No. 20-8003

In the

Supreme Court of the United States

CYNTHIA METIVIER,

Petitioner,

v.

Deb Haaland, Secretary
DEPARTMENT OF THE INTERIOR,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

I. Whether the federal-sector provision of Title VII (42 U.S.C. § 2000e-16(a)), which provides in pertinent part that "All personnel actions affecting employees or applicants for employment ...shall be free from any discrimination based on sex..." requires a plaintiff to prove that sex was a "motivating factor" rather than a "but for" cause of the challenged personnel action in order to prove discrimination, retaliation and harassment/hostile work environment.

II. Whether Title VII 41 U.S.C. § 2000e-2(m) also applies to a federal employee and requires her to prove that sex was a "motivating factor" rather than a "but for" cause of the challenged personnel action in order to prove a gender-discrimination claim.

If so, whether a federal employer waives its right to limiting a federal employee's remedies pursuant to 42 U.S.C. § 2000e-5(g)(2)(B) when it failed to plead a same decision affirmative defense.

III. Whether Title VII's anti-retaliation provision (42 U.S.C. § 2000e-3, §§703 and 704) extends to a federal employee and protects her from adverse action because she cooperated with her supervisor's internal investigation of a hostile work environment claim.

LIST OF PARTIES AND RELATED CASES

The *Petitioner* is Cynthia Metivier.

The *Respondent* is Deb Haaland, Secretary, Department of the Interior.

Metivier v. Bernhardt, No. 17-cv-02017-ECT, U.S. District Court for the District of Minnesota. Judgment entered October 31, 2019.

Metivier v. Bernhardt, No. 20-1013, U.S. Court of Appeals for the Eighth Circuit. Judgment entered December 8, 2020.

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OPINIONS AND ORDERS BELOW

The September 17, 2020 opinion of the court of appeals, which was not designated for publication, is set out at pp. 1a-2a of the Appendix. The October 31, 2019 order of the district court, which was also unreported, is set out at pp. 3a-41a of the Appendix. The December 8, 2020 order of the court of appeals is set out at p. 42a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on September 17, 2020. A timely petition for rehearing and rehearing en banc was denied on December 8, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify 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, <u>because of</u> such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) and (2).
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was <u>a motivating factor for any</u> employment practice even though other factors also motivated the practice. 42 U.S.C. § 2000e-2(m).

> All personnel actions affecting employees or applicants for employment...in executive agencies as defined in section 105 of title 5...shall be made free from any discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16(a). (emphasis added)
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a) §§ 703 and 704.

STATEMENT OF THE CASE

This case presents questions of fundamental importance to the resolution of thousands of VII federal-sector employment cases that are brought annually. Primarily, it concerns the causation standard that applies to federal-sector employment claims brought under Title VII of the Civil Rights Act of 1964 that affects disparate treatment claims.

A. LEGAL BACKGROUND

This case primarily concerns the causation standard to be applied to federal-sector brought under Title VII, 42. U.S.C. § 2000e *et. seq.* But, it also addresses the impact and scope that the proper causal standard has on defining adverse actions, protected activity, and comparators.

In 1972, Congress extended Title VII's protections to federal employees, codified as 42 U.S.C.§ 2000-16(a). Additionally, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court examined the causation standard pursuant to Title VII,

42 U.S.C.§ 2000e-2 and ruled that an employee could prove causation by showing that the employee's membership in a protected class was a "motivating factor" in the employer's adverse decision thereby establishing the mixed-motive framework. *Id.* This Court in *Price Waterhouse* rejected the "but-for" causation reasoning stating that Congress did not write "solely because of" and, therefore, it intended that even a small amount of discrimination would be prohibited by the statute. *Id* at 241. 42 U.S.C. § 2000e-5(g)(2)(B) limits the employer's liability (but does not negate liability) only where the employer pleads and proves that it would have made the same decision in the absence of a discriminatory motive. In response to *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991 (CRA 1991), Pub L. No. 102-166, §107, 105 Stat. 1075-1076 amended Title VII by adding § 2000e-2(m). the language in § 2000e-2(m) made clear that Congress intended to hold employers liable when discrimination was a contributing factor in the employment action, even if other motives existed.

In *Desert Palace v. Costa,* 539 U.S. 90 (2003), this Court held that neither direct evidence nor a heightened evidentiary standard is required in a "mixed motive" case pursuant to 42 U.S.C. § 2000e *et. seq.* in order to apply the "motivating factor" causation analysis. *Desert Palace* also held that there are different types of circumstantial evidence that can be used to show an inference of discrimination: 1) an employer's ambiguous statements or behavior; 2) similarly situated individuals outside of the protected class were treated more favorably; 3) pretext for the adverse action (i.e., proof that the employer's explanation is unworthy of credence).

Post-*Desert Palace,* this Court found the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is not the only way for a plaintiff to prove unlawful discrimination. "Proof that the defendant's explanation is unworthy of credence [i.e., pretextual] is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves* v. *Sanderson Plumbing, Inc.*, 530 U.S. 133 (2000). The trier of fact can reasonably infer from the falsity of the explanation that the employer is covering up a discriminatory purpose." Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id* at 148.

In 2006, this Court held that the mixed-motive framework does not apply to private-sector discrimination claims under the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 623). *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 173-80 (2006). It found that § 623(a)(1) prohibits personnel decisions made "because of" a person's age, and based on its ordinary usage, it meant that age was the reason that the employer elected to act. *Id.* Consequently, "a plaintiff must prove that age was the but-for cause of the employer's adverse action." in order to prove age discrimination under the ADEA private-sector provision. *Id.* Although the ADEA adopted much of its language directly from the Title VII discrimination statute, it did not adopt the § 2000e-2(m) text, which provided for a motivating factor test in Title VII cases. Unlike § 623(a)(1), this Court in *Gómez-Pérez v. Potter*,

553 U.S. 474 (2008), described the federal-sector provision of the ADEA (§ 633a) as a "broad, general ban on 'discrimination based on age'".

The D.C. Circuit Court in *Ford v. Mabus,* 629 F. 3d 198 (DC Cir. 2010) was the only Federal Circuit Court to address the statutory language in the federal-sector version of the ADEA— §633a. Because of what it described as "sweeping language" it interpreted the "free from" text in §633a(a) more broadly and applied the "motivating factor" causal standard.

Three years later, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), this Court held that while Title VII applies a mixed motive discrimination framework to private-sector discrimination claims pursuant to 42 U.S.C. § 2000e-2 (from which § 623(a) derived its language), that framework did not apply to private-sector claims of retaliation under 42 U.S.C. § 2000-3,. Neither *Gross* nor *Nassar* addressed the issue of a federal-sector claims present in this case. Recently, while this matter was pending, this Court in *Babb v. Wilkie, Secretary of Veterans Affairs,* 140 S. Ct. 1168 (2020) held that "the plain meaning of § 633a(a) demands that personnel actions be untainted by any consideration of age."

In *Torgerson v. City of Rochester*, 643 F. 3d 1031 (8th Cir. 2011) (from which the Eighth Circuit based its decision in this matter), concluded that there is no "discrimination case exception" to summary judgment standard in restating this Court's finding in *Reeves* that the courts should not "treat discrimination differently from other ultimate questions of fact." However, in overcorrecting, the Eighth Circuit violated its no "discrimination case exception" rule. Summary judgment

allows early disposition of cases only when there are no disputed material facts and one side is entitled to prevail on the law, but it also guarantees a jury trial when there are contested facts and when reasonable inferences by jurors can be drawn. *See* Fed. R. CIV. P 56(a). A "discrimination case exception" can also exist when cases are taken away from juries— as when there are questions of credibility, omission of alternative causation frameworks, and factual disputes mistaken for legal certainties through a very narrow definition of antidiscrimination terms and concepts—as it would when cases are improperly submitted to them. Rather than merely analyzing the components separately and in isolation from a subjective perspective, a court's focus is to be based on the totality of circumstances in context as viewed through the eyes of a reasonable juror. *See generally Torgerson* at 1054 (Smith, J. dissenting). Summary judgment should only be granted "[w]here the record, *taken as a whole*, could not lead a rational trier of fact to find for the nonmoving party. " (emphasis added) *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This Court has never required the use of the *McDonnell Douglas* framework nor was it intended to be exclusively and rigidly used at the expense of other causal frameworks. *See*, e.g., *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 388-89 (6th Cir. 2008); *See also* Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 526 (2008).

In *Crawford v. Metropolitan Gov't Nashville & Davidson County, Tenn.*, 555 U. S. 271 (2007), this Court confronted the anti-retaliation provision of Title VII in holding that §704(a) of the 1964 CRA (42 § 2000e-3(a)) extends to employees who

cooperate in their employer's internal investigation, initiated by someone else, by answering questions asked of them by an employer. They are not required to take any further action following the investigation and prior to an adverse employment action to preserve their retaliation claim. *Id.* Since Congress granted at least the same rights to federal employees as it did to private employees, it intended that these protections extend to them as well.

This Court has found that the critical issue in discrimination claims is whether members of a protected category are exposed to disadvantageous terms or conditions of employment to which others outside of the class are not exposed—or said differently whether an employer treats a person worse than they would have tolerated had the person been of another gender. *See Oncale v. Sundowner Officeshore Services,* 523 U.S. 75 (1998); *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008); *Bostock v. Clayton Cty., Georgia,* 590 U.S. ___ , 140, S. Ct. 1731 (2020).

Recently, this Court examined whether discrimination claims under the federal-sector provision of ADEA, 29 USC 633(a)—which was adopted from and contains the identical "shall be made free from any discrimination based on [protected class]" language to the Title VII provision—requires a plaintiff to prove that age was a "but for" cause of the personnel action, and it found that it did not. *Babb.* Unlike §703 (a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (private sector provision that prohibits discrimination "*because of sex...*) or 42 U.S.C. § 2000e-2(m), (the "mixed motives" provision of Title VII, that provides that discrimination is

established when one of those characteristics "was a motivating factor for *any* employment practice, even though other factors also motivated the practice"), §717 of Title VII, 42 U.S.C. § 2000-16(a), (federal sector provision) provides that [a]ll personnel actions affecting employees of federal government agencies "*shall be made free from any discrimination...* " (emphasis added) (from amicus brief of AARP, Washington Employment Lawyers, etc. in *Ponce v. Billington*, 679 F.3d 840 D.C. Cir. 2012) (December 2011).

The Eighth Circuit erred when it failed to take into account this Court's previous findings in *Babb* that the causation standards governing federal-sector cases differs from private-sector cases and "it is not anomalous to hold the Federal Government to a stricter standard than private employers..."

B. Factual Background

1. Original EEOC Complaint, Settlement terms and Supervisor's Opposition.

Petitioner was employed by the Respondent for nearly twelve years before her employment was terminated in July 2014. On March 4, 2007, Petitioner began as an Indian Probate Judge (pursuant to 25 U.S.C. § 372-2) with the Respondent's Office of Hearings and Appeals Office ("OHA"), Probate Division, Twin Cities Field Office, Minnesota. She filed her original Equal Employment Opportunity Commission ("EEOC") complaint on December 2, 2009 after 32 months of ongoing sex discrimination—including explicit sexual jokes and comments, and disparate treatment by her direct supervisor, Administrative Law Judge Richard Hough

('Hough") —, after she was berated and harassed by Hough's supervisor, Administrative Law Judge Earl Waits ("Waits") for reporting her disparate treatment, and after reporting both to Director Bob More ("More"). In December 2009, Principal Deputy Director, Janet Goodwin ("Goodwin") joined More on a visit to the Twin Cities' office, where she was fully informed of Petitioner's VII claims, if not before.

On or about February 28, 2010, More, over Petitioner's request to remain as an Indian Probate Judge in the Probate Hearings Division ("PHD"), reassigned her to the position of Administrative Judge[1] and head of the White Earth Land Settlement Act ("WELSA") Hearings Division replacing Administrative Judge Thomas Pfister ("Pfister"). In turn, Pfister assumed Petitioner 's position as an Indian Probate Judge. As a result on February 28, 2010, Goodwin became Petitioner's direct supervisor, and she continued to serve in that role until Petitioner's termination on July 22, 2014.[2]

Petitioner entered into a settlement agreement with More on June 3, 2011 to resolve her pending EEOC complaint. Within days of the settlement agreement, More directed Goodwin to seek office space for the Plaintiff in the Twin Cities,

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[1] See 43 C.F.R. § 4.352. The district court erred in failing to acknowledge Petitioner's title and duties as an "Administrative Judge" as indicated on her performance appraisals and on thousands of her judicial decisions.

[2] Although, on paper, Goodwin formally designated Hope Mentore-Smith ("Smith") as Petitioner's supervisor on March 31, 2014—the day prior to Goodwin informing Petitioner that she would be terminated— Goodwin continued performing all supervisory duties over the Petitioner, including designating her performance standards and directly overseeing her work until she was terminated.

Minnesota area pursuant to the terms of the settlement. It is undisputed that during the walkthrough of the office space, Goodwin told the Petitioner that she objected to the terms of the settlement agreement that established the WELSA office in Bloomington, Minnesota.

2. Internal Investigation, Malfunctioning Office Equipment, Poor Performance Review, and 3-day Suspension.

On September 20, 2012, the Petitioner's assigned Paralegal, Cheryl Schwartz ("Schwartz"), resigned and her position remained vacant throughout the remaining two years of Petitioner's employment, despite More's pre-approval of funds to fill the paralegal vacancy and Petitioner's selection of a replacement paralegal.

On September 20-21, 2012, Goodwin conducted an internal investigation (protected activity) into Schwartz's false and unfounded allegations of a hostile work environment against the Petitioner through lengthy and aggressive questioning of Petitioner—including openly questioning Petitioner's responses without justification. Despite the false accusations and the lengthy and aggressive questioning of Petitioner, Petitioner fully cooperated and provided complete and truthful responses to Goodwin's questions. The false claims were never pursued by anyone other than Goodwin.

Three months later, on December 20, 2012, after completing her investigation and admittedly knowing[3] that the claims were unsubstantiated and without merit,

[3] Goodwin twice provided sworn testimony acknowledging that the accusations against the Petitioner were unsubstantiated.

Goodwin gave Petitioner a poor performance review, specifically citing the knowingly false allegations as her reason for the poor performance review—knowing that such unfounded defamatory comments would permanently negatively affect Petitioner's personnel file, damage her unvarnished legal reputation, cause her to lose her annual bonus, affect future job prospects (that rely upon past performance ratings), and it would reduce her tenure status for a future Reduction in Force ("RIF"). Also, Goodwin unlawfully used Petitioner's cooperation and honest responses to Goodwin's questions during an internal investigation/protected activity as the basis for giving Petitioner a poor performance rating and a 3-day suspension. During the internal investigation, Petitioner was repeatedly asked by Goodwin to explain Schwartz's allegations and accused of not being fully forthcoming. Unsatisfied with Petitioner's initial response, Goodwin pushed further. In an attempt to fully cooperate and resolve the situation, Petitioner told Goodwin that Schwartz experienced personal challenges in addition to the many ongoing challenges at the office— the office had been understaffed for over a year, Petitioner and Schwartz were working with a poorly functioning telephone and office equipment, and Schwartz had worked overtime to manually input nearly all of the lost case file data within the WELSA docketing system caused by a software update at main headquarters—all those things together could explain Schwartz's stress.[4]

[4] Goodwin also repeatedly refused to finance necessities in Petitioner's office space(including denying funds for a staff member's desk), while adding or enlarging offices led by Petitioner's male counterpart, office heads Waits and Administrative Law Harvey Sweitzer ("Sweitzer") More intervened to authorize the desk and approve the hiring of a full time legal assistant.)

On December 20, 2013, Goodwin also advised Petitioner that she would be proposing a suspension for the same actions. Thereafter, More retired on January 3, 2013 and Goodwin was appointed as the "Acting" Director. On January 8, 2013, Petitioner requested that Goodwin reconsider her performance rating, but Goodwin refused. On January 22, 2013, Petitioner formally requested that Goodwin's supervisor, Andrew Jackson ("Jackson"), reconsider her performance rating. In her request for reconsideration, Petitioner objected to Goodwin's improper investigative procedure and the use of Petitioners truthful responses and cooperation for an illicit purpose. Her request was denied on February 11, 2013.[5]

On January 11, 2013, Goodwin proposed suspending Petitioner for 3 days without pay. Petitioner responded to the suspension on January 21, 2013. Petitioner again raised serious concerns about Goodwin's improper treatment of her and Goodwin's suspension based on a false claims of "unsubstantiated statements" and "unsubstantiated negative statements" allegedly made by Petitioner in her responses during an internal investigation/protected activity on September 20-21, 2012. Petitioner truthfully "responded" to Goodwin's persistent questioning about Schwartz's alleged Title VII claims during a protected activity—claims for which Goodwin twice admitted under oath were never substantiated. They would never be substantiated because Petitioner's responses were truthful, Goodwin's reasons for taking these adverse actions were baseless, and the underlying claims against

[5] Jackson did not personally address any of Petitioner's concerns but rather delegated them to others.

Petitioner were simply always untrue, despite Goodwin's three and a half-month attempt to find support for her gender-based bias.[6] Thereafter Petitioner continued to exhaust her administrative remedies.

3. EEOC filing, Reassignment of Duties, Weekly Conference Calls, Training of Replacement, Elimination of Staff, Exhausting Administrative Remedies, and 5-day Suspension.

On January 30, 2013, Goodwin directed the Petitioner to attend weekly conference calls (which were not previously required of the Petitioner prior her complaints against Goodwin nor required of any other field office), which were used to harass and verbally abuse Petitioner.[7] On February 6, 2013, Petitioner filed an

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[6] Petitioner presented evidence of Goodwin's history of disparate treatment against female subordinates. Goodwin's personal secretary, Paula Hubbard, testified to Goodwin's unwarranted written reprimand and harsh treatment of her and other females, including removing Administrative Officer Jacqueline Moran's telework and flex-work privilege despite her long commute, causing her to resign. Goodwin testified that as Minnesota based Legal Assistant, Barbara Kratzke's 3rd level supervisor, she bypassed lower levels supervisors to discipline Kratzke for leave violations occurring in another office. Conversely, Goodwin took no disciplinary action against male subordinates, including Hough who made explicitly sexual comments and distributed clear sexual material.

[7] E.g., On the May 30, 2013 teleconference when Petitioner could not hear Goodwin because of the poorly functioning telephone, Goodwin violently yelled "You can't hear me because you are still talking!" On the same call, when Petitioner inquired about the paralegal position (which had been vacant since September 2012) that she heard had been canceled, Goodwin admitted to having eliminate the position, and she became angry. When Petitioner expressed concern over her ability to perform her duties without assigned staff, Goodwin yelled back. Goodwin raised her voice, became very abusive, condescending, and disrespectful towards Petitioner, causing the Legal Assistant, Melody Negron ("Negron"), to cover her mouth in shock. Shortly thereafter, Negron resigned. She later testified that she was shocked by Goodwin's remarks. On June 6, 2013 teleconference, Goodwin advised Petitioner that she would not be filling the Legal Assistant position. Because Petitioner was soon to be entirely without staff, she asked whether a Legal Assistant could be assigned to her office from another Bloomington office. Goodwin responded: "Why

informal grievance with Jackson, where among other things, she specifically raised issues of disparate treatment. When Petitioner's efforts proved unsuccessful, she formally contacted the EEOC office on February 27, 2013, while continuing to raise concerns about Goodwin's treatment through Respondent's formal grievance and Respondent's other available administrative remedial processes. On March 26, 2013, Petitioner was suspended for three days.

As early as spring of 2013, according to Hubbard's testimony—while Goodwin was "Acting" Director, before she had the authority to conduct a RIF or determine

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would I do that? This isn't about helping you; this is what is best for the department!" After having previously transferred Petitioner's incoming cases to another office on April 16, 2013, Goodwin also responded that "[she] want[ed] it perfectly clear that they [Salt Lake City staff] will not be working for you [Petitioner] or taking any direction from you. They work for Judge Harvey Sweitzer, and you will be responsible for training them to perform the WELSA cases. In fact, I'm adding the duty of training them to your EPAP [Employee Performance Appraisal Plan]. You will train them, and they alone will decide if your current procedures make sense to them. They will be most likely be changing them once they understand what you are doing, and they will notify you of the changes!". After months of abuse by Goodwin, Petitioner became physically ill, and she asked twice to take a break. When Goodwin refused, for the sake of her health, Petitioner excused herself and politely ended the call. Soon thereafter, Petitioner sought medical treatment. In response to Goodwin's abusive actions, Negron stated, "No one should be expected to take such abusive treatment. It is just too much. No one could possibly respond to this degree of treatment effectively." Goodwin's secretary, Paula Hubbard ("Hubbard"), testified that she heard Goodwin yelling at the Petitioner from her office down the hall from Goodwin. During these events, Petitioner reached out to Jackson by telephone and e-mail asking for assistance, but he did not respond.

On June 7, 2013, despite Petitioner being placed on sick leave by her physician because of the events on June 6, 2013, Goodwin continued to harass Petitioner through an email sent to her personal e-mail account that contained false accusations. Although the e-mail did not request a response, when Petitioner did not respond to the false accusations, Goodwin charged her with failing to do so in a 5-day suspension.

who might be eligible for it—she directed her secretary, Hubbard, not to return WELSA records to the WELSA (Petitioner 's) office because she planned to close Petitioner's office.

On April 16, 2013, Goodwin, then "Acting" Director—without authority to conduct a reorganization or a RIF and without notifying the Petitioner in advance—transferred all incoming new WELSA cases from the Petitioner to Sweitzer (who was located in a separate division in Salt Lake City). While Goodwin told Petitioner that she was doing so to assist her temporarily, she simultaneously told Sweitzer she planned to close Petitioner's office. The WELSA cases had always been exclusively adjudicated by WELSA office pursuant to the WELSA Act, and neither Sweitzer nor his staff had any prior experience handling WELSA cases. Soon thereafter, (despite prior authorization and pre-funding to fill the vacancy by More, and the selection of a candidate by Petitioner as the hiring official) unbeknownst to Petitioner, on or about April 24, 2013, Goodwin intervened and canceled the paralegal position authorized to assist the Petitioner.[8] Despite the fact that all judges had historically been assigned both a Paralegal and Legal Assistant, and all male judges were assigned had at least one of each and had access to others within their division, Petitioner was left without staff members within her division

[8] Petitioner only learned of the termination of the paralegal position from the candidate herself.

throughout the remainder of her employment. [9] At the same time, Goodwin continued to fill other vacancies.[10]

Goodwin made false allegations not only in Petitioner 's permanent personnel file, but to others as well. Goodwin used the teleconferences to subject Petitioner to ongoing verbal abuse and hostility by repeatedly raising her voice; she questioned Petitioner 's integrity; and refused to provide Petitioner with adequate staff and equipment necessary to perform her duties. All of this culminated into Goodwin issuing a second 5-day suspension.[11] No reasonable jury would find Petitioner's grievances about Goodwin's extreme actions to be "run of the mill workplace strife" as described by the district court.

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[9] Petitioner did not have an assigned Paralegal from September 2012 to July 2014 nor did she have an assigned Legal Assistant from July 2013 to July 2014. Despite Petitioner being stripped of her supervisor duties, Goodwin refused to remove this element from Petitioner's performance ratings during FY2014.

[10] During the first half of 2013, Goodwin hired three additional Indian Probate Judges (a position previously held by the Petitioner and comparative with her position as an Administrative Judge).

[11] On July 11, 2013 Petitioner received a 'Notice of Proposal to Suspend" her for five days. During a conference call the week of July 14, 2013 Goodwin's primary purpose of the call was to advise Petitioner that she filed a second proposal to suspend and to inquire into Petitioner 's pending EEO matter. During this call, she became confrontational about Petitioner 's selection of a mediator, which Petitioner arranged with the department's Office of Collaborative Action and Dispute Resolution ("CADR") to help resolve her EEO claims.)

4. RIF Deficiencies and Termination under the Pretext of a RIF

The district court incorrectly found that the RIF deficiencies had no bearing on whether it was conducted for a legitimate reason when the Respondent's failure to follow its own RIF policies supports an inference of discriminatory motive. *Hilde v. City of Eveleth,* 777 F.3d 998, 1007 (8th Cir. 2015). Since the RIF was improperly conducted, by its very nature it lacks legitimacy. The RIF was fraught with errors, and Goodwin willfully violated established policies and procedures. She did not have the requisite authority to develop a reorganization plan[12]; she did not have the required RIF policy prior to implementing the RIF; she did not apply the RIF neutrally or uniformly; she failed to take into account less severe measures; she did not have the required consultation with the tribes; she took actions inconsistent with her stated purpose for the RIF; and she subsequently continued to shift her reasons for the RIF to justify such actions. Additionally, the Respondent's policy was to avoid RIFs and to opt for other measures that would preserve jobs. Moreover, Respondent clearly erred at the onset when it misapplied Plaintiff's tenure group, which is a fundamental and essential element to identifying whether Plaintiff was eligible for the RIF. The district court erroneously based its findings on the incorrect assumption that Goodwin had to cut positions, that her approval had been

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[12] Jackson testified that Goodwin approached him about the reorganization plan and that it was highly unusual for an "Acting" Director to take such action as they normally take on more of a caretaker role. He also testified that "this wasn't the last step in the process. This was, you know, an important step but since all of these effected client service to Native Americans they also required consultation."

approved without conditions, and that the male employees work could not be absorbed, despite ample evidence to the contrary.

Although in April 2013 it was "estimated" that there may be a need to reduce four full time employees, that was 15 months before Plaintiff's position was terminated in July 2014. By then, more than five times that many full-time employees resigned or retired (eight times as many according to Hubbard's testimony) for a total of at least 21-40 individuals, making the need to eliminate any further positions moot. Furthermore, Goodwin obtained approval contingent upon proper consultation with the tribes, which did not occur. In March 2014, Goodwin's supervisor, Jackson, made it clear after signing the proposal that there was more to be done before the RIF could be implemented, including proper consultation with the tribes. Within days, Jackson transferred to another agency, and Goodwin never completed the requisite consultation with the tribe.

Both males, Judge Richard Hines ("Hines") and Attorney Advisor Scott Fukumoto's ("Fukumoto") positions were also selected to be eliminated under the RIF policies, but Goodwin carved out an exception under the pretext that their positions were needed. Clearly, Fukumoto's position was not needed as Goodwin transferred him to another division (the division occupied by the Plaintiff) during the time of the RIF. As for Hines, judges regularly shared dockets across the U.S., and Goodwin had just hired three additional judges who could have easily absorbed the work. Moreover, the Plaintiff had performed the exact same judicial functions in the Probate Divisions for 6 years, long before Hines, at a lower cost to the

Department—both because her salary was lower and because it was be supplemented by agency. If Goodwin was truly savings driven as she alleged, she would have clearly retained the Plaintiff at the lower cost.

Prior to taking any actions to terminate Petitioner's office, Goodwin was required to counsel with the White Earth Tribe. On September 9, 2013, (five days after Petitioner met with an investigator to discuss her EEOC complaint), Goodwin wrote to the White Earth Tribal Council Chairwoman Erma J. Vizenor ("Vizenor") informing Vizenor of her plans to close Petitioner 's office and to terminate her position. Vizenor objected to Goodwin's plans. On September 12, 2013, Goodwin canceled the mediation scheduled for September, which was initiated by the Petitioner to resolve the EEO matter. In October, Petitioner was suspended for five days. On October 24, 2013, Petitioner 's informal grievance and requested relief from the 5-day suspension was denied. On November 15, 2013, Goodwin wrote to Vizenor a second time informing her that she was moving forward with her plan to terminate Petitioner 's position over Vizenor's objection.

On April 1, 2014, Goodwin, without warning, informed the Petitioner that her position was being terminated and the WELSA office closed. On April 29, 2014, Petitioner received a "Certificate of Expected Separation" ("CES") notifying her that its purpose was to allow her to participate in the Department of the Interior's Career Transition Assistance Plan program ('CTAP') prior to the expected date of the reduction in force. On May 13, 2014, Petitioner believing that she would have a hiring preferences according to the CTAP language in the CES, she applied for

OHA's Administrative Judge vacancy on the Interior Board of Indian Appeals ("IBIA"). On May 21, 2014, Petitioner received a RIF notice that contradicted the CES and stated that she was not eligible to participate in the agency's CTAP program (although the Respondent was aware that the Petitioner had previously relied upon this language). On August 22, 2014, the Petitioner was terminated under the pretext of a RIF while accommodations were made for similarly situated male employees, Hines and Fukumoto. [13] Petitioner had a longer tenure with the agency and more experience adjudicating probate estates in both the PHD and WELSA division than either Hines or Fukumoto. Waits testified that despite the fact that Hines met the criteria for the RIF eligibility pool, he was asked whether he wished to be retained, he indicated that he did, and he was permitted to telework once his office was closed. Petitioner was not given an option. In fact, Goodwin testified that she intentionally did not give Petitioner advance notification.

Despite Petitioner 's outstanding performance ratings and expertise both as an Indian Probate Judge and an Administrative Judge in the WELSA and PHD Divisions, which uniquely qualified her to fill the Administrative Judge vacancy on the IBIA, Goodwin chose a far less experienced and less tenured male attorney, Fukumoto, (who lacked any judicial experience with the agency) to serve as Acting Administrative Judge on the IBIA. In addition, the selecting official for the position,

[13] Based on Office of Personnel Management (OPM) regulations, employees are ranked according to established criteria in order to determine whether they are selected for a RIF. Both Hines and Fukumoto met the criteria for the RIF eligibility, and they would have been terminated pursuant to the RIF but for the exceptions they were granted by Goodwin.

Chief Administrative Judge Steven Lincheid ("Lincheid"), testified that he was [improperly] informed prior to selecting the Administrative Judge that the Petitioner had filed an EEO complaint against Goodwin.[14] He also testified that he was surprised with Goodwin's temporary placement of Fukumoto because he lacked the experience. The Agency ultimately selected a male candidate to permanently fill the position and did not take into consideration Petitioner's displacement as the result of the RIF. Of the six individuals selected to be terminated by the purported RIF, accommodations were made for two males, Fukumoto and Hines, to remain with the OHA (to either work from home or transfer within OHA), and the four females, including the Petitioner, were all selected to be terminated.

The district court consistently drew inferences in favor of the Respondent rather than the Petitioner, and it used subjective and biased language—often adopting Goodwin's version of facts that were clearly inaccurate or deceptive and omitting clearly conflicting evidence. The district court referred to the harassing telephone calls as "check in calls" and minimized Plaintiff's adherence to the agency policies, EEO complaints of two disciplinary actions, poor performance review based on false information, denial of appropriate staff, refusal to provide a proper functioning telephone, a reassignment of her duties, and generally reporting of Title VII violations by referring to them as "run-of the mill workplace strife" when they were anything but. In addition, the district court relied on outdated budgetary

[14] Lincheid was also supervised by Goodwin, and he was located within the same office space as she in Arlington, VA.

recommendations intended to avoid the need for a RIF (that had been long resolved by attrition but nevertheless used as a pretext for RIF thirteen months later). It also omitted evidence of Goodwin's excessive spending on travel, non-essential equipment, and office expansions. Furthermore, the district court's references to consultation and input with Plaintiff's counterpart head—Waits [head of the Probate Division] omitted the fact that Goodwin admitted under oath that she purposefully left Plaintiff [head of WELSA Division] out of the discussions traditionally involving the heads of the affected divisions and purposefully kept Plaintiff uninformed. Contrary to the evidence, the district court incorrectly found that "...suffice it to say, [the RIF] was based on established, objective largely quantifiable criteria", and it incorrectly held, counter to established precedent, that the serious deficiencies in the RIF had "no bearing" on its legitimacy or on the discriminatory animus. *See Young v. Warner- Jenkinson Co.*, 152 F.3d 1018, 1024 & n. 6 (8th Cir. 1998) (an employer's failure to follow its own policies may support an inference of pretext).

The district court admitted unduly prejudicial hearsay evidence into the record by allowing Goodwin to attach the statements allegedly made by Schwartz and Dahlke to her declaration. Goodwin and Dahkle lacked first-hand knowledge (Dahlke had resigned over a year before the incident), and their statements were unduly prejudicial, false, unsigned, and unverified; there was no foundation; and they were clearly used to prove the fact therein—that the allegations against Plaintiff. The district also improperly disallowed Plaintiff's separate disputed facts

despite the fact that the district court rules do not prohibit it, and it struck Plaintiff's reply brief, although the parties agreed to combine their pleadings in tandem so as to ensure judicial economy.

C. PROCEEDINGS BELOW

The district court case stems from two separate matters arising from the Merit System Protection Board ("MSPB") and the Equal Employment Opportunity Commission ("EEOC') that eventually merged together in this matter. The MSPB matter exclusively dealt with the Petitioner 's termination whereas that EEOC matter dealt with the discriminatory actions leading up to, but not including, the termination. Both cases ran parallel. Although the MSPB found in Respondent's favor solely on the issue of the RIF, on appeal to the EEOC, it found that the MSPB used an improper standard in arriving at its conclusion, but upheld the termination nevertheless. Petitioner filed this matter in district court appealing the MSPB order in June 2017 while the EEOC matter addressing the non-termination issues was ongoing.

In the separate EEOC case, which dealt with all other claims, after a thorough investigation, the EEOC found reasonable cause to believe that discrimination occurred and assigned this matter to an Administrative Judge for hearing. The Respondent's motion for summary judgment was not granted. Respondent then moved to dismiss arguing that the issues were identical to those

presented in district court. As a result, the EEOC dismissed the action to allow it to proceed in district court.

Respondent filed its summary judgment in district court on all counts and Petitioner filed a timely cross-motion in response.[15] Respondent's experienced counsel suggested and Petitioner agreed that it would be helpful to the district court if the parties were to combine their summary judgment pleadings in tandem with Respondent's counsel filing first, followed by Petitioner 's cross-motion and response to Respondent's motion, etc. It was with that format and timing in mind that Petitioner filed her pleadings, including her reply brief. Petitioner agreed to the two extensions requested by Respondent's counsel and adjusted her schedule to the comply with the extended deadlines and altered her filings accordingly in order to comport with D. Minn Local Rule 7.1. In her cross-motion, Petitioner moved to strike the attached letters and e-mails attached to Goodwin's Declaration that she asserts are hearsay evidence.

The summary judgment matter was heard on August 5, 2019. The Petitioner was not made aware of any deficiencies nor given an opportunity to amend her pleadings. On October 31, 2019, the district court granted summary judgment to the Respondent, denied Petitioner's motion to strike, and disallowed Petitioner's reply brief and separate statement of undisputed facts. First, the district court erred in finding that there were no disputed issues of material fact presenting a triable issue

[15] The parties agreed to Respondent's two requests for continuances as well as the Petitioner's single request, and the court approved all three.

on Petitioner's claims when it limited its analysis to the *McDonnell Douglas* "but for" causation framework by omitting or undermining evidence of adverse actions (i.e., poor performance review, Petitioner's cooperation in an internal investigation, lack of staff and equipment, and reassignment of her work duties), disregarding discriminatory and retaliatory intent and pretext. (i.e., Respondent's failure to properly define and apply comparators and supervisor's abusive conduct; Respondent's illicit and shifting reasons for disparate treatment; and Respondent's failure to neutrally apply RIF policies and procedures).

Second, the district court erred in failing to take into account Petitioner's claims under the "motivating factor" framework analysis pursuant to 42 U.S.C. § 2000e-2(m) or § 2000e-16, which would have raised a jury question as to whether discrimination and/or retaliation was a motivating factor in the personnel action. The conclusory language in the district court's decision stating "*Because* Metivier points to no *direct evidence* of sex discrimination, her claim must be analyzed under the McDonnell Douglas burden-shifting framework[16]" and "*Because* Metivier has introduced no *direct evidence* of unlawful retaliation, her claim must be analyzed under the McDonnell Douglas framework" clearly reflects that the analysis was limited to the "but for" McDonnell Douglas framework.[17] (DCD 24, 34).

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[16] Although the district court attempted to define "direct evidence" in a footnote, it failed to apply the motivating factor analysis to the facts, and in so doing ignored material facts showing circumstantial evidence of discrimination and retaliation.

[17] "DCD" refers to District Court Decision.

Third, the district erred by not considering the accumulative and collective effect of the Petitioner's supervisor's abusive conduct over time, rather than measuring each incident separately and in isolation when evaluating Petitioner's hostile work environment claim. Additionally, it erred by not applying the retaliation based hostile work environment standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53, 57 (2006), which states that the retaliation is material if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Fourth, the district court erred by taking an acontextual and compartmentalized approach by marginalizing (or in some cases disregarding altogether) hostile remarks, comparators, and treatment by Petitioner's supervisor and very narrowly restricting its analysis to seeking evidence of clear stray remarks, obvious stereotyping, and requiring *contemporaneous* male colleagues when comparators are not required to be contemporaneous. This Court rejected the claim that comparators must be "so apparent as virtually to jump off the page and slap you in the face." Ash v. Tyson Foods, Inc., 546 U.S. 454. 456-57 (2006).

Petitioner argued on appeal to the Eighth Circuit that the district court erred in granting summary judgment to the Respondent because it erred by: 1) allowing the unauthenticated, unsworn and false statements of Schwartz and Dahlke attached to Goodwin's declaration; 2) disallowing Petitioner's response to Respondent's statement of undisputed material facts and reply brief; 3) failing to

apply the motivating factor causation standard[18], to acknowledge adverse employment actions, to take into account evidence of inferences of discrimination, to properly apply the correct standard to comparators; and to consider RIF deficiencies, improper procedures, protected activity, and evidence of pretext in Petitioner's gender discrimination, retaliation, and hostile work environment claims. The Eighth Circuit affirmed the district court's granting of summary judgment without comment, and it denied petitioner's timely petition for panel rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

Currently, federal employees filing claims under Title VII are subjected to different burdens of proof and means of evaluating their evidence depending upon their Circuit. This case provides this Court with an opportunity to clarify the statutory causation framework applicable to Title VII federal-sector discrimination, retaliation, and hostile work environment claims as well as closing the chasmic divide between the Federal Circuits as to the scope in defining adverse actions, protected activity, and comparators under the appropriate causation standard.

A. The Eighth Circuit's decision conflicts with this Court's established principles of statutory construction generally, and more specifically as it relates to its interpretation of the terms "personnel actions", "discrimination", "based on [a protected status or activity]", and "free from any" language.

[18] Petitioner pleaded violations alternatively pursuant to 42 U.S.C. § 2000e *et. seq.* and 42 U.S.C. § 20003e-16 throughout her Complaint. Respondent did not raise a "same decision" affirmative defense.

There is a long established method for interpreting federal statutes. This Court has held that "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Courts first look to the plain meaning of the text as ordinarily used, next to statutory structure, and then to sources outside the four corners of the statute. William N. Eskridge. Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). Where Congress uses different language within separate provisions of the same statute, we must give effect to those differences and it can be assumed that it was done intentionally. *See generally Russello v. United* States, 464 U.S. 16, 23 (1983). Among the Title VII provisions contained in Title 42 U.S.C. § 2000e *et seq.* pertaining to gender, § 2000e-2 generally prohibits discrimination "*because of sex...*" while also requiring only that sex be a "*motivating factor for any employment practice*" to be actionable under § 2000e-2m; 2000e-3 *et. seq.* prohibits retaliation "*based on sex...*", and§ 2000e-16 requires that all personnel actions affecting federal employees "shall be made "free from any discrimination based on ...sex..."

Merriam-Webster's defines "any" as "one or some indiscriminately of whatever kind". Merriam-Webster, http://www.merriam-webster.com/dictionary /any. (last visited April 19, 2021.) *See also United States v. Gonzales,* 520 U.S. 1, 5 (1997). "Based on" means to "...form a foundation for." OXFORD ENGLISH

DICTIONARY, http://www.oed.com/view/Entry/15856. In other words, when it's an essential part. In *Babb* at 1171, this Court carefully scrutinized the identical "critical statutory language" found in the federal-sector Title VII provision §2000e-16 as the ADEA provision (29 U.S.C. § 633(a)) and found that it does not mandate a "but-for" causation requirement. Noting that the adjectival phrase "based on age [or a protected trait or protected activity]" modified the noun 'discrimination,' not "personnel actions," this Court held in *Babb* that "[a]s a result, age [or other protected trait or protected activity] must be a but-for cause of discrimination—that is, of differential treatment–but not necessarily a but-for cause of a personnel action itself". *Id.* Next, this Court determined that the adverbial phrase "free from any discrimination" modified the verb "made", and informs us as to "how a personnel action must be 'made.' " *Id.* Therefore, "[i]f age [or sex] discrimination plays any part in the way a decisions is made," then that decision "is not made in a way that is untainted by such discrimination." *Id. at 1174.* In summary, "[T]he statute does not require proof that an employment decision would have turned out differently if age [or sex] had not been taken into account"—in other words, it does not require that age, sex or any protected trait or protected activity be the but-for cause of an adverse action. *Id.*

This Court has also held that the "free from" language used in the above provisions broadly applies to discrimination generally, including retaliation claims. *See Gómez-Pérez* at 485-91 (2008) ("[R]etaliation for complaining about [a protected trait or protected activity]is 'discrimination' based on [that protected trait or

protected activity]. *Id.* at 488. Therefore, Petitioner may establish her federal-sector Title VII claims if the personnel actions were tainted by *any* retaliation for the protected activity, including those actions that were not a but-for cause of the personnel action.

The proper interpretation of "protected activity" and of the above statutory language, was illustrated in *Crawford* where this Court held that Title VII's "antiretaliation provision's protections extends to an employee who speaks out about allegations of discrimination not on her own initiative, but in answering questions during her employer's internal investigation." at issue here. *Id.*at 848. Here, Petitioner honestly answered questions in direct response to allegations of a hostile work environment asked of her by her direct supervisor, Goodwin, during an internal investigation on September 20-21, 2012. In retaliation for her truthful answers to questioning, Goodwin gave her a poor performance rating and suspended her (resulting in a loss of pay, a lower RIF ranking, and harm to Petitioner's future job prospects). Goodwin specifically cited Petitioner's responses as the direct cause for the adverse actions taken, despite knowing (and later twice admitting under oath) that the basis for the personnel actions were unsubstantiated. Such retaliatory actions violate the intent of both the participation and opposition clauses of Title VII's antiretaliatory provisions in that they deter cooperation in investigations in order to gather the truth as to whether discrimination has occurred, and punishes those who truthfully oppose false allegations in response to questioning. Although such employer actions

undoubtedly met the "but for" standard set forth in *Crawford*, using truthful responses during an internal investigation as a basis for taking adverse actions against a plaintiff would, at a minimum, meet §2000e-16's "motivating factor" standard. Under *Babb*, a plaintiff may establish a §2000e-16 violation if the ultimate personnel was tainted by any retaliation for a protected activity, even if found not to be a but-for cause of the personnel action. *See Gómez-Pérez v. Potter*, 553 U.S. 474, 479, 487 (2008) (finding retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a), which contains the exact language of §2000e-16). Here, Petitioners responses to the hostile work environment allegations were the object or but-for cause of her employer's personnel action as they were cited as the cause in the very disciplinary actions and poor performance rating themselves.

This Court held in *Burlington v. White* that employers are liable for retaliation under the employment discrimination statutes for conduct that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id* at 68.

The critical issue in determining whether a plaintiff is discriminated because of her gender is whether she is exposed to disadvantageous terms or conditions of employment to which others are not exposed or if she is treated worse than would have been tolerated in a person of another sex. *Bostock v. Clayton Cty., Georgia*, 590 U.S. ___ , 140 S. Ct. 1731 (2020). *See also Oncale v. Sundowner Officeshore*

Services, 523 U.S. 75 (1998); *White v. Baxter Healthcare Corp.,* 533 F.3d 381 (6th Cir. 2008).

The district court acknowledged that Petitioner was treated differently than her male counterparts during the RIF but excused it away for reasons that proved to be false and pretextual. In determining whether an adverse action was based in part on sex, it does not matter whether other factors played a part other than sex; it only matters that sex contributed to the decision, If changing employees would yield a different result, it is a statutory violation.

Discriminatory intent can also be discerned from context, including an employer's acts and statements in sexual harassment cases. *Meritor Savings Bank v. Vinson* , 477 U.S. 57, 69 (1986) A same-sex harassment plaintiff may also offer direct or circumstantial comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace, *Oncale v. Sundowner Offershore Services,* 523 U.S. at 81. Observing discrimination in a workplace requires a contextual evaluation of not only "the words used or the physical acts performed" but also a constellation of surrounding circumstances, expectations, and relationships as well the proper causation standard. *Id* at 82.

This Court in *Babb* found that the ADEA federal-sector statutory provision (§ 633(a)) was materially identical to Title VII's provision (§ 2000e-16) and that the plaintiff need only show that "discrimination plays *any* part in the way that a decision is made [.]" *Id.* at 1174 (emphasis added).

B. The Eighth Circuit's decision conflicts with the decisions of other Federal Circuits as well as the EEOC and MSPB when interpreting the language of federal sector claims under § 2000e *et. seq.* generally and § 2000e-16 specifically.

Although the Eighth Circuit has cited to 42 U.S.C. § 2000e-16 generally in federal-sector discrimination and retaliation cases it has failed to analyze those cases pursuant to its statutory language, and instead it has solely analyzed them under the private-sector provisions—§§ 2000e-2 and 2000e-3. *See Brower v. Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999); *AuBuchon v. Geithner*, 743 F.2d 638, 641 (8th Cir. 2014) (citing to §2000e-16(a), but applying § 2000e-3(a)); *See also Shaffer v. Potter,* 499 F.3d 900, 904 (8th Cir. 2007) (citing to *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (Erroneously requiring but-for causation in federal-sector discrimination claim by requiring specific link between discriminatory animus and the ultimate decision). In *Griffith* at 735 (a private-sector case), the Eighth Circuit held that this Court's decision in *Desert Palace* referred to jury instructions and did not extend to summary judgment in employment discrimination cases.) However, recently, this Court disagreed and re-emphasized that the causation standard does not change from the motion stage to trial. *Comcast v. National Association of African American-Owned Media et. al.*, 589 U.S. (2020). The Eight Circuit struggled with labeling and sorting evidence in *Torgerson*, where it ultimately upheld the separate frameworks and condoned the labeling and sorting of evidence into these frameworks as opposed to viewing the evidence in its entirety. The Eighth Circuit based its decision in this matter on *Torgerson*.

Beyond its reluctance to address the statutory language in §2000e-16, the Eighth Circuit also conflicts with all other federal circuits in its approach to addressing discrimination claims under § 2000e-2 *et. seq.* Although all other federal circuits may be divided as how to analyze summary judgment challenges in mixed-motive cases generally, none have taken such a strict adherence to *McDonnell Douglas* as the Eighth Circuit. The Second, Third, Fifth, and Tenth Circuits have adopted a modified *McDonnell Douglas* test that allow a plaintiff to present either evidence of pretext or motivating-factor. *Holcomb v. Iona Coll.*, 521 F.3d, 141-42 (2d Cir. 2008); *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *Fye v. Okla. Corp.* Comm'n, 516 F.3d 1217, 1224-26 (10th Cir. 2008).

The First, Fourth, Seventh, Ninth and D.C. Circuit allow plaintiffs to argue their case using either *McDonnell Douglas or Desert Palace. Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 & n. 8 (1st Cir. 2009)[19]; *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860-62 (7th Cir. 2007); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Fogg v. Gonzales*, 492 F.3d 447, 451 & n. * (D.C. 2007).

The Sixth and Eleventh Circuits no longer apply McDonnell Douglas to mixed motive cases at summary judgment, but instead asks whether the adverse action was motivated by discrimination. *White v. Baxter Healthcare Corp.*, 533 F.3d

[19] Although the First Circuit declined to analyze *McDonald Douglas* after *Desert Palace,* it appears to have adopted similar approach to the Fourth, Seventh, Ninth, and D.C. Circuits.

381, 396 (6th Cir. 2008); Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1232, 1241 (11th Cir. 2016).

The Eighth Circuit is the only Circuit to hold that post-*Desert Palace,* the *McDonnell Douglas* approach must be applied in evaluating mixed-motive claims based on circumstantial evidence. *See Griffith* at 736; but see *id.* at 739-48 (Magnuson, J., concurring specially) (disagreeing with the majority that the "*McDonnell Douglas* paradigm" is appropriate for evaluating mixed-motive claims).

Congress gave the EEOC the enforcement authority over federal sector EEO matters in 42 U.S.C. § 2000e-16(b). The EEOC has set forth guidelines in its EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016) (available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues), and addressed the issue of causation in section II(C). In section II(C)(1)(b), the EEOC guidelines set forth the motivating factor causation standard for Title VII claims in federal-sector claims, in which it cited to an EEOC case involving the Respondent that held that the "but-for" standard does not apply to federal-sector Title VII retaliation cases because the federal-sector statutory provisions do not contain the same language on which this Court based its holding in *Nassar. Id.*; (citing *Nita H. v. Dep't of Interior,* EEOC DOC 0320110050, 2014 WL 3788011, at *10 n. 6 (July 16, 2014)). The EEOC guidelines also state that "[t]he federal sector provisions contain a 'broad prohibition of 'discrimination' rather than a list of specific prohibited practices,' requiring that employment 'be made free' from any discrimination,, including

retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor." *Ibid.* (citing *Gómez-Pérez* at 487-88 ("holding that the broad prohibition in 29 U.S.C. § 633 a(a) that personnel actions affecting federal employees...'shall be made free from any discrimination...' prohibits retaliation by federal agencies"); *see also* 42 U.S.C. § 2000e-16(a) ("providing that personnel actions affecting federal employees 'shall be made free from any discrimination' based on...sex...")

The Eighth Circuit erred in affirming the application of the *McDonnell Douglas* framework standard while failing to take into account the motivating factor standard. It also erred by upholding the district court's very narrow interpretation of adverse actions, its incorrect definition of comparators, its failure to acknowledge the internal investigation as a protected activity, its disregard for the defective RIF procedures, and the false pretext the Respondent used to justify its adverse actions.

Federal employees may bring claims for retaliation under Title VII even though the federal sector provision does not explicitly reference retaliation. *See. Komis v. Sec'y of United States Dep't of Labor*, 918 F.3d 289, 295 (3d Cir. 2019) This Court has "assume[d] without deciding that it is unlawful for a federal agency to retaliate against a civil servant for complaining of discrimination." *Green v. Brennan*, 578 U.S. ____, 36 S. Ct. 1769, 1775 n. 1 (2016).

Relying on earlier precedent in *Quigg v. Thomas County School District*, 814 F.3d 1277, 1237 (11th Cir. 2016), the Eleventh Circuit in *Babb*, held that the district

court erred by applying the *McDonnell Douglas* test rather than the more lenient motivating factor test, to plaintiff's mixed motivate Title VII gender-discrimination claim. *Babb v. Secretary, Department of Veterans Affairs,* 743 F. App'x 280 (11th Cir. 2018). It found that "a mixed-motive plaintiff need only allege that discrimination was 'a motivating factor' for the employer's action." 42 U.S.C. § 2000-2; *Quigg* at 1235.

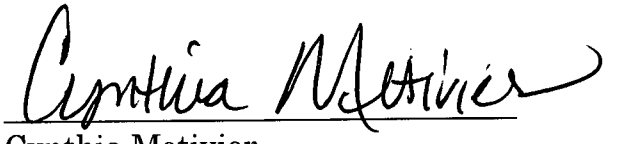
The Eleventh Circuit also held that "discrimination as used in §2000e-16, includes retaliation. *See Canino v. U.S. E.E.O.C.*, 707 F.2d 468, 472 (11th Cir. 1983). Much like *Gómez-Pérez's* holding that "retaliation for complaining about age *discrimination is 'discrimination based on age'", the Eleventh Circuit on remand in Babb* has followed the analysis of its predecessor Circuit, the Fifth Circuit, in holding that "retaliation for complaining about prohibited forms of discrimination is itself 'discrimination' within the meaning of § 2000e-16(a) *See Gómez-Pérez* at 488; *See also Babb v. Secretary, Department of Veterans Affairs,* No. 16-16492 (11th Cir. 2021) citing *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. Unit A Mar. 1981). On remand, the Eleventh Circuit also reiterated this Court's ruling that it "did 'not mean that age must be a but-for cause of the outcome'. Rather, '[i]f, at the time when the decision is actually made, age *plays* a part, then the decision is made 'free from' age discrimination' " *Id.* at 22. (emphasis added). It also recapped this Court's reasoning in *Babb* that " 'age must be a but-for cause of *differential treatment*, not that age must be a but-for cause of the *ultimate decision.*' " *Id. (*quoting *Babb* at 1174).

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit. In the alternative, the petition for writ of certiorari should be granted and the judgment below summarily reversed.

Dated: May 6, 2021

Respectfully submitted,



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