No. 20-1582

IN THE

SUPREME COURT OF THE UNITED STATES

WEI-PING ZENG

Petitioner,

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER AT EL PASO; PETER ROTWEIN; RICHARD LANGE; BEVERLEY COURT; REBECCA SALCIDO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should resolve the following question for which the circuit courts of appeals are split: for his/her claim of wrongful termination for alleged violation of employer's policy to survive summary judgment motion, whether a plaintiff has to name similarly situated employee(s) who had nearly identical job responsibilities, shared the same supervisor, and committed nearly identical policy violations, or present "circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent".

2. Whether Respondents violated Petitioner's due process right guaranteed by the Fourteenth Amendment by disregarding employer's own policy to label Petitioner as "not eligible for rehire" due to misconduct "demonstrating unfitness for employment", for which the circuit courts of appeals are split in terms of how to define a stigma that infringes liberty interest and what constitutes the publication of the stigma.

(b) LISTS OF ALL PARTIES AND PROCEEDINGS

Parties involved

The caption of the case contains the names of all parties. Respondents were represented by counsel Rola Daaboul.

Proceedings

Wei-ping Zeng v. Texas Tech University Health Science Center at El Paso; Peter Rotwein; Richard A. Lange; Beverley Court; Rebecca Salcido, No. 20-50210 (5th Cir. December 15, 2020)

Wei-ping Zeng v. Texas Tech University Health Science Center at El Paso; Peter Rotwein; Richard A. Lange; Beverley Court; Rebecca Salcido, No. 20-50210 (5th Cir. November 9, 2020)

Wei-ping Zeng v. Texas Tech University Health Science Center at El Paso; Peter Rotwein; Richard A. Lange; Beverley Court; Rebecca Salcido, No. 3:19-cv-00099-KC (TXW_USDC, March 4, 2020).

(c) TABLES OF CONTENTS AND AUTHORITIES

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(d) CITATION TO OPINION BELOW

The Fifth Circuit Court's opinion is not published.

(e) BASIS FOR JURISDICTION

The 5th Circuit Court entered orders denying Petitioner's appeal on Nov 9, 2020, and denying *en banc* rehearing on Dec 15, 2020. This Court has jurisdiction to review the 5th Circuit Court's final judgment under 28 U.S.C. §1254.

(f) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 USC §1981(a). "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other".

42 USC §1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, 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 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

42 USC §2000e–2(a). "It shall be an unlawful employment practice for an employer-

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin".

14th Amendment to U.S. Constitution, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 laws"

(g) STATEMENT OF THE CASE

Factual background

Petitioner, an Immunologist known for his discovery of GATA-3 as the master regulator of allergy and immunity against helminth infections, started working at Dr. Wu's lab at Texas Tech University Health Science Center at El Paso (the university) on March 1, 2017. The work tasks assigned to Petitioner by Dr. Wu included writing NIH grant applications, research progress reports, animal study protocols and manuscript reviews for research projects on Zika, HIV, EV71 and influenza viruses. (A26-7). For these tasks, Petitioner's work was mostly reading and writing. However, as a staff member Petitioner did not have an office at the university, therefore was subject to distractions by the constant noises in the lab. As such, Petitioner believed he could work more effectively at his permanent home in West Virginia. Mainly for this reason, and to lesser degree some legal matters in W. Va., Petitioner asked Dr. Wu if he could work from his W. Va. home. Dr. Wu approved this request. (A26).

The university policy OP70.06 provided that employee had to receive the university president's approval to work from home. However, as part of the hiring process, Petitioner signed the Employee Acknowledgement form and the New Employee Document Receipt. These two documents listed a number of university policies, but OP70.06 was not listed on either document. Therefore, at the time he

requested to work from home, Petitioner was unaware of this policy, neither was Dr. Wu. (A35, 43-4).

From early May to early December 2017, Petitioner mainly worked from home, but was back to the university several times for work-related reasons, and successfully completed his work assignments. For most of December 2017, Petitioner worked at the university. (A27-8).

On Jan 9, 2018, Petitioner received an email from his department's chair Rotwein, stating that the department found that Petitioner claimed 119 workdays without electronic records of swipe card access to the university building from May to Dec 2017. In his email, Rotwein expressed his concern whether Petitioner actually worked, and requested that Petitioner provide him documentations of Petitioner's "scientific activities" for Dr. Wu's research. On Jan 11, 2018, Petitioner sent Rotwein the summary and PDFs of his work products by email. (A28).

Rotwein's Jan 9 email was the first departmental communication that Petitioner received regarding the discrepancies between employees' claimed workdays and swipe card usages. Prior to Rotwein's email, on December 18, 2017, the department's senior director Ms. Court sent Petitioner a meeting request by email. However, Ms. Court did not mention anything about the discrepancies or policy violation in her email. Appellant initially missed the email because he was working at the university and did not expect that his colleagues needed to communicate with him by email. When Appellant saw the email later, he went to see Ms. Court but was told she had been gone for her Christmas break. (A28).

From Jan 8 to early Jan 9, Ms. Court and Petitioner had a number of email communications about Petitioner's December timesheet entries, during which Ms. Court made anther meeting request, again did not mention anything about the discrepancies or policy violation. At that time, Petitioner was not in El Paso, but replied to the email, telling Ms. Court he would be back as soon as possible, and would meet with her once back if she still needed to meet. (A39).

Rotwein also contacted Dr. Wu. On Jan 7, 2018, Dr. Wu told Rotwein that he approved Petitioner's working from home, and praised Petitioner as "an excellent researcher" and having "worked diligently" for his research. (A29). Around the same time, Dr. Wu also discussed the situation with Petitioner. Petitioner expressed skepticism to Dr. Wu about the accuracy of the number of Petitioner's claimed workdays without swipe card usage. Petitioner believed it should be 103 instead of 119 days. (A29). To his recollection, Petitioner also conveyed this skepticism to Rotwein or other administrator(s) by emails. (A63)[1]. Dr. Wu advised Petitioner to return to El Paso. Petitioner agreed and informed Rotwein that he would follow Dr. Wu's advice. (A29).

After the discussion with Dr. Wu and receiving Rotwein's Jan 9 email, Petitioner started preparing to return to El Paso by renting out his W. Va. home. On Jan 26, 2018, Appellant was back in El Paso, and found an apartment there for long-term lease. However, on Jan 29 Petitioner received an email from Ms. Court,

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[1] The emails could not be produced because Respondents deleted Petitioner's email account.

informing him that his employment had been terminated effective Jan 22, 2018. The formal termination form described the reason for the termination as "Misconduct". Prior to Jan 29, Petitioner received no warning or any indication of the pending termination. (A29-30).

On Jan 31, 2018, Petitioner wrote to Rotwein, and later to president Lange, expressing his worries about the adverse effect of the termination for misconduct on his career and urging them to reconsider the termination decision, but received no reply. Petitioner also wrote to Lange and the Human Resources Division (HR) to inquire about filing formal complaint, but HR told him that he was not permitted to file complaint. (A59).

After left the university, Petitioner applied for numerous positions but didn't even received any invitation for interview. Petitioner then hired the reference check company Allison & Taylor (A&T) to **specifically** find out whether the university might tell prospective employers that Petitioner was fired for misconduct. (A53, 89). A&T appeared in turn to have hired CredentialVerificationService.com, which sent a reference check form to the HR head Salcido. Salcido forwarded the form to the departmental director Ms. Court. Ms. Court, with permission from Rotwein answered "yes" to the question on the form whether Petitioner was "not eligible for rehire" (NEFR). Ms. Court testified that she did not know that the reference check was ordered by Petitioner. (A53).

A&T sent the reference check report to Petitioner, and recommended Petitioner to send a "Cease & Desist" request regarding the NEFR statement to the

university. Petitioner sent the request to Rotwein, Ms. Court and Salcido, but received no reply. (A53). Prior to the reference check report, Petitioner had never received any notice of NEFR. The university had a strict policy and procedure for designating an employee as NEFR, and the NEFR designation had to be sent to the designated employee by the HR. Salcido, the HR head, testified that Petitioner had never been designated as NEFR. (A56).

In addition to Petitioner, the department found many other employees who also claimed workdays without swipe card usage. One of them was Montoya, a self-described White and Native American, who like Petitioner was a research staff member. After initially found to have wrongfully claimed workdays, Montoya received a performance coaching. However, she continued the same violation with high frequency. On the records produced in this case, she accumulated 105 workdays without swipe card usage, but might have claimed additional 29 such days for a period that Respondents refused to provide records. Montoya received a formal "Notice of Corrective Action" as the final disciplinary action. (A36-7).

President Lange was the final decision maker of employment termination by the university. Under his presidency, the university fired 13 other employees, all of who had repeated policy violations and received multiple opportunities and assistance to correct their behaviors prior to their termination. (A80-4). There were also numerous employees who committed serious policy violations and received multiple disciplinary actions but were not fired. (A85-8, 64-79). Petitioner was the only employee who was fired without an opportunity to improve.

Federal jurisdiction in the court of first instance

The U.S. District Court for the Western District of Texas in El Paso has jurisdiction over this case pursuant to 28 USC § 1331 as this case involves federal questions, and the district court has jurisdiction over all civil actions arising under the Constitution, laws, and treaties of the United States. The district court has jurisdiction over this case pursuant to 28 USC §1343, which gives the district courts original jurisdiction of any civil action authorized by law to be commenced by any person. The district court has supplemental jurisdiction over this case on claims arising under state laws pursuant to 28 USC §1367(a).

Judicial history

Petitioner filed the original complaint with claims of employment discrimination based on race and national origin and due process violation, and tort claims of defamation and tortious interference in the 243rd District Court of El Paso County, Texas on March 18, 2019. On March 27, 2019, Defendants removed the case to the U.S. District Court for the Western District of Texas in El Paso. On March 4, 2020, the district court entered order and judgment granting Respondents motion for summary judgment on all claims. (A25-6)

On March 16, 2020, Petitioner appealed from the district court's decision to the U.S. Court of Appeals, 5th Circuit. On November 9, 2020, the 5th Cir. Ct. entered order affirming the district court's decision. (A1-20). Petitioner filed petition for *en banc* rehearing. On December 15, 2020, the 5th Cir. Ct. entered order denying *en banc* rehearing, from which Petitioner now appeals. (A21).

(h) REASONS FOR ALLOWANCE OF THE WRIT

1. Whether the Court should resolve the following question for which the circuit courts of appeals are split: for his/her claim of wrongful termination for alleged violation of employer's policy to survive summary judgment motion, whether a plaintiff has to name similarly situated employee(s) who had nearly identical job responsibilities, shared the same supervisor, and committed nearly identical policy violations, or present "circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent".

Under current laws, a plaintiff could prove his/her claim of unlawful discrimination by either direct or indirect method. Direct evidence would require something akin to an admission of unlawful discrimination by the defendant. *Raymond v. Ameritech Corp.*, 442 F.3d 600, 610 (7th Cir. 2006). In this day and age such evidence is rare. Therefore, the indirect method is the predominant method of proof of employment discrimination.

Pertaining to the method of indirect proof of unlawful employment discrimination, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (S. Ct. 1973), the Court held:

> "On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.*

Since then, the circuit courts of appeals have adopted the *McDonnell Douglas* burden-shift framework or the "four-prong test" for analyzing employment

discrimination claims. In *West v. City of Hous.*, 960 F.3d 736, 740 (5th Cir. 2020), the 5th Cir. Ct. described the four-prong test:

> "(The plaintiff) must show that she (1) belongs to "a protected class"; (2) "was qualified for the position"; (3) experienced "an adverse employment action"; and (4) was "similarly situated" to other employees who were not members of her protected class and who "were treated more favorably."" *Id.*, (internal citation omitted).

The 5th Cir. Ct. further set forth the criteria for determining "similarly situated":

> "We have defined "similarly situated" narrowly, requiring the employees' situations to be "nearly identical." Employees are similarly situated when they (1) "held the **same** (emphasis added) job or responsibilities," (2) "shared the **same** (emphasis added) supervisor or had their employment status determined by the same person," and (3) "have essentially comparable violation histories."" *Id.* (internal citations omitted). "[T]he conduct the employer points to as the reason for the firing must have been 'nearly identical' to 'that of the proffered comparator who allegedly drew dissimilar employment decisions.'" *Garcia v. Prof'l Contract Servs., Inc.*, 938 F.3d 236, 244 (5th Cir. 2019).

In addition to the 5th Cir. Ct., other circuit courts have adopted similar analytical frameworks. *Ajayi v. Aramark Business Services, Inc.*, 336 F. 3d 520 (7th Cir. 2003); *Ortiz v. Hershey Co.* 580 F. Appx 352 (6th Cir. Ct. 2014).

However, these stringent standards have significantly deviated from the Court's original holding in *McDonell*, supra, which did not require the plaintiff to show that the comparators had the same or similar job responsibilities as the plaintiff, or committed offenses same as or similar to the "stall in", but rather the plaintiff only need to show that the other offenses are of "comparable seriousness" to the "stall in". *Id.*

The stringent standards for qualifying a comparator as "similarly situated" could be problematic in cases that concern disparate treatments/punishments for violating employer's policies. For example, hypothetically two employees, an accountant and an engineer, violated their company's policies. The account stole a million dollars from the company, but only received a letter of reprimand. Whereas, the engineer with his supervisor's permission worked at home for a few months, and designed a number of successful new products for the company, but was fired because he did not have the company's president's permission to work from home even though he did not know that he needed the president's permission. Under the stringent standards, the accountant would not be "similarly situated" to the engineer because they have different job responsibilities and supervisors and their violations are dissimilar, so that the engineer would not have a case of discrimination for disparate treatments. No reasonable mind could believe that such outcome was the federal or any state's legislature's intent when they enacted the civil/human rights acts. As the Honorable Justice Gorsuch once wrote "[w]hile the law is often subtle and sometimes complex, it is rarely so unreasonable", *Simmons v. Uintah Health Care*, 506 F.3d 1281 (10th Cir. 2007), the law should not be so unreasonable in this hypothetical case either.

Moreover, even in cases where the stringent standards may be more applicable, the lack of clear definition of "nearly identical" leaves too much room for error of caprice. Such caveat undermines and often defeats the ultimate goal of the civil rights acts to eliminate unlawful workplace discrimination.

Thus, it is not surprising that instead of requiring the identification of "similarly situated" employees, a number of circuit courts have decided employment discrimination cases based on whether plaintiff "presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Smith v. Lockheed Martin Corp.*, 644 F. 3d 1321, 1328 (11th Cir. 2011). The most recent (to the Petitioner's knowledge) such decision was from the 9th circuit court in *Haynes v. Home Depot USA, Inc.*, Nos. 16-55698, 16-55922 (9th Cir. 2020). Without engaging in the identification of specific "similarly situated" but younger employees, the 9th Cir. Ct. held that viewing the facts in the light most favorable to the plaintiff, the plaintiff presented evidence to "allow a reasonable factfinder to conclude ..... that the true reason (for the plaintiff's discharge) was (age) discriminatory." *Id.*

Some other circuit courts have taken the same approach. In *Smith*, supra, the 11th circuit court, while acknowledging that plaintiff Mitten failed to provide "similarly situated" employees based on the standard of "nearly identical job responsibilities", held:

> "However, establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case. Accordingly, the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case. Rather, the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.*

Similarly, in a case of discharge for policy violation, the 7th circuit court declared "that the time has come to jettison the "ossified direct/indirect paradigm" in favor of a simple analysis of whether a reasonable jury could infer prohibited discrimination." *Perez v. Thorntons, Inc.* 731 F.3d 699, 703 (7th Cir. 2013). There, the 7th Cir. Ct. held that although the comparator provided by plaintiff Perez did not fit the definition of "similarly situated" employee because of different job responsibilities, it should be up to a jury to decide whether "she was fired because of her gender or national origin". *Id.*, at 712.

In this case, Petitioner alleged that his discharge for alleged violation of the university policy was motivated by discrimination based race and national origin. The 5th Cir. Ct. affirmed the district court's decision granting summary judgment to the Respondents on the ground that there were no similarly situated employees, hence no *prima facie* case under the *McDonnell Douglas* framework. (A8-11).

However, Petitioner offered multiple lines of evidence showing that he was treated worse than any other policy violators who were outside his protected class. The Petitioner's discharge resulted from a departmental audit conducted at the end of 2017 that found discrepancies between the workdays claimed by Petitioner and a number of other employees and the electronic records of their swipe card usages. Therefore, Petitioner first provided evidence to show that at least one of the other employees, Montoya, received more favorable treatment even though the seriousness of her violation was greater than, or at least comparable to, that of the Petitioner's.

For comparisons between Montoya and Petitioner, the following facts are material. Firstly, Respondents alleged Petitioner claimed 119 workdays without swipe card usage, but Petitioner disputed this number and believed that he should had only 103 such days if taken into consideration of the weekends and holidays he worked at El Paso for the university but did not claim as workdays from May to Dec 2017, as well as days when his co-workers gave him ride to work so that he entered the building without using his own swipe card. (A29). As for Montoya, on the records produced in this case, she had 105 workdays without swipe card usage (83 days for 4/6/2016 – 10/15/2017, 22 days for March 2018 to June 15, 2018), but might have additional 29 or more such days from the period of 10/16/17 to Feb 2018 for which Respondents refused to provide records. (A36). Although Respondents alleged that Petitioner and Montoya violated different policies, the factual basis of their violations is the same, i.e., claiming workdays without swipe card usage. This is important because the similitude of employees' violations may not be necessarily determined by "how a company codes an infraction under its rules and regulations." *Lee v. Kansas City Southern Ry. Co.*, 574 F. 3d 253, 261 (5th Cir. 2009). Despite having similar or more number of wrongfully claimed workdays, Montoya only received a formal "Notice of Corrective Action" as the final disciplinary action.

Secondly, the reason that Petitioner claimed workdays without swipe card usage was because he worked from home. However, he asked for and received permission to do so from his supervisor Dr. Wu, and at the time neither he nor Dr. Wu knew that they needed approval from the university president. (A27).

Therefore, Petitioner's violation was **unintentional**. This fact is material because the 5th Cir. Ct. has held that it is justifiable for employer to fire employees who knowingly, but not those unknowingly, violated policy. *Turner v. Texas Instruments, Inc.*, 555 F. 2d 1251, (5th Cir. 1977). Moreover, Petitioner **promptly took actions to correct his mistake** by returning to work at the university and making arrangements for long-term stay in El Paso. (A29).

In contrast, after initially found to have wrongfully claimed workdays, Montoya received a performance coaching, in which she explained that she worked in the lab in the evenings on the disputed days but her swipe card was not programed for evening access. However, there was no documentary or testimonial evidence from her supervisor that her supervisor even knew, let alone approved, her working in the evenings. Further, after the performance coaching, she was granted 24/7 access on Feb 22, 2018, but afterwards continued to claim 22 workdays without swipe card usage from Mar to June 15, 2018. (A36). Thus, her repeated violations were not only undeniably **intentional** or "knowingly", they would also raise doubt in the minds of a jury about the **truthfulness** of her explanation for her earlier violations.

Thirdly, Petitioner worked hard and effectively, and had **excellent work productivity**. He wrote 2 NIH grant applications, one of which was awarded $420,750 for 2 years, 2 animal study protocols, 3 project progress reports, 1 manuscript review; he also passed a number of university mandated trainings, helped other lab members with their research, and offered 2 lectures to a graduate

course. (A91). In contrast, there was no evidence of Montoya's work productivity or that Montoya actually worked on her wrongfully claimed workdays except Respondent Ms. Court's affidavit stating that Montoya's supervisor told Ms. Court that Montoya did research. Ms. Court's statement in her affidavit however was merely hearsay. (A36-7).

Finally, Petitioner provided evidence for which a reasonable jury would conclude that he fully cooperated with Respondents in the investigation of his alleged policy violation. Respondents claimed that they made several requests for Petitioner to cooperate in the investigation. These requests included 2 meeting requests by email from Ms. Court dated Dec 18, 2017 and Jan 8, 2018, and Rotwein's Jan 9 email. (A28, 90). However, Ms. Court's meeting requests did not mention the audit or policy violation, therefore could not be considered as requests for the investigation thereof. Nonetheless, Petitioner responded to both. Petitioner initially missed Ms. Court's Dec 18 request because he did not check his work emails thinking that while he was working at the university, his colleagues would not need to communicate with him by email. When he did see the email, he went to meet with Ms. Court but only to find out that she had gone for her Christmas break. For Ms. Court's Jan 8 email, Petitioner replied that he was not in El Paso at the time but would return as soon as possible, and once back would meet with her if she still wanted to. However, on the next day Jan 9 chair Rotwein sent Petitioner an email to request that Petitioner provide him documentation of "scientific activities"

that Petitioner had done for Dr. Wu's research[2]. Petitioner promptly responded by providing Rotwein not only a summary but also the actual PDFs of Petitioner's work products. (A28, 90-1).

Petitioner also provided evidence to show that his discharge was unreasonably harsh compared with the disciplinary actions received by two groups of other employees. One group of employees had repeated and serious violations but were not fired. Their violations included violations of policies for HIPA privacy, policies against sexual harassment (OP51.03) and failure to perform (OP70.31). (A85-8, 64-79). These policies are arguably more important than the policy (OP70.06) (working from home) that Petitioner was accused of violating because their violations directly jeopardizes the core missions (patient care, teaching and research) and personnel security of the university, and indeed they were specifically emphasized in the Employee Acknowledgement form whereas OP70.06 was not. (A43-4).

The other group consists of all the employees other than Petitioner (13 of them) who were discharged by president Lange. Their violations must be comparably serious to that of the Petitioner's in the eyes of the Respondents because they too warranted discharge. However, unlike the Petitioner, all those 13 other employees were offered multiple opportunities and assistance to correct their

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[2] Rotwein requested that Petitioner provide him documentation of Petitioner's "scientific activities" with "specifics" of "primary data that you analyzed, and/or the primary research papers or grant applications that you wrote or edited, or any other related activities, such as developing a new research plan". (A28).

behaviors before being discharged. (A80-4). In contrast, Petitioner took solid actions to correct his mistake by renting out his home in West Virginia, returning to El Paso and finding an apartment there for long-term lease, but was cruelly denied such an opportunity to improve. Not only so, he was also fired without any warning or a chance to argue for himself. (A42-3).

Taken together, these lines of evidence, if not have already proven unlawful discrimination, have at least created a triable issue concerning the Respondents' discriminatory intent.

2. Whether Respondents violated Petitioner's due process right guaranteed by the Fourteenth Amendment by disregarding employer's own policy to label Petitioner as "not eligible for rehire" (NEFR) due to misconduct "demonstrating unfitness for employment", for which the circuit courts of appeals are split in terms of how to define a stigma that infringes liberty interest and what constitutes the publication of the stigma.

(1) Stigma that infringes liberty interest

With regard to due process for the deprivation of liberty interest, the Court has previously held:

> "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." *Paul v. Davis*, 424 US 693, 712 (S. Ct. 1976).

Although this holding have been the legal authority for circuit courts of appeals in deciding cases concerning due process protection from deprivation of liberty interest

in future employment, the circuit courts are nonetheless divided on how to define a stigma that infringes liberty interest. Some circuit courts emphasize "moral turpitude" of a charge to be stigmatizing enough to implicate liberty interest, but generally do not consider charges of professional incompetence as infringement of liberty. "[A] stigma of moral turpitude, which infringes the liberty interest, and a charge of incompetence or inability to get along with coworkers which does not." *Stretten v. Wadsworth Veterans Hospital*, 537 F. 2d 361, 366 (9th Cir. 1976); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F. 2d 1093, 1101 (9th Cir. 1981). Statement that an employee "should not be rehired ..... due to "failure to perform duties"" does not infringe on the employee's liberty. *Townsend v. Vallas*, 256 F. 3d 661, 669 (7th Cir. 2001).

In contrast, other circuit courts have decided cases on grounds of charges of professional incompetence. For example, in *Donato v. Plainview-Old Bethpage Cent. School Dist.*, 96 F. 3d 623 (2nd Cir. 1996), the 2nd Cir. Ct. held "stigmatizing allegations (of deprivation of liberty) also include charges going to professional competence when the charges are sufficiently serious." *Id.*, at 632.

In this case, Petitioner claimed that Respondents violated his liberty interest by labeling him as "not eligible for rehire" (NEFR). The 5th Cir. Ct. denied this claim in part on the ground that the NEFR label was based on Respondents' charge against Petitioner for misconduct "demonstrating unfitness for employment". (A14). As argued in the following, the Respondents' charge of NEFR and/or misconduct

against Petitioner is not only false but also insinuates moral turpitude and professional incompetence.

First, there is compelling evidence that Respondents made a false statement by labeling Petitioner as NEFR. Texas Tech University System Regulation 01.09 (the Regulation), which was published openly on the university system's website, set forth the criteria for NEFR:

> "i. the individual engaged in behavior that constitutes serious misconduct including but not limited to fraud, theft, violence/threat of violence, alcohol/drug policy violation, moral turpitude, sexual misconduct, or other conduct demonstrating unfitness for employment; or ii. The individual has been involuntarily terminated two times or more from the System within a five-year period." (A52).

The Regulation also provided the procedure for making a NEFR designation:

> "a. In accordance with University policy, the respective Human Resources office will review the circumstances surrounding the termination and, based on the criteria in Section 2 of this regulation, determine whether an individual should be submitted for NEFR consideration. b. A designation of NEFR, including the effective time period, will be made on a case-by-case basis in consultation with the respective director of Human Resources, respective president or designee, the Office of General Counsel, and the Office of Equal Opportunity. c. Human Resources will document the former employee's name, ID number, social security number, date of birth, institution, department, date of termination, reason for ineligibility, and time period of NEFR designation." (A56).

According to these policy and/or procedure, Petitioner had never been designated as NEFR by the proper authorities of the university. In fact, Salcido the head of Human Resources, which was charged by the Regulation to document and send notice of NEFR to the designated employee, testified that Petitioner had never been designated as NEFR. (A56). Therefore, Rotwein and Ms. Court, who had no

authority to designate employee as NEFR, clearly made a false statement about Petitioner when they described Petitioner as NEFR.

However, Respondents argued, that their NEFR statement was not false because Petitioner was fired for "misconduct" "demonstrating unfitness for employment". Although this ostensible argument was adopted by the 5th Cir. Ct., (A14), it is misleading. The university fired Petitioner for misconduct due to violation of OP70.06, i.e., working from home without the president's approval. Even if *arguendo* this original charge of misconduct was serious enough for the university to fire Petitioner from the job he had in 2017, the university clearly did not consider it serious enough to permanently ban Petitioner from other future jobs because it did not designate Petitioner as NEFR. Thus, labeling Petitioner as NEFR essentially elevated the seriousness of the Petitioner's original misconduct to a higher level, which Rotwein and Ms. Court were not authorized to do. Therefore, Rotwein and Ms. Court's charge of NEFR and/or "misconduct" against Petitioner is false, or at least the falsity of the charge is a factual issue that should be decided by a jury. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 US 133 (S. Ct. 2000).

The stigmatizing nature of the Respondents' labeling of Petitioner as NEFR is two fold. As shown in this case, it is the university's practice to forward reference check request to the department. However, the department, represented by Ms. Court and Rotwein, has refused to heed Petitioner's "Cease & Desist" request regarding the NEFR label. Therefore, the department has described and likely will continue to describe Petitioner as NEFR either without an explanation as they did

with the reference check company, or with an explanation that Petitioner committed "misconduct" "demonstrating unfitness for employment". In the former scenario where there is no explanation, the public or prospective employers would construe the meaning of the NEFR label as that provided in the openly published Regulation, which clearly insinuates moral turpitude. In fact, the reference check company did indeed consider it as a negative statement, and recommended Petitioner to request the "Cease & Desist". (A31).

In the latter scenario where there is an explanation, the "misconduct" insinuates professional incompetence, i.e., inability to follow employer's policy. However, since the "misconduct" has been falsely given the meaning of **unfitness for not just one previous job, but all future jobs** in the Petitioner's chosen profession, it becomes a stigma that infringes liberty interest as defined in *Paul,* supra. This is because the Regulation protects the constitutional right of an employee, even an involuntarily discharged employee, who is not designated as NEFR by the proper authorities following the proper procedure, to seek re-employment. This right of the Petitioner's has been altered by the label of NEFR and/or "misconduct".

(2) Publication

The circuit courts are also divided in terms of what constitutes the "publication" of a stigma, and there is even inconsistency on this issue in the same circuit court. In some cases, the circuit courts require actual public dissemination of the stigma directly by defendant, and reject self-publication triggered by plaintiff's

own actions such as job application as publication in the meaning of infringement of liberty interest. (See for examples, *Burton v. Town of Littleton*, 426 F. 3d 9, 17, n9 (1st Cir. 2005); *Olivieri v. Rodriguez*, 122 F.3d 406 (7th Cir. 1997)).

In other cases, some circuits have determined that direct publication by defendants is not necessary so long as the stigmatizing charges are **likely** to become known to prospective employers, therefore consider publication in such circumstances albeit triggered by a plaintiff's own action, which might be considered as self-publication in other circuits, sufficient to satisfy the publication requirement. *Donato*, supra, at 631; *Sciolino v. City of Newport News, Va.*, 480 F. 3d 642, 649-50 (4th Cir. 2007)). In *Sciolino*, the 4th Cir. Ct. reasoned:

> "the constitutional harm" is not the defamation" itself; rather it is "the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge." If an allegation of actual dissemination were required, the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged before any possibility for a name-clearing hearing. Further, a requirement that an employer need only provide a name-clearing hearing if it actually disseminates the employee's personnel file to a specific prospective employer would be virtually impossible to enforce. Most job applicants will never know whether a prospective employer decides against hiring them because of false damaging charges in a personnel file, or for other reasons, and would not even know if the prospective employer has learned of the charges. Therefore, a requirement that a plaintiff must allege actual disclosure to a particular prospective employer would undermine the liberties protected by the Fourteenth Amendment." *Id.*, (internal citations omitted).
>
> "The very reason the Constitution requires procedural due process is that the dynamic of a fair hearing often alters a decisionmaker's determination." "Indeed, we have held that it is not, as a matter of law, impossible to prove that, had a due process hearing been conducted, the result of the hearing would in fact have been

> different." *Garcia v. Bd. of Ed. of Socorro Consol. Sch. Dist.*, 777 F. 2d 1403, 1418, n6 (10th Cir. 1985) (internal citation omitted).

Apart from the general principle of "likely to be published", specific factors have been considered to limit the meaning of self-publication even in circuits that generally reject self-publication. For example, in the 7th circuit, a plaintiff's own voluntary disclosure of stigma is considered as self-publication and not qualified as publication for a due process claim. However, if a plaintiff is obliged to authorize the disclosure by defendant, but does not make the disclosure himself, such disclosure is not self-publication and satisfies the publication requirement for a due process claim. *Doe v. Purdue University*, 928 F. 3d 652, 662 (7th Cir. 2019). The 7th Cir. Ct. drew these distinctions from comparison of two of their cases:

> "In contrast to *Olivieri*, where disclosure was voluntary and speculative, it was compelled and certain in *Dupuy*. And in *Dupuy*, unlike in *Olivieri*, the disclosure was not self-published—it came from the defendant, even if the plaintiff had been obligated to authorize it. So too here: Purdue, not John, revealed to the Navy that it had found him guilty of sexual violence, and John had a legal obligation to authorize the disclosure." *Id.*

In this case, the 5th Cir. Ct. denied Petitioner's due process claim in part on the ground that it did not satisfy the publication element. (A14-5). The circumstance under which the NEFR stigma was published in this case was analogous to that of job application. After being discharged by the university, Petitioner applied numerous jobs, but did not even receive any interview invitations, whereas after he left his earlier job, he had a number of job interviews and eventually found a job. Suspecting that his bad luck in finding a new job might

be caused by the university telling his prospective employers that he was fired for misconduct, Petitioner hired the reference company A&T to do a reference check. A&T in turn apparently hired CredentialVerificationService.com to conduct the reference check. In filling out the reference check form provided by CredentialVerificationService.com, Ms. Court stated that Petitioner was "not eligible for rehire".

Although Ms. Court made the disclosure to a reference check company instead of a prospective employer, she or Rotwein would **likely** make the same disclosure to a prospective employer. In this regard, it is important to point out that reference check on behalf of prospective employers is a legitimate business of a reference check company. In fact, when Ms. Court made the disclosure, she did not know that the reference check was ordered by Petitioner. (A53). Therefore, it is logical to conclude that she believed that the reference company was making the inquiry on behalf of a prospective employer. Second, as demonstrated in this very incidence, it is the university's practice to forward reference check inquiry to an employee's department. (A56). As already argued, Ms. Court and Rotwein refused to consider Petitioner's "Cease & Desist" request. Consequently they would likely have described, and continue to describe Petitioner as NEFR to prospective employers.

Nonetheless, the publication of the NEFR stigma in this case did not fit the definition of self-publication as defined in *Doe,* supra. The publication was not made by Petitioner himself, nor was it voluntary. When Petitioner hired the

reference check company, he wanted to find out whether the university would disclose the misconduct in its original meaning to prospective employers. He did not know that he was considered as NEFR by Rotwein and Ms. Court. He discovered the NEFR label only after he received the reference check report. (A30-1). Logically, if Petitioner did not even know of the stigma, he could not possibly self publish it. It must also be noticed that Petitioner did not hire CredentialVerificationService.com, to which Ms. Court made the NEFR disclosure. (A53).

Thus, the NEFR designation of Petitioner is both false and stigmatizing. It likely has been, and will continue to be, disclosed to prospective employers and the public. The Respondents' disclosure of it to a reference check company was not Petitioner's self-publication.

CONCLUSION

For the foregoing reasons, this case is a suitable vehicle for the Court to resolve the inconsistencies of legal standards for claims of employment discrimination arisen from disparate treatments of employees for alleged policy violations, and for due process claims of liberty violation in terms of how to define stigma and its publication. As such, Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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