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20-1763

No. 21-_____

In the
Supreme Court of the United States

FENYANG STEWART,
Petitioner

v.

ANDRE IANCU AND WILBUR ROSS, JR.,
Respondents

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should disability-related interference claims brought pursuant to 42 U.S.C. § 12203(b) be analyzed as retaliation claims susceptible to a burden-shifting, but-for analysis, or should they be analyzed under a broader framework according to the original intent of the statutory text?

2. Is the legal standard of review of a Final Decisions of the Merit Systems Protection Board upholding the removal of a Federal Employee, based on an initial decisions that were decided on the papers without a hearing, *de novo* review, or the "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" standard of review?

3. Is a district court's failure to grant a plaintiff discovery on discrimination claims subject to *de novo* review brought after a final decision from the Merit Systems Protections Board, prior to ruling on a summary judgment motion, a violation of the Fifth Amendment's guarantee of due process and the property right of continued Federal employment?

4. Is a transfer of a Federal employee to a prior identified supervisor who is not a trigger of said employee's Post-Traumatic Stress Disorder a reasonable accommodation under the Rehabilitation Act?

LIST OF PARTIES

The Petitioner appears in the caption of the case on the cover page as Fenyang Stewart.

The Respondents appear as Wilbur Ross, Jr., and Andre Iancu, sued in their official capacities as Secretary of Commerce, and the Director of the United States Patent & Trademark Office, respectively.

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PETITION FOR A WRIT OF CERTIORARI

Fenyang Stewart, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth circuit's opinion which affirmed the district court's rulings granting the Respondents' joint partial motion to dismiss and motion for partial summary judgment (App. A) is unreported. The district court's order granting the respondents' joint partial motion to dismiss and motion for partial summary judgment (App. B-1) is unreported. The Fourth Circuit's order denying rehearing and rehearing en banc (App. C) is unreported.

JURISDICTION

Mr. Stewart's timely petition for rehearing *en banc* was denied on March 22, 2021. This Court's jurisdiction is invoked under 28 U.S.C. §1275, having timely filed this petition for a writ of certiorari within ninety days of the Fourth Circuit's judgment.

Constitutional Provisions Involved

Amendment V of the U.S. Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.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

Statutes Involved

42 U.S.C. § 12203 states as follows:

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b),

with respect to subchapter I, subchapter II and subchapter III, respectively.

5 U.S.C. § 554 states in part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court...

5 U.S.C. § 557 states in part:

> (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the

presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof. (emphasis added).

The Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, states in part, at 29 U.S.C. § 791 (f):

> Standards used in determining violation of section
>
> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

STATEMENT OF THE CASE

Petitioner Fenyang Stewart petitions the Court for a Writ of Certiorari reviewing the decision of the U.S. Court of Appeals for the Fourth Circuit Court affirming the judgment of the Eastern District Court of Virginia, Alexandria Division (a) dismissing in part, the amended consolidated complaint in Stewart's consolidated employment actions, comprising several claims of discrimination related to his employment with the U.S. Patent and Trademark Office and (b)

granting Respondents' joint motion for partial summary judgment on Stewart's claim seeking reversal of the final decision of the Merit Systems Protection Board (MSPB) upholding his removal from his position as a Patent Examiner.

Reason for Granting the Petition

I. The Fourth Circuit's adoption of the District Court's ruling that interference claims brought under the Rehabilitation Act are to be analyzed as retaliation claims using the but-for standard and McDonnell Douglas burden-shifting framework perpetuates an irreconcilable conflict in intracircuit law, where only the 1st and 4th Circuits treat interference claims as retaliation claims, but where the majority of the other circuits (the 3rd, 7th, 9th, and D.C. Circuits) agree that Congress intended to provide broad coverage for interference claims and as such analyzes those claims under a broader legal framework in accordance with the statutory text.

The Fourth Circuit adopted the district court's reasoning treating his interference, coercion, and threat claims as retaliation claims under the Rehabilitation Act:

> First, although Counts XVI, XVII, XVIII, and XIX are brought under 42 U.S.C. § 12203(b), which prohibits "[interference, coercion, or intimidation," as opposed to 42 U.S.C. § 12203(a), which prohibits "[retaliation," numerous courts have recognized that "the elements are the same" under both provisions. *Kerrigan v. Bd. of Educ. Of Carroll Ctv.*, 2015 WL 4591053, at 5. (D. Md. July 28, 2015). Therefore, these counts will be analyzed in the same manner as plaintiff's other retaliation claims. plaintiff's allegations themselves support this conclusion, as Counts XVI, XVII, XVIII, and XIX allege that any interference, coercion, or

> intimidation was in retaliation for his "request[ing] a reasonable accommodation of a transfer to a previous supervisor." Compl. ¶ 200... Turning to plaintiff's remaining retaliation claims under the Civil Rights Act and the Rehabilitation Act, "[t]o make out a prima facie claim of retaliation [under the Civil Rights Act], a plaintiff must show: (1) that [he or] she engaged in protected activity, (2) that the employer took a materially adverse action against [him or] her[,] and (3) there is a causal connection between the protected activity and the adverse action." *Evans v. Int'l Paper Co.*, 936 F.3d 183, 195 (4th Cir. 2019)... Defendants argue that Counts IX, XIII, XIV, XV, XVI, XVII, XVIII, and XIX should be dismissed because plaintiff has failed to allege that he engaged in protected activity, and that Count VII should be dismissed because plaintiff has failed to allege that there was a causal relationship between his protected activity and the adverse action. Plaintiff offers no argument in response. Defendants arguments are persuasive...
>
> ...Accordingly, Counts IX, XIII, XIV, XV, XVI, XVII, XVIII, and XIX will be dismissed for failure to state a claim upon which relief can be granted.

Stewart v. Ross, 1:18-cv-1369 (LMB/TCB) (E.D. Va. Apr. 17, 2020).

Therefore, the Fourth Circuit's affirmation of the district court's decision was made in clear harmful interpretation of applicable law because 42 U.S.C. 12203(b) does not require a causal connection per the burden-shifting *McDonnell Douglas* legal framework as does retaliation claims; not only that, the statutory text is written in a manner to provide

broad coverage even to persons without disabilities, and thus cannot be analyze under the stricter retaliation standard. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Indeed, in order to prove retaliation pursuant to the Rehabilitation Act, an individual must show: engagement in prior protected activity, including requesting a reasonable accommodation for one's own disability; the employer took a materially adverse action against the employee; and retaliation caused the employer's action.

Initially, the decision referenced paragraph 200 of Appellant's Amended Consolidated Complaint (Compl.), which stated in part:

> A reasonable disabled employee in Appellant's position would feel threatened, intimidated and coerced to attend the meetings against their will under threat of such punishment. The intimidation, threats, and coercion contributed [to] his removal because the Notice of Removal stated that some of the pre-noon meetings he attended or didn't attend were a reason in particular why he was removed from Federal Service.

Compl., ¶ 200.

Thus, the interference alleged was not only based on the denial of Petitioner's request for a reasonable accommodation, but was also based on coercion, intimidation, and threats made by his supervisor of imposition of disciplinary action if he did not forego his granted reasonable accommodation (no pre-noon 1-on-1 supervisory meetings). The latter allegation is separate and apart from the denial of the accommodation to be transferred to a prior identified supervisor with whom he did not experience demeaning treatment

under, which is what the district court based its decision on. See *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001):

> On January 20, 1994, the plaintiff wrote the letter to NOCO in which, inter alia, she cited the ADA and set forth her understanding of its requirements, suggesting several possibilities for accommodating her disability. In response to this letter, on January 26, 1994, NOCO's president wrote the short, sharp letter of rebuke quoted above. A jury could reasonably find that the letter's statement that "[i]f she continue[d] this behavior, [NOCO would] have no choice but to address [her] behavior through legal channels," and that that was NOCO's "final position on this matter and it [would] not be entertaining further communication on th[e] matter" served to "intimidate" or "threaten" her in the assertion of her right to make complaints or file charges under the ADA.

Similarly, the statement made by Petitioner's supervisor that "these [pre-noon] meetings are mandatory" carried with it a clearly unmistakable threat of disciplinary action which served to coerce and intimidate Petitioner into foregoing his granted reasonable accommodation and attend those several pre-noon meetings despite suffering from breakthrough pain based on a back injury he had which was the nucleus of his reasonable accommodation requests. In order to prevent a manifest injustice, the Court should find that the rescission of a granted accommodation without an individual assessment that concludes a granted accommodation is no longer reasonable is per se discrimination under the Rehabiliation Act as a failure to accommodate a qualified employee with a disability. The panel decision thus relied upon misstated facts and application of relevant law which was material to the underlying decision and to the outcome of the appeal, whereby Counts XVI,

XVII, and XVIII (interference, coercion, and threats) (collectively, "interference claims") would not have been dismissed but for said plain harmful legal, factual, and procedural errors. But for the lower court's affirming without question the district court's imposition of a retaliation standard onto Petitioner's interference claims, the case would have been reversed after fashioning a new legal framework for interference claims that expands protections beyond the borders of retaliation claims.

As such, the decision as it stands perpetuates an irreconcilable conflict in intracircuit law, as shown in the following summaries of U.S. Circuit Court decisions on the subject. It should be noted that although it appears that the Fourth Circuit has not yet ruled on this issue of first impression, and merely adopted the district court's reasoning which is lacking in statutory analysis and inquiry into Congressional intent as is required when facing such issues. Unless reversed by the High Court, the position of the district court controls via the 4th Circuit's affirmance of the same.

The D.C. Circuit

In *Menoken v. Dhillon, 975 F.3d 1, 9 (D.C. Cir., 2020)*, the D.C. Circuit held in part:

> Our court has not previously addressed the proper standard for analyzing interference claims under section 12203(b). We ordered supplemental briefing from the parties and the court-appointed amicus on this question, and now conclude that the district court erred by treating section 12203(b) as an

> anti-retaliation provision. This conclusion is compelled by a straightforward reading of the statute, which includes separate provisions prohibiting retaliation and interference. Section 12203(a)—titled "Retaliation"—proscribes retaliation on the basis of statutorily protected activity, while section 12203(b)—titled "Interference, coercion, or intimidation"—prohibits "coerc[ion], intimidat[ion], threat[s], or interfer[ence] with" an employee in the exercise of statutorily protected rights. The statute's text and structure reinforce that retaliation and interference are distinct protections. It would unnecessarily render section 12203(b) surplusage if we were to treat it as nothing more than another prohibition on retaliation. See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting." (citation and quotation marks omitted)).

Menoken v. Dhillon, 975 F.3d 1, 9 (D.C. Cir., 2020).

Here, *Menoken*, decided by a sister circuit in a jurisdiction in which a large number of Federal employees work and where a majority of Federal agencies are located, is highly persuasive because it is based on the plain text of the statutory text at bar and in compliance with the High Court's reasoning in *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), as being "reluctant to treat statutory terms as surplusage in any setting". In contrast, the lower courts were rather eager to treat section 12203(b) as surplusage by clearing announcing and affirming that "the elements are the same" under both 12203(a) and 12203(b) provisions, which they clearly are not. To be sure, 42 U.S.C. 12203(a) states:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> 42 U.S.C. 12203(a).

In contrast, 42 U.S.C. 12203(b) states:

> (b) Interference, coercion, or intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. 12203(b).

It is strikingly clear that 42 U.S.C. 12203(b) is not a simple copy and paste of the prior Section 12203(a), and the former section clearly offers broader protection than the latter section by prohibiting the intimidation, coercion, or threatening of individuals who may not be disabled when giving aid to or encouragement of any other individual in the exercise or enjoyment of, any right granted or protected by that chapter (the ADA and Rehabilitation Act)

Petitioner pleads that the petition should also be granted in order for the Court to decide whether the burden-shifting framework of *McDonnell Douglas* applies to Section 12203(b) claims. Petitioner argues it does not due to it being too narrow, and lacking full coverage

to all persons according to the text of the statute. Instead, a new broader legal framework should be fashioned that is based on offering facts that satisfy the applicable textual phrases which would survive a motion to dismiss, and leaving it for the trier of fact to determine if controverted material facts supported by the evidence exists at the summary judgment stage in order to proceed to a trial on the merits. Having to force a but-for analysis and provide proof of pretext along with a causal connection at any stage of adjudication for such claims truncates the broad coverage intended for Section 12203(b) claims. Such analysis is proper and in alignment with the Congressional mandate that Federal agencies be a model employer of individuals with disabilities. It also fosters healthy working environments where employees can feel free to stand up for and encourage such individuals in the enjoyment of their rights without suffering coercion, intimidation, and threats from Agency supervisors or coworkers.

The 7th Circuit and the 9th Circuit

In *Frakes v. Peoria Sch. Dist. No. 150,* the 7th Circuit held in part:

> While this court has not previously addressed an interference claim made pursuant to the ADA or Section 504, we agree with the district court and the Ninth Circuit that guidance can be found in our application of the anti-interference provision of the Fair Housing Act ("FHA"), 42 U.S.C. § 3617; see *Brown v. City of Tucson*, 336 F.3d 1181, 1191 (9th Cir. 2003) (applying the FHA interference standard to an ADA interference claim). Because the ADA

> anti-interference clause is identical to the anti-interference clause found in the FHA, compare 42 U.S.C. § 3617 with 42 U.S.C. § 12203(b), we use the FHA framework to establish the legal standard for an ADA interference claim. In doing so, we determine that a plaintiff alleging an ADA interference claim must demonstrate that: (1) she engaged in activity statutorily protected by the ADA; (2) she was engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) the defendants coerced, threatened, intimidated, or interfered on account of her protected activity; and (4) the defendants were motivated by an intent to discriminate. See *Bloch v. Frischholz*, 587 8 F.3d 771, 783 (7th Cir. 2009) (en banc) (providing the framework for an FHA interference claim).

Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 550–51 (7th Cir. 2017).

Here, the 7th and the 9th Circuits' reasonable analysis and creation of a legal framework to analyze Section 12203(b) claims that is a strict departure from retaliation claims is highly persuasive, because it follows the statutory text and is in alignment with the Congressional mandate as discussed prior. Petitioner, however, does not agree with the addition of the proof of intent prong because preponderant evidence of the threat, coercion, or intimidation carries with it an inherent intention to discriminate which need not be proved separate and apart from the threats, coercion, or intimidation allegations themselves. Additional proof would just serve to block persons such as Petitioner from their day in court and the opportunity

for equitable remedies, nominal remedies, and damages, if it was found that a violation of Section 12203(b) occurred.

The Third Circuit

In *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3rd Cir. 2002), the Third Circuit held in part:

> As an alternative basis for his third-party claim Greg also relies on the second anti-retaliation provision of the ADA, 42 U.S.C. § 12203(b), which reads: It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter. We have noted that the scope of this second anti-retaliation provision of the ADA "arguably sweeps more broadly" than the first. *Mondzelewski v. Pathmark Stores, Inc.* 162 F.3d 778, 789 (3d Cir.1998). In particular, unlike the first provision, the text of this provision does not expressly limit a cause of action to the particular employee that engaged in protected activity. This provision contains language similar to that found in section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in exercising their rights guaranteed under the Act.
>
> In *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400 (3d Cir.1990) (in banc), we enforced an order of the National Labor Relations Board that interpreted section 8(a)(1) to prohibit an employer's retaliation against a supervisory employee (who was otherwise unprotected by the Act) for protected activity engaged in by her close relatives. We noted that the firing of a close relative could have a "coercive" effect on the employees engaging in protected activity, id. at 407, instilling "fear that the exercise of their rights will give the company a license to inflict harm on their family." Id. at 409. Our sister courts of appeals have also recognized that section 8(a)(1) prohibits the firing of a close relative of an employee who engages in activity protected by the NLRA. See, e.g., *Tasty Baking Co. v. NLRB*, 254 F.3d 114,

127-28 (D.C. Cir. 2001); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir. 1987).

> Our interpretations of the NLRA can serve as a useful guide to interpreting similar language in the ADA, as both are "part of a wider statutory scheme to protect employees in the workplace nationwide." M*cKennon v. Nashville Banner Pub'g Co.*, 513 U.S. 352, 357, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). The texts of section 8(a)(1) of the NLRA and the ADA's second anti-retaliation provision are essentially similar-each makes it illegal for an employer to "coerce" or "interfere with" an employee exercising his rights under the act. In view of this fact, as well as the similar policies underlying the two provisions, it seems sensible to hold, as we now do, that Greg may assert his third-party retaliation claim under this section of the ADA just as he would be able to do under the NLRA. Accordingly, we will reverse the District Court's order granting summary judgment to Mercy to the extent that it was based on the Court's view that Greg's third-party retaliation claim was not cognizable under the ADA's second anti-retaliation provision.

Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002).

The Third Circuit's reasoning is elegant and highly persuasive, and shows that any overlapping of Section 12203(b) (interference) claims with retaliation claims is necessary in order to provide the broad coverage Congress intended. A manifest injustice will occur if sometime in the future the Fourth Circuit would adopt the broader legal framework for analyzing interference claims in a published decision, since said decision will not be retroactive. Petitioner would lose his opportunity to be redressed for irreparable harm he has suffered due to said interference, threats and coercion, a violation of his Fifth Amendment right to due process and right of

continued Federal employment. Therefore, the Court should grant the petition, which would give amicus the opportunity to suggest what the applicable legal framework for such claims are, and an opportunity via oral argument for clarification of the same after appointment of counsel to argue on Petitioner's behalf.

The First Circuit

The only Circuit court in agreement with the Fourth Circuit's analysis and affirmance of the district court's finding that interference claims are to be analyzed in the exact same manner as retaliation claims are analyzed, is the First Circuit. Specifically, in *Champagne v. Servistar*, 138 F.3d 7 (1st Cir. 1998), the 1st Circuit stated and held in part:

> As summary judgment has been granted, we review the facts in the light most favorable to Champagne and will draw all reasonable inferences in his favor. See *Soileau v. Guilford of Maine*, 105 F.3d 12, 13 (1st Cir.1997). Because the issue of causation as to the termination of Champagne's employment is largely dispositive of the case, we focus particularly on those facts... Champagne says he has suffered harm from two sources: (1) the termination of his employment, which he says resulted from discrimination or retaliation or both, and (2) the memorandum notifying him he would have to return to rotating routes or work in the warehouse, which he says was a threat to withdraw the accommodation Servistar was obligated to grant him.
>
> A. Termination and Retaliation
>
> As to the first harm, the district court carefully parsed Champagne's discrimination and retaliation

claims, and concluded that Champagne did not meet the statutory definition of disabled and that his evidence of retaliation was insufficient. We take a shorter route. We have no doubt that Champagne suffered from a mental impairment, a first step toward establishing disability under the ADA. But even if Champagne could establish he was disabled within the meaning of the ADA, his case on termination fails on the issue of causation. Champagne has not produced evidence from which a finder of fact could reasonably find that Servistar "discharged [him] in whole or in part because of [his] disability," *Equal Employment Opportunity Comm'n v. Amego, Inc.*, 110 F.3d 135, 141 n. 2 (1st Cir.1997), or that there was a "causal connection between [his] discharge and the conduct" of filing an ADA complaint. *Soileau*, 105 F.3d at 16... To make out a retaliation claim under the ADA, see 42 U.S.C. § 12203(a), Champagne must "show that he was engaged in protected conduct, that he was discharged, and that there was a causal connection between the discharge and the conduct." *Soileau*, 105 F.3d at 16... We have no doubt that Champagne makes out a prima facie case of retaliatory firing. At issue is whether Champagne's evidence permits a fact finder to conclude that the articulated reason is pretextual... On the evidence, Champagne's claim does not survive. He relies on part of the ADA's anti-retaliation statute, 42 U.S.C. § 12203(b):

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

It is doubtful Champagne has shown that he had "exercised a right granted or protected by the ADA." Before he filed his EEOC complaint, Champagne had not asserted he was disabled

> within the meaning of the ADA. He certainly never provided Servistar with any medical evidence from which a conclusion of disability, as defined in the ADA, was warranted. That Servistar voluntarily decided to permit Champagne to avoid route-rotation for a period of time does not establish that Champagne was disabled or that avoidance of route-rotation was a required reasonable accommodation.
>
> In this context, like the district court, we do not think the memorandum may be reasonably viewed as a threat or interference under § 12203(b). Under the ADA, Servistar has substantial leeway in defining the essential functions of its truck driving positions, and it may require its drivers to be able to perform those functions. See 42 U.S.C. § 12111(8). It is true that other Servistar managers had not enforced the route-rotation policy strictly or cross-checked phone records against DOT logs in the past. But that does not permit the conclusion that the decision by new managers to enforce company policy, and to audit for non-compliance, is a threat or interference with ADA rights. We stress that the decision of new managers to enforce the policy was applied uniformly. The district court properly granted summary judgment in favor of Servistar on this claim.
>
> The decision of the district court is affirmed.

Champagne v. Servistar, 138 F.3d 7,1-2, 22, 29-33 (1st Cir. 1998) (emphasis added).

In *Champagne*, it is clear that the First Circuit treated the appellant's 12203(b) interference claim as a retaliation claim, analyzed it under the burden-shifting framework per *McDonnell Douglas* and required Champagne to plead and prove causation in order to succeed on his interference claim at

the summary judgment stage. Specifically, the 1st Circuit affirmed the lower court's granting of the defendant's motion for summary judgment on that claim due to a failure to provide controverted facts which showed that but for defendant's interference with his exercise of his ADA rights under Section 12203(b) via a threatening memorandum, he would not have suffered the adverse action of being fired by his employer, Servistar. The 1st Circuit also affirmed the decision granting summary judgment because Champagne failed to provide evidence that the reasons given for his termination were false, and that the real reason he was fired was interference with his participation in 12203(b) activities. Specifically, the First Circuit grafted the requirements of a successful retaliation claim onto the requirements for a successful interference claim by substituting the first prong of a normal retaliation claim covered by the ADA (that he engaged in a protected activity such as filing an EEO complaint based on disability discrimination), with an allegation that his ADA rights were interfered with via threats from his employer to satisfy the first prong of an interference analysis and requiring Champagne to prove all other prongs in the same manner as he would a retaliation claim. It should be noted that the ADA's interference claims 42 U.S.C. § 12203 is incorporated into the Rehabilitation Act per 29 U.S.C. § 791(f).

This method of pleading and proving interference claims via the retaliation legal framework as held by the First Circuit and found not to be

legal error by the Fourth Circuit in the underlying case shrinks the broad coverage Congress intended when it carefully crafted and debated each word that comprises Section 12203(b), rendering it a dead letter. *But See* U.S. Congressional Record Proceedings and Debates of the 10th Congress 2nd Session, Vol. 154-part 10 (amendment "makes it absolutely clear that the ADA is intended to provide broad coverage to protect anyone who faces discrimination on the basis of disability"). For an application example, the EEOC has stated the following are examples of 12203(b) claims which neither not fit inside nor can be resolved within the parameters of a retaliation framework:

> Coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
>
> Intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
>
> Threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
>
> Issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
>
> Interfering with a former employee's right to file an ADA lawsuit against the former employer by

> stating that a negative job reference will be given to prospective employers if the suit is filed; and
>
> Subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.[1]

In conclusion, since a majority of the Circuit courts that have ruled on the issue in published decisions (the 3rd, 7th, 9th, and D.C. Circuits) clearly articulate why interference claims should not be analyzed as discrimination claims, and are more persuasive than the holding of the published decision of the First Circuit to the contrary, this petition for a writ of certiori should be granted in order to resolve the intracircuit conflict. Specifically, the Court should hold that interference claims are to be analyzed under a wider framework than retaliation claims and specify what the prongs of the analysis at the motion to dismiss and summary judgment stages are. Since many of the 10,000 plus Federal employees live or work in the geographical region covered by the Fourth Circuit, such a ruling would expand and protect the rights of thousands of individuals and breathe life into 42 Section 12203(b) as Congress intended. Otherwise, the Fourth Circuit's adoption of the District Court's ruling that interference claims brought under the Rehabilitation Act are to be analyzed as retaliation claims using the but-for

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[1] EEOC. *Enforcement Guidance on Retaliation and Related Issues. No. 915.004* (August 25, 2016) at 19. Date accessed: 04/07/2021. URL: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

standard and McDonnell Douglas burden-shifting framework would violate Petitioner's Fifth Amendment property right of continued employment free of such interference, threats and coercion and his right of due process.

II. Initial MSPB administrative decisions that are based upon the written submissions by the parties and were made without a hearing and become final due to a petitioner wishing to avoid the years long backlog due to lack of a quorum by seeking review in district court, should be subject to de novo review by the district court based on the existing violation of the Fifth Amendment's guarantee of due process.

After filing an appeal with the MSPB of the removal decision, Petitioner chose to have the AJ issue the initial decision without a hearing for reasons related to his disability and his *in forma pauperis* status at that time as he was informed by the AJ that he could do so. At no time, however, was he put on notice by the AJ or any rule promulgated during the proceedings that forgoing his opportunity to have a hearing would waive his right to a *de novo* review of the non-discrimination claims, including the decision to remove him from his employment as a Patent Examiner with the U.S. Patent & Trademark Office (USPTO), in Federal Court.

The purpose for the more deferential standard of review by Federal courts of MSPB final decisions is to avoid duplicative processes and to give deference to the AJ's decisions made at the hearing based upon the demeanor of the witnesses who give live testimony that are material to the facts in controversy prior to the issuance of the initial decision. Such matters are left

up to the discretion of the AJ, and will only be overturned if the petitioner can show that such findings were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. Such is not the case with decisions made on the papers only without a hearing, however. The reviewing Federal court has the right to determine de novo what the material facts are in that case because no deference applies since no determinations based upon the demeanor of the witnesses were made by the prior adjudicator and the weighing of the evidence can be performed anew based on the Federal court's Article III powers granted to them in the Constitution. *Marbury v. Madison,* 5 U.S. 137, 177 (1803); See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) ("[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy). Therefore, in order to avoid the administrative quagmire and receive justice in a swift manner as conceived by Congress, Stewart let the time period lapse during which he could have filed a petition for review with the Board and then filed a complaint in Eastern District Court for Virginia, Alexandria division, seeking de novo review of the removal decision along with his discrimination claims and other claims. Indeed, the statutory scheme created by Congress for the

adjudication of Federal employees' removal claims that involved alleged discrimination was crafted with the intent of bringing about a swift resolution of such claims and to the have the Federal judiciary be the final arbiter of justice.

For example, in Petitioner's first appeal of the dismissal of his claims to the Fourth Circuit Court of Appeals, Stewart successfully argued that the 180-day waiting period was a mandatory waiting period after which his claims before the Agency's Equal Employment Opportunity (EEO) subcomponent became vested and could be brought into Federal court. *Stewart v. Iancu*, 912 F.3d 693, 700 (4th Cir. 2019) (Holding that the 180-day statutory waiting period during the administrative EEO complaint process after which a Federal employee can bring his claims into Federal court is a "claims processing" rule that does not impact a district court's jurisdiction and is not extended via amendments to said administrative complaint).

Just as the statutory 180-day period is a claims processing rule that does not rob the Federal court of its jurisdiction, the statute prescribing the manner in which the MSPB reviews claims that were decided without a hearing does not rob Federal courts of its power of de novo review of MSPB final decisions upholding the removal of a Federal employee and the non-discrimination claims if the Federal employee opts out of Board review and goes directly into Federal court. Specifically, 5 U.S.C. § 557 states in part:

> (c) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
>
> When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557.

Since it is clear under 5 U.S.C. § 557 that the Board has the power of *de novo* review of all claims brought before it, a Federal employee who wishes to avoid indeterminate waiting period due to the lack of a quorum should be given a *de novo* review upon timely filing of those claims in Federal court in order to prevent a manifest injustice and in accordance with congressional intent. The manifest injustice is the violation of the Fifth Amendment's right of due process and continued property right of Federal employment caused by the lack of a quorum and the impracticability involved in waiting over 4 plus years for the President to nominate three new members of the Board and for

Congressional approval of said nominations. For good measure, respectfully noted, the nomination of three Supreme Court Justices (Hon. Justice Gorsuch, Hon. Justice Kavanaugh, and Hon. Justice Barrett) has occurred during the period the MSPB has lacked a quorum and the filing of the instant petition. The way the system works now would cause a manifest injustice to occur by making MSPB employees who are not administrative law judges appointed by that agency the final arbiter of justice, in terms of the power of *de novo* review. Yet Congress specifically preserved Federal employees' Constitutional right of continued Federal employment sans discrimination as protected by the Fifth Amendment, and it was their intent that only an Article III judge or the three-member MSPB panel yield such power. In the Civil Service Reform Act of 1978 (CSRA), Congress sought to ensure that agencies could remove poor performers and employees who engage in misconduct, while protecting the civil service from the harmful effects of management acting for improper reasons such as discrimination or retaliation for whistleblowing, per MSPB literature on the subject:

> While a legislature can decide whether to grant property, the Constitution determines the degree of legal process and safeguards that must be provided before the Government may take away that property. The U.S. Supreme Court has repeatedly held that, when a cause is required to remove a public employee, due process is necessary to determine if that cause has been met. Neither Congress nor the President has the power to ignore or waive due process. Due process "couples" the pre- and post-deprivation processes, meaning that the more robust the post-deprivation process (i.e., a

> hearing before an impartial adjudicator), the less robust the process must be before the action occurs. However, at a minimum, due process includes the right to: (1) be notified of the Government's intentions; and (2) receive a meaningful opportunity to respond before the action takes place. Congress has enacted the procedural rules described above to help ensure that adverse actions are taken in accordance with the Constitution and for proper cause. Due process – and the rules that implement it – are in place for everyone, not only for the few problem employees who will inevitably appear in any workforce of more than a million individuals. Due process is there for the whistleblower, the employee who belongs to the "wrong" political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.[2]

MSPB.

Petitioner is one of the Federal employees as mentioned above who has been misjudged due to faulty information and thus is entitled to the full process that is due to him under the Fifth Amendment, including timely de novo review of the initial decision on the merits. Although the AJ overturned several specifications composing the reasons for removal that were written by the USPTO's deciding official on the removal action, the AJ failed to remand the decision back to the Agency for further consideration without the overturned specifications included, since the Agency decision was not based

[2] Merit Systems Protection Board. "What is Due Process in Federal Civil Service Employment? A Report to the President and the Congress of the United States. May 2015.

on findings of facts and applicable law per specification but rather a blanket rubber-stamping of the Notice of Proposed Removal. As such, Petitioner argued at the lower court that the district court committed harmful legal and procedural error when it granted the defendants' joint partial motion to dismiss/motion for partial summary judgment, without affording petitioner discovery by barring him from making any such requests, and without *de novo* review of all claims before it prior to making the decision. By failing to apply the *de novo* standard of review, the district court deprived the petitioner of the process that was due. The Fourth Circuit affirmed the district court's decision for the reasons stated by the district court in a per curiam opinion discerning no reversible error in the district court's "thorough and well-reasoned analysis", including a finding by the district court that neither the MSPB nor the EEOC committed reversible error.

However, reversible error did occur because being forced to wait in line at the MSPB until it has a quorum is a violation of due process due to the years-long and indeterminable waiting time prior to a decision on the merits of a Petition for review, and there is no jurisprudence on this issue of first impression whether final MSPB decisions made on the papers are subject to *de novo* review. Petitioner's foray into federal court was to avail himself of this impracticable quagmire so he could get the *de novo* review he deserves in a timely manner and which is required under Federal common law. Federal common law states that where no hearing was held and thus the decision was

made on the submitted papers only, Petitioner has to right to face his accusers in a Federal Court via the statutory processes of discovery, and if applicable, a trial on the merits, in order to preserve his Constitutional rights of due process pursuant to the Fifth Amendment and prevent a manifest injustice.

In order to prevent a manifest injustice, where it is clear that the AJ committed harmful procedural and legal error by failing to remand the case back to the USPTO for further adjudication on the merits after excluding the reversed specifications from consideration, the Court should reverse. This should occur because Petitioner's Fifth Amendment due process rights were violated since the original removal decision was tainted with misstatements about Petitioner's "misconduct" encapsulated by at least three overturned specifications (descriptions of incidents that was alleged to have occurred) which prejudiced the trier of fact at each level to rule against Petitioner via the supervisor using all deciding officials and adjudicators as his cat's paw whereby he knew the specifications that were overturned were false and made up with the intent to retaliate against Petitioner. Based on a preponderance of the evidence, it was determined by the AJ that those specifications did not occur, as set forth in the initial MSPB decision that then became the Final decision. Petitioner prays the High Court grants the instant petition and remands the case back to the USPTO for reconsideration of the removal decision absent the discriminatory specifications.

Since Petitioner was deprived of the equal opportunity to undertake discovery as all other similarly-situated litigants before the district court, and because such discovery was essential to a de novo review of his claims and to overcome a motion summary judgment by providing evidence in support of material facts that controvert the Respondents material facts essential to resolving the case as a matter of law, the Court should reverse. Since the lower courts applied the wrong legal standard of review to the MSPB final Decision, certiorari is required in order to correct this gross legal and procedural error and to prevent a manifest injustice, that being the violation of the Fifth Amendment right of due process as it pertains to Petitioner's right as a Federal Employee of continued employment. This issue is of national importance since a decision will provide due process for over a significant portion of the over three thousand employees who wish to have their removal decisions, other adverse actions, and non-discrimination claims decided by a proper Federal court in a timely manner rather than being stuck in the adjudicative quicksand over at the MSPB. Specifically, the Court could hold that such an indefinite waiting period violates due process, and could provide relief (as well as reversal ok the decision below in Petitioner's appeal) by allowing the current former Federal employee-bystanders waiting in line to be hear at the MSPB the opportunity to cancel their petitions for review upon notification of the Court's decision and the opportunity to file a complaint for *de novo* review of their claims in the applicable Federal court.

III. The Appellate Court's affirmance of the district court's failure to grant petitioner discovery on discrimination claims subject to de novo review brought after a final decision from the Merit Systems Protections Board, prior to ruling on a summary judgment motion by the respondents, violated his Fifth Amendment guarantee of due process and the right of continued Federal employment.

Prior to Stewart submitting his response to the Defendants' joint partial motion to dismiss and motion for partial summary judgment ("the Defendant's motion"), the district court issued an order barring Appellant from filing any more motions. But for this order, Stewart would have filed a motion for discovery pursuant to rule 56(e) or otherwise prior to or or adjacent to filing his motion opposing the Defendants' motion. Appellant had several cases in that same court and expected the court to issue a standing order with various tight deadlines in accordance with local rule 16(b), which states that in all filed civil actions other than reviews of administrative agency decisions the Court shall schedule an initial pretrial conference to be conducted in accordance with Fed. R. Civ. P. 16(b). In addition thereto, or in lieu thereof, not later than sixty (60) days from first appearance or ninety (90) days after service of the complaint, the Court shall enter an order fixing the cut-off dates for the respective parties to complete the processes of discovery, the date for a final pretrial conference and, whenever practicable, the trial date, and providing for any other administrative or management matters permitted by Fed. R. Civ. P. 16 or by law generally.

Hence, since the majority of Petitioner's claims were subject to de novo review as discrimination claims, his complaint should have been classified as a civil action complaint and not a petition for review of an administrative agency decision. As such, Petitioner waited in good faith for the granting of discovery to be automatic and granted without request via issuance of the standing order after the initial conference, hence the name "Rocket Docket".

Appellant was prejudiced by the lack of discovery after his case was, due to harmful procedural error, was entered into the system as an administrative review even though he should have been afforded discovery on his non-disrcrimination claims as explained above as well as the discrimination claims. But for the constructive denial of discovery by the district court, Petitioner would have deposed the responsible management officials who he alleged subjected him to discrimination and discovered unknown facts to support all of his claims via that process. Discovery at the MSPB before an AJ issues an initial decision is not adequate because it is not based on the Federal Rules of Civil Procedure and because of that, Petitioner was subjected to a Constitutional deprivation of his right of due process, liberty, and his property right of continued employment inherent with a de novo review of his claims since he was not allowed to move to depose his accusers. But for said denial, Petitioner would have deposed the deciding officials who may have discriminated or interfered with his rights under all causes of action in order to determine the truth of the matter. Since discovery is a key

element to *de novo* review, the failure to allow Petitioner discovery at the very least on his claims of discrimination was a violation of due process protected by the 5th Amendment. Indeed, the petition should be granted in order to ensure the right of all Federal employees to full discovery of their discrimination claims after a Final decision is issued by the MSPB and their cases are filed in Federal court, and for full discovery on their non-discrimination claims that were decided without a hearing by the MSPB as in Petitioner's case.

IV. The lower court's affirmance of the District Court's and the MSPB's reliance on outdated EEOC guidance from 2002 that a transfer of a Federal employee to a new supervisor is not a form of reasonable accommodation affects the rights of all employees with psychiatric disabilities and is a violation of the Rehabilitation Act and their Fifth Amendment property right of continued Federal employments absent disability discrimination.

In the MSPB's final decision, the Board stated:

> The Board has long held that an inability to work for a particular supervisor or in a particular position does not constitute a disability under the Rehabilitation Act because it is not a barrier to employment and does not foreclose an employee generally from his line of work. *Sublette*, 68 M.S.P.R. at 86–88 (1995). The Board's position is consistent with the *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*; No. 915-002, which stated that the request to be reassigned to a different supervisor is not considered a form of reasonable accommodation. I find the appellant's argument that the EEOC overruled its decision unpersuasive, as the EEO policy and cases cited by the appellant refer to reassignments to vacant positions when

> an employee is no longer able to perform a current job. *See https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm*. Here, the appellant clearly requested a different supervisor, and not a different position. *See* AF, Tab 14 at 16 – 32. In addition, the agency considered the request for a new supervisor, but determined it not to be a reasonable accommodation. *Id.* at 7. In making his decision, Mr. Harvey said, "even if the agency were to consider granting Mr. Stewart a reassignment to a different supervisor, there is no indication that the requested accommodation would be effective." *Id.* Accordingly, the appellant's request for a new supervisor was properly denied.

MSPB final decision, Stewart v. Dep't of Commerce (2017).

However, the guidance that the Board cites is from 1995 and 2002, before the ADAA Amendments Act of 2008 became law which expanded the ADA and provided broader protections to qualified employees with disabilities. Petitioner dutifully cited the new sources in his initial and amended appeals, and throughout the appeals process to no avail. Petitioner referenced JAN accommodation network's advice, which the EEOC endorses, which states that a transfer to a different supervisor is a form of reasonable accommodation for a qualified employee with PTSD whose current supervisor is a trigger of the condition via panic attacks and feelings of intense fear:

It is undisputed that the Agency EEOD office received on Dec. 17, 2015, Appellant's submission of Dr. Welsing's physician's statement, and his argument in support of granting of the RA request, a statement from Job Accommodation Network which stated in part:

> JAN also receives questions about reassigning an employee to a vacant position if changing supervisory

methods is not effective. For example, an employee with an anxiety disorder had anxiety attacks that were triggered by any interaction with the current supervisor because of their past relationship. It was not hostile or harassing, just a bad relationship for the person's anxiety. The employer asked if reassignment must be considered as an accommodation in this type of situation. This is a challenging situation because how does the employer know that a similar situation will not develop between the employee and a different supervisor? The EEOC has expressed that, under most circumstances, the ADA would not require an employer to reassign an employee to a different position due to a poor relationship with a supervisor. Let's look at this situation from another perspective, where an employee maybe was only having problems with one supervisor, for example someone who has PTSD as a result of being assaulted and her current supervisor reminds her of the attacker. In this situation, it is not a relational or supervisory situation, but rather a PTSD trigger for the employee. EEOC has stated that this may be one of the limited situations in which an employer should consider reassignment when an employee cannot work with a specific supervisor. This is because a change in supervisory methods will not be effective in this situation and there may not be any other accommodation that would work other than reassigning the employee to a job with a different supervisor".[3]

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[3] Saab, Tracie D. "1- Changing a Supervisor as an Accommodation under the ADA," Job Accommodation Network(JAN) E-News, Vol. 11, Issue 2, Second Quarter, 2013. Accessed Nov. 20, 2015.
url: https://askjan.org/ENews/2013/Enews-V11-I2.htm#1

Therefore, applying the Job Accommodation Network's wisdom to the instant petition, a reasonable inference should have been made by the lower courts and tribunals that a transfer of petitioner to a prior supervisor with whom petitioner did not experience symptoms of PTSD (panic attacks, shaking, etc.) was proper. Wherein the Agency's failure to accommodate petitioner's PTSD disability related to all of the specifications, the Court must reverse the lower court's decision and remand for further proceedings. The failure to do so would continue to allow discrimination on the basis of disability to occure whereby biased supervisors are allowed to stereotype qualified disabled employees as violent based on uncontrollable attributes of their disability, such as shaking and/ore breathing rapidly (Seizure disorder, panic attack disorder, PTSD) and even speaking out of turn (Turrets syndrome) by accusing qualified employees of violating the Agency's overbroad workplace violence policy. Specifically, the USPTO Workplace Violence Policy prohibits aggressive or hostile behavior that creates a reasonable fear of injury to another person. Tab 4e, Agency file MSPB record. It further provides that threats, threatening conduct, or any other acts of aggression or violence in the workplace will not be tolerated. Id. Any employee determined to have committed such acts may be removed from the premises and will be subject to disciplinary action, up to and including termination from Federal Service, and may also be subject to prosecution. Id. Whereby involuntary attributes of Stewart's behavior, panic attacks described

as shaking and breathing in an angry manner, was determined to have violated the Agency's workplace violence policy, the policy should be struck down in order to prevent a manifest injustice via the continued discrimination and removal of qualified employees based on their disabilities without performing Metz analysis:

> Whether an employee's actions or words actually constitute a threat is an issue that is frequently raised. In *Metz v. Department of the Treasury,* 780 F.2d 1001, 1004 (Fed. Cir. 1986), the Federal Circuit held that in deciding whether statements constitute threats, the Board is to apply the reasonable person criterion, considering the listeners' reactions and apprehensions, the wording of the statements, the speaker's intent, and the attendant circumstances. It is important to remember that, as with all charges, an agency must prove all of the elements of its charge, but that it may choose from any number of possible charges for the same act of misconduct.

By alleging Petitioner committed workplace violence, the Agency upgraded the charges from misconduct to "making threats that violated the Agency's workplace violence policy", which required a Metz analysis by the Board before sustaining the removal. Since the AJ failed to perform a *Metz* analysis, and in order to prevent a manifest injustice, the Court should grant the petition and strike down all workplace violence policies that ensnare the

Federal employee with a disability based on involuntary attributes of their disability and not actual threats or words constituting a threat.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted.

Respectfully submitted on this 25th day of May, 2021,

/s/

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