District Court’s exclusion of EEOC’s right-to sue letter as part of Petitioner’s pleadings and factual bases to dismiss her claim by faulty reason “lack of subject-matter jurisdiction” was affirmed by the panel-leading judge and stated in the curiam opinion.

## 2. Arguments:

First of all, question is whether evidence of EEOC's permission to sue and her request of second amendment filed with District Court between 11/2/2017 and 3/22/2018 (as described above) should be included or excluded from both the District Court and Fourth Circuit' review as pleading including supplemental exhibits for her exhaustive administrative remedies and request for second amendment and should be considered as factual bases.

"[I]n the light of Rule 7(a) pleadings include only the complaint, the answer and the reply." (*Rekeweg v. Federal Mut. Ins. Co.*, 27 F.R.D. 431, 4 Fed. R. Serv. 2d 605 (N.D. Ind. 1961))

"[F]ed. R. Civil P. Rule 7. Pleadings allowed; form of motions ad other papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;..."

In addition, Federal Rule of Civil Procedure Rule 15 Amended and Supplemental Pleadings (d) instructed Court:

"[S]UPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense."

*Ruth v. State Arkansas DWS* No. 17-1457 (8<sup>th</sup> Cir. 2017) claim stated based on 29 C.F.R. 1601.12(b):

“ [A] change may be amended to cure technical defects, including defects or omissions, including failure to verify the changes, or to amplify allegations therein.”

Whether EEOC's 10/16/2017 right-to sue letter enclosed as the exhibit #1 in the Petitioner's response to Respondents' motion to dismiss should be included as the factual basis for the District Court's decision of granting Defendants' motion to dismiss, a related case shows that it should be considered in *School Bd. of Manatee County, Fla. v. L.H. ex rel. D.H., M.D.Fla.*2009, 666 F.Supp.2d 1285. It states that portions of administrative record which were attached to counter-plaintiffs' response to motion to dismiss, and which were central to parties' claims and undisputed, became part of the pleadings for purposes of motion to dismiss and could be considered by court without conversion of motion to dismiss into one for summary judgment. Similarly, once district court's subject matter jurisdiction has been questioned, it is appropriate for district court to look beyond jurisdictional allegations of complaint and to view evidence submitted by plaintiff in response to motion to dismiss. *U.S. for Use of Chicago Bldg. Restoration, Inc. v. Tazzioli Const. Co., N.D.Ill.*1992, 796 F.Supp. 1130.

Therefore, according to Rule 7(a) Pleadings Allowed, and 15 (d) Supplemental Pleadings, and Rule 29 C.F.R. 1601.12(b), and other federal district courts and circuit courts' reports, the statement and proof of Petitioner's exhaustive administrative remedies described above should not be neglected and excluded by

the District court and the Fourth Circuit for their review and fact-findings. There was no enough justification or reason for “lack of subject-matter jurisdiction” to derive their dismissal judgments.

Second, to the challenge of subject matter-jurisdiction, “[W]here subject-matter jurisdiction is challenged, it is appropriate for the trial court to weight the evidence and resolve factual disputes as necessary to determine if the court has jurisdiction. In cases where the factual issues are central to jurisdiction and the merits of the underlying case, the trial court must assume jurisdiction and hear the case.” (*Montez v. Department of Navy*, 392 F. 3d 147, 60 Fed. R. Serv. 3d. 395 (5<sup>th</sup> Cir. 2004). “[T]he District Court should see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in plaintiff’s complaint are taken as true for purposes of the motion; look beyond the pleadings to decide factual matters relating to jurisdiction.” *Compagnie Maritime Marfret v. San Juan Bay Pilots Corp.*, D.Puerto Rico 2008, 532 F.Supp.2d 369. In this case, the District Court not only excluded the Petitioner’s pleadings which contains evidence of EEOC’s right-to-sue letter and her statement in cover letter to the clerk in “Plaintiff’s response to Defendants’ motion to dismiss”, but also refused to provide her a chance for clarification, amendment and jury trial to hear her dispute regarding the fact of exhaustive administrative remedy by dismissal and closure of her case without pre-direction.

Third, for Appellate Courts’ discretion, Federal Rules Digests under Rule 12b.2, Objections as to Jurisdiction, Venue and Process states:

“[W]here a district court grants a defendant’s motion to dismiss for lack of subject–matter jurisdiction, an appellate court will review the district court’s factual findings for clear error and its legal conclusions de novo. The plaintiff bears the burden of providing subject-matter jurisdiction by a preponderance of the evidence, in a motion to dismiss for lack of subject-matter jurisdiction. After construing all ambiguities and drawing all inferences in a plaintiff’s favor, a district court may properly dismiss a case for lack of subject matter jurisdiction if it lacks the statutory or constitutional power to adjudicate it.” The district court’s dismissal was vacated and the case was remanded for further proceedings in case: *Aurecchione v. Schoolman Transp. System, Inc.*, 426 F. 3d 635, 63 Fed. R. Serv. 3d 283 (2d Cir. 2005). “[I]n an action stemming from the termination of a government contract to supply uranium extrusion, the district court’s dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) would be reviewed under the clearly erroneous standard of review. In this action, the district court was called upon to weight the evidence concerning the jurisdiction presented by the parties and decide jurisdictional facts. Where a district court’s ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court’s fact-findings unless they were clearly erroneous. However, review of the district court’s application of the law to the facts would be reviewed de novo.” *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F. 3d 1125, 34 Fed. R. Serv. 3d 1288, 1996 FED App. 0099P (6<sup>th</sup> Cir. 1996).

It is inappropriate for the District Court to dismiss Petition's complaint without prejudice under Rule 8 and Rule 12 (b)(1) by ignoring the evidence and concluding "she does not allege that she ever received a right-to-sue letter" and "lack of subject-matter jurisdiction". Nor is it proper for the District Court to dismiss her claims with prejudice under Rule 8 and 12 (b)(6) by mistakenly stating the dismissal "due to her failure to allege proper exhaustion of her administrative remedies" and by incorrectly decides the facts with the exclusion of EEOC's right-to-sue letter, her (11/2/2017) cover letter to the District Clerk and biased speculation (Appendix 6.1&8). Nonetheless, the panel-leading judge at Fourth Circuit (via curiam opinion)excluded clear and convincing evidence (EEOC's right-to-sue letter) affirming the District Court's biased speculation that Petitioner did not exhaust administrative remedies (which is patently untrue) depriving her property right without mediation, a trial and or a hearing.

*B. The Congress' abrogation of State's Eleventh Amendment immunity to ADA claim and the State's waiver of its sovereign immunity under 504 Rehabilitation Act, 29 U.S.C. §794 (b) due to Respondents' receipt of federal CDC funding were prejudicially neglected when Panel-leading judge affirmed the District Court's dismissal reason for State's immunity to Petitioner's suit of disability-retaliatory termination without mediation against her EEOC charge under ADA to dismiss Petitioner's appeal.*

1. Facts:

As the Petitioner's pleadings and background indicated, Petitioner's claims of the retaliation includes that her position and seniority job duties in federal CDC 1305 funding program were deprived and interfered with by Ms. Barra although

Petitioner was the only epidemiologist with 100% of time devoted to CDC-1305 funds program (Appendix-19, COA4-doc#4, ECF#4)<sup>4</sup>. Consequently, Petitioner was rejected to be accommodated working under other supervisor as the State Medical Director's recommendation and was terminated without mediation by falsely stating that the disabled employee with accommodation was unable to do essential job. Furthermore, in Petitioner's pleadings (via "Plaintiff's response to defendants' motion to dismiss" and "Supplemental response in opposition to defendants' motion to dismiss" (Appendix-19.3&19.4, COA4-doc#4, ECF#20&30), Petitioner addressed the Congress's abrogation of State's immunity to ADA claims and her right to be protected under the Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a because the Respondents' receipt of CDC 1305 funds means that Respondents waived their Eleventh Amendment Immunity to law suits under ADA.

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<sup>4</sup> After having received the psychiatrist's notice sent by Petitioner, Ms. Barra requested Human Resource to have Petitioner's workability evaluation on May 19, 2014 by alleging the impact the office DCD 1305 program activities when Petitioner was sick leave in home for two weeks. It is not appropriate for Ms. Barra to deny her receipt of psychiatrist's notice provided by Petitioner (who also always Cc. the psychiatrist's notice to the office director), and her awareness of Petitioner's mental illness since April 2014 to cover her disability discriminatory and retaliatory behaviors such as frequent calling, emails and even creating disciplinary action for cyber issue (because of Petitioner previous report to managers via email regarding Ms. Barra's harassment and retaliatory interference with her seniority job) while Petitioner was sick leave.

However, the Congress' abrogation of State's Eleventh Amendment immunity to ADA claims and evidence of Respondents' waiver of state sovereign immunity were neglected when the panel-leading judge affirmed (via Curiam Opinion) the District Court's dismissal decision for State's immunity to her ADA claim even though the judge acknowledged that the District Court prejudicially adopted Respondents' reasons to dismiss Petitioner's ADA claim by stating that Congress has not abrogated Eleventh Amendment Immunity for ADA or ADEA, and Petitioner does not assert a Rehabilitation Act claim in her complaint, or allege that State has accepted qualifying federal funds. This faulty reason was affirmed by the panel-leading judge and stated in the Curiam opinion

## 2. Arguments:

In fact, the House report on the ADA indicated, “[i]nconsistent treatment of people with disability by state or local government agencies is both inequitable and illogical”. (H.R. Rep. No. 101-485 (II), at 37 (1990)). “[T]he Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid” (42 U.S.C. §12202).

Based on the analyses of *Kimel* 528 U.S. 62, 120 S.Ct. 631, 145 I.Ed. 2d 522 (2000) and others opinions for ADEA and ADA claim, the court “[h]old that the ADA validly abrogated Eleventh Amendment Immunity so that Plaintiff's ADA claims

against the defendants are not barred by the immunity”. *Cisneros v. United States of America, Intervenor*. No. 98-2215, Part II. (10<sup>th</sup> Cir. 2000).

The Fourth Circuit panel-leading judge demanded to not publish their opinion but used several sentences of curiam opinion to affirm District Court’s dismissal reason (such as “State’s immunity to Petitioner’s ADA claim”) without indicating how Respondents’ immunity to Petitioner’s ADA claim regarding termination without mediation or hearing, (because Respondents’ alleged that disabled Petitioner with accommodation was unable to do basic job which was not true), (Appendix 4.2&4.3) can be outside of the controlling authority of Congress’ clear abrogation of State’s Eleventh Amendment Immunity in ADA suit.

In addition, Section 504 of the Rehabilitation Act provides: “[n]o otherwise qualified individual with a disability in the United States as defined in section 705(20) of this title shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). The term “program or activity” is defined to mean all of the operations of “a department, agency, special purpose district, or other instrumentality of a state or of a local government,” or “the entity of such state or local government that distributes such assistance and each department or agency... to which the assistance is extended”. (29 U.S.C. § 794 (b), incorporating 42 U.S.C. § 2000d-4a).

According to the 504 Rehabilitation Act (29 USCS § 794), State is not immune by virtue of Eleventh Amendment from suit brought against it under ADA since the Act contains express waiver of Eleventh Amendment immunity, and by accepting federal funds, state has accepted waiver. *Clark v California Dep't of Corrections*, (1997, CA9 Cal) 123 F3d 1267, 25 ADD 146, 97 CDOS 6894, 97 Daily Journal DAR 11140, 7 AD Cas 292, cert den (1998) 524 US 937, 141 L Ed 2d 711, 118 S. Ct. 2340, 8 AD Cas 480. Here, when the panel-leading judge affirmed the District Court's decision of granting Respondents' motion to desmiss Petitioner's ADA claim, they neglected the evidence that Respondents failed to show that any and all of Petitioner's exhibits from different resources (Appendix-19, COA4-doc#4, ECF#4, related exhibit #9, 21, 22, 26 &29, and ECF#20, related exhibit#3) related to the MDH's activities involving Federal CDC 1305 program funds did not exist, or were invalid, or that Respondents never received CDC 1305 program funds. Furthermore, the panel-leading judge ignored that Respondents failed to demonstrate that they had not waived State's immunity when they received Federal CDC 1305 program funds. Finally, panel-leading judge neglected that Respondents denied their waiver of State's sovereign immunity despite their receipt of CDC-1305 program funding, but failed to prove why that the federal CDC 1305 program funds, (which was received and used by Respondent and many co-workers and County Health Department in Maryland, as well as received by many other States of the United States), addressed by Petitioner, does not qualify for "the certain federal funds", which is defined to mean that all of the operations of "[a]

department, agency, special purpose district, or other instrumentality of a State or of a local government,” or “[t]he entity of such State or local government that distributes such assistance and each department or agency... to which the assistance is extended”. (504 Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a).

It is important for the court to review “[d]ocuments integral to the complaint upon which the plaintiff relied in drafting the pleadings, as well as any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.” *Locicero v. O’Connell*, S.D.N.Y.2006, 419 F.Supp.2d 521. Therefore, in this case, when the District Court is faced with a motion to dismiss a pro se complaint alleging violations civil rights, the Court should not omitted the fact (ECF No. 4 and related exhibits, especially Exhibit#9, 21, 22 & 26) that MDH receives federal funding support, such as through the CDC-supporting 1305 program. Specifically, Petitioner was only the epidemiologist with 100% of time under seniority system devoted to the CDC-1305 program (Appendix-19, COA4-doc#4, see ECF No. 4, *id.* p.8 under B, and exhibit# 9, 21, 22&26) but was interfered with and consequently terminated without mediation by replacement of her with Ms. Barra due to rejection of accommodation based on pretext “undue hardship” (Appendix-12). There are no merits for Fourth Circuit to affirm the District Court’s dismissal of Petitioner’s claim of ADA by denying Respondents’ wavier of State’s sovereign immunity to ADA claim according to the Section 504 of Rehabilitation Act. Related State employees’ ADA complaint cases granted by

Federal Courts in favor to state's employees in *James Bridgewater v. Michigan Gaming Control Board* (282 F. Supp. 3d 985, 2017) and *Timothy Dugger v. Stephen F. Austin State University* (232 F. Supp. 3d 938, 2017) were addressed in Petitioner's response to respondents' motion to dismiss (Appendix-19.3, COA#4, ECF#20, *id.* p. 24-26 & exhibit#3).

Furthmore, State labor agency was not entitled to constitutional immunity from disability discrimination action in federal court since the agency waived its immunity by accepting federal financial assistance even though the employee worked in division which did not receive federal funds, and waiver encompassed all of agency's operations regardless of use of federal funds. *Arbogast v Kansas* (2015, CA10 Kan) 789 F3d 1174, 31 AD Cas 1245.

Therefore, dismissal of Petitioner's complaint should not be affirmed because the District Court falsely stated that Petitioner "has failed to properly exhaust her administrative remedies and Defendants are immune from many of her claims", (COA4-doc#4, ECF No. 32, *id.* p.13, 2<sup>nd</sup> paragraph, L6-7) in spite of that Petitioner has already addressed MDH CCDPC's receipt of CDC funding, (which Petitioner's seniority position worked in and Section 504 of Rehabilitation Act) in her complaint and response to Defendants' motion to dismiss (which is the part of pleading based on Rule 7(a)). (See, ECF No. 4, Exhibit 9, 21, 22&26). Thus, Respondents is not entitled to immunity from Petitioner's ADA suit regarding the retaliatory depreservation of her property right for her EEOC charge of disability discrimination and retaliation in addition to other charges under Title VII and ADEA in Federal

courts. It needs to be reversed that Fourth Circuit's judgment in favor to Ms. Barra and Respondents directed by panel judges' prejudicially ignoring the facts and refusing to apply Congress's abrogation of State Eleventh Amendment and 29 U.S.C. §794(a)&(b), incorporating 42 U.S.C. §2000d-4a deprives Petitioner's property right and violates Due Process and Equal Protection rights of two clauses of Fourteenth Amendment to U.S. Constitution.

Furthermore, Petitioner's pleadings established that Ms. Barra's motivating termination of Petitioner's seniority job (supported by the CDC funds) was clear and convincing evidence of retaliation against her ADA complaint in addition to her charges filed with EEOC under Title VII and ADEA. Therefore, there is no merits for the panel-leading judge to affirm the District Court's dismissal Petitioner's appeal for "State's immunity to her ADA claim" because Respondents' adverse actions retaliated against Petitioner's EEOC charge (stated in Petitioner's ADA complaint with enormous evidence, COA4-doc#4). The Fourth Circuit' judgment is significant "congruent and proportional" to identified constitutional violations based on Congressional abrogation of State's Eleventh Amendment immunity to ADA and Due Process and Equal Protection two clauses of Fourteenth Amendment of U.S. Constitution.

*C. There were no merits when the panel-leading judge affirmed (via curiam opinion) the District court's reason of "failure to state claim" to dismiss Petitioner's appeal despite acknowledging that the District Court failed to take their burden to determine facts under Rule 8(a)(1&2) and Rule 12(b)(1&6); Respondents failed to provide evidence of termination with*

*prior mediation, and any legitimate non-retaliatory reasons for the adverse actions under McDonnell Douglas Scheme.*

1. Facts:

Petitioner's complaint demonstrated the damages from a series of progressive retaliations against Petitioner's charges filed with EEOC because of disability, racial, ethnicity/national origin and age discrimination and retaliation she had endured. It included willful unequal/under payment, disciplinary actions, rejection of disability accommodation, constructive discharge, and employment termination without mediation. These damages clearly demonstrate that Petitioner is entitled to the requested relief. These adverse actions and damages, however, were either omitted, misrepresented or misinterpreted by the District Court. The major harassment, discriminatory and retaliatory actions that caused Petitioner's health problems and deprivation of her property right without mediation were taken or motivated by Ms. Sara Barra, but her name was miswritten as "Sara Barry" in the District Court's memorandum. The panel judges leader at Fourth Circuit (via curiam opinion) affirmed the District Court's false reason of "failure to state claim" to dismiss Petitioner's appeal despite acknowledging acknowledged that the District Court failed to take their burden to determine facts under Rule 8(a)(a&2) and Rule 12(b)(1&6); Respondents failed to provide an evidence of termination with prior mediation, and did not provide any legitimate non-retaliatory reasons for their adverse actions under McDonnell Douglas Scheme as described above (Appendix-4&7, COA4-doc#4,10&23, Petitioner's major complaint

with enormous evidence of 39 exhibits as well as her “Informal Brief” and “Informal Reply Brief” filed with Fourth Circuit).

## 2. Arguments:

Under the McDonnell Douglas scheme, if defendants submit no evidence of any legitimate non-retaliatory reason for its adverse actions alleged by Plaintiffs, district court should not dismiss Plaintiff's claims. *Medlock v. Ortho Biotech Inc.*, 164 F. 3d 545, 550 (10<sup>th</sup> Cir. 1999); *EEOC v. Avery Dennison Corp.*, 104 F. 3d 858, 861 (6<sup>th</sup> Cir. 1997). Here, the panel-leading judge dismissed Petitioner's appeal after neglecting the causal connection and retaliatory evidence provided by Petitioner through “Informal Brief” and “Informal Reply Brief” and related exhibits. The panel-leading judge affirmed the District Court's reason “failure to state claims” to dismiss petitioner's appeal but failed to determine whether the District Court took the burden to prove that Respondents' disciplinary action, rejection of accommodation, constructive discharge and termination without mediation were not adverse action under McDonald Douglass Scheme in granting Respondents' motion to dismiss. It is not appropriate to neglect the causal connections between Petitioner's charges of age, racial/ethnicity and disability discrimination and retaliation filed with EEOC and consequent damages done to deprive Petitioner's property right by Ms. Barra and Ms. Johnson (see background).

Under Federal Rules Digests Rule 8(a)(1), “[i]t is not essential that a complainant set forth the statutory basis for the court's jurisdiction in order for the

court to assume jurisdiction, if the facts alleged provide a basis for the assumption of jurisdiction. Similarly under Rule 8(a)(2), it is not necessary that plaintiff set forth the legal theory on which he relies if he sets forth sufficient factual allegations to state a claim showing that he is entitled to any relief which the court may grant. While it may impose a heavy burden on the trial court to require it to search a complaint for any claim which may be stated therein, it is a burden which must be undertaken. A district court has the duty under Rule 8(a) to read a complaint liberally and to determine whether the facts set forth justify it in taking jurisdiction on grounds other than those pleaded, if the stated grounds do not provide jurisdiction, and also whether the facts set forth state a claim for relief on a basis other than the statutory basis pleaded." *Rohler v. TRW. Inc.*, 576 F. 2d 1260, 25 Fed. R. Serv. 2d 581 (7<sup>th</sup> Cir. 1978).

In conflict with this series of directives, the District Court abused and failed to take this heavy burden under Rule 8 (a) by ignoring all of the evidence Petitioner provided in her pleadings. The panel-leading judge prejudicially affirmed District Court's dismissal in spite of knowing the District Court's failure to take the appropriate burden required to lead to dismissal of Petitioner's appeal. Although the facts were provided in Petitioner's pleadings, the District Court used several wrongful methods to misrepresent, misinterpret and omit facts (see below). Instead, they alleged Petitioner's failure to state claims based on false information leading to the prejudicial decision to dismiss Petitioner's claims and depriving Petitioner's property right and constitutional rights.

The District Court misrepresented Petitioner's claim of the cause of the willful underpayment and unequal payment as "some form of tort" instead of the age and racial discriminatory deprivation of MDH and MDBM approved Petitioner's reclassification. In addition, the District Court went outside the pleading to consider false information, which led to the confusion, misrepresentation and misinterpretation of Petitioner's claims. For example, the District Court manipulated the fact that the Respondents (both Department of MDH and MDBM) approved in March 2011 reclassification of Epidemiologist III for Petitioner, that was applied for by the office director in 2010 specifically for Petitioner as that "she (Petitioner) was told she would be promoted, but HR application process stalled, largely because various supervisors sabotaged...Ms. Barry (Barra) promoted a younger, white woman instead of Plaintiff" (Appendix 10, COA4-doc#4, District Court's memorandum, *id.* p. 2, L10 and L12). Both parties (Respondents and Petitioner) never made these statements, and there were no relevant records in the District Court's docket as the District Court's memorandum made.<sup>5</sup> The retaliatory

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<sup>5</sup> When CCDCP former director, Dr. Audrey Regan's application of reclassification for Petitioner to be Epidemiologist III was approved by Defendants (MDH and MDBM) in March 2011, there was no any new supervisor recruited into CCDPC. Ms. Barra did not have an authority to promote any employee. However, Dr. Maria Price denied herself initial signed (in Jan 2011) the Petitioner's Epidemiologist III position-linked form MS-22 (per HR's instruction) which was completed reflecting Petitioner's increased responding job to be associated and matched with the DBM office of Personnel Service and Benefits' MS-44 (Supervisory Questionnaire for Subordinate reclassification Request) and MS-2024

downgrading of Petitioner's performance evaluation with the improvement memorandum towards "unsatisfactory" leading to the continuous unequal payment and willful underpayment and wrongful termination was omitted and misrepresented in the District Court's memorandum as that "Ms. Barry (Berra) amended Plaintiff's self-evaluation from 'outstanding' to 'satisfactory', (Appendix-23, COA4-doc#4, ECF No. 32, *id.* p.2, Section I, L3-6, L11-12). In fact, "outstanding" was reported 2012 MDH HR's personnel record and signed by MDH managers but not Petitioner's self-evaluation of performance. This clearly indicated that the panel-leading judge's affirmation of the District Court's dismissal reasons and direction of the Fourth Circuit's judgment lacked factual and legal grounds.

"[B]ecause of the differing standards for evaluating the evidence under rule 12(b)(1) and 12(b)(6), it was a significant procedural error the issue in terms of subject matter jurisdiction. Under Rule 12(b)(1), the court is free to weight the evidence and satisfy itself as to the existences of its power to hear the case; under Rule 12(b)(6), all of plaintiff's allegations will be taken as true and all inferences favorable to plaintiff will be drawn. Further, if the court considers evidence beyond the pleadings in a 12(b)(6) motion, the motion shall be treated as one of summary judgment and disposed of as provided in Rule 56, and summary judgment cannot be

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(Request for Position Classification Study) that MDH and DBM had approved. In Jan. 2012, Dr. Prince discriminately gave the reclassification Epidemiologist III Position Identification Number (which was approved for Petitioner) to Ms. Barra and caused willful underpayment and unequal payment. Dr. Prince left CCDCP in March 2013.

granted unless there is no genuine issue of material fact.” *Boyle v. Governor’s Veterans Outreach & Assistance Center*, 925 F. 2d 71, 18 Fed. R. Serv. 3d 1099 (3d Circ. 1991). Here, the District Court failed “to weight the evidence and satisfy itself as to the existences of its power to hear the case” when they dismissed Petitioner’s claim for “lack of subject matter under Rule 12(b)(1)”. Nor did the District Court under Rule 12(b)(6) for that “all of plaintiff’s allegations will be taken as true and all inferences favorable to plaintiff will be drawn”, when stated Petitioner’s claim as “failure to state her claim” in their memorandum and order.

Further, the District Court simply adopted all allegations made by Respondents’ motion to dismiss (1/3/2018) as well as their reply (5/31/2018) to Petitioner’s response. It was beyond the Petitioner’s pleadings, because Petitioner clearly objected those false statements in her response filed with Court on March 22, 2018, and May 11, 2018, (Appendix 19, COA4-doc#4, ECF#20). Respondents failed to file summary judgment , yet, the District Court made their decision to grant their motion to dismiss Petitioner’s claim for failure to state claim, and close her case without pre-direction. Thus, the District Court failed to treat the Respondents’ motion to dismiss (which Petitioner objected) based on Rule 12(b)(6) “as one of summary judgment and disposed of as provided in Rule 56, and summary judgment cannot be granted unless there is no genuine issue of material fact”. Therefore, it has no merit that panel-leading judge affirmed District Court’s memorandum and order for granting Respondents’ motion to dismiss Petitioner’s claim and closing her case by false reasons which were adopted from the

Respondents motion to dismiss in spite of that Petitioner objected it in her response to Respondents' motion to dismiss without conversion of motion to dismiss into one for "Summary Judgment".

In addition to utilizing false information provided by the Respondents, misrepresentation, misinterpretation and going outside pleading, with which the District Court twisted the Petitioner's claims regarding causes and damages, the District Court also omitted the evidence. Despite Petitioner's proof of sufficient factual matter of Respondents' retaliation against Petitioner's internal discriminatory complaint and her first discrimination and retaliation charge of ADEA and Title VII filed with EEOC in Nov. 2013 by her Amended Complaint (Appendix-7, COA4-doc#4, ECF No. 4, *id.* p.6) with the bold subtitle "**15) Ms. Yu's reports to MDH Office of Equal Employment Program ("OEEP") director triggered disciplinary action**", yet the subsequent cause connection of Ms. Barra's retaliatory disciplinary actions were omitted which include Petitioner's reports of Ms. Barra's harassment and national origin discrimination and her clarifications for Ms. Barra's frequent abuse and false confusion made to managers (Appendix-21). Ms. Barra forbade Petitioner from seeking next level manager's help by creating internal consulting memorandum as the first step of disciplinary action, and by criticizing Petitioner's protected activities as "disruptive behavior and cross chain of command" to retaliate against her internal grievance and reports, but these cause of disciplinary actions and adverse actions were hidden. (Appendix-21, COA4-doc#4). Additionally, Ms. Barra harassed Petitioner by

calling, e-mailing, and requesting mitigation meetings for disciplinary actions and accusing her protected activities such as reports to managers and her union representative via office email system as violation of cyber policy for reason to give her disciplinary action even during Ms. Yu's sick leave (Appendix-21, COA4-doc#4, ECF#20). Ms. Barra's discriminatory and retaliatory deprivation of Petitioner's seniority rights and jobs<sup>6</sup> was misrepresented as Ms. Barra "tampered with some types of HR document, an 'MS-22', that was supposed to reflect Plaintiff's employment background" (Appendix-24, COA4-doc#4, ECF No. 32, *id.* p2, 2<sup>nd</sup> paragraph, L8). Moreover, the evidence of harm to Petitioner even after she was terminated on 11/3/2014 by escalated retaliatory interference with EEOC's investigation on 4/19/2017 is shown in Appendix-11, COA4-doc#4, ECF No. 4, *id.* p.12, under damages III. see related new evidence shown in ECF No. 53, Exhibit *id.* p.6, 15-18 of 30). This harm was omitted. Instead, it was misrepresented and misinterpreted in the District Court's memorandum (COA4#4, ECF No. 32, *id.* p. 10, second paragraph, L6-7) by stating "Plaintiff does not allege that her employer acted to her harm her after Nov. 3,

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<sup>6</sup> HR Position (job) description form MS-22 is developed prior to the recruiting process based on the Department's specific request to hire an employee who has their required educations and experiences. If employees are transferred to new job position, or application of reclassification for higher grade rank of the position, their previous position (job) form MS-22 will be replaced with their new position form MS-22 in their personnel file per MDH and MDBM HR policy. The statement of Ms. Barra tampered MS-22 "reflect employee's background" is faulty reason to cover Ms. Barra's discriminatory and retaliatory deletion of Petitioner's job duties in form MS-22 and derivation of Petitioner's seniority right of her job position in CDC funding program (Appendix 21.2&23).

2014.”

In addition, the District Court denied Dr. Robert Toney as State Medical Director<sup>7</sup> who made three workability evaluations between June and Oct. 2014 and recommended MDH to accommodate Petitioner for working under another supervisor. The recommendation was also made by an psychiatrist and independent psychological Institution regarding Petitioner’s suffering from workplace stress, major depressive disorder, anxiety, and posttraumatic stress disorder (Appendix-20, COA4-doc#4, ECF No. 4, exhibit# 4&28, and ECF No. 17, exhibit from the decision of Social Security Administration Retirement, Survivors and Disability Insurance vs. ECF No. 32, p. 3, L3-7 and foot note #4). The District Court misrepresented and omitted the diagnoses, cause and damages that Dr. Tony and Petitioner clearly stated (, ECF No. 4, p7-11) with the words “Plaintiff does not clearly allege what her disability is, but it appears to be essentially work place stress and anxiety” (Appendix,7.3&20, COA4-doc#4, ECF No. 32, *id.* p.3, L5-6).

Furthermore, Petitioner provided Respondents, District Court and Fourth Circuit sufficient facts to constitute the causes and actions of claims filed for her second charges with EEOC (9/2/2014), and the Respondents’ retaliation against this

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<sup>7</sup> The Court’s memorandum denied Dr. Toney was the State Medical Director when he provided MDH the workability evaluation (ECF No. 32, p.3, L2-3 and footnote #4). Yet, Defendants never objected that Dr. Toney was the State Medical Director and his diagnoses and evaluations along with the conclusion from independent mental health Institution even though Dr. Toney may not be the State Medical Director in 2018. “Impression” is usually used by a doctor to describe their opinion for the diagnoses in the case history.

charge started on next day 9/3/2014 after Ms. Johnson received it (Appendix-7&12, COA4-doc#4, .id. p.10, L2-7, Amended Complaint, ECF No. 4, Exhibit#32). It is not proper to state in the District Court's memorandum "Plaintiff filed a second Charge of Discrimination on September 3, 2014. (*id.* p.10.) it is unclear from Plaintiff's complaint what the substance of this Charge was" (ECF No. 32, p.3, second paragraph, L5-6) by ignoring the clearly written sub-title and fair notice about the factual matter of the cause and claims regarding Petitioner's second charge under Title VII, ADA and ADEA (Appendix-7.2&7.3, COA4-doc#4). In addition, immediate retaliation taken by MDH Ms. Johnson, HR and Ms. Barra on 9/3/2014 when they received Petitioner's charge on 9/2/2014 was omitted (Appendix-7&9, COA4-doc#4, ECF No. 4, L10, exhibit#32, Petitioner's rebuttal in her response to defendants' motion to dismiss, ECF No. 20, exhibit#2&3).

The statements in District Court's memorandum indicated above did not cite the key facts Petitioner provided in her Amended Complaint and related exhibits as the District Court stated (Appendix-10, COA4-doc#4, ECF No. 32, p.2, footnotes #2) "The facts are recited here as alleged by Plaintiff", nor did the memorandum reflect the District Court's docketed records as shown in both Petitioner's complaint including related exhibits and Defendants' motion. It demonstrates the biased position that the Officer or attorney who prepared the Memorandum (for Chief Judge Bredar to sign) adopted statements directly from the Respondents' motion. More importantly, the omission of facts and inappropriate statements described above influenced the actual nature of the District Court's responsive ruling in favor

of Ms. Barra and the Respondents to dismiss Petitioner's claim for "failure to state claim" under Rule 8 and 12 (b)(6) with prejudice (ECF No. 32&33).

Obviously, the panel judges at Fourth Circuit erroneously affirmed the District Court's dismissal reason "lack of subject-matter jurisdiction" under Rule 12(1) even they acknowledged (based on the Petitioner's informal brief) the District Court's failure to include EEOC's right-to-sue letter, to weight the evidence, and to satisfy itself as to the existences of its power to hear the case (as described above in part I). Also, they erroneously refused to provide Petitioner a chance to dispute her case with facts via an oral argument. Furthermore, they improperly affirmed the District Court's dismissal for "failure to state claim" under Rule 12(6) without drawing all reasonable inferences in Petitioner's favor even though the clear and convincing evidence of Congress' abrogation of State's immunity to ADA claim regarding deprivation of property right, State's waiver of sovereign immunity as receipt of CDC funds based on the Section 504 Rehabilitation Act, and the causal connection are stated in petitioner's pleadings and her informal brief. Therefore, there is a reasonable probability that certiorari will be granted because it has no merit that the Panel-leading judge made the errors and abused their duties to affirm the District Court's faulty reasons and biased dismissal without pre-direction and to direct the Fourth Circuit's judgment for prejudicial dismissal of Petitioner's appeal.

**II. It is fairly prospected that majority of the Court will vote to reverse the judgment below because the panel judges' direction for Fourth Circuit to dismiss Petitioner's appeal conflicts relevant decisions made by U.S. Supreme Court and other federal**

**Court of Appeals and violates the privileges “secured or protected” by the Congressional power of enforcement.**

1. Facts:

Petitioner meets standards of exhaustive administrative remedies prior to filing her complaint in District Court. Her claims are related to violation of 42 U.S.C. §2000e-5(f)3, ADA, Title VII, ADEA, 42 U.S.C.§1983 as well as Fair Labor Standards Act (“FLSA”) and National Labor Relations Act (“NLRA”). The proof of Petitioner’s exhaustive administrative remedies and citation of Congressional abrogation of State’s immunity to ADA claim (especially related to the deprivation of employee’s property right without mediation and a hearing) and the Section 504 Rehabilitation Act with the evidence of the Respondents’ receipt of Federal CDC funds are the part of Petitioner’s pleading filed with the District Court prior to their dismissal of her claim.

Fourth Circuit docket record includes that Petitioner’s writing report to the District Court Clerk Felicia C. Cannon (Appendix-6.1, 7.1&2.2, COA4-doc#4, 11/2/2017, 12/8/2017&3/19/2018) requested to amend new evidence upon her obtaining EEOC’s recording file via FOIA request. Also, Petitioner emphasized the evidence in her “Informal Brief” and “Petition for rehearing and rehearing en banc” (filed with the Fourth Circuit) that Respondents did not provide evidential mediation prior to termination and failed to provide any legitimate non-retaliatory reason for their adverse actions. However, the panel-leading judges affirmed the District Court’s reasons of “lack of subject matter jurisdiction”, “failure to state claims” and “State’s immunity to many of her claims” and directed the Fourth

Circuit's judgment (via curiam opinion) depriving Petitioner's property right without a hearing. The panel judges' prejudicial actions created a split among the federal circuit courts of appeal and conflicts with the decision by U.S. Supreme Court, even is contradictory with Fourth Circuit own decisions on the controlling legal issues for the dismissal of claims regarding workplace discrimination and retaliation-caused termination without mediation or hearing against Petitioner's charge filed with EEOC under Title VII, ADEA.

## 2. Arguments:

The U.S. Supreme Court has ruled that individuals may bring actions under 42 U.S.Code. §1983 to offer a "[r]emedy... against all forms of official violation of federally protected rights," *Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658, 700 (1978).

42 U.S.Code §1983 "[E]very person who, under color of any statute..., any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

However, as described above, the panel-leading judge affirmed the District Court's dismissal of Petitioner's claims regarding the retaliatory termination without mediation against her EEOC charges under ADA, Title VII and ADEA and deprived Petitioner's property right without a hearing. The Fourth Circuit's (1/24/2019) judgment directed by the panel-leading judge's curiam opinion is in

conflict with the decision of the U.S. Supreme Court (*Logan v. Zimmerman Brush CO.* et al 102 S. Ct. 1148, 455 U.S. 422, 71 L. Ed. 2d 265, 50 U.S. L.W. 4247, 1982. SCT. 40870). In which, the Supreme Court urgently reversed the lower Court's judgment which violated employee's federal rights to Due Process and Equal Protection of the law.

The standard guide of the Supreme Court's decision whether to grant a petition for a writ of certiorari "is in conflict with the decision of another United States Curt of Appeals on the same important matter" Sup Ct. R. 10(a).

The first conflict is regarding the panel-leading judge' determination of the not finding District Court's reversible errors and affirmation "lack of subject-matter jurisdiction" in the discriminatory and retaliatory employment case. The Second Circuit Court reviewed the dismissal of the claims about the workplace discrimination and retaliation for lack of subject matter jurisdiction in *Fowlkes v. Ironworkers Local 40*, No. 12-336-cv (2<sup>nd</sup> Cir. 2015). The panel judges of the Second Circuit Court searched the district court records regarding the plaintiff's failure to exhaust the administrative remedies for Title VII claims and the claim of breach of the duty of fair representation under NLRA, the judges concluded that "[t]he district court erred in its determination that Fowlkes' failure to exhaust administrative remedies deprived it of subject matter jurisdiction over his Title VII claims. In addition, we concluded that Fowlkes has stated a federal claim under NLRA, 29 U.S.C. § 151, et seq. for the local's breach of its duty of fair

representation. Accordingly, we vacate the judgment dismissing Fowlkes amended complaint and remand the cause to the district court.”

Here, the pleadings and appeal Petitioner filed with the District Court and Fourth Circuit contain the EEOC’s right-to sue letter and the letter to the District Court’s Clerk Cannon regarding EEOC’s permission to sue. Comparing with the Second Circuit’s factual and legal analyses-derived decision, it is clearly not appropriate to conclude by the panel-leading judge that there was no reversible error and further biasedly affirmed the District Court’s dismissal of Petitioner’s claim for “lack of subject-matter jurisdiction” by alleging that Petitioner failed to state if she had exhausted administrative remedy. Also, Petitioner’s complaint and appeal demonstrated that Union manager at Maryland Department of Health, Ms. Barbara Perry breeched her duty of fair representation and whose action was sufficient sever to alter the termination by participating in the decision to terminate her employment in the absence of mediation without informing Petitioner (Appendix-4.2&4.3, COA4-doc#4,ECF#4).<sup>8</sup> Because Petitioner provided ample

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<sup>8</sup> Even though several exhibits indicated that Petitioner was a Union member (COA4-doc#4, ECF No. 4, Exhibit#1, 12&20), the District Court stated “Plaintiff barely mentioned that she is in a union, it alone alleges sufficient facts to demonstrate an unfair labor practice that she was subjected to by said Union (whatever union it may be), or any other prohibited conduct falling under the umbrella of that stature” In the review of case from dismissal for failure to state claim, Court of Appeals “will consider new factual allegations raised for first time on appeal provided they are consistent with complaint.” *County of McHenry v. Insurance Co. of the West*, C.A.7 (Ill.) 2006, 438 F.3d 813, id.at 439; see also *Veazey v. Communicatons &cable of Chi, Inc.*, 194 F. 3d850,853 (7<sup>th</sup> Cir. 1999) (allowing petitioner to

evidence that both Union and Respondents' managers had failed in their alleged duty by negligently failing to address ongoing harassment, discrimination and retaliation (ECF#20 & related exhibit#3, ECF#4 & related exhibit#1,12&20; COA#10, 23&25). Petitioner believed that her major complaints under Title VII, ADA, ADEA, and 42 § 1983 were also related to Fair Labor Standards Act and National Labor Relations Act and thus she made selection of available related rules listing on JS 44 form and wrote some federal rules within restricted area in the JS44 form (Appendix#7). The panel-leading judge directed Fourth Circuit to dismiss Petitioner's appeal even though the judge acknowledged that the District Court's memorandum and Respondents' motion to dismiss and "Informal response brief" failed to provide any proof of legitimate un-retaliatory reasons for their failure to perform their alleged duties and adverse actions after received Petitioner's internal grievance and appeals, EEOC charges and request of accommodation.

Nevertheless, Petitioner's evidence of EEOC's permission and her claim related to Fair Labor Standards Act and National Labor Relations Act should not be prejudicially neglected by the panel-leading judge to direct Fourth Circuit's judgment when they concluded "no reversible errors", affirmed District Court's reason "lack of subject-matter jurisdiction" to dismiss her appeal according to 42 U.S. Code §1983 and prior decisions made by this Supreme Court and the Second Circuit.

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present facts not asserted in opposition to defendant's motion to dismiss under Rule 12(b)(6)).

The second conflict is about the panel-leading judge's affirmation of the District Court's dismissal due to the State's immunity to employee's ADA claim. The workplace retaliatory termination case related employee's ADA claim is in *Cisneros v. United States of America, Intervenor*. No. 98-2215, Part II. (10<sup>th</sup> Cir. 2000). Based on the analyses of *Kimel* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed. 2d 522 (2000) and others opinions for ADEA and ADA claim, the Tenth Circuit reversed district court's decision and dismissed State employer's request for state's immunity to state employee's ADA claim and protected state employee's property rights from retaliation against her EEOC charge of Title VII, ADA based on ADA 42 U.S.C. §12202 and Congress' abrogation Eleventh Amendment immunity.

The House's report on the ADA has clear instruction (see Part II described above, H.R. Rep. No. 101-485 (II), at 37 (1990)). Therefore, Congress' abrogation of Eleventh Amendment immunity in suits under the ADA is valid. (42 U.S.C. §12202).

In addition, Congressional power of enforcement is applied for depriving a person of rights or privileges "secured or protected" by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100).

Furthermore, Supreme Court is likely to grant certiorari and also will likely reverse the court's judgment "[i]f the interest of Congress is clear, that is the end of the matter". *Chevron USA v. Natural Res. Def. Council, Inc.*, 467 U.S. at 842-3, 104 S.Ct, 2778, 81 L.Ed. 2d 694 (1984). Therefore, it should be reversed that panel-

leading judge prejudicially affirmed the District Court's dismissal for "State's immunity to Petitioner's ADA claim" (by stating that Congress did not abrogate State's immunity to employee's ADA claim), deprived Petitioner's property right without mediation or a hearing, and violated Due Process and Equal Protection two clauses of Fourteenth Amendment to U.S. Constitution.

The third conflict in the decision for the cases of ADA, Title VII and ADEA EEOC charges, which were retaliated against resulting in termination of employment, is related to the panel-leading judge's biasedly affirming the District Court's reason for failure to state claim, miss-statutory citation in pleadings and rejection of request for amendment to dismiss Petitioner's appeal.

"[A]s the Eleventh Amendment Immunity is a critical gate for Plaintiff's complaint about harassment, discrimination and retaliation under ADA, a complaint should not be dismissed merely because a plaintiff's allegations do not state the particular legal theory. In addition, complaints in civil cases should not be dismissed unless it clearly appears that under no theory can the plaintiff be entitled to relief." *City of Fort Lauderdale v. East Coast Asphalt Corp.*, C.A.5 (Fla.) 1964, 329 F.2d 871, certiorari denied 85 S. Ct. 187, 379 U.S. 900, 13 L.Ed.2d 175.

*Harrison v. Robert E. Rubin, Secretary of the Treasury, United States Department of the Treasury* (No. 98-5019, D.C. Cir. 1999) is another case related to such decisions in Title VII and ADA claim. It instructs how to determine the statutory citation and amendments. Because district court denied Harrison's request to amend her complaint and to correct an erroneous statutory citation, and

erred in the fact-findings of her claims, District of Columbia Circuit reviewed the district court's denial of a motion to amend (Rehabilitation Act) for abuse of discretion and reversed the dismissal of appellant's Title VII and ADA claims and remand to the district court for further proceedings. In addition, in *Ruth v. State Arkansas DWS* No. 17-1457 (8<sup>th</sup> Cir. 2017) claim under Title VII, the Judge reversed district court's reversible error, remand with the direction to allow Ruth to amend her pleadings based on 29 C.F.R. 1601.12(b).

In this case, Petitioner had requested multiple times (since Nov. 2, 2017) to amend new evidence when she received EEOC's recording file via FOIA (Appendix-6.1, 7.1&22). EEOC's right-to-sue letter, Congressional abrogation of State' Eleventh Amendment immunity and Section 504 Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a are part of the pleadings based on Rule 7(a) and Rule 15(d). It is prejudicial action when the panel judges affirmed District Court's dismissal and closure of Petitioner's claim without pre-direction despite knowing that District Court biasedly alleged reasons that Petitioner failed to state if she exhaust administrative remedy; Congress has not abrogated Eleventh Amendment immunity for ADA claim; Petitioner did not state what she wish to amend<sup>9</sup>; and her amendments will not be able to cure these defects (Appendix-6, 7, 22, 8&9, see COA4-doc#4, ECF#33, *id.* p.11-13) because those defects are not true.

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<sup>9</sup> The district court alleged that Petitioner's attorney (Petitioner found half year later after filing claims), failed to file second amendment, despite the attorney submitted "Plaintiff's Supplemental Response in Opposition to Defendants' Motion to Dismiss" (in addition to

“[P]ro se complaint alleging deprivation of rights under color of state law should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief”. *Hudspeth v. Figgins*, C.A.4 (Va.) 1978, 584 F.2d 1345, certiorari denied 99 S.Ct. 2013, 441 U.S. 913, 60 L.Ed.2d 386.

Here, the District Court and Fourth Circuit acknowledged that Respondents failed to provide evidentiary mediation prior to termination of Petitioner’s employment and did not provide any of legitimate non-retaliatory reasons for their adverse actions and its damages to Petitioner’s health and property but misrepresented, misinterpreted, and omitted facts and also made false statement by going outside of pleadings to make dismissal reason of “failure to state claim”. (details please see Part I, subtitle part C under argument). Also, the evidence indicated by the Petitioner’s pleadings (described above) that the two of three reasons “lack of subject matter” and “State’s immunity to many of her claims” were not existed. Given facts of the District Court’s failure to take the burden to search and determine facts under Rule 8(2) and 12(b)(6) and Respondents failure to file summary judgment, even the panel judges should not affirm District Court’s reason of “failure to state claim” to dismiss Petitioner, *pro se*’s appeal because enormous factual materials provided to both District Court and Fourth Circuit in support of her claim that would entitle her to relief.

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Petitioner herself-filed “Plaintiff’s Response to Defendants’ Motion to Dismiss” with EEOC’s right-to-sue letter, EEOC charge form and her rebuttal) requesting second amendment prior to the District Court’s dismissal and close of Petitioner’s claim without pre-direction.

Finally, the Curiam Opinion is even not consistent with the Fourth Circuit owns decisions and reviewing standards in the cases of workplace retaliation under Title VII and ADA and dismissal due to lack of subject matter jurisdiction *and failure to state claims*, *Godon v. North Carolina Crime Control & Public Safety, et al*, (No. 99-2509, 4<sup>th</sup> Cir. 2000); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F 3d 337, 354-58 (4<sup>th</sup> Cir. 2000); *Cromer v. Brown*, 88 F.3d 1315, 1325-29 (4<sup>th</sup> Cir. 1996) and *Jones v. Calvert Group Limited*. No. 07-1680 (4<sup>th</sup> Cir., 2009). It is no merit for the panel judges to prejudicially direct the Fourth Circuit's judgment to dismiss Petitioner's appeal depriving Petitioner's property right without a hearing.

**III. The likelihood of irreparable harm will be if it cannot be intervened and reversed through granting the stay and injunctive relief that Fourth Circuit's judgment and related orders prevented petitioner from presenting her disputes at oral argument and rehearing en banc depriving her property right, and violating Due Process and Equal Protection two clauses of Fourteenth Amendment U.S.C. and Congressional power of enforcement.**

1. Facts:

Petitioner's request in the Fourth Circuit for intervening the District Court's prejudicial actions (including their denial of her amendment with new discovery evidence from EEOC) was rejected (Appendix-15, COA4doc#7&8); motion for concerns about the docket records was mooted (Appendix-14&3.1). The Respondents (10/11/2018) anticipated no oral argument by alleging that an oral argument has not been scheduled (via motion for extension of time to file their response brief to Petitioner's (10/1/2018) "Informal Brief" despite Petitioner's request to present

disputes of the deprivation of her constitutional rights via oral argument (Appendix-3.3, COA4 docket#10, 12&14). Consequently, panel-leading judge Motz (via Curiam opinion) dispensed Petitioner's opportunity for an oral argument in favor of Respondents' desire and directed the Fourth Court's (1/24/2019) denial of Petitioner's appeal; created pre-required condition of taking a poll from three judges in the panel as extra barrier to prevent Petitioner from obtaining the vote from the rest of Fourth Circuit's judges determining if the Fourth Circuit allows Petitioner to have rehearing en banc; and further denied her petition for rehearing and rehearing en banc because none of the three judges in the panel requested a poll (Appendix#3). Additionally, the panel judges directed Fourth Circuit to deny Petitioner's motion to recall the mandate in the absence of prior denial of her motion to stay which violated Rule 41(b) (Appendix-1.1). Currently, the Fourth Circuit has not made a decision regarding Petitioner's motion to reconsider the Fourth Circuit's denial of Petitioner's application for recall the mandate, and publication of unpublished opinion and. It leads likelihood of irreparable harm (described in her pleadings and brief as well as related exhibits) if this stay and injunctive relief are denied.

## 2. Arguments:

First prejudice and abuse of the appellate court's discretion was indicated by the fact that Petitioner pro se's request both verbally and in writing for help/relief (Fourth Circuit's intervention and correction) of the District Court's (6/26/2018) prejudicial actions was neglected. It led to the likelihood of irreparable harm to

Petitioner by lack of appellate court's legitimate intervene and relief or correction for the District Court's sequential prejudice: (1) dismissal and closure of her claims without pre-direction under 28 U.S.C. § 1291; (2) rejection of her motion for clarification and reconsideration and her second amendment with new discovery evidence from EEOC recording file via FOIA (affirmed on July 6, 2018), and (3) unreasonably and wrongfully repeated transmission of Petitioner's notice of appeal, (in the absence of her related exhibits), despite, which the District Court returned to her, to bring the difficulties and confusion for appellate court's review and judicial proceedings of her case.

Second prejudice and failure of performing appellate court's discretion is indicated by that Petitioner's oral argument request was prejudicially neglected even though Petitioner clearly stated reasons in her "Informal Brief" on October 1, 2018 according to the instruction of Fed. R. App. P. Rule 34(a) (1) "[P]arty's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted."

In contrast, Respondents stated (via motion to extend time to file appellees' informal response brief on Oct 11, 2018) without any reason "it is not anticipated that this case will require oral argument and oral argument has not yet been scheduled for this appeal." To which, Petitioner re-emphasized the necessity of an oral argument in her motion (10/15/2018) and Petitioner's "Informal reply brief" by providing Fourth Circuit sufficient evidence that she need an oral argument opportunity to present the factual and legal disputes related to the deprivation of

her property right without mediation because which had been twisted and omitted by the District Court's memorandum when dismissing her claims.

Fed. R. App. P. Rule 34 (b) states, "Notice of argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side." Local Rule 34(e) regarding Motion to submit briefs states "As soon as possible upon completion of the briefing schedule or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument." Both Fed. R. App. P. 34 and local Rule 34 did not specify that time of the appellate court' tentative notification of oral argument (including requirement from all parties for a statement to explain if oral argument should, or need not, be permitted) should be provided to all parties: whether at earlier stage as soon as appellate court's order for briefing schedule; or receipt plaintiff's informal brief only, (or receipt of all briefs including defendant's response brief and plaintiff's reply brief); or at later stage after panel judges of appellate courts' receipt of all briefs and completion of their review to schedule as "Oral argument must be allowed in every case", unless three of panel judges derive the denial decision of oral argument based on Fed. R. App. P. Rule 34 (a)(2)-(A) or (B) or (C). Because "oral argument must be allowed in every case" and the denial of oral argument is under a few "unless" conditions made by three judges in the panel, it lacked merits for Respondent to anticipate no oral argument to be granted

regardless whether the notice of the oral argument's schedule it should be provided to parties prior to receiving Respondents' informal response brief.

The Local Rule 34 with IOP 34 and "Fourth Circuit Appeal Process" (on posted in its website) indicate that a decision of oral argument by the panel judges at Fourth Circuit in the early stage of receipt of a plaintiffs informal brief, response brief and reply brief (Pre-argument Review) and then determination of further additional formal brief and possible oral argument for plaintiff pro se case after the panel judges' review of briefs (including plaintiff's informal brief, response brief, reply brief and supplemental brief).

Nevertheless, Local Rule 34(a) and Fourth Circuit appeal process flow-chart that sets out the Fourth Circuit's pre-argument review procedure clearly shows any determination of oral argument and schedule following briefing. There is no indication that the Fourth Circuit's decision of requirement of oral argument and schedule must be made within 10 days after receipt of plaintiff's informal brief and prior to defendants' filing their informal response brief. Given the facts described above that EEOC's permission to sue, Congressional abrogation of the State's Eleventh Amendment immunity to Petitioner's ADA claim and evidentiary causal connection of adverse actions against Petitioner's protected activities were twisted, and omitted by Respondents and adopted by the District Court, it is possible that Respondents misinterpreted the time of Fourth Court's tentative notification of oral argument and schedule for all parties indicated in Local Rule 34(e).

Fourth Circuit granted Respondents' motion to extend time to file their informal response brief (COA4-doc#13) without any clarification for Respondents' allegation and anticipation of the panel judges' denial of Petitioner's request for oral argument in spite of fact that Petitioner called and left the voice message with the case manager Ms. Cathi Bennett (10/11 and 10/12/2018) and even filed motion (10/15/2018) responding to Respondents' motion and urgently requesting necessary and important oral argument (COA4 docket #14). Unless, the Fourth Circuit does usually provide their tentative notification of oral argument with the requirement of parties' statement within 10 days of receipt of plaintiff's informal brief prior to receiving defendant's informal response brief and plaintiff's informal reply brief or soon after receipt of plaintiff's notice of appeal and transmitted records from the district court and release order of briefing schedule.

If the Respondents allegation is correct and the clerk of Fourth Circuit must provide an notice of oral argument to all parties no later than within 10 days of receipt of plaintiff's informal brief, it was used by Respondents to anticipate the panel judges' decision for not-granting oral argument. Even though Respondents did not explain whether they had wanted oral argument or not to be permitted, there was no any answer or explanation from the Fourth Circuit and case manager Ms. Bennett to Petitioner's calling message and motion requesting oral argument to present dispute in responding to the Respondents' anticipation and allegation regarding lack of oral argument schedule by October 11, 2018. It is no merits to not provide the notification of oral argument to all parties under Rule 34(b) and local

rule 34 (e) or response as the Respondents' allegation; nor is it appropriate for the panel-leading judge via curiam opinion (1/24/2019) to dispense Petitioner's right to present disputes of the factual and legal matters by making reason with Rule 34 (a)(2)(C) in favor of Respondents' (10/11/2018) anticipation to dismiss Petitioner's appeal based on the false information provided by Respondents (Appendix-3) Fed. R. App. P. Rule 34 (a) (2) clearly instructs "Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

Nevertheless, next day after Petitioner's motion (10/15/2018) responding to Respondents' anticipation for no oral argument, another biased action was occurred in the District Court's transmitted records. Petitioner's COA4 docket records were altered and some parts were deleted during transmission (COA4-do t#15&25).<sup>10</sup> It indicates Fourth Circuit's biased position.

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<sup>10</sup> COA4 docket#15 text indicated "supplemental assembled electronic records" from the District Court (even though the District Court's original docket stated the transmission was done on 10/16/2018 when was on the next day of Petitioner filed her response to

The third prejudice is the extra barrier put up by the panel judges through both setting up a unnecessary pre-required condition to take a poll based on local rule 35(b), even though Fed. R. App. P. 35(f) clearly instructs appellate courts that “[A] vote need not be taken to determine whether the case will be heard or reheard en banc”, and then three judges in the panel refused to take a poll to prevent Petitioner from obtaining the chance of the vote by the majority judges to determine whether Fourth Circuit should have an rehearing her case en banc and further whether the Fourth Circuit should grant her petition after rehearing. This vote is contingent upon a poll taken by the three judges in the panel.

However, the Fourth Circuit’s 3/26/2019 order was instructed by the panel judges to write, “No judge requested a poll under Fed. R. App P. 35” rather than correctly stated “No judge requested a poll under local Rule 35(b)”.

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Respondents’ motion anticipating no oral argument) and entered on 10/18/2018 after Petitioner filed her informal brief 17 days. Yet, the records of Petitioner’s 7/26/2019 notice of appeal, (which was transmitted from the District Court on 8/2 and 8/6//2018 respectively), were deleted from COA4 docket records and her 8/7/2018 re-filed notice of appeal and entered 8/8/2018 (COA4 docket#4) were entered on 10/18/2018 despite there was no any new supplemental records indicated by the COA4-doc#18 docketing test. Meanwhile, the part of records was disappeared from COA4 docket#4. Petitioner filed “Supplement informal brief” on Jan. 16, 2019, April 1 and April 16, 2019 regarding the alteration and deletion of her docket records in addition to her 9/4/2018 and 10/22/2018 filed her concerns regarding the COA4 docket records which may cause the difficulties for the judicial proceedings and obstruct the equal justice requesting the Fourth Circuit’s review and attention (Appendix-15&14, COA4-doc#7, 12, 23&25).

According to local Rule 35(b): "Decision to Hear or Rehear a Case En Banc. ...A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition [is it informal brief?] has been submitted to the court, and before an order [is it court's judgment?] has been entered, will be eligible to vote on the decision to hear or rehear a case en banc." It is obviously that, none of the three judges, (who sat on the panel, led by judge Motz, made unpublished opinion and directed court's affirmation of the District Court's decision to dismiss Petitioner's appeal), likes their unpublished opinion to be subjected a review and a rehearing en banc by majority judges of the Fourth Circuit if Petitioner is granted rehearing en banc. In fact, rehearing Petitioner case en banc would make the majority judges in the Fourth Circuit to learn insight how the curiam opinion led to their conclusion that there was no reversible errors by excluding the clear and convincing evidence and the grounds for their direction of the Fourth Circuit's judgment of dismissing Petitioner's appeal. The extra barrier and difficulty created by the three panel judges based on the Fourth Circuit local rule 35(b) described above is lack of merit because the deprivation of Petitioner's chance to present disputes. The panel judges'

prejudice violated “Due Process of law” and “Equal protection” of the Fourteenth Amendment to U.S. Constitution or privileges for “secured or protected” by the Congressional power of enforcement, and led to likelihood of irreparable harm to Petitioner.

To such panel judges’ prejudicial action, there is the case *U.S. v. Martorano*, 620 F.2d 912, 29 Fed. R. Serv. 2d 1242 (1<sup>st</sup> Cir. 1980) stating “There was no merit to the contention that the votes of three circuit judges were required to order rehearing en banc in the First Circuit...Appellate Rule 35, and 28 U.S.C.A. §46(c), plainly require that the required majority must exist among the judges in ‘regular active service,’ and a judge who is yet to be appointed is not a judge in regular service. There was no merit to the suggestion that the First Circuit, comprised of only three circuit judges in active regular service, was barred from granting a rehearing en banc because one three-judges panel is not authorized to overrule another. When, as often occurs, panels contain one or more judges who are not regular members of the court, the same danger exists in the First Circuit as elsewhere that uniformity and stability of precedent will suffer. There is no reason for the First Circuit to be excluded from the provisions of Appellate Rule 35(a) or 28 U.S.C.A. § 46(c). (en Banc).”

Unfortunately, Petitioner’s experience described above is similar to what occurred in the First Court due to the Local Rule 35(b) “Decision to Hear or Rehear

a Case En Banc”<sup>11</sup> which actually gives right to the possibility and eligibility of panel judge’s prejudice. There are double barriers to prevent Petitioner’s case from rehearing en banc as long as a judge of the panel put up a poll as pre-required condition and consequent none of the three judges takes a poll.

In addition, “[t]he grant of rehearing en banc should only have been with respect of the jurisdictional issue presented, and to the merits.” (Separate statement of Senior Circuit Judge Swygert, joined by Circuit Judges Cummings and Cudahy.) *Parisie v. Greer*, 705 F. 2d 882, 36 Fed. R. Serv. 2d 535 (7<sup>th</sup> Cir. 1983). It is no merit that needless of any reason from the panel judges at Fourth Circuit is required to set a barrier with a poll as pre-required condition and then none of three judges in the panel to take a poll to determine whether the case will be heard or reheard en banc prior to the most judges of Fourth Circuit to vote. There is no jurisdictional issue in this case as the faulty reasons for “lack of subject-matter jurisdiction and state’s immunity to Petitioner’s ADA claim” to dismiss Petitioner’s appeal were not exist, and the reason of “failure to state claim” was lack of factual

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<sup>11</sup> The original text part of this local rule 35(b) is referred in the 3<sup>rd</sup> prejudice argument described above, in other words, it means only the panel judges, (who participated in each specific case by various reasons, just like the panel-leading judge Motz for the Petitioner’s case), in the Fourth Circuit to decide if they allow a petitioner to have a chance to be heard or reheard en banc depend upon panel judges’ desire to make a requirement of a poll for the extra barrier prior to the majority judges to vote if the court need to order the rehearing, then none of judges in the panel to take a poll, and finally to make a statement in their directed court’s denying order of appellant’s petition “no judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.” which blocked Petitioner’s case to be reheard en banc.

and legal grounds. These clear and convincing facts indicated that rehearing Petitioner's case en banc should be ordered; if Petitioner's claims had been reheard en banc under Fed. R. App. P. Rule 35, her petition would have been granted as the case met the criteria for the appellate circuit to grant a petition.

Fourth prejudice is related to the recall of mandate. A fundamental right of due process is the opportunity to be heard (*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). However, the panel judges at Fourth Circuit not only failed to perform their duties in determining whether the District Court had erred in granting Respondents' motion to dismiss based on Rule 8 and Rule 12 without Respondents' proof of granting Petitioner a mediation prior to the termination and providing any legitimate non-retaliatory reasons for Respondents' adverse actions under the McDonnell Douglas scheme, but also prejudicially moot Petitioner's motion for consideration about alteration and deletion of Fourth Circuit's docket records; to dispense with her oral argument in the absence factual and legal grounds; to dismiss Petitioner's appeal by affirming faulty reasons; and to deny her petition for rehearing en banc by setting up a barrier via requesting a unreasonable poll as pre-required condition and further refusal to take a poll to block petitioner's opportunity to be heard.

Additionally, the Fourth Circuit issued the order directed by the panel judge denying Petitioner's motion to recall mandate even though the mandate was incorrectly entered in the absence of prior denial of Petitioner's timely filed stay for mandate based on Fed. R. App. P. Rule 41(b) (Appendix-1).

“ The Court of Appeals has the power to alter its judgment to confirm to new legislation of the Petitioner’s case.” (*First Bank, FSB v. Morales*, 42 F. 3d 895, 31 Fed. R. Serv. 3d 1078 (5<sup>th</sup> Cir. 1995)).The U.S. Supreme Court has held that “the courts of appeals are recognized to have an inherent power to recall their mandates.” *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).

Here, Petitioner’s previous sequential documents demonstrating the panel and leading judge’s actual prejudice and requesting the disqualified panel-leading judge Motz to recuse herself, and suspending the unjust order, but did not cause the Fourth Circuit’s attention. Fourth Circuit is pending her motion to reconsider recalling the mandate in spite of knowing that the mandate and denial order without prior denying Petitioner’s motion to stay violated Fed. R. App. P Rule 41(b) and Due Process and Equal Protection of two clauses under Fourteenth Amendment to U.S. Constitution.

Recall of the mandate is reviewed for an abuse of discretion. see *Alsamhuri v. Gonzalez*, 471 F.3d 209, 209–10 (1st Cir. 2006). Petitioner was wishing that Fourth Circuit will review the panel judges’ abuse of their discretion by filing sequential documents. Even though she could not obtain relief from the Fourth Circuit’s vacating, revising, reforming, or modifying its own demonstratively wrong judgment, (directed by the panel judges), and related mandate for the purpose of justice in this case and judicial integrity, Petitioner still appreciated the Fourth Circuit’s pending recall of the mandate which makes the necessity and importance to respectfully request this Court’s intervene and supervision through granting this

stay and injunctive relief for those significant prejudice in the panel judges' curiam opinion and direction for the Fourth Circuit's judgment and orders.

A stay is appropriate if there is "(1) a reasonable probability that Four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam). The enormous clear and convincing factual and legal arguments filed in her pleadings and appeal related documents described above makes Petitioner believe that there is significant probability that "Four Justice will consider the issue sufficiently meritorious to grant certiorari" and also helps her to have a fair prospect that there is a reasonable possibility "a majority of the court will vote to reverse the judgment below".

#### **IV. Balance of equities supports a stay and injunctive relief.**

Moreover, in close cases the Circuit Justice or the Court will balance the equities to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

If the stay and injunctive relief are not granted and Fourth Circuit's judgment is not intervened or reversed by the U.S. Supreme Court, the likelihood of irreparable harms to Petitioner's health and life will be: Petitioner would bear the life-long negative impact of willful underpayment and unequal payment (although she worked hard for increased her responsibilities) due to the discriminatory

deprivation of the reclassification approved of Epidemiologist III for her by both MDH and MDBM; she would suffer the lack of any reasonable remedy for the major anxiety, major depressive disorder and posttraumatic stress disorder caused by Ms. Barra's progressive harassment, discrimination and retaliation. Also, Petitioner would suffer the loss of her income even during the interactive accommodation period because she was disability discriminately prevented from utilizing the employee's leave time donated by her friend since Oct. 2014; she would lose compensation or accommodation because she was not allowed to return to work under seniority system for CDC funding supported programs as recommended by the State Medical Director. She would lose any compensation for the lawyer fee besides her continuers' medical cost under the condition without payment from the beginning of October 2014. In addition, because Petitioner was terminated without mediation since Nov. 3, 2014 prior to her 61<sup>th</sup> birthday by Ms. Barra's retaliation against her reports to internal managers and charges filed with EEOC under ADA, Title VII and ADEA, Petitioner spent the family's many-years savings, which were set aside for the emergency conditions. Petitioner has been spending her social security benefits and part of her 403-b retirement prior to the Social Security Office and 403 retirement managing company recommended at age of 67 for better returns due to her disability, medical costs, the lawsuit and attorney fee. All of these would result in irreparable damages to Petitioner and her husband's life quality and retirement benefits if this application for stay and injunctive relief are denied.

Furthermore, if the stay and injunctive are denied, the Petitioner's lawsuit in

the absence of relief for retaliatory termination of Petitioner's employment without mediation only because Petitioner sought managers' help for discriminatory deprivation of the reclassification of Epidemiologist III approved by MDH &MDBM for Petitioner and unequal payment and willful underpayment; also internal grievance and EEOC charge about Ms. Barra's progressive harassment, age, racial, ethnicity and disability discrimination and retaliation may have a chilling effect on other employees who may wish to seek managers' help and file charges with EEOC or Federal Courts for equal working condition and protection. Denial of the stay and injunctive relief could negatively interfere with state agency's working environment, EEOC's mission, and public trust and confidence in the equal justice and equal protection under constitution through federal courts. The denial of the stay and injunctive relief in this Court will also account for a continually worsening situation with regard to workplace retaliation, rates of the workplace retaliatory claims as well as the related hate crime claims filed with the courts that have dramatically increased over the past decade. The Supreme Court can, also should ensure that American citizens to have Due Process and Equal Protection from workplace discrimination and retaliation claims under law for their life, health and property in the federal court. In contrast, granting a stay and injunctive relief to intervene and reverse the Fourth Circuit's prejudicial judgment will not result in damages to Respondents' working environment, state agency, and the well being of co-workers as well as public interests.

For the standards for granting a stay and junction relief, preliminarily, the applicant must show that “the relief is not available from any other court or judge,” Sup. Ct. R. 23.3. In addition to *Teamsters v. United States*, 431 U.S. 324 (1977), this Court has very thoughtful analyses regarding the consideration of injunctive relief for the case involving violation of constitution and *Firefighters v. Scotts*, 467 U.S. 561. This Court instructs: “[c]ourt can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind §706(g) of Title VII of providing make-whole relief only to such victims.” Furthermore, this Court held that a well-established, closely adhered to seniority system and prohibited any unlawful refusal accommodation to disabled employee who filed Title VII, ADA and ADEA charges with EEOC by untruthful “undue hardship” to terminate employee’s employment under seniority system according to 42 U.S.C. §1983 and 42 U.S.C. §12112. In the same way, employers are not required to override a seniority-based system to accommodate a disabled employee. *U.S. Airways, Inc. v. Barnett*. 535 U.S. 391 (2002) 228 F. 3d 1105. The Fourth Circuit’s judgment directed by the panel judges neglected this Court’s rules to refuse granting relief but to affirm the District Court’s dismissal of her claim despite acknowledging that Respondents discriminately deprived Petitioner’s reclassification of Epidemiologist III resulting in willful underpayment and unequal payment, supported Ms. Barra’s interference with her job and consequently terminated Petitioner’s employment under seniority system without mediation because she filed charges with EEOC under Title VII, ADA and ADEA.

As described above and indicated by Petitioner's pleadings/informal brief and sequential documents filed with District Court and Fourth Circuit, Petitioner tried her best by initially seeking help from MDH and MDBM managers and Union, then filing internal grievance/appeals and further charges with EEOC who rejected her charge due to Ms. Barra's interference with EEOC's investigation of Petitioner's ADA, Title VII and ADEA charges after she wait for over three years during EEOC's investigation. This new discovery evidence from EEOC recording file via FOIA request and affirmation on July 6, 2018 was not allowed to be amended by the both Courts.

Petitioner could not obtain relief from the District Court and Fourth Circuit and the past several years of judicial process has increased the health risks for Petitioner, (who has suffered from major depression disorder, anxiety, and posttraumatic stress disorder). The constant and tremendous stress makes her relive the pains when she recalled all of these terrible harassment and retaliatory actions, and humiliation. Furthermore, no matter what facts and exhibits were provided to the District Court and Fourth Circuit, and what errors were recognized and also filed with both courts during the proceedings including court's prejudice, alteration and deletion of the docket records, the District Court and the panel judges at the Fourth Circuit prejudicially demanded to deny Petitioner's a hearing chance and refused to grant a remedy, regardless of the federal civil procedures, appellate procedures, decisions made by the Supreme Court and other appellate courts, as well as the Congressional power of enforcement, which drove the

Petitioner in the helpless and exhausting situation.

This is the major reason Petitioner files this application for stay and injunctive relief according to the Congressional power of enforcement while the Fourth Circuit is pending the reconsideration of recalling mandate following filing her application of extension for her application to stay and petition for writ of certiorari. U.S. Supreme Court granted stay while application for a stay was pending in lower Court, ((*Bush v. Gore* 531 U.S. 1046 (2000))).

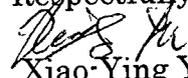
### **RELIEF REQUESTED**

Petitioner respectfully request the Honorable Court to grant the relief to her for the damages: retroactive reclassification to the Epidemiologist III, with all attendant back pay, benefits and other emoluments of employment; the sum of \$300,000 in compensatory damages suffered because of the discrimination and retaliation; front pay at the Epidemiologist–III pay level (including pay increases) until she reaches the age of 67 years when she would have retired from State service if she had not been terminated without mediation under seniority system for Ms. Barra’s discriminatory/retaliatory treatment of her, (which should be adjusted by subtracting the disability pension, \$342.31/per month effect date: 3/1/2018); costs for reasonable attorneys’ fees incurred since 2013 including this lawsuit with interest thereon and Medical costs, other damages and further relief the Honorable Court deems just.

### **CONCLUSION**

The Honorable Court should grant stay and injunctive relief to intervene and supervise the Fourth Circuit's pending recall for the mandate of the judgment which affirmed the District Court's dismissal of Petitioner's claims about termination without mediation or hearing retaliated against her charges filed with EEOC under Title VII, ADA and ADEA. Petitioner is respectfully requesting this Court to grant Petitioner relief for the damages in her health, life and property right resulting from deprivation of her constitutional rights, pending the timely filing and disposition of a petition for certiorari.

Respectfully submitted,

  
Xiao-Ying Yu, *pro se.*

*1/2/2019*

Mailing address:

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Abingdon, MD 21009

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,	*	
<i>Plaintiff-Appellant,</i>	*	
v.	*	Case No. 18-1889
	*	
MARYLAND DEPARTMENT OF HEALTH,	*	
SECRETARY ROBERT NEALL, and	*	
MARYLAND DEPARTMENT OF BUDGET &	*	
MANAGEMENT,	*	
SECRETARY DAVID BRINKLEY,	*	
<i>Defendants-Appellees.</i>	*	

\* \* \* \* \*

**MOTION TO MOVE FOR PUBLICATION OF UNPUBLISHED OPINIONS  
AND RECONSIDERATION OF THE COURT’S APRIL 22, 2019 ORDER**

Plaintiff-Appellant, Xiao-Ying Yu, *Pro Se.*, respectfully moves for publication of previously unpublished opinions and requests that the honorable Court reconsider the April 22, 2019 order denying Plaintiff’s motion to recall the mandate (see Appendix#1-3) pursuant to Fed R. App. P. 34 (a)(2), (b), Rule 27, Local Rule 36(b), USC 28, Chap. 21 § 455, Fed R. App. P. 41 (b)&(c); 42 U.S.C. §1983, “Due Process” and “Equal protection” clauses of Fourteenth Amendment and Congressional enforcement power for depriving a person of rights or privileges “secured or protected” by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100). In support of her request to move for publication of previously unpublished opinions and reconsider Court’s order denying her motion to recall the

mandate (by direction), the Plaintiff states the following:

**A. Plaintiff moves for publication of the unpublished opinions**

*1. The error to dispense with the Plaintiff's oral argument and to moot Plaintiff's concerns about docket records hidden in the unpublished opinions:*

Fed R. App. P. 34 (a)(2) Standards state that "Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. (b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and time allowed for each side...." The local Rule 34 (e) states "As soon as possible upon completion of the briefing schedule or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument."

Plaintiff never received the court's notification of oral arguments under Fed. R. App. P. 36(a)(1) (2) and (b) prior to defendants' motion to extend time and to remove the oral argument. Because defendants submitted the motion for extension

of time to file their response to Plaintiff's informal brief requesting removal of oral argument on 10/11/2018 (which was 11 days from Plaintiff's informal brief), Plaintiff objected to it and emphasized the reasons for the necessity of the oral argument on 10/15/2018 (COA4 docket#14). Consequently, the case manager, Ms. Cathi Bennett, permitted the District Court to re-transmit supplemental records on 10/16/2018, and made alterations and deletions of COA4 docket records on 10/18/2018 (COA4 docket#4 and #15) in favor of the defendants and supported the biased actions made by the District Court<sup>1</sup>. To such unlawful alteration and deletion of the Court's docket records 18 days after Plaintiff's informal brief,

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<sup>1</sup> Plaintiff, Asian American *pro se*, was Maryland State employee supported by Federal CDC funding and was terminated without mediation which was initiated and promoted by Plaintiff's former supervisor, Ms. Sara Barra within two months after she filed discrimination and retaliation complaints with EEOC under Title VII, ADEA and ADA. The Union manager in Maryland Department of Health participated in the decision of the termination without informing the Plaintiff (see Plaintiff's complaints, District Court's record ECF#4, exhibit 33&34, COA4, docket#4). The evidence were prejudicially neglected and these facts are (1) Plaintiff's written report regarding EEOC's permission to sue accompanying with her initial claim filed with the District Court of Maryland and a hard copy of EEOC's right-to-sue letter were received by the District Court (docketed 11/6/2017 and 3/22/2018, ECF#1, attachment#1 and ECF#20, exhibit#1, and COA4 #4) prior to the District Court's dismissal of her claims, (see Appendix#4); (2) defendants failed to provide a evidential pre-termination mediation or hearing, (*Goldberg v. Kelly*, 397 U.S. 254) and did not submit any legitimate non-retaliatory reason for their adverse actions under the McDonnell Douglas Scheme; and (3) Congress abrogated State employer's Eleventh Amendment Immunity for ADA complaint. Plaintiff has never been given a hearing and pre-direction of the District Court's decision prior to the District Court's denial of her claims. The District Court's dismissal and closure of the Plaintiff's case deprived her civil rights and property right due to the false reasons of lack of subject matter jurisdiction, failure to state the cause of claims and State's immunity to ADA complaint. The Plaintiff was never given a chance of oral argument, initial hearing and rehearing en banc by this Court to affirm the District Court's decision denying her claims and her petition which violated "Due process" and "equal protection" of Fourteenth Amendment of U.S. Constitution (Appendix#5).

Plaintiff filed a motion with concerns about the docket records, an informal reply brief, and a supplement to the informal brief. These filings were in addition to her initial request on 9/4/2018 for this Court's intervention regarding mistakes and biased actions on the part of the District court (COA4, docket #7, 14, 23&25).

Nevertheless, the Court's unpublished opinion, directed by the panel-leading judge Diana Jane Gribbon Motz<sup>2</sup>, hid the original cause of the lawsuits: the defendants' blatant retaliation for Plaintiff's protected activities and unlawful termination without mediation. The opinion also hid the District court's biased actions. This opinion indicates corruption and abuse of the judge's discretion to dispense with oral argument by using a statement of local rule 34(a)(2)(c) as an excuse<sup>3</sup> to refuse providing Plaintiff an initial hearing for her to argue those reversible errors which the panel judge ignored. Judge Motz further abused her discretion, and made moot Plaintiff's motion for concerns about the docket records

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<sup>2</sup> Judge Motz has worked for 14 years in Assistant Maryland State Attorney General with similar responsibilities like Mr. James Nelson Lewis to represent defendants' interest in the position of Assistant State Attorney General for Maryland Department of Health; is accustomed to representing Maryland government employers' interests; and led a panel to create biased opinions including this case which directed the Court's (1/24/2019) denial of the Plaintiff's appeal and denial of (3/26/2019) petition for rehearing en banc in favor of defendants, (please see Plaintiff's petition for rehearing and rehearing en banc, COA4 docket#26, 27, 29&37; her motion for concerns about docket records, COA4 docket #17; and Plaintiff's application for suspension and motion to recuse, COA4, docket#38), and deprived the Plaintiff's property and equal protection rights under Fourteenth Amendment.

<sup>3</sup> The decision to deprive the Plaintiff the due process opportunity of oral argument was prejudicially made when the Court failed to send the Plaintiff a copy of tentative notification of oral argument and the defendants requested to remove the oral argument on 10/11/2018, which was occurred prior to the panel judges' review of her informal brief, informal reply brief and supplemental informal brief and related exhibits.

in the Curium opinion concealing the evidence of interference with an EEOC investigation by Maryland Department of Health employee Ms. Sara Barra and the evidence of Maryland Department of Health Office of Equal Opportunity Program Ms. Delinda Johnson's lies regarding "undue hardship" in order to reject accommodations recommended by the State Medical Director.

A fundamental right of due process is the opportunity to be heard (*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In pursuit of that right, the Plaintiff timely filed her petition for rehearing en banc and a motion to stay mandate (COA4, docket #28, 29, 31&35) and a motion for due process of initial hearing and reconsideration of the Court's unpublished opinion (COA4, docket#33). Subsequently, she filed an application for suspension of the Court's judgment and orders and a motion to request the panel-leading judge Motz to recuse herself (COA4 docket#38, prior to the mandate). Plaintiff also filed a civil action for Court's help to intervene with the Panel-leading judge's direction of her case under Congressional enforcement power (COA4, docket#41&42) and further application to recall the mandate (COA4 docket#43) between Feb. 6, 2019 and April 19, 2019. However, the panel-leading judge intentionally and repeatedly denied the Plaintiff the fundamental due process opportunity to be heard. The panel-leading judge Motz's unpublished opinion prejudicially directed the Court to not only deny Plaintiff's appeal and petition for initial hearing/rehearing en banc

but also her application to recall for mandate which violated Fed. R. App. P. 41(b) and the Congressional enforcement power.

2. *The necessary to request the publication of the previously unpublished opinion made on Jan. 22, 2019*

“An unpublished decision ... means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings... [Unpublished decisions] are not prepared with the same kind of exactness,” admits Procter R. Hug Jr., chief judge of the 9th Circuit. *McMenamin*, Justice in the Dark: Forbes Magazine, October 30, 2000, at 72 col. 3, 74 col. 1-2 (Also available at <http://www.nonpublication.com> under “Press Clippings”) The New York Times, also quotes the Honorable Richard A Posner, Chief Judge of the Seventh Circuit, describing unpublished opinions as “sort of a formula for irresponsibility.” *Glaberson*, Caseload Forcing Two-Level System for U.S. Appeals, N.Y. Times, March 14, 1999, at, 26 col. 3.

“To the suspicious, unpublished will often suggest secret and corrupt.” (*Render*, On Unpublished Opinions 73 Kentucky L.J. 145, 158 (198485)). The harm from such a perception is great. *Bush v. Gore*, 531 U.S. 98 (2000).

Obviously, the publication upon a Plaintiff's request seems like a modest and minimal safe guard, doing no harm if the Plaintiff's fears are misguided.

The Plaintiff requests this Court publish the panel judge's opinion made on 1/22/2019 to deny Plaintiff's appeal, the opinion to direct the court to deny her petition for rehearing en banc, and motion for recall.

**B. Request the Court's reconsideration of 4/22/2019 order denying Plaintiff's application to recall for the mandate**

The Ninth Circuit stated: "En banc procedures are seldom used merely to correct the errors of individual panels." "Appellate courts often tolerate errors in their case law because the rigors of the en banc process make it impossible to correct all errors." *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). It might explain why this Court was directed to deny Plaintiff's petition for rehearing en banc by abusing the judge's discretion and requesting a poll to be taken from other judges of this Court to set up a barrier and to establish difficulty that deprived the Plaintiff of property rights, due process of law (hearing opportunity), and equal protection rights.

However, it should not be ignored that Plaintiff's consequential documents for protection of her constitutional rights were initially filed with the District Court on 11/2/2017, and filed with this Court prior to the mandate. It includes Plaintiff's recent application for suspension of the Court's judgment and orders to prevent and control the obstruction of the Court's equal justice under Fed. App. P. Title VII, Title 1, Rule 2 and Congressional enforcement power, the motion to recuse

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the disqualified panel-leading judge, who deprived Plaintiff's due process and equal protection rights under USC 28, Chap. 21 § 455, and *Marshall v. Jerrico Inc.*, 446 US 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), and request of prohibition of alteration and concealment of evidence in the Court's docket records, (which did not reflect Court's order and what Plaintiff filed in the court) under Title 18 U.S. C. 1512 (c) (April 1, 2019; COA4, docket#39).

Due process would even require recusal of a judge if anything less "is unlikely significantly to quell the concerns of the skeptic." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 & n.12 (1988) If *recusal* can be a preventive measure, then surely publication at an appellant's request is a far less burdensome preventive measure aimed at the same goal of sustaining public confidence. (*Render*, On Unpublished Opinions 73 Kentucky L.J. 145, 158 (198485)).

In addition to the Plaintiff's petition for rehearing en banc for the panel judge's biased review and prejudicial decision and motion for concerns about the Court's docket records, the Plaintiff's application for suspension<sup>4</sup> might seem to offend the sentiments of the panel-leading Judge Motz and the case manager Ms.

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<sup>4</sup> The Application for suspension of the Court's order (including the judgment) contains Plaintiff's request of the recusal of panel-leading judge Motz and request of the Court's prohibition of the alteration and deletion of the Court's docket records managed by Ms. Cathi Bennett.

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Bennett, because the motion to recuse and report to the Court's Clerk and chief judge about the alteration and deletion of the Court's docket records, indeed, further proposed that a different judge and case manager should decide the Court's review and action for Plaintiff's application for suspension Court's order to prevent the obstructions of the Court's equal justice under law, motion to recuse, application for civil rights, and application to recall for the mandate.<sup>5</sup> Therefore, after such motions and reports to the Court clerk and Chief Judge, it unlikely appear to be scrupulously impartial that Ms. Bennett created notice of local rule 41(d) to refuse the consideration of Plaintiff's application for suspension, recusal

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<sup>5</sup> The COA4 docket#7, 14, 17, 23&25 indicated that there are inconsistent, incorrect and incomplete records in COA4 #1-4 which do not reflect the facts and the records transmitted from the District Court to the Court between 8/2 and 8/7/2018. Also, the part of docket records of COA4 docket#4 were altered and deleted. After Plaintiff filed her informal brief for 17 days (COA4, docket#10) and re-addressed (10/15/2018) her need of oral argument in responding to the defendants' request to deprive her oral argument right via their motion of extension, (COA4, docket#14 v. #12), on 10/18/2018, Ms. Bennett entered COA4 docket#15 "Supplemental assembled electronic record docketed". However, she failed to provide any additional supplement transmitted by the District Court of Maryland on 10/16/2018 and only removed the part of records which was transmitted by the District Court of Maryland to the Court on 8/7/2018 (district court ECF#53, Appendix#6) and was initially entered in COA4 docket#4. The Plaintiff's 7/26/2018 filed appeal with the evidence (regarding the defendant's interference of EEOC's investigation provided by US EEOC-FOIA records), which the District Court of Maryland refused to file and returned to Plaintiff although cashed her filing fee, but only transmitted part of her 7/26/2018 appeal without the exhibits to the Court respectively on August 2 and August 6, 2018, were inconsistently stated in COA4 docket "Originating Court Information" and docket#1. This was confirmed with USCA Clerk Ms. Gomez and Ms. Amy Carlhem; also evidenced by the USCA4 Ms. Margaret Thomas's letter dated on 8/3/2018 (ECF #50). However, these transmitted records of Plaintiff's 7/26/2018 appeal (without exhibits) from the District Court to the Court (8/2&8/6/2018, ECF#48&52, Appendix#6) were not found in the entire of COA4 docket records of Plaintiff's case 18-1889 file with two Court clerk officers' help when the Plaintiff visited the Court and received a hard copies of records on 1/11/2019. On 8/6/2018, Ms. Bennett entered COA4 docket#1, but failed to disclose the transmitted records from the District Court to the Court regarding two set of Plaintiff's notice of appeal on 8/2, 8/6 and 8/7/2018 and the Court Ms. Thomas' response (8/3/2018) to intentionally cover the District court's prejudicial actions and defendants' interference of U.S. EEOC's investigation (Appendix#6,7&8).

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(see Appendix#9) and consequential request for constitutional rights; and the panel judge led by judge Motz directed the Court's (4/22/2019) order, denying Plaintiff's motion to recall for the mandate stating that "Upon consideration of the motion to recall the mandate and to vacate decision on appeal, the court denies the motion. For the Court-By Direction".

The Court's 4/22/2019 order denying Plaintiff's motion to recall should be reconsidered and reversed because the Court did not issue the order to deny the Plaintiff's motion to stay and Fed R. App. P. 41 (b)&(c) clearly directs that the mandate of a Court must issue 7 days after entry of an order denying motion for stay of mandate. The Court's 4/22/2019 order also prevented the unpublished panel-leading judge's opinion (which directed the Court's judgment and orders) to be subjected to the Court's review and justification for equal justice under law when the mandate is recalled and also violated Plaintiff's property, due process and equal protection rights under Fourteenth Amendment and Congressional enforcement power.

The Court's decision regarding publication and the extent to which the court determines that written explanation of its decision is called for is driven by whether the full opinion will benefit the bench, bar, or litigants under integrity of the Court justice, Fourteenth Amendment, congressional enforcement power and Fed. R.

App. 13

App. P 36 and local Rule 36(a) but not driven by prejudicial deprivation of a plaintiff's due process opportunity to be heard at oral argument due to the defendants' desire or untruthful excuse by using Fed. R. App. P. 34 (a)(2)(C).

### C. Conclusion

WHEREFORE, the Plaintiff respectfully requests that the Court publish the panel judge's unpublished opinions and directions submitted between Jan 22, 2019 and April 22, 2019, review the injustice and reconsideration of the Court's 4/22/2019 order for the recall the mandate under local rule 36 (b), Fed R. App. P. Rule 34(a)(2)&(b), Rule 41 (b)&(c), Rule 2, 42 U.S.C. §1983, "Due Process" and "Equal protection" clauses of Fourteenth Amendment, and the Congress's enforcement power for depriving a person of rights or privileges "secured or protected" by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100).

Respectfully submitted,



Xiao-Ying Yu, *pro se*

Mailing address: P.O. Box 293,

Abingdon, MD 21009

App. 14

**APPENDIX RELATED TO MOTION FOR PUBLICATION OF  
THE UNPUBLISHED OPINIONS AND RECONSIDERATION OF  
THE COURT'S 4/22/2019 ORDER (May 6, 2019)  
Case Number: 18-1889**

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**APPENDIX RELATED TO MOTION FOR PUBLICATION OF  
THE UNPUBLISHED OPINIONS AND RECONSIDERATION OF  
THE COURT'S 4/22/2019 ORDER (May 6, 2019, continued page)  
Case Number: 18-1889**

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**APPENDIX RELATED TO MOTION FOR PUBLICATION OF  
THE UNPUBLISHED OPINIONS AND RECONSIDERATION OF  
THE COURT’S 4/22/2019 ORDER (May 6, 2019, continued page)  
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Appendix 2.1

App. 17

FILED: February 7, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 18-1889  
(1:17-cv-03260-JKB)

---

XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

---

STAY OF MANDATE UNDER  
FED. R. APP. P. 41(d)(1)

---

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

*Appendix 2.2*

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FILED: April 15, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 18-1889  
(1:17-cv-03260-JKB)

---

XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

---

MANDATE

---

The judgment of this court, entered January 24, 2019, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

*/s/ Patricia S. Connor, Clerk*

App. 19

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,

*Plaintiff-Appellant.*

v.

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY.

*Defendants-Appellees.*

Case No. 18-1889

\* \* \* \* \*

**MOTION TO RECALL THE MANDATE**

Plaintiff-Appellant, Xiao-Ying Yu, *Pro Se.*, respectfully requests that the Court recall the mandate (4/15/2019), vacate its judgment on January 24, 2019 pursuant to Fed R. App. P. 41 (b)&(c); 42 U.S.C. §1983, "Due Process" and "Equal protection" clauses of Fourteenth Amendment and Congressional enforcement power for depriving a person of rights or privileges "secured or protected" by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100). In support her request to recall the Court's mandate and vacate the Court's judgment, the Plaintiff states following:

**A. The error of the mandate issued without entry of the order denying Plaintiff's motion to stay of the mandate**

On April 15, 2019, the Court issued "MANDATE" stating that "The judgment of this court, entered January 24, 2019, takes effect today. This constitutes the formal mandate of this court issued pursuant to the pursuant to Rule 41 (a) of the Federal Rules of Appellate Procedure." (see Appendix#1). However, Plaintiff's filed her motion to stay of the mandate along with her petition for rehearing en banc and the amendment of her motion to stay of the mandate. In which case, there is no instruction in Fed. R. App. P. 41(a).

On Feb. 7, 2019, the Court issued "STAY OF MANDATE UNDER FED. R. APP. P. 41 (d)(1)" stating that "...In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court" (COA4, docket#32, see Appendix#2). Also, Fed. R. App. P. 41(b) directs that the mandate of a Court must issue 7 days after entry of an order denying motion for stay of mandate.

The Plaintiff's amended motion to stay of the mandate (COA4, docket#36, see Appendix#3) demonstrated that her petition for certiorari would present substantial questions related to the deprivation of constitutional rights and ignorance of the facts that were presented in Court's panel-leading judge Diana Gribbon Motz's curium opinion which directed the Court's (1 24 2019) judgment. In addition, she indicated that the Court's judgment conflicted with the judgments/decisions of this Court, other circuit court and the Supreme Court, and also violated the clear instruction made by Congress. Furthermore, the Plaintiff

also addressed the necessity of amendment to Fed. R. App. P to prohibit the obstructions of equal justice under constitutional and federal law. After Feb. 7, 2019, the Plaintiff never received the further the order of this Court regarding her motion to stay of the mandate but the Court's (4/15/2019) mandate.

**B. Inconsistency of the case's judgment with the Supreme Court's decision**

Supreme Court has ruled that individuals may bring actions under 42 U.S.Code. §1983 to offer a "remedy... against all forms of official violation of federally protected rights," *Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658, 700 (1978).

42 U.S.Code §1983 "Every person who, under color of any statute.... any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

In order to receive this Court's equal justice under law for the Plaintiff's claim about the retaliatory termination of her employment without a mediation, which deprived her property and equal protection rights under Fourteenth Amendment and 42 §1983, Plaintiff, pro se, following her initial (11/2/2017) and updated (12/8/2017) complaints; the first notice of appeal with exhibits on 7/26/2018, (which was not docketed but returned); and the second notice of appeal

App. 22

(8/7/2018) filed with the District Court, she has filed complaints about the deprivation of rights and the concerns about the docket records with sequential documents in this Court (COA4 docket#7, 10, 14, 17, 23&25) between Sept 4, 2018 and Jan. 16, 2019 prior to the Court's 1/24/2019 order<sup>4)</sup>. However, Plaintiff's motion for concerns about the docket records was mooted, and her request to present facts of the deprivation of her constitutional rights via oral argument was dispensed as defendants' desire (expressed COA4 docket=12&14) by judge Motz's curium opinion, which biasedly directed the Court's (1/24.2019) denial of Plaintiff's appeal on 1/24/2019. The Plaintiff demonstrated, (through her petition for initial and rehearing en banc, motion to stay of the mandate and motion for

---

<sup>4)</sup> Plaintiff, Asian American *pro se*, was Maryland State employee supported by CDC funding and was terminated without mediation within two months after she filed discrimination and retaliation complaints with EEOC under Title VII, ADEA and ADA which was initiated and promoted by Plaintiff's former supervisor, Ms. Sara Barra. The Union manager in Maryland Department of Health participated in the decision of the termination without informing the Plaintiff (see Plaintiff's complaints, District Court's record ECF=4, exhibit 33&34, COA4, docket#4). The evidence were prejudicially neglected and these facts are (1) Plaintiff's written report regarding EEOC's permission to sue accompanying with her initial claim filed with the District Court and a hard copy of EEOC's right-to-sue letter were received by the District Court (docketed 11/6/2017 and 3/22/2018, ECF=1, attachment=1 and ECF=20, exhibit=1, and COA4 #4) prior to the District Court's dismissal of her claims. (see Appendix=4); (2) defendants failed to provide a evidential pre-termination mediation or hearing. (Goldberg v. Kelly, 397 U.S. 254) and did not submit any legitimate non-retaliatory reason for their adverse actions under the McDonnell Douglas Scheme; and (3) Congress abrogated State employer's Eleventh Amendment Immunity for ADA complaint. Plaintiff has never been given a hearing and pre-direction of the District Court's decision prior to the District Court's denial of her claims and deprivation of her civil rights and property right due to the false reasons of lack of subject matter jurisdiction, failure to state the cause of claims and State's immunity to ADA complaint and closure of her by Federal District Court of Maryland. no was she given a chance of oral argument, initial hearing and rehearing en banc by this Court to affirm the District Court's decision denying her claims and her petition which violated "Due process" and "equal protection" of Fourteenth Amendment of U.S. Constitution (Appendix=5).

relief, see COA4, docket#28, 29, 31, 33&36), that the panel-leading judge Motz's curiam opinion constituted biased review, abused her discretion, and deprived the Plaintiff's constitutional rights under Fourteenth Amendment.<sup>[2]</sup> The Plaintiff had trusted in the Court and wish that the Court would correct this injustice by granting her oral argument, or initial hearing or rehearing en banc under the Fourteenth amendment. Although Fed. R. App. P. 35(f) clearly instructs that "A vote need not be taken to determine whether the case will be heard or reheard en banc", the intentional extra barrier and difficulty was brought through requesting a poll. (by a judge of the panel, or by the panel-leading judge Motz herself), to be taken from other judges of the Court, (who were not provided sufficient time to review the Plaintiff's appeal and petition), to determine whether the Plaintiff's case should be heard. This action further blocked the Court's execution of equal justice under law in the review of the Plaintiff's appeal and rehearing en banc for the deprivation of her property and equal protection rights or privileges "secured or protected" by the Congressional enforcement power and federal laws. It also directed the Court's

<sup>[2]</sup> Judge Motz has worked for 14 years in Assistant Maryland State Attorney General with similar responsibilities like Mr. James Nelson Lewis to represent defendants' interest in the position of Assistant State Attorney General for Maryland Department of Health; is accustomed to representing Maryland government employers' interests; and led a panel to create biased curiam opinions including this case which directed the Court's (1/24/2019) denial of the Plaintiff's appeal and denial of (3/26/2019) petition for rehearing en banc in favor of defendants. (please see Plaintiff's petition for rehearing and rehearing en banc, COA4 docket#26, 27, 29&37; her motion for concerns about docket records, COA4 docket #17; and Plaintiff's application for suspension and motion to recuse, COA4, docket#38) and deprived the Plaintiff's property and equal protection rights under Fourteenth Amendment.

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another (3/26/2019) order denying the Plaintiff's petition for rehearing en banc (COA4, docket#37).

The Court's (1/24/2019) judgment is in conflict with the decision of the Supreme Court (Logan v. Zimmerman Brush CO. et al 102 S. Ct. 1148, 455 U.S. 422, 71 L. Ed. 2d 265, 50 U.S. L.W. 4247, 1982. SCT. 40870). In this case, the Supreme Court reversed the lower Court's judgment which violated employee's federal rights to due process and equal protection of the law.

**C. Importance and necessity of prohibiting the obstructions of equal justice for willful deprivation of Plaintiff's property and equal protection rights**

Consequently, on April 1, 2019, the Plaintiff filed her application for suspension of the Court's (3/26/2019) order, motion for the panel leading judge Motz to recuse herself, and the letter to the Clerk Connor and Chief Judge Gregory regarding the Plaintiff's case manager, Ms. Cathi Bennett's intentional and retaliatory alteration of the Court's docket records and concealment of the evidence with related appendix and affidavit, to request that the Court prohibit the willful and constant obstructions of the Court's equal justice and intentional deprivation of the Plaintiff's property and equal protection rights under F. R. App. P Rule 2, Rule 35, USC 28, Chap. 21 § 455, and Marshall v. Jerrico Inc., 446 US 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) and Fourteenth Amendment U.S.C. (COA4, docket#38).

App. 25

Nevertheless, on April 12, 2019, Ms. Bennett abused her discretion<sup>137</sup> by misapplying "Local Rule 40 (d) Notice" to state that "no further action will be taken in this matter by this court", (COA4, docket#39, Appendix#9), because Ms. Bennett misinterpreted the Plaintiff's request for the Court to prohibit the obstructions of the Court's equal justice based on her own experience, (through application for suspension, motion to recuse and concerns of alteration and concealment of evidence), as "further relief". She also misinterpreted the filing date of Plaintiff's request for relief from the deprivation of the property and equal protection rights as 4/1/2019.

<sup>137</sup> The COA4 docket#7, 14, 17, 23&25 indicated that there are inconsistent, incorrect and incomplete records in COA4 #1-4 which do not reflect the facts and the records transmitted from the District Court to the Court between 8/2 and 8/7/2018. Also, the part of docket records of COA4 docket#4 were altered and deleted. After Plaintiff filed her informal brief for 17 days (COA4, docket#10) and re-addressed (10/15/2018) her need of oral argument in responding to the defendants' request to deprive her oral argument right via their motion of extension, (COA4, docket#14 v. #12), on 10/18/2018. Ms. Bennett entered COA4 docket#15 "Supplemental assembled electronic record docketed". However, she failed to provide any additional supplement transmitted by the District Court of Maryland on 10/16/2018 and only removed the part of records which was transmitted by the District Court of Maryland to the Court on 8/7/2018 (district court ECF#53, Appendix#6) and was initially entered in COA4 docket#4. The Plaintiff's 7/26/2018 filed appeal with the evidence (regarding the defendant's interference of EEOC's investigation provided by US EEOC-FOIA records), which the District Court of Maryland refused to file and returned to Plaintiff although cashed her filing fee, but only transmitted part of her 7/26/2018 appeal without the exhibits to the Court respectively on August 2 and August 6, 2018, were inconsistently stated in COA4 docket "Originating Court Information" and docket#1. This was confirmed with USCA Clerk Ms. Gomez and Ms. Amy Carlhem; also evidenced by the USCA4 Ms. Margaret Thomas's letter dated on 8/3/2018 (ECF #50). However, these transmitted records of Plaintiff's 7/26/2018 appeal (without exhibits) from the District Court to the Court (8/2&8/6/2018, ECF#48&52, Appendix#6) were not found in the entire of COA4 docket records of Plaintiff's case 18-1889 file with two Court clerk officers' help when the Plaintiff visited the Court and received a hard copies of records on 1/11/2019. On 8/6/2018, Ms. Bennett entered COA4 docket#1, but failed to disclosure the transmitted records from the District Court to the Court regarding two set of Plaintiff's notice of appeal on 8/2, 8/6 and 8/7/2018 and the Court Ms. Thomas' response (8/3/2018) to intentionally cover the District court's prejudicial actions and defendants' interference of U.S. EEOC's investigation (Appendix#6,7&8).

App. 26

Within five days, on April 16, 2019, the Plaintiff brought civil action and requested again that the Court execute the discretion for equal justice pursuant to 42 U.S.C. 1983; "due process" and "equal protection" clauses of the Fourteenth Amendment and the Congressional enforcement power for the litigation to prohibit the deprivation of Plaintiff's property and equal protection rights, which was obstructed by panel-leading judge Motz's biased curium opinion based on the false information and unnecessary request of a poll (COA4. docket=38. footnote=1&2) and the Plaintiff's case manager Ms. Bennett's intentional and constant alterations of the docket records and concealment of the evidence (footnote=3).

Surprisingly, when the Plaintiff filed her action on 4/16/2019 through ECF, she saw the Court's 4/15/2019 "MANDATE". The Court's judgment affirmed the District Court's reason to deny the Plaintiff's appeal based on the disqualified judge Motz's curium opinion (see foot note=2, Appendix=1,3&4), and while the curium opinion was demonstrated as biased review and violation of the Constitutional and federal laws and conflicted with the Supreme Court's decision by the Plaintiff's petition for rehearing en banc. The facts cannot be neglected even though the Plaintiff's petition for rehearing en banc was unlawfully denied by the unnecessary request of a poll. Especially, without entry of the order denying the Plaintiff's motion to stay of the mandate, it is not proper that the Court issued the mandate on 4/15/2019 based on Fed. R. App. P. Rule 41 (b). This led to additional

obstruction to the Court's executing their discretion under "due process" and "equal protection" of constitutional and federal law for the deprivation of the Plaintiff's property and equal protection rights.

Given all of the good causes stated above, and the evidence that have been demonstrated by the Plaintiff's properly and timely filed sequential and consequential documents with enormous exhibits/appendix Court at a different stage during judicial proceeding (footnote#1&3, Appendix#1-9, prior to filing her appeal and informal brief; prior to and post the Court's 1/24 2019 decision), it was clear that the Plaintiff's property and the equal protection rights were willfully deprived. Furthermore, the intentional and constant mistakes by the clerk and the panel-leading judge Motz' biased review and prejudicial actions violated "due process" and "equal protection" of constitutional and federal law. The evidence stated above built the solid ground for the Plaintiff to respectively request that the Court recall the mandate for the judges of the Court to review. The U.S. Supreme Court has held that "the courts of appeals are recognized to have an inherent power to recall their mandates." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). Recall of the mandate is reviewed for an abuse of discretion. *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005) (finding reconsideration of an appellate determination appropriate if there is a dramatic change in law, significant new evidence, or blatant error that would result in serious injustice). Thus, the

App. 28

judge-made mandate rule is not wholly inflexible. *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (“After all, the so-called ‘mandate rule’ . . . is simply a specific application of the law of the case doctrine and, as such, is a discretion-guiding rule subject to an occasional exception in the interests of justice.”).

#### **D. Conclusion**

WHEREFORE, in addition to her sequential documents and consequential requests for suspension, recuse and civil action, the Plaintiff respectfully requests that the Court recall the mandate and vacate the Court’s 1 24 2019 judgment, and execute the discretion in stopping the consequences of default-caused manifest injustice and enforcing a comprehensive review and investigation of the Plaintiff’s case under Fed R. App. P. 41 (b)&(c), Fed. R. App. P Rule 2, 42 U.S.C. §1983, “Due Process” and “Equal protection” clauses of Fourteenth Amendment, and the Congress’s enforcement power for depriving a person of rights or privileges “secured or protected” by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100).

Respectfully submitted,

  
Xiao-Ying Yu, *pro se*

Mailing address: P.O. Box 293,  
Abingdon, MD 21009

Appendix 3.1

App. 29

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**No. 18-1889**

XIAO-YING YU,

Plaintiff - Appellant,

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, Chief District Judge. (1:17-cv-03260-JKB)

Submitted: January 22, 2019

Decided: January 24, 2019

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Xiao-Ying Yu, Appellant Pro Se. James Nelson Lewis, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

Appendix 3.1

App. 30

## PER CURIAM:

Xiao-Ying Yu appeals the district court's order dismissing her civil action that alleged claims of workplace discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Yu v. Neall*, No. 1:17-cv-03260-JKB (D. Md. June 26, 2018). We deny as moot Yu's "Motion for Concerns of the Docket Records." We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

Appendix 3.2

App. 31

FILED: January 24, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 18-1889  
(1:17-cv-03260-JKB)

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XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

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J U D G M E N T

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In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix 4.1

App. 32

CHARGE DISCRIMINATION		AGENCY	CHARGE NUMBER
This form is to be completed by the complainant after receiving a written statement before completing this form.		<input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC	
NAME (Last, First, Middle Initial) Dr. Xiang		HOME TELEPHONE (Include Area Code) 410-671-9823	
STREET ADDRESS 5570		CITY, STATE AND ZIP CODE Abingdon, Maryland 21009	
NAME Maryland Department of Health and Mental Hygiene Preventive Health Promotion Administration		DATE OF BIRTH 11/07/1953	
Over 50 employees		TELEPHONE (Include Area Code): 410-767-6742	
STREET ADDRESS 201 West Patrick Street		CITY, STATE AND ZIP CODE Baltimore, MD 21201	
COUNTY			
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))			
<input checked="" type="checkbox"/> RACE Asian (not Hispanic/Latino)	<input type="checkbox"/> COLOR	<input type="checkbox"/> SEX	<input type="checkbox"/> RELIGION
<input checked="" type="checkbox"/> RETALIATION former protected activity- Charge No. 531-2014-06271, internal complaints/grievances	<input checked="" type="checkbox"/> AGE	<input checked="" type="checkbox"/> DISABILITY	<input checked="" type="checkbox"/> NATIONAL ORIGIN People's Republic of China
			<input checked="" type="checkbox"/> OTHER (Specify) Hostile work environment/pervasive and continuous discrimination and retaliation
DATE DISCRIMINATION TOOK PLACE EARLIEST 1/1/13		DATE DISCRIMINATION TOOK PLACE LATEST continuing	
<input checked="" type="checkbox"/> CONTINUING ACTION			
THE PARTICULARS ARE			
See attached Particulars			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone Number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		Notary -- (When necessary for State and Local Requirements)	
I declare under penalty of perjury that the foregoing is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.	
Date: 9/20/14 Charging Party: <u>Xiang Xu</u>		/s/ _____ SIGNATURE OF COMPLAINANT	
		DATE	
		Sworn to and subscribed to before me this _____ day of _____ 200____	
		My commission expires: / /	
EEOC Form 5 modified		Notary Public	

RECEIVED  
BALTIMORE FIELD OFFICE  
U.S. EEOC  
2014 SEP -3 P 10:24

Appendix 4.2

App. 33

JKB-17-CV-3260

Exhibit 38

Complaint-Ex-1886

STATE OF MARYLAND  
DEPARTMENT OF BUDGET & MANAGEMENT  
OFFICE OF PERSONNEL SERVICES & BENEFITS  
301 WEST PRESTON STREET  
BALTIMORE, MD 21201

**NOTICE OF TERMINATION**

(Use ONLY for the disciplinary termination of employees in the Skilled and Professional Services, other than Special Appointments.)

TO: <u>Yiao-Ying Yu</u>	<u>213-25-7243</u>	<u>Epidemiologist II</u>
Name	Social Security Number	Classification
<u>557 Kirkcaldy Way</u>	<u>Abingdon, MD</u>	<u>21009</u>
Home Address	City/State	Zip Code
<u>Department of Health &amp; Mental Hygiene</u>		
Name of Employing Agency		

Under the authority of Title 11 of the State Personnel and Pensions Article, I hereby terminate you from your Skilled Service;  Professional Service position effective 11-3-14. This termination is  With Prejudice,  Without Prejudice.

You are advised that you may appeal, in writing, this termination within fifteen (15) calendar days after receipt of this notice to:

Name: Harold Young, III, Esquire  
Title: Chief, Employee Relations Unit  
Address: 201 W. Preston Street  
Baltimore, MD 21201

**CAUSE(S) FOR TERMINATION**

(Specify the rules violated and the incidents of violations with dates.)

.....  
 COMAR 17.04.05.03 B (1) That the employee is incompetent or inefficient in the  
 Performance of the employee's duties;  
 .....  
 COMAR 17.04.05.03 B (2) That the employee is an individual with a disability  
 who with a reasonable accommodation cannot perform the essential functions of  
 the position;  
 .....  
 Ms. Yu displayed disruptive behavior in the workplace. She received a number of  
 disciplinary actions for this behavior. She was sent to the State Medical  
 Director for an evaluation. The State Medical Director determined that she is  
 not able to perform job duties effectively in the foreseeable future.  
 .....

EXPLANATION FOR TERMINATION

(State why termination was determined to be the appropriate discipline.)

Xiao-Ying Yu has been employed by the Maryland Department of Health and Mental Hygiene (DHMH) since November 4, 2009. Ms. Yu has been classified as an Epidemiologist II in the Prevention and Health Promotion Administration since November 7, 2010.

On October 8, 2014, Management received a report from the State Medical Director stating that Ms. Yu is unable to safely, consistently, and reliably perform the essential duties of her position.

On May 19, 2014, Sara Barra requested a work ability exam for Xiao-Ying Yu to determine whether or not she is able to return to work. Ms. Yu's appointment was scheduled for June 16, 2014, but the results of that visit was delayed because the employee was approved for Family and Medical Leave Act (FMLA). The employee was on FMLA from June 23, 2014 to September 12, 2014. The employee has been absent from work since May 1, 2014 due to health related matters. Sara Barra requested a second work ability exam for Xiao-Ying Yu on September 2, 2014, and she was seen by the State Medical Director on September 16, 2014. During this visit, it was recommended that Ms. Yu receive a psychiatric evaluation which was done on September 23, 2014. Ms. Yu's final follow-up appointment with the State Medical Director was on October 6, 2014.

On two occasions, Ms. Yu made requests for reasonable accommodations. These accommodations included changing her direct supervisor and/or a reclassification to an Epidemiologist III due to symptoms associated with her medical condition. Delinda Johnson, DHMH's Equal Access Compliance Manager reviewed the requests in accordance with State and Federal laws, policies and procedures. It was determined that these requests were not reasonable and created an undue hardship to the Prevention and Health Promotion Administration, so the request were denied.

In the final report, Dr. Toney stated that Ms. Yu cannot perform her job duties effectively under her current supervisor, and will not likely be able to do so in the foreseeable future. Also, if Ms. Yu cannot be granted a new supervisor, it is not recommended that she return to work as it will likely continue to worsen her medical condition. After considering mitigating circumstances, the Medical Director's determination, and her entire work history termination is deemed the appropriate action.

DATE OF NOTICE: 10-31-14

(Signed) [Signature]  
Appointing Authority  
PHPA Director  
Title of Position

APPROVED BY: Josh Shartstein RPD  
Head of Principle Unit

DATE: 10/31/14

Please forward a copy of this notice to the Office of Human Resources, Department of Budget and Management, Attention: Employee Relations Division, at the time this notice is given to the employee.

Appendix 4.3  
Exhibit 39

App. 35

# STATE PERSONNEL MANAGEMENT SYSTEM APPEAL AND GRIEVANCE FORM

Complaint-Ex-1188

Attach copies of any earlier agency decisions. If appealing a disciplinary action, the notice of discipline must be attached.)

EMPLOYEE'S NAME: Xiao-Ying Yu		SS#: 213-25-7243
EMPLOYING AGENCY: DHMH, PHPA		DIV. or UNIT:
EMPLOYEE'S CLASSIFICATION: Epidemiologist II		
HOME ADDRESS: 557 Kirkcaldy Way, Abingdon, MD 21009		HOME PHONE #: 410-671-9823
		WORK PHONE #: 410-767-5263
<b>Issue of employee's grievance or reason given by agency for taking disciplinary action (attach additional pages as necessary):</b> On 11/3/2014, the employee received a notice of termination based on disability & disciplinary actions. No accommodation was granted even though State Med. Director stated that "if Ms. Yu can be granted the accommodation of a new supervisor, it is recommended that she be given a trial of returning to regular activity." Appeals of disciplinary actions are in "abeyance" until the employee returns to work, and therefore, the employee has not been determined to be incompetent or inefficient. Management's actions are the result of supervisor's retaliation for employee's engagement in protected activity.		
<b>Date grievance or discipline was discussed with appointing authority:</b> Not aware of details for termination		
<b>State the issues of fact and law, to the extent possible, that support the employee's action (attach additional pages as necessary):</b> The employee asserts there is no factual or legal basis for the agency's action. Disciplinary actions resulted from supervisor's retaliation for the employee's discrimination complaints. Employee appeals under SPPA 11-101 et seq., and EEOC Prohibited Employment Policies/Practices.		
<b>Employee's Requested Remedy:</b> Employee seeks manager to allow her to work under different supervisor as State Medical Director recommended, restore her epidemiologist job duties including access to databases and information and stop all retaliation for the EEOC complaints.		
EMPLOYEE REPRESENTED BY:		
Address:		
Phone Number:		

EMPLOYEE'S SIGNATURE: *Xiao-Ying Yu*

DATE SIGNED: 11/14/2014

Please Circle Appeal Category:

- |   |   |
|---|---|
| <input checked="" type="radio"/> 10 Termination                                     | 40 Forfeiture of Annual Leave                 |
| 11 Termination on Probation   | 42 Written Reprimand                          |
| 20 Suspension Without Pay   | 50 Involuntary Demotion                       |
| 22 Emergency Suspension With Pay  | 60 Denial of Pay Increase                     |
| 30 Grievance (If complaint involves a denied reclass,<br>give date of last audit: ) | 80 Retaliation for "Whistleblower" Disclosure |

**FAILURE TO FULLY COMPLETE THIS FORM WILL DELAY THE PROCESSING OF THIS APPEAL OR IT MAY RESULT IN ADVERSE ACTION ON THIS APPEAL.**

App: 36

Complaint-Ex-189

November 14, 2014

Via E-mail and Certified Mail

Mr. Harold Young, III, Esquire  
Chief, Employee Relations Unit  
Department of Health & Mental Hygiene  
201 W. Preston Street,  
Baltimore, MD 21201

Dear Mr. Young:

On 10/27/2014, I sent a letter to Ms. Toria Livingston inquiring about the status and reason of termination. I have not gotten a response. On 11/3, someone delivered the termination letter to my home (see attached letter). I wish had learned this before 11/3, as I would have made a better choice.

On 2/18/2014 when I sent the appeal and addendum of the 1<sup>st</sup> disciplinary action to you and Dr. Sharfstein, I believe that you would not like and expect me to be terminated.

As per the instruction, I have made this appeal (see attached). I am requesting that you review and investigate the decision to terminate me as I trust you can help me to smoothly resolve this issue. I would like to report to you the following additional information related to my appeal.

***I. Cause of the termination: Ms. Yu displayed disruptive behavior in the workplace. She received a number of disciplinary actions for this behavior***

In order to respond to Sara Barra and HR properly and better communicate with management and HR, I have spent over \$23,000 in lawyer fees.

In consideration of creating a healthy working environment and CCDPC, CCDB and PHPA management, I actively reported to the next level of management, as well as PHPA managers, about Ms. Sara Barra's disruptive behavior (bullying, discrimination, harassment and retaliation) and bore these unfair treatments for years. I sent a number of reports to PHPA managers and HR indicating that the problems and negative impacts on CCDPC and PHPA were not from me. In responding to these reports, Sara Barra claimed that my reporting facts and providing recommendations to managers constituted disruptive behavior and initiated mitigation meetings and progressive disciplinary actions (even when I was out on sick leave), changed my password to prevent me from accessing my office mail on 8/28/2014 (while I was waiting for DHMH HR Ms. Delinda Johnson's response to our reasonable accommodation request), and required workability examinations on 5/19/2014, when I had only been out on sick leave for 12 days, and again on 9/2/2014 when I was on FMLA leave.

I believed change of supervisor would be a reasonable accommodation. Because CCDPC director Ms. Kristin Pier and PHPA planned, in 4/2014, to reorganize CCDPC office structure to best utilize each employee's experience as Ms. Kristin Pier informed each of us, changing me to another group would allow me to do my job duties and avoid the worsening my depression and anxiety. After sending the reasonable accommodation request with DHMH form, doctor's medical documentation and lawyer letter to Ms. Delinda Johnson on 8/19/2014 as per her instruction, I wrote several e-mails to my lawyer in August and on 9/2 and asked the lawyer to check with Ms. Johnson to see if she could consider the accommodation to change supervisor, as I was hoping to find a solution with DHMH instead of filing a complaint with EEOC and also because returning to work and escaping from Sara Barra's bullying,

harassment and retaliation were my goal. I did not hear from the lawyer until the evening of the 9/2/2014, when I got the e-mail from the lawyer that she sent the complaint file to EEOC and also to Ms. Johnson. The following day, (9/3/2014) Ms. Johnson denied our accommodation request.

Again, on 9/29, 10/10 and 10/24, I explained in my e-mails to Ms. Johnson again that my health problem is only caused by Sara Barra's bullying and retaliation. I stated that the completion of my reclassification would be helpful for me to effectively work without Sara Barra's restriction and suppression, but that I am willing to wait for a good time for management to do this and hoped she would reconsider the accommodation as State Medical Director recommended.

Therefore, giving me disciplinary actions and denying State medical director's recommendation and denying my reasonable accommodation request with the reason that it would create an undue hardship to the PHPA lack factual basis. The assertion "employee is incompetent or inefficient in the performance of the employee's duties" (COMAR 17.04.05.03 B1) is premature. The 6 appeals/grievance have been filed but not resolved.

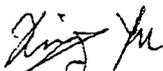
## *II. Cause of the termination: employee disability*

In the "Cause(s) For Termination", it states "The State Medical Director determined that she is not able to perform job duties effectively in the foreseeable future". In the "Explanation For Termination", it states "On October 8, 2014, Management received a report from the State Medical Director stating that Ms Yu is unable to safely, consistently, and reliably perform the essential duties of her position". These statements are misrepresentations of what the State Medical Director concluded and recommended "Ms. Yu is unable to safely, consistently, and reliably perform the essential duties of her position as an **Epidemiologist II under her current supervisor**" (see his reports on 10/8 as well as 6/18 and 9/18/2014). In accordance with his recommendation, I have not applied for the disability benefit which was one option DHMH HR Ms. Livingston provided, but was hoping Ms. Johnson and Ms. Livingston would consider the State Medical Director's recommendation. Because I was never granted a reasonable accommodation, the assertion that "the employee is an individual with a disability who with a reasonable accommodation cannot perform the essential functions of the position" (COMAR 17.04.05.03 B2) lacks factual and legal basis.

Finally, I am concerned about Ms. Michelle Spencer's role as appointing authority in this case, as Ms. Spencer signed my MS-22 on 7/24/2014 when Ms. Barra deleted and restricted my job duties and project involvement. At that time, I explained to Ms. Spencer in person and in writing about the unfairness of the situation, but an investigation was not completed. The change of my MS-22 triggered the series of the internal memorandums and disciplinary actions against me, worsening the retaliation.

I hope with your kind help and investigation about Ms. Barra's claims of "disruptive behavior and 2014 PEP", management can reconsider mitigating circumstances and allow me to return to work with different supervisor based on CCDPC and PHPA plan in 4/2014, my 5 years performance in DHMH (most PEP are outstanding except Sara Barra made) and previous reports to you, other HR officers and managers. I would very much appreciate your attention and consideration and look forward to hearing from you.

Sincerely yours,

  
Xiao-Ying

App. 38

Complaint-Ex-P191

November 14, 2014

**Via E-mail and Certified Mail**

Joshua M. Sharfstein, M.D.  
Secretary  
Department of Health & Mental Hygiene  
201 W. Preston Street,  
Baltimore, MD 21201

Dear Dr. Sharfstein:

On 10/27/2014, I sent a letter to Ms. Toria Livingston inquiring about the status and reason of termination. I have not gotten a response. On 11/3, someone delivered the termination letter to my home (see attached letter). I wish had learned this before 11/3, as I would have made a better choice.

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In consideration of creating a healthy working environment and CCDPC, CCDB and PHPA management, I actively reported to the next level of management, as well as PHPA managers, about Ms. Sara Barra's disruptive behavior (bullying, discrimination, harassment and retaliation) and bore these unfair treatments for years. I sent a number of reports to PHPA managers and HR indicating that the problems and negative impacts on CCDPC and PHPA were not from me. In responding to these reports, Sara Barra claimed that my reporting facts and providing recommendations to managers constituted disruptive behavior and initiated mitigation meetings and progressive disciplinary actions (even when I was out on sick leave), changed my password to prevent me from accessing my office mail on 8/28/2014 (while I was waiting for DHMH HR Ms. Delinda Johnson's response to our reasonable accommodation request), and required workability examinations on 5/19/2014, when I had only been out on sick leave for 12 days, and again on 9/2/2014 when I was on FMLA leave.

I believe a change of supervisor would be a reasonable accommodation. Because CCDPC director Ms. Kristin Pier and PHPA planned, in 4/2014, to reorganize CCDPC office structure to best utilize each employee's experience as Ms. Kristin Pier informed each of us, changing me to another group would allow me to do my job duties and avoid the worsening my depression and anxiety. After sending the reasonable accommodation request with DHMH form, doctor's medical documentation and lawyer letter to Ms. Delinda Johnson on 8/19/2014 as per her instruction, I wrote several e-mails to my lawyer in August and on 9/2 and asked the lawyer to check with Ms. Johnson to see if she could consider the

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JTB-17-CV-3260  
Complaint-Ex-192

accommodation to change supervisor, as I was hoping to find a solution with DHMH instead of filing a complaint with EEOC and also because returning to work and escaping from Sara Barra's bullying, harassment and retaliation were my goal. I did not hear from the lawyer until the evening of the 9/2/2014, when I got the e-mail from the lawyer that she sent the complaint file to EEOC and also to Ms. Johnson. The following day, (9/3/2014) Ms. Johnson denied our accommodation request.

Again, on 9/29 and 10/24, I explained in my e-mails to Ms. Johnson again that my health problem is only caused by Sara Barra's bullying and retaliation. I stated that the completion of my reclassification would be helpful for me to effectively work without Sara Barra's restriction and suppression, but that I am willing to wait for a good time for management to do this and hoped she would reconsider the accommodation as State Medical Director recommended.

Therefore, giving me disciplinary actions and denying State medical director's recommendation and denying my reasonable accommodation request with the reason that it would create an undue hardship to the PHPA lack factual basis. The assertion "employee is incompetent or inefficient in the performance of the employee's duties" (COMAR 17.04.05.03 B1) is premature. The 6 appeals/grievance have been filed but not resolved.

## *II. Cause of the termination: employee disability*

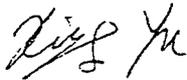
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Finally, I am concerned about Ms. Michelle Spencer's role as appointing authority in this case, as Ms. Spencer signed my MS-22 on 7/24/2014 when Ms. Barra deleted and restricted my job duties and project involvement. At that time, I explained to Ms. Spencer in person and in writing about the unfairness of the situation, but an investigation was not completed. The change of my MS-22 triggered the series of the internal memorandums and disciplinary actions against me, worsening the retaliation.

As you know, you supported our DHMH GIS grant application (see your letter on 12/30/2013). I have been the lead and made the application with our core team members (see 1/2014 GIS grant application). This application received a much higher score (in the high 80's) than the 2013 application written by Ms. Barra. I followed up with Sara Barra (on 2/20/2014) after she and I received the notice of this GIS application from CDC/NACDD, but I have not heard any response. I am hoping you will investigate the "disruptive behavior and 2014 PEP" Sara Barra claimed and created for terminating me before you go to Johns Hopkins Bloomberg School of Public Health. I believe your investigation will help management to reconsider mitigating circumstances and allow me to return to work as the State Medical Director

recommended. If I have management's support, I can continue leading our team and sending our improved-GIS application by the 1/9/2015 deadline. Doing this would require basic working conditions, such as access to databases and information, (that Sara Barra has never allowed me), with a different supervisor or even report temporarily to CCDPC office director Ms. Pier, as occurs in other DHMH offices. I believe a change of supervisor is possible and reasonable given the plans to re-organize the CCDPC office structure in 4/2014. This work would allow DHMH to better utilize the GIS tool for our Maryland chronic disease control and prevention programs as well as for other programs and related policy making and changes. I hope to continue my valuable work, given my 5 years performance in DHMH (most PEP are "Outstanding" except those made by Sara Barra), my good working relationships with DHMH team members and other offices; CDC, NACDD, CSTE and colleagues in other States, and past efforts to solve problems by communicating with managers, HR officers and you. I would very much appreciate your kind consideration and look forward to hearing from you and meeting with you, if it is possible.

Sincerely yours,



Xiao-Ying

Enclosed:

1. Termination letter
2. The Appeal (termination letter)
3. HR Ms. Toria Livingston's letter
4. State Medical Director's letter on 10/8, 9/18 and 6/18/2014
5. GIS grant supporting letter
6. 2014 GIS grant application
7. 2013 GIS grant application (Sara Barra generated), and
8. My DHMH ID card and key for my office desk (in certified mail only)

Appendix 5.1

App. 41

February 6, 2019  
Patricia S. Connor, Clerk  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA. 23219

Re: Case No. 18-1889, Xiao-Ying Yu v. Robert Neal (1:17-cv-03260-JKB),  
Petition for Panel Rehearing and Rehearing En Banc and related exhibits

Dear Clerk Connor:

On January 24, 2019, I received the Curiam Opinion and judgment and instruction for Petition Rehearing/ Rehearing En Banc.

I just searched this Court's website and realized there are "Petition for Initial Hearing En Banc". However, I never have had any hearing in this Court or received any instruction for "Petition for Initial Hearing". Based on my case situation, I am seeking your help for "Petition Initial Hearing" if there is more opportunity to be granted by this Court than "Petition for Panel Rehearing and Rehearing En Banc". If so, please instruct me for further procedure.

To avoid missing the deadline, I file through "Petition for Initial Hearing En Banc" based on the proceedings in my case. Meanwhile, I will pay petition fee and upload through Petition for panel rehearing and petition for rehearing En Banc as the document I received from pacer e-file email on 1/24/2019.

The certificate of compliance and certificate of service are also enclosed.

Respectfully submitted,



Xiao-Ying Yu, *pro se*

Cc. Chief Judge: Robert L. Gregory

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No. 18-1889

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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XIAO-YING YU,  
*Plaintiff-Appellant*

v.

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL, and  
MARYLAND DEPARTMENT OF BUDGET & MANAGEMENT,  
SECRETARY DAVID BRINKLEY,  
*Defendants-Appellees*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MARYLAND

---

**APPELLANT'S PETITION FOR PANEL REHEARING  
AND REHEARING EN BANC**

---

February 6, 2019

Xiao-Ying Yu  
Mailing address:  
P.O. Box 293  
Abingdon, MD 21009  
Telephone: 410-671-9823  
Pro se plaintiff-appellant

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*B. The Curiam Opinion affirming the reason of "lack of subject matter Jurisdiction" and "failure to state claims" to dismiss Plaintiff's Claims stated by district Court conflicts with relevant decisions by U.S. Supreme Court, this Court and other Federal Circuit Courts.....6*

*C. It needs to be heard through Panel Rehearing and Rehearing En Banc That the Curiam Opinion affirming the reason "State's immunity to employee's ADA complaint" to dismiss Plaintiff's claim stated by District Court conflicts with relevant decisions with the standard review and decision by U.S. Supreme Court, this Court and other Federal Court of Appeals.....13*

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3. Plaintiff's 12/8/2017 (ECF#4) report to district court and request to amend EEOC's records (Missed from ECF#USCA4 docket records #4).....	App-8
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**PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

**I. INTRODUCTION**

After filing Appellant's "Informal Brief" and "Informal Reply Brief" appealing the District Court of Maryland's judgment that dismissed her claims (pursuant to EEOC's 10/16/2017 right-to-sue letter, Exhibit #1) of workplace retaliation, Appellant, ("Plaintiff") filed "Supplemental Informal Brief" indicating that part of docket records transmitted by District Court to the Fourth Court of Appeals (USCA4) was missing. On 1/24/2019, Plaintiff received the two page Curiam Opinion and one page judgment from this Court which affirmed District Court's decision. According to Federal Rules of Appellate Procedure ("FRAP") Rule 35, 28 U.S.C. §46(c&d) and 40 as well as this Court's procedure, Plaintiff herein respectfully moves this Honorable Court for Panel Rehearing and Rehearing En Banc because some material, factual and legal matters were overlooked; the Curiam Opinion and consequent Judgment conflict with decisions of the U.S. Supreme Court, this Court and other Federal Court of Appeals without providing details to Plaintiff; and questions related to "due process of law" during the judicial proceedings under Rule 54, 29 U.S.C. § 1291 and Fourteenth Amendment, the omissions of facts and changes of docket records stated in Plaintiff's appeal are exceptionally important and were not addressed. Plaintiff states the following:

## II. GROUND FOR PANEL REHEARING AND REHEARING EN BANC

**A. Panel Rehearing and Rehearing En Banc are warranted because overlooking/mis-apprehending the material, factual and legal matters provided in Plaintiff's complaints, Informal Brief, Informal Reply Brief and Supplemental Informal Brief and related exhibits led to biased fact-findings and affirmation of the reasons to dismiss Plaintiff's claims stated by District Court.**

*1. Plaintiff's claims of retaliation under ADEA, ADA and Title VII were overlooked or mis-apprehended which led to affirmation of the reason of "failure to state claim" to dismiss Plaintiff's claims stated by District Court:*

Plaintiff's complaint was based on Title VII, ADEA, ADA, 42 U.S.C. §1981&NLRA et al.<sup>1</sup> This complaint was filed in response to damages from harassment, discrimination, and retaliation initiated by her immediate supervisor, Ms. Sara Barra and tolerated and supported by MDH and MDBM managers including the Union between Dec. 2013 and 2014 after Plaintiff's previous charges were filed with EEOC (Exhibit#2). However, the damages from the progressive retaliation including willful unequal/under payment, disciplinary actions, rejection of disability accommodation and employment termination without mediation were either omitted or misrepresented. Defendants demanded dismissal of Plaintiff's claims for failure to state a claim and denial of her request of a second amendment. District Court dismissed her claims under Rule 8 and 12(b)(6) with prejudice (ECF#32&33, order 1 b). Even though the established causal connections (between

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<sup>1</sup> Regarding other related federal laws, see details in amended complaint, the opposition, supplemental response in opposition to motion to dismiss and informal brief (ECF#4, 20, 30, COA#10, 23&25).

Plaintiff's protected activities and adverse actions) and consequent damages as the major complaint were demonstrated by enormous evidence in Plaintiff's complaints and 39 exhibits as well as her "Informal Brief" and "Informal Reply Brief" filed with this Court, these material, factual and legal matters were overlooked/mis-apprehended as "find no reversible error" and only "workplace discrimination" stated in the Curiam opinion leading to this Court to affirm District Court's dismissal of Plaintiff's claims with the reason of "failure to state a claim" with prejudice.

*2. EEOC's right-to-sue letter and related reports provided to District Court were ignored or omitted leading to the decision to affirm the reason of "lack of subject matter jurisdiction" to dismiss Plaintiff's claims stated by District Court.*

Plaintiff reported to District Court (11/2/2017) "I received EEOC's conclusion and letter for right to sue for my second charge (dated 10/16/2017)" (see ECF#1, COA docket No. "COA#"4, Exhibit.1). She updated reports to District Court that she hold EEOC's permission letter because she requested EEOC to reconsider their conclusion and she also requested to file second amendment with newly discovery upon receiving EEOC recordings on 12/8/2017 (Exhibit#3); 3/19/2018 (Exhibit#4), and 3/22/2018 (Exhibit#5). Meanwhile, she provided District Court EEOC's 10/16/2017 right-to-sue letter after she received EEOC's

rejection of reconsideration following her filing complaints (ECF#20, related exhibit#1).

However, some of these related records (Exhibit#3,4&5) transmitted by District Court were missing and some records were changed in the USCA4 docket records (COA#4, 15&23) because District Court's receipt of EEOC's right-to-sue letter and related reports was neglected for dismissal of Plaintiff's claims by "lack of subject matter". This matter was initially stated in Plaintiff's "Response to Defendants' Motion to Dismiss" on 3/22/2018 (ECF#20). The questions related to "due process of law" during judicial proceedings and concerns about the deletion and changes in the docket records were addressed in "Supplemental Informal Brief" (1/16/2019, COA#23) in addition to her letter on 9/4/2018 (COA#7), "Informal Brief"(COA#10), and "Motion for Concerns of the Docket Records" with exhibits (10/22/2018, COA#17). Plaintiff did not receive a response for this motion under Fed. Rules of Appellate Procedure Rule 27, yet, she was denied as moot for this motion as stated in the Curiam opinion even though this motion and related exhibits were referred and stated in her "Informal Reply Brief" and "Supplemental Informal Brief" (Exhibi#6).

Obviously, without intentionally making these errors, such as denial of receipt of EEOC's right-to-sue letter and failure to acknowledge the established causal connection between Plaintiff's EEOC charges and defendants' adverse

actions; ignorance and deletion of Plaintiff's reports (USCA4 docket records) regarding EEOC's permission to sue, and Plaintiff's request to amend new discovery upon receiving EEOC's complete recordings on 11/2/& 12/8/2017, 3/19&3/22/2018 (Exhibit#1, 3-5)<sup>2</sup>, District Court was unable to dismiss Plaintiff's claim under Rule 8 & 12(b)(1)&(6) for the reasons stated in their judgment (failure to state claim; lack of subject matter jurisdiction; failure to provide what type of information for amendment, and amendment would not cure the defects). District Court failed to have "an express determination that there is no just reason to delay" and "an express direction for entry of judgment" per instruction of Federal Civil Procedure 54 (b) and 28 U.S.C. §1291 prior to closure of Plaintiff's case and denial of her request for second amendment by stating any amendment would not cure this defect. Therefore, these errors are not harmless but are reversible errors according to the definition of Reversible Error in Wikipedia "[I]n United States law, a reversible error is an error of sufficient gravity to warrant reversal of a judgment on appeal. It is an error by the trier of law (judge), or the trier of fact (the jury, or the judge if it is a bench trial), or malfeasance by one of the trying attorneys, which results in an unfair trial."

([https://en.wikipedia.org/wiki/Reversible\\_error](https://en.wikipedia.org/wiki/Reversible_error))

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<sup>2</sup> District Court falsely stated Plaintiff does not allege that she received a right-to-sue letter in the judgment and has not moved to amend her complaint a second time (COA#4, ECF#32. P.3-4); the established causal connections and related legal matters were described in her Amended Complaint, the Response, Supplemental Oppositions and Informal Brief and Informal Reply Brief (ECF No. 4, 20, 30 and COA#10, 23&25).

Because these reversible errors were not identified in the Curiam Opinion and Plaintiff's concerns about these errors stated in her "Motion for Concerns of the Docket Records" and related exhibits were denied as moot in the Curiam Opinion; and also due to that the Curiam Opinion stated "we dispense with oral argument because the facts and legal contentions are adequately presented in the material before this court and argument would not aid the decisional process",<sup>3</sup> these reversible errors need to be heard through Panel Rehearing and Rehearing En Banc in this Court.<sup>4</sup>

**B. The Curiam Opinion affirming the reasons of "lack of subject matter jurisdiction" and "failure to state claim" to dismiss Plaintiff's claims stated by District Court conflicts with relevant decisions by U.S. Supreme Court, this court and other Federal Court of Appeals.**

*1. The factual essence of claims about whether Plaintiff really failed to exhaust administrative remedies and if Plaintiff provided information of EEOC's right-to-sue and the established causal connections must first be articulated prior to determining whether District Court errors are reversible.*

According to commands in "Civil Litigation Management Manual" for *pro se* cases, District Court is obligated to check subject matter jurisdiction and give Plaintiff opportunity to cure defects. District Court could allow Plaintiff to file second amendment of her complaint or to grant jury trial prior to closure her case. However, District Court refused to provide any of these opportunities for Plaintiff.

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<sup>3</sup> Defendants requested this Court for not having oral argument (see COA#12 &14)

<sup>4</sup> Plaintiff reported that these material, factual and legal matters (COA#4, 7, 10, 17, 23&25) were overlooked; and her motion was denied as moot and her request for oral argument was rejection. Plaintiff's right to be heard for the questions related to due process of law in District Court's proceeding under Fourteenth Amendment and consequent changes of the docket records is warranted.

Instead, District Court adopted the false reasons of “lack of subject matter of jurisdiction” and “failure to state claim” to dismiss her claims under Rule 8 & 12(b)(1)&(6). Pro se complaint alleging deprivation of rights under color of state law should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hudspeth v. Figgins*, C.A.4 (Va.) 1978, 584 F.2d 1345, certiorari denied 99 S.Ct. 2013, 441 U.S. 913, 60 L.Ed.2d 386.

District court referred their previous case for making the reason of “lack of subject matter jurisdiction” to dismiss Plaintiff’s claims. However, this case (*S. Walk at Broadlands Homeowner’s Ass’n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184(4<sup>th</sup> Cir. 2013)) was not comparable with Plaintiff’s situation because District Court received the information of EEOC’s permission to sue along with Plaintiff’s initial pleading as described above. Even though her reports to District Court regarding this matter (transmitted by the District Court to USCA4) were missing, Plaintiff’s “Supplemental Informal Brief” in addition to her letter and “Motion for Concerns of the Docket Records” and related exhibits should be able to bring this to Court’s attention (Exhibit#6) under Federal Rules of Appellate Procedure Rule 10. The Record on Appeal (a)(1) &(e).

This Court judge Traxler, Shedd and Senior Judge Hamilton stated how to identify if there were false reasons for district court to dismiss an employee’s claim

by the reasons of lack of subject matter jurisdiction and failure to state claim in the alleged claims of workplace retaliation: *Jones v. Calvert Group Limited*. No. 07-1680. (4<sup>th</sup> Circ., 2009).

Also, this Court Chief Judge Gregory (joined by judge Diaz and Harris) hold the workplace harassment, discrimination and retaliation claims, *Strothers v. City of Laurel, Maryland* (4<sup>th</sup> Cir. 2018) and addressed 8 key points to determine whether the factual issues existed in plaintiff's complaint and if plaintiff stated her retaliation claims by demonstrating a prima facie retaliation, such as: proof of plaintiff engaged protected activities; her immediate supervisor's harassment and discrimination; sufficient severe or pervasive adverse actions to alter terms or conditions of her employment and create abusive environment; determination if employer was negligent in failing to address ongoing harassment of employee; and examine the causal connection. "[W]e therefore concluded that Strothers has shown, at the summary judgment stage, sufficient facts to support a causal connection between her complains about Koubek's harassment and her termination by the City." He reversed the decision of district Court of Maryland and remanded for further proceedings consistent with this opinion.

*2. The Information related to EEOC's permission to sue and EEOC's right-to-sue letter enclosed in Plaintiff's reports along with her complaints and her "Response to Defendants' Motion to Dismiss" which were filed with District Court should be permitted to serve as the supplemental pleadings under Rule 15 (d), and the Curiam Opinion affirming the reason of "lack of subject matter jurisdiction" to dismiss Plaintiff's claims lacked factual and legal ground.*

As described above, District Court stated “Plaintiff does not allege that she received a right-to-sue letter” to dismiss her claim and rejected her request for second amendment stated in multiple letters and “Supplemental Response in Opposition to Defendants’ Motion to Dismiss ” (filed by her attorney, 5/11/2018, ECF#30).

Question is whether evidence of EEOC’s permission to sue and her request of second amendment filed with District Court between 11/2/2017 and 3/22/2018 (as described above) should be kept in the docket records and permitted to serve as supplemental pleading for her exhaustive administrative remedies and request for second amendment. Federal Rule of Civil Procedure Rule 15 Amended and Supplemental Pleadings (d) instructed Court:

“SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.”

In *Ruth v. State Arkansas DWS* No. 17-1457 (8<sup>th</sup> Cir. 2017) claims under Title VII, the Judge reversed district court’s reversible error, remand with the direction to allow Ruth to amend her pleadings based on 29 C.F.R. 1601.12(b):

“ A change may be amended to cure technical defects, including defects or

omissions, including failure to verify the changes, or to amplify allegations therein.”

Therefore, according to Rule 15 (d) and 29 C.F.R. 1601.12(b), affirming District Court’s dismissal of Plaintiff’s claim for lack of subject matter jurisdiction and prohibition her from filing second amendment for not being able to cure the defects and filing too late lacked factual and legal ground.

*3. The Curiam Opinion affirming the reasons of “lack of subject matter jurisdiction” and “failure to state claim” to dismiss Plaintiff’s claims stated by District Court conflicts with standard reviews and relevant decisions made by this Court, other federal Court of Appeals and U.S. Supreme Court.*

First, the Curiam Opinion is not consistent with the judgment which the Judge Motz herself participated along with this Court’s former Chief Judge Wilkinson and Judge Niemeyer for the claims of retaliation under Title VII and civil rights in the case *Godon v. North Carolina Crime Control & Public Safety, et al*, (No. 99-2509, 4<sup>th</sup> Cir. 2000). *Godon* was dismissed by district court for failure to state a claim upon which relief can be granted under Rule 12(b)(6). This Court stated “[T]he current forecast of the evidence, when viewed in a light most favorable to Godon, tends to show that she was terminated because she spoke as a citizen on matters of public concern. See *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F 3d 337, 354-58 (4<sup>th</sup> Cir. 2000); *Cromer v. Brown*, 88 F.3d 1315, 1325-29 (4<sup>th</sup> Cir. 1996)” Accordingly, this Court affirmed in part, vacated in part, and remanded for Godon’s case.

Second, the Curiam Opinion conflicts with the previous decisions made by this Court Judges Traxler, Shedd and Hamilton (senior Judge), for the alleged claims of workplace retaliation and dismissal due to lack of subject matter jurisdiction: *Jones v. Calvert Group Limited*. No. 07-1680. (4<sup>th</sup> Circ., 2009): This Court stated: “[w]e vacate the judgment against Jones on the merits of her age, sex, and race claims and we remand to the district court for dismissal of those claims for lack of subject matter jurisdiction because of Jones's failure to exhaust administrative remedies. (the Court footnote#1: Jones seeks no relief from this court regarding the dismissal of her breach of contract cause of action).”

Regarding determination of reversible errors, Second Circuit Court reviewed the dismissal of the claims of the workplace discrimination and retaliation for lack of subject matter jurisdiction in *Fowlkes v. Ironworkers Local 40*, No. 12-336-cv (2<sup>nd</sup> Cir. 2015). The judge examined the records regarding the plaintiff's failure to exhaust the administrative remedies for Title VII claims and the claim of breach of the duty of fair representation under National Labor Relations Act (NLRA), the judges concluded that “ [t]he district court erred in its determination that Fowlkes's failure to exhaust administrative remedies deprived it of subject matter jurisdiction over his Title VII claims. In addition, we concluded that Fowlkes has stated a federal claim under NLRA, 29 U.S.C. § 151, et seq. for the local's breach of its

duty of fair representation. Accordingly, we vacate the judgment dismissing Fowlkes amended complaint and remand the cause to the district court.”

Here, the complaints and appeal Plaintiff filed include the claim of that Union manager breached her duty of fair representation and whose action was sufficient sever to alter the termination (ECF#4). Because Plaintiff provided ample evidence that both Union and defendants’ managers had failed in their alleged duty by negligently failing to address ongoing harassment, discrimination and retaliation (ECF#20 & related exhibit#3, ECF#4 & related exhibit#1,12&20; COA#10, 23&25), she believed that her major complaints under Title VII, ADEA and ADA were also related to Fair Labor Standards Act and National Labor Relations Act and thus she made selection of related rules on JS 44 form (Exhibit#7). It is not proper for District Court to allege that Plaintiff did not correctly categorize legal theories (ECF#32, p12, 1<sup>st</sup> paragraph, L12-13) and decide “To the extent Plaintiff has attempted to bring any of these claims, they will be dismissed” because the pleading does not need to correctly categorize legal theories giving rise to the claims, and the court will not dismiss complaint merely because plaintiff’s allegations do not support particular legal theory advanced. *Espinoza v. Fry's Food Stores of Arizona, Inc.*, D.Ariz.1990, 806 F. Supp. 855.

Nevertheless, Plaintiff’s claim under NLRA should not be neglected in Curiam Opinion and judgment prior to affirming District court’s decision even

though Plaintiff was unable and can not provide more details about Union manager's failure of her duty and specific detail section of NLRA by pages limitation of her complaints, her "Informal Brief" and this petition.

**C. It needs to be heard through Panel Rehearing and Rehearing En Banc that the Curiam Opinion affirming the reason of "State's immunity to employee's ADA complaint" to dismiss Plaintiff's claim stated by District Court conflicts with relevant decisions by U.S. Supreme Court, this court and other Federal Court of Appeals.**

Plaintiff's claims of the retaliation include that her position and seniority job duties in federal CDC 1305 funds program were deprived and interfered with by Ms. Barra although Plaintiff was the only epidemiologist with 100% of time devoted to CDC-1305 funds program (ECF#4). Also, Plaintiff addressed the Congress's abrogation of State's immunity to ADA claims and her right to be protected under the Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a as the State's receipt of CDC 1305 funds which means defendants waived their Eleventh Amendment Immunity to law suits under ADA (ECF#20&30). These factual and legal matters were overlooked when the Curiam Opinion affirmed District Court's decision for State's immunity to her ADA claim.

Under the McDonnell Douglas scheme, if defendant submits no evidence of any legitimate non-retaliatory reason for its adverse actions alleged by Plaintiff, district court should not dismiss Plaintiff's claims. *Medlock v. Ortho Biotech Inc.*,

164 F. 3d 545, 550 (10<sup>th</sup> Cir.); *EEOC v. Avery Dennison Corp.*, 104 F. 3d 858, 861 (6<sup>th</sup> Cir. 1997). Here, defendants did not provide evidence of a legitimate, non-retaliatory reason for their adverse actions that were indicated by the causal connections between Plaintiff's EEOC charges and the retaliation and damages done by Ms. Barra and Ms. Johnson (ECF#4, p. 6-13; COA #10 &23).

However, District Court adopted the defendants' reasons for Eleventh Amendment Immunity to dismiss Plaintiff's ADA claim by stating that Congress has not abrogated Eleventh Amendment Immunity for ADA or ADEA, and Plaintiff does not assert a Rehabilitation Act claim in her complaint and has not alleged that State has accepted qualifying federal funds.

In fact, the House report on the ADA indicated, "inconsistent treatment of people with disability by state or local government agencies is both inequitable and illogical". (H.R. Rep. No. 101-485 (II), at 37 (1990)). "The Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid" (42 U.S.C. §12202).

Based on the analyses of *Kimel* 528 U.S. 62, 120 S.Ct. 631, 145 I.Ed. 2d 522 (2000) and others opinions for ADEA and ADA claim, the court "hold that the ADA validly abrogated 11<sup>th</sup> Amendment Immunity so that Plaintiff's ADA claims

against the defendants are not barred by the immunity”. *Cisneros v. United States of America, Intervenor*. No. 98-2215, Part II. (10<sup>th</sup> Cir. 2000).

Thus, District Court failed to indicate how defendants’ immunity to Plaintiff’s ADA claim can be outside of the control of Congress’ clear abrogation of Eleventh Amendment Immunity in suits under the ADA especially when Plaintiff’s seniority job (supported by the CDC funds) was terminated against her ADA claim; Defendants failed to provide evidential materials to show that any and all of Plaintiff’s exhibits from different resources (ECF#4, related exhibit #9, 21, 22, 26 & 29, and ECF#20, related exhibit#3) related to the activities involving Federal CDC 1305 program funds did not exist, or were invalid, or that defendants never received CDC 1305 program funds. Furthermore, defendants failed to demonstrate that they had not waived State’s immunity when they received Federal CDC 1305 program funds. Finally, defendants failed to indicate that the federal CDC 1305 program funds, (received and used by defendant and many co-workers and County Health Department in Maryland, as well as received by many other States of the United States), does not qualify for “the certain federal funds” which is defined to mean that all of the operations of “a department, agency, special purpose district, or other instrumentality of a State or of a local government,” or “the entity of such State or local government that distributes such

assistance and each department or agency... to which the assistance is extended".  
(504 Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a)

In the case *Harrison v. Robert E. Rubin, Secretary of the Treasury, United States Department of the Treasury* (No. 98-5019, D.C. Cir. 1999) related to Title VII and ADA claim, because district court denied Harrison to amend her complaint to correct an erroneous statutory citation and erred in finding her claims, District of Columbia Circuit reviewed the denial of a motion to amend (Rehabilitation Act) for abuse of discretion. Therefore Court reversed the dismissal of appellant's Title VII claims and remand to the district court for further proceedings.

### III. Conclusion

Plaintiff's appeal is based on the ground that District Court made erroneous findings of facts; ruled on errors of laws and failed to provide due the process of law in judicial proceedings in order to dismiss Plaintiff's claims. However, these materials, factual and legal matters of District Court's proceedings and decisions were overlooked, and the Curiam Opinion and judgment conflict with relevant decisions made by this Court and other federal Court of Appeals as well as U.S. Supreme Court. Plaintiff respectfully requests this Court to reverse/partially reverse the judgment of District Court with appropriate remedies, or vacate District Court's judgment against Plaintiff on claims under Title VII and ADA and remand

App. 62

to District Court for further proceedings, including reasonable discovery and jury trial with the opinions and decisions made by this Court.

Dated February 6, 2019

Respectfully submitted



Xiao-Ying Yu, *pro se*

Mailing address:

P.O. Box 293

Abingdon, MD 21009

Appendix 5.2

App. 63

Appeal: 18-1889

Doc: 37

Filed: 03/26/2019

Pg: 1 of 1

FILED: March 26, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 18-1889  
(1:17-cv-03260-JKB)

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XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader); DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

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ORDER

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The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Keenan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix 6, 1,

App. 6A

FILED \_\_\_\_\_ ENTERED \_\_\_\_\_  
LODGED \_\_\_\_\_ RECEIVED \_\_\_\_\_

November 2, 2017  
Clerk Felicia C. Cannon  
United States District Court  
For The District Court Of Maryland  
101 West Lombard Street  
Baltimore, MD 21201

NOV 06 2017

AT BALTIMORE  
CLERK U.S. DISTRICT COURT  
DISTRICT OF MARYLAND DEPUTY

BY

**JKB17CV3260**

Dear Clerk Cannon:

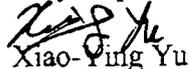
I filed a charge of age, national origin and disability discrimination and retaliation with EEOC in Baltimore Office on 9/3/2014 because of adverse actions in retaliation for my previously filing a charge of my former supervisor Ms. Sara Barra's harassment, age and race discrimination and retaliation behavior with EEOC on 11/12/2013. I was granted the right to sue by EEOC on 11/26/2013, although I did not filed lawsuit.

On 10/21/2017, I received EEOC's conclusion and letter for right to sue for my second charge (dated 10/16/2017). However, I have some concerns and am hoping that the EEOC director will reconsider the conclusion.

While I am waiting for EEOC's reconsideration and a copy of the administrative file for this charge, I am filing this complaint because the statute of limitation is 3 years for filing a complaint about willful underpayment and wrongful termination. I am requesting to amend my complaint and related exhibits and also provide certificate of service and summons to defendants when I receive complete information from EEOC.

Enclosed please find the Civil Cover Sheet, the Complaint I completed according to the video instruction on your website and filing fee with personal check \$400. Please instruct me on how to successfully file my complaint in the Honorable Court. Your kind attention and consideration are highly appreciated.

Very respectfully submitted,



Xiao-Ping Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009  
Home phone: 410-671-9823

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**  
Xiao-Ying Yu

**(b) County of Residence of First Listed Plaintiff** Harford County  
(EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorneys (Firm Name, Address, and Telephone Number)**

**JKR 17 CV 3260**

**DEFENDANTS**

- Maryland Department of Health, Secretary:  
Mr. Dennis Schrader
- Maryland Department of Budget and Management, Secretary:  
Mr. David Brinkley

County of Residence of First Listed Defendant Baltimore BALTIMORE  
(IN U.S. PLAINTIFF CASES ONLY) CLERK U.S. DISTRICT COURT  
DISTRICT OF MARYLAND

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

NOV 06 2017

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input checked="" type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input checked="" type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input checked="" type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input checked="" type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>LABOR</b> <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input checked="" type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**V. ORIGIN** (Place an "X" in One Box Only)

Original Proceeding     2 Removed from State Court     3 Remanded from Appellate Court     4 Reinstated or Reopened     5 Transferred from Another District (specify)     6 Multidistrict Litigation - Transfer     8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): ADA, ADEA, Title VII of the Civil Rights Act of 1964, Law. 42 U.S.C. § 1981 & 1983; 29 USC § 187. Fair Labor Act

Brief description of cause: National Origin & Disability discrimination and retaliation for my previous filing a charge with EEOC in 2013.

**VII. REQUESTED IN COMPLAINT:**  CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 750,000 CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY** (See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_ SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

Appendix T.1

App. 66

December 7, 2017  
Clerk Felicia C. Cannon  
United States District Court  
For The District Court Of Maryland  
101 West Lombard Street  
Baltimore, MD 21201  
Re: Civil Action No. JKB 17-cv-3260

BALTIMORE-NIGHT BOX

2017 DEC -8 PM 4:14

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

Dear Clerk Cannon:

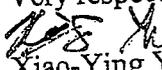
I submitted 2 copies of completed summons for each defendant (Maryland Department of Health and Maryland Department of Budget and Management) on December 6, 2017 as your order requested (dated 11/16/2017).

As your officer instruction over the phone, I am submitting my amendments for my previous complaint (filed on 11/2/2017) and related exhibits.

Although I filed my request to reinvestigate my case in EEOC and requested a copy of my charge file in Philadelphia EEOC Administrative Office, I have not heard from EEOC. I would like to submit additional information as soon as I receive a response from EEOC.

Enclosed please find the updated and signed complaint and related 39 exhibits. Your kind attention and consideration are highly appreciated.

Very respectfully submitted,

  
Xiao-Ying Yu

557 Kirkcaldy Way  
Abingdon, MD 21009  
Home phone: 410-671-9823

No.18-1889: Exhibit No. 2-Petition for Panel Rehearing and Rehearing En Banc

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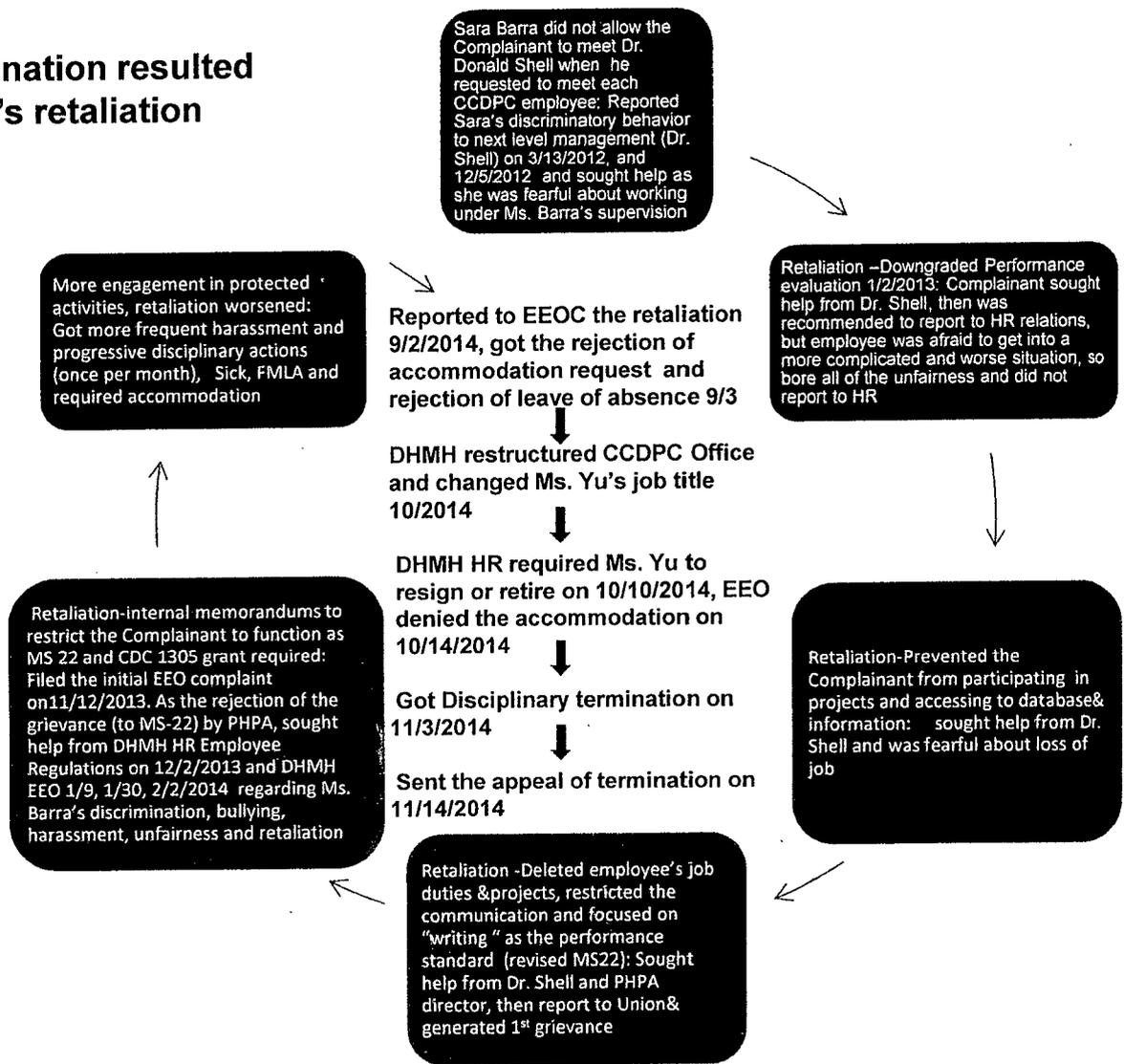
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# Xiao-Ying Yu's termination resulted from the supervisor's retaliation

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### Disciplinary actions:

1. 2/3/2014 Due to the Complainant's checking the status of CSTE abstract submission by calling Dr. Shell work phone on 1/15/2014
2. 3/18/2014 Due to checking with CDC about 1305 grant e-mail list although the Complainant provided one page detailed report per PHPA requested on 3/13/14. The Complainant requested several times from Ms. Barra's permission to participate in 1305 program with basic working condition and information, but she was not allowed.
3. 4/23/2014 As Ms. Barra learned that CDC officer was aware of the Complainant's suspension for checking CDC e-mail list and claimed that was due to her report to CDC.
4. 5/20/2014 Because Ms. Barra sent her the memo with restriction of her job duties, the Complainant explained to Ms. Barra on 4/18 and not heard a response. The Complainant sent the clarification to PHPA managers and cc'ed to Union representative and director on 4/25/2014.
5. 6/9/2014. Ms. Barra gave her "unsatisfactory" annual PEP and disciplinary action with denial of annual increase.
6. 11/3/2014. termination

Appendix 7.3

APP. TO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

BALTIMORE-NIGHT BOX  
2017 DEC -8 PM 4:14

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

Xiao-Ying Yu

557 Kirkcaldy Way, Abingdon, MD 21009

(Full name and address of the plaintiff)  
Plaintiff(s)

vs.

Maryland Department of Health  
Secretary: Mr. Dennis Schrader

201 W. Preston Street,  
Baltimore, MD 21201

Maryland Department of Budget and  
Management  
Secretary: Mr. David Brinkley

301 W. Preston Street,  
Baltimore, MD 21201

(Full name and address of the defendant(s))  
Defendant(s)

FILED ENTERED  
LODGED RECEIVED

DEC 08 2017  
CLERK U.S. DISTRICT COURT  
BALTIMORE-NIGHT BOX

Civil No.: JKB-cv-3260  
(Leave blank. To be filled in by Court.)

COMPLAINT

1. Jurisdiction in this case is based on:

- Diversity (none of the defendants are residents of the state where plaintiff is a resident)
- Federal question (suit is based upon a federal statute or provision of the United States Constitution)
- Other (explain) \_\_\_\_\_

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2. The facts of this case are:

Plaintiff, Xiao-Ying Yu brings forth the following cause of claims and alleges the following:

I. Underpayment of Salary:

On 2/18/2014, Ms. Yu wrote email to former Secretary Dr. Joshua Sharfstein to seek his help about missing reclassification and underpayment (Exhibit "E"#1). The problem was not resolved and was remain unsolved when she was wrongfully terminated on 11/3/2014. Please see the facts and background below:

- 1) Ms. Yu was only Chinese and oldest person at age over 60, who was the epidemiologist working in Maryland Department of Health ("MDH"), Center of Chronic Disease Prevention and Control ("CCDPC") between 11/4/2009 and 11/3/2014. She was reinstated on 11/4/2009 as Epidemiologist I at grade 16 and pay step 9. Her salary was dropped from \$67,800 to \$51,860 due to grant budget limitation.
- 2) In February 2010, CCDPC former office director, Dr. Audrey Regan increased Ms. Yu's job responsibilities from heart disease and stroke program to all types of chronic diseases such as diabetes, obesity, and her supervision level changed from "General" to "Manager" level. Dr. Regan verbally told Ms. Yu that she would increase Ms. Yu's salary by \$10,000 thru HR appropriate application process.
- 3) In March 2011, Ms. Yu learned that Dr. Regan's application for Ms. Yu's reclassification was approved by MDH and Maryland Department of Budget and Management ("DBM") with the Epidemiologist III Position Identification Number. The decision was made to grant her Epidemiologist III and corresponding salary increase after the discussion between Dr. Regan, HR, Ms. Cathie Thompson and Dr. Maria Prince.
- 4) Yet, in May 2011, Dr. Prince refused to complete the HR required MS-44 and MS-2024 forms with the facts (about the increase of Ms. Yu job duties and changes of the supervision level since 1/2010) insisting on taking the easiest way to give Ms. Yu non-competitive promotion from Epidemiologist I to Epidemiologist II, grade 17, payment step 9, \$55,332 in 2011, which she previously mentioned once to Ms. Yu. But, she promised Ms. Yu for non-competitive promotion from Epidemiologist II to Epidemiologist III the next year (2012). Dr. Prince requested Ms. Toria Livingston at HR (instead of Ms. Thompson at HR) to proceed this "reclassification" process in the several months later.
- 5) After Dr. Regan resigned, Dr. Prince became acting office director in January 2012. Dr. Prince opened the Epidemiologist III position and did not allow Ms. Yu to apply when Ms. Yu checked with her. The Position Identification Number of Epidemiologist III previously approved for Ms. Yu (who did extra job duties with underpayment from January 2010) was given to Ms. Sara Barra, who was Epidemiologist II position as Ms. Yu, is white and young, and transferred to the office in July of 2011. Ms. Barra was promoted from Epidemiologist II to III.
- 6) In March 2012, the newly appointed office director, Dr. Donald Shell, requested that everyone meet with him privately. While Ms. Yu's coworkers were allowed to meet with him, Ms. Sara Barra forbade Ms. Yu to be included from this private meeting, without offering any explanation (Ms. Barra was the acting deputy office director from 1/1/2012 to

12/15/2012). Ms. Yu emailed Dr. Shell on 3/13/2012 and asked him to give her the same opportunity her coworkers were given, and she greatly appreciated Dr. Shell's consent to her request. Ms. Yu reported to him about the unfair treatment including the deprived reclassification as Epidemiologist III approved by MDH and DBM, deleting her office email box completely in March 2011, and disallowing her to do her job and projects according to MS-22 job form (E2).

6) In the middle of Oct. 2012 and 12/5/2012, Ms. Yu verbally and in writing asked Dr. Shell to check her reclassification issue and reported to him about Ms. Barra's interference with her job such as preventing her from accessing database and program information which were required for her job. The reclassification-underpayment and unfair treatment problems were not resolved (E3).

7) Instead, Sara Barra became Ms. Yu's supervisor on 12/19/2012.

8) During interactive accommodation process between July and October 2014, Ms. Yu requested Ms. Delinda Johnson at MDH Office of Equal Opportunity Program ("OEO") several times to consider the unfairly missing reclassification form and to allow her to escape Ms. Barra's harassment and retaliation and to return to work in another supervisor or office where Ms. Yu had applied for the Epidemiologist III position and was evaluated by DHMH HR as the "Best qualified" in June 2014 (E4).

## **II. Reports of Retaliation for Engagement in Protected Activities:**

Ms. Yu's request for Dr. Shell to give her the same opportunity as her co-workers (because Ms. Barra rejected her) on 3/13/2012 was regarded by Ms. Barra as a "failure to follow instructions, and crossing the chain of command". Ms. Yu's engagement in protected activities between 2012 and 2014 (via multiple reports to MDH managers including HR, OEO and filing grievance and appeals in MDH and charge about discrimination and retaliation filed in U.S. Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act and Age discrimination in Employment Act ("ADEA") on 11/12/2013 were labeled as "disruptive behavior". Ms. Yu received progressive retaliations: downgrading performance evaluation from "outstanding" to "satisfied" with improvement memorandum after Ms. Barra became Ms. Yu's supervisor for two weeks. Then Ms. Yu received another hard copy of this similar improvement memorandum on 12/17/2013 and further received "unsatisfied" as well as the termination on probation with 180 days on 6/9/2014. Additionally, because Ms. Yu's filed the grievance against Ms. Barra's interference with her job in MDH on 8/14/2013, she received the two Internal Memoranda from Ms. Barra on 10/10/2013 and 4/15/2014, (which was HR required step prior to giving employee disciplinary action). Furthermore, Ms. Yu received 5 disciplinary actions between 2/3/2014 and 6/9/2014 according to Ms. Barra's retaliatory memoranda post Ms. Yu's engagement in protected activities. Please see following facts:

1) **Downgraded Ms. Yu's performance evaluation:** After Ms. Barra received Ms. Yu's self-Performance Evaluation in Dec. 2012, Ms. Barra refused to discuss with Ms. Yu as she did for all other white or young co-workers she supervised. On 1/3/2013, Ms. Barra downgraded Ms. Yu's performance evaluation from "outstanding" to "satisfied" and

requested Ms. Yu to sign the "Memorandum" (Ms. Barra pre-generated) for her to improve "follow instruction, judgment and writing" (which was inserted into her personnel file) although HR instructed that the improvement memorandum is only for employees with "unsatisfied" performance evaluation.

2) **Refused response:** Between Dec. 2012 and January 2013, Ms. Yu requested to talk to Ms. Barra several times about her projects, Ms. Barra either responded that she had no time or did not respond Ms. Yu's emails.

3) **Made confusion:** In Feb. 2013, Ms. Barra contacted the funding organization Chicago University School of Public Health (where Ms. Yu prepared proposed for Asthma and Chronic Obstructive Pulmonary Disease study) and did confusing summary about their time frame of the plan to mislead and discourage office manager and Dr. Shell to reject the project.

4) **Missing MS-22 and evaluation forms in Ms. Yu's personnel file:** On 2/21/2013, Ms. Yu reported to HR Ms. Tonia Livingston, Ms. Barra and Dr. Shell that there was not any job description MS-22 or the performance evaluations in Ms. Yu's personnel file. Ms. Barra agreed to find all missing forms and put them back into her personnel file, but she had only returned part of these forms. Although Ms. Yu reminded Ms. Barra again on 6/20/2013, she did not hear from Ms. Barra. However, those negative memoranda were kept in her personnel file (E5).

5) **Blocked Ms. Yu to access to job-related information:** In March and June 2013, Ms. Yu wrote emails to Ms. Barra requesting access to office programs and related information which was required for her job. She did not receive any response from Ms. Barra.

6) **Refused to use Ms. Yu's data and reports:** In the beginning of June 2013, Ms. Barra refused to use Ms. Yu's provided specific matched data for the office "Healthy Behavior" grant application, and did not respond to Ms. Yu's emails. So, Ms. Yu reported to Dr. Shell about her concern of "failure of office grant application without specific matched data" and sought Dr. Shell's help.

7) **Forbade Ms. Yu to report her work and clarify the confusion at a staff meeting:** On 6/24/2013, Ms. Barra requested Ms. Yu to provide 5 of fact sheets of various chronic disease reports for the office website. Although, Ms. Yu had previously provided her these reports including "Maryland Men's Health Factsheet". Ms. Barra did not allow to load them onto the web. Instead, Ms. Barra instructed to load the National Men's health information onto the web. However, Ms. Barra forbade Ms. Yu to report her work progress as co-works did and did not allow her to clarify this at the staff meeting by frequently interrupting her, thus mislead managers and others to believe that Ms. Yu was incompetent. In addition, Ms. Barra criticized Ms. Yu's behavior via email (E6) and refused to use Ms. Yu's updated reports for two years in spite of the fact that Ms. Yu wrote multiple emails to remind Ms. Barra to load updated reports on the web between June 2013 and April 2014 (E7).

8) **Ms. Yu sought the office director's help:** On 6/28/2013, Ms. Yu sought Dr. Shell's help for Ms. Barra's harassment and retaliatory behavior (making confusion and isolation via controlling office meeting invitations and Ms. Yu's job assignment) and asked him to allow her to work under a normal working condition (E8). This was criticized by Ms. Barra as

“disruptive behavior”.

9) **Changed Ms. Yu’s MS-22 job description:** On 7/2/2013, Ms. Yu received the revised job MS-22 from Ms. Barra (dated 6/12/2013 to retaliate against Ms. Yu’s earlier report in the June to Dr. Shell about Ms. Barra’s refusing to respond to her email and rejecting her provided data for office grant application). Ms. Barra changed Ms. Yu’s job duties and deleted all her program/projects under seniority system (which was specified and indicated by CDC-supported MDH’s 1305 program, E9); restricted Ms. Yu’s communication and exchange of information with others; changed her performance evaluation standards from professional skills to “Writing” to set Ms. Yu up for failure as writing is not her strong point and major job focus); and supervision level from “Manager” to “General” on this revised MS22 form. Ms. Barra’s revising MS-22 was not based on any justifications that HR instructed for changing employee’s job description, such as the condition in the change of supervisor, job or restructure. There was no any new employee was recruited in the office as Ms. Barra reported to EEOC on 4/19/2017. Ms. Yu wrote several emails to Ms. Barra, but she insisted on her changes without responding to some of Ms. Yu’s concerns regarding Ms. Barra’s restriction of epidemiologist basic and required working conditions (E10).

Nevertheless, Ms. Barra put her modified MS-22 into Ms. Yu’s personnel file on 7/25/2013 although Ms. Yu sought Dr. Shell and higher level manager, Ms. Michelle Spencer’s help verbally and in writing between July and August 2013 (E11).

10) **Requested CDC to replace Ms. Yu:** On 7/25/2013, Ms. Barra prevented Ms. Yu from functioning as the epidemiologist (the State Chronic Disease program) invited by CDC to participate in CDC-led “Health System Survey Scorecard Team”. Ms. Barra requested CDC to replace Ms. Yu with her own name and informed CDC and Ms. Yu that Ms. Yu could be allowed to remain in the team as a listener.

11) **Ms. Yu filed grievance:** On 8/14/2013, Ms. Yu filed her first grievance and further reported to HR on 12/2/2013 against Ms. Barra’s unfair treatment and interference with her job including the changes of her MS-22 in MDH (E12).

12) **Ms. Barra generated internal consulting memorandum:** On 10/4/2013, Ms. Barra required Ms. Yu to attend personnel meeting without informing her the reason for the meeting for 4 days. Finally, Ms. Barra responded that the meeting was related to Ms. Yu’s contacts with Dr. Shell. Although Ms. Yu provided Ms. Barra with written report about her contact and work with Dr. Shell (E13), yet, on 10/10/2013, Ms. Barra sent Ms. Yu an Internal Memorandum of Counseling (put into her personnel file to prevent Ms. Yu from working as her MS-22 job description and from seeking Dr. Shell’s help for Ms. Barra’s retaliation), with the threaten of taking the disciplinary action if Ms. Yu provide the office director Dr. Shell any recommendation and information related to office program/project regardless whether Dr. Shell need or Ms. Barra refused to respond to Ms. Yu (E14).

On 10/18/2013, Ms. Yu filed the response to Ms. Barra’s Memorandum as Union representative’s instruction that employee has the right to report to next level manager for the issues (when she was treated unfairly and her job was interfered, E15).

13) **Ms. Yu filed charge in EEOC:** Ms. Yu filed the discrimination at age and race and retaliation charge under Title VII ADEA (Case# #531-2014-00271C) on 11/12/2013 with

EEOC in Baltimore, and was granted the right to sue on 11/26/2013, but Ms. Yu did not file the lawsuit (E16).

14) **Ms. Barra generated same improvement memorandum as 1/3/2013:** After Ms. Yu reported to MDH HR on 12/2/2013 based on the MDH manager's instruction with the detailed facts regarding Ms. Yu 8/14/2013 grievance against Ms. Barra's unfair interference with her job on 12/17/2013. Ms. Barra retaliated against Ms. Yu with same improvement memorandum she made on 1/3/2013 for her "satisfied" mid-cycle performance evaluation, which HR instructed for supervisor to give employees with "unsatisfied" performance evaluation.

Additionally, although Ms. Yu asked Ms. Barra to decide on her teleworking time as her preference, Ms. Barra falsely reported Dr. Shell on 12/13/2013 that Ms. Yu unreasonably requested to telework on each Friday and misled Dr. Shell to reject Ms. Yu's request.

15) **Ms. Yu's reports to MDH Office of Equal Employment Program ("OEEP") director triggered disciplinary action:** Ms. Yu reported to OEOP director, Ms. Keneithia J. Taylor between 1/9 and 1/31/2014 about Ms. Barra's discrimination, harassment and retaliation including frequently preventing Ms. Yu from accessing the database and training course (E17). Then on 2/2/2014, Ms. Yu reported to her about Ms. Barra's new discrimination at National Origin behavior because Ms. Barra sent Ms. Yu a warning email on the Chinese New Year eve although Ms. Barra had previously approved her request to take half the day off (E18). Additionally, Ms. Yu also reported to Ms. Taylor on 2/2/2014 that Ms. Barra retaliated and interfered with her job including block of her submission of abstract for office program/projects (E19).

a. **1<sup>st</sup> disciplinary action:** Ms. Barra initiated the mitigation meeting and first reprimand disciplinary action on 2/3/2014 retaliated against Ms. Yu's 2/2/2014 reports to OEOP Ms. Taylor. Ms. Yu often represented office to submit abstracts in the past, yet, she had not known whether office submitted an abstract or not as Ms. Yu had not received Ms. Barra's response her clarification email during the day of 1/15/2014. Ms. Barra rejected Ms. Yu's request to submit her abstract, but used Ms. Yu's provided data and information to generate another abstract, and refused to respond Ms. Yu's clarification and concerns about her abstract. So, Ms. Yu checked with Dr. Shell about the submission of the abstract before the deadline of 1/15/2014. However, Ms. Barra made confusing and biased summary of the mitigation meeting and put into Ms. Yu's personnel file without informing her falsely stating at EEOC "Fact -Finding-conference" that Ms. Yu received the disciplinary action that was due to her contacted Dr. Shell several times for the abstract without thru Ms. Barra. This violated Ms. Barra's 10/10/2013 memorandum. On 2/18/2014, Ms. Yu filed the addendum to the appeal, along with Ms. Yu's 10/18/2013 response to Ms. Barra's memorandum sent to HR, former secretary, Dr. Sharfstein and Union representative (E20).

b. **2<sup>nd</sup> disciplinary action:** Ms. Yu was assigned by MDH as the only epidemiologist (100% salary supported) to work for CDC supported MDH CCDPC office 1305 program, but Ms. Barra prevented her from participating in CDC-conference calls and any CDC-1305 program related work plan and progress report meetings as well. Ms. Barra refused to respond Ms. Yu's several requests regarding this issue in March and June 2013 and Jan 2014. On 3/11/2014, Ms. Yu contacted the CDC coordinator, (who works for States epidemiology

conference call and releases CDC information and Ms. Yu had previously communicated with), about the email list to check if her name had been accidentally deleted since she had not received any information as other state epidemiologist (who worked for CDC-supported 1305 program) received CDC epidemiology information on 2/26/2014. Although Ms. Yu's response to the questions of mitigation about her checking email list was sent to MDH Manager on 3/15/2014 as requested, nevertheless, Ms. Barra initiated a disciplinary action for 5 days suspension on 3/18/2014 simply because Ms. Yu had contacted the CDC coordinator to check the email list as she used to do before Ms. Barra transferred to the office in July 2011. The appeal was sent on 3/26/2014 (E21).

Ms. Barra blocked Ms. Yu to attend CDC-1305 program meeting conference call on 3/18/2014 but all co-workers who listed in the CDC grant attended. On 4/15/2014, Ms. Barra's sent Ms. Yu second Internal Memorandum (dated 3/31/2014 after Ms. Yu requested the right to access health care database that Ms. Barra only allowed the white and young people who is not epidemiologist to access) with additional restrictions preventing Ms. Yu from doing her job under basic and normal working conditions.

c. 3<sup>rd</sup> disciplinary action: On 4/22/2014, Ms. Barra initiated 4<sup>th</sup> disciplinary action for 3 days of Forfeiture of Annual Leave as Ms. Barra learned that the CDC officer was aware of Ms. Yu's "5 days-suspension" disciplinary action although Ms. Yu told and also wrote to Ms. Barra that she did not report CDC about her suspension due to her checking CDC email list. The appeal was filed on 4/23/2014 (E22)

d. 4<sup>th</sup> disciplinary action: When Ms. Yu was sick in home, Ms. Barra called her several times and initiated 4<sup>th</sup> disciplinary action on 5/20/2014 stating that Ms. Yu violated cyber communication policy because Ms. Yu emailed MDH managers and Union on 4/22/2014 to clarify the confusion Ms. Barra made in her memoranda (10/10/2013 and 3/31/2014) and her revised MS-22, and refused to responder Ms. Yu's clarification for a week. So, Ms. Yu sought protection against Ms. Barra's retaliation from them. The appeal was filed on 5/27/2014 against Ms. Barra's retaliated disciplinary action for her protected activities (E23).

e. 5<sup>th</sup> disciplinary action: On 6/9/2014, Ms. Barra initiated 5<sup>th</sup> disciplinary action with "unsatisfied" performance evaluation and denial Ms. Yu's annual increase as well as the termination on probation with 180 days plan. The reason was explained by Sara Barra as resulting from failure of "timely, appropriate complete work assignments". However, Ms. Barra refused to upload Ms. Yu provided fact sheets and reports of Maryland Men's Health Fact sheet and heart disease, stroke, diabetes and obesity for two years, refused to use Ms. Yu's provided data and information, and caused negative impressions among managers and co-workers about Ms. Yu's job performance. Sara Barra did not allow Ms. Yu to clarify this at the staff meeting (E24).

### III. Damages to Ms. Yu's Health and Further Discrimination and Retaliation (Complaint Filed in U.S. EEOC under Title VII, ADEA and ADA):

Ms. Yu filed her second discrimination and retaliation charge under Title VII, ADEA and ADA (Case# 531-2014-02468C) on 9/3/2014 in U.S. EEOC which was emailed to DHMH OEOP Ms. Delinda Johnson on 9/2/2014 by Ms. Yu's former lawyer. Then Ms. Yu

received Ms. Johnson's rejection of her accommodation on 9/3/2014 and was terminated on 11/3/2014. Ms. Yu requested EEOC to amend these adverse events of termination into her existing retaliation charge file and also filed ADA complaint in Department of Justice, Civil Right Division, Disability Section.

**1). Damages to Ms. Yu's health by:**

**a. Frequent confusions:** As the facts described above, Ms. Barra often intentionally made Ms. Yu to be subjected to intolerable working conditions by making some confusions such as Ms. Yu's "unreasonable" request for teleworking time and non-updating reports to mislead DHMH managers, but forbade her to clarify and communicate with Dr. Shell, co-workers and projects related partners in retaliation for Ms. Yu's complaint about her unfair treatment, discrimination and retaliation (E6, 7, 25).

**b. Refusing to respond or rejecting Ms. Yu's requests for normal working conditions:** Between March 2013 and March 2014, Ms. Yu wrote several emails and talked to Ms. Barra and asked Ms. Barra to allow her to do her job with normal working condition as coworkers and other MDH Epidemiologists did, such as access to database, receiving CDC and other organizations program information and attending office program meetings. Ms. Yu did not hear from Ms. Barra. However, Ms. Barra invited others except Ms. Yu by email or calendar notice for CDC Tele-conference and program meetings and removed her name from the list to access to the database and training. Ms. Yu had not been allowed to review, or to be aware of CDC's instruction, was not given an equal opportunity to participate in the discussing and preparing 1305 program working plan although she was the only epidemiologist (100% salary) supported by this grant (E26). Ms. Yu's job duties were taken away from CDC-1305 enhanced program working plan and progress report and her name and responsibilities were replaced by other white and young (non epidemiologist) that Ms. Barra instructed to send to CDC on 3/27/2014 and 4/28/2014 without any explanation to Ms. Yu. Ms. Yu suffered this harassment and sought different level of managers' help, which were criticized by Ms. Barra as "disruptive behavior" and "crossing chain of command".

**c. Harassment after Ms. Barra learned that Ms. Yu received award:** After Ms. Barra blocked Ms. Yu's abstract to be submitted to Council of State and Territorial Epidemiologist ("CSTE") conference on 1/15/2014 and initiated first disciplinary action on 2/3/2014, when Ms. Barra learned that Ms. Yu received the award and invitation for 2014 CSTE conference on 2/6/2014. Ms. Barra requested Ms. Yu report to her why and how Ms. Yu received invitation and award. Between Feb. and March 2014, although Ms. Yu reported to Ms. Barra what she had previously done for CSTE, Ms. Barra repeatedly sent Ms. Yu emails to not allow Ms. Yu to attend the CSTE conference except using her own annual leave time (regardless it is her job related). In addition, she emailed Ms. Yu twice with attaching document of HR policy about supervisor's authority to disapprove employee's request of attending a conference or training. However, there was no any employee including epidemiologist in MDH who were required to use their annual leave time to attend the same CSTE conference prior to or in 2014. Ms. Yu sought a help from Dept. of Budget and

Management, Employee and Labor Relations, the Mediation Program Officer Ms. Awida Pena.

d. **Retaliation:** In the morning of 3/13/2014, Mr. Joseph Horvath at DBM Employee and Labor Relations organized mediation meeting. DBM officer, Mr. Horvath, the mediator, Union Director, Ms. Michael McNally, Ms. Barra and Ms. Yu attended. Ms. Barra denied all facts and rejected Ms. Yu's request for allowing her to work under normal working conditions and other's supervision. Ms. Barra answered it is not possible. In the afternoon, Ms. Barra sent Ms. Yu a request of mitigation meeting about Ms. Yu's email checking with an CDC officer if her name on the CDC's 1305 program email list was accidentally deleted.

e. **Abuse:** On 3/18/2014, Ms. Barra organized an office 1305 program teleconference with CDC officer and invited all co-workers except Ms. Yu. When Ms. Yu was sick, Ms. Barra refused her request to take sick leave and required her to immediately attend the mitigation meeting for initiating the disciplinary action of 5 days-suspension. Ms. Barra rejected Ms. Yu's request even though she told Ms. Barra that she did not feel well and asked for taking sick leave or personal leave several times during March and April 2014.

f. **Bullying:** When Ms. Yu checked with Financial Officer (whose office is near to Ms. Barra) about the travel support policy for employee to attend job-related conference and the process of application, Ms. Barra walked in and interrupted their conversation stating "Do not cross chain of command!" Ms. Barra bullied Ms. Yu by sharing the disciplinary action "suspension" against Ms. Yu on her public office calendar so all co-workers could see it between Feb and April, 2014 (E27) The frequent confusion, chronic bullying and harassment often made Ms. Yu panic attacks include extra thirst, hand shanking, flushing tachycardia chest pain.

2) **Diagnoses:**

Ms. Yu was required to have workability evaluation and was diagnosed with "workplace stress, major anxiety, major depressive disorder and Post Traumatic Syndrome Disorder" by State Medical director, Dr. Robert Toney, (who performed workability evaluation at MDH HR's request); her health provider and Independent Psychology Institution (as MDH HR and Dr. Toney requested) respectively in April, June, September and October 2014 (E28).

3) **Approved FMLA:**

Ms. Yu was approved with FMLA between 6/23 and 9/12/2014.

4) **Harassment following disability diagnosis:**

On 5/12/2014, ten minutes after Ms. Yu went to back office to complete time sheet as Ms. Barra requested, Ms. Barra sent an email to her requesting mitigation meeting. In the May and June 2014, although Ms. Barra was aware of Ms. Yu's health condition after she received several of Ms. Yu's health provider's notices, Ms. Barra frequently emailed and called Ms. Yu for the mitigation meetings and denied that she received Ms. Yu's sick leave reports which Ms. Yu always emailed her prior to her reports to HR. Also, Ms. Barra sent her duplicate disciplinary action notices by FedEx mails and regular mails to her home; and requested her for work ability evaluation on 5/19/2014 when she was on sick leave for 2 weeks. These harassment and retaliatory behaviors worsened Ms. Yu's health condition (E29).

**5) Accommodation request:**

Ms. Yu's accommodation request was filed on 7/23/2014 with MDH HR and OEOP. On 8/6/2014, Ms. Yu completed her accommodation request form as DHMH required stating reasons that caused her health problems and she could not do her job under Ms. Barra's harassment and retaliation mentioned above. Ms. Yu also requested to correct the unlawful missing reclassification; and assign to other Epidemiologist position she applied for (E30). Her former lawyer edited and sent the form on 8/19/2014.

**6) Emergency and hospitalization:**

Because Ms. Yu could not eat, sleep and had severe vomit, she was sent to emergency room on 8/20/2014 and was in hospital between 8/20 and 8/22/2014.

**7) The charge of discrimination and retaliation filed in EEOC under Title VII, AEDA and ADA:** Because Ms. Yu did not receive MDH OEOP Ms. Delinda Johnson response for her accommodation request to correct hostile working condition for her to work or to assign her to other position, but was required to only work under supervision of Ms. Barra's harassment and retaliation during the interactive accommodation process, she filed charge (which her former lawyer prepared) in EEOC on 9/3/2014.

**Plaintiff brings forth the following counts and allegations of damages supporting her case of action and her request of relief.**

**I. Willful underpayment:**

Defendant ignored and concealed the evidence of unlawful refusal to complete reclassification and giving the Epidemiologist III position identification number to Ms. Barra (approved by MDH and DBM for Ms. Yu) during interactive accommodation process. MDH refused to correct the underpayment given Ms. Yu for years and extra jobs she did for MDH since 2010 although Ms. Yu sought MDH managers and former Secretary Dr. Sharfstein' help for the unlawful deprivation. The deprivation had been greatly inhibiting Ms. Yu's performing her job duty and has damaged Ms. Yu's career development, brought significant negative impact on her health and personal and family financial condition as well.

**II. Disability-Discrimination, Harassment and Retaliation after Ms. Yu Filed Charge in EEOC under ADA in 2014:**

**1) Immediate retaliation:** After Ms. Johnson at MDH Office of Equal Employment Program ("OEOP") received Ms. Yu's complaint of discrimination and retaliation under Title VII Civil Right of Act, ADEA, and ADA filed in U.S. EEOC on 9/2/2014, she rejected Ms. Yu's accommodation request without any explanation about "undue hardship". Meanwhile, Ms. Yu's request of using her friend's donated employee's leave to cover the interactive accommodation process was rejected by HR and her access to office mail was blocked by Ms. Barra on 9/3/2017 (E31).

**2) Refusal to respond to Ms. Yu's accommodation requests:** Ms. Yu responded to Ms. Johnson's rejection on 9/29/2014 with detailed evidence about hostile working condition she had been subjected to (E32). Ms. Yu did not receive Ms. Johnson's response to consider

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assigning her for other epidemiologist position which she applied for and was evaluated as "Best qualified" in June 2014. Besides, although OEOP director, Ms. Taylor and Ms. Johnson received Ms. Yu's charges filed in EEOC on 11/12/2013 and 9/2/2014 and multiple reports between 1/9/2014 and 9/29/2014 with tremendous evidence of Ms. Barra's harassment, discrimination and retaliation against Ms. Yu and interfere with her job. Ms. Johnson refused to accommodate her to work in the same CD-1305 program under seniority system with different supervisor as other co-workers who work for 1305 program; and to correct harassing working condition Ms. Barra made for Ms. Yu.

**3) Rejection of accommodation recommended by State Medical Director, Psychiatrist and Psychological Institution:** On 10/8/2014, DHMH HR and EEO received the legitimate recommendations made by State Medical director, Dr. Robert Toney and Independent Psychology Institution for correcting the situation in which they suggested to change Ms. Yu's supervisor. (This recommendation coincided with the one made by her health provider) (E4 and 28).

**a. Ms. Barra's contacted HR, which triggered HR's termination plan:** Ms. Barra stated on 5/16/2015 that she contacted with Ms. Toria Livingston at MDH HR during 10/8 and 10/10/2014 to provide information of disciplinary actions and performance evaluations (E33). This triggered the action taken by Ms. Livingston, who sent a letter to Ms. Yu and Cc. to Ms. Barra on 10/10/2014 to force Ms. Yu to retire or resign, otherwise to terminate her during interactive accommodation process (E34).

**b. Restructure of the office as pretext of "undue hardship" to reject accommodation:** On 10/14/2014, Ms. Johnson at DHMH OEOP refused to accommodate Ms. Yu's mental disability recommended by Dr. Toney. Instead, they began the CCDPC office restructuring including the modification of the Office Medical Director's job (made medical director no longer to supervise any staff). These actions created the pretext for "undue hardship" and prevented Ms. Yu from returning to work under the office Medical Director's supervision as Ms. Yu requested since 7/23/2014 (E35).

**4) Rejection of Ms. Yu's friend's donated employee's leave:** Although Ms. Yu filed her application to use her friend's donated employee leave for period of the interactive accommodation process (after she exhausted her annual leave), on 9/3 and 10/15/2014 MDH HR respectively rejected Ms. Yu's request for using her friend's donated employee's leave. Ms. Yu sent the completed application on 9/18, and then 10/8/2017 again (E36). Ms. Margaret Embardino and the director Ms. Cynthia Kollner denied her application on 11/7/2014 with the reason that Ms. Yu was terminated, so that Ms. Yu did not have any income for October 2014 while was during the interactive accommodation process (E37).

**5) Unlawful termination:** MDH refused to accommodate Ms. Yu as Dr. Toney recommended and disallowed Ms. Yu taking leave of absence leading to subsequent termination and preventing her from rehiring in DHMH. The termination was without a prehearing or mitigation meeting and Union Ms. Barbara Perry participated in the decision making but did not inform Ms. Yu. (Union director Mr. McNally was prohibited to help Ms. Yu and left Union after I reported EEOC in my rebuttal). These are prohibited by MD

COMAR 14.03.02.04 Employment From A(1-5). This constitutes disability-based discrimination and retaliation.

The causes listed in the termination notice indicate: by quoting COMAR17.04.05.03, that Ms. Yu is "an individual with disability who, with a reasonable accommodation, cannot perform essential functions of the position" (E38). Ms. Yu was never given the opportunity to work with an accommodation. The termination with the condition "without prejudice" is against ADA and COMAR 14.03.02.04 (2) policies and violates Ms. Yu's right to be rehired in DHMH. The termination violates 42 U.S.C. §§ 2000e et seq., Title VII of the civil rights Act of 1964 law "...c. Employers are prohibited from retaliating against an employee for making a complaint under this law."; 42 U.S. Code § 12101. The American with Disabilities Act Law "a. Employers cannot discriminate against a person with a disability in any aspect of employment. This includes interviews, testing, hiring, job assignment, evaluations, discipline, training, promotions, layoffs, compensation, leave and benefits. b. Employers are also prohibited from retaliating against an employee for making a complaint under this law", and EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship No.33 that "an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment".

Defendant restructured office as pre-text for "undue hardship" and refused to accommodate and to allow Ms. Yu return to work under seniority system with non-hostile conditions, by controlling and correcting MS Barra's disability-harassment, discrimination and retaliation. This damaged Ms. Yu's health condition, career, and family life and Ms. Yu filed an appeal to this termination (E39).

### **III. Retaliation for Complaints reported to DHMH managers and filed in EEOC in 2013 and 2014 under Title VII and ADEA**

MDH Ms. Barra and Ms. Johnson concealed evidence of violating Ms. Yu's civil and constitutional rights:

1. Ms. Barra treated Ms. Yu unfairly, which Ms. Yu reported to Dr. Shell beginning in March 2012 including missing her reclassification approved by MDH and DBM in March 2011 with the position identification number which was unlawfully given to Ms. Barra in Jan. 2012. This was prior to Ms. Barra becoming Ms. Yu's supervisor and also was the initial cause of the Ms. Barra's retaliation.

2. Ms. Barra's revising Ms. Yu's MS-22 was in retaliation for Ms. Yu's continually seeking Dr. Shell's help in the beginning of June 2013, (as Ms. Barra refused to respond Ms. Yu's emails and refused to use the data Ms. Yu provided for office grant application):

3. Ms. Barra's creating Internal Memo (10/10/2013) was retaliation against Ms. Yu's filed the grievance (8/14/2013) for Ms. Barra's violating her equal working rights, bullying her, deleting all of her projects under seniority system in her MS-22 job description and gave them to white and young people who was not epidemiologist and unfair treatment as well, which Ms. Yu had sought Dr. Shell's help since 3/13/2012.

4. Ms. Barra's initiated 1<sup>st</sup> of progressive disciplinary actions on 2/3/2014 was the

retaliation against Ms. Yu's reports about Ms. Barra's discrimination, harassment and retaliation to MDH OEP on 2/2/2014. And Ms. Johnson's (9/3/2014) rejection of accommodation without any explanation of "undue hardship" and consequent termination was retaliation against Ms. Yu's filed charge in EEOC in 2013 and 2014.

5. Ms. Johnson and Ms. Barra provided EEOC false information, (regarding Ms. Barra's created memorandum and disciplinary actions), and perjured witness in her "Position Statement" on 2/19/2015 and "Fact-Finding Conference" on 4/19/2017 that misled EEOC's investigation and conclusion, and worsened Ms. Yu's health condition.

As described above, in addition to the damages of willful underpayment and disability discrimination and harassment violating Fair Labor Standards Act, 42 U.S. Code § 12101, The American with Disabilities Act Law, and EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship No.33, tremendous facts of this case are related to chronic and progressive retaliation for Ms. Yu's previous protected civil rights activities after her reports to DHMH managers since March 2012; filing complaints, grievance and appeals in MDH since August 2013 and charges filed in EEOC on 11/12/2013 and 9/3/2014 under 42 U.S.C. §§ 2000e et seq., Title VII of the civil rights Act of 1964 law; 42 U.S.C. §1981&1983; 29 U.S. Code § 187 Unlawful activities and conduct. Defendants tolerated and supported Ms. Barra's harassment, discrimination and retaliation behavior for years violating Ms. Yu's equal working and communication opportunity, civil rights and constitutional rights, not only damaged Ms. Yu's mental and physical health, career, and her family life, but also damaged MDH working environment.

Plaintiff hereby requests a jury trial on all issues raised in this complaint.

3. The relief I want the court to order is:

Damage in the amount of : \$750,000 (lost pay, front pay, under pay, pain and suffering, lawyers fee, etc.)

An injunction ordering: Clear up Ms. Yu's personnel file which Ms. Barra put without Ms. Yu's awareness and any other relief deemed just and equitable by the Honorable Court.

Other (explain): Ms. Yu continues searching employment lawyer's help, so additional lawyer fee may be requested if she can find.

updated 12/2/2017  
(Date)

Xiao-Ying Yu  
(Signature)

Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009  
Home phone: (410) 671-9823  
(Printed name, address and phone number of Plaintiff)

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### Privacy Rules and Judicial Conference Privacy Policy

Under the E-Government Act and Judicial Conference policy, any paper filed with the court should not contain an individual's social security number, full birth date, or home address; the full name of person known to be a minor; or a complete financial account number. These rules address the privacy concerns resulting from public access to electronic case files.

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**EXHIBITS RELATED TO THE COMPLAINT FILED  
IN FEDERAL DISTRICT COURT OF MARYLAND  
(Case No. JKB 17-cv-3260, Dec. 7, 2017)**

BALTIMORE-NIGHT BOX

2017 DEC -8 PM 4: 20

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

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Appendix 8



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Baltimore Field Office**

*APP. 87*

191 110 201

City Crescent Building  
10 South Howard St., 3<sup>rd</sup> Floor  
Baltimore, MD 21201

Intake Information Group: (800) 669-4000  
Intake Information Group TTY: (800) 669-6820  
Baltimore Direct Dial: (410) 209-2237  
TTY (410) 962-6065  
FAX (410) 209-2221  
FAX (410) 962-4270

Dr. Xaio-Ying Yu  
557 Kirkcaldy Way  
Abingdon, Maryland 21009

Re: EEOC Charge No.: 531-2014-02468C  
Yu v. Maryland Department of Health and Mental Hygiene

Dear Dr. Yu:

We have reviewed the information provided by both you and your previous employer, hereafter referred to as "Respondent." In addition, I reviewed your rebuttal and the information secured during the Fact-Finding Conference held on April 19, 2017 at 10:00 a.m.

You alleged that you were subjected to harassment due to your race (Asian), national origin (China), age (61), disability and discharged in retaliation for engaging in protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Americans with Disabilities Act Amendment Act (ADAAA) of 2008.

Respondent denied all allegations of discrimination and contends that Sara Bara became your new supervisor on December 19, 2012. During the Fact-Finding Conference held on April 19, 2017, Ms. Bara indicated that she did not discriminate against you due to your race, age, national origin, disability or age. At the time, you were the only individual in your position as Epidemiologist II in the unit. Ms. Bara stated that due to the addition of more work, more people were hired. The MS-22 Job Description was refined and expanded for the other new staff members. Ms. Bara indicated that there were several times in which you met with Dr. Schell regarding research abstract and other matters and Ms. Bara advised you to go thru her before discussing issues with internal and external partners. The disciplinary actions you received were in reference to you still going to these internal and external partners to discuss matters before meeting with Ms. Bara or to argue your point. Although you complained of discrimination, I was unable to find any evidence to support your claim and unable to find a causal connection of retaliation that led to your termination.

As you know, the Fact-Finding Conference was held on April 19, 2017 and attended by Delinda Johnson, Equal Access Compliance Manager, DHMH, Sara Bara, formerly Chief, Epidemiology & Special Projects and Nicholas Johansson, Assistant Attorney General, DHMH, and on conference call Peter Y. Qui, Esq. of the Law Office of Peter Y. Qui listened in on your behalf. As you aware, you came to the fact-finding conference and handed me a doctor's note from Dr. Sharen Bisson, MD, indicating that you were not medically able to attend a conference without the support and active participation of your attorney. After handing me the note, I still held the fact-finding conference because the other attendees had arrived.

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The Fact-Finding Conference was an efficient way of getting all the players together and discussing the issues that brought the complaint about in the first place. I have made the decision to recommend a no-cause finding.

On September 5, 2017, I received an email from James M. Ray II of the Law Firm of Ledyard Ray, LLP indicating that he no longer represented you. During your visit to our office on August 29, 2017, you also indicated that Mr. Ray no longer represented you.

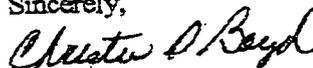
Therefore, you are being issued a Dismissal and Notice of Rights which affords you the opportunity to take this matter into Federal Court. You have the right to file a lawsuit against the employer within 90 days from the date you receive the Dismissal and Notice of Rights. If you fail to file a lawsuit within the appropriate time frame, you will lose the right to pursue this matter in court.

Should you wish to obtain a copy of the administrative file for this charge, please write to the following address to make such a request. You must do so within the above-referenced 90-day period, which can be extended if you do file a lawsuit in court concerning this matter. Please be advised that there may be a fee if you make such a request for file disclosure. Furthermore, please note that failure to receive requested documents in a timely manner does not extend the time-period for filing a lawsuit.

File Disclosure  
EEOC-Philadelphia District Office  
801 Market Street, Suite 1300  
Philadelphia, Pennsylvania 19107

Should you have any questions, I can be reached at (410) 209-2762 or via email at [christie.boyd@eoc.gov](mailto:christie.boyd@eoc.gov).

Sincerely,



Christie D. Boyd  
Investigator

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EEOC Form 161 (11/16)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: **Xiao-Ying Yu**  
557 Kirkcaldy Way  
Abingdon, MD 21009

From: **Baltimore Field Office**  
10 South Howard St  
3rd Floor  
Baltimore, MD 21201

On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
531-2014-02468	Christle D. Boyd, Investigator	(410) 209-2762

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.
- Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
- The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.
- The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- Other (briefly state)

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

**Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act:** This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

**Equal Pay Act (EPA):** EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred **more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission  
*Rosemarie Rhodes*  
Rosemarie Rhodes,  
Director

**OCT 10 2017**

(Date Mailed)

Enclosures(s)

cc: Nicholas E. Johansson  
Assistant Attorney General  
Office of the Attorney General, State of Maryland  
Department of Health 7 Mental Hygiene  
Suite 302  
300 West Preston Street  
Baltimore, Maryland 21201

Appendix 9,

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total 681

## Rebuttal of DHMH EEO, Ms. Delinda Johnson's Position Statement by Xiao-Ying Yu

Updated 4/13/2015

Re: EEOC Charge No. 531-2014-02468 (filed by Xiao-Ying Yu on 9/2/2014, received by EEOC on 9/3/2014)

Xiao-Ying Yu vs. DHMH and Sara Barra

### HIGHLIGHTS OF THE POSITION STATEMENT VS. THE REBUTTAL

#### Highlights of the DHMH Position Statement

**1. Denies the Complainant's mental disability and rejects reasonable accommodations:** Delinda Johnson (Ms. Johnson) states in the Position Statement on page 19, paragraph 6, "the Complainant does not meet the 'regarded as' requirement necessary under ADA because she was not subjected to a prohibited action due to any real or perceived disability."; on page 23, paragraph 7, "DHMH engaged in an interactive process with the Complainant in an effort to accommodate her based on disabilities; however, it was determined that the accommodations she requested to be assigned a new supervisor or receive a reclassification to a higher level position were unreasonable and created an undue hardship. Alternative options were explored with the Complainant, but she declined to consider additional options. Medical documentation by both the Complainant's health care provider and State Medical Director indicated that she was unable to return to work, thus unable to perform the essential functions of her job." It also states on page 22, paragraph 2 that "the Complainant was advised of her options to retire or resign by October 24, 2014. Effective November 3, 2014, the Complainant was no longer employed with PHPA, DHMH."

**2. Denies all the evidence of discrimination and retaliation provided by the Complainant:** Ms. Johnson concluded on page 22, paragraph 3 "The Complainant provides no supporting evidence that she was subjected to discrimination based on her race, age, national origin, disability, or that she was subjected to retaliation for opposing alleged discriminatory activity."

**3. Accuses the Complainant of exhibiting repeated and excessive behavior:** Ms. Johnson concluded on page 22, paragraph 6: "The Complainant had difficulty accepting rejection and following the direction of PHPA management as evidenced by her repeated excessive behaviors despite receiving counseling and eventual disciplines. On more than one occasion, when presented with rejection she exhibited unprofessional behavior to the Bureau Director on his work issued call phone for non-emergency related issues despite requests to cease; repeated contacts to federal funding agency, despite both the funder's and PHPA manager's request to cease; making defamatory statements about her supervisor being untruthful and intentionally misleading to PHPA management, without any evidence, even though the examples she provided were previously reviewed and resolved; and being disruptive to her colleagues by interrupting their work day to discuss issues related to rejections she received regarding her work."

**4. Denies discrimination and retaliation against the Complainant:** Ms. Johnson stated on page 3,

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bottom paragraph that "Ms. Barra, the Complainant's immediate supervisor, did not treat the Complainant differently compared to other employees she supervised"; on page 5-(7), "Ms. Barra has not threatened the Complainant or subjected her to 'abuse' at any time during her employment."; on page 5-(9), "Ms. Barra does not have knowledge about the Complainant's medical conditions."; on page 6 -(11), "The Complainant was not retaliated against for filing the Charge No. 531-2014-00271 with the EEOC on November 12, 2013", and on page 7, paragraph 4, "The Complainant was not subjected to discrimination or retaliation through her employment with PHPA.". Also, it concluded on page 24, paragraph 1: "The Complainant was not discriminated against, did not suffer a hostile work environment and no adverse action was taken against the Complainant in retaliation of her initial EEOC charge of discrimination."

**5. Denies that poor performance evaluations (PEP) were due to retaliation:** the Position Statement stated on page 4, paragraph (2): "The Complainant's race, age, national origin, disability, or 'cultural differences' were not considered when determining her performance ratings throughout her employment with DHMH; nor was the lower score she received on her PEP retaliatory for her protests against alleged discriminatory activities. Rather, it was based on her poor work performance during her most current rating period."

**6. Denies that the change of Job description (MS-22 form) was because of retaliation** the Position Statement stated on page 7, paragraph 4, "The complainant was the only epidemiologist under Ms. Barra's supervision. Therefore, there are no similarly situated employees for the Complainant to make valid comparisons of disparate treatment"; however, it stated on page 4, paragraph 3, "As employees were recruited and hired to work in the Complainant's unit, Ms. Barra revised and adjusted employee's position descriptions to adequately divide responsibilities amongst her staff."

**7. Denies interference with the Complainant's job:** Ms. Johnson stated on page 9, paragraph 4, "The Complainant's revised position description did not restrict her from making contact with internal and external, nor was she denied access to materials; she has access to all materials necessary in the office, including electronic folders that other staff accessed." Also, it stated on page 22, paragraph 5 that "as Chief of Special Projects, it was also reasonable that Ms. Barra has decision-making authority over decisions related to the 1305 grant. The Complainant was simply unwilling to accept Sara Barra's supervisory authority over her."

**8. Conclusion of the position Statement:** On page 24: "The Respondent concludes that the allegations made by the Complainant should be dismissed. The Complainant was not discriminated against, did not suffer a hostile work environment and no adverse action was taken against the Complainant in retaliation of her initial EEOC charge of discrimination or alleging discrimination to PHPA management. The rules were not applied in an arbitrary or discriminatory manner. Therefore, the Department of Health and Mental Hygiene requests a finding of No Probable Cause."

### Highlights of the Rebuttal

**1. Discrimination and retaliation led to rejection of accommodation and termination:** The medical diagnosis of the Complainant's mental disability was submitted to the DHMH HR on numerous occasions. The Complainant's request for reasonable accommodation (based on the recommendations by the State Medical Director and her health provider) was rejected for no other reason than discrimination and retaliation, which led to her subsequent termination. The Position Statement is full of conflicting and false information that could be misleading to the EEOC investigators.

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**2. Repeated complaints of discrimination to DHMH EEO prompted the first disciplinary action in retaliation:** The Complainant has provided ample supporting evidence of discrimination by Ms. Barra to DHMH EEO, HR, Center for Chronic Disease prevention and Control (CCDPC) ex-Office Director and PHPA managers. When the Complainant made a series of complaints in oral and written communication describing the discrimination and retaliation she had suffered from her supervisor to the DHMH EEO between 1/9/2014 and 2/2/2014, she received an immediate disciplinary action the next day on 2/3/2014. This is the first (trigger) of progressive disciplinary actions that followed her initial charge filed in Federal EEOC on 11/12/2013. This is clearly retaliation against protected activities.

**3. Protected activities are not "repeated and excessive behavior":** The Complainant was not permitted to work according to her job description in the MS-22 form which requires the Complainant to communicate and provide recommendations and relevant information as epidemiologist to the Office Director and the Medical Director on a daily or weekly basis. This was evidenced by Ms. Barra's internal memos and e-mails. The Complainant also has the obligation to communicate on issues related to discrimination and retaliation. What Ms. Johnson called 'repeated and excessive behavior' included the Complainant's mitigation factors, two grievances and five appeals related to the retaliation and disciplinary actions including the clarification to the PHPA manager about her supervisor's internal memos and adverse actions. The alleged "repeated and excessive behavior" is actually the Complainant's protected activities intensified by escalated discrimination and retaliation.

**4. Ms. Barra treated the Complainant differently from other employees:** Examples of harassment: Ms. Barra requested the Complainant to supply the burden reports for the office website, but she refused to upload the new reports for over two years. This caused negative impressions among managers and co-workers about the Complainant's job performance. Ms. Barra did not allow the Complainant to clarify this at the staff meetings. Additionally, Ms. Barra gave the Complainant a performance evaluation with "unsatisfactory" that was explained by Ms. Barra as the result from the failure of "timely, appropriate complete work assignments". Ms. Barra tried to isolate the Complainant by sharing the disciplinary action "suspension" against her in the calendar so all the co-workers could see it. This cruelty caused the Complainant extreme stress and mental disability.

**5. The process of performance evaluation (PEP) for the Complainant did not conform to DHMH HR policy:** Ms. Barra's constant downgrading of the Complainant's performance evaluation was because of retaliation against the latter's complaints of unfair treatment by Ms. Barra. Even when the Complainant received a "satisfactory" in evaluation, Ms. Barra always sent an internal memorandum with a request for improvements which, however, is only required in mid-cycle PEP "unsatisfied" cases by DHMH HR PEP policy. Ms. Johnson tried to defend Ms. Barra's retaliation and stated incorrectly on page(s) 7-8 that "When an employee receives a rating of "satisfactory" during the mid-cycle, supervisors are permitted to issue a performance evaluation memorandum in lieu of completed performance evaluation form". Because "Satisfactory" form does not include any improvement memo, Ms. Johnson addressed this policy and applied it wrongfully to the Complainant's mid-cycle PEP "satisfactory" forms specifically made by Ms. Barra's retaliation (with improvement memos) to mislead EEOC investigator. Since 12/5/2012, when the Complainant reported to her ex-Office Director, Dr. Shell, about Ms. Barra's discrimination and retaliation, Ms. Barra had never sat down and discussed the self-evaluation and the internal memorandum with the Complainant privately as she did for other employees instructed by DHMH HR policy. According to DHMH HR policy, Ms. Barra, as a supervisor, should at least discuss it once with the Complainant before requesting Complainant to sign the performance appraisal she made, but she never did since she became the Complainant's supervisor on 12/19/2012.

**6. The revision of the Complainant's job description (MS-22) was not warranted:** The justifications given by the Position Statement were false. The Complainant's job description was revised by Ms. Barra on 6/12/2013 when there was no newly hired epidemiologist or data analyst in the office to work on heart

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disease, stroke, and diabetes, and no changes to the 1305 grant that the Complainant was designated to work on, nor was the Complainant informed of any "inappropriate workplace behavior" as described in the Position Statement. However, Ms. Barra deleted from MS-22 the Complainant's job duties and projects, created a set of restrictions limiting the Complainant's internal and external communication, and changed the performance standards from epidemiologist professional skills to "writing." Those changes were premeditated for the purpose of discrimination and retaliation. The Complainant requested Ms. Barra to treat her equally as other epidemiologists in DHMH by e-mails, but Ms. Barra rejected her requests. Therefore, the Complainant filed grievance against Ms. Barra on 8/14/2013. After the Complainant received the PHPA's rejection of her grievance on 11/18/2014, she appealed to DHMH HR Employee Relations to request their reconsideration of the revised MS-22 and sought their help to stop Ms. Barra's retaliation. She attached the original rejection with her response in her appeal.

**7. Ms. Barra's interference with the Complainant's job created formidable situations:** The Complainant was not only forced out of projects, but also blocked from receiving CDC instructions, including CDC 1305 grant, and limited in accessing data and information. Even in such a difficult situation, the Complainant still tried to work things out with Ms. Barra. She expressed her willingness to work under Ms. Barra's supervision by verbal and written communication. The Complainant never received any response from Ms. Barra regarding those requests. Ms. Barra's interference with the Complainant's job created formidable situations and it was described in various reports by the Complainant to superiors at different levels.

**8. Concerns about witnesses and individuals that are listed in the exhibits:** The witnesses listed in the Position Statement are highly biased because one of them, Ms. Erica Smith, directly benefits from Ms. Barra's discriminating actions. She was given most of the Complainant's responsibilities even though at that time she was not an epidemiologist or evaluator in the office nor was she under Ms. Barra's supervision. Ex-Medical Director, Vanessa Walker Harris, (working in the CCDPC office during 10/2013-6/2014, was misrepresented by Ms. Johnson as the current Office Medical Director), who was influenced by Ms. Barra, met everyone but the Complainant to discuss work in the office since she first came in 10/2013. The Complainant complained about this to DHMH EEO in writing on 2/2/2014. It is highly biased that the Position Statement specifically included (see the position statement exhibits) those individuals (65 years old, non American-born and non Caucasian) as current employees under Ms. Barra's supervision to defend Ms. Barra's discrimination and harassments, even though they already left the office.

**9. Conclusion:** The Complainant was discriminated against, harassed, and retaliated by Ms. Barra because she had reported her complaints followed by further clarifications to various officers, including the next level managers, ex-office director since 3/13/2012 and the PHPA manager since 7/28/2013. The Complainant has filed complaints with her Union since 8/12/2013, HR Employee Relations on 12/2/2013, DHMH EEO between 1/9/2014 and 2/2/2014, and Federal EEOC on 11/12/2013 and 9/2/2014 about Ms. Barra's unfair treatment and discrimination against age, race, national origin, and disability as well as harassments and retaliation. The escalated discrimination and retaliation are the causes for the rejection of the Complainant's request for accommodation by DHMH EEO and the subsequent termination. Although the requests of "*abeyance condition*" for the Complainant's appeals to Ms. Barra for the disciplinary actions by the Union representative on 7/2/2014 were approved because of her FMLA until the Complainant returns to work, these appeals were blocked by DHMH EEO's refusal to allow the Complainant to return to work under a different supervisor and subsequent termination. Therefore, the Complainant is asking for EEOC's investigation into her case and doing her justice.

## THE REBUTTAL

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## **Rebuttal of Maryland Department of Health and Mental Hygiene EEO, Ms. Delinda Johnson's Position Statement by Xiao-Ying Yu**

**Re: EEOC Charge No. 531-2014-02468 (531-2014-02468c) filed by Xiao-Ying Yu on  
9/2/2014, received by EEOC on 9/3/2014**

**Xiao-Ying Yu vs. Maryland Department of Health and Mental Hygiene and Sara Barra**

### **HIGHLIGHTS OF THE POSITION STATEMENT VS. THE REBUTTAL**

Highlights of the DHMH Position Statement

*p1*

1. Denies the Complainant's mental disability and rejects reasonable accommodations.
2. Denies all the evidence of discrimination and retaliation provided by the Complainant.
3. Accuses the Complainant of exhibiting repeated and excessive behavior.
4. Denies discrimination and retaliation against the Complainant.
5. Denies that poor performance evaluations were due to retaliation.
6. Denies that the change of Job description (MS-22 form) was because of retaliation:
7. Denies interference with the Complainant's job by forcing her out of projects.
8. Conclusion of the position Statement.

Highlights of the Rebuttal (for your convenience, including related exhibits)

*p2-4*

1. Discrimination and retaliation led to rejection of accommodation and termination (*key exhibits #1a,b&c, 2,4,5,22a&b, 20, 21,13c&d, 3a, 23,24a&b*)
2. Repeated complaints of discrimination to DHMH EEO prompted the first disciplinary action in retaliation (*#31, 32, 34a&b, 36, 37, 43, and 44*)
3. Protected activities are not "repeated and excessive behavior" (*#11a,b&c, 46a&b, 54a,b&c, 53, 55a&b, 56a&b, 51, 57,58,59and EEOC Charge No. 531-2014-00271*)
4. Ms. Barra treated the Complainant differently from others (*#60,39,40, 41,42a&b, 44, 62,63,65,66,67, 70, 71, 72, 73b,74,75, 76, 77, 78,79,80a&b and 81*)
5. The process of performance evaluation for the Complainant did not conform to DHMH HR policy (*#49 & 50*)
6. The revision of the Complainant's job description (MS-22) was not warranted (*#52, 54a,b&c, 56a&b*)
7. Ms. Barra's interference with the Complainant's job created formidable situations (*#79, 82a,b&c, 83, 84b, and 69*)
8. Concerns about witnesses and individuals listed in the exhibits (*#71, 81,85, 52, and 57*)

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9. Conclusion

**THE REBUTTAL**

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1.3.1. The termination on 11/3/2014 lacks factual and legal basis for COAM 17.04.05.03

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1.3.2. The termination notice is based on the misrepresentation of State Medical Director's medical documentation

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1.3.3. The termination notice blocked the Complainant's appeal process

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- 3.2.7. Oral and written complaints to DHMH EEO between 1/9/2014 and 2/2/2014 p23-24
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*5.3. Ms. Barra never discusses with the Complainant privately about her PEP.* p49

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**8.2. Concerns about the listing name of employees**

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8.2.2. Dr. Donald Shell is the ex-CCDPC Office Director, but also current cancer and Chronic Disease Bureau director

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8.2.3. Current CCDPC Office Director: Ms. Kristi Pier

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**10. Exhibits**

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## 10. Exhibits

- 1a. DHMH EEO Ms. Johnson rejection of accomodation0903-2014
- 1b. DHMH HR EEO Ms. Johnson received the EEOC Charge file 0902-2014
2. DHMH HR Ms. Johnson rejection accomodation10-14-2014
- 3a. DHMH HR Ms. Toria Livingston letter-force to resign-retire10-10-2014
- 3b. E-mail com with DHMH HR Ms. Livingston10-24-10-27-2014
4. ReasonableAccommodation.Request.7-23-2014
5. ReasonableAccommodationRequest. DHMH ADA08-19-2014
6. Sick leave report to Ms. Barra5-1 to 5-12-2014
7. Ms. Barra requests during sick leave 0513-05-18-2014
8. Ms. Barra required doctor notice 0606-2014
9. Ms. Barra demand doctor notices0608-06-19-2014
- 10a. Ms. Barrarejected taking leave0318-2014
- 10b. Ms. Barra rejected taking off 0418-0423-2014
- 11a. Reported Ms. Barra discrimination0312-13-2012-p1
- 11b. Reported Ms. Barra discrimination0312-13-2012-p2
- 11c. Reported Ms. Barra discrimination0312-13-2012-p3
12. DHMH CCDPC Oranization structure
- 13a. FMLA completed application-380E-0825-2014
- 13b. DHMH HR approval FMLA0827-2014
- 13c. FMLA completed application-380E-0624-2014
- 13d. DHMH HR approval FMLA0630-2014
- 13e. FMLA completed application-MS308E-10-03-2014 require take donated leave
14. DHMH HR instruced employee to apply donated leave06-2014
- 15a. Application to use donated leaveMS-402 E-to-E

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- 15b. friend donated leave-p1
- 15c. friend donated leave-p2
- 16. DHMH HR disapproval of donated leave 0904-2014
- 17a. Appeal to DBM Ms. Embardino per DHMH rejection donated leave Sept-Oct 2014
- 17b. Dr. Bisson Medical documentation 0918-2014
- 17c. Completed appeal MS-406-use donated leave 0917-2014
- 17d. Medical release form 0918-2014
- 18. DHMH HR disapproval of donated leave 10-14-2014
- 19. DBM rejection donated leave 11-07-2014
- 20. Ms. Barra blocked the access to office mail 0903-2014
- 21. State Medical director letter 09-18-2014 & 10-08-2014 letter
- 22a. Requested DHMH EEO Ms. Johnson-ADA from 0929 to 10-24-2014
- 22b. DHMH HR Ms. Johnson response 1031-2014
- 23. Termination letter 11-03-2014
- 24a. Appeal-form termination 11-14-2014
- 24b. Appeal DHMH HR Mr. Young 11-14-2014
- 25a. Appeal DHMH Dr. Sharfstein 11-14-2014
- 25b. Requested DHMH Dr. Sharfstein relief 1207-2014
- 25c. Reminded DHMH Secretary 12-11-2014
- 26. E-mails to DHMH appeal-terminate Nov-Dec-2014
- 27a. DHMH HR lawyer Mr. Doring between 1205 to <sup>2014</sup>0206/2015
- 27b. Terminate-hearing req. by DHMH Mr. Doring 12-23-2014
- 28. Final resp from DHMH Dr. Sharfstein 12-19-2014
- 29. State medical director 0618-2014 letter
- 30. Mr. Yarbor request abeyance-appeals 0702-2014

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31. Reported DHMH HR EEO Ms. Taylor Ms. Barra discrimination & retaliation 0109-2014
32. Union Mr. McNally + Yu met DHMH EEO Ms. Taylor 1-30-2014
33. Reported to DHMH EEO Ms. Taylor 0131-2014
- 34a. Reported DHMH EEO Ms. Taylor disc National orig 0201-2014
- 34b. Reported DHMH EEO Ms. Taylor disc & retaliat 0202-2014
35. E-mail to Dr. Shell before cal him for CSTE ABS deadline 01-15-2014b
36. Ms. Barra req mtg with short notice 2-3-2014
37. Reported DHMH EEO- discip acti 0203- Ms. Taylor resp 02-04-2014
38. Disciplinary reprimand notice 0203-2014
39. Memo to HR by Ms. Barra 1010-2013
40. Responded to Ms. Barra 10-10-2013 Memo on 1018-2013
41. Appeal 1st discipline 0206-2014
- 42a. Cover letter addendum with appeal 1st discipline 02-18-2014
- 42b. Appeal Addendum for 1st discipline 0218-2014
43. letter to Union Mr. McNally about DHMH EEO Complain form 02-05-2014
44. Completed DHMH discrimination Complaint Form
45. MS22- updated 01-2011
- 46a. E-mailed to Dr. Shell with attached letter about fear to work for Ms. Barra-1205-2012
- 46b. Attached letter to dr. Shell 12042012
- 47a. Reported to Ms. Barra 12-21-2012
- 47b. Reported to Ms. Barra summary of external-internal activities 11-2009-12-2012
48. Sought a support from Ms. Barra 12-21-2012
- 49a. Requested Ms. Barra review of self-PEP 12-19-2012
- 49b. Retaliation resulted in mid-cycle PEP with improvement memo 01-02-2013
50. Retaliation resulted in mid-cycle PEP with improvement memo 12-20-2013

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51. Ms. Barra generated Memo 0331-2014 & revised 0415-2014
52. Grievance V. MS-22 by Union-Dr. Shell advised to HR-814-2013
53. Reported to PHPA director about Ms. Barra discrimination 8-2013
- 54a. Job description revised MS-22 7.19.13 by Ms. Barra-signed
- 54b. MS-22 SB updated 6.12.13-xy edited 0718-2013
- 54c. Required to be treated same as others in job description-MS-22-0719-2013
- 54d. Ms. Barra blocked performing job as CDC requested normal communication-refPS Exhibit 33
- 55a. Blocked 1305 budge meeting with CDC 0318-2014
- 55b. Reported to Union about fear of lossing job 03-18-2014
- 55c. 1305 prog budget-job duties 06-2013 to 6-31-2014
- 56a. Appeal letter to DHMH HR Mr. Young for grievance 1202-2013
- 56b. Attached doc-PHPA rejection Step One Grievance Conference with Yu appeal responses 12-2-2013
57. Initial Clarification to Ms. Barra 0418-2014 for Ms. Barra 03-31-2014 memo
58. Clarification for the negative impact v. the restriction on Ms. Barra MS-22 and memo 0421-2014
59. 2nd Clarification on 04-25-2014 to PHPA managers about Ms. Barra 3-31-2014 memo
60. Explanations to Ms. Barra for Personnel meeting-communication with Dr. Shell-10-2013
61. Entired e-mail com with Ms. Barra about CSTE ABS 1-9 to 1-15-2014
62. Reported to Union Mr. McNally about mitigation meeting 2-3-2014
63. Appeal disciplinary 5 days suspension 0318-2014
64. Responded to Dr shell 0117-2014 w. conversation Ms Ntatin
65. Appeal disciplinary 3 annual leave day 0422-2014
66. Appeal disciplinary-reprimand- 0520-2014
67. Appeal disciplinary-denail annual increase 0609-2014
- 68a. Yu helped Ms. Barra for predict Maryland heart disease-stroke burden condition

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- 68b. Helped Sara Barra-evaluation-calculation
69. Helped Ms. Erica Smith for analyses methods
70. Sara Barra forbade to use work time for job-related conference
71. Sara Barra forced to give out analyses to Ms. Erica Smith
72. Sara Barra exposed mitigation and suspension in calendar since 03-2014
- 73a. Sara Barra forbade the explanation for the confusion 6-27-2013 (See Exhibit-34-a)
- 73b. Reported to DHMH EEO the concerns about Sara Barra letter on 0627-2013
74. Reminders for Sara Barra to use new burden reports
75. Reported to Dr. Donald Shell suffers from Sara Barra warning e-mail for website reports 0628-2013
- 76a. Sara Barra blocked getting travel support 10-2013 to 3-2014
- 76b. Travel for professional study
77. Sara Barra created the confusion about tele-working at home
78. Missed forms in DHMH HR Yu personnel file 0221-2013
79. Grant data suggestion to Dr. Donald Shell as rejected by Sara Barra 0617-2013
- 80a. Sara Barra blocked access to Nelson database 11-18-2013 to 2-2014
- 80b. Sara Barra blocked access to Nelson database as name was removed from the CMA e-mail list
81. Sara Barra and Erica Smith blocked the access-to health data
- 82a. Sara Barra blocked access to 1305 grant inf.-1120-2013
- 82b. Sara Barra rejected the request accessing to the needed materials for 1305 grant 04-30-2014
83. Sara Barra prevented from participating in ASTHO program 10-2013
- 84a. Sara Barra suppressed and ignored the request of new COPD asthma co-operating project
- 84b. Sara Barra made the confusion and rejected COPD-asthma cooperating project
85. Dr. Vanessa Walker Harris involved in the bullying

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

XIAO-YING YU,

Plaintiff

v.

DENNIS SCHRADER, *et al.*,

Defendants.

CIVIL NO. JKB-17-3260

\* \* \* \* \*

MEMORANDUM

Plaintiff Xiao-Ying Yu was fired from the Maryland Department of Health, Center for Chronic Disease Prevention and Control ("CCDPC") on November 3, 2014. Just over three years later, she filed this lawsuit, *pro se*, on November 6, 2017, naming as Defendants the Secretary of the Maryland Department of Health,<sup>1</sup> and the Secretary of the Maryland Department of Budget and Management. She alleged, essentially, that she was discriminated against and retaliated against when she worked at CCDPC. Defendants moved to dismiss on January 3, 2018. (ECF No. 6.) After Plaintiff responded in opposition (ECF No. 20) and Defendant replied (ECF No. 23), Plaintiff obtained counsel, and was given an opportunity to file a supplemental opposition (*see* ECF No. 29). Plaintiff availed herself of that opportunity (*see* Supp. Opp'n, ECF No. 30) and Defendants have replied to that paper (ECF No. 31). Defendants' motion is therefore fully briefed and ripe for review. There is no need to hold a hearing to resolve the

<sup>1</sup> Plaintiff filed this lawsuit on November 6, 2017, when Dennis Schrader was still Acting Secretary of the Maryland Department of Health. The current secretary is Robert R. Neall, but neither party brought this to the attention of the Court or requested to substitute the parties.

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matter. *See* Local Rule 105.6 (D. Md. 2016). Plaintiff's complaint fails under Rule 8 to provide a short and plain statement of her claims. Nevertheless, the Court considered her possible claims, including those asserted by her new counsel, and they fail for a variety of reasons, including failure to properly exhaust administrative remedies and because Defendants are immune.

### I. *Background*<sup>2</sup>

Plaintiff, a woman of Chinese national origin over sixty years old, began working for CCDPC on November 4, 2009, as an Epidemiologist.<sup>3</sup> Starting in 2010 she was given increased job responsibilities for which she was not compensated properly. She was told she would be promoted, but her HR application process stalled, largely because various supervisors sabotaged that process. Plaintiff reserves most of her complaints for a particular supervisor, Ms. Sara Barry. Ms. Barry promoted a younger, white woman instead of Plaintiff. She often baselessly reprimanded Plaintiff for going outside the chain of command, and prevented Plaintiff from making complaints. Ms. Barry tampered with some type of HR document, an "MS-22," that was supposed to reflect Plaintiff's employment background. Ms. Barry deleted projects from the MS-22 that Plaintiff had worked on, or changed information about Plaintiff's skills in order to set Plaintiff up for failure. Ms. Barry amended Plaintiff's self-evaluations from "outstanding" to "satisfactory" and placed negative material in Plaintiff's HR file, all out of retaliation for Plaintiff's complaints about Ms. Barry. Ms. Barry tried to prevent Plaintiff from receiving an award, mischaracterized Plaintiff's work contributions, and interfered with Plaintiff's access to databases and files.

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<sup>2</sup> The facts are recited here as alleged by Plaintiff, as this memorandum is evaluating a motion to dismiss. *See Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

<sup>3</sup> Plaintiff may have worked at CCDPC in the past, as she wrote in her complaint that she was "reinstated" on November 4, 2009.

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Plaintiff suffered deteriorating health due the harassment and retaliation she faced at work. She was evaluated by a doctor who worked for the State Medical Director's Office, and he seemed to think that Plaintiff suffered from workplace stress, anxiety disorder, and depression. (See Am. Compl. Ex. 28, ECF No. 4-1.)<sup>4</sup> At some point, Plaintiff requested an accommodation for her disability. Plaintiff does not clearly allege what her disability is, but it appears to be essentially workplace stress and anxiety, and her requested accommodation seems to have been not working under Ms. Barry. This accommodation request was denied. Ultimately, Plaintiff was terminated from her position on November 3, 2014.

Plaintiff filed two Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). On November 12, 2013, Plaintiff asserted a charge of age and race discrimination. (Am. Compl. pp. 5-6.) Plaintiff was granted a right-to-sue letter fourteen days later, on November 26, 2013. Plaintiff "did not file the lawsuit." (*Id.* p. 6.) Plaintiff filed a second Charge of Discrimination on September 3, 2014. (*Id.* p. 10.) It is unclear from Plaintiff's complaint what the substance of this Charge was. She does not allege that she received a right-to-sue letter.<sup>5</sup>

Plaintiff filed the instant action on November 6, 2017. She named Dennis Schrader, Secretary of the Maryland Department of Health, and David Brinkley, Secretary of the Maryland Department of Budget and Management, as Defendants. (Plaintiff does not allege that she ever

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<sup>4</sup> Plaintiff alleges that she was examined by the State Medical Director and she "was diagnosed with 'workplace stress, major anxiety, major depressive disorder and Post Traumatic Syndrome [sic] Disorder.'" (Am. Compl. p. 9.) But she cited to her workability evaluation, and attached that document to her complaint. That document was prepared by a doctor who worked in the State Medical Director's Office, nowhere seems to "diagnose" Plaintiff with anything, and nowhere mentions "Post Traumatic Syndrome Disorder" (or Post Traumatic Stress Disorder). There is a section for "IMPRESSION" under which he wrote "Workplace stress," "Anxiety disorder," and "Depression."  
<sup>5</sup> Plaintiff argues in opposition to Defendants' motion to dismiss that she received a right-to-sue letter, and provides that letter to the Court as an exhibit attached to her opposition. (See Opp'n Ex. 1, ECF No. 20-1.) "It is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). This is true for represented and *pro se* litigants alike. See *Uzoечи v. Wilson*, Civ. No. JKB-16-3975, 2017 WL 3968535, at \*1 (D. Md. Sept. 8, 2017) (remanded in part on other grounds) (not considering allegations set forth in a *pro se* litigant's briefing that were not contained in the complaint).

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worked for the Maryland Department of Budget and Management). Plaintiff filed her Complaint *pro se* and filed an amended complaint *pro se*. Several months after Defendants moved to dismiss Plaintiff's amended complaint Plaintiff engaged counsel, who then began to represent her. Counsel continues to represent her now, and through that counsel she has filed a supplemental opposition to Defendants' motion to dismiss. Plaintiff has not moved to amend her complaint a second time.

## II. *Standards*

Ultimately, the Court will dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 8, 12(b)(1), and 12(b)(6). The standards for reviewing complaints under those rules are as follows:

### a. *Federal Rule of Civil Procedure 8*

The Federal Rules require that a complaint contain a "short and plain statement" of the grounds for the Court's jurisdiction and the claim, and "a demand for the relief sought." Fed. R. Civ. P. 8(a). "Short and plain" means short and plain. The Court does not look for technical forms, magic words, and legal jargon. What matters here is notice: "In general, a pleading must provide the defendant and the court with fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Jackson v. Experian Fin. Servs.*, Civ. No. RDB-13-1758, 2014 WL 794360, at \*1 (D. Md. Feb. 26, 2014) (internal quotation marks omitted). Courts hold *pro se* litigants "to less stringent standards than trained lawyers," and courts afford a *pro se* complaint a "generous construction." *Engle v. U.S.*, 736 F. Supp. 670, 671 (D. Md. 1989). But "these principles are not without limits." *Id.* at 672. "A plaintiff's status as *pro se* does not absolve her of the duty to plead adequately." *Moore v. Bd. of Educ. of Baltimore Cty.*, Civ. No. RDB-16-3439, 2017 WL 3172820, at \*4 (D. Md. July 25, 2017).

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**b. Federal Rule of Civil Procedure 12(b)(1)**

The burden of proving subject-matter jurisdiction is on the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). At this stage, “it is the court’s task to evaluate whether the pleadings allege[ ] facts that affirmatively and plausibly suggest” that the Court has jurisdiction. *Piper v. Meade & Assocs., Inc.*, 282 F. Supp. 3d 905, 907 (D. Md. 2017) (discussing standing). That is, the Court will take all allegations in Plaintiff’s complaint as true, and determine whether they are sufficient to establish subject-matter jurisdiction. See 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d. ed. Apr. 2018 Update) (“A facial attack challenges subject matter jurisdiction without disputing the facts alleged in the complaint and requires the court to treat the allegations of the complaint as true.”).

**c. Federal Rule of Civil Procedure 12(b)(6)**

A complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). An inference of a mere possibility of misconduct is not sufficient to support a plausible claim. *Id.* at 679. Although when considering a motion to dismiss a court must accept as true all factual allegations in the complaint, this principle does not apply to legal conclusions couched as factual allegations. *Twombly*, 550 U.S. at 555.

**III. Analysis**

Plaintiff’s amended complaint will be dismissed for several reasons. It fails to present a short and plain statement of her claims, and therefore fails under Rule 8. Even if the Court reads

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Plaintiff's amended complaint according to her current interpretation of it (put forth by her new counsel), her claims still fail for a variety of reasons.

*a. Rule 8*

Plaintiff's amended complaint is a maze. It consists of thirteen pages, all single spaced, all underlined. Its headings present an air of logical form that belies the dizzying allegations contained within—allegations that often reference unexplained persons, unexplained acronyms and unexplained HR forms. Some allegations proceed in impenetrable run-on sentences. (For example:

Yet, in May 2011, Dr. Prince refused to complete the HR required MS-44 and MS-2024 forms with the facts (about the increase of Ms. Yu job duties and changes of the supervision level since 1/2010) insisting on taking the easiest way to give Ms. Yu non-competitive promotion from Epidemiologist I to Epidemiologist II, grade 17, payment step 9, \$55,332 in 2011, which she previously mentioned once to Ms. Yu.

(Am. Compl. p. 2)). Plaintiff's amended complaint contains passing references to statutes and legally relevant events (such as filing Charges of Discrimination), as well as seemingly novel causes of action, like "willful underpayment," and discussion of events of questionable relevance to any claim. It is a document that perplexes the Court and, more importantly, would leave any defendant largely at a loss as to what he or she was defending against.

Importantly, Plaintiff's errors do not arise only from a lack of legal training. The problem with Plaintiff's complaint is not that she ineloquently explained the basis for subject-matter jurisdiction or that she fails occasionally to reference a particular section of the United States Code. Plaintiff's pleading errors arise from a lack of proof-reading, or perhaps some forethought about how to present her claims. The Federal Rules do not require Plaintiff to put forth a statement filled with legal jargon. They require a "short and plain" statement. Plaintiff's complaint is *not* "short and plain."

*App. III*

Plaintiff argues that the Court should overlook her pleading errors because she is *pro se*. That is a curious argument to be made by a Plaintiff who is represented by counsel. To be sure, Plaintiff *was pro se* when she filed this nearly indecipherable complaint. But she is *pro se* no longer. And yet she has not moved the Court to amend her complaint a second time. Her amended complaint, then, exists in a sort of bardo, a state somewhere between a pleading filed by counsel and a pleading filed *pro se*; and it is reviewed in light of that circumstance. *Even if* Plaintiff herself could be excused for her poor presentation, her current counsel cannot piggy-back on Plaintiff's purported ignorance of the pleading rules. Plaintiff's complaint falls short of the pleading standards even for a *pro se* litigant, and far short of the standards for a litigant such as Plaintiff who is not, in fact, *pro se*.<sup>6</sup> Her complaint fails under Federal Rule of Civil Procedure 8(a).

Still, the Court will look past this failure to examine the viability of several claims that Plaintiff argues she has presented in her complaint, as well as the claims Defendants believe she has brought.

***b. Employment Discrimination Claims***

Plaintiff argues now that she has brought claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and the Rehabilitation Act. Insofar as she brought these claims, they will be dismissed in part for lack of subject matter jurisdiction due to her failure to allege proper exhaustion of her administrative remedies, and in part because they fail to state a claim upon which relief can be granted.

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<sup>6</sup> Plaintiff's newly acquired counsel makes arguments that actually enforce the Court's finding that the complaint fails under Rule 8. For example, Plaintiff now argues that she asserted a Rehabilitation Act claim. If that is true, her complaint clearly does not put the Defendants on notice: the words "Rehabilitation Act" do not appear anywhere in Complaint, even though "Title VII," "ADA", and "ADEA" appear multiple times, and Plaintiff was clearly capable of citing to the U.S. Code and naming statutes. (*See Am. Compl. p. 13.*)

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“[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim.” *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009). The same is true for claims arising under the ADEA, *see id.* at 300-301, as well as the ADA or the Rehabilitation act, *see Snead v. Bd. of Educ. of Prince George’s Cty.*, 815 F. Supp. 2d 889, 894 (D. Md. 2011). For the purposes of this case there are two important jurisdictional exhaustion requirements that apply to all of these statutes: A plaintiff must first file a Charge of Discrimination with the EEOC, and the EEOC must issue a right-to-sue letter. *Roberts v. Am. Neighborhood Mortg. Acceptance Co.*, Civ. No. JKB-17-0157, 2017 WL 3917011, at \*2 (D. Md. Sept. 6, 2017) (citing *Davis v. North Carolina Dep’t of Corr.*, 48 F.3d 134, 140 (4th Cir. 1995) (discussing Title VII); *see Snead*, 815 F. Supp. 2d at 894 (exhaustion requirements for ADA and Rehabilitation Act are the same as requirements for Title VII); *Mandengue v. ADT Sec. Sys., Inc.*, Civ. No. ELH-09-3103, 2012 WL 892621, at \*25 (D. Md. Mar. 14, 2012) (exhaustion requirements for ADEA are same as for Title VII).<sup>7</sup>

If a plaintiff receives a right-to-sue letter, she has ninety days to file suit. *See*, 42 U.S.C. § 2000e-5(f)(1). Failure to comply with this statutory requirement, however, does not destroy the Court’s subject-matter jurisdiction; rather it is “in the nature of a statute-of-limitations defense.” *Laber v. Harvey*, 438 F.3d 404, 429 n. 25 (4th Cir. 2006). Thus, if a plaintiff fails to file a claim within ninety days of receiving her right-to-sue letter (and there are not grounds for equitably tolling the clock), her claim will be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See Roberts*, 2017 WL 3917011, at \*3.

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<sup>7</sup> A court may have subject-matter jurisdiction over a case brought by the EEOC in which the EEOC has not issued a right to sue letter.

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Plaintiff alleged that she filed a Charge of Discrimination with the EEOC on September 2, 2014 (the second charge), but she does not allege that she ever received a right-to-sue letter. Whatever claims arise from that Charge of Discrimination will therefore be dismissed for lack of subject-matter jurisdiction.<sup>8</sup> Plaintiff's statutory employment discrimination claims that arise out of her first Charge of Discrimination will be dismissed under Rule 12(b)(6) because Plaintiff did not file suit within ninety days of her receipt of the right-to-sue letter. Plaintiff alleged that she received the right-to-sue letter associated with this Charge on November 26, 2013, and did not file suit until 1,441 days later. Plaintiff's claims based on this Charge of Discrimination are therefore time-barred.

In short, any claim arising from her first Charge of Discrimination was filed too late, any claim arising from her second Charge fails for lack of subject matter jurisdiction (because she does not allege that she received a right-to-sue letter), and any statutory employment discrimination claim (under Title VII, ADA, ADEA, or the Rehabilitation Act) not addressed in either fails for lack of subject matter jurisdiction as well (because she does not allege that she filed any other Charge with the EEOC).

*c. Tort Claims*

Defendants understood Plaintiff's complaint as asserting, in part, a claim for "Willful underpayment," which they interpret as some form of a tort. Plaintiff, in her supplemental opposition, seems at first to agree. She begins her supplemental opposition stating that she filed a complaint "alleging causes of action of willful underpayment [and] unequal payment . . . ." (Supp. Opp'n at 1.) But then, several pages later, she argues that she did not bring a "willful

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<sup>8</sup>Again, Plaintiff *argues* that she received a right-to-sue letter, but the Court of Appeals for the Fourth Circuit has "long held that receipt of, or at least entitlement to, a right-to-sue letter is a jurisdictional prerequisite *that must be alleged in a plaintiff's complaint.*" *Davis*, 48 F.3d at 140 (emphasis added). Despite Plaintiff's argument that she has received a right-to-sue letter, she has not moved to amend her complaint a second time to make such an allegation, even after obtaining counsel.

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underpayment” claim, and that “[u]nderpayment is simply a statement of facts and a claim for damage.” (*Id.* at 6.) So, Plaintiff argues that she did not bring a “willful underpayment” tort claim; rather, she alleges that she was willfully underpaid and seeks recourse for that harm. This makes no sense. The Court remains unsure as to whether Plaintiff intends to bring a “willful underpayment” claim (whatever that may be) but will proceed to analyze the viability of such a claim out of an abundance of caution.

Under Maryland law, civil actions must be filed “within three years from the date [they] accrue[] unless another provision of the Code provides a different period of time.” Md. Code Ann., Cts. & Jud. Proc. § 5-101. Plaintiff was fired on November 3, 2014. Aside from some cryptic allegations about interference with the EEOC investigation in 2015 and 2017 (*see* Am. Compl. p. 13), a confusing allegation that she “stated” something in 2015 (*see id.* p. 11), and what appear to be some typographical errors,<sup>9</sup> Plaintiff does not allege that her employer acted to her harm her after November 3, 2014. Therefore, regardless of whether Plaintiff intended to bring a tort claim, or what the substance of that tort claim is, such a claim would be barred by Maryland’s three year statute of limitations, as she did not file her claim in this Court until three years and three days after November 3, 2014.

***d. Eleventh Amendment Immunity***

The Eleventh Amendment generally bars suits by citizens against their own state, including suits such as the one here: a suit by a citizen of the State of Maryland which “is in essence one for the recovery of money from the state.” *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945)). The only

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<sup>9</sup> For example, Plaintiff alleged that her “access to office mail was blocked by Ms. Barra on 9/3/2017,” but Plaintiff was out of her job almost three years by then. (Am. Compl. p. 10.)

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relevant exceptions to this general immunity are when the state has consented to suit, or when Congress has abrogated the immunity.

The State of Maryland has not consented to this suit, and Congress has not abrogated Eleventh Amendment immunity for ADA or ADEA claims. (Plaintiff's assertion that the State has consented by engaging in this litigation or the EEOC process is incorrect. *See Lapidus v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 622 (2002) (explaining that *voluntary* participation in litigation may constitute a waiver of immunity, but *involuntary* participation does not)). Plaintiff contends that Congress abrogated immunity for claims arising under the Rehabilitation Act when the State accepted certain qualifying federal funds. This contention is doubly misplaced: Plaintiff does not assert a Rehabilitation Act claim, and even if she did, she has not alleged that the State has accepted qualifying federal funds. *See Pickens v. Comcast Cable*, 2015 WL 127822, at \*2 (D. Md. Jan. 7, 2015) ("Under the Rehabilitation Act, a plaintiff also must show that the program or activity in question receives federal financial assistance.").

Most troublingly, Plaintiff asserts that Congress abrogated Maryland's Eleventh Amendment immunity for suits under the ADEA, and cites to *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761 (7th Cir. 1998) for that proposition. *Goshtasby* is not good law. *Goshtasby's* holding that the ADEA was a valid use of Congress's 14th amendment enforcement power to abrogate states' Eleventh Amendment immunity was itself abrogated in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82-83 (2000).

*e. Miscellaneous claims*

Plaintiff references several other claims throughout her amended complaint, particularly on the final page. Neither party addresses these purported claims in their motions papers; to wit, a violation of the Fair Labor Standards Act, violations of 42 U.S.C. §§ 1981 and 1983, and a

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violation of 29 U.S.C. § 187. If Plaintiff ever intended to bring claims under these statutes, it appears that she has abandoned them, as they are not discussed in her opposition. Even if Plaintiff had not abandoned these claims, they would still fail. Mere reference to a statute at the end of a complaint is insufficient to state a claim. Further, there are problems with these statutory references that suggest Plaintiff was not seriously attempting to bring claims under these statutes. For example, Plaintiff mentions the “Fair Labor Standards Act” but cites to a section of the U.S. Code for the ADA. She nowhere explains what Constitutional violation would underlie a Section 1983 claim. And 29 U.S.C. § 187 makes it unlawful for a labor organization to engage in unfair labor practices as defined in the National Labor Relations Act—Plaintiff barely mentions that she is in a union, let alone alleges sufficient facts to demonstrate an unfair labor practice that she was subjected to by said union (whatever union it may be), or any other prohibited conduct falling under the umbrella of that statute. To the extent Plaintiff has attempted to bring any of these claims, they will be dismissed.

*f. Leave to amend*

Plaintiff concludes her supplemental opposition with a request: that she be given leave to file a second amended complaint in the event that her first amended complaint is dismissed. The Court will deny that request for two reasons. First, Plaintiff could have moved to amend her complaint at any time prior to the entry of this order, and chose not to do so, even after acquiring counsel. Nor has she provided the Court with any proposed amendments, “or other indication of the amendments [she] wishes to make.” *Estrella v. Wells Fargo Bank, N.A.*, 497 F. App’x 361, 362 (4th Cir. 2012). Under such circumstances, the Court will not grant Plaintiff “a blank authorization to ‘do over’ [her] complaint.” *Id.* (quoting *Francis v. Giacomelli*, 588 F.3d 186, 197 (4th Cir. 2009); *cf. Confederate Mem’l Ass’n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir.

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1993) (“[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion within the contemplation of Rule 15(a).” (internal citation omitted)).

Second, the Court is not dismissing Plaintiff’s amended complaint only under Rule 8. To be sure, when a court dismisses a complaint under Rule 8, such dismissal is usually without prejudice, and the plaintiff will be given leave to amend. *See North Carolina v. McGuirt*, 114 F. App’x 555, 559 (4th Cir. 2004) (noting that dismissal with prejudice under Rule 8 “is an extreme sanction”). But the Court considered Plaintiff’s claims that she now argues are contained in her amended complaint, and has found significant structural problems: she has failed to properly exhaust her administrative remedies and Defendants are immune from many of her claims. A more clear and concise version of Plaintiff’s amended complaint would not cure these defects. *See Laber*, 438 F.3d at 426 (leave to amend under Rule 15(a) should be denied when the proposed amendments would be futile).

#### IV. Conclusion

Plaintiff’s amended complaint fails under Rule 8, in part under Rule 12(b)(1), and in part under Rule 12(b)(6). Accordingly, Defendants’ motion to dismiss will be granted by accompanying order, and the Clerk will be directed to close the case. An order shall issue setting forth this disposition.

DATED this 26<sup>th</sup> day of June, 2018.

BY THE COURT:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Bredar  
Chief Judge

*App 118*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**XIAO-YING YU,**

**Plaintiff**

**v.**

**DENNIS SCHRADER, *et al.*,**

**Defendants.**

**CIVIL NO. JKB-17-3260**

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**ORDER**

In accordance with the foregoing memorandum, IT IS ORDERED:

1. Defendants' motion to dismiss, construed as a motion to dismiss under Federal Rules of Civil Procedure 8, 12(b)(1), and 12(b)(6) is GRANTED.

a. Plaintiff's statutory employment discrimination claims arising solely from her alleged September 2, 2014 Charge of Discrimination, or based on claims not presented to the Equal Employment Opportunity Commission at all, are dismissed pursuant to Rule 8 and Rule 12(b)(1) for lack of subject-matter jurisdiction. These claims are dismissed without prejudice.

b. The remainder of Plaintiff's claims are dismissed pursuant to Rule 8 and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. These claims are dismissed with prejudice.

2. Plaintiff's Amended Complaint is DISMISSED and the Clerk is directed to CLOSE THE CASE.

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DATED this 26<sup>th</sup> day of June, 2018.

BY THE COURT:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Bredar  
Chief Judge

Appendix-11.1

JRB 193  
PP-CV-3260

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Complaint-Ex-157 1

Exhibit. 33.

1 Before Maryland Office of Administrative Hearings

2 (Maryland Department of Health and Mental Hygiene)

3 Xiao-Ying Ms. Yu,

Maryland Office of Administrative Hearings Case No.

4 Epidemiologist, II,

SPMS-DHMH-10-15-06200

5 Employee,

6 v.

7 Maryland Department of Health

8 And Mental Hygiene

9 -----

10 The hearing in the above -entitled matter commenced on Thursday, May 14, 2015, at  
11 Maryland Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland.

12  
13 BEFORE: THE HONORABLE JUDITH JUDGE OBSON

14 Maryland Office of Administrative Hearings Law Judge

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25 Transcripts from the audio recording VIQ Satellite CDAs Maryland Office of Administrative Hearings provided to  
Xiao-Ying Yu on 5/26/2015

APPEARANCES (5/14/2015)

2 ON BEHALF OF THE EMPLOYEE:

3 XIAO-YING MS. YU, (Former employee)  
4 557 KIRKCALDY WAY  
5 ABINGDON, MD 21009  
6

7 ON BEHALF OF MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE:

8 ALEX. C. MR. DORING, (Esquire)  
9 Employee Relations Officer  
10 Maryland Department of Health and Mental Hygiene  
11 Department of Human Resources  
12 201 West Preston Street, 1<sup>st</sup> Floor  
13 Baltimore, MD 21201  
14

15 WITNESS OF MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE:

16 Sara Barra  
17 Former DHMH Employee Xiao-Ying Yu's immediate supervisor (12/19/2012-11/3/2014)  
18 Center for Chronic Disease Prevention and Control  
19 Maryland Department of Health and Mental Hygiene  
20 201 West Preston Street, 3<sup>rd</sup> Floor  
21 Baltimore, MD 21201

22  
23 Kristin Pier  
24 Current Director (4/4/2014-present)  
25 Center for Chronic Disease Prevention and Control  
26 Maryland Department of Health and Mental Hygiene  
27 201 West Preston Street, 3<sup>rd</sup> Floor  
28 Baltimore, MD 21201

29  
30 Dr. Donald Shell  
31 Director (12/19/2012-5/2015)  
32 Cancer and Chronic Disease Bureau  
33 Former Director for Center for Chronic Disease Prevention and Control (3/2012-4/2014)  
34 Maryland Department of Health and Mental Hygiene  
35 201 West Preston Street, 3<sup>rd</sup> Floor  
36 Baltimore, MD 21201

37  
38 Donna Gugel  
39 Deputy Director (7/2012-present)  
40 Prevention and Health Promotion Administration  
41 Maryland Department of Health and Mental Hygiene  
42 201 West Preston Street, 3<sup>rd</sup> Floor  
43 Baltimore, MD 21201

1 Ms. Barra: She got her health provider; She refused to do independent psychological evaluation, and she refused to return to work unless change new supervisor.

3 Judge: Any objection?

4 Ms. Yu: No

5 Judge: I am going to accept it.

6 Mr. Doring: (Distributed exhibit #10. DHMH EEO rejection of Ms. Yu's accommodation request on 9/3/2014).

7 Judge: Is Ms. Ruth Ann Arezeredo your lawyer on 9/3/2014?

8 Ms. Yu: Yes.

9 Mr. Doring: Have you seen this document before? Do you know her lawyer? Can you make the summary?

10 Ms. Barra: Ms. Yu requested her disability accommodation. This letter telling her changing supervisor is not  
11 reasonable accommodation.

12 Mr. Doring: Are you under impression if Ms. Yu can play essential function?

13 Ms. Barra: No.

14 Judge: I am going to accept this document.

15 Mr. Doring: Did they ask you what can be done for this accommodation request?

16 Ms. Barra: No

17 Judge: I got another Dr. Toney's letter evaluation on 9/18/2014, DHMH exhibit #11

18 Mr. Doring: Can you tell about this?

19 Ms. Barra: Continue evaluation. Ms. Yu can't back work and suggested independent evaluation

20 Mr. Doring: Evidence...

21 Judge: I am going to accept this.

22 Mr. Doring: (Distributed exhibit #12)

23 Judge: This is Dr. Toney's 10/8/2014 report.

24 Mr. Doring: Could you summary?

25 Ms. Barra: Ms. Yu can't perform work under current supervisor. Recommend not return to work.

Mr. Doring: What is your decision?

1 Ms. Barra: Asked my supervisor, HR and EEO. I got the instruction. Ms. Yu's request is not reasonable. To grant  
new supervisor is not reasonable. Rejected her accommodation request.

3 Judge: Any objection?

4 Ms. Yu: ..

5 Mr. Doring: You stated the conversation, what conversation? Are you willing to accommodate?

6 Ms. Barra: I will try all my best to accommodate her behavior, her writing part issue. But she does not want to  
7 talk to me or work to me. She wanted to talk with my supervisor. She just do not want to talk and work to me.

8 Mr. Doring: Do you know her health condition?

9 Ms. Barra: No, I do not know. She sent the doctor's notice, then, refused. She sent the doctor's notice to HR.  
10 That is the protocol HR instructed. She could send to HR but need to report me that.

11 Ms. Barra: I took part load. It is difficult taking her working load. It is difficult for the Center.

12 Judge: Dr. Toney's notice on 10/8/2014 as exhibit #12. It is time 12:15. Can I ask how long will be?

13 Mr. Doring: It will take 30 min.

14 Judge: 0.5 hr later, then take break lunch. You have time to ask later. I got DHMH exhibit #13, DHMH HR Ms.  
15 Toria Livingston 10/10/2014 notice to Ms. Yu.

16 Mr. Doring: Who is Ms. Livingston? What role? How did you involve with her?

17 Ms. Barra: She is HR with PHPA for the personnel decision. She advice employee and supervisor in PHPA as to  
18 what allowable under HR regulations.

19 Mr. Doring: Do you have any consultation with her?

20 Ms. Barra: I have not conversation with Ms. Livingston.

21 Mr. Doring: What content of the conversation with HR Ms. Livingston between 10/8 and 10/10/2014?

22 Ms. Barra: I told her Ms. Yu's PEP unsatisfactory, disciplinary action, I gave her everything so far I had.  
23 Accommodation request and what options to her.

24 Mr. Doring: Did she (Ms. Livingston) was aware of EEO unable to accommodation, that Ms. Yu can't be given,  
25 EEO rejected accommodation?

26 Ms. Barra: Yes

27 Mr. Doring: Summary?

28 Ms. Barra: Ms. Livingston's letter advice her that she may resign, retire and disability, if not, she will be  
29 terminated.

- 1 Mr. Doring: Did you recommend Ms. Yu about these options?
- 2 Ms. Barra: This is Department give all employee in her position.
- 3 Judge: Any objection?
- 4 Ms. Yu: Ok.
- 5 Mr. Doring: Did Ms. Yu excise any option, resign or retire?
- 6 Ms. Barra: No
- 7 Judge: DHMH exhibit #14, termination notice two pages on 10/31/2014. I am going to admit it.
- 8 Mr. Doring: Could you tell me of what is this? Do you familiar with this document?
- 9 Ms. Barra: Yes. This is the termination notice from Department.
- 10 Mr. Doring: Could you tell the summary of detail process from 10/10 to 10/31 process of termination notice?
- 11 **CDA#3, Track#1.**
- 12 Ms. Barra: Because Ms. Yu did not apply for resign and retire, in fact, termination.
- 13 Mr. Doring: Did you consult anyone about her termination?
- 14 Ms. Barra: I do not.
- 15 Mr. Doring: What process of Department arrive this termination?
- 16 Ms. Barra: There are many meetings between administrate leaders, HR leaders, my leader, EEO and Union.
- 17 Look out medical record, her performance evaluation history, unsatisfactory recent PEP, numerous of
- 18 disciplinary actions, based on all these accumulated factors, they arrived this decision.
- 19 Mr. Doring: Did Ms. Yu?...
- 20 Ms. Barra: She prepared her mitigation factors, she was provided meeting for PEP, but she refused.
- 21 Mr. Doring: Prostate you and other PHPA arrive this decision?
- 22 Ms. Barra: Yes.
- 23 Judge: Any objection
- 24 Ms. Yu: En.
- 25 Mr. Doring: (Distributed new exhibit)
- Judge: #15 exhibit, I am given appeal from 11/14/2014.

FACT-FINDING CONFERENCE

WEDNESDAY, APRIL 19, 2017

10:00 a.m.

(Xiao-Ying Yu v. Maryland Department of Health and Mental Hygiene)

NAME

JOB TITLE

Delinda Johnson

Equal Access Compliance Mgr., DH

SARA BARRA

CHIEF, EPIDEMIOLOGY & SPECIAL PRO  
(former title)

CHIEF PLANNER, PREPAREDNESS &  
RESPONSE  
(current title)

Nicholas Johansson

Assistant Attorney General, DHMH



OFFICE OF THE ATTORNEY GENERAL  
STATE OF MARYLAND  
DEPARTMENT OF HEALTH & MENTAL HYGIENE

**Nicholas E. Johansson**  
Assistant Attorney General

Suite 302  
300 W. Preston Street  
Baltimore, Maryland 21201

(410) 767-5162  
Fax (410) 333-7894  
njohansson@oag.state.md.us

4/19/17

Timeline

Dr. XIAO Ying-Yui v DHMH 531-2014-02468C

BASIS: Race (Asian), N.O. (Chinese), Age (61) and Retaliation

- 11/3/09 - CP hired as Epidemiologist
- 12/19/12 - Sara Barr becomes CP's supervisor
- FMLA Requested & Approved 6/23/14 - 9/12/14
- 7/23/14  
8/19/14 CP Requested reasonable Accommodation: Change Supervisor
- 9/3/14 CP request was rejected as "undue hardship"
- 10/8/14 2nd workability exam by Dr. Toney showed results of Anxiety, depression, post TRAUMATIC stress disorder.
- 10/10/14 CP ASK to Resign or retire
- 10/14/14 Final rejection of CP's accommodation requests
- 11/3/14 CP was terminated
- 2/19/15 Rec'd Respondent's position statement
- 3/6/15 P.S. mailed to CP
- 4/20/15 CP sent her rebuttal

FOIA 3/21/18  
P. 207 (bottom  
missed)

Sick leave  
annual leave

It's approve

exhausted

a lot of leave taken before FMLA

impact  
don't get her schedule  
SARA took some of her work  
erratic schedule  
leave was erratic

came in she could "part of a day" - she left

INITIAL  
workability

prior to FMLA - Sara recommended workability

- (1) concern for her help = First time
- (2) Vague Dr. Yu did → NO CONVERSATION with STAFF
- (3)

(and workability) → → →

mandatory work schedule - Capt. time slower

EPI - For short

update manda reports - not updated

(con = was delayed) \*

Footnote =  
 \* Due to exlarge prin  
 paper, it is not sh  
 "(She was delayed).  
 Reclassification III  
 It is very hard to see  
 201

Appendix A

App. 127

Supp Exh #3 (A) 7A



STATE OF MARYLAND

DHMH

Maryland Department of Health and Mental Hygiene  
201 W. Preston Street • Baltimore, Maryland 21201

Martin O'Malley, Governor - Anthony G. Brown, Lt. Governor - Joshua M. Sharfstein, M.D., Secretary

October 10, 2014

Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009

Dear Ms. Yu,

I am writing in reference to your employment status with the Department of Health and Mental Hygiene, Prevention and Health Promotion Administration. We recently received a letter from the State Medical Director, Dr. Robert Toney, advising us that if a change in your work environment could not be granted, than it is not recommended that you return to work.

This is to advise you that you may resign your position by forwarding a letter to that effect to my attention by October 24, 2014 or, if you are eligible, you may apply for a disability or service retirement, in lieu of termination. If you choose not to resign or retire, regrettably based on the Medical Director's finding, we have no alternative but to terminate your employment. Enclosed, please find an application for the continuation of health benefits (COBRA), an Application for Service and Disability Retirement, and a copy of Dr. Toney's letter. Should you have any questions or if we can be of assistance in any way, please don't hesitate to contact me on (410) 767-5424.

Sincerely,

Toria Livingston  
Personnel Officer II  
Office of Human Resources

Attachments

c: File  
Sara Barra

Appendix 12.1

App. 128



Delinda Johnson -DHMH- <delinda.johnson@maryland.gov>

**RE: CONFIDENTIAL - DHMH Reasonable Accommodation Request Form**

1 message

Ruth Azeredo <ruthazeredo@comcast.net>  
To: Delinda Johnson -DHMH- <delinda.johnson@maryland.gov>  
Cc: Ruth Azeredo <ruthazeredo@comcast.net>

Thu, Jul 31, 2014 at 9:52 AM

Ms. Johnson,

As I mentioned to you in yesterday's telephone conversation and as is stated in the reasonable accommodation letter sent to the Agency, the critical component here is "the supervisor," not supervision.

We also spoke of sensitivity training for Ms. Barra, at a minimum.

In addition, I mentioned two openings – one in St. Mary's County and the other in Howard County. Was management able to give some information on these?

You state below that "this is not a possibly [sic] as after today that position is vacant." Why does the fact that the position of Medical Director is vacant after today make a transfer to that side of the division not possible? Who will be supervising that side of the division after today? If it is not Ms. Barra, then it seems Dr. Yu could move there.

I am conferring with my client and then we will, in turn, consult with her medical provider. At that point, I will provide you with more information.

If you could send me your contact information, that would be helpful. (of course, I do have your email).

Best regards,

Ruth Ann Azeredo  
w Office of Ruth Ann Azeredo LLC  
1997 Annapolis Exchange Parkway, Suite 300

Delinda Johnson -DHMH- <delinda.johnson@maryland.gov>



**RE: Reasonable Accommodation Request for Xiao-Ying Yu**

1 message

Ruth Azaredo <ruthazaredo@comcast.net>  
To: Delinda Johnson -DHMH- <delinda.johnson@maryland.gov>  
Cc: ruthazaredo@comcast.net

Ms. Johnson,

The only point that Dr. Yu and I find particularly disingenuous below is the assertion that the agency "has no knowledge of any pending complaints of discrimination." Insofar as Dr. Yu's union grievances include allegations of discrimination and Dr. Yu has stated that she is being discriminated against not only within union meetings with management but other meetings, your assertion is not accurate.

In terms of the EEO complaint, you will receive the Charge via the EEOC, as is customary.

Best regards,

Ruth Ann Azaredo

Law Office of Ruth Ann Azaredo LLC

1997 Annapolis Exchange Parkway

Suite 300

Annapolis, Maryland 21401

(410) 558-1915

(410) 558-1916

Fax: (410)558-1917

www.azaredolegal.com

From: Delinda Johnson -DHMH- [mailto:delinda.johnson@maryland.gov]  
Sent: Monday, August 25, 2014 3:03 PM  
To: Ruth Azaredo  
Subject: Re: Reasonable Accommodation Request for Xiao-Ying Yu

Ms. Azaredo,

Appendix 2.2

App. 130

**EXHIBIT**

59

Sup. Exh # 5 (2a)  
p 4.



Delinda Johnson -DHMH

**Fwd: CCDPC Medical Director Position Posting**

1 message

Thu, Aug 28, 2014 at 10:03 AM

Donna Gugel -DHMH- <donna.gugel@maryland.gov>  
To: Delinda Johnson -DHMH- <delinda.johnson@maryland.gov>  
Cc: Michelle Spencer -DHMH- <michelle.spencer@maryland.gov>

Delinda,

See below for our response.

Thanks  
Donna

----- Forwarded message -----

From: **Delinda Johnson -DHMH-** <delinda.johnson@maryland.gov>  
Date: Wed, Aug 27, 2014 at 11:09 AM  
Subject: Re: CCDPC Medical Director Position Posting  
To: Michelle Spencer -DHMH- <michelle.spencer@maryland.gov>, Donna Gugel -DHMH- <Donna.Gugel@maryland.gov>

Hello Colleagues,

Yu's attorney insists the only accommodation that exists is a change in supervisor. She states that Kristy Pier met with staff in April and informed them of a re-organization, which she believes creates an opportunity for to remove Yu from Barra's supervision. Could either of you clarify this?

Also, please answer the following:

1. How many staff did the former Medical Director supervisor? What are the titles of the subordinates? Who supervises this staff now that the position is vacant?

The previous Medical Director supervised three positions (2 PINs Health Policy Analyst II and Program Administrator I; one contractual Program Coordinator). The positions are temporarily supervised by the Center Director. The previous medical director resigned and left her position at the end of July. The new MS22 for the Center Medical Director does not include staff supervision.

In April when Ms. Pier assumed the role of the director of the Center for Chronic Disease Prevention and Control she stated that she was going to look at the Center and its structure and that she may make some changes. Ms. Pier is currently working on an Action Plan for the Center, and staff were informed that there may be modest responsibility changes. The Action Plan is scheduled to be completed by the end of the calendar year.

As the Chief Epidemiologist for the Center, and the supervisor of the Epidemiology and Special Projects section of the Center, Ms. Barra is the appropriate, trained and experienced management staff in the Center to supervise any and all epidemiologists in the Center, including Ms. Yu.

2. Provide in writing what specific hardships exists for PHPA transferring to other supervisor?

PHPA does not have any vacant Epi II positions. If there are any vacant EPI III positions, Ms. Yu would need to submit an application and compete with other candidates for the position.

I am available with any questions or concerns at 410-767-5184.

App. 131

P1



# STATE OF MARYLAND JOB OPENINGS

Powered by JobPost

## MEDICAL DIRECTOR

## PHYSICIAN PROGRAM MANAGER I

Recruitment #14-004688-001

DATE OPENED 7/21/2014 2:20:00 PM  
 FILING DEADLINE 8/4/2014 11:59:00 PM  
 SALARY \$120,391.00 - \$198,615.00/year  
 EMPLOYMENT TYPE Full-Time  
 HR ANALYST Julianne Stolt  
 WORK LOCATION Baltimore City

### GRADE

36

### LOCATION OF POSITION

DHMH  
 PHPA, Center for Chronic Disease Prevention and Control (CCDPC)  
 Baltimore, MD

### MAIN PURPOSE OF JOB

The position provides advanced medical consultation for the programs in the Center for Chronic Disease Prevention and Control (CCDPC), which includes cardiovascular health, diabetes, nutrition and physical activity (obesity prevention, osteoporosis, and stroke prevention), chronic obstructive pulmonary disease, and Office of Oral Health programs. This position provides guidance and direction in working and partnering with health systems, health care providers and payers. The position serves as an interface with the health care system and providers in the community. The position leads program coordination and the position is responsible for providing input on the development of legislative position papers and provision of subject matter testimony before the legislature on behalf of the Department for chronic disease-related issues. The position fosters and maximizes collaboration within and between the Department and academia, as well as other federal, state and local agencies disease councils. The position has a leadership role and provides chronic disease subject matter expertise in determining Center priorities and new initiatives, to decrease the burden of chronic disease and its risk factors in Maryland. This position provides support and clinical consultation to all chronic disease prevention and management initiatives. The position prepares documents and presentations to inform professional audiences of Center programmatic successes and outcomes. The position provides highly responsible clinical and programmatic work at the level of an experienced physician. In addition, this position provides medical direction and guidance to the Director and the programs within the Office. The position is responsible for providing input on the development of media position papers and provision of subject matter interviews before the media on behalf of the Department for chronic disease-related issues.

### MINIMUM EDUCATION AND EXPERIENCE REQUIREMENTS

Requires an MD degree from an accredited college or university, and five years of medical practice, preferably with public health or population health experience, and be able to make recommendations for chronic disease priorities at the state level.

### LICENSES, REGISTRATIONS AND CERTIFICATIONS

Applicants must be licensed by the Maryland Board of Physicians. The Board may be contacted online at <http://www.mbp.state.md.us/> or by mail at 4201 Paterson Avenue, Baltimore, Maryland 21215. A copy of your license must accompany application.

### SELECTION PROCESS

This is a management service recruitment.

Applicants who meet the minimum qualifications will be evaluated. The evaluation may be a rating of your application based on your education, training and experience as they relate to the requirements of the position. Therefore, it is essential that you provide complete and accurate information on your application. Please report all related education, experience, dates and hours of work. For education obtained outside the U.S., a copy of the equivalent American education as determined by a foreign credential evaluation service must accompany the application. All information concerning your qualifications must be submitted by the closing date. We will not consider information submitted after this date. Applicants certified to list will receive eligibility for a period of one (1) year. Eligibility may be extended beyond one (1) year period. For Recorded Job Information Call: 410-767-6015.

Online applications are **STRONGLY** preferred, however the paper application may be submitted to DHMH, Recruitment and Selection Division, 301 W. Preston St., Room 114-B, Baltimore, MD 21201. The paper application must be received by 5 pm, close of business, on the closing date for the recruitment; no postmarks will be accepted.

Incorrect application forms will not be accepted.

If you need to submit additional information, the preferred method is to upload. If unable to upload, please fax requested information only to +1-410-333-5688.

Appropriate accommodations for individuals with disabilities are available upon request by calling: (410) 767-1251 or MD TTY Relay Service 1-800-735-2258.

**BENEFITS**

**STATE OF MARYLAND BENEFITS**

**FURTHER INSTRUCTIONS**

We thank our Veterans for their service to our country, and encourage them to apply.

As an equal opportunity employer Maryland is committed to recruiting, retaining and promoting employees who are reflective of the State's diversity.

App. 133

1997 Annapolis Exchange Parkway, Suite 300  
Annapolis, Maryland 21401  
www.azedolegal.com

July 23, 2014

ruthazeredo@comcast.net  
Tel. 410-558-1915  
Tel. 410-558-1916  
Fax. 410-558-1917

**VIA EMAIL (jennifer.english@maryland.gov) and U.S. CERTIFIED MAIL**

Jennifer English  
Department of Health & Mental Hygiene  
Office of Human Resources  
201 W. Preston St. Room 111  
Baltimore, Maryland

*Re: Reasonable Accommodation of Xiao-Ying Yu*

Dear Ms. English:

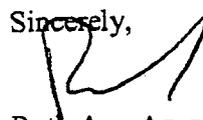
This correspondence is a request by Xiao-Ying Yu ("Dr. Yu") for reasonable accommodation in her workplace. Dr. Yu was propelled to take time off pursuant to the Family Medical Leave Act ("FMLA") as a result of the emotional and psychological harm she has suffered since working under the supervision of Sara Barra ("Ms. Barra"). Dr. Yu's FMLA is currently approved through August 29, 2014.

Pursuant to the Americans with Disabilities Act, the Rehabilitation Act and the Maryland Human Relations Statute, Dr. Yu is formally requesting a reasonable accommodation for her disabilities – anxiety and depression. Enclosed is a letter from Dr. Yu's healthcare provider addressing what Dr. Yu's disabilities are and what can be done to reasonably accommodate them. The difficulty here is that the accommodation that is integral is that Dr. Yu not be supervised by Ms. Barra. (Ms. Barra's treatment of Dr. Yu has triggered several grievances/appeals through Dr. Yu's union and will be addressed in the EEO complaint that Dr. Yu is filing).

So as to reach a workable solution, Dr. Yu is asking that she receive the reclassification to Epidemiologist III, which was supposed to occur a while back and also be placed under the supervision of the Medical Director. It is my understanding that Dr. Yu's current working Center is set up in such a way that there is a Center Director and then under the Center Director, it is broken out to two parts. One is under the Medical Director (who has resigned and will be leaving on or about 7/31/14) who leads program managers and specific program evaluators, and the other is under Ms. Barra, whose title is Chief (a recently created position after Ms. Barra did not remain as Acting Deputy Director) and who leads specific project coordinators and Dr. Yu, an epidemiologist who has worked for all Center chronic disease programs since 2009. Dr. Yu's many years of applicable experience, her stellar work history (pre Ms. Barra) and her high level of commitment to the Agency should not be ignored or squandered. This transfer would remove Dr. Yu from Ms. Barra's supervision and allow her to continue with her career.

Please contact me at (410) 558-1915 to discuss the above.

Sincerely,



Ruth Ann Azeredo

Enclosure

cc: Dr. Yu

----- Forwarded message -----  
From: XIAO-YING Yu <xiaoying.yu67@gmail.com>  
Date: Wed, Aug 6, 2014 at 7:01 PM  
Subject: Re: Reasonable accommodation  
To: Ruth Azeredo <ruthazeredo@comcast.net>

Dear Ruth,

Thank you very much for your detail and specific instruction, I will let my doctor know and ask her help to work explain why and how my working with Ms. Barra triggered acute symptoms as your instruction.

I am so glad to learn that you have reviewed 23 case same as my condition and are going to rework on my draft. For your convenience, before I can reach my doctor in my next visit (8/9/2014) to address those issues as you listed, I would like to answer your question as following:

1. St Mary's epidemiologist job description and my application (see attached, e-mail was returned as e-mail address was wrong but he received my fax. He informed me that I was evaluated as the best qualified person for DHMH epidemiologist III;
2. I have not applied Howard epidemiologist III position and have not copied the position description.
3. The current office medical director position opened from 7/23-8/4/2014. The heart disease and diabetes program administrator: Ms. Adelline Ntatin and obesity & school health program manager: Ms. Erin Prinston and PHHS program coordinator/contract 1305 program evaluator (since 9/2013) Ms. Erica Smith work under Medical director.
4. My responsibility for CDC-supported 1305 program (that is the office major founding resource and major work cover heart disease, stroke, diabetes, obesity, health care, school health and community health) is specifically designated by DHMH, PHPA and my current Center managers as 100% time working epidemiologist and my salary supported by 1305 program grant (Ms. Sara Barra was not initially included in this program, but ex-medical director has insisted on including Ms. Barra as 0.5 time worker listed with other office managers together). My job duties and Ms. Erica Smith job duties are stated respectively in the 1305 program application, but all my jobs have been taken away by Ms. Barra to Ms. Erica Smith (I have sent your the summary table of out loop programs and office reports to CDC indicated that my name has been completely deleted as Ms. Barra's instruction). I have included major description into the DHMH form in the part of "...limitation prevents me from ...", for your convenience, see below:

*Provide population-based epidemiological support for the program including processing and analysing data to determine changes in trends and probable causes of epidemiological problems, identifying existing data systems to assess morbidity and morality associated with chronic diseases, leading the design, data collection and analysis of evaluations associated with programmatic initiatives, and implementation*

*and evaluation of control or prevention measures.*

Ms. Barra deleted all of these duties in her revised MS-22 performance standards but focus on "the writing and summary".

5. The suggestion by Ms. Johnson for accommodation are what Ms. Barra stated in her "**Improvement plan**" on 6/9/2014. Ms. Barra made untruthful evaluation and memo, set up the PEP standards and "improvement plan" and tasks for me to do within 90 days, if she think I fail her task, she has power to make "unsatisfactory" again, then additional 90 days, if she still think I fail her task, she can terminate me. Usually other office managers will not against her for protecting me. As you can see for attached "improvement plan, this "improvement plan" will immediately trigger my acute symptoms and make my anxiety, depression into more worse condition.

Thank you very much again and best regards,  
Xiao-Ying

Appendix 12.A

App 136

JKB-17-CV-3260  
Complaint-Ex-147

Exhibit 31a.

**From:** Delinda Johnson -DHMH- [mailto:[delinda.johnson@maryland.gov](mailto:delinda.johnson@maryland.gov)]

**Sent:** Wednesday, September 03, 2014 1:51 PM

**To:** Ruth Azeredo

**Subject:** Re: Follow up regarding reasonable accommodation and copy of EEO complaint sent to EEOC

Good Afternoon Ms. Azeredo,

Please see the attached correspondence addressing Ms. Yu's reasonable accommodations request.

Sincerely,

Delinda A. Johnson  
Equal Access Compliance Manager  
Equal Access Compliance Unit  
Office of Equal Opportunity Programs  
Department of Health and Mental Hygiene  
201 West Preston Street, #514B  
Baltimore, Maryland 21201  
410-767-5184 (office) / 410-333-5337 (fax)  
[delinda.johnson@maryland.gov](mailto:delinda.johnson@maryland.gov)

**From:** Ruth Azeredo [mailto:[ruthazeredo@comcast.net](mailto:ruthazeredo@comcast.net)]

**Sent:** Tuesday, September 02, 2014 7:52 PM

**To:** 'Delinda Johnson -DHMH-'

**Cc:** [ruthazeredo@comcast.net](mailto:ruthazeredo@comcast.net)

**Subject:** Follow up regarding reasonable accommodation and copy of EEO complaint sent to EEOC

Ms. Johnson:

I am following up on the reasonable accommodation request. Also, though I know you will receive this from the EEOC, I am enclosing the EEO complaint that was sent to the EEOC today.

Best regards,

Ruth Ann Azeredo

Law Office of Ruth Ann Azeredo LLC  
1997 Annapolis Exchange Parkway  
Suite 300  
Annapolis, Maryland 21401  
(410) 558-1915  
(410) 558-1916  
Fax: (410) 558-1917  
[www.azedolegal.com](http://www.azedolegal.com)



STATE OF MARYLAND  
**DHMH**

App. B7

Exhibit 31 b

JKB-17-cv-3260  
Complaint Ex. P. 148

Maryland Department of Health and Mental Hygiene  
201 W. Preston Street • Baltimore, Maryland 21201

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

September 3, 2014

Via Email and First Class Mail

Ruth Ann Azeredo, Esquire  
1997 Annapolis Exchange Parkway, Suite 300  
Annapolis, Maryland 21401

Dear Ms. Azeredo:

I have reviewed your client, Xiao-Ying Yu's, request for reasonable accommodation in accordance with State and Federal laws, policies, and procedures. Specifically, Ms. Yu has requested a change in supervisor and/or a reclassification to an Epidemiologist III due to symptoms associated with her medical condition. It has been determined that these requests are not reasonable and create an undue hardship to the Prevention and Health Promotion Administration; therefore, Ms. Yu's request is denied.

DHMH has suggested and engaged in dialog about possible reasonable accommodations that might assist Ms. Yu in performing the essential functions of her current position including, but not limited to: implementing revisions in supervisory strategies and communication methods of her current supervisor; scheduling meetings to provide guidance, feedback or discuss progress and/or issues; providing written summaries and/confirmation of instructions and/or management expectations; developing a process for handling conflict with her current supervisor; dividing larger projects into smaller tasks; modifying break schedule and/or granting permission to utilize stress management techniques at work. On behalf of your client, you declined trying any of these accommodations as long as your client remained under supervision of her current supervisor. DHMH remains open to discussing other possible accommodations.

Please be advised that the ADAAA does not require the employer provide the exact accommodation that an employee and/or physician requests; it only requires that the accommodation be feasible and effective so that the employee can perform the essential functions of the job. In this case, you have indicated that the employee can perform her essential functions under different supervision, a proposed accommodation that this office has determined to be unreasonable.

For additional information regarding your client's rights to pursue this matter, you may contact the following agencies:

Maryland Commission on Civil Rights  
6 St. Paul Street, 9<sup>th</sup> Floor  
Baltimore, Maryland 21202  
(410) 767-8600

Equal Employment Opportunity Commission  
10 South Howard Street, 3<sup>rd</sup> Floor  
Baltimore, Maryland 21201  
(410) 962-3932

Sincerely,

Delinda Johnson, Equal Access Compliance Manager  
410-767-5184

Toll Free 1-877-4MD-DHMH – TTY/Maryland Relay Service 1-800-735-2258

Web Site: [www.dhmh.maryland.gov](http://www.dhmh.maryland.gov)



DHMH

App. 138

JKB-17-CV-3260  
Complaint-Ex-P150

Maryland Department of Health and Mental Hygiene  
201 W. Preston Street • Baltimore, Maryland 21201

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

MEMORANDUM

TO: Ms. Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009

FROM: Jennifer English  
Administration Unit  
DHMH Office of Human Resources

RE: Employee to Employee Leave Donation - Disapproval

DATE: August 28, 2014

This memorandum serves as notification that the employee to employee leave donation submitted on August 26, 2014, is denied because the medical documentation you submitted was insufficient to support your Leave request.

In accordance with Code of Maryland Regulation (COMAR), you may appeal the denial within 14 days receiving this letter. We are enclosing an Appeal Form (MS-406), an Authorization Form for Release of records and Information and examples of Medical Documentation to assist you in the appeal process. If you choose to submit an appeal, please complete the Appeal Form and the Authorization Form for Release of Records and Information and send them to:

Ms. Margaret Embardino  
Department of Budget and Management  
301 W. Preston Street, Room 508  
Baltimore, MD 21201  
Phone: 410-767-4483 Fax: 410-333-5440  
Email: [margaret.embardino@maryland.gov](mailto:margaret.embardino@maryland.gov)

In addition to submitting your information, please have your treating physician(s) fax any medical records that support your absence. The medical documentation should address the period of time for which you need leave. It must include detailed information that explains the severity and duration of your medical condition(s).

If you have any questions, feel free to contact me at 410-767-5532.

Steve Elmore  
Medical File

Toll Free 1-877-4MD-DHMH – TTY/Maryland Relay Service 1-800-735-2258  
Web Site: [www.dhmh.state.md.us](http://www.dhmh.state.md.us)

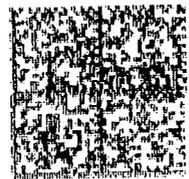


UNIT # 1-17-08-03260-0 KB Do  
 STATE OF MARYLAND  
**DHMH**  
 Maryland Department  
 201 W. Preston Street  
 Baltimore, Maryland 21



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FIRST CLASS



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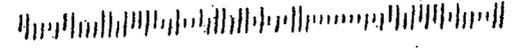
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**\$06.480**  
 09/03/2014  
 Mailed From 21201  
 US POSTAGE

ADDRESS SERVICE REQUESTED

*Ms Xiao-Ying Yu  
 557 Kirkcaldy way  
 Abingdon MD 21009*



21009241957



*App. 139*

*JKB-17-CV-2000  
 Complaint-Ex-1149  
 Exhibit 31c.*

Appendix 12.5

App. 140

JKB-17-CV-3260  
Complaint-Ex-1151

Exhibit 31d.

----- Forwarded message -----

From: Sara Barra -DHMH- <sara.barra@maryland.gov>

Date: Wed, Sep 3, 2014 at 12:49 PM

Subject: Re: seek help for the password of my office mail box has been changed by someone

To: XIAO-YING Yu <xiaoying.yu67@gmail.com>

Cc: Kristi Pier -DHMH- <kristi.pier@maryland.gov>

Xiao-Ying,

Good afternoon! Email access will be restored when you return from leave on September 30, 2014.

Best,  
Sara

Sara Barra, MS  
Chief, Epidemiology and Special Projects  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene  
201 W Preston St, Rm 306  
Baltimore MD, 21201  
(P) 410-767-6781  
(F) 410-333-7106

On Sat, Aug 30, 2014 at 9:42 AM, XIAO-YING Yu <xiaoying.yu67@gmail.com> wrote:  
Good morning, Sara and Kristi,

The password of my office mail box ([xiao-ying.yu@maryland.gov](mailto:xiao-ying.yu@maryland.gov)) has been suddenly changed by someone on 8/28/2014, but I have not received any notice and you know my personal mail box. So, I could not access my office mail box. Could you look into this and help me to access my office mail box?

Thank you and best regards,  
Xiao-Ying

Appendix 12.5

App. 141

JKB-IT-CV-3260  
Complain-Ex-1152

Exhibit 32.

Ms. Yu sent her detail accommodation requests to her former lawyer on 8/6/2014 (see separate form). Because she did not hear a response from Ms. Johnson and some feedback she heard from her former lawyer indicating the confusion. Therefore, she wrote additional letter to OEOP Ms. Johnson on 9/29/2014.

.....  
From: **XIAO-YING Yu** <xiaoying.yu67@gmail.com>  
Date: Mon, Sep 29, 2014 at 12:22 PM  
Subject: Confidential DHMH reasonable Accommodation Request  
To: [delinda.johnson@maryland.gov](mailto:delinda.johnson@maryland.gov)

September 29, 2014

**Via Email and Certified Mail**

Delinda Johnson  
Equal Access Compliance Manager  
Equal Access Compliance Unit  
Office of Equal Opportunity Programs  
Department of Health and Mental Hygiene  
201 West Preston Street, #514B  
Baltimore, Maryland 21201

Dear Ms. Johnson:

I have received your letter sent to Ms. Ruth Azeredo on 9/3/2014. I am writing this letter to you to continue the dialog with DHMH about my accommodation request. I would like to discuss this matter with DHMH myself, as it is not financially feasible to have Ms. Ruth Azeredo continue to handle all aspects of my work situation.

First, it seems there is a misunderstanding about our accommodation request for the "reclassification to an Epidemiologist III". This reclassification was approved by DHMH and DBM in 2011, but follow up paper work to complete the reclassification was not completed.

As you know, the symptoms associated with my medical condition are caused by Ms. Sara Barra's mistreatment. The accommodation request to "change supervisor and to complete the reclassification" would allow me to perform my essential functions as clearly stated in the letter Ms. Azeredo sent to you on 8/19, with Dr. Bisson's medical documentation and completed DHMH ADA form.

On 8/7/2014, Ms. Azeredo asked me if I would like to consider alternative accommodation such as to do Tele-work and e-mail reports to Ms. Barra and Cc. to CCDPC director. I told her this would not improve my symptoms and assist me to do my essential job because most harassment from Ms. Barra was through her e-mails.

I am willing to put aside the accommodation request "to complete reclassification" and wait for a good time when DHMH could complete the previously approved reclassification. This issue was brought to the attention of DHMH HR regulation Director, Mr. Harold Young and DHMH Secretary Dr. Jushua Sharfstein in my 2/18/2014 addendum, which I sent along with the Union appeal.

Additional information to consider is that Ms. Barra came to CCDPC in 7/2011 when her previous division director retired and employees were distributed into different offices. She is the epidemiologist designated by DHMH to work with Maryland BRFSS with another statistician and Maryland Assessment Tool for Community Health (MATCH) after Dr. George Thrope became sick in 2011. In addition, Ms. Lee Hurt gave Ms. Barra the information related to children surveillance system and database when she resigned in 2013. Therefore, Ms. Barra, as the epidemiologist, has a job description which is completely different from mine. However, most of my job responsibilities and participation in office projects and programs have been taken away by Ms. Barra and all of the office projects/programs included in the performance standards of my MS-22 have been deleted. Many job functions, such as providing recommendations to the office director and co-workers and communicating with internal and external contacts etc., have been restricted and prohibited in the modified MS-22 and several "Internal memorandums" generated by Ms. Barra. Instead of using my epidemiologic and analytic professional skills and experience, Ms. Barra, as my supervisor, focused on "writing and one-to one meetings with her" based on her needs. This is also stated in her "180 days- improvement plan" (to terminate me) based on her untruthful statements and self-contradictory performance evaluation of me.

We still believe, because CCDPC director Ms. Kristi Pier informed us about reorganization of the office structure to better utilize all employees' experiences and skills, our accommodation to allow me to work under a different supervisor should not create an undue hardship to the Prevention and Health Promotion Administration. In fact, this would be a great benefit to limiting the negative impact by Ms. Barra and building a healthy office working culture and honest and co-operative communication system and as well as enhance the effectiveness and efficiency.

The EEOC complaint file we sent to the Federal EEOC office in Baltimore is to seek their help and protection (also sent to you on 9/2/2014). We delayed filing this complaint, while actively seeking the help of DHMH in finding a solution to stop the bullying, discrimination, and retaliation by Ms. Barra and allowing me to return to work under a different supervisor. Although we have been unsuccessful over the past several months, I continue to hope this matter can be resolved.

Sincerely,

Xiao-Ying Yu,

557 Kirkcaldy Way,  
Abingdon, MD 21009

STATE OF MARYLAND

App. 143

JKB-17-CV-3260

Complaint-Ex-P154



# DHMH

Maryland Department of Health and Mental Hygiene  
 201 W. Preston Street, Room 514 • Baltimore, Maryland 21201

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

## Request for Reasonable Accommodation

To request a reasonable accommodation complete this form and present it to your unit/program ADA Designee. Contact information for DHMH unit ADA Designees can be obtained by contacting the OEOP Equal Access Compliance Unit at 410-767-6600.

Requesting Party's Name: Ms. Ruth Azeredo for Xiao-Ying Yu		Job Title / Position Applied to or Program Name: Xiao-Ying Yu is Epidemiologist in DHMH, PHPA CCDPC	
Daytime Phone Number: 410-558-1915	Request Date: 1 <sup>st</sup> : 7/23/2014 by Ms. Azeredo and Dr. Bisson 2 <sup>nd</sup> : 8/2/2014, see above	Address: Law Office of Ruth Ann Azeredo LLC 1997 Annapolis Exchange Parkway, #300 Annapolis, Maryland 21401	
Please check one: <input type="checkbox"/> Employee <input type="checkbox"/> Applicant <input type="checkbox"/> Program Participant			

If employee, Supervisor's Name and Phone Number:

### **State the functional limitations that you experience as a result of your health condition:**

**NOTE: SPECIFIC DISABILITY NEED NOT BE DISCLOSED**

1. Xiao-Ying Yu's (Dr. Yu) extra anxiety, fearfulness, emotions and depression caused by her immediate supervisor, Ms. Sara Barra's (Ms. Barra) daily bullying, harassment and retaliation associated with downgraded Dr. Yu's performance evaluation, restricted and deleted her job duties by changing her MS-22 and routinely generating personnel/mitigation meetings, internal memos and disciplines have interfered with her memory and concentrations.
2. Frequent harassment including unreasonable confusions and request by Ms. Barra, (not allowed Dr. Yu to clarify) often made her panic attacks include extra thirst, hand shaking, flushing, tachycardia chest pain, that have led to anti pantry anxiety and interfered with her focusing on her regular work like review references and data analyses.

### **My limitation(s) prevents me from performing the following program or work related activities:**

Because Dr. Yu's limitations resulted from anxiety, depression and panic attacks are directly related to Ms. Barra's bullying, harassment and retaliation, including her "improvement plan" (6/9/14), Dr. Yu rather emphasizes the limitations and restrictions given by Ms. Barra who seriously interferes with her job duty and related activities and prevents Dr. Yu from doing her job in office projects/programs than address her limitation only resulted from her health conditions. Dr. Yu is the full time daily working epidemiologist and 100% of her salary from CDC supported the office 1305 program, which is office major founding resource. Dr. Yu's major job duties and activities are stated in 1305 program as: "Processing and analyzing data, identifying existing data system, leading the design, data collection, and analysis of evaluations associated with programmatic initiatives, and implementation and evaluation of control and prevention measures". Dr. Yu has requested on 3/22/2013, 6/28/2013, 11/20/2013 and 3/11/2014 by e-mails to Ms. Sara Barra regarding supervisor's permission for her to participating in the office -organized events related to chronic disease programs especially 1305 program and reviewed/participated in 1305 related working plan. However, Dr. Yu has never been allowed to review, or to be aware of CDC's instruction for 1305 program from 2/26/2014 till 3/11/2014 (when Ms. Adeline Ntatin released to Dr. Yu) and to have given an equal opportunity to participate in the discussing and preparing the 1305 working plan. In addition, Dr. Yu's name has been completely deleted from 1305 enhanced program working plan and progress report without any explanation to her that Ms. Barra instructed to send to CDC on 3/27/2014, again on 4/28/2014.

App. 1A

JKB-17-CV-3260  
Complaint-Ex-P155

**I am requesting accommodation because:**

I am applying for employment and the accommodation will allow me to participate in the application / selection process.

I am currently employed by the State of Maryland and require an accommodation in my current position.

I am a person seeking an accommodation so that I may participate in a DHMH program, service or activity for which I am otherwise qualified.

**The accommodation I am requesting is:**

(Describe the type of accommodation, suggestions for work site, exam or program site modifications or specific job duties that may be restructured to facilitate your employment or participation, and the details of how or where the accommodation (if purchasable) may be obtained, including the cost, if known).

1. To be removed from the harasser: Ms. Sara Barra bullied Dr. Yu by controlling office meeting invitation and e-mails with her supervisor and Chief power and forbid Dr. Yu to have an equal opportunity to access data and information resources related to programs, exchange information through internal and external contacts and professional friendship, provide recommendations and information to office director, which, however, are listed in her job duties and related activities in MS-22 form since she came to DHMH in 2009.

2. To receive the relief from the harassment:

1) To stop the harassment by granting the reclassification to "Epidemiologist III" that has been deprived by the ex-medical director Maria Prince who refused to do proper reclassification forms after DHMH and DBM approved office director Dr. Audrey Regan's application in 4/2011 (due to Dr. Yu's job duties were expanded from heart disease and stroke in 11/2009 to all chronic disease programs and supervision was changed from general to manager since 3/2010). This deprivation has been greatly inhibiting Dr. Yu's performing her job duty (she has not been allowed to do anything without Ms. Barra's permission and approval) as Dr. Yu was informed that as epidemiologist II, she must be under Ms. Barra's supervision, while Ms. Barra was promoted as "epidemiologist III" position by Dr. Prince with the DHMH and DBM approved PIN number immediately after ex-director Dr. Regan left 12/2011.

2) To give an equal opportunity to Dr. Yu as other DHMH epidemiologist and CCDPC co-workers has to allow her to compete for her job and access the privileges of employment. Ms Barra has been preventing Dr. Yu from participating in the office projects/programs by modifying her MS-22 with deletion and restriction of her job duties, removing all projects from her performance standards, forbidding her to use her best professional experiences and skills to perform her job duties. Also, Ms. Barra has generated a set of memos to restrict and prevent Dr. Yu from accessing information resource to do her job and clarifying much confusion Ms. Barra intentionally generated to mislead DHMH managers and co-workers. In addition, in order to prevent Dr. Yu from receiving privilege of employment, Ms. Barra has inserted a set of documents, even that do not reflect the fact, into Dr. Yu's personnel file without informing Dr. Yu, such as 3/31, 5/20 and 6/9/2014 memos and 3 of total 5 disciplines on 2/3/2014, 3/18/2014 and 6/9/2014 although those disciplines are during appealing process.

In summary, in order to best utilize each CCDPC employee's knowledge, experience and skills, CCDPC Director Ms. Kristi Pier has planned to reorganize office structure and informed each of CCDPC employees by meeting with each of us including Dr. Yu on 4/29/2014. Therefore, Dr. Yu requests the accommodation to be removed from the harasser, Ms. Barra to another branch of the office: New Medical director will not result in any undue hardship or administrative burden but benefits to the healthy office culture and fair working system building and operations. In addition, Dr. Yu requested to receive the relief from the harassment by considering completing those previous missed proper reclassification forms, modifying MS-22, clearing up her personnel file with her new supervisor as HR policy instruction and also working out the best flexible working hours and working styles as new supervisor's convenience and needs of CCDPC projects/programs including 1305 program.

APP. 145

This accommodation will allow me to perform the functions of my job or participate in the application / selection process or program as follows: (Describe how the accommodation will assist you)

JKB-7-cv-3260  
3260  
Complaint-Ex  
P156

1. To be removed from the harasser, Ms. Sara Barra to new Medical Director.  
This will give Dr. Yu great mental relief from Ms. Barra's daily bullying, harassment and retaliation, especially Ms. Barra's "improvement plan" that was based on the 2014 untruthful annual performance evaluation Ms. Barra has planned and generated for Dr. Yu on 6/9/2014 during Dr. Yu sick leave time. This accommodation will allow Dr. Yu to focus and concentrate on her work to do all her best for 1305 program as DHMH PHPA and CCDPC managers expectations without fearfulness how to respond the continuous confusion and retaliation plan as Ms. Barra has been generating for Dr. Yu.

2. To be relieve from the harassments:  
1) Reclassification with proper forms for "Epidemiologist III": Dr. Yu has trusted DHMH leadership, so she has heard this unfair employment practice since 8/2011 and hopes this is the good timing to solve this after change to new supervisor. This will allow Dr. Yu to use her best knowledge and professional working experience and skills that Ms. Barra has been restricting her although she has actively communicated with Ms. Barra by verbally and many e-mails for office projects/programs including GIS grant application that she has checked with Ms. Barra after received the notice from CDC/NACDD in 2/2014, but Dr. Yu has never heard any feedback from Ms. Barra.

2) According to HR policy, modifying MS-22, clearing up Dr. Yu's personnel file when Dr. Yu is allowed to change to new supervisor. Modifying MS-22 to reflect Dr. Yu's job duty and office programs especially her performance standards and removing those specific restrictions Ms. Barra has given to Dr. Yu will allow her to have equal opportunity to access database and information resources, exchange information, participate in office projects and programs, provide recommendation and information to office as her job duty required and epidemiologist function listed in MS-22 and 1305 program without Ms. Barra's suppression.

In summary, because Dr. Yu's current health condition is caused by Ms. Barra's bullying, harassment and retaliation, to be removed from Ms. Barra and to be relieve from the harassments will reduce Dr. Yu's tremendous stress and extreme anxiety, depression and panic attack symptoms and allow her to gradually recovery, do her job efficiently without daily facing the conflicts in how to do the best for her job duty and deal with Ms. Barra's restriction, confusions as well as suppression (by not allowing her to work with the basic working condition and data information).

**I UNDERSTAND THAT I MAY BE REQUIRED TO PROVIDE MEDICAL INFORMATION FROM MY HEALTH CARE PROVIDER AS PART OF THIS PROCESS.**

SIGNATURE

DATE

PRINT NAME

Please forward to:

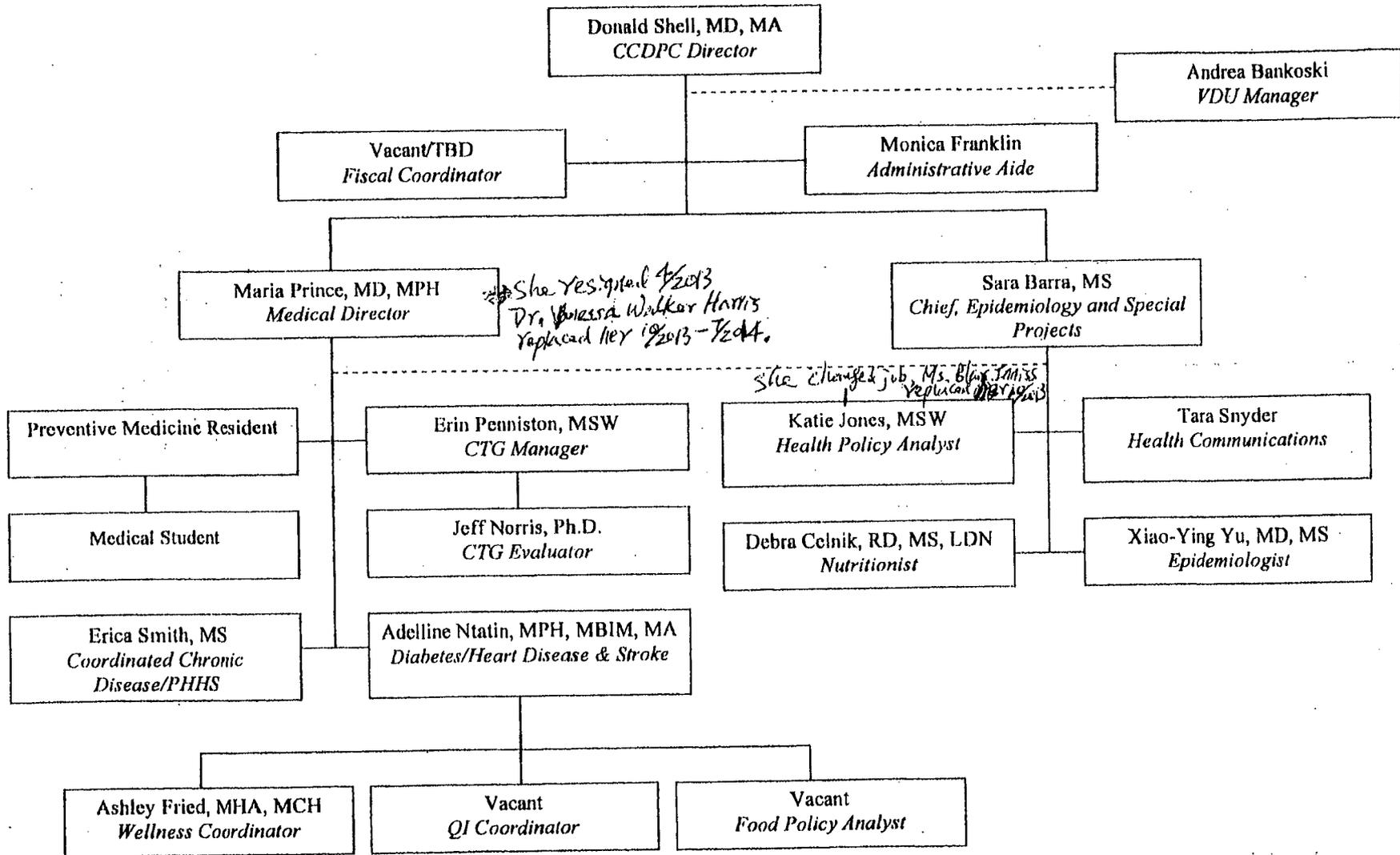
Delinda Johnson  
Equal Access Compliance Manager  
Office of Equal Opportunity Programs  
Equal Access Compliance Unit  
201 W. Preston Street, Room 514B  
Baltimore, MD 21201  
Office: (410) 767-5184  
Fax: (410) 333-5337  
Email: Delinda.Johnson@maryland.gov

App. 146

Exhibit 35a | JKB-17-cv-3760  
Complent-Ex-1163

Maryland Department of Health and Mental Hygiene  
Prevention and Health Promotion Administration  
**Center for Chronic Disease Prevention and Control**

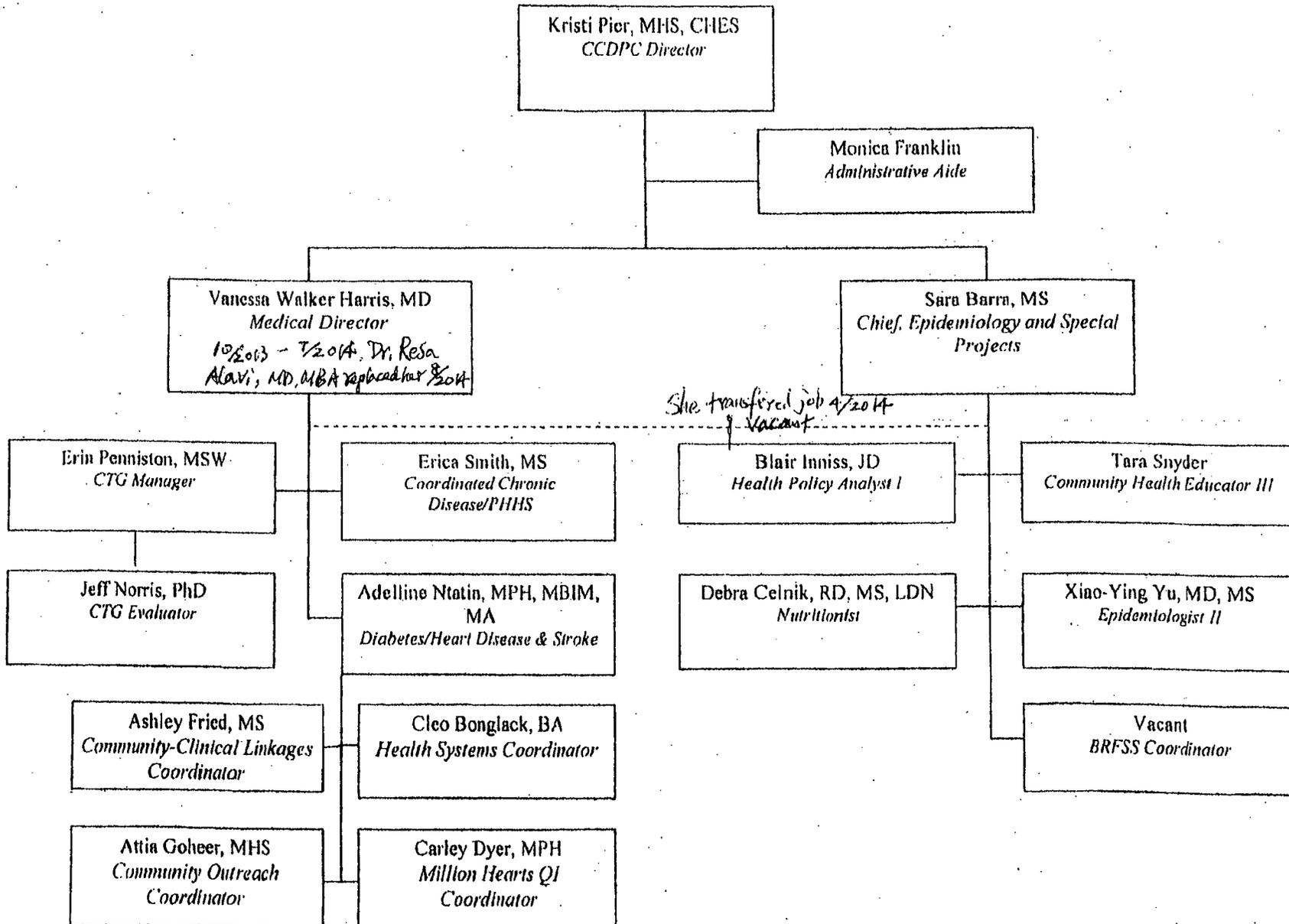
Organizational Chart  
March, 2013

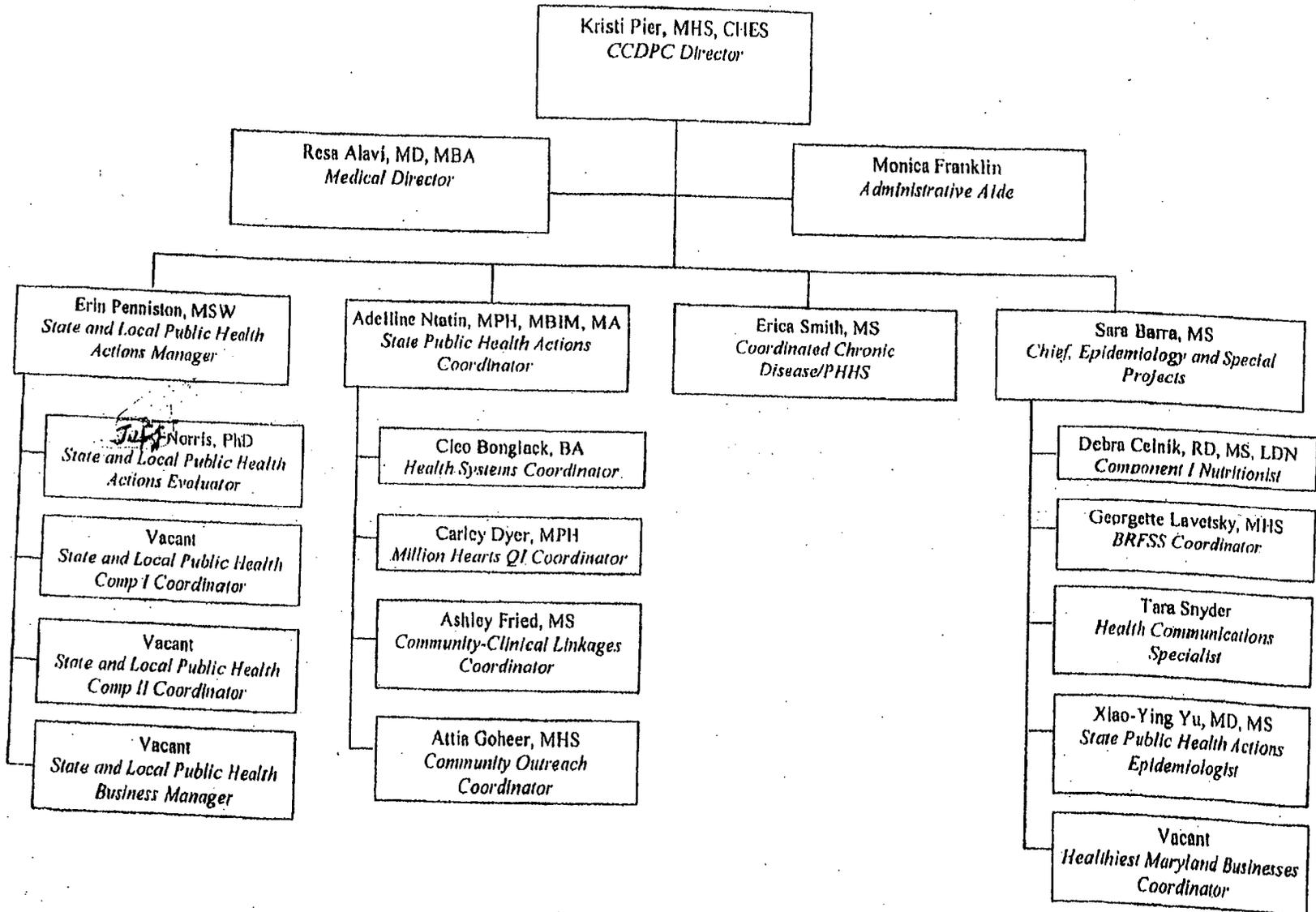


App. 147

JKB-17-CV-3260  
Complaint-Ex-1164

Center for Chronic Disease Prevention and Control  
Organizational Chart  
April 2014 ~ Oct, 2014





Appendix-13.1

App. 149

- Exhibit # 2-f.1 Page 5 of 37

APPEAL,CLOSED,FEEPRO

**U.S. District Court  
District of Maryland (Baltimore)  
CIVIL DOCKET FOR CASE #: 1:17-cv-03260-JKB**

Yu v. Neall et al  
Assigned to: Chief Judge James K. Bredar  
Demand: \$750,000  
Case in other court: Fourth Circuit Court of Appeals, 18-01889  
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 11/06/2017  
Date Terminated: 06/26/2018  
Jury Demand: Plaintiff  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff**

**Xiao-Ying Yu**

represented by **Xiao-Ying Yu**  
557 Kirkcaldy Way  
Abingdon, MD 21009  
410-671-9823  
Email:  
PRO SE

**Eric Hawkins**  
6615 Wilson Lane  
Bethesda, MD 20817  
240-600-1126  
Email: [eric@hawkinsattorney.com](mailto:eric@hawkinsattorney.com)  
*TERMINATED: 08/01/2018*  
*ATTORNEY TO BE NOTICED*

**William X Zou**  
Law Offices of Xian Feng Zou  
136-20 38th Ave. Ste. 10D  
Flushing, NY 11354  
7186619562  
Fax: 7186612211  
Email: [zoulawoffice@yahoo.com](mailto:zoulawoffice@yahoo.com)  
*TERMINATED: 08/01/2018*  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*

v.

**Defendant**

**Robert R. Neall**  
*Maryland Department of Health  
Secretary*

represented by **James Nelson Lewis**  
Office of the Attorney General  
Department of Health  
300 West Preston Street  
Suite 302

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Baltimore, MD 21201  
 (410) 767-5162  
 Fax: (410) 333-7894  
 Email: [James.Lewis1@maryland.gov](mailto:James.Lewis1@maryland.gov)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**David Brinkley**  
 Maryland Department of Budget and  
 Management Secretary

represented by **James Nelson Lewis**  
 (See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Email All Attorneys  
 Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
11/06/2017	<u>1</u>	COMPLAINT against David Brinkley, Dennis Schrader ( Filing fee \$ 400 receipt number 14637101819.), filed by Xiao-Ying Yu. (Attachments: # <u>1</u> Cover Letter, # <u>2</u> Civil Cover Sheet)(bas, Deputy Clerk) (Entered: 11/07/2017)
11/16/2017	<u>2</u>	ORDER Directing plaintiff to submit completed summons to the Clerk and the Clerk SHALL prepare and issue and return summons to Plaintiff. Signed by Chief Judge James K. Bredar on 11/16/2017. (c/m 11/16/17 bas, Deputy Clerk) (Entered: 11/16/2017)
12/07/2017	<u>3</u>	Summons Issued 21 days as to David Brinkley, Dennis Schrader.(c/m 12/7/17 bas, Deputy Clerk) (Entered: 12/07/2017)
12/08/2017	<u>4</u>	AMENDED COMPLAINT against David Brinkley, Dennis Schrader, filed by Xiao-Ying Yu. (Attachments: # <u>1</u> Exhibits)(bas, Deputy Clerk) (Entered: 12/11/2017)
12/15/2017	<u>5</u>	SUMMONS Returned Executed by Xiao-Ying Yu. David Brinkley served on 12/13/2017, answer due 1/3/2018; Dennis Schrader served on 12/13/2017, answer due 1/3/2018. (Attachments: # <u>1</u> Cover Letter)(bas, Deputy Clerk) (Entered: 12/18/2017)
01/03/2018	<u>6</u>	MOTION to Dismiss for Failure to State a Claim by David Brinkley, Dennis Schrader (Attachments: # <u>1</u> Supplement, # <u>2</u> Text of Proposed Order)(Lewis, James) (Entered: 01/03/2018)
01/04/2018	<u>7</u>	Rule 12/56 letter mailed to Xiao-Ying Yu (c/m 1/4/18 bas, Deputy Clerk) (Entered: 01/04/2018)
01/04/2018	<u>8</u>	Correspondence Received from Xiao-Ying Yu re: Judgment. (bas, Deputy Clerk) (Entered: 01/04/2018)
01/09/2018	<u>9</u>	MOTION for Clerk's Entry of Default, MOTION for Default Judgment as to by Xiao-Ying Yu (Attachments: # <u>1</u> Exhibts)(bas, Deputy Clerk) (Entered: 01/09/2018)

App. 51 - Exhibit # 2-p. 3

page 7 of 37

01/10/2018	<u>10</u>	ORDER Denying <u>9</u> Motion for Clerk's Entry of Default, Motion for Default Judgment. Signed by Chief Judge James K. Bredar on 1/10/2018. (c/m 01/10/18 bas, Deputy Clerk) (Entered: 01/10/2018)
01/16/2018	<u>11</u>	MOTION for Extension of Time to File Response/Reply as to <u>6</u> MOTION to Dismiss for Failure to State a Claim by Xiao-Ying Yu (Attachments: # <u>1</u> Cover Letter)(bas, Deputy Clerk) (Entered: 01/17/2018)
01/19/2018	<u>12</u>	RESPONSE to Motion re <u>11</u> MOTION for Extension of Time to File Response/Reply as to <u>6</u> MOTION to Dismiss for Failure to State a Claim filed by David Brinkley, Dennis Schrader. (Attachments: # <u>1</u> Text of Proposed Order)(Lewis, James) (Entered: 01/19/2018)
01/19/2018	<u>13</u>	MOTION for Clarification Related to Default by Xiao-Ying Yu (Attachments: # <u>1</u> Affidavit, # <u>2</u> Cover Letter)(bas, Deputy Clerk) (Entered: 01/19/2018)
01/22/2018	<u>14</u>	ORDER Granting <u>11</u> Motion for Extension of Time to File Response. Signed by Chief Judge James K. Bredar on 1/22/2018. (c/m 1/23/18 bas, Deputy Clerk) (Entered: 01/23/2018)
01/23/2018	<u>15</u>	MOTION for Clerk's Entry of Default, MOTION for Default Judgment by Xiao-Ying Yu (Attachments: # <u>1</u> Declaration)(heps, Deputy Clerk). (Entered: 01/24/2018)
01/25/2018	<u>16</u>	ORDER Denying <u>13</u> Motion for Clarification Related to Default; Denying <u>15</u> Motion for Entry of Default and Default Judgment Order. Signed by Chief Judge James K. Bredar on 1/24/2018. (c/m 1/25/18 bas, Deputy Clerk) (Entered: 01/25/2018)
03/01/2018	<u>17</u>	MOTION for Extension of Time to File Response/Reply as to <u>6</u> MOTION to Dismiss for Failure to State a Claim by Xiao-Ying Yu (Attachments: # <u>1</u> Exhibit, # <u>2</u> Cover Letter)(bas, Deputy Clerk) (Entered: 03/05/2018)
03/06/2018	<u>18</u>	ORDER Granting <u>17</u> Motion for Extension of Time to File Response/Reply. Signed by Chief Judge James K. Bredar on 3/6/2018. (c/m 3/6/18 bas, Deputy Clerk) (Entered: 03/06/2018)
03/19/2018	<u>19</u>	MOTION for Extension of Time to File Response/Reply as to <u>6</u> MOTION to Dismiss for Failure to State a Claim by Xiao-Ying Yu (Attachments: # <u>1</u> Exhibit)(bas, Deputy Clerk) (Entered: 03/20/2018)
03/22/2018	<u>20</u>	RESPONSE in Opposition re <u>6</u> MOTION to Dismiss for Failure to State a Claim filed by Xiao-Ying Yu. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3)(bas, Deputy Clerk) (Entered: 03/23/2018)
03/23/2018	<u>21</u>	ORDER Granting <u>19</u> Motion for Extension of Time to File Response/Reply. Signed by Chief Judge James K. Bredar on 3/22/2018. (c/m 3/23/18 bas, Deputy Clerk) (Entered: 03/23/2018)
03/23/2018	<u>22</u>	AFFIDAVIT of Service for Response in Opposition and Exhibits, filed by Xiao-Ying Yu. (Attachments: # <u>1</u> Cover Letter)(bas, Deputy Clerk) (Entered: 03/26/2018)

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04/05/2018	<u>23</u>	REPLY to Response to Motion re <u>6</u> MOTION to Dismiss for Failure to State a Claim filed by David Brinkley, Dennis Schrader.(Lewis, James) (Entered: 04/05/2018)
04/11/2018	<u>24</u>	MOTION to Appear Pro Hac Vice for Willlliam X. Zou, Esq. (Filing fee \$100, receipt number 0416-7264031.) by Xiao-Ying Yu(Hawkins, Eric) (Entered: 04/11/2018)
04/16/2018	<u>25</u>	PAPERLESS ORDER granting <u>24</u> Motion to Appear Pro Hac Vice on behalf of William X Zou. Directing attorney William X Zou to register online for CM/ECF at <a href="http://www.mdd.uscourts.gov/electronic-case-filing-registration">http://www.mdd.uscourts.gov/electronic-case-filing-registration</a> . Signed by Clerk on 4/16/2018. (srd, Deputy Clerk) (Entered: 04/16/2018)
04/17/2018	<u>26</u>	Consent MOTION for Leave to File <i>a supplemental memo in opposition to Defendants' motion to dismiss</i> by Xiao-Ying Yu(Zou, William) (Entered: 04/17/2018)
04/19/2018	<u>27</u>	ORDER Denying without prejudice <u>26</u> Motion for Leave to File a Supplemental Memorandum in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss. Signed by Chief Judge James K. Bredar on 4/18/2018. (bas, Deputy Clerk) (Entered: 04/19/2018)
04/19/2018	<u>28</u>	Consent MOTION for Leave to File <i>a supplemental memo in opposition to Defendants' motion to dismiss</i> by Xiao-Ying Yu(Zou, William) (Entered: 04/19/2018)
04/19/2018	<u>29</u>	PAPERLESS ORDER granting <u>28</u> Motion for Leave to File Supplemental Memorandum. Plaintiff's supplemental response in opposition due 5/11/18; Defendants' supplemental reply due 5/31/18. Signed by Chief Judge James K. Bredar on 4/19/2018. (vdcs, Chambers) (Entered: 04/19/2018)
05/11/2018	<u>30</u>	Memorandum re <u>6</u> MOTION to Dismiss for Failure to State a Claim <i>As Supplemental Response in Opposition to Defendants' Motion to Dismiss</i> filed by Xiao-Ying Yu.(Zou, William) (Entered: 05/11/2018)
05/31/2018	<u>31</u>	REPLY to Response to Motion re <u>6</u> MOTION to Dismiss for Failure to State a Claim <i>Supplemental Memorandum of Law in Reply</i> filed by David Brinkley, Dennis Schrader.(Lewis, James) (Entered: 05/31/2018)
06/26/2018	<u>32</u>	MEMORANDUM. Signed by Chief Judge James K. Bredar on 6/26/2018. (bas, Deputy Clerk) (Entered: 06/26/2018)
06/26/2018	<u>33</u>	ORDER Granting <u>6</u> Motion to Dismiss under Federal Rules of Civil Procedure 8, 12(b)(1), and 12(b)(6); Dismissing <u>4</u> Amended Complaint. Signed by Chief Judge James K. Bredar on 6/26/2018. (bas, Deputy Clerk) (Entered: 06/26/2018)
07/06/2018	<u>34</u>	MEMORANDUM to Counsel. Signed by Chief Judge James K. Bredar on 7/6/2018. (bas, Deputy Clerk) (Entered: 07/06/2018)
07/17/2018	<u>35</u>	NOTICE of Appearance by Xiao-Ying Yu. (Attachments: # <u>1</u> Cover Letter) (bas, Deputy Clerk) (Entered: 07/17/2018)
07/23/2018	<u>36</u>	NOTICE to Substitute Attorney <i>and to Discharge Attorneys</i> (Zou, William)

		(Entered: 07/23/2018)
07/26/2018	<u>37</u>	ORDER Denying without prejudice <u>36</u> Notice to Substitute Attorneys and Discharge Attorneys; Directing Zou and Hawkins to either file a notice of appeal and motion for extension of time to appeal, or they shall instruct Yu on how to accomplish these things re: <u>35</u> Notice of Appearance. Signed by Chief Judge James K. Bredar on 7/25/2018 (cags, Deputy Clerk) (Entered: 07/26/2018)
07/27/2018	<u>38</u>	-[FILED IN ERROR]- RETURN DOCUMENT ORDER. Signed by Chief Judge James K. Bredar on 7/25/2018. (Attachments: # <u>1</u> 1st Page of Consent Motion for Leave to File a Second Amendment of Complaint, # <u>2</u> 1st Page of Motion for Clarification and Relief)(c/m 7/30/18 bas, Deputy Clerk) Modified on 7/30/2018 (bas, Deputy Clerk). (Entered: 07/30/2018)
07/27/2018	<u>39</u>	RETURN DOCUMENT ORDER. Signed by Chief Judge James K. Bredar on 7/25/2018. (Attachments: # <u>1</u> Consent Motion for Leave to File a Second 1st Page of Amendment of Complaint, # <u>2</u> 1st Page of Motion for Clarification and Relief)(c/m 7/30/15 bas, Deputy Clerk) (Entered: 07/30/2018)
07/31/2018	<u>40</u>	RETURN DOCUMENT ORDER. Signed by Chief Judge James K. Bredar on 7/30/2018. (Attachments: # <u>1</u> First Page of Returned Pleading and Cover Letter)(c/m 7/31/18 bas, Deputy Clerk) . (Entered: 07/31/2018)
07/31/2018	<u>41</u>	MOTION to Withdraw as Attorney by Xiao-Ying Yu(Hawkins, Eric) (Entered: 07/31/2018)
08/01/2018	<u>42</u>	RESPONSE in Support re <u>41</u> MOTION to Withdraw as Attorney filed by Xiao-Ying Yu.(Zou, William) (Entered: 08/01/2018)
08/01/2018	<u>43</u>	ORDER granting <u>41</u> Motion to Withdraw as Attorney. Attorneys Eric Hawkins and William X Zou terminated as counsel for Plaintiff. Signed by Chief Judge James K. Bredar on 8/1/2018. (dass, Deputy Clerk) (c/m 8/1/18-das) (Entered: 08/01/2018)
08/01/2018	<u>44</u>	Local Rule 101.2 Letter mailed to Plaintiff.(dass, Deputy Clerk) (Entered: 08/01/2018)
08/02/2018	<u>45</u>	NOTICE OF APPEAL by Xiao-Ying Yu. Filing fee \$ 505, receipt number 14637107751.(slss, Deputy Clerk) (Entered: 08/02/2018)
08/02/2018	<u>46</u>	MOTION for Extension of Time to File a Notice of Appeal by Xiao-Ying Yu (slss, Deputy Clerk) (Entered: 08/02/2018)
08/02/2018	<u>47</u>	(ELECTRONICALLY FILED IN ERROR)NOTICE of Appearance by Xiao-Ying Yu (slss, Deputy Clerk) Modified on 8/6/2018 (slss, Deputy Clerk). (Entered: 08/02/2018)
08/02/2018	<u>48</u>	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>45</u> Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to <a href="http://www.ca4.uscourts.gov">http://www.ca4.uscourts.gov</a> and click on Forms & Notices.(slss, Deputy Clerk) (Entered: 08/02/2018)

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08/02/2018	<u>51</u>	NOTICE of Appearance by Xiao-Ying Yu (slss, Deputy Clerk) (Entered: 08/06/2018)
08/03/2018	<u>49</u>	Correspondence from USCA re: District Court ruling on Motion for Extension of Time to File an Appeal <u>45</u> Notice of Appeal. (slss, Deputy Clerk) (Entered: 08/03/2018)
08/03/2018	<u>50</u>	ORDER granting <u>46</u> Motion for Extension of Time. Signed by Chief Judge James K. Bredar on 8/3/2018.(c/m 8/3/2018-sls) (slss, Deputy Clerk) (Entered: 08/03/2018)
08/06/2018	<u>52</u>	USCA Case Number 18-1889 for <u>45</u> Notice of Appeal filed by Xiao-Ying Yu. Case Manager - Cathi Bennett (slss, Deputy Clerk) (Entered: 08/06/2018)
08/06/2018		Assembled Electronic Record Transmitted to Fourth Circuit -- Initial(slss, Deputy Clerk) (Entered: 08/06/2018)
08/07/2018	<u>53</u>	AMENDED NOTICE OF APPEAL by Xiao-Ying Yu.(Attachments: # <u>1</u> Attachments to Notice of Appeal)(slss, Deputy Clerk) (Entered: 08/07/2018)
08/07/2018	<u>54</u>	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>53</u> Amended Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to <a href="http://www.ca4.uscourts.gov">http://www.ca4.uscourts.gov</a> and click on Forms & Notices.(slss, Deputy Clerk) (Entered: 08/07/2018)

Appendix 13.2

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- Exhibit # 1-P.1

Total page 31

Page 1 of 37

General Docket

United States Court of Appeals for the Fourth Circuit

<b>Court of Appeals Docket #:</b> 18-1889		<b>Docketed:</b>	
<b>Nature of Suit:</b> 3440 Other Civil Rights		08/06/2018	
Xiao-Ying Yu v. Robert Neall			
<b>Appeal From:</b> United States District Court for the District of Maryland at Baltimore			
<b>Fee Status:</b> fee paid			
<b>Case Type Information:</b>			
1) Civil Private			
2) private			
3) null			
<b>Originating Court Information:</b>			
<b>District:</b> 0416-1 : 1:17-cv-03260-JKB			
<b>Presiding Judge:</b> James K. Bredar, Chief U. S. District Court Judge			
<b>Date Filed:</b> 11/06/2017			
<b>Date Order/Judgment:</b>	<b>Date Order/Judgment EOD:</b>	<b>Date NOA Filed:</b>	<b>Date Rec'd COA:</b>
06/26/2018	06/26/2018	08/02/2018 08/07/2018	08/02/2018 08/07/2018
<b>Prior Cases:</b>			
None			
<b>Current Cases:</b>			
None			

<p>XIAO-YING YU Plaintiff - Appellant</p>	<p>Xiao-Ying Yu [NTC Pro Se] 557 Kirkcaldy Way Abingdon, MD 21009</p>
v.	
<p>ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader) Defendant - Appellee</p>	<p>James Nelson Lewis, Esq. Direct: 410-767-5162 Email: James.Lewis1@maryland.gov [COR NTC Government] OFFICE OF THE ATTORNEY GENERAL OF MARYLAND Suite 302 300 West Preston Street Baltimore, MD 21201</p>

DAVID BRINKLEY, Maryland Department of  
Budget and Management Secretary  
Defendant - Appellee

James Nelson Lewis, Esq.  
Direct: 410-767-5162  
[COR NTC Government]  
(see above)

XIAO-YING YU

Plaintiff - Appellant

v.

ROBERT R. NEALL, Maryland Department of Health Secretary (formerly Dennis Schrader);  
DAVID BRINKLEY, Maryland Department of Budget and Management Secretary

Defendants - Appellees

08/06/2018	<input type="checkbox"/>	<u>1</u>	Case docketed. Originating case number: 1:17-cv-03260-JKB. Case manager: CBennett. [18-1889] CB [Entered: 08/06/2018 11:17 AM]
		1 pg, 12.96 KB	
08/06/2018	<input type="checkbox"/>	<u>2</u>	RECORD requested from Clerk of Court. Due: 08/20/2018. [18-1889] CB [Entered: 08/06/2018 11:42 AM]
		1 pg, 10.65 KB	
08/06/2018	<input type="checkbox"/>	<u>3</u>	INFORMAL BRIEFING ORDER filed. Mailed to: Xiao-Ying Yu. Informal Opening Brief due 08/30/2018. Informal response brief, if any: 14 days after informal opening brief filed. [18-1889] CB [Entered: 08/06/2018 11:46 AM]
		11 pg, 52.45 KB	
08/08/2018	<input type="checkbox"/>	<u>4</u>	ASSEMBLED ELECTRONIC RECORD docketed. Originating case number: 1:17-cv-03260-JKB. Record in folder? Yes. Record reviewed? Yes. PSR included? N/A. [18-1889] TW [Entered: 08/08/2018 12:08 PM]
08/24/2018	<input type="checkbox"/>	<u>5</u>	MOTION by Appellant Xiao-Ying Yu to extend filing time for informal opening brief for 30 days. Date and method of service: 08/24/2018 hand delivery. [1000354981] [18-1889] CB [Entered: 08/24/2018 01:47 PM]
		2 pg, 330.9 KB	
08/24/2018	<input type="checkbox"/>	<u>6</u>	ORDER filed [1000354983] granting Motion to extend filing time [5] Number of days granted: 30. Informal Opening Brief due 10/01/2018. Copies to all parties. Mailed to: Xiao-Ying Yu. [18-1889] CB [Entered: 08/24/2018 01:49 PM]
		1 pg, 8.28 KB	
09/04/2018	<input type="checkbox"/>	<u>7</u>	Letter re: district court docket by Appellant Xiao-Ying Yu. [1000361235] [18-1889] CB [Entered: 09/05/2018 11:07 AM]
		5 pg, 988.41 KB	
09/13/2018	<input type="checkbox"/>	<u>8</u>	Notice issued: response to [7] letter from Xiao-Ying Yu. Mailed to: Xiao-Ying Yu. [18-1889] CB [Entered: 09/13/2018 03:48 PM]
		1 pg, 19.1 KB	
10/01/2018	<input type="checkbox"/>	<u>9</u>	DISCLOSURE OF CORPORATE AFFILIATIONS by Xiao-Ying Yu. Was any question on Disclosure Form answered yes? No. [1000376479] [18-
		2 pg, 448.69 KB	

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Exhibit #4  
page 15 of 3

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX  
1100 EAST MAIN STREET, SUITE 501  
RICHMOND, VIRGINIA 23219-3517  
[WWW.CA4.USCOURTS.GOV](http://WWW.CA4.USCOURTS.GOV)

PATRICIA S. CONNOR  
CLERK

TELEPHONE  
(804) 916-2700

August 3, 2018

Felicia Cannon, Clerk  
U.S. District Court of Maryland  
101 West Lombard Street  
Baltimore, MD 21201-2690

Re: Yu v. Schrader et al  
1:17-cv-03260-JKB

Dear Ms. Cannon:

Review of the district court docket discloses that a motion to extend the appeal period was filed within 30 days of expiration of the appeal period and is pending in the district court under Fed. R. App. P. 4(a)(5).

This court will docket the appeal after the district court has ruled on the motion for extension of time. Please notify this court upon entry of an order ruling on the motion for extension of time.

Yours truly,

*/s/ Margaret Thomas*

cc: Xiao-Ying Yu, Pro se  
James Nelson Lewis, AAG

Appendix 13.3

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United States District Court  
for the  
Northern District Court of Maryland

FILED  
U.S. DISTRICT COURT  
DISTRICT OF MARYLAND  
2018 AUG -7 PM 2:33  
CLERK'S OFFICE  
AT BALTIMORE  
BY \_\_\_\_\_ DEPUTY

XIAO-YING YU,  
Plaintiff,

v.

Case No. 17-cv-03260-JKB

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL<sup>[1]</sup>, and  
MARYLAND DEPARTMENT OF BUDGET &  
MANAGEMENT,  
SECRETARY DAVID BRINKLEY,  
Defendants.

\* \* \* \* \*

**NOTICE OF APPEAL**

**(Replacement of the Court's Returned Notice of Appeal, ECF No. 40&50<sup>[2]</sup>)**

Notice is hereby given that Xiao-Ying Yu, Plaintiff (*pro se*) in the above named case appeals to the United States Court of Appeals for the Federal Fourth Circuit (located in

[1] When Plaintiff filed her initial complaint on Nov. 2, 2017 after she received EEOC's Right-to-Sue letter, Mr. Dennis Schrader was Secretary of the Maryland Department of Health and Mental Hygiene (currently Maryland Department of Health), but the current Secretary is Mr. Robert Neall. Plaintiff addressed this issue in her Motion (3/1/2018) to extend (ECF No. 17), and her response (3/22/2018) to Defendant's Motion to dismiss in her footnote #1, at page1 (ECF No. 20). Plaintiff did not see the attention from Defendants' correspondence and the Court's orders.

[2] According to the phone conversation with Chief Judge's Chamber on August 6, 2018, Plaintiff has been instructed to file this Notice of Appeal based on Chief Judge's orders (ECF No. 40, entered July 31, 2018 and ECF No. 50, entered August 3, 2018) because ECF No. 47 (entered the Court's returned notice of appeal on August 2, 2018) is regarded as clerical mistake which must be withdrawn and replaced by Plaintiff's re-filed Notice of Appeal. If by some special reasons, the clerical mistake is not corrected, Plaintiff respectfully requests to amend this re-filed Notice of Appeal in order to keep consistent and integrity of the docket records.

Richmond Virginia). This appeal concerns the United States District Court of Maryland's Order (ECF No. 33) and Memorandum (ECF No.32), which entered a judgment in favor of Maryland Department of Health & Maryland Department of Budget and Management and against Plaintiff on June 26, 2018. The Court's decision dismissed Plaintiff's complaint due to "lack of subject matter-jurisdiction" without prejudice and claimed that Plaintiff failed to exhaust EEOC administrative remedies <sup>[3]</sup> and that State agencies are immune to Plaintiff's complaint under ADEA and ADA even under Section 504<sup>[4]</sup>. In addition, the Court's Order and Memorandum also dismissed Plaintiff's claims pursuant to Rule 8 and Rule 12(b)(6) with prejudice. Furthermore, the Court immediately closed Plaintiff's case on June 26, 2018.

Plaintiff filed her notice of appearance (7/17/2018, ECF, No.34), which was confirmed with Plaintiff's attorney's consent and agreement via emails. After Plaintiff's attorneys filed a withdrawal of appearance (7/23/2018, ECF No. 35), Plaintiff filed her motion for clarification and relief and motion for leave to file second amendment of complaint, and related supporting exhibits (including new evidence of the retaliation through EEOC's Freedom of Information Act recording files which was received after Plaintiff filed her complaint and opposition), as well as an affidavit within 28 days

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<sup>[3]</sup> The Court's memorandum and order are not consistent with the Court's records because the Court was aware that Plaintiff received EEOC's 10/16/2017 suit letter (ECF No. 1, attachment #1, cover letter which was filed by certified mail on 11/2/2017 and received by the Court on 11/6/2017, and ECF No. 20, Exhibit#1, EEOC's 10/16/2017 Right -to-Sue letter received by the Court on 3/22/2018).

<sup>[4]</sup> The Court was aware that Plaintiff filed her suit concerning ADEA and ADA according to EEOC's right of law suit letter without knowing the issue concerning immunity of State agencies and officers (ECF No. 1 &4) prior to receiving the Defendants' motion to dismiss (ECF No. 6). However, Plaintiff's opposition on 3/22/2018 addressed Section 504 of Rehabilitation Act and her complaint (ECF No. 4 exhibit 19) and demonstrated that the Plaintiff's position was 100% supported by CDC funding to MDH under seniority system. Because of federal funding, Defendants should not be immune to her ADA or ADEA complaints as filed with the Court.

(7/24/2018)<sup>[5]</sup>. These motions were filed for three key reasons: because the Court denied the evidence of the EEOC's Right-To Sue letter granted by EEOC to Plaintiff on 10/16/2017 docketed in the Court on Nov. 6, 2017 and March 22, 2018 and section 504 of Rehabilitation that was presented to the Court by Plaintiff, because the Court rejected Plaintiff's request (5/11/2018) for approval to file a second amendment of complain (ECF No. 30), and because the Court proceedings protected a key figure in this case, Ms. Sara Barra, by misspelling her name as "Sara Barry." Then Plaintiff filed (pro se) her notice of appeal on July 26, 2018 (within 30 days) as her counsel preferred and advised. However, mistakes in the Court's memorandum and order were not corrected and all documents including the new evidence were returned to Plaintiff due to the deficiency with Court's statement "Civil Action closed 6/26/2018" (ECF No. 38&39, entered 7/27/2018). In addition, Plaintiff's notice of appeal was also returned to her on July 31, 2018 due to the deficiency claiming "Documents should be filed by counsel of record" (ECF No. 40).

According to the Court's order (ECF No. 37), the Plaintiff's counsel re-filed the withdrawal on July 31, 2018 and this withdrawal was granted. Since the Plaintiff's notice of appeal was returned, Plaintiff is re-filing this appeal with exhibits (including the new evidence which was initially filed on 7/24/2018 and then filed along with her notice of appeal on 7/26/2018 for the Circuit Court to review) based on the Court's approval (ECF No. 50) of the Plaintiff's motion for extension of time to re-file the notice of appeal. Please

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<sup>[5]</sup> Plaintiff's motion for clarification and relief demonstrated that this dismissal was due to inappropriate denial and manipulation of the evidence of harassment, discrimination and retaliation on the part of Ms. Sara Barra against Plaintiff through wrongful speculation, confusion, misrepresentation and misinterpretation (that neither party never filed with the Court) but her motion and exhibits were not docketed in the court on 7/24/2018.

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find enclosed supporting exhibit including the motion for clarification and Relief, supporting exhibits with new evidence and an affidavit filed on July 24, 2018.

Dated August 7, 2018

Respectfully submitted,

Xiao-Ying Yu, *pro se*

557 Kirkcaldy Way

Abingdon, MD 21009

Phone: 410-671-9823 (home)

Email: xiaoying.yu67@gmail.com

*healed*  
*7/31/18*  
BALTIMORE-NIGHT BOX

*App 162*

FILED  
U.S. DISTRICT COURT  
DISTRICT OF MARYLAND

~~2018 JUL 28 9:11 AM~~  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MARYLAND  
2018 JUL 24 AM 11:09

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND  
XIAO-YING YU,

Plaintiff,

CLERK'S OFFICE  
AT BALTIMORE

BY     Km     DEPUTY

v.

Case No. 17-cv-03260-JKB

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL<sup>1</sup>, and  
MARYLAND DEPARTMENT OF BUDGET &  
MANAGEMENT  
SECRETARY DAVID BRINKLEY,  
Defendants.

\* \* \* \* \*

**MOTION FOR CLARIFICATION AND RELIEF**

Plaintiff, Xiao-Ying Yu, *pro se*, pursuant to Rule 60 (a) and (b).1, 2& 3, and Rule 15 (a) moves for clarification and relief from the Honorable Court's judgment and Order<sup>2</sup> and states:

A. THE COURT'S MEMORANDUM MISTAKELY SPELLED THE NAME OF MS. SARA BARRA (AS "SARA BARRY") WHO DISCRIMINATED AND RETALIATED AGAINST PLAINTIFF. THIS EVIDENCE WAS NOT DISPUTED BY THE DEFENDANTS.

<sup>1</sup> When Plaintiff filed her initial complaint on Nov. 2, 2017 after she received EEOC's Right-to-Sue letter (supporting exhibit #1&2), Mr. Dennis Schrader was Secretary of Maryland Department of Health and Mental Hygiene (current Maryland Department of Health), but the current secretary is Mr. Robert Neall. Plaintiff addressed this issue in her Motion (3/1/2018) to extend (ECF No. 17), and her response (3/22/2018) to Defendant's Motion to dismiss in her footnote #1, at page 1 (ECF No. 20). However, the Court continually uses Dennis Schrader as Defendant instead of using MDH and MDBM and current Secretary's name, and the Court stated (see footnote No. 1 at p.1) "neither party brought this to the attention of the court or requested to substitute the parties".

<sup>2</sup> The Court's memorandum and order were signed on 6/26/2018, sent to Counsel on 7/6/2018, and received by Plaintiff on 7/6/2018. It makes tremendous stress and pressure to the Plaintiff *pro se* to prepare her response to 10 days delayed Court's judgment.

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Misspelling of Ms. Sara Barra's name in the Court's memorandum should be corrected.

Although Ms. Barra's discriminatory and retaliatory action caused Plaintiff's health problems, a fact was not disputed by the Respondents, these actions were concealed and manipulated as follows:

1. The first discriminatory action Ms. Barra took was in the March 2012. This action was reported to the former office Director, Dr. Donald Shell. Significant retaliation for this protected reporting began on Jan 2, 2013 when Ms. Barra refused to discuss an employee performance evaluation with Plaintiff privately as she did with other employees she supervised, instead of a private conference, Ms. Barra forced Plaintiff to sign an improvement memorandum that she prepared although Plaintiff was evaluated as "satisfied", which violated HR policy. This event was misrepresented by the Court's memorandum through the statement that Plaintiff "alleged, essentially, that she was discriminated against and retaliated against when she worked at CCDPC" which was not proper because it suggested that Plaintiff had a problem in CCDPC and was part of a wrongful speculation ("Plaintiff may have worked at CCDPC in the past"). It was not in the Court's records provided by any of parties (Memorandum p.1, L6-7, and footnote #3).

2. Ms. Barra's major retaliation against Plaintiff included, but was not limited to inappropriate deletion of a job duty in MS-22<sup>3</sup> against a seniority system and inappropriate, according to HR policy, changing of professional performance evaluation standards to "writing" in July 2013. Then Ms. Barra generated a second memorandum on 10/10/2013 in retaliation against Plaintiff's grievance (which was filed with MDH on

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<sup>3</sup> MS-22 is developed prior to the recruiting process based on the department's request and it is only changed for employee when they are transferred to new job position or to new supervisor or application of reclassification.

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8/14/2014 for Ms. Barra's unreasonable changes of her MS-22), to block Plaintiff from seeking help from the next level manager and to interfere with Plaintiff's job. After Plaintiff filed charge of age and racial discrimination and retaliation with EEOC on 11/12/2013, and reported Ms. Barra's discriminatory activities to HR and the director of Internal Office of Equal Opportunity Program ("OEOP"), Ms. Barra immediately (1) generated the first of six progressive disciplinary actions within 4 months, including an unsatisfactory performance evaluation, (2) prevented Plaintiff from attending a professional conference and a CDC telephone conference (that related to the funding program of which Plaintiff was the only one full time epidemiologist (100% salary) supported by this CDC grant (ECF, No. 1, Exhibit-19&21), (3) refused to use Plaintiff's prepared Maryland chronic disease burden reports for over two years, yet Ms. Barra claimed Plaintiff's failure of completing job timely for "unsatisfied" performance evaluation and disciplinary action, and (4) declared that the protected activities in which Plaintiff engaged were "disruptive behavior."

The numerous pieces of evidence of Ms. Barra's discriminatory and retaliatory actions were concealed in the Court's memorandum. These confusions of incidents of discriminatory and retaliatory actions were made such as that Ms. Barra "amended Plaintiff's self-evaluation from "outstanding" to "satisfactory," and "tried to prevent Plaintiff from receiving an award, mischaracterized Plaintiff's work contribution,..." These statements were not in the Court's records.

Therefore, the Court statement in the footnote #2 on page 2, that "The facts are recited here as alleged by Plaintiff" does not reflect facts. These statements and related resources in the memorandum should be clarified.

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3. Ms. Barra's escalating harassment and discrimination due to age, racial and national origin/ethnicity and the subsequent retaliation had significant consequences. Because of these actions, Plaintiff suffered from major anxiety, major depressive disorder and Post Traumatic Syndrome Disorder, which were diagnosed by multiple individuals, including State Medical Director Dr. Robert Toney in June, Sept. and Oct 2014, Plaintiff's health provider, a Psychiatrist, and a third independent Psychology Institution. The respondents granted Plaintiff's FMLA in June, but on 9/3/2014, Ms. Delinda Johnson, of the MDH Office of Equal Opportunity Program ("OEOP"), rejected of Plaintiff's accommodation request on a day after Ms. Johnson received notice of Plaintiff's charge filing with EEOC under ADEA, Title VII, ADA although she did not address the Section 504 of Rehabilitation Act other federal civil rules until she received the Defendants' motion to dismiss her complaint for State Immunity<sup>4</sup> (supporting exhibits #3). Then, on 10/10/2014, Ms. Toria Livingston of HR requested Plaintiff to resign and retire after Ms. Barra contacted her. This inappropriate demand was prior to Ms. Johnson's actions on 10/15/2014. Ms. Johnson's actions included rejection of Plaintiff's accommodation request (made since July 23, 2014) for reassignment to another position, for leave absence (without payment,) and for Dr. Toney's 10/8/2014 recommended accommodation for Plaintiff to work under another supervisor (supporting exhibit#4). Due to these inappropriate actions on the part of Ms. Johnson, MDH terminated Plaintiff on 11/3/2014 with the statement that the individual employee cannot perform essential functions, not noting that Plaintiff's disabilities would have been mediated with the requested but denied accommodations.

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<sup>4</sup> Plaintiff's opposition on 3/22/2018 addressed Section 504 of Rehabilitation Act and her complaint (ECF N. 4 exhibit 19) to demonstrate that the Respondent should not be immune to her ADA complaint filed with the Court.

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However, the retaliatory consequence initiated by Ms. Barra and Dr. Toney's function as his position of State Medical Director and three evaluations requested by Ms. Barra and MDH HR during 2014 were concealed in the Memorandum, which used the unusual wording (without addressing time and cause consequence of adverse events) that "she was evaluated by a doctor who worked for the State Medical Director's Office."<sup>5</sup> Similarly, the Memorandum glossed over important details by stating that "at some point, Plaintiff requested an accommodation for her disability. Plaintiff does not clearly allege what her disability is, but it appears to be essentially workplace stress and anxiety, and her requested accommodation seems to have not working under Ms. Barra and her requested accommodation was denied."

These statements in the Memorandum indicated above do not cite the facts Plaintiff alleged in her complaint as the Court stated in their footnotes #2 in p.2, nor do they reflect the Court's records of the evidence as shown in Plaintiff's complaint-related exhibits. Importantly, the Respondents never objected to any exhibit. These omissions demonstrate the biased position that the Officer or attorney who prepared the Memorandum (signed by Chief Judge Ms. Bredar) has taken. More importantly, the factors described above and below influenced the actual nature of the Court's responsive ruling to favor the Defendants with their motion to dismiss.

**B. COURT'S DETERMINATION FOR LACK OF SUBJECT-MATTER JURISDICTION WAS INCONSISTENT WITH COURT RECORDS AND WITH THEIR AWARENESS OF THE FACT THAT PLAINTIFF PROPERLY EXHAUSTED EEOC'S ADMINISTRATIVE REMEDIES**

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<sup>5</sup> The respondent never objected that Dr. Toney was the State Medical Director and the diagnoses and evaluations along with the conclusion from independent psychology institution he provided to MDH HR in 2014 even though Dr. Toney may not be the State Medical Director in 2018 (supporting exhibit#4).

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1. On 11/2/2018, Plaintiff sent certified mail with attachment to the Court Clerk. The cover letter stated that "on 10/21/2017, I received EEOC's conclusion and letter for right to sue for my second charge (dated 10/16/2017). However, I have some concerns and am hoping that the EEOC director will reconsider the conclusion. While I am waiting for EEOC's reconsideration and a copy of the administrative charge, I am filing this complaint because the statute of limitation is 3 years for filing a complaint about willful underpayment and wrongful termination" (see ECF No. 1, attachments #1, Cover letter).

2. The Plaintiff provided the Court and respondents the EEOC's 10/16/2017 Right-To-Sue letter after she received EEOC's rejection of her reconsideration (ECF No. 20, Attachments: #1 Exhibit 1). Also, in addition to the detail statement in her complaint and brief in her opposition what she filed with EEOC for her discrimination and retaliation charges, she also provided the Court her charge of discrimination signed on 9/2/2014 ECF No. 20, Exhibit 2, EEOC form 5, and Exhibit 3, her rebuttal).

Therefore, it is very necessary for the Court to clarify the erroneous statement "It is unclear from Plaintiff's complaint what the substance of this charge was" and "she does not allege that she ever received a right-to-sue letter" (Memorandum, p. 3, L13-14; p. 9, L2) in its memorandum.

#### C. PLAINTIFF ADDRESSED SECTION 504 OF REHABILITATION ACT IN RESPONSE TO THE IMMUNITY STATED BY THE RESPONDENT'S MOTION

1. The Plaintiff's major complaints were her charges of discrimination with respect to age, racial, National origin/ethnicity, and disability and retaliation relating to protected activities as filed with EEOC under ADEA, ADA and Title VII. Plaintiff could not expect immunity of State Agencies and Officers to her complaints filed with the

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Court based on EEOC's Right-To-Sue letter until she received the Respondents' motion to dismiss. Plaintiff was unaware of her right to receive the waiver of ADEA and ADA Statute of Limitations signed by the Respondent when the Respondent rejected the settlement during EEOC's enforcement procedures. Plaintiff became aware only recently, during the proceedings of her request to be entitled to her charge file based on EEOC Freedom of Information Act.

2. Evidence that the Plaintiff's seniority-related job duties were supported by CDC funding received by the Defendants was provided in Plaintiff's updated complaint filed on Dec. 8, 2017 (ECF No. 4, Exhibit #19 & 21), which provided detailed information of the specific CDC program and financial support. This file met the conditions stated in the Section 504 of Rehabilitation Act. It indicated that the Respondents couldn't be immune to the Plaintiff's complaint of discrimination due to disability and subsequent retaliation under Section 504.

Therefore, according to the facts provided to the Court and addressed above in part B and C, there is no basis to state that Plaintiff "has failed to properly exhaust her administrative remedies and Defendants are immune from many of her claims" (memorandum, p.13, L9-10). Nor is it proper to reject the Plaintiff's request of Court's approval for her to file an amendment of complaint (her supplement of law to the opposition, ECF, N. 30, p. 14) by stating "A more clear and concise version of Plaintiff's amended complaint would not cure these defects." It is an injustice to dismiss the Plaintiff's complaint for lack of subject-matter jurisdiction without prejudice and for failure to state a claim upon which relief can be granted with prejudice.

D. THE PLAINTIFF (PRO SE)'S DEFECTS CAN BE EASILY CURED VIA THE COURT'S CIVIL LITIGATION MANAGEMENT PROCEDURE WHICH

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WOULD REQUEST THE CORRECTION OF PLAINTIFF'S CLAIM VIA DOUBLE SPACING. REMOVAL OF UNDERLINING. AND INCLUSION OF AN ADDITIONAL ATTACHMENT (EEOC'S RIGHT-TO-SUE LETTER) ALONG WITH HER STATEMENT IN THE COVER LETTER

As described above (part B) and in ECF No. 1 Attachment 1, it is not true that Court's memorandum states that Plaintiff "does not allege that she received a right-to-sue letter" (memorandum, p. 9 L2). The defects the Court stated as the reason to dismiss Plaintiff's complaint would had been fixed if Plaintiff (as *pro se*) had received the Court's early review to start it down an orderly path (in addition to the direction her to file summons). The instructions in the Civil Litigation Management Manual for *pro se* cases, include the following relevant commands (in addition to other pertinent information, not stated here):

- Review the pleadings as soon as possible;
  - Check promptly for threshold issues, such as subject matter jurisdiction;
- and
- If pleadings fail to meet technical requirements, inform the parties and give them opportunity to cure defects.

Because the Plaintiff was not informed of the quickest and easiest way to cure defects, the evidence of Plaintiff's statement (11/2/2017) of her receiving EEOC's 10/16/2018 right-to-sue letter in the attachment of complaint (ECF No. 1, Attachment #1) was denied, and the exhibit of EEOC's right-to-sue letter provided in Plaintiff's opposition (ECF No. 20, Exhibit#1) was omitted as the bases of the Court's judgment; nevertheless, the approval should be given for the Plaintiff to leave to amend her complaint as she requested in the Supply of Law for her opposition (ECF

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No. 30, p. 14) under Rule 15 (a). Otherwise, it appears that the Court would abuse its discretion or act unreasonably in enforcing Plaintiff's rights.

E. PLAINTIFF'S COMPLAINT AND EXHIBITS, INCLUDING THOSE THAT IDENTIFIED THE ALLEGED DISCRIMINATORY AND RETALIATORY ACTIVITIES, THE TIME, THE PLACE AND THE ACTORS REGARDING WILLFUL UNDERPAYMENT, ADEA, ADA, TITLE VII AND SECTION 504 OF REHABILITATION ACT FOR RELIEF, SHOULD NOT BE CONCEALED AND MISINTERPRETED.

1. Willful underpayment resulted from the discriminatory deprivation of the Plaintiff's approved reclassification as Epidemiologist III:

1) Plaintiff identified the basis of the willful underpayment complaint as the failure of reclassification to Epidemiologist III, which occurred in retaliation for her protected activities. Due to increasing Plaintiff job duties in 2010, her reclassification to this position was approved by both respondents in March 2011 but was deprived by Dr. Maria Prince in May 2011 by denial of her previous signature on form MS-22 (the Epidemiologist III job description form)<sup>6</sup>. This denial was obviously due to discrimination regarding age, race and national origin because Ms. Prince gave the "Reclassification Epidemiologist III Position Identification Number," which to be clear was actually created for Plaintiff, to Ms. Sara Barra, (who was much a less experienced than Epidemiologist II than was Plaintiff but was white and young). The willful underpayment was also due to neglect of Fair Lab Standard (payment to the employee linked to their jobs performed), and violations of ADEA

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<sup>6</sup> In May 2011, Dr. Maria Price denied her initial signature in Jan 2011 on the Epidemiologist III position-linked form MS-22 which (as per HR's instruction) should be associated with the DBM office of Personnel Service and Benefits' MS-44 (Supervisory Questionnaire for Subordinate reclassification Request) and MS-2024 (Request for Position Classification Study) that MDH and DBM had approved, based on former CCDPC director Dr. Audrey Regan's filed application for Plaintiff's reclassification to Epidemiologist III.

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and Title VII. The respondent did not object to these claims as fact except that the claim was made that they were "Tort claims". The ignoring of the misreclassification of the position after Plaintiff reported such to former Secretary Dr. Joshua Sharfstein and HR on Feb. 18, 2014, causes Plaintiff allege that this scenario represents willful underpayment, and Plaintiff clarified the Respondents' confusion on this matter again (ECF 20). The memorandum manipulated Dr. Prince's discriminatory misreclassification (again, this reclassification went against approval of two departments) as "she was told she would be promoted, but HR application process stalled, largely because various supervisors sabotaged" and Ms. Barra "promoted a younger, white woman instead of Plaintiff" (memorandum, p. 2, L10 and L12) which both parties never stated. The Court concealed discriminatory and retaliatory evidence to which the Defendants did not object, and made the statement without referring to the source of this false information.

2). Plaintiff filed her initial complaint on Nov. 2, 2017, according to the Federal Court's general guidance, and provided the evidence of the post office receipt and tracking records to the Court (ECF, No. 9. Affidavit and exhibits #1 p.1-4) (see sup. exhibit#1) prior the Court's 6/26/2018 judgment. It is not proper to use the date of receipt (Nov. 6, 2017)<sup>7</sup> instead of Nov. 2, 2017 (the submission date) as Plaintiff's filing date. It is therefore proper to determine that Plaintiff filed her claim about willful underpayment in a timely manner, and the timing of submission cannot be used to dismiss her claim.

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<sup>7</sup> There was lack of specific instruction for prohibiting Plaintiff as pro se from filing their complaint via certified mail by the deadline in the website of Federal District Court of Maryland Court on Nov. 2, 2017.

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2. Although Plaintiff is acting *pro se* and lacks formal legal training, she effectively addressed the fact that her rights were deprived under Fair Labor Standards Act, FMLA and ADA. This deprivation involved being discriminated and retaliated against by denial and refusal of correction of the mis-reclassification and underpayment; being refused reassignment to another epidemiologist III position for which she applied; being rejected a requested unpaid leave of absence; and being kept unaware of the representation by Union manager in MDH, Ms. Barbara Perry, who participated in the decision of terminating Plaintiff and disallowing the chance of a mitigation meeting prior to termination, which violated due process of law, Fair Labor Standards Act, 42 U.S.C. §1983 and 29 U.S.C §187 unfair labor practice. Plaintiff's complaint indicated that Plaintiff was a member of the Union, and exhibits demonstrate Ms. Barra's rejection of Plaintiff's request to allow her to meet with Union representative (ECF No. 4, Exhibit-20) for the mitigation meeting on Feb. 3, 2014. Plaintiff's several appeals against the disciplinary action also suggested that she is union member.

3. If direct evidence and indirect evidence provided by Plaintiff in her attachments of cover letter, complaints, and exhibits for her relief and her supporting exhibits (including EEOC's notes in the FOIA records, see supporting exhibit #5) cannot be considered as covering all<sup>8</sup> of the bases of Court's determination and judgment, the Court must clarify why need make some speculations and statements which were not in Court records filed by both parties.

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<sup>8</sup> The Civil Litigation Management Manual instructed the Court for *pro se* case to consolidate related cases, such as cases involving similar claims arising in the same institution. The similar case as Plaintiff's complaint is that Ying-Jun Chen v. Maryland Department of Health in this Court and Mr. Chen also filed the complaint of discrimination under Title VII and due process of law.

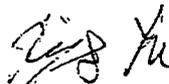
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If such other information, inaccessible to Plaintiff, has been relied on for decisions, it is obviously biased to not provide Plaintiff an alternative decision of resolution, to prohibit the Plaintiff's right of having discussions concerning the settlement, or to not conduct a discovery/trial as based on the Civil Litigation Management Manual.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court clarify its decision based on Court records as filed by both parties and grant relief, such as a settlement discussion for the Plaintiff based on the Civil Management Manual. Otherwise, this Honorable Court is asked to provide the Plaintiff an opportunity for discovery and trial.

Dated: July 23, 2018

Respectfully submitted,



Xiao-Ying Yu, *pro se*  
557 Kirkcaldy Way  
Abingdon, MD 21009  
410-671-9823



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the Rehabilitation<sup>3</sup> (Supporting exhibit#3); information of Dr. Robert Toney as State Medical Director (supporting exhibit#4); and additional information from EEOC Freedom of Information Act ("FOIA") recording files related to Plaintiff's second Amended Complaint (supporting exhibit#5).

Plaintiff has conferred with Defendants regarding the motion of filing a Second Amendment of Complaint by email on July 19, 2018, as she could not reach Mr. Lewis and Mr. Gray by phone. Then Plaintiff sent the Defendants a warm reminder by email on July 23, 2018. Because Plaintiff did not receive the Respondents' objection to her email about the motion to consent for leave to file a Second Amendment of Complaint by today (July 23, 2018), Plaintiff believes that Defendants consent to this motion. It must be noted that Plaintiff (*Pro Se*) must respond to the Court within a very short time period after receipt of the Court's memorandum and order on July 6, 2018. Plaintiff would not oppose the entry of an order granting an extension of time for the Defendants to file a reply to Plaintiff's second Amendment of Complaint.

Plaintiff respectfully requests that the Court enter an order:

1. Granting the Plaintiff, *Pro Se*, leave and twenty (20) days to file a second Amendment of Complaint;
2. Granting such other and further relief including settlement discussion to which Court finds the Plaintiff (*Pro Se*) otherwise entitled.

Dated July 23, 2018

Respectfully submitted,

  
Xiao-Ying Yu, *pro se*  
557 Kirkcaldy Way  
Abingdon, MD 21009  
410-671-9823

<sup>3</sup> Plaintiff filed the opposition on 3/22/2018 (ECF No. 20) including the answer to the Defendants' immunity issue as stated in their motion to dismiss (ECF. No. 6) based on Section 504 of the Rehabilitation Act and the fact that her position and seniority job duties were 100% supported by CDC 1305 funding to MDH (ECF No. 4, Exhibit #19)

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FILED  
U.S. DISTRICT COURT  
DISTRICT OF MARYLAND

2018 JUL 24 AM 11:10

CLERK'S OFFICE  
AT BALTIMORE

BY     KM     DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MARYLAND

XIAO-YING YU,

Plaintiff,

v.

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL<sup>1</sup>, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT

SECRETARY DAVID BRINKLEY,

Defendants.

Case No. 17-cv-03260-JKB

\* \* \* \* \*

**AFFIDAVIT FOR THE MOTION FOR LEAVE TO FILE SECOND  
AMENDMENT OF COMPLAINT, EXHIBITS AND MOTION FOR CLARIFICATION**

I am the Plaintiff in this action, and I stated all these matters under oath.

My motion for leave to file second amendment of complaint, supporting exhibits,

<sup>1</sup> When Plaintiff filed her initial complaint on Nov. 2, 2017, Mr. Dennis Schrader was Secretary of Maryland Department of Health and Mental Hygiene (current is Maryland Department of Health), but the current secretary is Mr. Robert Neall. Plaintiff addressed this issue in her Motion to extend time (3/1/2018, ECF No. 17), and her response to Defendant's Motion to dismiss in her footnote #1, at page1 (ECF No. 20).

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and motion for clarification and relief, affidavit filed on July 23, 2018 are true and correct

Date: July 23, 2018

Respectfully submitted,

*Xiao-Ying Yu*

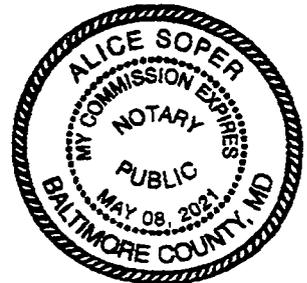
XIAO-YING YU, pro se

SUSSCRIBED AND SWORN to before me on July 23, 2018 by Xiao-Ying Yu

*Alice Soper*

Notary Public

My Commission Expires: May 8, 2021



CB

Appendix 14.1

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October 18, 2018  
Patricia S. Connor, Clerk  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA. 23219

RECEIVED  
2018 OCT 22 PM 2:41  
U.S. COURT OF APPEALS  
FOURTH CIRCUIT

Re: Case No.: 18-1889, Xiao-Ying Yu v. Robert Neal  
(District Court case No.: 17-cv-03260-JKB)  
Motion for concerns of docket records

Dear Clerk Connor:

I received a hard copy of my case docket records on 10/15/2018 and have some concerns regarding the docket records of my case after reviewed it. Although I sought my case manager Ms. Cathi Bennett's help regarding my concerns over the phone in the earlier afternoon on 10/16/2018, I understood that she has limited authority to help me for my concerns. I feel it is very necessary to file my concerns by sending you a hard copy of motion for concerns of the docket records with related exhibits, affidavit and the certificate of service. Your kind consideration is highly appreciated.

A copy of above documents and certificate of service are also mailed to attorneys for defendants.

*A copy of above documents in a separate package with my home address is enclosed here. Could you please send it back to me as my reference when you put received stamp of clerk of the COA? Thanks!*

Respectfully submitted,

*Xiao-Ying Yu*  
Xiao-Ying Yu, pro se

557 Kirkcaldy Way  
Abingdon, MD 21009  
Phone: (410) 671-9823 (h)

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IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

XIAO-YING YU,

Plaintiff-Appellant,

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY,

Defendants-Appellees.

\* \* \* \* \*

RECEIVED 2018 OCT 22 PM 2:41 U.S. COURT OF APPEALS FOURTH CIRCUIT

AFFIDAVIT RELATED TO MOTION FOR CONCERNS OF DOCKET RECORDS

I am the Appellant in this action, and I stated all these matters under oath.

My motion for concerns of the docket records, supporting exhibits, and affidavit filed on October 18, 2018 are true and correct.

Date: October 18, 2018

Respectfully submitted,

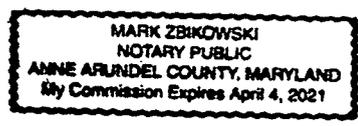
Xiao Yu

XIAO-YING YU, pro se

SUSSCRIBED AND SWORN to before me on 18th Oct by 2018

Notary Public

My Commission Expires: 04/04/21



*App. 180*

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

XIAO-YING YU,

*Plaintiff-Appellant,*

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY,

*Defendants-Appellees.*

\* \* \* \* \*

**MOTION FOR CONCERNS OF THE DOCKET RECORDS**

After reviewed the docket records on October 15, 2018 (exhibit#1), Plaintiff-Appellant, Xiao-Ying Yu, *Pro Se*, pursuant to Federal Rules of Appellate Procedure, Rule 45 and Rule 3 moves for the amendment of statement in docketing records of her appeal in COA Case No. 18-1889.

**A. Federal Rules of Appellate Procedures:**

According to Federal Rules of Appellate procedure Rule 45 (b) **Records.**

“(1) *The Docket.* The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the director of the Administrative Office of the United States Courts. The Clerk must record all papers filed with the clerk and all process, orders, and judgments.”

Also Local Rule 3 (d) **Serving the Notice of Appeal:**

“(1) ...The district court must properly send a copy of the notice of appeal and of the docket entries-and any later docket entries-to the clerk of the court of appeals named in the notice. The district court must note, on each copy, the date when the notice of appeal was filed.

**I.O.P.-3.1 Transmission of District Court Order.**

The clerk of the district court shall transmit to the Clerk of the Court of Appeals a copy of the order appealed from, along with copies of the materials required by FRAP 3(d) (1).”

**B. Concerns of the Court of Appeals at Fourth Circuit (“COA”) Docketing Records in Case No. 18-1889:**

1. The information Under Title “Originating Court Information” regarding the filed date of the returned initial notice of appeal is contradictory to the facts:

The “Originating Court Information” record indicated that the date of Notice of Appeal was filed on 8/2/2018, and date received by COA was on 8/2/2018. However, the district court’s “Return Document Order” in the docket records (ECF No. 40, see exhibit #2, district court docket sheet, p. 5 of 6) demonstrated that Appellant’s initial notice of appeal was filed on 7/26/2018 by the deadline of 30 days from district court’s order 6/26/2018<sup>1</sup>. The filed date (7/26/2018) was shown on the Appellant’s initial notice of appeal (see exhibit #3-p1 with 7/26/2018 district court night drop box stamp and 7/26/2018 district court received stamp) and

<sup>1</sup> Because Appellant already filed her notice of appearance (7/17/2018, ECF No. 35), and her counsel also filed the notice of withdraw (ECF No. 23), Appellant filed her notice of appeal pro se on 7/26/2018 when she learned the district court did not respond her motion for second amendment of complaint and motion for clarification filed pro se on 7/24/2018 (which were returned on 7/27/2018, ECF No. 38&39) even though Appellant’s counsel wanted Appellant to file motion to extend time to file her notice of appeal in the afternoon of 7/26/2018 based on the district court’s order (ECF. No. 37). Appellant was afraid to loss the chance of appeal by being claimed time-barred appeal if the counsel’s motion to extend appeal was denied. Nevertheless, Appellant’s timely filed initial notice of appeal was not docketed but was returned, and further, the filed date of 7/26/2018 was changed to 8/2/2018 when the district court entered the returned initial notice of appeal to the docket (ECF No. 45).

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returned date (7/31/2018) was also shown on the same page of the initial notice of appeal (see the exhibit #3-p1&2 with the hand writing note by the district court's clerk office staff, and ECF No. 40). The written personal check dated 7/26/2018 (exhibit #3-p.3) was not returned along with the initial notice of appeal on 7/31/2018. In fact, Appellant did not file the district Court's specific returned notice of appeal on 8/2/2018 when was 7 days passing the deadline of 7/26/2018.

It is intentional violation of local rule 3 (d)(1) to change the filed date of the district court's returned notice of appeal from 7/26/2018 to the entered day, August 2, 2018 by deputy clerk, Ms. Stephanie Savoy (Please see exhibit#2, p.5 of 6, ECF No. 45, slss, Deputy clerk, entered 8/2/2018, v. district court's order, ECF No. 40). It was because Appellant's notice of appearance, (received by the district court on 8/2/2018), was entered by the same district court deputy clerk, on 8/6/2018, but the district court's docket sheet (exhibit#2, p. 6 of 6) indicated the filed date as 8/2/2018 (ECF No. 51, slss, Deputy Clerk, entered 8/6/2018). It may cause the confusion that Appellant's notice of appeal was untimely filed by attention to the "Date Order/Judgment EOD" (6/26/2018) and "Date NOA Filed" (8/2/2018) in the COA "Originating Court Information". Keeping such false information of the "Date NOA Filed" in the summary of COA "Originating Court Information" makes the Appellant's appeal to be reviewed under a disadvantage condition but in favor to Appellees.

In addition, it also violated Fed. R. App. P. 4(a)(5) to transmit this returned notice of appeal and docket sheet to the Clerk of COA on 8/2/2018 (ECF No. 48, exhibit#2, p.5 of 6) when district court received Appellant's motion for extension to re-file the notice of appeal (ECF No. 46) prior to the district court's approval of Appellant's motion to extend appeal (ECF No. 50). Regarding this district court's mistake, the notice of COA was sent from Ms. Margaret Thomas

to the district Court clerk Ms. Felicia Cannon and also Appellant on 8/3/2018 (see district court case ECF No. 49, exhibit#4).

Ms. Thomas suggested that the district court could transmit docket records to the Court of Appeals after the district court ruled the Appellant's motion to extend appeal. Obviously, Ms. Thomas' letter does not mean that Ms. Thomas or the COA encourages and supports the district court to re-transmit the docket sheet and the returned initial notice of appeal with wrongful filed date and deletion of her exhibits to the COA on 8/6/2018 prior to allowing Appellant to re-file her updated notice of appeal by 8/7/2018 to replace the returned one according to district court's "Return Document Order" (ECF No. 40) and the order granting her motion to extend appeal (ECF No. 46&50).

These errors were reported to the Court when Appellant met Ms. Cathi Bennett (case 18-1889 manager) and Mr. Mark J. Zanchelli (Deputy Clerk) and sought their help on 8/24/2018. Ms. Bennett and Mr. Zanchelli also agreed and were concerned that the district court's transmissions of the district court's returned notice of appeal and docket sheets for multiple times are very confusing and difficult for the Clerk, judges and counsel to manage and review during judgment making process. For the Court of Appeals to review and deal with these errors in Appellant's case 18-1889 related to the docket records of her complaint filed with the district court (17-cv-03260-JKB), Appellant was instructed by Mr. Zanchelli to file her formal clarification and request by a letter or motion. Therefore, Appellant filed her motion to extend time for the Court of Appeals' review of those errors in the district court's docketing records and proceedings which she reported to the Court of Appeals prior to filing her informal brief (COA docket No. 5&6). Meanwhile, Appellant started to prepare her writing request and filed it by sending a letter to the Clerk of the Court on 8/30/2018 prior to Appellant's filing her informal

brief as Ms. Bennett and Mr. Zanchelli's advice<sup>2</sup> (see COA case Docket No.7, entered on 9/4/2018).

2. The statement of the COA's docketing records is incomplete and also inconsistent with "Originating Court Information":

The earliest statement of docketing records (the COA docket No. 1 with 1 page, No. 2 with one page and No. 3 with 11 pages) were made on 8/6/2018 (exhibit#1, p. 2of 4). Yet, these docketing notes did not record the district court's documents repeatedly sent to the COA and wrongful proceedings of Appellant's returned notice of appeal on 8/2 and 8/6/2018 that (1) first wrongful transmission of the returned initial notice of appeal by deleting her exhibits and changing the filed date, and electronic docket sheet from the district court to the COA was received on 8/2/2018 (ECF No. 45&48); (2) the notice regarding this error in the district court's 8/2/2018 transmission sent by COA Ms. Thomas was on 8/3/2018 (see exhibit#4, ECF No. 49), and (3) consequent second wrongful transmission of the returned initial notice of appeal and assembled electronic docket sheet from the district court to the COA was received on 8/6/2018 (see district Court docket records ECF No. 52).

All of these errors regarding the transmission proceedings with wrongful filed date as 8/2/2018 instead of 7/26/2018 was not recorded in the COA docket No. 1-3 and "Originating Court Information" on 8/6/2018 prior to allowing Appellant to re-file her updated notice of appeal on 8/7/2018 according to the district court's order (ECF No. 40: returned her 7/26/2018 filed initial notice of appeal) dated 7/31/2018 and the order (ECF No. 46&50: granted her motion to extend appeal) dated 8/3/2018.

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<sup>2</sup> It meets the requirement for COA to deal with the negative impact caused by district court clerical mistakes (17-cv-03260-JKB) on the docket records of Appellant's appeal filed with COA (case 18-1889) under Federal Rule 60.

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In addition, the district court's docketed Appellant's 8/7/2018 re-filed updated notice of appeal as ECF No. 53. Appellant filed this updated notice of appeal and related exhibits to replace the initial notice of appeal which was returned, but was unlawfully entered to the docket by change of the filed date and deletion of her exhibits and further to transmitted to the Court of Appeals on 8/2/2018 and 8/6/2018, (which was stated in Appellant's re-filed notice of appeal and the attachment, see ECF No. 53 and 53-1). The district court made note for ECF. 53 as "Amended notice of appeal by Xiao-Ying Yu (attachment: #1 attachments to Notice of Appeal)". The district court's third transmission, ECF No. 54, to COA on 8/7/2018 indicated "Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 53 Amended Notice of Appeal".

Although the COA also made note (under title "Originating Court Information") that Appellant filed her notice of appeal 8/7/2018, which was received by COA on 8/7/2018, these documents and process were not shown in the note of the COA docketing number by 10/15/2018 (see exhibit #1, p. 2 of 4) and the transmitted pages of the returned notice of appeal and docket sheet on 8/2 and 8/6/2018 were not recorded in the COA docket as instruction by Rule 45.

It is not clear which COA docket number contains district court's 8/2/2018 and 8/6/2018 transmitted the returned Appellant initial notice of appeal with deletion of the related exhibits and wrongful filed date (ECF No. 48&52) and which COA docket number contains the district court's 8/7/2018 transmitted (see ECF No. 53 and attachment ECF No. 53-1 and ECF No. 54) Appellant's 8/7/2018 re-filed notice of appeal with the exhibits of the new evidence<sup>3</sup> provided by

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<sup>3</sup> Because Appellant was waiting for EEOC's reconsideration and recording file via FOIA request, she filed her requests to amend the EEOC's records (which related to her complaint about Ms. Sara Barra misled EEOC's investigation) in her attached cover letters on 11/2/2017 (ECF No. 1) and 12/8/2017 amended complaint (ECF No.4) and her motion to extend time to file her opposition for defendants' motion to dismiss her complaint on 3/19/2018 (ECF No. 19). Appellant's request for second amendment of complaint was denied on 6/26/2018 (ECF No. 32&33), so she provided the EEOC's new records to the district Court on 7/24/2018 along with her motion for second amendment of complaint and motion for clarification which was returned on 7/27/2018 (ECF No.38&39).

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EEOC's recording file through FOIA request (ECF No. 1&4).

The information in the statement of COA docket Number 1 to 4 is difficult for the judges and counsels of Court of Appeals to see how the district court repeatedly violated Rule 3 by changing the filed date from 7/26/2018 to 8/2/2018 for the district court's returned Appellant's initial notice of appeal and deleting her exhibits through the transmission of documents on 8/2/2018 and 8/6/2018 to COA and made the Clerk of Court of Appeals to have to enter this false information in "originating Court Information" without a note to bring the Court's judges and counsel's attention to review. It is not clear in COA docket No 1-4 and "Originating Court Information" when the exhibit including new evidence provided by EEOC investigator's hand-written notes was omitted by the district court through deletion of her exhibits attached to her initial notice of appeal (please see district court ECF No. 53 and related exhibits, ECF No. 53-1, 3<sup>rd</sup> paragraph in page 26 of 53, page 35 of 53, 36 of 53 compared with MDH HR's constructive discharge on 38 of 53, see attached exhibit #5)<sup>4</sup>. The deleted EEOC's investigator's hand-written notes demonstrated that EEOC's investigation of Appellant's complaint under ADEA, ADA and Title VII was interfered by Ms. Sara Barra on 4/19/2018. Although this exhibit is directly related to and also supported the complaint filed on 11/2/2017 (ECF No. 1 and attachment) and 12/8/2017 (see attached exhibit#5, ECF No. 4, attachment and related exhibits and), it was deleted when the district court falsely changed the returned initial notice of appeal from filed date of 7/26/2018 to the entered date of 8/2/2018 and transmitted it to the Court of Appeals on 8/2/2018 and also on 8/6/2018. Moreover, the transmission of the returned initial notice of appeal with deletion of the exhibits and wrongful filed date may also mislead Clerk

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<sup>4</sup> Ms. Sara Barra interfered with EEOC's investigation by stating that Appellant requested to resign and retire instead of that HR's constructive discharge was made on 10/10/2014 by Ms. Barra's motivation with false information. It should not be excluded for it supported Appellant's complaint of continuous damages made by Ms. Barra on EEOC's 4/19/2017 Fact-Finding Conference (ECF No. 4, page 12, #5 under III in the section of damages).

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office of COA to believe that those critical complaint-relevant evidence, (which was not available to be presented to the district court when her complaint was filed in Nov and Dec. 2017, ECF 1&4 and attachments), omitted by the district court on 8/2/2018 should be ignored as it was provided to the district court after judgment was made, and consequently it should be excluded from the review during decision making process by the COA (to make it easier for the COA's judges and counsel to review Appellant's informal brief and appendix referred facts in case, please see exhibit 5)<sup>5</sup>.

Therefore, I am hoping that Clerk of Honorable Court will amend the notes for the docket records in case 18-1889 to make it to be clear, accurate, consistent and complete. Justice can not be achieved if the COA docket records do not reflect facts, such as the wrongful filed date of Appellant's notice of appeal and deletion of exhibits based on the Federal Rules of Appellate procedure Rule 45 and Rule 3, for the clerk of Court of Appeals, judges and counsel to easily locate and get entire information needed for effective case management and to focus on the key substance of the appeal. Here, the re-filed notice of appeal with exhibits of new evidence (ECF No. 53) was received by the COA on 8/7/2018 and should be brought to attention for review.

**C. Conclusion:**

WHEREFORE, Appellant respectfully requests that this Honorable Court will amend the description of the docketing records in COA case 18-1889. Specifically, the amendment of the COA docketing records with accurate, precise and complete statement would assist the Court judges and counsel in giving prompt attention to the Appellant's re-filed Notice of Appeal on 8/7/2018 and exhibits including EEOC's investigator's hand written notes. Furthermore, the

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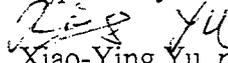
<sup>5</sup> Appellant visited COA on 8/24/2018 and received a hard copy of the district court's transmitted her notice of appeal and exhibits (ECF No. 53&54) She was told that the docket sheet is exactly same as the docket records which Appellant received from the district court (see exhibit#2) and there was no docketing statement transmitted from the district court to the US Court of Appeal at the Fourth Circuit.

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amendment of statement in the COA docketing record for Case 18-1889 would make all docketed information, which the district court transmitted, to reflect the facts and avoid inaccurate, inconsistent and incomplete docket records to cause the judges and counsel's confusion in the review of Appellant's informal brief (30 pages) and appendix of the statement of the case (9 pages) during decision making process, and avoid misleading to the injustice in this case.

Dated October 18, 2018

Respectfully submitted,

Xiao-Ying Yu, *pro se*

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Appendix 14.2

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No. 18-1889

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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XIAO-YING YU,  
*Plaintiff-Appellant*

v.

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL, and  
MARYLAND DEPARTMENT OF BUDGET & MANAGEMENT,  
SECRETARY DAVID BRINKLEY,  
*Defendants-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MARYLAND

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**APPELLANT'S SUPPLEMENTAL INFORMAL BRIEF**

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January 16, 2019

Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009  
Telephone: 410-671-9823  
Pro se plaintiff-appellant

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No. 18-1889

## **APPELLANT'S SUPPLEMENTAL INFORMAL BRIEF**

In addition to the Appellant's "informal brief" filed in Fourth US Court of Appeals, "USCA4" (COA Docket #10, 10/1/2018), the Appellant, Xiao-Ying Yu, *pro se*, respectfully submits this "supplemental informal brief" after reviewing supplemental assembled records provided by the Federal District Court of Maryland to this Court of Appeals (see COA Docket #15 &4, Exhibit #1 ) on 1/11/2019.

### **I. Statements of the Facts**

*A. Supplemental assembled records transmitted by the District Court to the Court of Appeals were docketed on October 18, 2018 after the Appellant filed her "informal brief" for more than a half month*

After the Appellant filed her "informal brief" on 10/1/2018 and her "reply to Appellees' motion to extend time to file Appellees' brief regarding oral argument" on 10/15/2018, in which she requested the Court of Appeals to consider counsels for "Formal Brief" and "Oral Argument" under Rule 27&34 based on the condition that the facts of her claims were omitted, misrepresented, and misinterpreted by Appellees and the District Court of Maryland, the Appellant's reply motion was docketed in COA No. 14 that "RESPONSE/ANSWER (Titled 'Reply to Appellees' Motion to Extend Time') by Xiao-Ying Yu to Motion to extend filing

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time [12].[18-1889] CB [Entered: 10/16/2018 05:01 PM]”. Then, on 10/16/2018, the District Court transmitted “supplemental assembled electronic record” pursuant to the request of the Appellant’s case manager, Ms. Cathi Bennett for the docket records missed in the Appellant’s file. This information was confirmed via the conversation with Ms. Bennett over the phone in the afternoon on 10/22/2018. The transmission was entered in COA docket #15 on 10/18/2018. However, the Appellant was not aware what supplemental records were provided to USCA4 on 10/16/2018 (COA docket #15), nor did she understand why District Court failed to provide USCA4 with entire records by 8/20/2018, as Clerk of USCA4 requested,<sup>1</sup> and wanted to provide these supplemental assembled records to USCA4 after the Appellant filed her “informal brief” for more than a half month.

*B. Review and concerns about the docket records*

On January 11, 2019, the Appellant visited the Court of Appeals and requested USCA4 Clerk, Ms. Gomez to allow her to review her case file. She was told all case records are electronic files. Then, the Appellant specifically requested to get hard copies of the supplemental assembled records in COA docket #15 entered on 10/18/2018. She was provided with 64 pages of hard copies of the electronic records, which is the Appellant’s re-filed notice of appeal and related

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<sup>1</sup> Please see COA docket No. 2: “RECORD requested from Clerk of Court. Due: 08/20/2018. [18-1889] CB [Entered: 08/06/2018 11: 42 AM].”

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exhibits, (ECF#54) transmitted along with the "Docket sheet" by the District Court to USCA4 on 8/7/2018. However, these records were the same copies that the Appellant received from USCA4 Ms. Gomez on 8/24/2018. The Appellant was confused and asked Ms. Gomez why the electronic records in COA docket #15 (entered on 10/18/2018) were the same as COA docket #4 (entered 8/8/2018), but were not as Ms. Bennett stated as the supplement for missing records. Then, Ms. Gomez introduced Tony, who is supervisor of the Appellant's case manager, Ms. Bennett, to help the Appellant. The Appellant expressed her concerns to Tony as follows:

1. There was lack of the Appellant's initial and amended complaints and related exhibits, her response and supplement in opposition to defendants' motion to dismiss and her supporting exhibits (the Appellant filed with the District Court) in both COA docket # 4 and 15 according to the hard copies of initial electronic records, (transmitted by the District Court between 8/2/2018 and 8/8/2018), which USCA4 clerk, Ms. Gomez, provided to the Appellant on 8/24/2018 and the supplemental assembled records, (transmitted by the District Court on 10/16/2018), Ms. Gomez, provided on 1/11/2019;

2. If the clerk, Ms. Gomez could not see the Appellant's electronic file for those electronic records of Appellant's complaints and exhibits filed with the District Court of Maryland transmitted by the District Court to USCA4, the

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Appellant was wondering how the USCA4 judges, who were assigned to Appellant's case, could review those exhibits which the Appellant referred in her "informal brief" and "informal reply brief".

Thus, Tony informed the Appellant that there were 522 pages of electronic records transmitted by the District Court of Maryland in the August 2018. After he edited COA docket #4 with 522 pages and COA docket #15 with 64 pages on 1/11/2019, Ms. Gomez was able to see these 522 of electronic records in the Appellant's case docket #4 (Exhibit#1, Tony edited 1/11/2019). Also, Appellant was provided the hard copies of these 522 pages of electronic records transmitted by the District Court of Maryland to USCA4 (Exhibit #2, copy of the payment for these records).

*C. Missing documents and inconsistent records in the electronic records transmitted by the District Court to the Court of Appeals*

After reviewing 522 pages of electronic records in the COA docket # 4 entered on 8/8/2018 and edited on 1/11/2019, the Appellant realized that these District Court's electronic records were only to cover the period between 11/6/2017 and 8/6/2018. There were several problems in these records which include but are not limited to: Some the Appellant's filed documents were deleted; some records were reversed ordering pages of documents, which led to the confusion; and some filed documents were excluded and replaced by other

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duplicated documents in these 522 pages of the electronic records, which did not match the District Court's description for several docket numbers such as ECF #45, 47&48. These changed electronic records conflicted with the facts that the District Court transmitted the electronic records to USCA4 on August 2, 2018 and these electronic records have been reviewed and docketed by the Clerk of this Court of Appeals.

Because these changes of the electronic records transmitted by the District Court to USCA4, it is necessary for the Appellant to file this "supplemental informal brief" and to address each of those changes and deletions. Also, the Appellant would provide those filed documents, which were deleted from these 522 pages of electronic records, and hopes USCA4 clerk to provide the Appellant's case with comprehensive, correct and consistent docket records that will make it easier for judges to find and review the Appellant's filed documents even though some description of docket numbers made by the District Court did not match the containing documents.

1. Several attachments were deleted in the COA Docket # 4 (see Exhibits #3-5). These attachments were filed on 12/8/2017, 1/23/2018, 3/22/2018 respectively (see the District Court's ECF # 4, 15&20) and are very important because the Appellant asked to amend the EEOC records prior to her receiving

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EEOC's response to her request of the reconsideration regarding EEOC's conclusion in the right-to-sue letter and the request of the default judgment);

2. The District Court docketed ECF# 45: "NOTICE OF APPEAL by Xiao-Ying Yu. Filing fee \$505, receipt number 14637107751. (slss, Deputy Clerk) (Entered: 08/02/2018)", but the 522 page of electronic records transmitted by the District Court to USCA4 on 8/2/2018 did not contain this notice of appeal (see COA Docket #4, p. 507-509) although USCA4 Clerk docketed and the Appellant claimed this action in her concerns of the docket records and her "Informal Brief" because the Appellant's (7/26/2018 filed) initial notice of appeal, which the District Court returned back to the Appellant on 7/31/2018.<sup>2</sup>

Meanwhile, another District Court's docket record ECF #48 was changed. The District Court originally docketed ECF#48 as "Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 45 Notice of Appeal. Important Notice: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to <http://www.ca4.uscourts.gov> and click on Forms & Notices. (slss, Deputy Clerk) (Entered: 08/02/2018), but there was only the "Docket Sheet" in COA docket #4, page 517 of the electronic records because the Appellant's Notice of Appeal was

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<sup>2</sup> This Appellant's 7/26/2018 notice of appeal transmitted by the District Court on 8/2/2018 to USCA4 without related exhibits was confirmed respectively through conversation over the phone with the District Court clerk, Chief Judge Bedar's chamber, and USCA Clerk Ms. Amy Carthem and Ms. Bennett, also evidenced by the USCA4 Ms. Margaret Thomas's letter dated on 8/3/2018 (ECF #50).

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excluded from the ECF#48. The transmitted electronic records on 8/2/2018 by the District Court to the Court of Appeals were deleted due to the changes in the docket ECF#45&48 and replaced with triplicated copies of the Appellant's motion for extension of time to re-file her notice of appeal on ECF #45, 46&47, please see the electronic records in COA Docket # 4 page: 507-509; 510-512; and 513-515 respectively.

3. The district court initially docketed on 8/6/2018 "Assembled Electronic Record Transmitted to Fourth Circuit-Initial (slss, Deputy Clerk) (Entered: 08/06/2018)". It was supposed to be labeled with a sequencing Number ECF #51 prior to the Appellant's case manager, Ms. Bennett's establishing the Appellant's COA case number 18-1889 on 8/6/2018 (ECF#52, COA docket #1-3, and COA docket # 4, page 522), but this "Assembled electronic record" was not labeled with any docket number in the District Court's docket (see Exhibit#6: the District Court's docket dated 8/6/2018); instead, the electronic record which was transmitted with a "Docket Sheet" on 8/6/2018 by the District Court to USCA4 was excluded from the COA docket records. Please see USCA4 printed COA docket #4, page 5-6, provided on 1/11/2019, compare with Exhibit#7, ECF#52 in District Court of Maryland docket recording CM/ECM live 6.1 dated 8/16/2018);

Again, in the docket ECF#47, the District Court initially docketed on 8/2/2018 as "NOTICE of Appearance by Xiao-Ying Yu (slss, Deputy

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Clerk)(Entered: 08/02/2018)", please see Exhibit#6, District Court of Maryland docket recording CM/ECF live 6.1 printed on 8/6/2018, was replaced with triplicated copies of Appellant's filed (8/2/2018) motion for extension time to re-file her notice of appeal in ECF No. 45, 46 and 47. Please compare with Exhibit #7, District Court of Maryland docket recording CM/ECF live 6.1, printed on 8/16/2018). Thus, the sequential docketed number 51, supposed labeling for the 8/6/2018 "Assembled Electronic Record Transmitted to Fourth Circuit-Initial" for the Appellant's 7/26/2018 notice of appeal, was used to labeled the duplicates of the ECF No. 47 for Appellant's (8/2/2018 re-filed) notice of appearance by changing the District Court's record ECF #47 as "(ELEXCTRONICALLY FILED IN ERROR) NOTICE of Appearance by Xiao-Ying Yu (slss, Deputy Clerk) Modified on 8/6/2018 (slss, Deputy Clerk) (Entered: 08/02/2018)". Please see COA docket record #4, page. 518-519.

However, because the Appellant's initial notice of appeal transmitted on 8/2/2018 and 8/6/2018 by the District Court to USCA4 were removed from these 522 pages of USCA4 docket records, the District Court replaced these original docketed documents with different documents without making each of these docket number with the description of "**electronically filed in error**" to conceal their violations of the federal civil procedures.

4. The Appellant's cover letters to the Clerk, Ms. Felicia C. Cannon at the District Court, which explained what reason and which type of documents to file and were always placed on the front page in all of her filed documents, were either intentionally deleted (described as above fact #1), or misplaced to the last page of Appellant's filed documents, or separated from Appellant's filed documents. The District Court's actions made the Appellant's case file difficult to be reviewed by the USCA4 judges. Please see the cover letters which Appellant filed and were docketed in ECF #1, 5, 9, 11, 13, 17, 19, 22, 35 respectively on COA docket #4, electronic records p.17 p.18 (JS44), 241, 276, 280, 292, 308, 312, 424 & 482. In addition, the cover letter filed on 8/2/2018, located at COA docket #4, page 516, was separated from the Appellant's (8/2/2018) filed motion for extension time to re-file her notice of appeal, in ECF No. 45, 46& 47 (see COA docket No. 4, page 507-515) and her re-filed notice of appearance in ECF# 51 (COA docket No. 4, from page 518-519). Also, the page sequencing orders of the exhibits in ECF #5, which the Appellant filed, were reversed.

5. Appellant's motion for the clarification and relief, motion for leave to file the second amendment of her complaint with new evidence provided by EEOC, and request for jury trial filed on July 24, 2018 (within 28 days from the District Court's 6/26/2018 judgment) were not docketed, but were returned back to the Appellant on 7/30/2018, because the District Court stated that the case was closed

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on 6/26/2018 (see ECF #38&39, COA docket #4, duplicated pages 488-490, and 491-493).

6. Appellant's initial filed (*pro se*, on 7/26/2018) Notice of Appeal and related exhibits were un-docketed, but was returned back to the Appellant on 7/31/2018 by the District Court's order ECF #40 without mention of the returned document of the Appellant's Notice of Appeal by stating "Returned document order. Signed by Chief Judge James K. Bredar on 7/30/2018. (Attachments:#1 First page of Returned Pleading and cover letter) (c/m 7/30/15 bas, Deputy Clerk). (Entered: 7/31/2018)". Please compare with the description in ECF #38&39 (COA docket #4, p. 4-5)

7. ECF #54 with Appellant's re-filed notice of appeal and related exhibits transmitted by the District Court to USCA4 on 8/7/2018 were omitted in COA docket #4, although the USCA4 Ms. Gomez already provided the Appellant with the hard copies of these electronic records on 8/24/2018 (see Exhibit #2). Ms. Bennett also knew that these copies were provided to the Appellant when she met the Appellant on 8/24/2018.<sup>3</sup>

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<sup>3</sup> Per Ms. Bennett and Chief Deputy Clerk Mark J. Zanchelli's permission and advice, Appellant filed her concerns during the Appellant's leave after reviewing these electronic records, also filed her informal brief on 10/1/2018 and her informal reply brief on 11/13/2018 in COA docket # 7, 17, 21&23 regarding the inconsistent and incomplete docket records transmitted by the District Court to USCA4, which did not reflect facts regarding her clarification, amendment of the new evidence and notice of appeal filed with the District Court. Appellant was hoping to bring the Court of Appeal's attention to the District Court's clerk errors and violation of Federal Civil Procedure.

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Nevertheless, on January 11, 2019, USCA4 Ms. Gomez provided the Appellant the COA docket No. 15 again with the 64 pages of hard copies of ECF #54, which the District Court docketed as “Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 53 Amended Notice of Appeal. Important Notice: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to <http://www.ca4.uscourts.gov> and click on Forms & Notices. (slss, Deputy Clerk) (Entered: 08/07/2018)”.<sup>4</sup> However, on COA docket#15, it was stated “SUPPLEMENTAL ASSEMBLED ELECTRICAL RECORD docketed. Record in folder? Yes. Record reviewed? Yes. [18-1889]CB [Entered: 10/18/2018 10:28 AM]”.

## **II. Needs of the Issues Existed in the Docket Records of the Appellant’s Case File for the Judges at Court of Appeals to Review**

The changes and deletions of the assembled electronic records transmitted by the District Court to USCA4 made the confusions and inconsistent docket records in the Appellant’s case file as follows:

- Where are those missing supplemental assembled records and the docket sheet dated 10/16/2018 and transmitted from the District Court to USCA4 stated in COA docket #15?

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<sup>4</sup> This is the same language used by the District Court in ECF #48, yet, there was only the “docket sheet” from the 522 pages of the COA docket #4. Please see page 517. There was a lack of the Appellant’s (7/26/2018) initial filed notice of appeal transmitted from the District Court in the ECF #48 re #45.

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- Were these charges and deletions of the assembled electronic records transmitted by the District Court to UDCA4 in COA docket #4 (522 pages) and COA docket #15 (64 pages of the District Court's 8/7/2018 transmitted records) due to the concerns and claims filed by Appellant's "informal brief" and related exhibits?<sup>5</sup>

- How was "Original Court Information: Date Notice of Appeal filed: 8/2/2018 and Date received COA: 8/2/2018" docketed in Appellant's case on 8/6/2018 if there was no evidence that USCA4 received Appellant's notice of appeal dated 8/2/2018, and transmitted from the District Court on 8/2/2018 and 8/6/2018 based on the current electronic records in the COA docket #4?

- How was the Appellant's case established on 8/6/2018 with "Original Court Information: Date Notice of Appeal filed: 8/7/2018; Date Received COA: 8/7/2018" if there was no evidence that USCA4 received the Appellant's (8/7/2018) re-filed notice of appeal transmitted by the District Court to USCA4 on 8/7/2018 in the COA Docket # 4, 522 pages of electronic records based on the current electronic records in the COA docket#4?

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<sup>5</sup> Tony and Ms. Gomez could not explain why those 522 pages were absent from Appellant's COA case electronic file on 8/24/2018 and on 1/11/2019 when Ms. Gomez reviewed the Appellant's case file, and that was why Ms. Gomez provided the Appellant with duplicated hard copies of the electronic records for COA docket #4 and #15 containing the District Court's 8/7/2018 transmitted Appellant's notice of Appeal and related exhibits.

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- How were the Appellant's re-filed notice of appeal and related exhibits along with the docket sheet dated 8/7/2018 and transmitted by the District Court to USCA4 on 8/7/2018 docketed on 10/18/2018 in COA docket#15?

### **III. The Consequence of the Changes of the Docket Records**

The changes and deletion of the electrical records transmitted by the District Court to USCA4 led to the confusion and possible errors in the USCA4 docket records.

Such changes in the docket records were to hide the evidence of the District Court's violation of Appellant's appealing right, pro se, on 7/26/2018, and resulted in the confusion of the time when the Appellant initially filed the "Notice of Appeal". This led to USCA4 to docket Appellant's filed "Notice of Appeal" as 8/2/2018 instead of 7/26/2018, (which, in fact, was the correct time), as described above and also in the Appellant's concerns and "informal brief". The deletion of initial docketed documents on ECF #45 & 48 (includes the Assembled record without any docket number on 8/6/2018) and excluding ECF#54 in the COA docket#4, 522 pages of the electronic records were also likely to cover the District Court's mistakes of sending the Appellant's 7/26/2018 notice of appeal on 8/2/2018 and 8/6/2018, and to make it difficult for the USCA4 judge to review the Appellant's case file and understand why USCA4 docketed on 8/6/2018 "Original Court Information" for the Appellant's Notice of Appeal filed on 8/2 and 8/7/2018.

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In addition, it is difficult for USCA4 judges to review and track the exhibits related to the Appellant's "informal brief" and "informal reply brief" through the current COA Docket #1-4 and #15. Therefore, judges' preparation of their "Formal Brief" and recommendation for the "Oral Argument" leading to a fair decision may be impaired by these changes and deletion of the electronic records.

On the other hand, in addition to the facts stated in Appellant's "informal brief" and "informal reply brief", the changes and deletions of the District Court's assembled electronic docket records indicated in this supplemental informal brief and related exhibits may bring to the USCA4 judges' attention to the possible ignorance of the Appellant's claims that District Court's violation of the Appellant's civil rights to file clarification, relief and amendment with newly discovered evidence provided by EEOC, which she previously requested to amend for multiple times (see deleted documents in the Exhibits#3-4 and COA docket #4, page 17); her right to be heard; and her right to appeal, *pro se*, and also to be docketed on 7/26/2018 under Fed. R. Civ. P. 15, 16, 60& Federal Rules of Appellate Procedure 3 & local rule 3, seventh amendment and Fourteenth Amendment of U.S.C. Furthermore, it can not be neglect that the District Court failed to perform their discretion for both "an express determination that there is no just reason to delay" and "an express direction for entry of judgment" prior to dismissal of Appellant's discrimination and retaliation claims under ADEA, ADA,

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29 U.S.C. §794(a)(b), Section 504 of the Rehabilitation Act, and Title VII, and simultaneous closure of her case on 6/26/2018 with false reasons (see the Appellant's "informal brief" and "informal reply brief" based on the requirement of Federal Civil Procedure 54 (b) and 28 U.S.C. §1291.

#### **IV. Conclusion**

Because of the facts and reasons stated above, in addition to the clarification and relief that the Appellant filed prior to her Appeal on 7/24/2018 (ECF#38, 39, 53&54, COA docket #15) with the District Court, and her concerns filed with the USCA4 on 9/4/2018 during the Appellate court's leave and 10/22/2018 (COA docket #7 &17), according to the Federal Rule Civil Procedure 60 (a)&(b)1-3&6, Seventh and Fourteenth Amendment U.S.C., the Appellant respectfully requests this Court to grant her relief. The District Court's failure of making their discretion with false reasons of the lack of subject matter jurisdiction and State's immunity to Appellant's disability retaliation claim as well as racial and national origin/ethnic discrimination and retaliation should be reversed under Federal Rule Civil Procedure 15, 16, 54, 28 U.S.C. §1291, ADA, 29 U.S.C. §794(a)(b), Section 504 of the Rehabilitation Act, 42 U.S.C. §1981&2000d, Title VII, Eleventh and Fourteenth Amendments of U.S.C. Furthermore, the Appellant respectfully requests the Honorable Court to grant an appointment with Counsel for a "Formal Brief" to reflect on the facts stated in this supplemental informal brief, her

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“informal brief” and “informal reply brief”, and also to recommend an “Oral Argument” in order to clarify the issues, arguments and authorities that Appellees and the District Court omitted, misrepresented and misinterpreted and to lead to justice. Moreover, Appellant respectfully requests this Court of Appeals to grant the relief to her for the damages addressed in her amended complaints and informal brief, that the Court deems just and necessary.

Dated January 16, 2019

Respectfully submitted



Xiao-Ying Yu, *pro se*  
557 Kirkcaldy Way  
Abingdon, MD 21009

Appendix 15.1

App. 208

August 30, 2018  
Via Certified mail  
Clerk Patricia Connor  
US Court of Appeals for the Fourth Circuit  
1100 East Main Street, 5<sup>th</sup> Floor  
Richmond, VA. 23219

RECEIVED

2018 SEP -4 PM 3: 09

U.S. COURT OF APPEALS  
FOURTH CIRCUIT

18-1889

Dear Clerk Connor:

Thank you very much for allowing me extended time to file my Informal Brief (new deadline 10/1/18). I am writing this letter to seek further help regarding the future review of the docket records (District Case No. 17-cv-03260-JKB, Fourth Circuit Case No. 18-1889) transmitted by the United States Northern District Court of Maryland. Specifically, there are two key problems with the files as they currently stand. First, the abstract of docket file does not accurately reflect its substance and the abstract of docket ECF No. 53 is incomplete, as it lacks exhibits (including several important pieces of new evidence) that I attempted to append to my case files. Second, the initial Notice of Appeal (entry of ECF No. 45) was returned to me on 7/31/2018, and ECF No. 45, 48 & 52 contradicts Court's orders (ECF No. 40&50).

I filed an initial Notice of Appeal on 7/26/2018 (along with exhibits that included my Motion for Clarification and Motion for Second Amendment of Complaint with new evidence, because motions and new evidence filed on 7/24/2018 were not docketed) prior to receiving the Court's order (ECF No. 37). This initial Notice of Appeal was returned to me without docket per District Court order on 7/31/2018 (ECF No. 40).

According to the Court's 8/1/2018 order (ECF No. 43), on 8/2/2018, I re-filed the Notice of Appearance (ECF No. 47 & 51) and the Motion for Extension (from 7/26/2018 to 8/7/2018) to Re-file the Notice of Appeal (ECF No. 46).

On 8/2/2018, after receiving my Motion for Extension to Re-file a Notice of Appeal, the Court entered (ECF No. 45) the initial Notice of Appeal without exhibit (even though this Notice of Appeal was returned on 7/31/2018 per Court order, ECF No. 40 as described above). Meanwhile, a disclosure including ECF No. 45 and docket sheet were transmitted to the Honorable US Court of Appeals for the Fourth Circuit (ECF No. 48) prior to the Court's granting my motion for extension to re-file my Notice of Appeal (entered 8/3/2018, ECF No. 50).

On 8/7/2018, I re-filed a modified Notice of Appeal along with exhibits that clarified some misrepresentation and misinterpretation in Court's memorandum and introduced new evidence, which was uncovered by an FOIA request for EEOC recording files, but were returned to me due to Court's 7/27/2018 order (ECF No. 38&39). This Notice and exhibits were meant to replace ECF No. 45, based on the Court's orders (ECF No. 40 &50) and

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instructions received via an 8/6/2018 phone conversation with the Chambers of Chief Judge James K. Bredar. I called the Chambers of Chief Judge because I had not received a response to my inquiries about ECF No. 45 from the deputy clerk, Ms. Claudia Gibson, that were left via voice message at 410-962-3854 on 8/6/2018. However, the exhibits filed on 8/7/2018 were not shown in the text of the docket abstract for ECF No. 53. The attachments in the text of docket abstract are usually referred to the cover letter in the docket record (see ECF No. 1, Attachment #1). Omission from the abstract may lead to the exhibits, including the important new evidence, being missed during reviews for the proceedings of my case in the Court of Appeals for the Fourth Circuit.

Nevertheless, on 8/6/2018, ECF No. 45 without exhibits was sent for a second time to the Circuit Court along with the "Assembled Electronic Record Transmitted to the US Fourth Circuit (Slss, Deputy Clerk) (Entered: 8/6/2018)" (ECF No. 52). The ECF No. 45 even caused the receptionist of the District Court's confusion, who initially mistakenly refused to accept my re-filed Notice of Appeal (8/7/2018), because she said that the Notice of Appeal had already been docketed on 8/2/2018. She then accepted the Notice of Appeal when I informed her that filing was in line with the instructions of the Chambers of the Chief Judge Bredar (given 8/6/2018).

It is no doubt that the errors in the docket ECF No. 45 and 48 for its violation of Federal Civil Procedure made it very confusing (ECF No. 49) and additional transmission of electronic record for multiple times will also make it difficult for the Honorable Court of Appeals of the Fourth Circuit as they review my case. Moreover, ECF No. 45 contradicts the Court's orders from 7/31/2018 (ECF No. 40) and 8/3/2018 (ECF No. 50). Please note that my request to correct this docket error was brought to the attention of the Chambers of Chief Judge on 8/6/2018.

Therefore, in order to maintain integrity and consistency in the docket records and also to ensure that the docket abstract accurately reflects the facts in the District Court and US Court of Appeal for Fourth Circuit regarding my case, review and ruling on this matter by the US Court of Appeals for the Fourth Circuit is needed. The District Court's docket ECF No. 45, along with accompanying transmission of records (ECF No. 48 & 52), should be withdrawn and the incomplete docket abstract of ECF No. 53 should be corrected based on the reasons and facts described above. Your consideration and help will be greatly appreciated.

I would like a file stamped copy returned, please find the enclosed original certificate of service, an extra copies and a self addressed stamped envelope.

Respectfully submitted,

  
Xiao-Ying Yu, *pro se*  
557 Kirkcaldy Way  
Abingdon, MD 21009

Appendix 15.2

App. 210

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX  
1100 EAST MAIN STREET, SUITE 501  
RICHMOND, VIRGINIA 23219-3517  
WWW.CA4.USCOURTS.GOV

PATRICIA S. CONNOR  
CLERK

TELEPHONE  
(804) 916-2700

September 13, 2018

Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, MD 21009

Re: 18-1889; Xiao-Ying Yu v. Robert Neall

Dear Ms. Yu:

I have reviewed the concerns stated in your letter of August 30, 2018, about the handling of your case at the district court. Although you believe that certain filings were not docketed correctly, it is generally improper to try to add additional evidence in the district court without first seeking leave of court to do so. Also, material that was not considered by the district court judge prior to the court's ruling is not properly included in the material forwarded to the appellate court. The evidence that the appellate court considers is limited to what was presented to the district court before the district judge ruled.

Your appeal appears to be proceeding properly and this court will be able to review the entire electronic version of the district court record including all the documents you filed when it reviews the issues raised in your brief.

Sincerely,

Mark J. Zanchelli  
Chief Deputy Clerk

MJZ: rl

Appendix-16

App. 211

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

XIAO-YING YU, \*

Plaintiff-Appellant, \*

v. \* Case No. 18-1889

ROBERT NEALL, et al., \*

Defendants-Appellees. \*

\* \* \* \* \*

MOTION TO EXTEND TIME TO FILE APPELLEES' BRIEF

The appellees, through counsel, move, under Fed. R. App. P. 26(b), to enlarge the time within which they may file their informal response brief, extending the deadline by five business days, from October 15, 2018 to October 22, 2018.

1. Under the existing scheduling order, the appellees' informal response brief is due to be filed on October 15, 2018. This deadline was established when the Court granted a request made by the appellant to extend her time to file a brief from August 30, 2018 to October 1, 2018. Appellees are permitted to file an informal response brief within 14 days after service of the informal opening brief.

2. The brief for appellees will need adequate time to undergo the internal review process required of every appellate brief filed by the Attorney General of Maryland.

3. In addition to the Columbus Day holiday, counsel for appellees has been out of the office with a fever and sore throat. This has created a minor delay in preparing the brief for the internal review process.

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4. It is not anticipated that this case will require oral argument and oral argument has not yet been scheduled for this appeal.

5. The requested five-day extension for filing the appellees' informal response brief will not cause prejudice to the appellant.

A proposed order is attached.

BRIAN E. FROSH  
Attorney General of Maryland

/s/ James N. Lewis

---

JAMES N. LEWIS  
Assistant Attorney General  
Office of the Attorney General  
Maryland Department of Health  
300 West Preston Street, Suite 302  
Baltimore, Maryland 21201  
James.Lewis1@maryland.gov  
(410) 767-5162  
Attorneys for Appellees

October 11, 2018

#### **CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2018, a copy of the foregoing motion to extend time to file appellees' brief, which was electronically filed in this case on October 11, 2018, was served by first-class mail on the following:

Ms. Xiao-Ying Yu  
557 Kirkcaldy Way  
Abingdon, Maryland 21009

/s/ James N. Lewis

---

James N. Lewis

Appendix #1

App. 213

April 1, 2019

Patricia S. Connor, Clerk and Chief Judge, Robert L. Gregory  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA. 23219

Re: Case No. 18-1889, Xiao-Ying Yu v. Maryland Department of Health and Maryland Department of Budget and Management (1:17-cv-03260-JKB):  
Plaintiff's application for suspension of the Court's 3/26/2019 order denying Plaintiff's petition for rehearing and rehearing en banc; Plaintiff's motion to recuse; and Plaintiff's request to correct the mistakes in the docket record No. 37

Dear Clerk Connor and Chief Judge Gregory:

After reviewing the Court's order and the statement of COA4 docket#37, according to Fed. App. P. Title VII, Rule 27 and Title I, Rule 2, I respectfully make my application for suspension of the Court's order denying my petition for rehearing and rehearing en banc entered on March 26, 2019 (details please see my application for suspension).

Also, I respectfully submit my motion and move that Honorable Judge Diana Jane Gribbon Motz, (who led the panel), recuse herself from the leader and direction of legal proceedings of my petition for rehearing en banc accompanying with affidavit based on USC 28, Chap. 21 § 455, because Judge Motz has worked for 14 years as Assistant Maryland State Attorney General and is accustomed to representing State government employers' interests, and previously led the panel's decisions in favor of Maryland employers in this Court. These disabling conflicts of interest are also explained in my petition for rehearing and rehearing en banc and mandate filed with this Court (COA4 docket #29, 31, 33&36), which provided exhibits, cases, and laws as evidence of the conflicts. Another reason to file the motion to recuse is that the curiam opinion from the panel led by Judge Motz was a biased review and was in conflict with the decisions of this Court, other Federal Circuit Courts and the Supreme Court. This biased review and the above mentioned conflicts of the interests led to affirming the District Court's dismissal of my claims for lack of subject matter jurisdiction, failure to state cause of my claims and the State employer's immunity to my ADA claim which are not true (please see Appendix#1). Although I was hoping this biased review to be corrected by a rehearing en banc since I filed my petition, yet, the panel of judges led by Judge Motz consequently and continually directed results stating "no judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing En Banc" and the denial of my petition for rehearing En Banc in the Court's 3/26/2019

order. However, a vote or poll to be taken from all judges in the Court (who are not given a chance to review the Plaintiff's appeal or petition) is not needed to determine whether a case to be heard or reheard en banc based on Fed. R. App. P. 35(f) and the local rule 35 (b). In order to receive equal protection through the justice of the proceedings based on Fourteenth Amendment U.S.C. § 1, according to 28 U.S. Code § 455, I respectfully request that Judge Motz recuse herself from leading position in charge of the legal proceedings for my petition for rehearing and rehearing en banc as well as from participation in the decision regarding my petition for rehearing and rehearing en banc about the Court's 1/24/2019 order (details please see my motion to recuse).

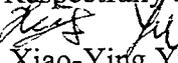
The statement of COA4 docket record#26 only addressed the moot the Plaintiff's motion for concerns about docket records (COA4 docket #17) compared with the curiam opinion (please see Appendix 2a). It appears that mooted Plaintiff's motion is more important than affirming the reasons to dismiss Plaintiff's claims stated by the District Court. In addition, there are some confusion and mistakes in the duplicated statement in the COA4 docket #37 which also appears different from enclosed original 3/26/2019 Court Order denying my petition (filed COA4 docket record #28&29) released by the Court clerk Connor (see supporting Appendix#2b). First, by altering and expanding on the original court's 3/26/2019 order, the statement of COA4 Docket #37 not only denies my petition (COA4 Docket #28&29), but also denies the mandate and motion for relief regarding the lack of initial hearing chance provided to me, and reconsideration of the panel Judge leader Motz's direction to moot my motion of concerns about docket records filed with the Court Docket #30, 31 and 33. Second, the key words of my "PETITION" and "MANDATE" in the documents that I filed in COA4 Docket 28&30 and also for #29&31 have been omitted and replaced with duplicated as "Motion for initial hearing en banc" or "Motion for rehearing and rehearing en banc" in the statement of COA4 docket#37. I suspect that actions are retaliation for my motion of concerns about the docket records filed with this Court about the mistakes made by my case manager (COA4 docket#17, 25&33) in favor of the employer defendants' workplace retaliation and unlawful termination against my complaints under ADA and Title VII and ADEA. The mistakes in the statement of COA4 docket #37 led to confusion and to the legal mistake of the Court's Oder to not only deny my petition for rehearing and rehearing en banc, but also my mandate and motion. Third, using "Motion" (which was typed as the **Capital** in the statement of Docket#37) to replace "Petition" stated in the Court's 3/26/2019

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Order caused confusion and misunderstanding of the Plaintiff's failure of filing "Petition" as the part of reasons for the Court's 3/26/2019 denial. This may also drive the Court to be tied up with the rejection of my request of mandate due to the fact that the statement of Docket #37 indicated the Court's denying the documents #30&31 that Plaintiff filed for her initial mandate which were passed to defendants and District Court.

Therefore, I am hoping my application for suspension of Court's 3/26/2019 order to be granted under Fed. App. P. Rule 2, because it was based on the prejudicial direction led by disqualified Judge Motz. Furthermore, I am respectfully seeking your help to move that Judge Motz recuses herself and correct the mistakes in the statement of docket #37 avoiding erroneous or distorted conception of the facts or the laws or court's orders. Moreover, I am requesting to have a another judge to direct the legal proceedings of my appeal and petition for rehearing en banc under local Rule 35(b), 14<sup>th</sup> Amendment's protection of liberty and property, and Fed. App. P. Rule 2, because I am Asian American pro se and former Maryland State employee supported by CDC funding, who was retailed and unlawfully terminated without mediation, and I have never been given a hearing chance, or oral argument or rehearing en banc for denial of my appeal due to lack of subject matter jurisdiction and failure to state the cause of claims by Federal District Court of Maryland and this Court because the evidence that my written reports of EEOC's permission to sue and EEOC's right-to-sue letter were docketed (11/6/2017 and 3/22/2018); defendants failed to provide a evidential pre-termination mediation or hearing and reason for adverse action and Congress abrogated State employer's 11<sup>th</sup> Amendment Immunity to ADA complaint were prejudicially neglected.

The cover letter contains 3 pages; application for suspension of the court's 3/26/2019 order (total 5 pages) ; motion to recuse (15 pages); Appendix (31 pages) , affidavit (1 page), certificate of compliance (2 pages) and certificate of service (1 page) are enclosed. Total 58 pages. I look forward to hearing from you.

Respectfully submitted,  
  
Xiao-Ying Yu, prose  
Mailing address:  
P.O. Box 293,  
Abingdon, MD 21009

Appendix 17.2

App. 216

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,

*Plaintiff-Appellant,*

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY,

*Defendants-Appellees.*

\* \* \* \* \*

**APPLICATION FOR SUSPENSION OF THE ORDER DENYING THE  
PETITION FOR REHEARING AND REHEARING EN BANC**

Plaintiff-Appellant, Xiao-Ying Yu, *Pro Se.*, respectfully makes application pursuant to Fed. App. P. Title VII, Rule 27 and Title 1, Rule 2 for suspension of the order denying her petition for rehearing and rehearing en banc in Xiao-Ying Yu v. Maryland Department of Health and Maryland Department of Budget and Management, (for the Court's 1/24/2019 curiam opinion and derived order, docket No. 26, 27&37), entered on March 26, 2019, pending the filing and final disposition of her petition for rehearing and rehearing en banc and appeal. In support of this application, the Plaintiff states the following:

1. If the order denying the rehearing and rehearing en banc is not suspended, it will be tolerated, supported and continued in this Honorable Court

that inappropriate judiciary reviewing process was performed for the evidential workplace discrimination and retaliation claims resulting in the damages of public service employees' health, life and property<sup>1</sup>; obstruction of justice of legal proceedings of the Plaintiff's appeal and petition was led by a disqualified panel Judge Diana Jane Gribbon Motz<sup>2</sup> (COA4 docket#26&37), and the Court docket records were altered and omitted which were indicated by COA4 docket #1, 4, 15&20 and consequent concerns written by Plaintiff's letter and motions (COA4

---

<sup>1</sup> Plaintiff, Asian American *pro se*, was Maryland State employee supported by CDC funding and was terminated without mediation within two months after she filed discrimination and retaliation complaints with EEOC under Title VII, ADEA and ADA which was initiated and promoted by Plaintiff's former supervisor, Ms. Sara Barra. The Union manager in Maryland Department of Health participated in the decision of the termination without informing the Plaintiff (see Plaintiff's complaints, District Court's record ECF#4, exhibit 33&34, COA4, docket#4). The evidence were prejudicially neglected and these facts are (1) Plaintiff's written report regarding EEOC's permission to sue accompanying with her initial claim filed with the District Court and a hard copy of EEOC's right-to-sue letter were received by the District Court (docketed 11/6/2017 and 3/22/2018, ECF#1, attachment#1 and ECF#20, exhibit#1, and COA4 #4) prior to the District Court's dismissal of her claims, (see Appendix#1); (2) defendants failed to provide a evidential pre-termination mediation or hearing, *Goldberg v. Kelly*, 397 U.S. 254 and did not submit any legitimate non-retaliatory reason for their adverse actions under the McDonnell Douglas Scheme; and (3) Congress abrogated State employer's Eleventh Amendment Immunity for ADA complaint. Plaintiff has never been given a hearing and pre-direction of the District Court's decision prior to the District Court's denial of her claims and deprivation of her civil rights and property right due to the false reasons of lack of subject matter jurisdiction, failure to state the cause of claims and State's immunity to ADA complaint and closure of her by Federal District Court of Maryland, no was she given a chance of oral argument, initial hearing and rehearing en banc by this Court to affirm the District Court's decision denying her claims and her petition (Appendix#2).

<sup>2</sup> Judge Motz has worked for 14 years in Assistant Maryland State Attorney General with similar responsibilities like Mr. James Nelson Lewis to represent defendants' interest in the position of Assistant State Attorney General for Maryland Department of Health; is accustomed to representing Maryland government employers' interests; and led a panel to create biased curiam opinions including this case which directed the Court's denial of the Plaintiff's appeal and petition for rehearing en banc in favor of defendants, (please see Plaintiff's petition for rehearing and rehearing en banc, COA4 docket#27&29; her motion for concerns about docket records, COA4 docket #17; and Plaintiff's motion to recuse, see separate filing document).

docket #7, 14, 17, 25&33). These actions conflict with decisions by this Court, other Federal Circuit Courts, and U.S. Supreme Court and violation of Fourteenth Amendment U.S.C. § 1 (requirement of procedural due process of law and equal protection for property); H.R. Rep. No. 101-485 (II), at 37 (1990) and 42 U.S.C. § 12202 (Congress' clear abrogation of Eleventh Amendment Immunity in suits under ADA); Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a (State's receipt of qualified federal funds which means State automatically waives their Eleventh Amendment Immunity to law suits under ADA); and Fed. R. Civil P. Rule 79. "Records kept by the Clerk" and Title 18 U.S. C. 1512 (c). Fed. App. P. Title I. Rule 2, Notice of Advisory Committee on Rules-1967 (Amended 1998), authorizes the Courts "to relieve litigants of the consequences of default where manifest injustice would otherwise result." The United States Constitution guarantees an unbiased judge who will consistently provide litigants with full protection of all rights.

2. If the order denying rehearing and rehearing en banc is suspended, the Court may have a sufficient time to review the Plaintiff's motion to recuse and her petition for rehearing and rehearing en banc that Plaintiff filed under USC Title 28, Chap. 1 § 455, Fourteenth Amendment U.S.C. § 1, Fed. App. P. 35 (a)&(f) and local rule 35 (b) "A majority of the Circuit Court judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc".

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The Court's judicial responsibilities with integrity, impartiality and competence are warranted to avoid the violation of other litigants' personal liberties, life and property and/or having wantonly refused to provide process and equal protection to all litigants before the Court or having behaved in a manner inconsistent with that which is needed for full, fair impartial hearings.

3. If Plaintiff's application for suspension of the Court's order denying rehearing and rehearing en banc and Plaintiff's motion to recuse are granted, as the neutrality requirement helps to guarantee people's life, liberty, or property that will not be taken on the basis of an erroneous or distorted conception of the facts or the laws, Plaintiff's motion of concerns about docket records, COA4 docket #17, may not be mooted. It helps the justice of judicial review process and legal proceedings in the Court as the evidence of this motion are referred in "Informal reply brief", "Supplemental informal brief", "Petition for rehearing and rehearing en banc", and Motion for relief regarding the lack of initial hearing information and opportunity provided to the Plaintiff, and reconsideration of biased curium opinion mooting the Plaintiff's motion of concerns about docket records (COA4 docket#23, 25, 29 &33). Furthermore, it may cause your attention to the prevention of docket records in the Court from being altered and omitted for that the destruction or concealment of evidence or attempts to do so are prohibited by Title 18 U.S. C. 1512 (c).

WHEREFORE, the Plaintiff prays that this application be granted.

 pro se

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Respectfully submitted,

 4/1/2019

Xiao-Ying Yu, *pro se*

Mailing address: P.O. Box 293,

Abingdon, MD 21009

Appendix 17.3

App. 221

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,

*Plaintiff-Appellant,*

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY,

*Defendants-Appellees.*

\* \* \* \* \*

**MOTION TO RECUSE**

Now comes Plaintiff-Appellant, Xiao-Ying Yu, pro se, and moves that Honorable Judge Diana Jane Gribbon Motz recuse herself from the above entitled matter under USC 28, Chap. 21 § 455, and Marshall v. Jerrico Inc., 446 US 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980).

**A. Background**

Plaintiff filed for redress of violation of her civil rights and retaliation under Title VII, ADEA and ADA, 42 U.S.C. §1981&NLRA et al.<sup>1</sup> in Federal District

<sup>1</sup> Regarding other related federal laws, please see details in amended complaint, the opposition, supplemental response in opposition to motion to dismiss and informal brief (District Court ECF#4, 20, 30 , COA4 docket#4, 10, 23&25).

*App. 222*

Court of Maryland on 11/2/2017 (Case number 17-cv-3260-JKB) and wrote that “I received EEOC’s conclusion and letter for the right to sue for my second charge (dated 10/16/2017)”. Plaintiff reported to the District Court that she had requested EEOC to reconsider their unfavorable conclusion and also provided the District Court EEOC’s right-to-sue letter after EEOC rejected her request for reconsideration (see District Court docket ECF#1, attachment #1 and ECF# 20, exhibit#1, COA4 docket #4, please see enclosed Appendix#1).

However, as the facts indicated in Plaintiff’s “Informal Brief” filed with the Honorable Court, the Defendants’ representative, Mr. James Nelson Lewis, Assistant State Attorney General for Maryland, filed a motion to dismiss Plaintiff’s claims with false reasons. Notably, Judge Motz has served for 14 years in Maryland Assistant State Attorney General for Maryland State employers as Mr. Lewis represents the defendants’ interest in the current position (Assistant State Attorney General for Maryland Department of Health). Subsequently, the District Court either ignored, omitted or misrepresented the fact that they had received Plaintiff’s report as described above regarding EEOC’s permission to sue and a hard copy of EEOC’s 10/16/2017 letter, as well as the evidence showing damages from the progressive retaliation initiated by Ms. Sara Barra. These damages include willful unequal/under payment, disciplinary actions, the change of the office restructure as pre-text for the undue hardship and rejection of a disability

accommodation recommended by the State Medical Director, constructive discharge by Human Resources, and employment termination without a mediation or a hearing promoted by Ms. Barra who also interfered with EEOC's investigation and led to EEOC's wrongful conclusion (Please see Appendix#3 compared with Appendix#1 EEOC's 10/16/2017 letter)<sup>2</sup>. In addition, the Union manager for Maryland Department of Health participated in the termination making without informing the Plaintiff.

Defendants' representative, Assistant State Attorney General Lewis, submitted no evidence of any legitimate non-retaliatory reason for Defendants' adverse actions and failed to provide a pre-termination evidentiary mediation or hearing claimed by Plaintiff under the McDonnell Douglas scheme. Yet, the District Court adopted his demands and alleged that Plaintiff did not state if Plaintiff had ever received EEOC's right-to-sue letter and failed to state cause of her claims. Also, the District Court adopted the statement by Mr. Lewis, as Defendants' representative, alleging that the State has immunity to Plaintiff's

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<sup>2</sup> According to EEOC's affirmed records which contains the EEOC's investigator, Ms. Christine Boyd's hand notes combining with EEOC's 10/16/2017 right-to-sue letter together, Ms. Sara Barra directly interfered with EEOC's investigation leading to the wrongful conclusion on 4/19/2017 (see motion for concerns about docket records, COA4, docket# 17, exhibit#5 page20-26) by providing false information that Plaintiff asked to resign or retire in stead of the constructive discharge by Human Resources (HR). Ms. Barra's intentional interference was because that in order to terminate the Plaintiff, she contacted HR and alleged Plaintiff's disciplinary actions and disqualification during 10/8/2014 and 10/10/2014 which she made testimony at Maryland Administrative Hearing on 5/14/2015 (see Plaintiff's complaint, District Court docket record ECF#4, exhibit #33&34, COA4, docket#4).

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disability claim through false statements indicating that Congress has not abrogated State's Eleventh Amendment Immunity for ADA complaint. He also inappropriately denied the fact that defendant, Maryland Department of Health has accepted qualifying federal CDC funds (which also supported the Plaintiff's position) by ignoring all evidence and exhibits that Plaintiff provided to the District Court only because Plaintiff addressed the Congress's abrogation of State's immunity under Eleventh Amendment to ADA claims and her right to be protected under the Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a as the defendant's receipt of CDC 1305 funding which means defendant waived their Eleventh Amendment Immunity to law suits under ADA (District Court docket ECF#20&30, COA4, docket#4). In fact, the House report on the ADA indicated, "inconsistent treatment of people with disability by state or local government agencies is both inequitable and illogical" (H.R. Rep. No. 101-485 (II), at 37 (1990)). "The Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid" (42 U.S.C. §12202). Finally, State General Attorney Assistant Lewis's demand was adopted by the District Court to dismiss Plaintiff's claims for lack of subject matter jurisdiction and failure to state a claim

under Rule 8 & 12 (b)(1)&(6). The District Court also denied Plaintiff's request for a second amendment by falsely stating that her amendment would not cure the lack of subject matter jurisdiction and State's immunity to Plaintiff's ADA complaint.

Even though the established causal connections between Plaintiff's protected activities and adverse actions and consequent damages are demonstrated by enormous amount of evidence in Plaintiff's complaints and 39 exhibits as well as her "Informal Brief" and "Informal Reply Brief" filed with this Court, a panel led by Judge Motz, who, like Assistant State Attorney General Lewis, represents Maryland State employers' interests, overlooked or mis-apprehended these factual and legal matters using words such as "find no reversible error." Consistent with her support of employers, she misrepresented Plaintiff's claim as "workplace discrimination" without "retaliation" (which is critical claim) in the curiam opinion leading to this Court's affirmation of District Court's dismissal of Plaintiff's claims, with reasons of "Lack of subject matter jurisdiction" and "failure to state a claim".

Some of these related records transmitted by District Court were missing and some records were changed in the Court docket records (COA4 docket#4, # 15, 17 & #23). The questions (including lack of defendants' providing a pre-termination hearing and lack of pre-direction of the District Court's decision and closure of her case) related to "due process of law" during judicial proceedings and concerns

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about the deletion and changes in the docket records were addressed in “Informal Brief”, “Informal Reply Brief” and “Supplemental Informal Brief” (COA4 docket#10, 23&25) in addition to her letter on 9/4/2018 (COA4 docket#7), and “Motion for Concerns of the Docket Records” with exhibits (10/22/2018, COA4 docket #17). Plaintiff did not receive a response for this motion under Fed. App. P. Rule 27, yet, she was denied as moot for this motion as stated in the curiam opinion even though the evidence provided by this motion and related exhibits were referred and stated in her “Informal Reply Brief” and “Supplemental Informal Brief”.

Because these reversible errors were not identified in the curiam opinion and Plaintiff’s concerns about mistakes of docket records stated in her “Motion for Concerns of the Docket Records” and related exhibits were denied as moot in the curiam opinion; and also due to that the curiam opinion stated “we dispense with oral argument because the facts and legal contentions are adequately presented in the material before this court and argument would not aid the decisional process” in favor of defendants’ desire (COA4 docket#12),<sup>3</sup> these reversible errors need to be heard through Panel Rehearing and Rehearing En Banc in this Court.

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<sup>3</sup> Defendants requested this Court for not having oral argument in their motion to which the Plaintiff responded and requested the Court to protect her right to present the facts (see COA4 docket#12 &14).

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Plaintiff filed her petition for rehearing and rehearing en banc on 2/6/2019 based on Fed. App. P. 35 indicating that the curiam opinion led by Judge Motz was based on the biased review and in conflict with the decisions of this Court, other Federal Circuit Courts and Supreme Court. Plaintiff trusted the Court that the determination of her petition to be reheard en banc should not continue to be influenced by the biased direction of panel leader Judge Motz.

However, Judge Motz, (or a judge of the Court or the panel of judges led by Judge Motz), who is pro-defendants, as influenced by her past position in defending Maryland State employers, requested a poll to be taken from other judges of the Court, who have not been given a chance to review Plaintiff's informal brief and petition, to determine whether to rehear en banc on Plaintiff's petition. This is an extra barrier set up to obstruct justice of legal proceedings of Plaintiff's petition to be reheard en banc in this Court. Judge Motz further directed the Court's 3/26/2019 order for denial of Plaintiff's petition for rehearing and rehearing en banc by stating that "No judge requested a poll under Fed. App. P. 35 on the petition for rehearing en banc," even though Fed. App. P. 35(f) clearly instructs that a vote is not needed to determine whether a case is to be heard or reheard. Therefore, this denial directed by Judge Motz represents an additional attempt to deprive Plaintiff's civil right (due process of law) and relief benefits.

**B. The reason to recuse**

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According to Congress and U.S. Supreme Court case law of judicial ethics, a judge should be recused from leading a panel or hearing any case in which his or her impartiality might reasonably be questioned. Judges must avoid all impropriety and appearance of impropriety. The test for appearance of impropriety is whether the conduct would create a perception in a reasonable mind that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. The above are the grounds why Plaintiff requests that panel-leading Judge Motz recuse herself.

First, from the perspective of professional practice, Judge Motz has worked for 14 years as Assistant Maryland State Attorney General and had similar responsibilities in the position held by the representative of the defendants, Mr. Lewis. She is accustomed to representing Maryland government employers' interests. This is indicated not only by the evidence stated above and stated in Plaintiff's petition for rehearing and rehearing en banc (COA4 docket# 29), but also in the case where Judge Motz led a panel to affirm the District Court's decision in favor of Brian E. Frosh, State Attorney General and representative of Maryland MTA employer Officials against an employee who brought workplace retaliation for employee's criticism of the employer under 42 U.S.C. § 1983, First and Fourteenth Amendment in David McClure; Amalgamated Transit Union Local

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1300 v. James Porta; Earl Lewis; Paul Comfortt; Lois Jones; Kevin Quinn (COA4 Case No. 18-1065).

Second, Judge Motz led the creation of the curiam opinion and to direct the Court's (1/24/2019) denial of Plaintiff's appeal. What she did is biased and prejudiced against Plaintiff (pro se) who seeks equal justice and relief benefits based on the evidence stated in the background and the first reason to recuse above. Facts stated in her informal brief, motion of concerns about docket records, informal reply brief, supplemental brief, and petition for rehearing and rehearing en banc prove that District Court made erroneous findings of facts, ruled on errors of laws, and failed to provide due the process of law in judicial proceedings in order to dismiss Plaintiff's claims. However, these materials, factual and legal matters of District Court's proceedings and decisions were overlooked, and the curiam opinion, judgment and direction of legal proceedings of Plaintiff's petition for rehearing en banc conflict with relevant decisions made by this Court and other Federal Court of Appeals as well as U.S. Supreme Court.

Third, Plaintiff was never given a pre-termination hearing by defendants and a pre-direction by the District Court prior to their decision and closure of her case. Nor was she given a chance for submission of a clarification, reconsideration, or a second amendment when defendants and District Court denied their receipt of Plaintiff's written report regarding EEOC's permission to sue and EEOC's right-

to-sue letter and when Plaintiff received EEOC's affirmed records; nor was she given a chance to present her facts in a hearing in District Court or oral argument in this Court. Nevertheless, panel leader Judge Motz created the curiam opinion to deny her appeal without requesting a vote/ poll for initial hearing or requesting a poll to rehear this case en banc prior to receiving the Plaintiff's petition for rehearing and rehearing en banc. Instead, after receiving the petition for rehearing and rehearing en banc that Plaintiff filed with the Court because of the biased review and conflicts in the curiam opinion, a judge of the Court, or a panel of judges led by Judge Motz, or Judge Motz herself, requested a poll to be taken from the rest of the judges of this Court, which is not required condition, to determine whether the case will be reheard under Fed. App. P. Rule 35(f) and local Rule 35(b). Fed. App. P. Rule 35(f) instructs " A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote." And local rule 35 (b) states " A poll on whether to rehear a case an banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll." It is known that Plaintiff's informal briefs are only reviewed by assigned panel judges and the panel-leading judge

suggests the Court for a oral argument or initial hearing and writes a decision which directs the Court's order. It would not be reasonable for a chairman of the Congress to request that other Congressman vote for a bill without giving them a chance to hear or review that bill, nor is it reasonable for any judge of the Court, without reviewing Plaintiff's informal brief and related documents and petition, or only based on the biased abstract and curiam opinion derived from the decision of the panel of judges (which led to Plaintiff's petition), to request a poll to be taken from other judges of the Court (without providing these judges sufficient time to review Plaintiff's informal briefs and petition, or participating in his/her oral argument) on that Plaintiff's petition, especially when judges of the Court are overloaded with other cases assigned to them. Therefore, it should not be expected for a poll to be taken from other judges of the Court to determine whether to hear a case or rehear that petition. Furthermore, it is important to note that it is not needed or pre-required condition in the Court to determine whether to hear a case or rehear a petition en banc under Fed. App. P 35 (f) and local rule 35 (b) unless a judge of the Court or a judge from the panel of the Court hopes to set up a barrier and extra difficulty in order to block Plaintiff's petition to be reheard en banc in addition to denial of his/her appeal.

It is clear, then, that the reason that Judge Motz (or a judge of the Court or panel of judges led by Judge Motz) requested a poll to be taken was to set up the

difficulty that prevented the Plaintiff's petition from being reheard en banc by other judges of the Court, thus depriving Plaintiff of her right to receive relief benefits. Obviously, the obstruction of justice is also indicated by the curiam opinion in which the panel-leading Judge Motz inclined more towards depriving Plaintiff of her civil rights to present evidence (which were concealed/omitted and falsely stated by defendants; adopted by the District Court and affirmed by the panel-leading Judge Motz) through the oral argument as desired by the defendants (COA4 docket#27&12). Judge Motz's action is in direct conflict with the practice and decisions of the Court, other Federal Circuit Courts and the Supreme Court, which are in favor of unlawfully terminated-employee's relief benefits, as would be granted through Plaintiff's petition for rehearing en banc (COA4 docket #29). Plaintiff's appeal to be heard in the oral argument or initial hearing may reverse the District Court's decision and her petition for rehearing en banc to be reviewed by all eligible, active and participating judges of the Court in rehearing en banc may vacate the previous panel's judgment and opinion led by Judge Motz. However, this is not what Judge Motz wants to happen. It may be the part of driving force for Judge Motz to direct the Court's denial of Plaintiff's appeal and petition for rehearing and rehearing en banc.

Fourth, mooted her motion of concerns about the omitted and altered docket records, (evidence of which are referred by Plaintiff's supplemental brief and

informal reply brief), resulted in the destruction of the evidence to be reviewed and heard during pending federal court proceedings, which directly or indirectly prohibit performing the leading panel's discretion with integrity, impartiality and competence during legal proceedings of Plaintiff's appeal and petition for rehearing en banc.

These tasks related to claims of unlawful termination of a Maryland state employee supported by federal funding due to workplace retaliation should all be performed and led by a judge who does not have a direct history of legal practice for many years in Maryland associated with representing Maryland State employers as Assistant Maryland State Attorney General, because any "reasonable member of the public", knowing all the circumstances related to panel leading Judge Motz's history together, would readily conclude that Judge Motz's impartiality might reasonably be questioned. Because Judge Motz led the biased curiam opinion to cover erroneous findings of facts, ruling on errors of laws, and failure to provide due the process of law in judicial proceedings in the District Court, and to direct this Court's denial of Plaintiff's appeal on 1/24/2019; prejudicially mooted Plaintiff's motion of concerns about docket records (COA4 docket#17&27); dispensed oral argument which Plaintiff requested to present the evidence but defendant did not want (COA4 docket#10, 12&14); and consequently requested a poll from other judges of the Court as extra barrier to deny Plaintiff's

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petition for rehearing on 3/26/2019, she should had been preside over this legal of proceedings of the Petition for rehearing en banc.

The mentioned judge in the reference (referred as the basis to move to recuse) has in the past deliberately violated other litigants' personal liberties and/or has wantonly refused to provide process and equal protection to all litigants before the court or has behaved in a manner inconsistent with that which is needed for full, fair impartial hearings.

The United States Constitution guarantees an unbiased judge who will consistently provide litigants with full protection of all rights. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the laws. There have been judges who recused themselves or were recused by requests in this Court, and Plaintiff's case should not be an exception.

### **C. Conclusion**

WHEREFORE, Plaintiff respectfully moves and prays that the Honorable Judge Motz remove and disqualify herself as the panel-leading judge in light of the evidence stated above and that Plaintiff's petition for rehearing en banc be heard by Court's other judges pursuant to Fed. App. P 35 (a)&(f) and local rule 35 (b) "A majority of the Circuit Court judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc".



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Dated April 1, 2019

Respectfully submitted

  
Xiao-Ying Yu, *pro se*

Mailing address:

P.O. Box 293

Abingdon, MD 21009

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,  
*Plaintiff-Appellant,*

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,  
SECRETARY ROBERT NEALL, and  
MARYLAND DEPARTMENT OF BUDGET &  
MANAGEMENT,  
SECRETARY DAVID BRINKLEY,  
*Defendants-Appellees.*

\* \* \* \* \*

**AFFIDAVIT RELATED TO MOTION TO RECUSE**

I am the Plaintiff-Appellant in this action, and I stated all these matters under oath.  
My letter to Patricia S. Connor, Clerk and Chief Judge, Robert L. Gregory in U.S. Court of Appeals for the Fourth Circuit, motion to recuse, application for suspension of the Court's order denying Plaintiff's petition for rehearing and rehearing en banc, referred supporting exhibits, and affidavit filed on March 29, 2019 are true and correct.

Date: March 29, 2019

Respectfully submitted,

*Xiao Ying Yu*

XIAO-YING YU, *pro se*

SUSSCRIBED AND SWORN to before me on 3/29/19 by Xiao Ying Yu.

*B. Corona*

Notary Public  
BHAWANA K. CHONA  
Notary Public  
Harford County  
Maryland  
My Commission Expires April 26, 2019

My Commission Expires:

Appendix 18.1

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
1100 East Main Street, Suite 501, Richmond, Virginia 23219

April 12, 2019

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LOCAL RULE 40(d) NOTICE

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No. 18-1889; Xiao-Ying Yu v. Robert Neall  
1:17-cv-03260-JKB

TO: Xiao-Ying Yu

We are in receipt of your motion filed in this case.

This court's Local Rule 40(d) states that, except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the office of the clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

Pursuant to the provisions of Local Rule 40(d), no further action will be taken in this matter by this court. A petition for writ of certiorari may be filed in the Office of the Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543-0001, within 90 days of this court's entry of judgment or, if a timely petition for panel or en banc rehearing was filed, denial of rehearing. Additional information on filing a petition for writ of certiorari is available on the Supreme Court's website, [www.supremecourt.gov](http://www.supremecourt.gov), or from the Supreme Court Clerk's Office at (202) 479-3000.

Cathi Bennett, Deputy Clerk  
804-916-2702

Appendix 18, 2

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April 16, 2019  
Patricia S. Connor, Clerk and Chief Judge, Robert L. Gregory  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA. 23219

Re: Case No. 18-1889, Xiao-Ying Yu v. Robert Neal (1:17-cv-03260-JKB),  
Plaintiff's request for Court's prohibition of deprivation of Plaintiff's property and equal  
protection rights and the obstructions of the Court's equal justice under law

Dear Clerk Connor and Chief Judge Gregory:

As you know, I filed multiple sequential documents requesting the Court's prohibition of the deprivation of my property and equal protection rights prior to the Court's 3/26/2019 order. My application for suspension of the Court's order, motion to recuse the panel leading judge Motz and concerns about the Court's docket records filed on 4/1/2019 indicated the need of the Court to forbid the obstructions of the Court's equal justice under law and to control the Court's docket records from being altered and omitted which deprived my constitutional rights under Fourteenth Amendment U.S.C. I am respectfully submitting my civil action and request (including exhibits) in reply to Ms. Cathi Bennett's improper application of "Local 40(d) Notice" to intentionally deprive my property and equal protection rights and obstruct the Court's executing the discretion under 42. U.S. Code section 1983, Fourteenth Amendment and Congress enforcement power because of her misrepresentation, misinterpretation and retaliation.

The certificate of service and compliance are enclosed. I look forward to hearing from you and your attention to protecting my rights or privileges "secured or protected" by the Constitution and U.S. law and Congress enforcement power is highly appreciated.

Respectfully submitted,

 4/16/2019  
Xiao-Ying Yu, *pro se*

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

XIAO-YING YU,

*Plaintiff-Appellant,*

v.

Case No. 18-1889

MARYLAND DEPARTMENT OF HEALTH,

SECRETARY ROBERT NEALL, and

MARYLAND DEPARTMENT OF BUDGET &

MANAGEMENT,

SECRETARY DAVID BRINKLEY,

*Defendants-Appellees.*

\* \* \* \* \*

**REQUESTING THE COURT’S PROHIBITION OF DEPRIVATION OF  
PLAINTIFF’S PROPERTY AND EQUAL PROTECTION RIGHTS**

Plaintiff-Appellant, Xiao-Ying Yu, *Pro Se.*, respectfully brings civil action and requests that the Honorable Court prohibit the deprivation of rights pursuant to 42 U.S.C. §1983, Fourteenth Amendment’s “Due Process of law” and “Equal protection under law” and Congress’s enforcement power for depriving a person of rights or privileges “secured or protected” by the Constitution or U.S. law (*Screws v. U.S.* 325 U.S. 91, 98-100) and Fourteenth Amendment §5. In spite of Plaintiff’s sequential documents filed with this Court requesting the prohibition of deprivation of her property and equal protection rights and the attention to her concerns about the alteration of docket records and the concealment of evidence prior to the Court’s 1/24/2018 order, Ms. Cathis Bennett abused her discretion, (as the Plaintiff’s case manager), by improperly using “Local Rule 40 (d) Notice” (4/12/2019), in favor of defendants, to deprive continually the public service employee of the Plaintiff’s property rights without a mediation and a hearing in the

both of District Court and this Court for the Plaintiff's discrimination and retaliation charges filed with U.S. EEOC under Title VII, ADA and ADEA. In support of this action, the Plaintiff states the following:

- A. Plaintiff filed sequential documents with the Court for the prohibition of deprivation of her property and equal protection rights and concerns about the docket records, prior to the Court's denials of her oral argument and petition for initial and rehearing en banc.<sup>1</sup>**

Supreme Court has ruled that individuals may bring actions under 42 U.S.Code. §1983 to offer a "remedy... against all forms of official violation of federally protected rights," *Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658, 700 (1978).

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<sup>1</sup> The COA4 docket#7, 14, 17, 23&25 indicated that there are inconsistent, incorrect and incomplete records in COA4 #1-4 which do not reflect the facts and the records transmitted from the District Court to the Court between 8/2 and 8/7/2018. Also, the part of docket records of COA4 docket#4 were altered and deleted. After Plaintiff filed her informal brief for 17 days (COA4, docket#10) and re-addressed (10/15/2018) her need of oral argument in responding to the defendants' request to deprive her oral argument right via their motion of extension, (COA4, docket#14 v. #12), on 10/18/2018, Ms. Bennett entered COA4 docket#15 "Supplemental assembled electronic record docketed". However, she failed to provide any additional supplement transmitted by the District Court of Maryland on 10/16/2018 and only removed the part of records which was transmitted by the District Court of Maryland to the Court on 8/7/2018 (district court ECF#53, Appendix#1) and was initially entered in COA4 docket#4. The Plaintiff's 7/26/2018 filed appeal with the evidence (regarding the defendant's interference of EEOC's investigation provided by US EEOC-FOIA records), which the District Court of Maryland refused to file and returned to Plaintiff although cashed her filing fee, but only transmitted part of her 7/26/2018 appeal without the exhibits to the Court respectively on August 2 and August 6, 2018, were inconsistently stated in COA4 docket "Originating Court Information" and docket#1. This was confirmed with USCA Clerk Ms. Gomez and Ms. Amy Carlhem; also evidenced by the USCA4 Ms. Margaret Thomas's letter dated on 8/3/2018 (ECF #50). However, these transmitted records of Plaintiff's 7/26/2018 appeal (without exhibits) from the District Court to the Court (8/2&8/6/2018, ECF#48&52, Appendix#1) were not found in the entire of COA4 docket records of Plaintiff's case 18-1889 file with two Court clerk officers' help when the Plaintiff visited the Court and received a hard copies of records on 1/11/2019. On 8/6/2018, Ms. Bennett entered COA4 docket#1, but failed to disclosure the transmitted records from the District Court to the Court regarding two set of Plaintiff's notice of appeal on 8/2, 8/6 and 8/7/2018 and the Court Ms. Thomas' response (8/3/2018) to intentionally cover the District court's prejudicial actions and defendants' interference of U.S. EEOC's investigation (Appendix#1).

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42 U.S.Code §1983 “Every person who, under color of any statute..., any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...”

It is important to note that in order to receive equal justice under law for her claims of the deprivation of her property and equal protection rights under Fourteenth Amendment, Plaintiff, *pro se*,<sup>2</sup> after filing her initial appeal on 7/26/2018 and updated appeal on 8/7/2018 with the District Court as their instruction, she has filed sequential documents with this Court (COA4 docket#7,

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<sup>2</sup> Plaintiff, Asian American *pro se*, was Maryland State employee supported by CDC funding and was terminated without mediation within two months after she filed discrimination and retaliation complaints with EEOC under Title VII, ADEA and ADA which was initiated and promoted by Plaintiff's former supervisor, Ms. Sara Barra. The Union manager in Maryland Department of Health participated in the decision of the termination without informing the Plaintiff (see Plaintiff's complaints, District Court's record ECF#4, exhibit 33&34, COA4, docket#4). The evidence were prejudicially neglected and these facts are (1) Plaintiff's written report regarding EEOC's permission to sue accompanying with her initial claim filed with the District Court and a hard copy of EEOC's right-to-sue letter were received by the District Court (docketed 11/6/2017 and 3/22/2018, ECF#1, attachment#1 and ECF#20, exhibit#1, and COA4 #4) prior to the District Court's dismissal of her claims, (see Appendix#2); (2) defendants failed to provide a evidential pre-termination mediation or hearing, (Goldberg v. Kelly, 397 U.S. 254) and did not submit any legitimate non-retaliatory reason for their adverse actions under the McDonnell Douglas Scheme; and (3) Congress abrogated State employer's Eleventh Amendment Immunity for ADA complaint. Plaintiff has never been given a hearing and pre-direction of the District Court's decision prior to the District Court's denial of her claims and deprivation of her civil rights and property right due to the false reasons of lack of subject matter jurisdiction, failure to state the cause of claims and State's immunity to ADA complaint and closure of her by Federal District Court of Maryland, no was she given a chance of oral argument, initial hearing and rehearing en banc by this Court to affirm the District Court's decision denying her claims and her petition which violated Fourteenth Amendment' "Due process of law" and "equal protection under law" (Appendix#3).

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10, 14, 17, 23&25) between Sept 4, 2018 and Jan. 16, 2019 prior to the Court's 1/24/2019 order, including concerns about the alteration of the Court's docket records and the concealment of evidence. These documents indicated that Ms. Bennett's failure to file the Court's docket records for those events and the transmitted records to the Court as required by Fed. R. Civil P. Rule 79. "Records kept by the Clerk" in favor of defendants was not an occasional mistake. It also demonstrated that Ms. Bennett intentionally and constantly made the false statements, inconsistent and incomplete records to make it difficult for Court to review and to understand, also willfully concealed the evidence of the Federal District Court of Maryland's prejudicial actions and the defendant's interference of U.S. EEOC's investigation from the Court's review (which Plaintiff filed on 7/24/2018, but was returned; she re-filed with her initial notice of appeal on 7/26/2018 which was also returned, and finally she re-submitted it with her updated notice of appeal and was transmitted by the District Court to the Court on 8/7/2018, Appendix#4 see CD4 docket#18, entered 10/18/2018; and Appendix#5, see COA4, docket#4&18). However, Plaintiff's motion for concerns about the docket records was mooted, and her request to present facts of the deprivation of her constitutional rights via oral argument was dispensed as defendants' desire (expressed COA4 docket#12&14) by the panel leading judge Diana Gribbon

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Motz's<sup>3</sup> curium opinion which biasedly directed the denial of Plaintiff's appeal on 1/24/2019. These actions obstructed the Court's executing discretion in equal justice, deprived Plaintiff's property rights and violated Fourteenth Amendment's "Due process of law" and "Equal protection under law".

Consequently, between 2/6/2019 and 4/1/2019, in responding to the willful progressive deprivation of her property and equal protection rights led by the Judge Motz and false statement made in the docket records by Ms. Bennett, the Plaintiff respectively submitted: 1) her petition for initial hearing en banc, (which she was never provided, docket# 28), rehearing en banc (docket#29), mandate (#31&33) as the Court's instruction, and motion for relief due to lack of being provided any information and chance related to initial hearing en banc and mootng her motion for concerns about docket records and related evidence while which are referred in her informal reply brief and supplemental informal brief (docket#36); 2) the application for suspension of the order denying the petition for rehearing and rehearing en banc; 3) motion for the panel leading judge Motz to recuse herself from Plaintiff's case (COA4, docket#38); and 4) the letter to the Court's Clerk and

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<sup>3</sup> Judge Motz has worked for 14 years in Assistant Maryland State Attorney General with similar responsibilities like Mr. James Nelson Lewis to represent defendants' interest in the position of Assistant State Attorney General for Maryland Department of Health; is accustomed to representing Maryland government employers' interests; and led a panel to create biased curiam opinions including this case which directed the Court's denial of the Plaintiff's appeal and petition for rehearing en banc in favor of defendants, (please see Plaintiff's petition for rehearing and rehearing en banc, COA4 docket#27&29; her motion for concerns about docket records, COA4 docket #17; and Plaintiff's motion to recuse, see separate filing document) and deprived the Plaintiff's property and equal protection rights under Fourteenth Amendment.

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Chief Judge. In these documents and related exhibits, Plaintiff stated the necessary of suspension and recuse for prohibition of the obstructions of the Court's equal justice under Fed. App. P. Title 1, Rule 2, USC 28, Chap. 21 § 455, and Marshall v. Jerrico Inc., 446 US 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980); re-emphasized her request that the Honorable Court prohibit the deprivation of her property and equal protection rights (for the Court's convenience to review, see attached appendix); and control the docket records in the Court from being altered and omitted; and to provide Plaintiff equal protection of all rights, (which was deprived by the obstructions of equal justice), based on "due process of law" and "equal protection" of Fourteenth Amendment U.S.C.

**B. Ms. Bennett's 4/12/2019 action obstructing equal justice under law to deprive Plaintiff's property and equal protection rights, and violating the First and Fourteenth Amendments U.S.C. should be reversed.**

Nevertheless, Ms. Bennett, instead of recusing herself from this case based on the facts stated above, abused her discretion to interfere with the Court's prohibiting the deprivation of Plaintiff's property and equal protection rights, by filing "Local Rule 40 (d) Notice" and stating "pursuant to the provision of Local Rule 40(d), no further action will be taken in this matter by this Court." Also, Ms. Bennett wrote the docket#39, "Notice issued re: further consideration unavailable-Local Rule 40(d). Document [38] Motion to reve decision on appeal [38], Motion

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vacate decision on appeal [38], Motion to disqualify/recuse judge [38], Motion to suspend [38].”

The Local Rule 40 (d) stated “the office of the clerk shall not receive motion or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.” It suggest that applying “Local Rule 40(d)” required two conditions: 1) Plaintiff requesting further relief; and 2) filing further relief after the court’s denial of petition.

First, Ms. Bennett biasedly misrepresented and misinterpreted April 1, 2019 as the date of Plaintiff’s filing the request for the remedy of damages by deprivation of rights under 42 U.S. C. §1983 and Fourteenth Amendments. In fact, the request for relief was initially filed on 11/2/2017 (although part of her initial complaint filed with the District Court transmitted to the Court were missing, COA4, docket record#4, JS44. p. 18, updated complaint filed on 12/8/2017, p.33-35), and then the evidence of the deprivation of her property and equal protection rights were sequentially re-addressed between 9/4/2018 and 2/13/2018 filed with this Court. Please see Appendix#6 (COA4, docket#7, 10, 14, 17, 23, 25, 29, 31,33&36). Second, Ms. Bennett neglected the fact that there was never been any consideration of Congress’ enforcement power for depriving a person of rights or privileges “secured or protected” by the Constitution or U.S. Law (Screws v. U. S.

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325 U.S. 91, 98-100) in the Panel leading Judge Motz's curium opinion or her requesting a poll to be taken from other judges of the Curt as a barrier to block the Court's equal justice under law for Plaintiff's appeal and petition. This was the major reason and focus that Plaintiff filed (4/1/2019) her consequential application for suspension and motion to recuse indicating the necessary for Court to forbid obstructions of the Court's equal justice under law by having the panel leading judge Motz to recuse herself from the Plaintiff's case and by controlling the Court's docket records from being altered and omitted which, of cause, would lead to the Court's executing "due process of law" and "equal protection under law" during judicial proceeding previously requested by the Plaintiff prior to the Court's 3/26/2019 denial of her petition. Third, obviously, there is no any further relief/remedy stated in the suspension, or motion to recuse or the letter to the Court Clerk and Chief Judge even though the Plaintiff suspected Ms. Bennett's false statements in the docket #37 as the retaliatory action. Therefore, these documents Plaintiff filed on 4/1/2019 (COA4 docket#38) did not meet any of these two conditions as Ms. Bennett's desire in favor of defendants for her to apply Local Rule 40 (d); nor was any reason there for Ms. Bennett to make the wrongful statement "no further action will be taken in this matter by this Court" and "further consideration unavailable". According to Congress enforcement power "In constitutional law, the name for a provision that expressly authorizes Congress to

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enforce a constitutional amendment through appropriate legislation” which including “due process law” and “equal protection”, it was unlawful action that Ms. Bennett misapplied “Local Rule 40 (d) to block the Court’s executing their discretion in providing the Plaintiff equal justice, (which was prejudicially obstructed by the panel judge Motz since 1/22/2019, see footnote#2 and COA4, docket #26, 27&38), under 42 U.S. C. §1983, Fourteenth Amendment’s “Due Process” and “Equal Protection” and Congress enforcement power. Furthermore, the Plaintiff did not file four motions as Ms. Bennett stated in the docket#39 (please see COA4, docket#38).

**C. Ms. Bennett’s 4/12/2019 is additional retaliatory attempt to deprive the Plaintiff’s property and equal protection rights.**

If Plaintiff had only filed a simple motion to reconsider a further relief/remedy after the Court’s denial of her petition for rehearing en banc; or if she had never filed those sequential documents as stated above, regarding the damages to her property and equal protection rights (foortnotes#2) and her concerns and requests for the Court’s attention to the concealment of evidence prior to the Court’s 3/26/2019 order, which indicated that Ms. Bennett intentionally obstructed Court’s equal justice under law, especially on Oct. 18, 2018 in favor of defendants to deprive the Plaintiff’s property and equal protection rights (see the footnote No. 1, related COA4, docket# 14, 10, 15,17,23&25), it would have been reasonable for Ms. Bennett to file “Local Rule 40(d) Notice” and state “further consideration

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unavailable” (COA4 docket#39). However, the fact is that the Plaintiff filed her sequential concerns and consequential application for suspension, motion to recuse and the letter to the Clerk Patricia S. Connor, and Chief Judge, Robert L. Gregory<sup>4</sup> providing the evidence of the willful obstructions of the Court’s equal justice under law and re-addressing her request for the prohibition of deprivation of her property and equal protection rights. Given that all of this evidence occurred in the Court together, it cannot be ignored that Ms. Bennett, as professional clerk for Plaintiff’s case manager, knowing her own motivated purpose and the Court system’s regulation, intentionally altered docket records and concealed the evidence, (which are related to the District Court’s prejudicial actions and defendant’s interference of U.S. EEOC’s investigation of the workplace age, racial, national origin and disability discrimination and retaliation); and she constantly made false statements in the Court’s docket records to obstruct the Court’s equal justice under law, even prior to the panel judges’ review; neither can it be neglected that in order to cover previous obstructions of the Court’s equal justice and retaliate against the Plaintiff’s multiple documents filed with the Court regarding the concerns about the docket records, Ms. Bennett’s further action on 4/12/2019 was willfully to violate continually the constitution and federal law by preventing the Court from executing the discretion under Fed. App. P. Title 1, Rule 2, USC 28, Chap. 21 §

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<sup>4</sup> Plaintiff’s letter includes Plaintiff’s suspicion of Ms. Bennett’s retaliation against her’ pre-filed motion for concerns about the docket records.

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455, Fourteenth Amendment U.S.C. and 42 U.S.C. §1983 to reinstate the judicial proceeding of Plaintiff's appeal for the damages due to the deprivation of her property and equal protection rights, which was prejudicially disrupted and interfered with by the panel leading judge Motz.

The First Amendment to U.S. C. "...Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances..."

Fourteenth Amendment to U.S. C. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law..."

Plaintiff does not believe that Ms. Bennett's abusing her discretion and improperly applying the "Local Rule 40(d) Notice" to deprive the Plaintiff's rights and privileges "secured or protected" by the Constitution or U.S. law represented the rest of clerks and judges of the Court.

#### **D. Conclusion**

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WHEREFORE, according to 42 U.S.C. §1983, Fourteenth Amendment §1&5, Congress enforcement power, Fed. App. P. Title 1, Rule 2, USC 28, Chap. 21 § 455, and *Marshall v. Jerrico Inc.*, 446 US 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), it is warranted that the Court's Clerk Connor, and Chief Judge, Gregory prohibit the deprivation of Plaintiff's property and equal protection rights and the obstructions of the Court's equal justice under law, which violated the constitutional and federal law and conflicted with the Supreme Court's decision to offer a remedy (*Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658, 700 (1978)), based on the evidence demonstrated by Plaintiff's sequential and consequential documents filed with the Court under Title VII, ADA, H.R. Rep. No. 101-485 (II), at 37 (1990) and 42 U.S.C. § 12202 (Congress' clear abrogation of Eleventh Amendment Immunity in suits under ADA); Section 504 of Rehabilitation Act, 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a (State's receipt of qualified federal funds which means State automatically waives their Eleventh Amendment Immunity to law suits under ADA) , Fourteenth Amendment U.S.C. § 1&5 and 42 U.S.Code §1983.

Respectfully submitted,

*Xiao-Ying Yu* 4/16/2019

Xiao-Ying Yu, *pro se*

Mailing address:

P.O. Box 293,

Abingdon, MD 21009

Appendix 19.1

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JKB-17-CV-3260  
Complaint-Ex-P23

2013-2014 STATE PREVENTIVE HEALTH ACTIONS TO PREVENT AND CONTROL DIABETES, HEART DISEASE, OBESITY AND ASSOCIATED RISK FACTORS AND PROMOTE SCHOOL HEALTH

CDC RFA-DP13-1305  
BUDGET DETAIL AND JUSTIFICATION  
COMPONENT I - BASIC  
07/01/13 - 06/30/14

BALTIMORE-NIGHT BOX  
2017 DEC -8 PM 4:23  
U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

Salaries and Wages

Position Title and Name	Annual	Time	Months	Amount Requested
Program Coordinator Adelline Ntatin	\$ 51,055	100%	12	\$ 51,055

Job Description: The main purpose of this position is to supervise the Maryland State Public Health Actions to Prevent and Control Diabetes, Heart Disease, Obesity and Associated Risk Factors and Promote School Health Program, including making recommendations regarding program structure and services and serve as the federal/local liaison. This position is responsible for the strategic planning efforts of the program, as well as leading in the consultation/technical assistance, and training from grantees/contractors with the local health departments, Universities, and community organizations. This position also provides technical assistance and programmatic direction to local health departments and other organizations for the development and evaluation of Chronic Disease prevention and control activities.

Policy Analyst Katie Jones	\$ 47,424	100%	12	\$ 47,424
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Job Description: Duties are to lead, support, monitor, and coordinate a wide range of complex strategic health policy and planning activities related to statewide worksite wellness efforts, with particular emphasis on evaluating, analyzing, researching and developing policies and programs that address the public health challenges presented by heart disease and stroke in the State of Maryland

Epidemiologist Xiao-Ying Yu	\$ 58,753	100%	12	\$ 58,753
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Job Description: Provide population-based epidemiological support for the Program, including processing and analyzing data to determine changes in trends and probable causes of epidemiologic problems, identifying existing data systems to assess morbidity and mortality associated with chronic diseases, leading the design, data collection and analysis of evaluations associated with programmatic initiatives, and implementation and evaluation of control or prevention measures.

Fringe Benefits

Total Salaries	\$ 157,232			
FICA (based on salary)		7.31%	\$	11,494
Retirement (based on salary)		14.35%	\$	22,563
Health Insurance (per person)			\$	8,887
Retiree's Health (per person)			\$	4,977
Unemployment Insurance (based on salary)		0.28%	\$	440
Total Fringe			\$	76,089

Travel

In-State Travel:	\$ 1,413			
25 trips x 100 miles avg.	2,500	miles at	0.565 \$ per mile	1,413

In-State travel is needed to cover the costs of local trips over the year for two staff. In-State travel expenses may be incurred during trips for meetings, community activities, network and partnership development, and quality assurance activities related to the program.

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Out-of-State Travel: \$ 22,626

Out-State travel is needed to cover the expenses of mandatory meetings that will enhance the knowledge and/or capabilities of program staff to more effectively manage the State Public Health Actions to Prevent and Control Diabetes, Heart Disease, Obesity and Associated Risk Factors and Promote School Health Program in Maryland. Expense dollars requested included:

Nine staff to attend an orientation meeting in March, 2014 in Atlanta and includes representation by the state department of health leads for nutrition, physical activity, school health, heart disease, diabetes, the Chronic Disease Director, the state education agency school health lead, FOA evaluator, and the communication lead:

Lodging:	\$	150 night x 3 nights x 9 people	\$	4,050
Meals:	\$	44 day x 3 days x 9 people		1,188
Airfare:	\$	250 x 9 people		2,250
Registration:	\$	350 x 9 people		3,150
Miscellaneous:	\$	75 x 9 people	\$	675
			\$	11,313

Nine staff to attend the program update meeting TBD:

Lodging:	\$	150 night x 3 nights x 9 people	\$	4,050
Meals:	\$	44 day x 3 days x 9 people		1,188
Airfare:	\$	250 x 9 people		2,250
Registration:	\$	350 x 9 people		3,150
Miscellaneous:	\$	75 x 9 people	\$	675
			\$	11,313

<b>Equipment</b>				Total \$
<b>Supplies</b>				Total \$ 1,250

General office supplies (pens, pencils, etc.) for 5 staff @ \$250 each \$ 1,250

Office supplies are needed to carry out activities included in the Maryland Program's Work Plan for this twelve-month budget period. Items include but may not be limited to stationery, writing instruments, computer and fax per, computer disks, printer cartridges, labels, envelopes, and meeting materials.

Health education and Communication Materials \$ 676  
 Communication materials and resources specific to each domain will be developed and outreach efforts carried out. This will include: material development (written and online) and printing for Maryland specific consumer education information, updating online materials (website) and providing technical assistance to ensure support for delivery of health messages while creating healthier food environments.

<b>Contractual Costs</b>			Total \$ 77,318
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University of Maryland, Baltimore (UMB) \$ 77,318  
 Erica Smith

Name of Organization: University of Maryland, Baltimore  
 Method of Selections: Memorandum of Understanding/Sole Source Contract  
 Period of Performance: 12 months

Scope of Work: UMB will provide staff support to DHMH's Center for Chronic Disease Prevention's evaluation efforts associated with programmatic initiatives and provides scientific and/or technical advice and assistance to resolve barriers to program delivery. Staff will also manage daily operations of all Coordinated Chronic Disease (CCD) components, including contract oversight of integration activities in collaboration with the Department of Cancer surveillance and Control.

Method of Accountability: UMB will be paid quarterly upon successful completion of activities, invoices, and progress reports to the Department.

Justification: Staff is required to provide evaluation support to complete program activities.

Salary	\$	54,880
Fringe @ 31.67%	\$	17,380
Sub-total	\$	72,260
Indirect @ 7%	\$	5,058
Total	\$	77,318



## Maryland Department of Health and Mental Hygiene

Martin O'Malley, Governor - Anthony G. Brown, Lt. Governor - Joshua M. Sharfstein, M.D., Secretary

### Prevention and Health Promotion Admin

Michelle Spencer, MS, Director

Donna Gugel, MHS, Deputy Director

Hise D. Marrazzo, RN, BSN, MPH, Director, Maternal and Child Health Bureau  
Deborah B. McGruder, MPH, PMP, Director, Infectious Disease Bureau  
Clifford S. Mitchell, MS, MD, MPH, Director, Environmental Health Bureau  
Donald Shell, MD, MA, Director, Cancer and Chronic Disease Bureau

## INTERNAL MEMORANDUM

**TO:** Xiao-Ying Yu  
**FROM:** Sara Barra *SB*  
**DATE:** March 31, 2014  
**RE:** Further clarification of appropriate work contacts

The purpose of this memo is to reiterate appropriate and inappropriate work contacts.

You are a State of Maryland employee assigned to work on CDC State Public Health Actions (1305) grant in Maryland; you are not a CDC employee nor is the CDC in your chain of command. As an employee of the State of Maryland, you have been given a MS-22, which documents your work responsibilities and includes the appropriate level, frequency, and purpose of work contacts. Your current MS-22 was signed by Michelle Spencer, PHPA Director on July 24, 2013, which supersedes all previous MS-22s.

In your MS-22, you were given a list of appropriate daily contacts, such as your supervisor, CCDPC staff, the CCDPC Medical Director, and the CCDPC Director. In the same MS-22, you were also given a list of contacts that you should only contact as requested by your supervisor, the CCDPC Medical Director, or the CCDPC Director. This list includes:

- o Cancer and Chronic Disease Bureau Director
- o PHPA Director and Deputy Director
- o PHPA/DHMH Program Directors
- o Other DHMH staff
- o Local Health Officers and Local Health Department staff
- o Entities external to DHMH (e.g. MSDE, University of Maryland, and other State agencies, as well as CDC, NACDD, ASTHO, and any other funders/potential funders)

The Centers for Disease Control and Prevention and the National Association of Chronic Disease Directors are external entities to DHMH and should only be contacted upon the request of your

201 W. Preston Street, Baltimore, Maryland 21201  
410-767-6742 • Fax 410-333-5995  
Toll Free 1-877-4MD-DHMH • TTY for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

500 N. Calvert Street, 5<sup>th</sup> FL Baltimore, Maryland 21202  
410-767-5227 • Fax 410-333-6335 • Toll Free 1-800-358-9001  
1-800-201-7165 Voice for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

Web Site: <http://ohpa.dhmh.maryland.gov>

128 USCA4

supervisor, the CCDPC Medical Director, or the CCDPC Director. In your role on the 1305 team, I direct you to participate as a team member on NACDD and CDC webinars and conference calls specific to epidemiology and evaluation for this grant.

It is critical that all staff work collaboratively on our CCDPC team and represent the CCDPC professionally internally and externally. If you continue to contact CDC and/or NACDD outside of webinars and conference calls without being directed or requested to by your supervisor, the CCDPC Medical Director, or the CCDPC Director, progressive discipline will ensue.

All questions and clarification on this matter should be directed to me on appropriate and inappropriate contacts.

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Complaint-Ex-P91

On Fri, Apr 18, 2014 at 2:02 AM, Xiao-Ying Yu -DHMH- <xiao-ying.yu@maryland.gov> wrote:  
Hello, Sara,

As your invitation, I have attended this communication meeting in the afternoon 4/15/2014 at 4-4:30 p.m. and received your memo dated on 3/31/2014. You stated that the meeting is only related to 4/11/2014 (Friday my e-mail) in your invitation, but you addressed during the meeting about the e-mail I sent to CDC Ms. Patricia Schumacher on 3/11/2014 to check her e-mail list on 2/26/2014 with CDC guidance for 1305 program epidemiology, evaluation, progress report and working plan because I previously received her e-mail.

I received your memo at 4:30 p.m. after our meeting on 4/15/2014, however I just realized that your memo dated as 3/31/2014, which I have scanned in our office in the evening of 4/15/2014 and sent Union Mr. Yarbor and Mr. McNally in the midnight of 4/15/2014.

In your 4/15/2014 memo, you changed final revised and signed version of MS22 (7/24/2014) in the description of contacts back to your initial version edited MS22 on 6/12/2013 with your restriction for all list of contacts (I made edits on page 3 of your initial revised version of MS22). Since you stated that your final revised MS22 supersedes all previous MS-22s, and Ms. Kristi Pier came our office as our new director only half month, perhaps, it is better to attach the MS22s you mentioned in your memo 4/15/2014. please see the difference between my responding your e-mail for revising MS22 with my e-mail and edits on 7/18/2013 and final your signed MS22. I also would like to attach the initial MS22 (when I was epidemiologist I in 2009) and MS22 (1/2011) when I was epidemiologist II as the references to compare: 1) job duties, 2) level, frequency and purpose of work contacts and 3) performance standards.

In fact, as every one know including you, my co-workers, DHMH leaders, CDC and NACDD officer related to HDSP and diabetes programs, I have been working for almost 4 years according to previous MS-22 and participated in internal and external various activities through all contacts with encouragement by ex-directors Dr. Audrey Regan and Dr. Donald Shell to benefit to our office programs, presentation and abstracts for further publications without any problem as you initiated in your memos.

Best regards,  
Xiao-Ying

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Complaint-Ex-192

Exhibit 23c.

Because Ms. Yu requested to access the medical care database at program staff meeting in March 2014 as other co-workers, she was interrupted by Ms. Barra. Then, Ms. Barra generated additional internal memorandum to restrict Ms. Yu's working condition and interfered with her job on 3/31/2014. Ms. Barra required Ms. Yu to attend the personnel meeting with her and new office director, Ms. Kristi Pier on 4/15/2014 and released her internal memorandum. Ms. Yu wrote the clarification to Ms. Barra on 4/18/2014 and she did not hear Ms. Barra's response for a week. So, she wrote email and sought DHMH managers' (who attended the mitigation meeting on 4/22-23/2014) and Union representative and director's help and protection on 4/25/2014. Ms. Barra retaliated against Ms. Yu and initiated 4<sup>th</sup> disciplinary action.

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH** <xiao-ying.yu@maryland.gov>  
Date: Fri, Apr 25, 2014 at 11:22 AM  
Subject: Re: Invitation: Communication meeting @ Tue Apr 15, 2014 4pm - 4:30pm (xiao-ying.yu@maryland.gov)-Urgent: respond for the memo sent to me at the communication meeting  
To: Sara Barra -DHMH- <sara.barra@maryland.gov>, Kristi Pier -DHMH- <kristi.pier@maryland.gov>, Donald Shell -DHMH- <donald.shell@maryland.gov>, Richard Stringer -DHMH- <richard.stringer@maryland.gov>, "gyarbor@mcea.org" <gyarbor@mcea.org>, Michael McNally <mmmbjm@live.com>

Dear all,

I am in receipt of the internal memorandum from Ms. Sara Barra as of 4/15/2014 (at the Communication meeting but dated 3/31/2014). I would like to clarify some problems with this memorandum:

1. As a full time state employee working epidemiologist for Maryland 1305 basic and enhanced program, I should be provided by Ms. Barra, my supervisor about CDC instructions related to the evaluation plans and performance measures and allowed to participate all activities of 1305 program as epidemiology and surveillance is instructed by CDC as the core domain working through the domain 2, 3 and 4 (stated in CDC officer 2/26/2014 e-mail and attached documents). Ms. Barra provided all information related to 1305 program to my co-workers including the evaluator except me as she always has done to me that I reported to CCDPC director and Union since last year. However, Ms. Barra stated that "you are not a CDC employee nor is the CDC in your chain of command" to intentionally create the confusion to mislead CCDPC, CCDB, PHPA and DHMH leaders again by using "cross chain of command" she has frequently used since 1/2013 as well as the memo on 10/10/2013 to prevent me from doing the job duties as revised MS-22. Therefore, to clarify, I have only checked CDC about e-mail list on 3/11/2014 from the CDC officer, who I have received e-mails and communicated with in the past but have not received e-mails from her lately. I have not reported detail about 1305 project work to CDC anyone. Checking references and e-mail list is not related to "cross the chain of command" as Ms. Barra stated. Doing my job for ex-CCDPC directors in the past was based on "Daily to weekly provide recommendations and information to CCDPC director"

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JRB-PP-CV-3260  
Complaint-Ex-993

(which is stated in my previous and current MS-22). "Reporting to next level of management when I have had issues with my immediate supervisor, Ms. Barra is my employee right (as instructed by Union Labor specialist on 10/18/2013. This, however, has intentionally been turned up and down and confused "cause-unfair treatment" and consequence result: seeking protection" and manipulated as "cross chain of command".

2. Ms. Barra addressed the contacts in the signed MS-22 (7/24/2013) that "supersedes all previous MS-22s." This is not true because Ms. Barra's revised MS-22 deleted all projects in performance standards, major epidemiologist professional duties and skills, and restricted epidemiologist basic working conditions to communicate, exchange, educate, and dismiss public health information (this is also addressed and restricted by this memo).

3. Ms. Barra addressed in the memo "In the same MS-22, you were also given a list of contacts that you should only contact as requested by your supervisor, the CCDPC Medical director, or the CCDPC director. This list includes: Cancer and Chronic Disease Bureau Director, PHPA director and deputy director, PHPA/DHMH program directors, Other DHMH staff, local health officers and local health department staff and Entities external to DHMH (e.g. MSDE, University of Maryland, and other State agencies, as well as CDC, NACDD, ASTHO, and other funders/potential funders)". This is not true. In finalized and revised MS-22, Ms. Barra has deleted "as request by supervisor, the CCDPC Medical director, or the CCDPC director" and changed to only focusing on "as requested to provide recommendations and information" to various internal and external officers. This changes was after I have made some comments about my work interfered by her restriction in the revised MS-22 because none of my co-workers and DHMH employee have been prevented from the interaction including myself since I have worked as "epidemiologist I" from 2009 (the 4 of MS-22s have already been forwarded to you on 4/22/2014 as reference immediately after I received your notice of disciplinary action). Ms. Barra has intentionally and frequently provided CCDPC, CCDB, PHPA and DHMH leaders untruthful information and confusion to mislead DHMH to cover and defend her hostile behaviors related to discrimination, unfair employment practice and retaliation after I reported to ex-CCDPC director, Union and EEOC.

4. Ms. Barra confused the following: instead of "as requested to provide information, recommendations " to all contacts (stated in revised MS-22), Ms. Barra changed the restriction as "as requested by your supervisor, the CCDPC Medical director, or the CCDPC director" for all internal and external contacts in her memo. This was only in her 6/12/2013 revised version of MS-22 but not the current revised and signed MS-22 on 7/24/2013.

5. Ms. Barra addressed that "In your role on the 1305 team, I direct you to participate as a team member on NACDD and CDC webinars and conference calls specific to epidemiology and evaluation for this grant". However, 1305 is a combination with heart disease, stroke, diabetes and all other risk factor, epidemiology and evaluation is core of evidence based public health practice which involving and including program design, planning, monitoring, intervention, implementation, evaluation and policy making. Isolating and separating epidemiology and evaluation connected with program will bring the negative impact on our office 1305 program, which has been instructed by CDC.

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JKB-17-CV-3260  
Complaint-Ex-194

6. Ms. Barra created the confusion about the communications in work related and personal friendship. Communication is the key for epidemiologists in public health -- not only during webinars or conference calls but *also* after meetings to exchange information. Ms. Barra addressed it in her memo as, "If you continue to contact CDC and /or NACDD outside of webinars and conference calls without being directed or requested to by your supervisor, the CCDPC Medical Director, or the CCDPC Director, progressive discipline will ensure." This is not stated in the revised MS-22. Since 2009 I started working in DHMH chronic disease prevention and control for heart disease, stroke program then soon for all chronic diseases program including diabetes, I have appreciated all opportunities I have been given. I have tried my best to represent our office as CDC/NACDD/CSTE invited/supported as well as our office and DHMH supported to present our work at CDC DHDSP, CDC DDP and CSTE various conferences and contributed to all activities through differ ways and all contacts without any restriction but encouraged and supported by CCDPC ex-directors. I have not heard any negative impacts I have brought to CDC/NACDD or any partners related to our office and DHMH till 7/25/2014 Ms. Barra gave me the revised MS-22 with all restrictions. Some facts of negative impact on entities since 2011 including CDC, NACDD, other organizations and partners have been reported to you before the "mitigation meeting " on 4/21/2014. This is indicated that the negative impact on DHMH, CDC, NACDD and other organizations are not from me. Therefore, I have not understood why Ms. Barra has given me all restrictions in her revised MS-22 and in her memos on 10/10/2013 and 3/31/2014 (gave it to me on 4/15/2014).

In summary, because of the inaccurate information in the memo, my basic working conditions have and continue to deteriorate. This is yet another effort to alienate me and create a hostile working environment. For your convenience, I would like to attach the memos dated on 10/10/2013 and 3/31/2014, the summary of impact including the current signed MS-22 (I received on 7/25/2013 and Ms. Barra sent to me again on 4/23/2014) as your reference.

Your kind attention and consideration for this matter will be highly appreciated!

Sincerely yours,

Xiao-Ying



## Maryland Department of Health and Mental Hygiene

Martin O'Malley, Governor – Anthony G. Brown, Lt. Governor – Joshua M. Sharfstein, M.D., Secretary

## Prevention and Health Promotion Admin

Michelle Spencer, MS, Director

Donna Gugel, MHS, Deputy Director

Ilise D. Marrazzo, RN, BSN, MPH, Director, Maternal and Child Health Bureau  
Deborah B. McGruder, MPH, PMP, Director, Infectious Disease Bureau  
Clifford S. Mitchell, MS, MD, MPH, Director, Environmental Health Bureau  
Donald Shell, MD, MA, Director, Cancer and Chronic Disease BureauINTERNAL MEMORANDUM

**TO:** Xiao-Ying Yu  
**FROM:** Sara Barra  
**DATE:** May 20, 2014  
**RE:** Notice of Disciplinary Action Explanation

This memo is an explanation of the Notice of Disciplinary Action approved by Donna Gugel, the Appointing Authority, at the May 16, 2014 mitigation meeting regarding inappropriate e-mails written to and about me, your immediate supervisor. Work related emails must be professional, courteous, and not include personal information or opinions that are not relevant to the topic of the email.

On April 23, 2014, I sent you an email reiterating the need to follow your current MS-22. It is appropriate for me, your supervisor, to create a MS-22 that best meets the need of the Center for Chronic Disease Prevention and Control. This MS-22 has been approved by management and the Office of Human Resources; you must adhere to this MS-22.

Your email response to me, management, and Union representation on April 25, 2014 was inappropriate. Your criticism of me as hostile and the insinuation of intentionally and repeatedly providing untruthful information to supervisors and fellow employees to mislead is unprofessional and unacceptable, and should not be expressed through any communication sent on State of Maryland property.

According to the State of Maryland Information Security Policy v3.1 (p 30-32), sending inappropriate or defamatory emails utilizing the DHMH system is unacceptable, and contrary to the agreement required by each employee to use the system. If this inappropriate use of email continues, progressive discipline will ensue.

201 W. Preston Street, Baltimore, Maryland 21201  
410-767-6742 • Fax 410-333-5995  
Toll Free 1-877-4MD-DHMH • TTY for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

500 N. Calvert Street, 5<sup>th</sup> Fl, Baltimore, Maryland 21202  
410-767-5227 • Fax 410-333-6333 • Toll Free 1-800-358-9001  
1-800-201-7165 Voice for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

Web Site: <http://phpa.dhmh.maryland.gov>



Appendix 19A

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JKB-17-CV-3260  
Complaint - Ex - PVAO

[REDACTED]



STATE OF MARYLAND  
**DHMH**

Maryland Department of Health and Mental Hygiene

Martin O'Malley, Governor - Ant

4. Sharfstein, M.D., Secretary

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- Ilise D. Marrazzo, I
- Deborah B. McG
- Clifford S. Mitchell, MS, MD, MPH, Director
- Donald Shell, MD, MA, Director, Cancer and Chronic Disease Bureau
- Child Health Bureau
- Disease Bureau
- tal Health Bureau

INTERNAL MEMORANDUM

**TO:** Jennifer English

**FROM:** Sara Barra

**DATE:** May 19, 2014

**RE:** Employee referral to the State Medical Director

I am concerned about my employee, Ms. Xiao-Ying Yu, and her erratic behavior, which has increased in recent months and weeks, and am requesting a referral to the Medical Director. While I am concerned for Ms. Yu, I am also worried about the resulting impact of Ms. Yu's behavior on the Center for Chronic Disease Prevention and Control (the Center), the work that needs to occur, and the effect on the Center team. Ms. Yu has demonstrated many concerning and disruptive behaviors, such as:

- o Repeatedly calling the Cancer and Chronic Disease Bureau Director's work cell phone during and after hours as many as five times in one week, when expressly told on multiple occasions not to call the Director after hours;
- o Repeatedly claiming that OIT removed files from her computer/shared drives and e-mails from her work e-mail account, resulting in her sending many work e-mails to her personal e-mail account
- o Repeatedly calling/e-mailing external partners so that other partners have specifically asked not to work with her to the point that at least one partner (our major funder) refused to answer phone calls from the Maryland area code;
- o Difficulty moving on after the Center made decisions contrary to her wishes/ recommendations, such as not applying for certain grant opportunities;
- o Continuing to present/revisit irrelevant information on old issues and refusing to accept explanations on how these issues have been resolved;
- o Repeatedly refusing to accept information indirectly through her co-workers, management, the CDC project officer, or me, because she appears not to trust the information is valid and/or complete;
- o Continually calling out co-workers and management, in group emails and meetings, for not including her in meetings and projects, even when presented with evidence she was included;

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Maryland Relay Service 1-800-735-2258 or 711

500 N. Calvert Street, 5<sup>th</sup> Fl, Baltimore, Maryland 21202  
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1-800-201-7165 Voice for Disabled  
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Web Site: <http://phpa.dhmh.maryland.gov>

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- o Cornering co-workers and management to argue with them after they repeatedly asked her to leave their offices/cubicles;
- o Repeatedly stopping by management and internal DHMH staff offices (inside and outside the Center) so often these personnel have changed their behavior to avoid unwanted contact with the employee, such as keeping their doors shut;
- o Continuing to claim to Center staff, management, and other DHMH staff she is not given the same rights as other epidemiologists in DHMH or other states, even when given repeated explanations by management as well as reviewing duties detail in her MS-22, that as determined by the Office of Human Resources appropriate for her classification;
- o Refusing to follow the chain of command to work with me, her supervisor, after repeatedly being told to do so and soliciting other staff/management to become her supervisor.

These behaviors have resulted in several disciplinary actions by the Center. The Center took the extra step of providing Ms. Yu with a memo specifying appropriate and inappropriate internal and external contacts for future clarity.

In addition to these concerning behavioral issues, Ms. Yu has recently missed a substantial period of time for sick leave. The documented doctor's notes presented to me say "I will determine if she is able to return to work"—this nebulous language creates a strain on the Center to cover Ms. Yu's work responsibilities with no clarity on when or if she will be able to return to her regular job duties. There is uncertainty of a short or long-term return, as medical documentation is being provided one week at a time. When medical documentation submitted by Ms. Yu ended on May 12th, she returned to work on May 13th. Ms. Yu came into the office, and sent an email 30 minutes after receiving a meeting notice, stating she needed to leave for a unscheduled doctor appointment and would not return until the doctor released her. Ms. Yu later sent an email explaining her doctor instructed her to be out of the office from May 1<sup>st</sup>-May 19<sup>th</sup> and her doctor was unaware she was in the office the morning of May 13<sup>th</sup>. This is extremely troubling as she cannot be working against doctor's orders and I only became aware of the doctor's orders when the employee shares them with the Center.

In conclusion, Ms. Yu has been on sick leave for a substantial period of time and I am concerned about the impact of Ms. Yu's health and behavior on her work performance and office dynamics. I would appreciate the recommendation of the Medical Director to determine if Ms. Yu is able to return to work and if so, the time frame for her return, so the Center can plan for coverage of her work responsibilities.

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IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

BALTIMORE, MARYLAND  
2018 MAR 22 PM 11:38

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

Xiao-Ying Yu \*  
Plaintiff \*  
v. \*  
Maryland Department of Health \*  
Secretary: Dennis Schrader<sup>1</sup> & \*  
Maryland Department of Budget & \*  
Management \*  
Secretary: David Brinkley \*  
Defendants \*

Case No. 17-cv-3260-JKB

FILED  
LODGED  
ENTERED  
*Night drop*  
RECEIVED  
MAR 22 2018  
CLERK U.S. DISTRICT COURT  
DISTRICT OF MARYLAND  
*Ku*

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PLAINTIFF'S RESONSE TO  
DEFENDANTS' MOTION TO DISMISS

Plaintiff, Xiao-Ying Yu, ("Ms. Yu", or "Plaintiff") opposes defendants' motion to dismiss with prejudice. After receiving a letter from the EEOC (dated October 16, 2017, supporting doc. #1), Plaintiff, proceeding pro se, brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e seq., the Age Discrimination in Employment Act, 29U.S.C. § 621, e. seq., 42 U.S. Code § 12101, The American with Disabilities Act Law (a)& (b), and Section 504 of the Rehabilitation Act to remedy acts of harassment, discrimination and retaliation perpetrated against her by Maryland Department of Health and Department of Budget

<sup>1</sup> Because Dennis Schrader was the Secretary when Plaintiff filed her complaint on 11/2/2017, Mr. Schrader was included as one of defendants in the capacity of the Department of Health in Plaintiff's initial and updated complaints. Current Secretary is Mr. Robert Neill.

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and Management. This Court has subject matter jurisdiction in this matter and has been processing civil employment discrimination cases against the Department of Health for several years (Ying-Jun Chen v. Maryland Department of Health and Mental Hygiene, et al, case No.15-cv-01796-ELH). The complaint sufficiently demonstrated the alleged harm and damages that were caused by the defendant's "Disparate treatment" due to ethnic and national origin discrimination. This discrimination is similar to the way that the Maryland Department of Health treated Ying-Jun Chen; both Ying-Jun Chen and I experienced retaliation by the department after filing charges of racial, ethnic, national origin with EEOC, in addition, I also suffered age, and disability discrimination and retaliation.

There is significant genuine evidence supporting the concealment of Plaintiff's protected activity and defendants' adverse action, and the facts demonstrate that the causal links between Plaintiff's protected activity and defendants' actions were manipulated in the defendants' motion to dismiss. Therefore, the required conditions for a summary judgment under Rule 56 have not been met. It is also apparent that according to the Eleventh Amendment, Maryland State agencies can not be immune to suits alleging retaliation under Title VII, ADEA and ADA as well as First and Fourteenth Amendments in the Federal District Court. Rejection of mediation and settlement, as recommended by the EEOC, by the defendant pushed the Plaintiff to file suit in Federal district court, and the defendant consented to this suit by receiving a copy of EEOC's lawsuit letter and by receiving her application of suspension of

order and reconsideration during Nov. 2017 in which Plaintiff stated her concerns of the negative impact of the denying her petition on the current suit in this Court. Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendants' motion to dismiss and asks the Court to provide relief for the damages to Plaintiff caused by defendants' discrimination and retaliation.

## I. FACTS

### A. Critical factual Summary

1. Plaintiff is in a protected class (Asian American, over 60, and with a disability);
2. Plaintiff engaged in protected activities: she opposed unlawful and discriminatory employment practices (such as discriminatory reclassification of her job position as Epidemiologist III causing underpayment and depriving her of job responsibilities) by filing reports to managers and appeals with both departments (Complaint, "Comp." p. 2-3) and by filing charges of age, racial discrimination and retaliation with EEOC in Nov. 2013;(Comp. p. 2-5);
3. Plaintiff received defendants' adverse actions (such as unwarranted disciplinary action) on the day immediately after she sent accusatory emails to managers and two months from the date of her filing of charges under Title VII and ADEA with EEOC (Comp. p. 5-9) between January and August 2014.
4. Plaintiff became ill due both to escalating hostility in her working environment and to retaliation; she filed her second charge with EEOC for disability

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discrimination and retaliation under ADA as well as ethnic and national origin and age discrimination and retaliation under Title VII and ADEA in September 2014 (Comp. page 10, see supporting document #2)

5. Defendants immediately initiated retaliation (such as rejection of accommodations, refusal of reassignment to the epidemiologist position she applied for, and rejection of using employee leave time donated by Plaintiff's friend during the interactive accommodation process) on the day immediately after they received the Plaintiff's EEOC charge on September 2, 2014. Defendants consequently changed the organization of the office as a pretense that ultimately prevented Plaintiff from returning to work under different supervisor in a less hostile environment. This action led to unlawful termination without the benefit of mitigation and reassignment or rehiring and to continued retaliation for protected activities while Plaintiff's EEOC's investigation was pending (Comp. p.10-12).

### **B. Disputed and undisputed facts**

1. In Defendants' memorandum of law in support of defendants' motion to dismiss ("DML"), on page 3, 2<sup>nd</sup> paragraph, defendants stated "Ms. Yu's complaint attempts to assert one tort-based cause of action and two employment-based causes of action." In addition, defendants' conclusion that "there is no the cause of action for 'willful underpayment'" confused the issue because they omitted Plaintiff's description (complaint page 2-10) of how the manager (former Medical Director Maria Prince) discriminatorily gave an Epidemiologist III Position Identification

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Number, which was created expressly for Ms. Yu by Department of Health and Department of Budget and Management, to Ms. Sara Barra, (who is Caucasian and at least 20 years younger than Plaintiff), causing Plaintiff's underpayment.

In fact, Plaintiff filed her appeal and wrote a letter to former Secretary Dr. Joshua Sharfstein regarding retaliation and the deprivation of her reclassification and fair payment on February 18, 2014. Thus, the manager's refusal to correct the underpayment (due to discriminatory reclassification of the Epidemiologist III position that was approved by two Departments explicitly for Ms. Yu) represents racial and age discrimination and retaliation against Plaintiff's engaging in protected activities (filing of a charge with EEOC on 11/12/2013) under 42 U.S.C. §§ 2000e et seq. Title VII of the Civil Rights Act of 1964 Law (c) and ADEA 29 U.S.C. 621.

2. In DML, on page 4, paragraph 3, defendants stated that "Ms. Yu received her right to sue letter on Nov. 26, 2013... Ms. Yu would have had to sue by February 24, 2014 for discrimination at age and race with retaliation charge under Title VII, ADEA. Id. A claim based on anything that allegedly occurred on or before February 24, 2014 is now time-barred."

Plaintiff disagrees with this statement. In fact, after Plaintiff engaged in protected activities by filing her first charges with EEOC, and she received a letter from EEOC regarding the unlawful employment practices on November 12, 2013, Plaintiff sent her complaints about Ms. Barra's progressive hostile, discriminatory and retaliatory behavior to the director of the Office of Equal Opportunity Program in

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the Dept. of Health on February 2, 2014 to seek help. However, she received the first of unwarranted disciplinary actions on February 3, 2014, and this action was followed by another four disciplinary actions within about four months to retaliate against Plaintiff's engaging in protected activities, which caused Plaintiff's health problem. Plaintiff further filed her appeal and a second charge with EEOC under Title VII, ADEA and ADA on September 3, 2014 about the escalated harassment, discrimination and retaliation which occurred in 2014 prior to receiving defendants' decision about her request for accommodation. Plaintiff should have a right to file her claim for these adverse actions<sup>2</sup> with EEOC within 300 days from the time the adverse action occurred following her first charge with EEOC on Nov. 12, 2013. Therefore, it is not time-barred for her to file these adverse actions (which filed with EEOC on Sept. 3, 2014 and amended afterwards see her rebuttal, supporting doc.#3) in this Court based on EEOC's lawsuit letter (dated 10/16/2017, see supporting document#1).

3. On page 4 of DML, in paragraph 4, defendants stated Ms. Yu "was terminated on November 3, 2014... Ms. Yu filed this lawsuit on November 6, 2017...Any tort-based claim that accrued during her employment is now time-barred by the applicable statute of limitations". Plaintiff disagrees with this statement,

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<sup>2</sup> Defendants ignored Plaintiff's retaliation charge filed under Title VII, ADEA and ADA with EEOC on Sept. 3, 2014 and concealed facts of immediate retaliation from defendant (initiation of disciplinary actions, rejection of accommodation, rejection of using the employee's leave donated by her friend and blocking her access to office email) against Plaintiff after they received Plaintiff's complaints to managers on Feb. 2, 2014 and to EEOC on September 3, 2014.

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because defendants misrepresented and misinterpreted Plaintiff's complaint Count I as a "tort-based claim" instead of focusing on the discriminatory and retaliatory actions led by an unwillingness to correct for the underpayment and mis-reclassification of positions (Epidemiologist III) after Plaintiff reported discriminatory actions to managers and filed charges with EEOC as described.

In addition, Plaintiff filed her initial complaint with this Court by certified mail on November 2, 2017 after she received EEOC's lawsuit letter (dated 10/16/2017). Federal Courts, including Supreme Court of United States, inform Citizens to file their complaints via post office or hand delivery by the deadline as they do not allow citizens pro se to file electronically. Plaintiff could not know that the Federal District Court of Maryland is an exceptional case as the Court did not specify in their website that the date of certified mail submission of a complaint of a Maryland citizen filing pro se is not accepted as a filing date. The docket date at ECF 1 regarding Ms. Yu's initial complaint was the date of receipt (November 6, 2017) by the Court.

4. In DML, on page 4, paragraph 5, defendants stated, "From 2010 through 2012, Ms. Yu complained of issues that she alleges were related to her job classification, salary and unfair treatment." Plaintiff would like to clarify the confusion created by the defendants. In order to clearly stated her count I (willful underpayment), which was associated with her appeal and the letter to former Secretary Dr. Sharfstein on Feb. 18, 2014 (Comp. p.2 and exhibit #1), Plaintiff described the background and cause of the underpayment and mis-reclassification of

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an Epidemiologist III position as described above briefly and detailed in her complaint (page 2-3). Plaintiff did not complain of issues as defendants' statement alleges about "her job classification, salary and unfair treatment" between 2010 and 2011. In fact, Plaintiff tried her best to do the extra job duties and bore unfair deprivation by Dr. Prince of her right to be reclassified as Epidemiologist III and underpayment, except for a letter written to Dr. Prince in February 2011 and for expecting to receive a non-competitive classification to Epidemiologist III in 2012 as promised by Dr. Prince.

5. In DML, page 5, paragraph 2, defendants stated "Ms. Yu then alleges that she was the victim of retaliation between 2012 and 2014", and mixed adverse actions filed with EEOC in 2013 and in 2014 together in an effort to support their conclusion that Plaintiff's complaint is time-barred. Plaintiff generated genuine and serious material facts demonstrating that Plaintiff is the victim of intentional harassment, discrimination and retaliation for protected activities initially performed during 2012 (prior to working under the supervision of Ms. Barra), and her first EEOC charge in 2013 represents the background for these claims (see Comp. p. 2-4). This sequence is a useful tool to help identify the real issue, which is the escalated adverse actions in 2014, and the retaliation is continued and worsen after Plaintiff filed her second charge of retaliation with EEOC on September 3, 2014 under Title VII, ADEA and ADA and further brought this lawsuit in the Court under EEOC's instruction. In fact, defendants omitted the key issue that Plaintiff filed her grievance in August 2013 and

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the charge with EEOC in November 2013 because her job duties form MS-22 was unlawfully changed and restricted: major responsibilities relating to heart disease, stroke, and diabetes within the CDC 1305 program were deleted and performance standards were inappropriately changed by Ms. Barra from professional skills to “writing” skills, as she believes that the fact that English is a second language for Plaintiff would result in poor performance reviews.

Regarding the five disciplinary actions, Plaintiff alleges that defendants selectively hid Ms. Barra’s ethnic and national origin discriminatory actions by sending a warning email after 7:00 p.m. on Chinese New Year’s Eve (1/31/2014) to disturb Plaintiff’s ethnic cultural tradition despite the fact that Ms. Barra approved Plaintiff’s desire to take off half day to celebrate on January 31, 2014. Furthermore, defendants concealed the fact that Ms. Barra initiated (2/3/2014) the first of these progressive disciplinary actions in retaliation for Ms. Yu’s complaint to office managers about Ms. Barra’s harassment and discrimination on 2/2/2014. This was also based on Ms. Barra’s memorandum of October 10, 2013 that demonstrated adverse action against Plaintiff’s grievance (8/14/2013) concerning the deletion for the responsibilities in her job description and prevention Plaintiff from doing her job and seeking help against Ms. Barra’s horsetail interference. However, defendant did state that the cause of one of the disciplinary actions was due to “violating the cyber communication policy” as Ms. Barra stated on May 20, 2014 (see Comp. p.6, exhibit#15, #18 &19). This allegation by Ms. Barra is not true. In fact, Plaintiff wrote

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an email to office managers and the Union director and representative who participated in the mitigation of disciplinary action to clarify Ms. Barra's confusion in her memorandum of March 31, 2014<sup>3</sup>. Despite the claims of Ms. Barra, there was no prohibition in the official cyber communication policy of either department for an employee to write an email reporting to managers about a supervisor's harassment, discrimination and retaliation. Therefore, Ms. Barra's disciplinary action represents unlawful retaliation for plaintiff's email in which she engaged in protected activities. (see Comp. p. 6, under 4<sup>th</sup> disciplinary action and exhibit #23).

6. On page 5, paragraph 3 of DML, defendants described the Plaintiff's health problem. Yet, defendants did not fully state the facts of this issue. After Plaintiff filed retaliation charges with EEOC on Sept. 3, 2014 under Title VII, ADEA and ADA, defendants denied the diagnoses and rejected the recommendations of accommodation from State Medical Director Dr. Robert Toney.<sup>4</sup> Defendant concealed the facts that the hostile working environment created by Ms. Barra was not controlled or corrected by defendants' management but instead escalated in response to Plaintiff's engaging in protected activities, especially filing of charges

<sup>3</sup> Ms. Barra sent Plaintiff the memorandum (dated 3/31/2014) on April 15, 2014 to interfere with her job by creating confusions and restricting her communication with colleagues and doing her job for office director as job duties requested by HR form MS-22, but Ms. Barra refused to respond Plaintiff's clarification about her memorandum for a week. So, Plaintiff wrote an email to managers and union.

<sup>4</sup> Dr. Toney was required by Human Resources at Department of Health for workability evaluation twice and then HR approved Ms. Yu's FMLA. Dr. Toney's recommendation of accommodation was to allow Plaintiff to return to work under different supervisor, with which, other health provider and psychological Institute supported in order to separate the harasser, Supervisor Ms. Barra from Plaintiff and to accommodate Plaintiff's disability.

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with EEOC since Nov. 2013. In addition, defendants refused to respond to Plaintiff's request for accommodation that would correct the misclassification of Epidemiologist III and reassign the Epidemiologist III position for which she applied for and was evaluated by Human Resources as the "best qualified." Instead of accommodating her with respect to her health problems, defendants changed the office structure under the pretense of "undue hardship." This reorganization prevented Plaintiff from returning to work under a different supervisor, which would have remedied the situation, and instead led to her unlawful termination under false reasons and without mitigation.

7. Although disputes exist as described above, it is undisputed that defendants stated Plaintiff was the only Asian American (Chinese) and over 60 years old employee working as an epidemiologist for 5 years in Maryland Department of Health (notably, Plaintiff worked continually without complaints from her co-workers or customers).<sup>5</sup> It is also undisputed that Plaintiff is the victim of retaliation and that her health problems are caused by intentional discriminatory and retaliatory action including frequent confusion (not allowing Plaintiff to explain or clarify the discrimination); denial of job-required basic normal working conditions (blocking her access to databases and programs related to her job, and restricting her

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<sup>5</sup> Ms. Yu received satisfied or outstanding performance evaluations during 5 years of her service in the Department of Health except June 9, 2014 when Ms. Barra generated "unsatisfied" annual performance evaluation with false reasons including unable to teamwork and creating 4 memorandums and 5 disciplinary actions as retaliation against Ms. Yu's engaging in protected activities in order to terminate her.

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communications with others); harassment (refusing to use Ms. Yu's provided data for an office grant application and fact sheets for the office website for over two years and prevent her from attending a Counsel of State and Territory Epidemiologist conference even though she received an award and was invited for a round table discussion); abuse (exposing Ms. Yu's disciplinary actions in a publically-visible calendar); bullying (forbidding her from communication with other colleagues and preventing her from attending office program meetings, CDC officer site visits and conference calls); removing of forms from her personnel file (such as her job description and annual performance evaluations forms); and retaliation through downgrading her performance evaluation and creating 5 of disciplinary actions within approximately 4 months. Harassment by Ms. Barra included the sending of duplicate copies of disciplinary actions to Plaintiff and the calling of her cellular phone and leaving a message when Ms. Barra knew that Plaintiff was ill with mental health issues and at home (between May and June, 2014); Ms. Barra knew that these actions would worsen Plaintiff's health condition.

## II. ARGUMENT

**A. Retaliation as Key allegation and nucleus of three counts in Plaintiff's complaint is misrepresented, misinterpreted, concealed and disconnected.**

Defendants, Maryland Department of Health Secretary Robert Neill and Maryland Department of Budget and Management Secretary David Brinkley, moved

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to dismiss plaintiff's complaint with ten points. Defendants concealed the key allegation of "retaliation," which involved willful underpayment, refusal of accommodations for disability, wrongful disciplinary actions and unlawful termination. The retaliation was against Plaintiff's charges of racial, national origin, age and disability discrimination and retaliation filed with EEOC in 2013 and 2014 under Title VII, ADEA and ADA and was clearly stated as three counts in Ms. Yu's complaint but was misrepresented, misinterpreted and disconnected from each other by defendants as: "tort-based claim, disability discrimination and retaliation".

**B. Defendants supply no substantive proof to deny the alleged retaliation for relief.**

According to Rule 8 (2), in responding to the substance of a claim, "A denial must fairly respond to the substance of the allegation." In addition, (3) General and Specific Denials states that "a party that intends in good faith to deny all the allegations of a pleading -- including the jurisdictional grounds -- may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted." It appears that Defendants intend to deny all the allegations without conceding any part of the evidence of Plaintiff's complaint; yet, defendants misrepresented Plaintiff's complaint as a "tort-based claim", manipulated the time sequence of protected activities and adverse actions, ignored the evidence of "retaliation under Title VII, ADEA and ADA" (during 2014). Plaintiff was further

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pushed to file these retaliatory actions in this Court because the mediation program and settlement recommended by EEOC were rejected by defendant. The defendants' motion to dismiss supplies no substantive proof that initiation of disciplinary actions, refusal of correction of hostile environment and underpayment, and rejection of accommodations recommended by the State Medical Director (reorganizing the office structure) and consequent termination were not retaliation against Plaintiff's opposition to managers and to charges filed with EEOC for Ms. Barra's harassment, age, racial and national origin discrimination and retaliation under Title VII, ADEA and ADA. Defendants provide no evidence that these actions were due to neutral policy and correct employment practices.

Defendants' motion to dismiss cannot be used to deny the existence of the causal relationship in the "short" time sequence between defendants' adversarial actions and the Plaintiff's engaging in protected activities (see Comp p.6 and Exhibit #19&20; p.10 exhibit #31). The defendants did not address the substance or merits of the claim; instead, defendants requested the Court to dismiss Plaintiff's complaint by stating that Plaintiff, who filed the present claim pro se, did not file the complaint in the way that a professional attorney would (see Defs. Motion to dismiss. at p1. #2; .DML at p. 5-7).

The Plaintiff's complaint is not unintelligible or confusing and does not violate Federal Rule of Civil Procedure 8 (a)'s requirement of "a short and plain statement of the claim showing the pleader is entitled to relief." The complaint has a more than

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sufficient statement of the claim and more that meets the requirement that it be "short and plain"<sup>6</sup>. For example, on page 2. Plaintiff stated the claim of the underpayment, and its background and the cause, and also provided the defendants and the Court with "fair notice of what the Plaintiff's claim is and the grounds upon which it rests." Plaintiff clearly stated that the willful underpayment (see Comp. p. 2-4) linked to the discriminatory transgression of reclassification of the Epidemiologist III position. The Plaintiff clearly demonstrated that the underpayment was not corrected and retaliation was continued for Plaintiff's engaging in protected activities after she initially reported to the office director and then made complaint about the unlawful deprivation with underpayment to a former Secretary in Feb. 2014 (see Comp. P. 2-3, #1-7, exhibit #1-4)<sup>7</sup>. Therefore "Willful underpayment" is not a "tort-based claim" as defendant stated, but a claim about the intentional retaliation against her discrimination complaint. Then, Plaintiff stated that this discriminatory mis-reclassification and underpayment was also brought to Office of Equal Opportunity Program manager Ms. Delinda Johnson several times by emails and filed via an accommodation form during an interactive accommodation period between July and

<sup>6</sup> Defendants mistakenly refer to Fed. R. Civ. P 8(d)(1)'s "short and plain statement of the claim showing that pleader is entitled to relief", but make no reference to any deficiency throughout their motion regarding the failure of the claim to identify the causal-relationship between defendants' retaliation and Plaintiff's engaging in protected activities, how hostile working environment, discriminatory and retaliatory actions caused damages in Plaintiff's payment, career life and health which are entitled to relief Plaintiff requested for.

<sup>7</sup> Plaintiff initially reported to former office director Dr. Shell opposite the unlawful misreclassification of Epidemiologist in March 2012 and wrote to former Secretary in Feb. 2014 about underpayment when she filed the appeal against retaliation (the first disciplinary action) after she made charge with EEOC in Nov. 2013.

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September 2014 and that Plaintiff requested Ms. Johnson to reassign her to the Epidemiologist III position she applied for and for which she was evaluated as "best qualified" since July 2014 (see Comp. p.3 #8 and exhibit #4; p.10, exhibit #30-32).

In addition, in order to show the causal relationship between Plaintiff's protected activities (complaint about the harassment, unfair treatment and discrimination) and adverse actions, Plaintiff addressed her claim (as the request of the Court provided general form, under title 'fact of the claim', subtitle with italic type for 'the cause of this claim', on Comp. p.2) always in a consistent time sequence: under title "II. Reports of retaliation for engagement in protected activities" (Comp. p.3): First, Plaintiff emphasized who initiated discrimination; when Plaintiff had opposed the unlawful employment practice to managers; how a hostile working environment was created and escalated (see Comp. p. 2-5) prior to her filing charge with EEOC on 11/12/2013. Then, Plaintiff addressed what adverse action occurred against her after her EEOC charge in Nov. 2013 (see Comp. p. 6-7). Further, Plaintiff stated what chronic abuse and various hostile conditions caused her health problems after she reported to Department managers and Union and filed her charge of age and racial discrimination and retaliation with EEOC on November 12, 2013 (see Comp. p. 8-10) prior to her second charge with EEOC for the retaliation under Title VII, ADEA and ADA on 9/3/2014 (see Comp. p.7 under title III: brief introduction and page 10, at #7).

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Finally, Plaintiff clearly gave defendants fair notice of the charges against them (see Comp. under subtitle "...counts and allegations of damages..." with italic type page 10-13). Specifically, the complaint addressed retaliation and charged that defendants violated 42 U.S.C. §§ 2000 e. et seq. Title VII, Civil Rights Act of 1964 Law, ADEA, 42 U.S.C. §12101 (a) and (b) and EEOC Enforcement Guidance: Reasonable accommodation and undue hardship by: Count I. refusal to correct the underpayment due to the discriminatory transgression of reclassification of Epidemiologist III, Count II. allowing the hostile working environment to interfere with Plaintiff's job and to continue to damage Plaintiff's health by rejection of the accommodation request and consequent termination of her employment for her engaging in protected activities by filing discrimination and retaliation charge with EEOC under ADA in September 2014; and Count III. Summary of the important retaliation events against Plaintiff's charge with EEOC under Title VII and ADEA after Nov. 2013 such as initiation of progressive disciplinary action to damage Plaintiff's life and career immediately after her reports to Department of Health Office of Equal Opportunity Program and her charge filed with EEOC in Nov. 2013. Plaintiff also included those critical adverse action which greatly impacted her career and life and are directly related to adverse actions during 2014 (although were filed in Plaintiff's first charge with EEOC in 2013); a). discriminatory mis-reclassification (caused Count I underpayment); b). discriminatory and retaliatory changes in her job duties and performance standards (deprived Plaintiff's responsibility under seniority

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system for CDC-supported 1305 program; restricted her to work under hostile condition; damaged her career; resulted in the “unsatisfactory” performance evaluation, and led to a fifth disciplinary action on 6/9/2014); and c). A retaliatory memorandum (provided pre-required condition for Ms. Barra to create initial disciplinary action on 2/3/2014). Defendants’ motion to dismiss is therefore disputed by the material misrepresentation and misinterpretation of the Plaintiff’s complaint, turning upside down the sequence of protected activities and adverse actions, citation of non-relevant references and law based on the biased information and misinterpretation without providing any proof to refute the substance of Plaintiff complaints but instead referring to the suit as a “tort case” for their motion to dismiss. There is no basis for the summary judgment.

**C. Defendants cannot be immune from “Willful underpayment” claim under Title VII associated with racial, national origin and age discrimination and retaliation against Plaintiff’s engaging in protected activities.**

It is not fair or proper to dismiss Count I by concealing the age, racial, ethnic and national origin discrimination and retaliatory actions involved in the misclassification of the Epidemiologist III position, which was the cause of willful underpayment. The defendants misrepresent the issue by stating that there was “no cause of action for “willful underpayment””. Nor it is fair or proper to mislead the Court into considering the tort-claim because of defendants’ manipulation as “Ms. Yu is attempting to assert a tort claim”, and further to state that defendants are immune

from suit in Federal Court by mistakenly referring pursuant to the Eleventh Amendment and non-relevant cases of tort claims (see Defs. Motion to dismiss. at p.1 #3, DML, p. 7-8, at B).

**1. 'Willful underpayment' is not "tort-based claim"**

Defendants manipulated Plaintiff's case as a "tort-based case" and created confusion by claiming that the complaint did not clearly state allegations and causes of action (see DML. at p. 1-2) as described above. Similarly, defendants misrepresented and misinterpreted the complaint based on biased information, and they minimized the severity of the hostile working environment and of the discriminatory and retaliatory actions that caused damages to Plaintiff, using words such as Plaintiff "alleges that there was an error in classifying and/or reclassifying her job..., no cause of action for 'willful underpayment'". Further, defendants frequently used "classification job, ...misclassification" instead of "discriminatory mis-Reclassification for Epidemiologist III" and claimed in their memorandum of law, Foot note #1, p.4: "Perhaps, an alleged negligent act or omission resulted in the misclassification and caused Ms. Yu's damages" and misinterpreted that the issues of Ms. Yu's complaint "were related to her job classification, salary and unfair treatment" as well. (see DML. at p.5, first paragraph).

**2. Plaintiff's initial complaint is filed via certified mail on Nov. 2, 2017.**

This was clarified in "Facts" section (see above, p. 7 and comp. at p. 2-3, under title I, #1-8).

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Plaintiff stated in her complaint that her second charge of age, national origin and disability discrimination and retaliation was filed with EEOC on 9/3/2014, and request for an amendment that would add the rejection of accommodation and consequent termination to her charge with EEOC was afterwards between Sept. and Dec. 2014. Plaintiff received EEOC lawsuit letter (dated 10/16/2017, see supporting doc. #1), but the completed Ms. Yu's EEOC case file has still not been received from the Philadelphia EEOC office<sup>8</sup>. However, defendants concealed Plaintiff's second charge (9/3/2014) with EEOC containing adversary actions between December 2013 and August 2014, which Plaintiff has the right to suit in this Court. Yet, Defendants claimed that Ms. Yu's suit in the court was untimely as EEOC's first lawsuit letter was 11/26/2013 based on her initial charge with EEOC on 11/12/2013.

**3. Count I (Willful underpayment), the relief from that discriminatory mis-reclassification of Epidemiologist III caused underpayment should not be dismissed.**

Defendants claim that Plaintiff's case involves "one tort-based cause of action and two employment-based causes of action" (see DML. at p. 3), and along with their manipulation, defendants stated that they are immune to this "tort-based claim" in Federal court under Eleventh Amendment. Defendants did not provide evidence that any of facts of the allegation are not true and that 'no relief could be granted under

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<sup>8</sup> Plaintiff received (3/8/2018) the documents without her rebuttal and other critical documents filed with EEOC between 2014 and 2017 as EEOC Baltimore office did not provide to Philadelphia EEOC office. Philadelphia EEOC requested EEOC Baltimore Office to provide completed documents and information about Plaintiff's case filed with EEOC on 9/3/2014.

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any set of facts that could be provide consistent with the allegations.’ (Jackson v. Okaloosa County, Fla., 21 F. 3d 1531, 1534, 11<sup>th</sup> Cir, 1994) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 1984, emphasis in original. See Church v. City of Huntsville, 30 F. 3d 1332, 1336; 11<sup>th</sup> Cir. 1994. motion to dismiss challenging standing). Defendants motion to dismiss, therefore, should be denied.

**D. Defendants should not be immune from refusal of accommodation, and control for hostile environment, discrimination and retaliation caused Plaintiff’s disability and termination against plaintiff’s charges filed with EEOC under ADA as well as ADEA and Title VII.**

As described above, the key question is whether there is a racial, ethnic, national origin and age discrimination and retaliation problem. Why did defendants reject a mediation program and settlement in EEOC for over three years after Plaintiff filed retaliation charge under ADA, ADEA and Title VII, and why did they push Plaintiff to the end of the suit in Federal District Court, when the issue could have been settled much sooner and much simpler? Is it because defendants, as a professional attorney and Office of Equal Opportunity program manager, know that state official and government agencies can use the Eleventh Amendment as a tool to become immune from plaintiff’s suit in Federal district Court under ADA and ADEA? Is it a sign that defendant manipulated its immunity in a systematic fashion to discriminate against Federal causes of action? In a manner similar to that seen in Ying-Jun Chen v. Maryland Department of Health and Mental Hygiene, Ms. Yu’s claim here demonstrated disparate treatment based on national origin discrimination

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and retaliation under Title VII. Since defendants claim that they are immune from Plaintiff's complaint concerning discrimination and retaliation under ADA and ADEA, Plaintiff will address whether defendants are immune from Ms. Yu's complaint relevant to ADA and ADEA statutes as follows.

**1. Defendants' rejection of the mediation program recommended by EEOC and Ms. Yu's request for settlement in EEOC, voluntarily pushing Plaintiff to file suit in Federal Court.**

The United States Supreme Court did restrict Eleventh Amendment immunity on procedural grounds, in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002). In this action, the Court rules that States could not claim Eleventh Amendment immunity when they voluntarily remove a case to federal court. By doing so the Court concluded that state had voluntarily waived its immunity, thereby giving a plaintiff the chance to argue the merits of the case.

Plaintiff wrote several letters to the EEOC investigator and checked with EEOC about a possible plan for mediation and settlement in Dec. 2014 and between Feb and April 2017. However, she was told that defendant rejected the mediation program (EEOC requested Department of Health on 11/19/2014 to answer the mediation program by 12/13/2014) and refused settlement in EEOC during 2017. This suggested that defendant voluntarily pushed Plaintiff to file a suit in Federal District Court of Maryland. Although EEOC should make actions on behalf of the Plaintiff, a priority in order to promote the intention of Congress to stop racial, ethnic,

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national origin, age and disability discrimination and retaliation in state government, the EEOC knew the immunity of state government to lawsuits in Federal Court under ADEA and ADA. While EEOC did not, instead, grant Plaintiff's right for lawsuit (dated Oct. 16, 2017) in the federal Court after over three years of her filing retaliation charges under Title VII, ADEA and ADA on Sept. 3, 2014. Thus, Ms. Yu should have chance to argue the merits of the case in this Court.

**2. Defendant has consented to Plaintiff's suit.**

Defendants claimed that Maryland has not been consented to be sued for violation of ADA (see DML, p.10, at the bottom of paragraph, first line). However, as described above, after defendants rejected the settlement and mediation program which EEOC recommended, defendants have voluntarily driven Plaintiff to suit in Federal district Court. EEOC also sent a copy of this lawsuit letter to defendant, Maryland Department of Health, and Assistant to the Attorney General, Mr. Nicholas E. Johansson. Thus, it is obvious that defendant was aware of Plaintiff's right to suit in the federal court, because it was over three years after Plaintiff filed her retaliation charge with EEOC and past the statute of limitations to file the lawsuit in the Maryland State Courts. Defendants are aware that filing suit in the Federal court is the only and also the last chance for Plaintiff to argue the merits of the racial, ethnic, national origin, age and disability discrimination and retaliation that caused damages, and to request justice and relief because Plaintiff was denied employment, lost her health and basically lost everything.

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In addition, Plaintiff filed her reconsideration of the petition with Supreme Court in Nov. 2017 against the administrative office decision and requested the Justice to hold her petition avoiding the negative impact on her suit in federal district court by the potential denial of her reconsideration in Supreme Court. The certificate of service of the copy of this reconsideration was sent to the Maryland governor, State Attorney General and defendants' attorney Nicholas Johansson. It cannot be ignored that Maryland and defendants consented to Plaintiff's lawsuit for the retaliation against her charges with EEOC under ADA and ADEA.

Sovereign immunity bars suits only in the absence of consent.

Section 5 of the Fourteenth Amendment, as a source of congressional authority for the 1974 amendment of ADEA, became important only after the court determined that Congress could not abrogate Eleventh Amendment immunity when acting pursuant to the Commerce Clause, (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)) and state agency cannot be sued unless they are aware of the suit. Aside from this restriction, the 1974 amendment to the ADEA remains valid as to both state and local government employers; it can be enforced in federal court when suing a local government unit (*Conley v. Village of Bedford*, 215 F.3d 703).

The earlier decision of *Howlett v. Rose* also indicated that the states could not close their doors to Section 1983 claims by imposing a state-created immunity. State cannot discriminate against federal claims and cannot change the scope of federally provided rights by creating an immunity barrier.

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**3. Defendants should not be immune from the complaint of disability discrimination and retaliation and consequent unlawful termination under ADA as well as ADEA and Title VII in the Court**

The House report on the ADA indicated "inconsistent treatment of people with disability by state or local government agencies is both inequitable and illogical". (H.R. Rep. No. 101-485 (II), at 37 (1990)). The Fourteenth Amendment does allow Congress to abrogate state sovereign immunity. Section 5 grants Congress the enforcement power to advance the goals of the Amendment, which include the guarantees of Due Process and Equal Protection of the law. (Ivan E. Boden Steiner and Rosalie B. Levinson, Berkeley J. of Employment and Labor Law v. 22:1, 2011) "The Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid" (42 U.S.C. §12202).

In addition, defendant, Maryland Department of Health, receives federal funding support, such as through the Centers for Diseases Control and Prevention ("CDC")-1305 program. Plaintiff was only the epidemiologist with 100% of time devoted to the CDC 1305 program and supported by CDC 1305 funding (see Comp. p.8 under B, and exhibit# 26). Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) prohibits discrimination against individuals with a disability in "any program or activity receiving federal financial assistance." The term "program or

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activity” is defined to mean all of the operations of “a department, agency, special purpose district, or other instrumentality of a state or of a local government,” or “the entity of such state or local government that distributes such assistance and each department or agency... to which the assistance is extended”. (29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a.)

Therefore, defendants cannot be immune to the complaint related to ADA. The relief for Count II: rejection of accommodation and consequently termination due to disability discrimination and retaliation against Plaintiff’s charge filed with EEOC for continuous age, racial, ethnic and national origin and disability discrimination and retaliation (9/3/2014) under ADA, (as well as ADEA and Title VII) should not be dismissed.

**E. Defendants cannot be immune from complaint of escalated retaliation against Plaintiff’s opposition with managers in both departments and charges with EEOC for harassment, racial, ethnic and national origin discrimination under Title VII**

**1. Defendants concealed evidence of Plaintiff’s second charge with EEOC in 2014 which contains the retaliation facts in the time sequence post Plaintiff’s EEOC charge in Nov. 2013:**

Defendants claimed that Plaintiff’s complaint under Title VII was time-barred because of the ignorance of Ms. Yu’s charge filed with EEOC in Sept. 2014. Plaintiff described in part A of the argument (see above) that the retaliation was the key among three counts, and the claim of retaliation cannot be entirely cut off or completely disconnected from “Willful underpayment” and “Disability

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discrimination and retaliation” as defendants did in the motion. Plaintiff stated protected activities (filed charge with EEOC under Title VII and ADEA in Nov. 2013) and adverse employment action (between Dec. 2013 and Aug. 2014) against her first charge with EEOC in Nov. 2013 and updated complaints to managers between Dec. 2013 and Feb. 2014; then followed by the statement of her second charge with EEOC under Title VII, ADEA and ADA in Sept. 2014, and continuously escalating retaliation (between Sept 3, and Nov. 3, 2014). Plaintiff summarized these facts in her complaint (see p. 6-10). To avoid duplicated description of adverse actions during 2014 including five disciplinary actions, Plaintiff did not restate detailed information under Count I “Willful underpayment” for damages to request relief (as Comp. p. 2-3), nor was the retaliation against her complaints under Title VII and ADEA included in the relief for Court III because detailed information was summarized in complaint p. 6-9 prior to “2, Diagnoses” of p. 9.

**2. Defendants failed to provide proof that defendants’ actions were proper employment practice and neutral policies and not adverse actions in retaliation for complaints to managers and filing of charges with EEOC under Title VII.**

Plaintiff has already provided solid evidence of a prima facie case: 1. Plaintiff is a protected class (Asian American); 2. Plaintiff filed charges of racial, ethnic and national origin discrimination with EEOC under Title VII (as well as ADEA) in Nov. 2013 and reported Maryland Department of Health, Director of HR Employment Relations in Dec. 2013, and Director of Office of Equal Opportunity Program by

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emails on Jan. 9 and Feb. 2, 2014 about Ms. Barra's harassment, ethnic and national origin discrimination and retaliation; 3. Plaintiff received adverse action by memorandum requiring Plaintiff to follow supervisor's direction, judgment and addressing writing issue on Dec. 17, 2013 (although she was evaluated "satisfied" of performance), and first disciplinary action on 2/3/2014. Furthermore, because the retaliation caused Plaintiff's health problems and subsequent filing with FMLA as a protected class, Plaintiff filed her another charge of harassment, national origin, age and disability discrimination and retaliation with EEOC under Title VII, (as well as ADEA and ADA) on Sept. 3, 2014, and which was meanwhile sent to Office of Equal Opportunity Program manager at Department of Health on 9/2/2014 by Plaintiff's former lawyer via email. Again, Plaintiff received immediate adverse action by the rejections of accommodation and rejection of her request to use employee's leave donated by her friend on 9/3/2014. She did not get payment during an interactive accommodation process because Department of Budget and Management delayed the response to her appeal and rejected her appeals until after she was terminated. Defendants should not restrict these adverse actions to be claimed under ADA to be dismissed by state agencies' immunity, but ignored the facts that were also occurred against Plaintiff's charge of racial, ethnic and national origin discrimination and retaliation with EEOC under Title VII. According to McDonnell Douglas v. Green, (411 U.S. 792, 1973), the burden of proof shifted to defendants who must provide proof that those actions were not retaliatory or discriminatory immediately after

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Plaintiff's opposition and charge based on Plaintiff's filed prima facie case. Defendants failed to provide any proof in their motion to dismiss.

**3. Defendants misrepresented and misinterpreted Plaintiff's complaint of retaliation under Title VII as only the constitutional tort-based case as the pretext of the immunity.**

Defendants misinterpreted Ms. Yu's statement of civil and constitutional rights as Plaintiff's attempting to claim constitutional tort case (see DML p.12 and their foot note). Retaliation is a tool of power that discourages individuals from asserting their civil rights and that undermines the laws against discrimination (William R. Tamayo, et al. 2009). Defendants should not be immune to the complaint of discrimination and retaliation under Title VII because Plaintiff belongs to protected class under Title VII (as Asian American who filed racial, ethnic and national origin discriminatory charges with EEOC). Plaintiff showed that a reasonable employee would have found the challenged action materially adverse and the retaliatory discrimination occurred during the investigation while the EEOC charge under Title VII and ADA was pending. Plaintiff also stated statute on p.13 related to the Count III, and retaliation for her complaints under Title VII.

**F. Mr. Neill, Current Secretary of Maryland Department of Health and Mr. Brinkley, Secretary of Maryland Department of Budget and Management, are the Proper Defendants**

Defendants created confusion at the beginning by speculating whether Plaintiff is attempting to sue the Secretaries as individuals (although the complaint did not state any issue directly related to individual secretary), or to sue the Departments.

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Defendants claimed that “Any employment-based cause of action-including disability discrimination and retaliation can only be asserted against Ms. Yu’s employer... For this reason, Counts II and III should be dismissed as to Defendant David Brinkley (and/or the Department of Budget and Management)”. However, EEOC Enforcement Guidance on Retaliation and Related Issues states under Actions That Are Not Work-Related that “[A] materially adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside of work, as long as it might well dissuade a reasonable person from engaging in protected activity. Prohibiting only employment-related actions would not achieve the goal of avoiding retaliation because ‘an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.’” The Supreme Court in Burlington Northern observed that, although the substantive anti-discrimination provisions seek elimination of discrimination that affects employment opportunities because of employee’s racial, ethnic, or other protected status, the anti-retaliation provisions seek to secure that objective by preventing an employer from interfering in a materially adverse way with efforts to enforce the law’s basic guarantees. (Burlington N., 548 U.S. at 63-64, and Santa Fe Railway Co. v. White. 126 S. Ct. 2405 (2006)).

Therefore, defendants’ motion to dismiss Count II and III for Secretary Brinkley and Department of Budget and Management should be denied.

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In addition, defendants stated that the “complaint fails to state a claim against Secretary Brinkley and/or the Department of Budget and Management for anything...”, which, however, is contradictory with the other statement in the motion that “there are some allegations involving employees of the Department of Budget and Management”. (see DML, p.1 & 9, at D.). Secretary Brinkley in the Department of Budget and Management is the proper defendant for the followings:

1. In February and March of 2014, Plaintiff requested Department of Budget and Management, Division of Employee and Labor Relations Program to provide help to alleviate pain caused by Ms. Barra’s progressive harassment, discrimination and retaliation after Plaintiff’s initial report in August 2013 to seek their help in combatting Ms. Barra’s interference with her job. (see Comp. p.8- 9, at 1-c);
2. Plaintiff’s appeals against retaliatory disciplinary actions were also forwarded to the Division of Employee and Labor Relations Program between April and June, 2014 as Human Resources at Department of Health did not respond Plaintiff’s appeals for the disciplinary actions; and
3. Plaintiff filed appeals with the Department of Budget and Management, Office of Personnel Service and Benefits for Department of Health to overcome the rejection by Human Resources at Department of Health of her request for appropriate accommodation for her disability. Plaintiff had asked to use employee’s leave time donated by her friend in September and October 2014. The response to her appeals

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were delayed and denied until she was terminated meaning that Plaintiff did not get income in October during the interactive accommodation process (see Plaintiff's complaint page 11 and exhibits 36-37, at 4).

According to Rule 8. (c) (1), in responding to a pleading, "a party must affirmatively state any avoidance or affirmative defense, including: ...contributory negligence; failure of consideration; ... illegality...", defendants failed to state any action they ever took for correction and avoidance of harassment, discrimination and retaliation by one employee against to another minority employee due to her age, ethnic, and national origin supported by managers (which are not only employment-based causes) after Plaintiff reported to managers and filed appeals in both Departments, and filed charges of discrimination and retaliation with EEOC in 2013 and 2014 as stated in the complaint. According to EEOC's Enforcement Guidance on Retaliation and Related Issues described above, Plaintiff believes that the managers did not take even minimal action to control, stop or prevent the establishing of a hostile working environment and the deprivation of her equal working opportunity and payment, accommodation of her disability that was caused by harassment, discrimination and retaliation against Plaintiff for her engaging in protected activity. The reclassification of Epidemiologist III (Position Identification Number) approved by Department of Budget and Management for Ms. Yu was discriminatorily given to Ms. Barra and this discriminatory action was not attended to or solved by any manager in both Departments. Instead, Plaintiff was given an insulting

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recommendation to find another job. Because defendant David Brinkley is current Secretary of Maryland Department of Budget and Management, Secretary Brinkley is proper defendant for his official capacity (see Defs. Motion to dismiss, at p. 1-2, #4).

It is contradictory with the facts and the significant rulings of anti-retaliation by EEOC and Supreme Court for defendants to clam Count II and III should be dismissed as to Defendant David Brinkley (and/or the Department of Budget and Management)".

"If a company does not punish the harasser and the retaliating party (who might also be the harasser), it sends a signal to the workforce that retaliation is consistent with company policy and that is not safe to complain about discrimination or harassment. The plaintiff employee unreasonably failed to take advantage of available preventative or corrective opportunities or otherwise failed to avoid harm." (Faragher v. Boca Roton 524 U.S. 775, 1998).

Defendants Robert Neill and David Brinkley are current Secretaries for the two key Departments. Mr. Neill and Brinkley are being sued here in their official capacities only. For the above and foregoing reasons, Plaintiff's Count I-III should not be dismissed.

### CONCLUSION

Wherefore, the Plaintiff pleads to this Court to enter an order denying defendants' motion to dismiss. Plaintiff respectfully requests a trial by jury on all issues raised in this complaint and award her:

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1. A retroactive reclassification to the Epidemiologist III, with all attendant back pay, benefits and other emoluments of employment;
2. The sum of \$300,000 in compensatory damages suffered because of the discrimination and retaliation;
3. Front pay at the Epidemiologist-III pay level (including pay increases) until she reaches the age of 67 years when she would have retired from State service if not for Ms. Barra's discriminatory/retaliatory treatment of her;
4. Costs and reasonable attorneys' fees incurred since 2013 and with this lawsuit with interest thereon and
5. Medical costs, other damages and further relief deemed just.

Respectfully submitted,



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410-671-9823

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

-----X  
XIAO-YING YU,

Plaintiff,

-against-

Case No.: 17-cv-3260-JKB

DENNIS SCHRADER, *et al*,

Defendants,

-----X

**PLAINTIFF'S MEMORANDUM OF LAW  
AS SUPPLEMENTAL RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS**

In addition to the Plaintiff's Response to Defendants' Motion to Dismiss submitted on March 22, 2018 (Docket #20), Plaintiff Xiao-Ying Yu, by and through her undersigned counsels, respectfully submits this Plaintiff's Memorandum of Law as Supplemental Response In Opposition to Defendant's Motion to Dismiss.

**INTRODUCTION**

Plaintiff, Xiao-Ying Yu, filed a Complaint and an Amended Complaint (collectively referred to as the "Complaint") in this action *pro se* against her former employers, the Maryland Department of Health ("MDH") and the Maryland Department of Budget and Management ("DBM") and the Secretaries of such both Departments, alleging causes of action of willful underpayment, unequal payment, discrimination and retaliation based on national origin, age and/or disability in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"); the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, 42 U.S.C. §12101 ("ADEA"); the American with Disabilities Act Law, 29 USCS §794 ("ADA"), and Section 504 of the Rehabilitation Act.

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Plaintiff, a naturalized United States citizen who was born in China, at an age over 60, worked as an epidemiologist in the Center of Chronic Disease Prevention and Control (“CCDPC”) from November 4, 2009 until the wrongful termination of her employment on November 3, 2014. CCDPC is an independent commission that functions within MDH. Defendant DBM, as another branch of the State government of Maryland, exerted certain control over the Plaintiff’s employment with MDH.

Defendants brought this instant pre-answer Motion to Dismiss pursuant to Rule 12(b)(6). As demonstrated below, such Motion should be denied in its entirety because the Complaint adequately stated cognizable causes of action against the Defendants, and the Defendants are not entitled to immunity as contended.

Even if the Court inclines to grant such Motion, which it should not, the Plaintiff should be granted leave to amend her complaint liberally because there is no prejudice to the Defendants.

#### STANDARD OF REVIEW

The standard of review on a pre-answer Rule 12(b)(6) motion to dismiss is heavily weighted in favor of the plaintiff. Poison v. Village of Washingtonville, 382 F.Supp.2d 598 (SDNY 2005). A complaint must be read generously, drawing all reasonable inferences from allegations in the plaintiff’s favor. *Id.* In ruling on a motion to dismiss for failure to state a claim, the Court must accept the material facts alleged in the complaint as true. *Id.* The Court must deny the motion unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*

The issue, thus, is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232 (1974).

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A plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662 (2009) at 678 (quoting Twombly, 550 U.S. at 570)(*emphasis added*); accord Little v. KPMG LLP, 575 F.3d 533, 541 (5th Cir. 2009).

A Rule 12(b)(6) motion in any civil case is analyzed under the standard announced in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). To survive a Rule 12(b)(6) motion, the plaintiff must state a claim that is "plausible on its face."

A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing Twombly, 550 U.S. at 556); Gonzales v. Kay, 577 F.3d 600, 603 (5th Cir. 2009); Fields v. Dep't of Pub. Safety, 911 F. Supp. 2d 373, 383 (M.D. La. 2012) (Jackson, J.).

#### STATEMENT OF FACTS

The Court is respectfully referred to Plaintiff's Response to Defendants' Motion to Dismiss (Docket #20) for a statement of facts.

#### ARGUMENT

**I. The Complaint should not be dismissed pursuant to Rule 8 of the Federal Rules of Civil Procedure.**

Defendants move to dismiss the Complaint based upon Rule 8(a)(2) of the Federal Rules of Civil Procedure contending that Plaintiff has failed to make "a short and plain statement of the claim showing that the pleader is entitled to relief." Defendant argues that Plaintiff's complaint is lengthy, single-spaced, underlined.

However, these apparently nominal aspects are not sufficient for a ground of dismissal. What matters is the detailed factual allegations give sufficient notice to the Defendants.

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Especially, the complaint was prepared by a *pro se* plaintiff, a perfect professional pleading is not expected from her.

Pleadings of *pro se* plaintiff must be read liberally and should be interpreted to raise strongest arguments that they suggest. Gray v. Internal Affairs Bureau, 292 F Supp 2d 475. (S.D.N.Y. Nov. 17, 2003).

Although Plaintiff's *pro se* Complaint was long, the Court would not grant dismissal of complaint under Fed. R. Civ. P. 8 because under the less stringent standard held for *pro se* pleadings, complaints and attachments were sufficient to provide defendants with notice of the basis of the plaintiff's claims. Peavey v. Holder, 657 F Supp 2d 180 (D.D.C. Sept. 28, 2009).

The system of notice pleading established by Rule 8 does not require a plaintiff to plead facts or legal theories, and a complaint which sets out claim for relief is sufficient to withstand a motion to dismiss, as long as there is any set of facts, consistent with allegations, under which relief could be granted. Nance v. Vieregge, 147 F.3d 589 (7th Cir. Ill. June 17, 1998) cert. denied, 525 U.S. 973, 119 S. Ct. 426, 142 L Ed 2d 347 (U.S., Nov. 2, 1998).

Although Plaintiff's allegations were not strong, they were sufficient to meet lenient standards of notice pleading set out in Rule 8 and provided adequate notice to the Defendants, and therefore dismissal under Rule 12(b)(6) was inappropriate. Weston v. Pennsylvania (3d Cir. Pa. May 22, 2001), 251 F.3d 420, 85 Fair Empl Prac Cas (BNA) 1477.

Here in this case at bar, though the Complaint *pro se* might be not organized professionally and might be lengthy, the Complaint, Amended Complaint and 39 exhibits provided adequate notice to defense.

**II. Defendants are not immune in federal courts because the cause of action is not a tort-based claim.**

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Defendants contend that “Count I for willful underpayment should be dismissed because it is not a cause of action, and to the extent a claim does exist, it would likely be considered a tort claim.” Defendants’ interpretation is out of context of the Complaint.

Plaintiff *pro se* apparently utilized a template form of complaint (Rev. 12/2000) to prepare her complaint. The Amended Complaint (Docket #4) consists of 3 paragraphs numbered 1. Jurisdiction, 2. The facts of this case and 3. The relief I want the court to order.

Under paragraph 2, page 2 of the Amended Complaint, the Plaintiff enumerated **Section I, Underpayment of Salary, Section II, Reports of Retaliation for Engagement in Protected Activities, Section III Damages to Ms. Yu’s Health and Further Discrimination and Retaliation (Complaint Filed in U.S. EEOC under Title VII, ADEA and ADA)**. From page 2 through page 7 under Section I and II, paragraph 2, the Amended Complaint made factual allegations alleging various incidents of harassment, discrimination, retaliations, unequal payment and underpayment against her. Under Section III, she alleged damage to her health, and further discrimination and retaliations. Plaintiff further attached 39 exhibits consisting of correspondences, letters, emails, charges, and other documents in further support of her factual allegations.

Then under paragraph 2, page 10, the Amended Complaint asserted “the following counts and allegations of damages supporting her case of action and her request for relief,” enumerating **I. Willful underpayment, II. Disability-Discrimination, Harassment and Retaliation after Ms. Yu Filed Charge in EEOC under ADA in 2014 and III. Retaliation for Complaints reported to DHMH managers and filed in EEOC in 2013 and 2014 under Title VII and ADEA.**

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Reading the purported Count I in the entire context of the Amended Complaint, it is actually not a simple tort-based claim, it is actually a factual allegation of combined causes of action for discrimination, retaliation, unequal payment and willful underpayment. The paragraph alleges that an epidemiologist III position was expressly approved by MDH and DBM for her, but unlawfully deprived from her by her supervisors and given to Ms. Barra unlawfully, and that she was under paid and not equally paid according to her job duties. Underpayment is simply a statement of facts and a claim for damage.

For the same reasoning, Defendants' contention that it is timely-barred by the applicable statute of limitation because it was a tort-based claim lacks merit and should be denied as well.

**III. The complaint against Secretary Brinkley and the Department of Budget and Management should not be dismissed because the Department of Budget and Management exerted control over Plaintiff's employment.**

Defendants argue that the complaint against Secretary Brinkley and DBM should be dismissed because Plaintiff was employed by the MDH and CCDPC, not the DBM. Such an argument is not only an issue of fact which cannot be addressed through a Rule 12(b)(6) motion, but also is incorrect.

The MDH did not and does not have authority to approve an Epidemiologist III position identification number without the DBM. When Plaintiff applied to use her colleague's donated employee's leave, Plaintiff's director reported to the Department of Budget and Management. Clearly, to the extent of employment relationship, the Department of Budget and Management had certain control to a certain extent.

Two or more state or local governmental entities will be treated as a single employer under Title VII where one entity exerts or shares control over fundamental aspects of

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employment relationships of the other entity to such substantial extent that it clearly outweighs the presumption that the entities are distinct. Lyes v. City of Riviera Beach, 166 F.3d 1332 (CA11 Fla, 1999), 79 BNA FEP Cas 330, 75 CCH EPD P 45728, 12 FLW Fed C 515, remanded, 169 F.3d 1322, 12 FLW Fed C 617 (CA11 Fla, 1999).

Ordinarily, the question whether a defendant was the employer of a plaintiff in an age discrimination case is a question of fact for the jury. Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 7 BNA FEP Cas 117, 7 CCH EPD P 9239 (1973, ND Ga). Such an issue of facts should only be interpreted in favor of the Plaintiff, it cannot be addressed by a Rule 12(b)(6) pre-answer motion to dismiss without any discoveries.

**IV. Defendants are not immune from disability discrimination suit under ADA in federal courts.**

Section 504 of the Rehabilitation Act provides: "(n)o otherwise qualified individual with a disability in the United States as defined in section 705(20) of this title shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

A state is not immune by virtue of the Eleventh Amendment from suit brought against it under the Rehabilitation Act because the Act contains an express waiver of Eleventh Amendment immunity, and by accepting federal funds, the state has accepted waiver. Clark v. California Dep't of Corrections, (1997, CA9 Cal) 123 F.3d 1267, 25 ADD 146, 97 CDOS 6894, 97 Daily Journal DAR 11140, 7 AD Cas 292, cert denied (1998) 524 U.S. 937, 141 L Ed 2d 711, 118 S. Ct. 2340, 8 AD Cas 480 (criticized in Moyer v. Conti, (2000, ED Pa) 11 AD Cas 55) and (criticized in Frederick v. Dep't of Pub. Welfare (2001, ED Pa) 157 F. Supp. 2d 509, 12 AD Cas

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721) and (criticized in Bradley ex rel. Bradley v. Arkansas Dep't of Educ. (1999, CA8 Ark) 189 F.3d 745) and (criticized in Popovich v. Cuyahoga County Court of Common Pleas (2000, CA6 Ohio) 227 F.3d 627, 10 AD Cas 1784, 2000 FED App 330P) and (criticized in Garcia v. State Univ. of N.Y. Health Scis. Ctr. (2001, CA2 NY) 280 F.3d 98, 12 AD Cas 538) and (criticized in Sacca v. Buffalo State College (2004, WD NY) 2004 US Dist LEXIS 9134) and (criticized in Atwood v. Vilsack (2004, SD Iowa) 338 F. Supp. 2d 985).

A state labor agency was not entitled to constitutional immunity from disability discrimination action in federal court because the agency waived its immunity by accepting federal financial assistance, even though the employee worked in a division which did not receive federal funds, and the waiver encompassed all of the agency's operations regardless of use of federal funds. Arbogast v. Kansas (2015, CA10 Kan) 789 F.3d 1174, 31 AD Cas 1245.

Here, the CDC program that the Plaintiff worked in has been receiving federal funds. See, Exhibit 9 to the Amended Complaint. Thus, the Defendants are not entitled to immunity from Plaintiff's disability discrimination suit in deferral court.

**V. Defendants are not immune from age discrimination and retaliation suit under ADEA in federal court.**

ADEA is proper exercise of congressional §5 enforcement power under the Fourteenth Amendment; thus, Congress appropriately abrogated states' Eleventh Amendment immunity from suit in ADEA. Goshtasby v. Board of Trustees of the Univ. of Ill., (1998, CA7 Ill) 141 F.3d 761, 76 BNA FEP Cas 1179 (criticized in Humenansky v. Regents of the Univ. of Minn. (1998, CA8 Minn) 152 F.3d 822, 77 BNA FEP Cas 679).

Congress intended to abrogate states' Eleventh Amendment immunity in extending ADEA coverage to states, and in doing so, Congress acted pursuant to a valid exercise of power

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under Section 5 of the Fourteenth Amendment. Scott v. University of Mississippi (1998, CA5 Miss) 148 F.3d 493, 77 BNA FEP Cas 1085.

States and their agencies are liable under ADEA notwithstanding the 11th Amendment. Davidson v. Board of Governors of State Colleges & Univs. (1990, CA7 Ill) 920 F.2d 441, 54 BNA FEP Cas 956, 55 CCH EPD P 40425 (criticized in Kimel v. Florida Bd. of Regents (1998, CA11 Ala) 139 F.3d 1426, 11 FLW C 1288, 8 AD Cas 1, 22 EBC 2539, 76 BNA FEP Cas 1201, 73 CCH EPD P 45419).

## VI. Claims under Title VII

The Complaint must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if . . . [the] actual proof of those facts is improbable and . . . recovery is very remote and unlikely." Twombly, 550 U.S. at 556 (internal quotations omitted). "A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to the legal remedy sought. A Society Without A Name v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011), cert. denied, U.S., 132 S. Ct. 1960, 182 L. Ed. 2d 772 (2012).

A motion asserting failure to state a claim typically "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Edwards, 178 F.3d at 243 (quotation marks omitted); see Houck, 791 F. 3d at 484; Tobey v. Jones, 706 F.3d 379, 387 (4th Cir. 2013).

A district court did not lack subject matter jurisdiction over a claim simply because it did not allege all applicable components of a cause of action because the complaint need not set out all of applicable law or facts, provided it notifies the defendant of the claim's nature. Board of

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Trustees v. Elite Erectors, Inc. (7th Cir. Ind. May 16, 2000), 212 F.3d 1031, 24 Employee Benefits Cas (BNA) 1481.

Reading the Complaint, the Amended Complaint and the 39 exhibits in their entirety clearly shows sufficient allegations of discrimination and retaliation claims under Title VII.

Section II, page 3, of the Amended Complaint alleges that:

“Ms. Yu's engagement in protected activities between 2012 and 2014 (via multiple reports to MDH managers including HR, OEOP and filing grievance and appeals in MDH and charge about discrimination and retaliation filed in U.S. Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act and Age discrimination in Employment Act ("ADEA") on 11/12/2013 were labeled as "disruptive behavior". Ms. Yu received progressive retaliations, downgrading performance evaluation from "outstanding" to "satisfied" with improvement memorandum after Ms. Barra became Ms. Yu's supervisor for two weeks.” See, Amended Complaint, Docket #4.

Paragraph 15, page 6, of the Amended Complaint alleges that:

“15) **Ms. Yu's reports to MDH Office of Equal Employment Program ("OEOP") director triggered disciplinary action:** Ms. Yu reported to OEOP director, Ms. Keneithia J. Taylor between 1/9 and 1/31/2014 about Ms. Barra's discrimination, harassment and retaliation including frequently preventing Ms. Yu from accessing the database and training course (E17). Then on 2/2/2014, Ms. Yu reported to her about Ms. Barra's new discrimination at National Origin behavior because Ms. Barra sent Ms. Yu a warning email on the Chinese New Year eve although Ms. Barra had previously approved her request to take half the day off (E18). Additionally, Ms. Yu also reported to Ms. Taylor on 2/2/2014 that Ms. Barra retaliated and interfered with her job including block of her submission of abstract for office program/projects (E19).” See, Amended Complaint, Docket #4.

Section III, page 7, of the Amended Complaint alleges that:

“Ms. Yu filed her second discrimination and retaliation charge under Title VII, ADEA and ADA (Case# 531-2014-02468C) on 9/3/2014 in U.S. EEOC which was emailed to DHMH OEOP Ms. Delinda Johnson on 9/2/2014 by Ms. Yu's former lawyer. Then Ms. Yu received Ms. Johnson's rejection of her accommodation on 9/3/2014 and was terminated on 11/3/2014. Ms. Yu requested EEOC to amend these adverse events of termination into her existing retaliation charge file and also filed ADA complaint in Department of Justice, Civil Right Division, Disability Section.” See, Amended Complaint, Docket #4.

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Paragraph 7, page 10, of the Amended Complaint alleges:

**“7) The charge of discrimination and retaliation filed in EEOC under Title VII, AEDA and ADA:** Because Ms. Yu did not receive MDH OEOP Ms. Delinda Johnson response for her accommodation request to correct hostile working condition for her to work or to assign her to other position, but was required to only work under supervision of Ms. Barra's harassment and retaliation during the interactive accommodation process, she filed charge (which her former lawyer prepared) in EEOC on 9/3/2014.” See, Amended Complaint, Docket #4.

In addition to these factual allegations, the Plaintiff further attached 39 exhibits in support of her claims and the Amended Complaints. It not only stated cognizable causes of action and gave the Defendants adequate notice of the claims, but it also substantiated her claims with voluminous evidence of correspondence, emails, reports and documentation. These allegations not only clearly stated causes of actions, but they also allow the court to infer that Plaintiff has prima facially stated causes of action under Title VII.

**VII. The Secretaries are proper defendants under Title VII.**

Claims against the Secretaries are not to hold them liable under Title VII in their individual capacities, but in their official capacities.

The Commissioner of a State Department of Mental Health and Mental Retardation was the employer for purposes of a Title VII action because the Department was employer, the governor appointed the Commissioner (which was a policy-making position), and the Commissioner was an agent of the Department, with actual authority to hire and fire employees of the Department. Cross v. Alabama (1994, CA11 Ala) 65 BNA FEP Cas 1290, 8 FLW Fed C 548, amd, reh, en banc, den (1995, CA11 Ala) 49 F.3d 1490, 67 BNA FEP Cas 844, 67 CCH EPD P 43802, 8 FLW Fed C 1157,reh, en banc, den (1995, CA11 Ala) 59 F.3d 1248 and (criticized in Fredette v. BVP Management Assocs. (1995, MD Fla) 1995 US Dist LEXIS 14010).

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Pursuant to Section 2102 of Title 5 of the United States Code, the term "employer" was defined as a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *provided*, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Clearly, the Secretaries in this action are sued in their official capacity as the agents of State agencies. They are the proper parties to this action.

**VIII. Plaintiff should be granted leave to amend her Complaint.**

If the Court granted the Defendants' instant Motion to Dismiss, which it should not, the dismissal should be without prejudice and the Plaintiff should be granted leave to amend her Complaint.

If a District Court dismisses a complaint for failure to comply with Rule 8, it should generally give plaintiff leave to amend. Iwachiw v. N.Y. City Bd. of Elections, (E.D.N.Y. July 26, 2003), 273 F. Supp. 2d 224, *aff'd*, (2d Cir. N.Y. Mar. 17, 2005), 126 Fed Appx 27.

If information set forth in a complaint does not adequately apprise the defendant of the nature of the plaintiff's claim as required by Rule 8, the Court may allow the plaintiff to amend his pleading to state more clearly a cause of action, rather than dismiss the complaint under Rule 12(b)(6). Chisholm v. T.J.X. Cos. (E.D. Va. Oct. 7, 2003), 286 F. Supp. 2d 736.

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Although a complaint failed to make a short and plain statement of a claim, the District Court abused its discretion in dismissing a *pro se* complaint without granting leave to file an amended pleading where, liberally construed, the complaint alleged sufficient facts to suggest potentially meritorious claims. Elliott v. Bronson (2d Cir. Conn. Apr. 5, 1989), 872 F.2d 20.

Failure to allow a plaintiff leave to amend her complaint, pursuant to FRCP 15(a), in order to allege the issuance of a right-to-sue letter, is abuse of discretion because the plaintiff's complaint adequately alleges a basis for a claim, thus eliminating any possibility of prejudice to the defendants. Gooding v. Warner-Lambert Co. (3d Cir. N.J. Sept. 28, 1984), 744 F.2d 354, 35 Empl Prac Dec (CCH) P34671, 35 Fair Empl Prac Cas (BNA) 1707.

A plaintiff should be given opportunity to amend under Rule 15, where the complaint fails to comply with Rule 8(a)(1) and there is nothing to suggest that any prejudice would be worked upon the defendants by permitting such amendment, particularly where the plaintiffs' cause of action in state court would be barred by a statute of limitations. Sims v. Mercy Hospital of Monroe (6th Cir. Mich. Nov. 26, 1971), 451 F.2d 171.

Here, the Defendants' Rule 12(b)(6) Motion to Dismiss not only lacks merit, but also fails to allege any prejudice. In fact, there is no prejudice to the Defendants to grant leave to the Plaintiff who filed the Complaint *pro se* to amend her complaint should the Court be inclined to grant Defendants' instant motion.

#### CONCLUSION

Based upon the foregoing, it is respectfully requested that the Defendants' instant Rule 12(b)(6) Motion to Dismiss be denied in its entirety and in the unlikely event that the Court grants such Motion, that the Plaintiff be granted leave to amend her complaint and such other and further relief as the Court deems just and proper.

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Dated: May 10, 2018

Respectfully submitted,

*/s/ William X. Zou*

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LAW OFFICES OF XIAN FENG ZOU

By: William X. Zou, Esq.

Federal Bar ID: 808529

*Admitted Pro Hac Vice*

Attorney for Plaintiff

136-20 38<sup>th</sup> Avenue, Suite 10D

Flushing, NY 11354

Tel: (718) 661-9562

Fax: (718) 661-2211

*/s/ Eric Hawkins*

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LAW OFFICE OF ERIC HAWKINS

By: Eric Hawkins, Esq.

Federal Bar ID: 20065

Attorney for Plaintiff

6615 Wilson Lane

Bethesda, MD 20817

Tel: (240) 600-1126

Fax: (614) 748-5591

Robert Toney, MD  
Concentra Medical Advisory Services  
1419 Knecht Avenue  
Baltimore, MD 21227

June 18, 2014

**CONFIDENTIAL**

Jennifer English  
Department of Health and Mental Hygiene  
201 West Preston Street  
Baltimore, Maryland 21201

Employee: Xiao-Ying Yu  
SS#: xxx-xx-7243  
Date of Evaluation: 06/16/2014  
Position: Epidemiologist II

WORKABILITY EVALUATION

Dear Ms. English:

Thank you for referring Xiao-Ying Yu to the State Medical Director's Office/Medical Advisory Services for a Workability Evaluation. Ms. Yu was informed that any information provided may be incorporated in my report. In addition, she was informed that the purpose of this examination was for evaluation only and no doctor/patient relationship would be established in that regard. All the submitted administrative documents were reviewed. Ms. Yu was referred for a Workability Evaluation to determine if she is able to perform the essential duties of her position.

There were no medical records available at the time of this evaluation. The medical information provided by Ms. Yu during the interview was the primary source of the medical history.

**HISTORY OF PRESENT ILLNESS:** Ms. Yu is a 61-year-old female who works as an Epidemiologist II for DHMH. She has been with the agency for approximately four years. Her last day of work was on April 30, 2014, and Ms. Yu indicates that she has no plans to return to her job unless she is assigned to a new Supervisor.

The administrative documents submitted for this evaluation today indicate that Ms. Yu's Supervisor, Sara Barra, has requested an appointment with our office to determine if Ms. Yu is able to perform the essential duties of her position. It is reported that Ms. Yu has recently missed time from work. In addition, it is reported that the office is concerned about erratic and

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Complaint-Ex-P, 126

Page 2 of 4  
Ms. Jennifer English  
RE: Xiao-Ying Yu

disruptive behaviors that Ms. Yu has exhibited. The administrative documents list several examples of disruptive behaviors, which will not be repeated in my report. It is also indicated that as a result of these behaviors, Ms. Yu has received several disciplinary actions.

Ms. Yu indicates that she initially went out of work because of stress that was caused by what she feels is a hostile work environment caused by her Supervisor, Sara Barra. Ms. Yu feels that she has been harassed and retaliated against for several months by her Supervisor. Ms. Yu feels that she is working in a hostile work environment.

Ms. Yu states that her Supervisor has over time gradually not involved her in all projects at work. Ms. Yu feels that her Supervisor has taken away her job responsibilities. Ms. Yu feels that she is not treated fairly compared to the other employees on her job. Ms. Yu feels that her job duties have been gradually taken away and she is fearful that she will lose her job because she is being made useless by her Supervisor.

Ms. Yu was initially taken out of work by her psychiatrist, Dr. Bisson. Ms. Yu indicates that she did return to work for a half day on May 13, 2014, to complete some type of paperwork; however, as soon as she reported to work, she was sent for a mitigation conference, and she became very emotional and left her job.

Ms. Yu admits that she has filed a grievance with her union and also filed an EEOC complaint based on her perception of her unfair treatment by her Supervisor.

Prior to being seen by her psychiatrist, Ms. Yu was seen by a cardiologist because she felt like her chest pain symptoms were possibly related to heart disease. According to Ms. Yu, she was cleared from a cardiac standpoint, but she does admit that she takes nitroglycerin as needed for chest pain.

Currently, Ms. Yu states that she is very stressed and has a lot of anxiety. She states that her mood is sad. She has difficulty sleeping and a decreased appetite. Ms. Yu states that she is unable to report to work as long as she has to continue to work under her current Supervisor.

**PAST MEDICAL HISTORY:**

1. Generalized anxiety disorder.
2. Depression.
3. GERD.

**SURGICAL HISTORY:** None.

**SOCIAL HISTORY:** The patient has never smoked. She denies any use of alcohol or illicit drugs.

**REVIEW OF SYSTEMS:** Unremarkable other than what was previously mentioned in the History of Present Illness.

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Complaint-Ex-127

Page 3 of 4  
Ms. Jennifer English  
RE: Xiao-Ying Yu

**MEDICATIONS:** Ms. Yu claims that she does not recall the name of any of her medications. She takes one medication for sleep, one for depression, one for anxiety, and another medicine for reflux. She does take sublingual nitroglycerin as well.

**ALLERGIES:** No known drug allergies.

**MEDICAL RECORDS REVIEWED:** None.

**OTHER RECORDS REVIEWED:**

1. The job position description for an Epidemiologist II.

**PHYSICAL EXAMINATION:**

*General Appearance:* The patient was a well-developed female who was alert and oriented x 3. She showed no signs of physical or emotional distress throughout the evaluation today. Blood pressure 100/60 mmHg. Pulse 72. Height 61-1/2 inches, and weight 94 pounds.

*Cardiovascular:* Normal S1, S2. Regular rate and rhythm. No murmurs.

*Respiratory:* Lungs clear to auscultation bilaterally. No wheezes or rales.

*Spine:* The patient had full range of motion throughout the cervical, thoracic and lumbar spine without any reported pain.

*Upper Extremities:* The patient had full range of motion and normal strength throughout the upper extremities.

*Lower Extremities:* The patient had full range of motion and normal strength throughout the lower extremities.

*Neuro:* Normal examination of deep tendon reflexes. Cranial nerves II-XII grossly intact. Normal sensation and cerebellar function.

*Gait:* The patient ambulated independently with no assistive device. No limp was present.

**MENTAL STATUS EXAMINATION:** Her appearance was appropriate. Her speech was coherent. Her affect was tearful at times. Her mood was mildly depressed. Her thought processes were logical. She had no obvious deficits in short term or long term memory. She had no signs of auditory or visual hallucinations or delusions. She did not report any past or current suicidal or homicidal ideation.

**IMPRESSION:**

1. Workplace stress.
2. Anxiety disorder.
3. Depression.

**SUMMARY AND RECOMMENDATIONS:** Ms. Yu is a 61-year-old female who works as an Epidemiologist II for DHMH. The administrative documents submitted today indicate that Ms. Yu has displayed disruptive behavior which has resulted in several disciplinary actions over the last several months. Ms. Yu indicates that she went out of work secondary to significant stress and anxiety brought on by her perception of unfair treatment, harassment and retaliation from her

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Complaint-Ex-P128

Page 4 of 4  
Ms. Jennifer English  
RE: Xiao-Ying Yu

Supervisor, and a hostile work environment. Since Ms. Yu has been out of work, she has been followed on a regular basis by a psychiatrist, Dr. Bisson. Ms. Yu has no plans on returning to work unless she is working under a different Supervisor.

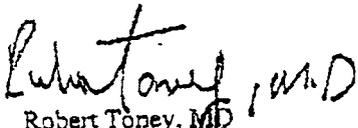
Based on the above information, it is my recommendation that Ms. Yu not report to work at this time. I have referred her for an Independent Psychological Evaluation to get a better assessment of her psychological status. I have also requested medical records from Ms. Yu's treating physicians.

Ms. Yu refused to sign a consent form that would allow me to obtain her medical records. Her lawyer called after her appointment indicating that she may not be going for the Independent Psychological Evaluation, and that her records would not be released. I have scheduled Ms. Yu for a follow-up visit; however, if she does not report for the Independent Psychological Evaluation, I have no need to reassess her. She has also declined to have me to review her past medical records.

Based on the limited information available to me at this time, it is my impression that Ms. Yu will not likely be able to return to her job and perform the essential duties of her position in the foreseeable future under her current Supervisor. Real or perceived, Ms. Yu has significant stress and anxiety for what she feels is a hostile work environment. Assuming that she does follow through with the recommended Independent Psychological Evaluation and sees me for a follow-up visit, she will be reassessed at that time.

Thank you, as always, for this referral. If you have any questions or concerns, please contact me at (410) 579-2775.

Sincerely,

  
Robert Toney, MD  
Medical Advisory Services  
Medical Director  
State Medical Director - MD  
RHT/pgc

DD: 6/16/2014

DT: 6/16/2014

c.c.: The Neuroscience Team

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Complaint-Ex-P132

Page 1 of 3  
Ms. Jennifer English  
RE: Xiao-Ying Yu

Robert Toney, MD  
Concentra Medical Advisory Services  
1419 Knecht Avenue  
Baltimore, MD 21227

October 08, 2014

**CONFIDENTIAL**

Jennifer English  
Department of Health and Mental Hygiene  
201 West Preston Street  
Baltimore, Maryland 21201

Employee:	Xiao-Ying Yu
SS#:	xxx-xx-7243
Date of Evaluation:	10/06/2014
Position:	Epidemiologist II

**FOLLOW-UP WORKABILITY EVALUATION**

Dear Ms. English:

Thank you again for referring Ms. Yu to the State Medical Director's Office/Concentra Medical Advisory Services for a Workability Evaluation. She was initially evaluated on June 16, 2014, seen for a follow-up visit on September 16, 2014, and is here today for another visit. Please review her previous reports for the details of her case.

In brief review, Ms. Yu is a 61-year-old female who works as an Epidemiologist II for DHMH. The administrative documents submitted at the time of her initial evaluation indicated that Ms. Yu displayed disruptive behaviors, which have resulted in several disciplinary actions over the last several months. Ms. Yu indicated that she went out of work secondary to significant stress and anxiety brought on by her perception of unfair treatment, harassment, and retaliation from her Supervisor and a hostile work environment.

After my initial evaluation, it was my recommendation that Ms. Yu not report to work. I referred her for an Independent Psychological Evaluation to get a better assessment of her psychological status and also requested medical records from her treating physicians.

Ms. Yu initially refused to sign a consent form that would allow me to obtain her medical records and she did not report to the Independent Psychological Evaluation that was scheduled.

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Complaint-Ex-P133

Page 2 of 3  
Ms. Jennifer English  
RE: Xiao-Ying Yu

When Ms. Yu was seen for a follow-up visit, she did agree to allow me to request her medical records, and she did agree to proceed with the referral for the Independent Psychological Evaluation. Ms. Yu continued to complain of stress and anxiety along with a low mood at the time of my follow-up evaluation. She still felt that she was unable to return to work under her current Supervisor, and felt that she should be granted the accommodation of a new Supervisor.

Ms. Yu was seen for an Independent Psychological Evaluation on September 23, 2014. The diagnostic impression was posttraumatic stress disorder, source unclear, anxiety disorder, and major depressive disorder, possibly in response to work stressors. In summary, it was felt that Ms. Yu would clearly not be able to return to work and perform the essential duties of her position if she is to continue to work under her current Supervisor, Ms. Barra. It was also the opinion of the Independent Psychological Evaluation that the only way to determine whether or not Ms. Yu can meet the demands of her position is through a change in Supervisor which will allow her a fair opportunity to prove her ability to work to required levels. It was reported that in the event that this change can be made, it was suggested that Ms. Yu return to work with careful attention being paid to her reviews and relationships thereafter. In the event that a change of her current Supervisor was not possible, it was recommended that Ms. Yu not report to work. It was felt that a return to work under her current Supervisor would only worsen her anxiety and depression.

Currently, Ms. Yu's complaints are essentially unchanged. She continues to have stress and anxiety associated with returning to work under her current Supervisor.

#### PHYSICAL EXAMINATION:

*General Appearance:* The patient was a well-developed female who was alert and oriented x 3. She showed no signs of physical or emotional distress throughout the evaluation today.

Physical exam deferred.

**MENTAL STATUS EXAMINATION:** The mental status evaluation today was unremarkable. Her appearance was appropriate. Her speech was coherent. Her affect and mood were normal. Her thought processes were logical. There were no obvious deficits in short term or long term memory. There were no signs of auditory or visual hallucinations or delusions. The patient denied any past or current suicidal or homicidal ideation.

#### IMPRESSION:

1. Workplace stress.
2. Major depressive disorder.
3. Anxiety disorder.

**SUMMARY AND RECOMMENDATIONS:** Based on the above information, it is my impression that Ms. Yu is unable to safely, consistently, and reliably perform the essential duties of her position as an Epidemiologist II under her current Supervisor. It is felt that if Ms. Yu were granted the accommodation of a new Supervisor, the only way to assess whether she is able

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Complaint-Ex-P134

Page 3 of 3  
Ms. Jennifer English  
RE: Xiao-Ying Yu

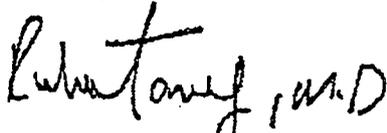
to perform her job duties would be to give her a trial of returning to work and see how her performance is at that time. It is felt that Ms. Yu clearly cannot perform her job duties effectively under her current Supervisor, and will not likely be able to do so in the foreseeable future.

In summary, if Ms. Yu can be granted the accommodation of a new Supervisor, it is recommended that she be given a trial of returning to regular activity. If Ms. Yu cannot be granted the accommodation of a new Supervisor, it is not recommended that she return to work as it will likely continue to worsen her anxiety and depression.

No follow up has been scheduled with Ms. Yu at this time. However, this office would be happy to reevaluate her again in the future should the need arise.

Thank you, as always, for this referral. If you have any questions or concerns, please contact me at (410) 579-2775.

Sincerely,



Robert Toney, MD  
Medical Advisory Services  
Medical Director  
State Medical Director - MD  
RHT/pge

DD: 10/6/2014  
DT: 10/6/2014

Appendix 2/1

Appendix

Complaint-Ex-P55

Exhibit 18

Ms. Yu reported to Dr. Shell and Ms. Taylor by the email about Ms. Barra's discrimination at National origin by sending Ms. Yu a warning email in Chinese New Year Eve.

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Sun, Feb 2, 2014 at 9:05 AM  
Subject: Fwd: Importance of a civil work environment  
To: "Keneithia J. Taylor -DHMH-" <keneithia.taylor@maryland.gov>  
Cc: Donald Shell -DHMH- <donaId.shell@maryland.gov>, Michael McNally <mmmbjm@live.com>

Good morning, Ms. Taylor,

The letter I wrote in the below was initially to Dr. Shell as he is the next level management of my immediate supervisor, Ms. Sara Barra. Then, I thought it is very necessary to also report you, so I added your name without changing my letter. Please forgive me about this.

By the way, I was informed by Ms. Sara Barra on 1/15/2014 afternoon that the abstract I generated for 2014 Council of States and Territorial Epidemiologists (CSTE) was recommended by Ms. Barra and Dr. Harris to not submit (the deadline is 1/15/2014) due to the reason: 1. confusing language; 2. improper inclusion of "community-clinical linkage" and 3. questionable results and conclusion. I have responded to Ms. Barra with the detail explanation on 1/15/2014 and she has not responded me till today (the e-mail and abstract will be forwarded to you soon).

Thanks and best regards,  
Xiao-Ying

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Sat, Feb 1, 2014 at 4:06 AM  
Subject: Fwd: Importance of a civil work environment  
To: Donald Shell -DHMH- <donaId.shell@maryland.gov>, "Keneithia J. Taylor -DHMH-" <keneithia.taylor@maryland.gov>  
Cc: Michael McNally <mmmbjm@live.com>

Dear Dr. Shell:

I am very surprised to receive Sara's letter that bring the great stress to me (in the Chinese New Year day as she has approved me to take the annual leave at 2:30 p.m. of

1/31/2014) like she has done on 6/27/2013 for requesting me to update our CCDPC websites with burden reports and on 12/13/2013 for informing me the decision about tele-working sheet.

My conversations with you about projects (and some issues are related to Sara's unfair treatment) have not been allowed by Sara that she stated in her 10/10/2013 memo because this has been criticized as "cross the chain of command" (to HR my personnel file, see attached memo document); my discussion about PHHS-HF program and NPPA grant application immediately after the HF conference call have been interrupted by Dr. Harris and even my uncompleted report due to Dr. Harris interruption in your office have been prohibited by Sara's letter (stated here) as she regard that my inputs for HF and NPPA in your office should be interrupted with the respect of "civil work environment". Sara's letter recalled my memory about the same logical thinking pattern and characters in the letter Sara wrote on 6/27/2013. I would like to attach her letter with my comments to cause your attention as well as the attention from Ms. Taylor and Mr. McNally.

As you know (I am very glad that you were there as my witness), after finished our conference call, I have asked Erica the plan what Erica and Dr. Harris have had for HF because Erica has invited me for today's conference call meeting without providing me any related information (how much for founding? what resource and what expectation we need from HF: short term and long term). Dr. Harris made some explanation to answer my question, then, she wanted to immediately stop our conversation, so she has interrupted my further discussion and input based on her explanation. I hope that Sara, Erica and Dr. Harris would have not rejected your suggestion on 1/22/2014 as well as in your e-mail on 1/30/2014 for Dr. Harris' Abstract.

However, I have been requested by Dr. Harris to go her office to talk to her privately (although I was hurry to leave the office for Chinese New Year). I was instructed again (same as Sara response my suggestions on 1/29/2014, see below) to follow the instruction of NPPA plan generated by Sara in CCDPC drive and I was also informed the changes in the direction of the NPPA grant application for objectives and partners which you have suggested. Although I have not understood why Dr. Harris has met each of our CCDPC members privately except me (she postpone the meeting with me from 11/1/2013 till today without any additional explanation to me) since she came in the end of last Oct. I have reminded Dr. Harris (in this afternoon at her office) that I have forward the diabetes summary to her as I always hope our team members to be kept in the loop even when Dr. Harris came to CCDPC only a few days after the end of last Oct. I wish that Dr. Harris had not been influenced by any negative impact, because I have not had any chance to talk to her or work with her since she came, except in the afternoon of 1/14/2014 to

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JKB-17-CV-3260  
Complaint-Ex-P5T

explain to her HF results and analysis methods included in the abstract I drafted for 2014 CSTE as she requested. Sara's letter indicated that Dr. Harris has communicated with Sara about our conversation immediately after the meeting for HF in your office as well as in her office as she requested. I do not think Sara's letter reflect the facts of our conversation in your office and bring any benefit to our positive team member interaction.

Because my suggestion for our team discussing the preparation of outline for objectives and working plan was rejected on 1/29/2014, I believe that I should be allowed as other white and young co-worker (Ms. Erica Smith) to tell you and Dr. Harris about my concerns for HF and NPPA after our initial discussion on 1/22/2014 as I have analyzed HF data and generated and finalized the CSTE abstract on 1/15/2014 although I was **not** allowed by Sara to submit it on 1/15/2014.

In order to avoid Sara's letter to mislead you, Ms. Taylor and Mr. McNally, it is better to let you know the background related to Sara's e-mail, so I would like to forward those previous e-mail communications I have had with Sara and Erica about our NPPA grant application and HF program related to this afternoon conference call with HF and the conversation after the meeting. Since Sara has often intentionally made many confusion and provided untruthful information (like the fact is that BRFSS pre-diabetes survey question is not included in 2013 based on Dr. Maria Prince and Sara's suggestion) to mislead you, PHPA and DHMH leaders in different aspects, I feel it is necessary to report you to avoid the potential negative impact on CCDPC NPPA grant application and my co-workers including Dr. Harris.

Thank you for your kind attention and have a great weekend.

Xiao-Ying

----- Forwarded message -----

From: Sara Barra -DHMH- <[sara.barra@maryland.gov](mailto:sara.barra@maryland.gov)>

Date: Fri, Jan 31, 2014 at 7:08 PM

Subject: Importance of a civil work environment

To: Xiao-Ying Yu -DHMH- <[xiao-ying.yu@maryland.gov](mailto:xiao-ying.yu@maryland.gov)>

Xiao-Ying,

Good evening! It has been brought to my attention that on more than one occasion, you have continued to carry on a conversation and not leave a co-worker's office or cubicle after the other party has asked for the conversation to end.

App. 372

Complaint-Ex-P58

It is very important as part of a civil work environment to respect agreed upon timeframes for meetings and discussions and to respond to social cues for a meeting or discussion to end, such as a co-worker asking for the meeting to end, a co-worker saying they need to go elsewhere, or if meeting in a co-worker's office, when a co-worker stands and escorts you to the door or cubicle opening.

I understand that you may feel in the above situation that your co-worker does not understand your entire message or that they have not or will not take an action you wish them to do. However, in order to maintain a respectful work environment, I ask that you please adhere to agreed upon timeframes for meetings and discussions with co-workers and that you respect social cues when a co-worker asks to end a meeting or discussion.

Best,  
Sara

Sara Barra, MS  
Chief, Epidemiology and Special Projects  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene  
201 W Preston St, Rm 306  
Baltimore MD, 21201  
(P) 410-767-6781  
(F) 410-333-7106

App. 323

JKB-17-CV-3260  
Complaint-Ex-159

Exhibit 19

Ms. Yu reported to OEOP director, Ms. Taylor about Ms. Barra's interference with her job by different ways including blocking her submission of abstract with false reasons. When Ms. Yu clarified with Ms. Barra, she refused to respond to her. So, Ms. Yu checked with Dr. Shell in the evening of 1/15/2014 when was the deadline of submission of the abstract to CSTE as it was her part of job.

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Sun, Feb 2, 2014 at 9:17 AM  
Subject: Fwd: Revised 2014 CSTE abstract (now is 400 words)-clarify your confusion  
To: "Keneithia J. Taylor -DHMH-" <keneithia.taylor@maryland.gov>

Good morning, Ms. Taylor,

As I mentioned to you in my earlier e-mail, this is the last e-mail I sent to Ms. Barra related to the conference call on 1/31/2014 in Dr. Shell's office and NPPA grant application plan, I have not heard from Ms. Barra till today.

I am very sorry for sending you so many documents as I thought these information may help you to investigate my case and understand why I have reported you that I have been treated unfairly by Ms. Barra and have been working in the hostile employment environment created by Ms. Barra.

Many thanks and best regards,  
Xiao-Ying

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Wed, Jan 15, 2014 at 4:47 PM  
Subject: Fwd: Revised 2014 CSTE abstract (now is 400 words)-clarify your confusion  
To: Sara Barra -DHMH- <sara.barra@maryland.gov>  
Cc: "Vanessa W. Harris -DHMH-" <vanessa.harris@maryland.gov>, Donald Shell -DHMH- <donald.shell@maryland.gov>

Good afternoon, Sara,

Thank you for responding my e-mail. I am very sorry to learn the confusion you have made in your e-mail again and I hope to be provided truthful and entire information related to the final submitted decision from our CCDPC and status of 2014 CSTE two abstracts. Previously, you informed me that the submitting any abstract require PHPA

Appendix 21,2

App. 324

Complaint-Ex-P64

On Mon, Feb 3, 2014 at 11:35 AM,  
Sara Barra -DHMH- <[sara.barra@maryland.gov](mailto:sara.barra@maryland.gov)> wrote:

Xiao-Ying,  
Good morning! This meeting cannot be rescheduled for tomorrow.

Thanks,  
Sara

Sara Barra, MS  
Chief, Epidemiology and Special Projects  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene  
201 W Preston St, Rm 306  
Baltimore MD, 21201  
(P) 410-767-6781  
(F) 410-333-7106

On Mon, Feb 3, 2014 at 10:06 AM,  
Xiao-Ying Yu -DHMH- <[xiao-ying.yu@maryland.gov](mailto:xiao-ying.yu@maryland.gov)> wrote:

Good morning, Sara,  
Could you reschedule this meeting to tomorrow morning as Ms. Michael McNally, (Executive Director, Maryland Professional Employees Council and AFT health Care-Maryland) does not have a time in this afternoon?

Thanks,  
Xiao-Ying

On Mon, Feb 3, 2014 at 9:29 AM,  
Sara Barra -DHMH- <[sara.barra@maryland.gov](mailto:sara.barra@maryland.gov)> wrote:

Xiao-Ying,  
Good morning! Please attend a meeting with myself, Dr. Shell, and Donna Gugel (Appointing Authority) at 2 PM in Room 300 of the 201 building. This meeting is in regard to a call and voice message you made to Dr. Shell on his work Blackberry after hours on 1/15/14, which you have been told many times not to do and received a Letter of Counseling for on 10/10/13. During this meeting, you will have an opportunity to present any mitigating factors or circumstances for placing this call to Dr. Shell after hours.

Sara Barra, MS  
Chief, Epidemiology and Special Projects  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene  
201 W Preston St, Rm 306

App. 325

JKB-17-CV-3260

Complaint-Ex-P89

State of Maryland  
Department of Budget and Management  
Office of Personnel Services and Benefits  
301 West Preston Street  
Baltimore, Maryland 21201

**NOTICE OF DISCIPLINARY ACTION**

**To Employee:** You or your representative may appeal this disciplinary action to the Cabinet Secretary of your department (if your agency is not headed by a Cabinet Secretary, appeal must be made to the agency head). The appeal **must** be in writing and filed within 15 calendar days after your receipt of this written notice.

**To Agency:** **COMPLETE IN DUPLICATE.** Give one copy to the employee; and retain one copy for your files. Please do not send copy to Department of Budget and Management.

This action must be processed via the Department of Budget and Management's Office of Personnel Services and Benefits electronic MS-310 processing system.

<u>Xiao-Ying Yu</u>	<u>Epidemiologist II</u>	<u>213-25-7243</u>
Name of Employee	Classification	Social Security No.

Check appropriate box and complete:

- is reprimanded.
  - forfeits \_\_\_\_ Annual Leave days.
  - is suspended without pay for 1 work days from \_\_\_\_ through \_\_\_\_.
  - is denied an annual pay increase effective \_\_\_\_.
  - is demoted to \_\_\_\_ at \_\_\_\_ effective \_\_\_\_.
- (Classification)                      (Salary Level)

DATE OF INCIDENT THAT PROMPTS THIS DISCIPLINE: January 15, 2014.

DATE WHEN INCIDENT WAS DISCUSSED WITH THE EMPLOYEE: February 3, 2014.

REASON FOR DISCIPLINE: (Explain in full) Attach pages as necessary.

Inappropriate work behavior. Employee called her supervisor's supervisor after hours on his work cell phone after being told not to do so on several occasions, including in a Memorandum of Counseling given to the employee on 10/10/13. Employee presented mitigating factors, but these factors were not sufficient to constitute a work-related emergency.

Copy to Employee: 2/3/14       In Person       Mailed to: \_\_\_\_\_  
(Date)

<u>2/3/14</u>	<u>DHMH/PHPA</u>	<u>Donna Gugel, PHPA Deputy Director</u>
(Date)	(Name of Department)	(Name and Signature of Appointing Authority)

*Donna Gugel*

Appendix 21, 3

App. 326

BALTIMORE-NIGHT BOX

2017 DEC -8 PM 4: 21

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>

Date: Tue, Feb 18, 2014 at 5:06 PM

Subject: Appeal document

To: Joshua Sharfstein -DHMH- <joshua.sharfstein@maryland.gov>

Cc: Harold Young -DHMH- <harold.young@maryland.gov>, "gyarbor@mcea.org"

<gyarbor@mcea.org>, Michael McNally <mmmbjm@live.com>

Dear Dr. Sharfstein:

I am very sorry for bothering you and seeking your help.

I have called Dr. Donald Shell in the evening of 1/15/2014 when was the deadline for submitting the abstract for Council of State and Territorial Epidemiologists. I left the message in his work cellular phone and asked him if our office has sent or not the abstract that Ms. Sara Barra and Dr. Vanessa Harris have rewritten (as I was informed that the initial abstract I generated was recommended by Ms. Barra to not submit in the late afternoon of 1/15/2014) and whether Dr. Shell wanted me or not to submit the rewritten abstract before 11:59 p.m. This is the reason I have received the "Notice of disciplinary action" on 2/3/2014 (see attached "notice") based on the memo Ms. Barra wrote on 10/10/2013 (see attached memo and my response instructed by my union representative).

According to the instruction of this notice, the appealing should address to you and today is the deadline. I would like to attach these documents (1. the memo, 2. the response to the memo, 3. the notice, 4. the appeal form, and 5. addendum.

Although I have not included the remedy "hope the management to consider the fair wages that was deprived by immediate supervisor's unfair employment practice (Dr. Maria Price has refused to do reclassification with DHMH and DBPM proper forms), I would highly appreciate if it can cause your kind attention. Your consideration and help is highly appreciated. I look forward to hearing from you.

Sincerely yours,  
Xiao-Ying



# DHMH

## Maryland Department of Health and Mental Hygiene

Martin O'Malley, Governor - Anthony G. Brown, Lt. Governor - Joshua M. Sharfstein, M.D., Secretary

### Prevention and Health Promotion Admin

Michelle Spencer, MS, Director  
Donna Gugel, MHS, Deputy Director

Ilise D. Marrazzo, RN, BSN, MPH, Director, Maternal and Child Health Bureau  
Deborah B. McGruder, MPH, PMP, Director, Infectious Disease Bureau  
Clifford S. Mitchell, MS, MD, MPH, Director, Environmental Health Bureau  
Donald Shell, MD, MA, Director, Cancer and Chronic Disease Bureau

## INTERNAL MEMORANDUM

**TO:** Xiao-Ying Yu  
**FROM:** Sara Barra  
**DATE:** October 10, 2013  
**RE:** Memorandum of Counseling

This counseling memo is a follow-up from our discussion about your repeated contact with Dr. Shell, without first contacting me, Ms. Sara Barra, your immediate supervisor.

On September 24 and 25, 2013, Dr. Shell received telephone calls from you on his work cell phone: the latest in many calls to his work cell phone after hours. You have been asked on several occasions to go to your immediate supervisor first for any assistance you may need and to only contact Dr. Shell if in the case of an emergency or if I am unable to assist you in a reasonable time frame. Three of these occasions occurred at your mid-cycle PEP on January 2, 2013 with Dr. Shell, Dr. Prince, and me; via email from Dr. Shell on January 30, 2013; and at your end-cycle PEP on June 17, 2013 with Dr. Shell and me. *(These occasions referred to above do not include the period between March 25-May 30, 2013, when I was on approved maternity leave and you were directly reporting to Dr. Shell.)*

Please understand that it is insubordination to continue to directly approach Dr. Shell for office matters, without going to me first as you have been previously instructed; this includes calling his work cell phone. You **must not** call his work cell phone during or after normal business hours, unless directed by me or during an emergency.

In order to ensure an environment of civility in the Center for Chronic Disease Prevention and Control, I encourage you to contact with me first to discuss any issues you may have. Please be advised that continuing to not follow the chain of command as outlined above and in your MS-22 is insubordination and therefore not acceptable. Any future misconduct of this nature could result in disciplinary action taken against you. If you have any questions pertaining to: appropriate contact with Dr. Shell, what constitutes an emergency, or a reasonable time frame for me to respond to requests, please see me. If you wish to respond to this memorandum or provide additional comments you may do so within (5) five days of receipt of counseling.

*My signature below does not imply agreement with the content of this memo, but does acknowledge my receipt of this memo.*

EMPLOYEE REFUSED TO SIGN  10/10/13

cc: DHMH Personnel File  
Donald Shell, MD, MA

201 W. Preston Street, Baltimore, Maryland 21201  
410-767-6742 • Fax 410-333-5995  
Toll Free 1-877-4MD-DHMH • TTY for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

500 N. Calvert Street, 5<sup>th</sup> Fl. Baltimore, Maryland 21202  
410-767-5227 • Fax 410-333-6333 • Toll Free 1-800-358-9001  
1-800-201-7165 Voice for Disabled  
Maryland Relay Service 1-800-735-2258 or 711

85 USCA4

October 18, 2013

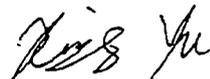
To: Ms. Sara Barra, MS  
Chief, Epidemiology and Special Projects  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene

Response to Memorandum of Counseling on October 10, 2013

There was only one phone call on 9/25 since I could not reach Dr. Shell on 9/24.

I completely understand the "follow the chain of command" direction. However, when an employee has issues with the immediate supervisor, the employee certainly has the right to discuss these issues with the next level of management.

My newly revised MS-22 is under "grievance".



Xiao-Ying Yu, M.D., MS  
Epidemiologist  
Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene

Cc: Dr. Donald Shell, M.D., MA  
Director, Cancer and Chronic Disease Bureau  
Acting Director, Center for Chronic Disease Prevention and Control  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene

DHMH Personnel File

App. 329

JKB-17-CV-3260  
Complaint-Ex-Pro

## STATE PERSONNEL MANAGEMENT SYSTEM APPEAL AND GRIEVANCE FORM

*(Attach copies of any earlier agency decisions. If appealing a disciplinary action, the notice of discipline must be attached.)*

EMPLOYEE'S NAME: Xiao-Ying Yu	SS#: 213-25-724
EMPLOYING AGENCY: DHMH	DIV. or UNIT: PHPA CCDB
EMPLOYEE'S CLASSIFICATION: Epidemiologist II	
HOME ADDRESS: 557 Kirkcaldy Way, Abingdon MD. 21009	HOME PHONE #: 410-671-9823
	WORK PHONE #: 410-767-5263
Issue of employee's grievance or reason given by agency for taking disciplinary action (attach additional pages as necessary): The Employee received disciplinary actions resulting in a written reprimand, Managements action were arbitrary, capricious and without merit, the employee denies any alledged misconduct or wrong doing	
Date grievance or discipline was discussed with appointing authority: 2/3/14	
State the issues of fact and law that support the employee's action (attach additional pages as necessary): The employee appeals under SPPA 11-101 et seq., SPPA A11-106 and asserts that there is no factual or legal basis for the Agency's actions-the employee denies any misconduct alledged. Additional issues of fact and law may be developed during discovery.	
Employee's Requested Remedy: The employee seeks that management rescind the disciplinary actions, remove it from all files and restore all lost wages and benefits provided by law.	
EMPLOYEE REPRESENTED BY: Stephen Yarbor, MCEA Labor Relations Specialist	
Address: 7127 Rutherford Road, Baltimore, MD 21244	
Phone Number: 410-298-8800	

EMPLOYEE'S SIGNATURE: Xiao-Ying Yu <sup>HY</sup> DATE SIGNED: 2/6/14

Please Circle Appeal Category:

- |  |   |
|--|---|
| 10 Termination<br>11 Termination on Probation<br>20 Suspension Without Pay<br>22 Emergency Suspension With Pay<br>30 Grievance (If complaint involves a denied reclass, give date of last audit: | 40 Forfeiture of Annual Leave<br><input checked="" type="checkbox"/> 41 Written Reprimand<br>50 Involuntary Demotion.<br>60 Denial of Pay Increase<br>80 Retaliation for "Whistleblower" Disclosure |
|--|---|

FAILURE TO FULLY COMPLETE THIS FORM WILL DELAY THE PROCESSING OF THIS APPEAL OR IT MAY RESULT IN ADVERSE ACTION ON THIS APPEAL.

App. 330

JKB-17-CV-3260

Complaint-Ex-PTI

BALTIMORE-NIGHT BOX

2017 DEC -8 PM 4: 22

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

**ADDENDUM**

To: Dr. Joshua M. Sharfstein, MD.

Secretary, Maryland Department of Health and Mental Hygiene

Cc. Mr. Harold Young III,

Chief Employer/Employee Regulations, Department of Health and Mental Hygiene

*The issue of employee's appeal:*

The employee received the disciplinary action resulting in a written reprimand. This disciplinary action is based on the Memorandum of Counseling on 10/10/2013 generated by Ms. Sara Barra. This disciplinary action is also a direct consequence of the retaliation that resulted in three negative Memorandums, downgraded PEP, deleted job duties and changed performance standards from the focusing on epidemiology professional skills to the "writing" (revised MS22) within one year after employee reported to the next level of management on 12/5/2012 about unfair employment practice (including the denied reclassification) and sent the grievance to immediate supervisor Ms. Sara Barra, CCDB and PHPA management on 8/14/2013.

*State the issues of fact and law that support employee's appeal:*

The employee denies any misconduct as the management alleged. In addition to State Personnel and Pensions Article (SPPA) 11-101 et seq., SPPA A11-106, the employee appeals under Maryland EXECUTIVE ORDER 01.01.2007.16 and Civil Rights-Title VII. Additional issues of fact and law may be developed during discovery.

*Employee's requested remedy:*

Besides seeking the management to rescind the disciplinary action and remove it from all files, the employee also hopes that management remove all unfair employment memorandums from all files.



Xiao-Ying Yu

Epidemiologist II

DHMH, PHPA, CCDB, CCDPC

Home address: 557 Kirkcaldy Way, Abingdon, MD21009



Date:

SS#: - 7243

Work phone: 410-767-5263

Home phone: 410-671-9823

Appendix-22

App. 331

**Xiao Ying Yu**

March 19, 2018

PM 2:52

**Via Hand Delivery**

Hon. James Bredar  
United States District Court Chief Judge  
United States District Court for the District of Maryland  
101 West Lombard Street, Chambers 3D  
Baltimore, MD 21201

Re: Xiao-Ying Yu v. Maryland Department of Health Secretary Dennis  
Schrader \* and Department of Budget and Management Secretary David  
Brinkley  
Case No.: 17-cv-3260-JKB

Dear Chief Judge Bredar:

I am the Plaintiff *pro se* in the above-referenced matter. I am writing this letter to request another extension of 30 days to respond to the Defendants' motion to dismiss.

This is my third request for extension of time. I was granted 45 days extension on my first request and then 15 days extension on my second request. However, due to my disability and sickness, I have not been able to complete my opposition. Attached please find a letter from my doctor explaining my symptoms including severe anxiety, memory problems and inability to manage my emotion. In the past few days, I was more troubled by the fact that the Philadelphia EEOC office received incomplete information of my file (without my rebuttal and other important documents), requiring additional time for the Maryland EEOC to provide missing documents.

Furthermore, Defendants' motion & memorandum raised many complicated legal issues, which I had hard time to comprehend. I have retained a law office to assist me with this matter and he will need some time to review all my documents and case files.

I do not see any prejudice to the Defendants if such extra 30 days extension is granted.

I thank the Court for its consideration and attention to this matter.

Respectfully submitted,

  
Xiao-Ying Yu

Cc: Maryland Assistant Attorney General's Office  
Attorneys for Defendants: James N. Lewis and Clifton R. Gray  
\* Current Secretary Robert Neill

App. 332

BALTIMORE-NIGHT BOX

2018 MAR 22 PM 11:41

U.S. BANKRUPTCY COURT  
DISTRICT OF MARYLAND

March 22, 2018  
Clerk Felicia C. Cannon  
United States District Court  
For The District Court Of Maryland  
101 West Lombard Street  
Baltimore, MD 21201

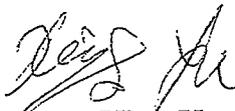
Re: Case No. 17-cv-3260-JKB, Plaintiff's opposition to defendants' motion to dismiss including their memorandum of law

Dear Clerk Cannon:

As you know, I requested another 30-day extension of time to file a response to defendants' motion to dismiss and their memorandum because of my disability and the retained counsel's request for time to review my files, but I have not heard from the Court's decision. To catch the deadline, I have to respectfully submit my opposition to defendants' motion to dismiss including their memorandum of law today and some additional documents may be amended after my lawyer gets a chance to review my files and the documents sent by Philadelphia EEOC.

Please find enclosed the original opposition and the certificate of service.

Sincerely,



Xiao-Ying Yu

557 Kirkcaldy Way  
Abingdon, MD 21009  
Phone: (410) 671-9823 (h)

Summary of the Changes Sara made for my Employee Performance Evaluation (Maryland DHMH)

Elements	Elements	2010	2011	2012	2013, (1/2) mid-cycle	2013(6/17) End-cycle	2014(6/9) mid v. End cyc
Work Ethic	Maintains good attendance	2	3	3	3	3	? 2
	Follows call-in/leave policies	2	3	3	3	3	? 1
	Reports to work area on time and does not leave until designated time	2	3	3	3	3	? 2
Team-work	Works cooperatively with others to implement the Department's goals	3	3	3	2	2	? 1
Communication	Speaks effectively	2	2	2	2	2	? 2
	Writes effectively (clear, organized, appropriate grammar, punctuation)	2	2	2	1	1	? 1
	Interacts positively with co-workers	3	3	3	2	2	? 1
Customer service	Strives to meet customer requirements	3	3	3	2	2	? 2
	Is courteous to customers and co-workers	3	3	3	3	3	? 1
	Provides timely, accurate and appropriate information to internal and external customers	2	3	2	2	2	? 2
	Presents a professional image to customers in attire and maintenance of workspace	3	3	3	3	3	? 3
	Keeps commitments and follows through on customer requests	3	3	3	3	3	? 3
Initiatives	Solves problems without being asking	2	2	3	2	2	? 2
	Works to continuously improve processes	2	3	3	3	3	? 2
	Engages in opportunities for self-improvement	2	3	3	3	3	? 3
Work performance	Appropriately prioritizes work	3	3	3	2	2	? 2
	Completes assignments accurately and on time	2	2	2	2	2	? 2
	Maintains confidentiality	3	3	3	3	3	? 1
	Exercises appropriate judgment	3	3	3	1	2	? 1
	Follows directions	3	3	3	1	1	? 1
Rating		2.48, Satisfactory	2.75, Outstanding	2.90, Outstanding	2.29, Satisfactory	2.33, Satisfactory	Satisfactory vs. Un-Satisfactory
Supervisor		Maria Prince	Maria Prince	Maria Prince	Sara Barra	Sara Barra	Sara Barra
Memo to HR					Memo (not seen scores till 6/28/13)	not seen scores till 6/28/2013	Memo (not seen score till 6/10/2014)

Summary of Changes in MS-22 (Ms. Sara Barra Deleted, Restricted and Changed My Job Duties and Performance Standards *Complaint-Ex P 31*)

Elements	Initial MS22(11/2009-4/2010)	Revised MS-22 by Dr. Maria Prince (5/2010-7/2013, but was not signed until 1/21/2011)	Revised MS22 by Ms. Sara Barra on 6/12 and gave it to me on 7/5/2013	Revised MS22 by Ms. Sara Barra (revised on 7/19, signed on 7/23-7/24/2013) <i>Although I have disagreed Sara to delete and restrict my job function, she refused to correct it.</i>
Service	Professional	Professional	Initial changed to "Skilled"	<i>Because I asked Sara why, then she changed back to the "professional"</i>
Class Title	Epidemiologist I	Epidemiologist II	Deleted it but replaced with "chronic disease epidemiologist"	Deleted it but replaced with "chronic disease epidemiologist"
Position Function	<p>1. 20%: leads in the processing and analyzing of collected data in order to determine changes in trends and probable causes of epidemiologic problems.</p> <p>2. 20%: Identifies existing data systems and analyzes the data to assess morbidity and mortality associated with chronic conditions, including heart disease and stroke.</p> <p>3. 15% : Leads in the design, as well as data collection and analysis of evaluation associated with programmatic initiatives.</p> <p>4. 15%:Characterizes and presents the nature of problems identified from collected data</p> <p>5. 10%: Designs new data collection systems, as well as improvements in existing system.</p> <p>6. 10%: participates in implementation and evaluation of control or prevention measures.</p> <p>7. 10% recommends or conducts investigations or</p>	<p>1. Same</p> <p>2. Same</p> <p>3. Deleted "Leads", changed to "Consults"</p> <p>4. Same</p> <p>5. Same</p> <p>6. Same</p> <p>7. Same</p>	<p>1. 25%: Deleted "leads"</p> <p>2. 25%: Same</p> <p>3. 15%: Deleted "Leads" changed to "Consults"</p> <p>4. 15% : Same</p> <p>5. Deleted this Function</p> <p>6. Same</p> <p>7. Same</p>	<p>1. 25%: Deleted "leads"</p> <p>2. 25%: Same</p> <p>3. 15%: Deleted "Leads" changed to "Consults"</p> <p>4. 15% : Same</p> <p>5. Deleted this Function</p> <p>6. Same</p> <p>7. Same</p>

	special studies which are indicated from data analyses			
<p><b>Level, Frequency and purpose of work contacts</b></p>	<p><i>Daily contacts:</i>                      1. Office Director and Medical Director to provide recommendation and seek direction;                      2. Program administrator: to provide supervision and seek direction;  <i>Weekly contacts:</i>                      Diabetes coordinator: to provide information and determine collaboration;                      Other staff: provide information;</p> <p>3. Heart disease and stroke council: to persuade and negotiate, as well as inform and educate.  <i>Monthly/Quarterly contacts:</i>                      4. CDC project officer: provide information;                      5. Administrator: to provide information                      6. Local Health Departments: to provide education and training analyses</p>	<p><i>Daily contacts:</i>                      1. Same for Medical Director or Office Director</p> <p>2a. Changed: Program administrator and coordinator: only provide information</p> <p>2b. Added:                      1) Policy analyst: to explain data and provide information ; and                      2) Evaluator: to provide information</p> <p><i>Monthly/quarterly contacts:</i>                      3. Heart disease and stroke council: to persuade and negotiate, as well as inform and educate.                      4. Same                      5. Same                      6. Same</p>	<p><i>Daily-weekly contacts:</i>                      1. Same</p> <p>2. Added restriction:                      1. Request permission from CCDPC Chief of epidemiology for all projects outside of CCDPC (including those from CDC) prior to accepting /working on them;                      2. DHMH staff/Local Health Departments: as requested by supervisor, medical director or office director to provide information and recommendations.</p> <p>3. Deleted contacts to Heart disease and Stroke Council</p> <p>4&amp;5. Deleted "Provide information" to CDC and administrators</p> <p>6. Deleted "provide education and training" to local health departments</p> <p>7. Added additional limitations for entities external to DHMH: As requested by supervisor, CCDPC medical director or CCDPC director to provide information and</p>	<p><i>Daily-weekly contacts:</i>                      1. Same</p> <p>Added restriction:                      1. Although I disagreed, Sara refused to correct it.</p> <p>2. As I disagreed, Sara changed to DHMH staff: as requested to provide information and recommendations. However, for local Health Departments, she insisted on keeping same restriction</p> <p>3. Same</p> <p>4&amp;5. Same</p> <p>6. Same</p> <p>7. Added additional limitations for entities external to DHMH: As requested by supervisor, CCDPC medical director or CCDPC director to provide information and recommendation and discuss</p>

			recommendation and discuss mutual needs and interests.	mutual needs and interests.
<b>Decisions and Recommendations</b>	<p>1.Recommendations to the Office Director concerning heart disease and stroke prevention and control outputs and outcomes.</p> <p>2.Recommendations to the medical director concerning improvements in the quality of heart disease and stroke care.</p> <p>3. Decisions to the heart disease and stroke Advisory Committee regarding Statewide priority areas.</p> <p>4. Decisions to the office of chronic disease prevention staff regarding statewide initiatives and priorities</p>	<p>Changed 1&amp;2. As following: Recommendations to the office Director and Medical Director regarding population based data on heart disease, stroke, diabetes, COPD and obesity prevention and control.</p> <p>3.Same</p> <p>4. Same</p>	<p>Changed 1&amp;2. As following: Recommendations to the supervisor, office Director and Medical Director regarding population based data on heart disease, stroke, diabetes, COPD, obesity, nutrition and physical activity.</p> <p>3.Deleted ths job function</p> <p>4.Changed to: Decision/recommendations to CCDPC Staff regarding epidemiological aspects/impacts of statewide initiatives and priorities.</p>	<p>Changed 1&amp;2. As following: Recommendations to the supervisor, office Director and Medical Director regarding population based data on heart disease, stroke, diabetes, COPD, obesity, nutrition and physical activity.</p> <p>As I disagreed Sara to delete #3 job function, Sara added the restriction: 3.Decision/recommendations to external entities, including the Maryland State Advisory Council on Heart disease and stroke, regarding epidemiological aspects/impacts of statewide initiatives and priorities, as requested by supervisor, CCDPC medical director, or CCDPC director.</p> <p>4.Same</p>
<b>Nature of Supervision received</b>	General supervision	Changed to Managerial supervision	Changed to General supervision	I disagreed, but Sara explained she only does "general supervision", so she kept it as same.
<b>Nature and level of responsibility for work of others</b>	Lead employees Train employees	Changed to "No" Changed to "No"	same	same
<b>Performance Standards</b>	<p>1.Fact sheets on the burden of heart disease, stroke, and its risk factors are developed and disseminated at least quarterly.</p> <p>2. Evaluation plans are developed,</p>	<p>Changed to office all programs related to chronic diseases as following: 1. Collecting and analyzing data to identify and characterize the</p>	<p>Deleted all chronic disease related programs/projects in performance standards:</p> <p>1. Timely, appropriate completion of work assigned, including: research, data</p>	<p>Sara insisted on to deleted all chronic disease related programs/projects in performance standards:</p> <p>1. Same</p>

	<p>implemented, and disseminated in accordance with federal guidelines annually.</p> <p>3. Formal presentations and recommendations are made regarding priority areas for interventions.</p>	<p>epidemiology of chronic disease and their risk factors.</p> <p>2. Developing the Annual burden outline and data file for fact sheets and reports for heart disease, stroke, diabetes, obesity, chronic obstructive pulmonary disease (COPD), inadequate fruit and vegetable consumption and physical activity.</p> <p>3. Developing the design, data collection, analysis and evaluation for COPD.</p> <p>4. Helping to prepare data analysis for presentations.</p> <p>5. Identifying existing data resources.</p> <p>6. Presenting burden summary to the chronic disease council meetings and CDC site visits</p> <p>7. Making recommendations regarding priority areas for interventions</p>	<p>collection/analysis, burden reports and summaries, analysis/results for presentations, and recommendations.</p> <p>2. Burden reports related various types of chronic diseases performance standards is included into #1 without listing any project/program) . In instead, Sara added following:          "Timely, appropriate preparation of meeting summaries/reports and other evidence of appropriate, timely attendance/participation as assigned" .</p> <p>3. Deleted this job design and evaluation function related performance standards on COPD project. However, Sara added following:          "Timely, appropriate communication with supervisor regarding work assigned and potential projects.</p> <p>4. See #1</p> <p>5. Deleted this job function related performance standards</p> <p>6. Deleted the presentation at Council meeting and CDC site visit</p> <p>7. Deleted the recommendation about priority areas for intervention</p>	<p>2. I disagreed with Sara, as this was not listed in my major job function, but Sara insisted on keeping this:          "Timely, appropriate preparation of meeting summaries/reports and other evidence of appropriate, timely attendance/ participation as assigned" .</p> <p>3. I disagreed with Sara to delete this and added communication with her which was not listed in my major job function such as design and evaluation and, but Sara refused to correct it.          "Timely, appropriate communication with supervisor regarding work assigned and potential projects".</p> <p>4. See #1</p> <p>5. Deleted this job function related performance standards</p> <p>6. Deleted same</p> <p>7. Deleted same</p>
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Appendix 24.2

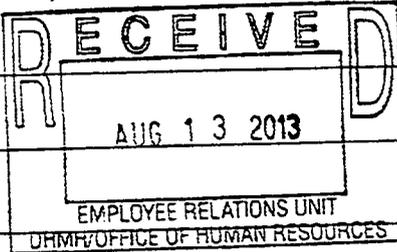
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# STATE PERSONNEL MANAGEMENT SYSTEM

Complaint-Ex-PST

## APPEAL AND GRIEVANCE FORM

Attach copies of any earlier agency decisions. If appealing a disciplinary action, the notice of discipline must be attached.)

EMPLOYEE'S NAME: Xiao-Ying Yu	
EMPLOYING AGENCY: DHMH, PHPA, CCDB	DIV. or UNIT: Chronic Disease Prev. & Control
EMPLOYEE'S CLASSIFICATION: Epidemiologist II	
HOME ADDRESS: 557 Kirkcaldy Way, Abingdon, MD 21009	HOME PHONE #: 410-671-9823
	WORK PHONE #: 410-767-5263
Issue of employee's grievance or reason given by agency for taking disciplinary action (attach additional pages as necessary): Employee was made aware of changes to her MS22 and they were implemented despite the employee's concerns and the limitations included in the revised MS22. This is a violation of the process for revision of employees' MS22.	
Date grievance or discipline was discussed with appointing authority: July 25, 2013	
State the issues of fact and law, to the extent possible, that support the employee's action (attach additional pages as necessary): COMAR Title 17, Annotated Code, State Personnel and Pensions, and any other law, rule, regulation, policy, and procedure that may apply.	
Employee's Requested Remedy: Employee requests that the MS22 be revised to include her original duties, the limitations on data access and attendance at scientific meetings be removed, and include her new responsibilities for the new grant. (see Addendum)	
EMPLOYEE REPRESENTED BY: Debra Perry, AFT Healthcare-MD	
Address: 7127 Rutherford Road, Baltimore, MD 21244	
Phone Number: 410-645-3062	

EMPLOYEE'S SIGNATURE: *Xiao-Ying Yu* DATE SIGNED: 8/13/2013

Please Circle Appeal Category:

- |   |   |
|---|---|
| 10 Termination  | 40 Forfeiture of Annual Leave                 |
| 11 Termination on Probation   | 42 Written Reprimand                          |
| 20 Suspension Without Pay   | 50 Involuntary Demotion                       |
| 22 <u>Emergency Suspension With Pay</u>   | 60 Denial of Pay Increase                     |
| 30 <u>Grievance (If complaint involves a denied reclass, give date of last audit: )</u> | 80 Retaliation for "Whistleblower" Disclosure |

**FAILURE TO FULLY COMPLETE THIS FORM WILL DELAY THE PROCESSING OF THIS APPEAL OR IT MAY RESULT IN ADVERSE ACTION ON THIS APPEAL.**

See reverse side for process to file your appeal

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ADDENDUM

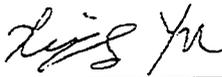
August 14, 2013

To: MS. Sara Barra, Dr. Donald Shell

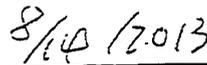
To: Employee Relations Unit

DHMD/Office of Human Resources

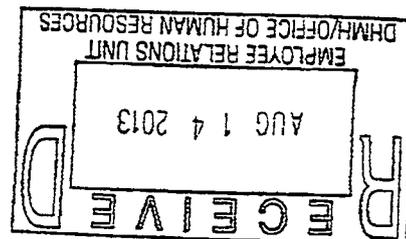
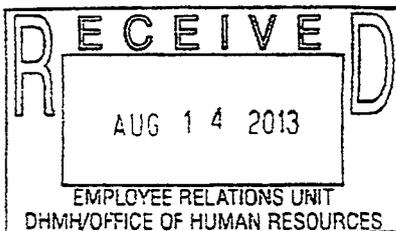
Employee also requests that management have MS-22 continue to permit her to respond to CDC requested activities specifically directed to employee. These are content questions dealing with a deep understanding of chronic disease, epidemiology and pathophysiology. As well as access to various clinical databases and attendance at chronic disease, surveillance, evaluation, CCDPC program meetings and scientific conferences.



Xiao-Ying Yu



Date:



Appalox 24.2

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JKB-17-CV-3260  
Complaint-Ex-B9

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Mon, Dec 2, 2013 at 5:27 PM  
Subject: seek help for fair treatment  
To: Harold Young -DHMH- <harold.young@maryland.gov>  
Cc: Donna Gugel -DHMH- <donna.gugel@maryland.gov>

Dear Ms. Young,

I understood that my supervisor Ms. Sara Barra has the right to change my MS22 and to do my PEP as her opinion. I really appreciate the opportunity Donna gave me to respond to the current decision about my case.

I do not agree the decision for these reasons:

1. The revised MS22 by Sara has not reflected the the epidemiologist job responsibilities to best contribute to our Department, PHPA and CCDPC;

2. The restriction make me can not use my best professional skills to do my professional job duty;

3. Although I have tried to communicate with Dr. Shell numerous times in writing and verbally since 3/13/2012 to seek his protection from Sara's unfair treatment, he has tried, the problem has not been solved, so he suggested me to contact HR regulations since last year as well as 1/2/2013 with PEP memo;

4. I hope that I will be permitted to perform my duty as epidemiologist (such as access to the data base, meetings and projects/programs information) without fearing retaliation because I reported truth.

Additional documents is attached to this letter.

Thank you and have a happy holiday season!  
Xiao-Ying

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Complaint-Ex-P51

**Exhibit 17.**

Ms. Yu reported to MDH Office of Equal Opportunity Program Director, Ms. Keneithia Taylor on 1/9/2014 about Ms. Barra's harassment and retaliation and requested making an appointment.

----- Forwarded message -----

From: **Xiao-Ying Yu -DHMH-** <xiao-ying.yu@maryland.gov>  
Date: Thu, Jan 9, 2014 at 6:25 PM  
Subject: Seek help  
To: keneithia.taylor@maryland.gov  
Cc: Michael McNally <mmmbjm@live.com>

Dear Ms. Taylor:

As the instruction by Mr. Michael McNally, Executive Director, Maryland Professional Employees Council and AFT Health Care-Maryland, I am writing this letter to you and seek your help, please protect me from the negative impact by the hostile work environment created by Ms. Sara Barra, my immediate supervisor.

I have received the hard copy of the "Memorandum" (memo) on 12/20/2013 from Ms. Barra for my 2014 mid-cycle performance evaluation. This memo is similar to the memo for my 2013 mid-cycle evaluation on 1/2/2013. Although I was evaluated as "Satisfactory" for the both periods, my official work efforts and contributions have been downgraded. Please see attached memo and the summary table of my PEP.

I would like to clarify some confusion Ms. Barra made in her memo. I have explained to Ms. Barra verbally at my PEP meetings on 1/2/2013 and 12/17/2013 and also in writing with these facts: 1. The chronic disease burden fact sheet I prepared have been regarded as easy to understand by everyone since 3/2010; 2. The recommendations I have previously provided to office directors and abstracts I initially generated (based on my judgments) have matched with the CDC's recent instructions and directions and 3. My doing the job duties to provide office directors recommendations as MS22 required and my seeking Dr. Shell's help to stop the unfair treatment by Dr. Maria Prince and Ms. Barra have been criticized by Dr. Prince and Ms. Barra as the "cross the chain of command". Therefore, I have refused to sign the memos, although I am willing to improve myself as English is my second language.

I have reported Dr. Donald Shell on 3/14/2012 at his request (he wanted to meet each of our staff, while Ms. Barra has not allowed me to have same chance as my co-workers to meet with Dr. Shell) and I have also written the e-mail to Dr. Shell on 12/5/2012 about the unfair treatment by Ms. Barra and Dr. Prince and asked Dr. Shell's help. Since then, I have been suffering from the continuous retaliation and also have been working in the unwelcomed and harassing environment generated by Dr. Prince and Ms. Barra. The retaliation has included but not limited as following: a) continuously and repeatedly creating the confusion in my work assignments and forbidding me to clarify it; b) forcing me out of participation in office projects/programs; c) diminishing my professional responsibilities via their meeting invitations and the assignments of

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JTB 17-CV-3260  
Complaint-Ex-152

work; d) downgrading my PEP scores immediately after Ms. Barra became my supervisor and I have complained to Dr. Shell; e) sending negative memos to HR for inclusion in my personnel file (2 memos within 2 months), and f) deleting and restricting my job duties by revising the MS-22.

All of these problems have not only damaged my health, and suppressed me to get the same working rights as my co-workers had, but also have prevented me from the professional advancements. In addition, it has been harmful to the office peaceful working environment and positive interaction, and the developing/ improving office programs.

As Mr. McNally suggested, could you please arrange a meeting that will include me, you and Mr. McNally at your earliest convenience?

Sincerely yours,

Xiao-Ying

Xiao-Ying Yu, M.D., MS  
Epidemiologist  
Center for Chronic Disease Prevention and Control  
Cancer and Chronic Disease Bureau  
Prevention and Health Promotion Administration  
Maryland Department of Health and Mental Hygiene  
201 W. Preston St., Rm 306-J-3  
Baltimore, MD 21201  
(Phone) 410-767-5263  
(Fax) 410-333-7106  
e-mail: [xiao-ying.yu@maryland.gov](mailto:xiao-ying.yu@maryland.gov)