No. 21-1445

In The
Supreme Court of the United States

Ellen Tracy Thatcher, pro se, Petitioner

v.

Department of Veterans Affairs, Respondent(s)

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

PETITION FOR WRIT OF CERTIORARI

Ellen Tracy Thatcher
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(4) QUESTIONS PRESENTED

1. Did the 11th Circuit Court of Appeals make a clear error when they termed perjury **"meritless,"** failed to consider the ***materiality*** of Thatcher's perjury allegations in relation to, but not limited to the Fact Finding when they said: "Thatcher's pro se brief implicitly **preserves** a *general challenge* to the district court's conclusion that *no genuine dispute of material fact exists* and even though Thatcher had raised genuine disputes as to material facts in her briefs, was the 11th Circuit affirmation of the District Court's summary judgment only under the McDonnell Douglas Framework and affirming summary judgment in contradiction with Fed.R Civ. P. 56(a) correct and require **a jury,** in civil cases to determine the materiality question, as under Gaudin where Appellate courts have addressed materiality in perjury cases, and recently have extended Gaudin to require **jury determination** of materiality as in *United States Waldemar, 98 F. 3d 306, 313 (7th Cir. 1996)?*

2. Under Kisor V. Wilkie, would the Veterans Administration still be able, with *deliberate indifference,* violate a disabled Veteran returning from FMLA leave for neck and back surgery, their Due Process rights under the 5th and 14th Amendments of the U.S Constitution and her property right of *continued employment* by being ordered to undergo a Fitness for Duty Exam where the the Dr was instructed to: "Please submit your

findings in such a way that it is clear that Ms. Thatcher is either physically fit or not physically fit to perform *all* of her duties at the *full performance level* required", including lifting 45 pounds, knowing that was a catch 22 situation,(1) getting fired for not taking the test,(2) injuring yourself to pass the test or (3) lying so you can pass the test. Depriving Thatcher of her career, with *deliberate indifference* to her ADA and Constitutional Rights?

3. Were Thatcher's Due Process Rights under the 5th and 14th Amendments of the U.S Constitution to an impartial Fact Finding, violated by the Veterans Administration *deliberate indifference* when Williams, perjured himself that he had recused himself from the Fact Finding, but was central to it, denying Thatcher's right to an impartial Fact Finding and denying Thatcher an opportunity to respond to the allegations relied upon prior to any action, and an opportunity to rebut afterwards before the VA made any decision that could and did, jeopardize her property interest in continuing her 20 year career? Under *Kisor V. Wilkie 139 S. Ct. 240 (2019)* would courts have to apply the Auer deference when reviewing an agency's ambiguous rules?

4. When the VA, with *deliberate indifference*, ignored Thatcher's Dr's orders for *over a year.* not to drive more than 15 minutes, yet the VA forced Thatcher to drive 45 minutes to the Largo annex, when her job for 21 years was less than eight minutes away.

Would that be a violation under "Failure to Provide Reasonable Accommodation" If applying *Kisor V. Wilkie 139 S. Ct. 240 (2019).* Would that constitute a genuine dispute of a material fact, negating summary judgment?

Parties to the Proceedings

[X] All parties appear in the caption of the case on the cover page.

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Corporate Disclosure

(not applicable)

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Related Cases

United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
Appeal Number: 20-12476-BB

United States District Court for the
Middle District Court of Florida
801 North Florida Ave
Tampa, Florida 33602
District Court Docket No.: 8:17-cv-03061-AEP

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Petition for Writ of Certiorari

Petitioner respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the 11th Circuit.

Opinions Below

[x] For cases from federal courts:
The opinion of the United States court of appeals appears at Appendix A to the petition and is

[x] reported at the
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303
Appeal Number: 20-12476-BB

The opinion of the United District Court appears at Appendix B to the petition and and is

[x] reported at the:
United States District Court for the
Middle District Court of Florida
801 North Florida Ave
Tampa, Florida 33602
District Court Docket No.: 8:17-cv-03061-AEP

JURISDICTION

The jurisdiction of this Court is invoked under

28 U.S.C. §1254.(1)

[x] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was October 22, 2021 by Circuit Judges: Branch, Grant and Anderson. The date on which the United District Court Middle District of Florida decided my case was on the 1st day of June, 2020 by United Magistrate Judge Anthony Porcelli.

[x] No petition for rehearing was timely filed in my case.

[x] An extension of time to file the petition for writ of certiorari was granted by Justice Clarence Thomas, who on January 26, 2022, extended the time to and including March 21, 2022 in Application No. 21A368.

Constitutional and Statutory Provisions Involved

U.S. Constitution Amendment V
U.S Constitution Amendment XIV
28 U.S.C. §1254(1)
42 U.S.C §12112(a)
42 U.S.C § 12112 (d)(4)
42 U.S.C §1983 and §1988(b)
Chapter 75, Title 5 U.S.C. §4303

Statement

Summary Judgment Review - In General an appellate court must consider not only whether the affidavits, facts, and record have created an issue of fact, but also whether such issue of fact is **material** to the cause of action. All evidence and inferences must be considered most favorably to the nonmoving party and **a trial is necessary if there is any genuine issue of material fact.**
Lamon v. Mcdonnell Douglas Corp The Supreme Court of Washington. En Banc Jan 4, 1979 91 Wn. 2d 345 (Wash.1979)

11th Circuit Court of Appeals Decision

According to the 11th Circuit Court of Appeals page 3,: "...an allegation of perjury, is essentially an argument that there is a genuine dispute of a material fact, because at bottom it is a claim that proved evidence is false. Read in this light , Thatcher's pro se brief implicitly preserves a general challenge to the District Court's conclusion that no genuine issue of material fact exists.
Page 4 the 11th Circuit concludes *"summary judgment is only appropriate when there is no genuine dispute as to any material fact "*
Page 10 *"even if we assume, arguendo, that Thatcher has implicitly preserved a challenge to the District courts summary judgment, we conclude that she failed to submit evidence*

giving rise to a genuine issue of material fact as to any of her three claims under the Rehabilitation Act.

It is a plain error for the11th Circuit to conclude that there is no genuine dispute of any material fact, to justify their opinion, after reading both Thatcher's initial brief and reply brief. And page 4 of the 11th Circuit opinion states "summary judgment is only appropriate where the movant demonstrates that there is no genuine dispute as to any material fact..." *Fed. R. Civ. P.56(a)*

Perjury, that was materially detrimental to Thatcher's Fact Finding conclusions. Thatcher's "Fact Finding" was without Due Process which rendered it invalid.

On page 10 of their opinion the VA *admits* quote::"*...as to Thatcher's claim that the Fitness for Duty examination was retaliatory, the VA argued below that it ordered the examination in response to the Fact Finding investigation's conclusions..."* The VA then said Thatcher presented no evidence indicating that the conclusions of the Fact Finding was not the true reason that the Fitness for Duty was and subsequent Fitness Duty examination was ordered.

Proof of another dispute as to a material fact. The VA ordered Thatcher to take a Fitness for Duty Exam. Thatcher had only just returned to

Bay Pines, less than a few weeks after being out on FMLA leave for neck and back surgery, recovering well and approved for full time work. August 16th at 2.38 pm Thatcher sent an email to her Supervisor Dr Leonard Williams, alleging a hostile work environment.

Within two hours, Thatcher's twenty two year career as an Advanced Registered Nurse Practitioner (ARNP) was effectively and irrevocably destroyed.

Dr Williams ordered the HR Department to remove Thatcher from her office, off the Bay Pines Medical Center, because of an "unspecified serious charge" of misconduct directed against Thatcher and in HR Dep't Cecil Johnson's testimony, he said Dr Williams told him a Police Report had been filed. That was untrue.

Upon return from FMLA Dr Kowalski gave Thatcher a clear medical report to return to work full time 8/12/2013.
Doc. 48 P. 99 Page ID. 1142 VA Supplemental. Appendix volume 111
8//15/2013 Thatcher files Hostile work email
8/15/ 2013 Dr Williams put Dr Krygowski in charge of Thatcher and Thatcher was not named as a Team Member.

8/16 /2013 Thatcher files another Hostile Work Report. Williams illegally evicts Thatcher from Bay Pines alleging a Police report had been filed. False. Not until 5 days later was a Police

report file and in an EEOC report, Williams admitted, there was a "witness" his alleged girlfriend but Thatcher was only in the office for a few minutes discussing a billing issue in a few minute discussion, with Correira on the computer and Dr Krygowski who was standing next to Thather, makes the most ludicrous accusation while Thatcher just back fron back and neck surgery that Thatcher leaned agaainst her, then arm on shoulder, then,"grinding" asked in Fact Finding if was it sexual she says yes, then in Depositions she said she never said that, then "Witness" Correira story changes for the Fact Finding, alleging mental issues, then later in Depositions, I never said that. Those accusations ended my career.

Thatcher was charged with seven codes of misconduct and a disciplinary charge of lying in an official investigation. Those charges, given to the neural Fact Finder that Williams picked and Williams solicited emails from the very people that took over Thatcher's job and magically made 8 charges of misconduct. Thatcher was labeled with, by the Fact Finding. To this day 10 emails Williams gave to the Fact Finder have not been turned over, and even to the 11th Circuit Court of Appeals the VA said Williams recused himself, even after in Thatcher's initial and reply brief the facts outlined in the record proves he was central and did not recuse himself. Then Williams ordered the first, then two other Fitness for Duties requiring disabled Thatcher to *"perform all the*

physical functions at full performance level', in violation of ADA, to lift 45 pounds or more, not being able to do that, Thatcher instantly became a Non Qualified individual and unable to keep her ARNP license as Dr Williams had demoted her doing telephone surveys only, so Thatcher could not renew her License attesting to ARNP required hours. Demoted doing telephone survey work,and banned from Bay Pines.

October Williams asks Joanne Dorn to write a Report of Contact on Thatcher's inappropriate conduct. Joanne Dorn refuses as she has never witnessed anything of that sort with Thatcher. "Quote" she personally thinks and believes Dr Williams was out to get Thatcher"
Doc. 61-4 P. 13. Page ID 1541

10/11/2013 Dr Williams orders Thatcher to take a Fitness for Duty for questionable behavior, as the Fact Finding stated.
VA Supplemental Appendix. 11, Doc.45. Page 82. PageID 831

10/23 Thatcher receives another Fitness for Duty from HR Buchele. Due to inappropriate behavior and questionable judgment.
VA Supplemental. Appendix. 11 Doc. 47 P. 90. PageID 1037

10/25/2013 Chief of Staff issues another one submitted to her by Williams this time for Thatcher to take a Fitness for Duty *"please submit your findings in such a way that it is*

clear, that Ms. Thatcher is either physically fit to perform or is not physically fit to perform **all** *of her duties at the* ***full*** *performance level required"*

HR Cecil Johnson admitted Thatcher's Fact Finding Disciplinary findings were added to Thatcher Fitness For Duty Request for the Fitness for Duty Dr. even though Thatcher herself had never seen them before.
VA Supplemental Appendix. Vol 11 Doc. 47, Page 92. PageID 1039

Under the ADA it is a violation to require *another* Doctors examination, especially for the Disabled, unless business related for business efficiency. Thatcher's duties for twelve months were sitting in a small cubicle, relegated, demoted, to telephone survey work, until Thatcher had no option but to retire on disability. It was a clear violation under ADA by any reading of the statutes. Unless the FFD purpose was to operate the business safely, and it would accomplish that purpose.

Thatcher, a Veteran with 25yrs of government service was falsely accused, removed from Bay Pines, without Due Process of Law, no advance notice of charges, no opportunity to confront the evidence against me, no impartial Fact Finder, and no chance to see or challenge the evidence violating both my 5th and 14th Amendment liberty and property right to pursue my career, losing income and profit sharing, stigmatized with no redress, unless the Court sees fit to

right a wrong that should "shock the conscience" of this Court.

Thatcher would have willingly worked another 15 years. At the time I was making just over $100,000 in 2013 and after being billed over $150,00 in Attorney fees, it harmed my financial stability and future. Ellen Tracy Thatcher, an Army Veteran (Preference Status) at Bay Pines Medical Center in St Petersburg, was denied access to Hospice records, my former job.

Thatcher's Fitness for Duty ordered Oct 25 2013. Seven weeks after Thatcher was illegally removed without Due Process, from the main VA Medical Center, Bay Pines, on Friday August 16th 2013 to an annex 45 minutes away, in Largo. Her new ordered duties were literally a harsh punitive demotion, evidenced by diminished responsibilities, her computer access that she needed to perform her Hospice duties were denied. Her ability to enjoy the benefits in the main campus, denied. She was excluded from meetings, essential to her job and forbidden to attend to her research duties on the Institute Review Board.

Prior to Thatcher being removed from campus Dr Williams deliberately misled Chief of Staff Thuriere that Thatcher was only dong the job of a clerk, when he knew and her prior evaluations

proved she was doing progrostinations and medical evaluations within the scope of an ARNP and received a nationally recognized Shining Star Award for Bay Pines leading the nation with regard to Hospice patient care.

This Fitness of Duty was again illegal and punitive as "an enquiry or medical examination that is not job related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability" See: S. Rep. No. 101- 116 at 39-40 (1989); and H.R. Rep. No. 101- 485, pt. 2, at 75 (1990) as in Thatcher's case.

What legitimate business purpose required Thatcher to qualify with lifting 45lbs or more, picking up a telephone and then saying this recovering disabled veteran is now *not qualified. Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176, 9 AD Cas. 385 (9th Cir. 1999)* (requiring plaintiffs to prove that they are persons with disabilities to challenge a medical examination would render §12112(d) (4) (A of the ADA "nugatory"; thus, plaintiffs need not prove that they are **qualified i**ndividuals with a disability to bring claims challenging the scope of medical examinations under the ADA).

"Transfers that quantitatively affect benefits or wages or that significantly reduce an employee's

career prospects may constitute adverse action *"Firestone v. Parkview Health Syst., Inc; 338 F.3d 229, 235 (7th Cir. 2004)*

Thatcher's Liberty Interest an Important Right

In fact Thatcher had a Constitutionally protected *liberty* interest in Bay Pines facilities and activities and social interaction with her fellow employees and patients at Bay Pines that was stripped away from Thatcher. *"...deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as as essential to the orderly pursuit of happiness by free men"* Also Thatcher had a *"...right to be free of official stigmatization and found that such threatened stigmatization could in all of itself require due process" Ingraham v. Wright 430 US 651(1977)*

"Once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio statute" Rather, it comes from the Federal Constitution. *Cleveland Bd. of Educ. v. Loudermill 470 U.S. 532 (1985)*

Materiality

United States V. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989) (false statements must tend to affect the outcome of the underlying civil suit for

which the deposition was taken). The statement may be material to any proper matter of inquiry, including collateral matters that might influence the outcome of decisions before the tribunal, such as determining credibility issues.

United States V. Kross, 14F.3d at 755. Materiality is not negated merely because the tribunal did not believe the testimony or sought cumulative information. *United States V. Reilly, 33 F.3d 1396, 1419 n.20 (3d Cir. 1994).*

Furthermore, testimony may be material even if it relates to events as to which the statute of limitations has run, since the grand jury may have legitimate reasons to inquire about such events aside from an expectation of returning an indictment charging those events as crimes. *United States V Chen, 933 F. 2d 793, 797 (9th Cir.1991); United States V Nazzaro, 889 F. 2d 1158, 1165-66 (1st Cir. 1989)*

A unanimous United States Supreme Court held that in a prosecution under 18 U.S.C §1001 *the jury must determine* "beyond a reasonable doubt [the defendant's] guilt of every element of the crime with which he is charged." *United States V. Gaudin, 115 S.Ct. 2310, 2320 (1995)*

Gaudin was predicated on the defendant's Fifth Amendment's right to due process, and Sixth Amendment right to a jury trial, under the United States Constitution. These protections are applicable to the states; see *Sullivan V*

Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and the constitutionality of section 837.011 (3) therefore must be assessed in light of Gaudin.

Following Gaudin, Appellate courts have addressed materiality in perjury cases, recently have extended Gaudin to require **jury determination** of materiality. *United States V.. Waldemar, 98 F. 3d 306, 313 (7th Cir. 1996); United States V. Keys, 95 F. 3d 874, 880-81 (9th Cir. 1996) (en banc), petition for cert. Filed, No.96-1089 (Jan.9, 1997); United States V. Littleton, 76 F.3d 614,617 (4th Cir. 1996).*

The United States Supreme Court granted Certiorari in *Johnson V. United States, 65 U.S.LW 3364 (No. 96-203) (*ruling below *United States V. Frost, 77 F. 3d 1319 (11th Cir,1996).* On the question of whether the United States Court of Appeals for the Eleventh Circuit correctly affirmed, under the plain error rule, Fed. R. Crim. P. 52(b), petitioners perjury conviction in which the trial court, without objection, resolved the materiality issue and said no reasonable jury could have found petitioners false testimony to have been *immaterial* The discriminatory motive of a non-decision maker can be imputed to the decision maker, and employer, where the discriminator has some significant influence that leads to the adverse employment action. 1. See *Burlington Industries, Inc v Ellerth (524 U.S. 775 {1998}) and Faragher and Faragher v*

City of Boca Raton (524 U.S. 775 {1998)). . If the harasser is a "supervisor," and the supervisor's harassment culminates in a tangible employment action, then the employer is vicariously liable.

Reasonable Accommodation

The 11th Circuit again makes a clear error on page 6-7 stating saying Thatcher failed to identify a **Reasonable Accommodation** in her request to limit her driving under
(2) Doctor Orders to restrict Thatcher 5miles or 15 minutes, driving disregarded. Thatcher lived 10 mins and 3 miles from Bay pines but forced for a year to drive 45 minutes in heavy road construction traffic to Largo
Doc 49 Page 138 Page id 1208-1281 Dr Kowalski
Doc 45 Page 81 Page ID 830
Union to HR outline Doc 49 pg 140. PageID1282
Thatcher did raise the issue in her Response to Plaintiff's" Response to defendant's Motion for Summary Judgment P. 15
Case: No 8;17-cv- 3061- T-23AEP

but again ignored and summary judgment was incorrectly granted to the VA.
This was a Failure to Provide Reasonable Accommodation, in violation of ADA
Tolivar v. City of Jacksonville, No 3: 2015cv01010(M.D. Florida 2017)

29 C.F.R § 1630.2 (0) (3)

Requires **employers** not the employee to provide Reasonable Accommodation, unless they can show it is an undue hardship

"Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation or the business of such covered entity"

Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant"42 U.S.C §12112 (B)(5) (A)and (B) 1994

The VA expressly did not show it was an undue burden, so under that statute Thatcher was in fact denied Reasonable Accommodation. Thatcher's Reply Brief P. 14-16.
Also *"Federal employers are far better placed than employees to investigate in good faith" the availability of vacant positions"*
Woodman v. Runyon 132 f.3d 1330,1334, 7AD Cas (BNA) 1189 1199 (10th Cir 1997)

Doctors Orders ignored-
Failure to Accommodate

Moreover, Thatcher's Doctor's orders were totally ignored by Williams and HR when Thatcher requested Reasonable Accommodations, despite Thatcher's Doctors saying she was not to drive more than 15 minutes, with her Bay Pines facility seven minutes away, and for a year having to drive 45 minutes to Largo. Dr Williams' pretext for not complying was that he did not have the authority to transfer Thatcher to a *non Geriatric* position. Thatcher never ever requested a non Geriatric position. Another, **Failure to Provide Reasonable Accommodation**, also mentioned to the District Court's attention. Doc. 49 Page. 90-92 Page Id 1232

This was assessed a Failure to Provide Reasonable Accommodation under ADA *Tolivar v. City of Jacksonville, No 3: 2015cv01010(M.D. Florida 2017)* Date Filed: 10/22/21 USCA11 Case 20-12476

The Circuit Court of Appeals states "Thatcher also attempted to raise a hostile work environment claim "under Title V11" for the first time on appeal. Because this issue was not raised below, we need not consider such a claim. Thatcher did raise the *hostile* work issue in the District Court in Thatcher's Response to Motion for Summary Judgment.Case NO.8:17-CV-3061-T-23AEP Filed 08/14/19 PAGE ID 1450 Doc 61

Actual Document raising "Hostile Work Environment" where Thatcher complains to her Supervisor, Dr Williams, literally hours before she is banned from the VA at Bay Pines. (Thatcher also in preparation came across another report I filed the day previous). Case 8:17-cv-03061-AEP Document 49. Filed 6/28/19 Page 147 of 268. Page id 1289. Same issue raised on Thatcher's brief to 11th Circuit Court of Appeals.USCA11 Case 20-12476 Date Filed: 05/14/2021 Page 36, 52 and page 19 (2014 EEO 006520. and again my Reply Brief to 11th Circuit Date Filed: 07/12/2021 page 43.

The 11th Circuit Court of Appeals refused to address the hostile work environment as Thatcher, after multiple mentions of that, inadvertently said once, it was under Title V11 instead of under ADA. Nonetheless, it remains a valid and genuine dispute as to a material fact, alleging Retaliation by Dr Williams. The retaliation was hostile and discriminatory. Two Federal Court of Appeals decisions confirmed that a "hostile work environment" cause of action *does exist* under the Americans with Disabilities (ADA). Both the 4th and 5th Circuits acknowledged the right of the plaintiff to sue an employer for descrimination on the basis of disability for creating or allowing a hostile work environment. *Flowers v. Southern*

Regional Physician Services, Inc., 247 F.3d 229 (5th Cir. 2001). And *Fox v. General Motors. 247. F.3d 169 (4th Cir. 2001)*

Both circuits focused on similar language, used in the Civil Rights Act of 1964 (Title V11) to establish a "hostile work " cause of action under the ADA. Notwithstanding Thatcher under the ADA, provides that *"no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard....terms..conditions, and privileges of employment"* 42 U.S.C §12112(a).

It is a plain error for the11th Circuit to conclude that there is no genuine dispute of any material fact, to justify their opinion after reading both Thather's initial brief and reply brief absolutely disputing the VA assertion that Thatcher has not disputed any material fact.

Due to there being a genuine dispute as to a material fact, page 4 of the 11th Circuit's opinion states "summary judgment is only appropriate where the movant demonstrates that there is no genuine dispute as to any material fact..." *Fed. R. Civ. P.56(a)*

Subsequently only analyzing the issues under the Mcdonnell Douglass framework used and referred to by the 11th Circuit was in error, and

would result in a different analysis if correctly analyzed with regard to:.

Kisor v. Wilkie 139 S Ct.2400 (2019). No Court could render a summary judgment in favor of the VA, saying there was "no dispute of any material fact". When the VA asserts their own rules, justifications and repeats disputed facts.

The 11th Circuit Court of Appeals also was in error in only applying the Mcdonnell Douglas analysis of the case when as the 11th Circuit Court of Appeals recognized that Thatcher in their opinion on page 3 "....implicity preserves a general challenge to the district court's conclusion that no genuine issue of material fact exists."

Materiality as an element of Perjury. Perjury was indeed very material and pivotal to this case. A false statement is material if it has *"a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed" Kungys V. United States, 485 U.S. 759,770 (1988) United States V. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989) (false statements must tend to affect the outcome of the underlying civil suit for which the deposition was taken). The statement may be material to any proper matter of inquiry, including collateral matters that might influence the outcome of decisions before the tribunal, such as determining credibility issues. United States V. Kross, 14F.3d at 755.*

Materiality is not negated merely because the tribunal did not believe the testimony or sought cumulative information. *United States V. Reilly, 33 F.3d 1396, 1419 n.20 (3d Cir. 1994).*

Furthermore, testimony may be *material* even if it relates to events as to which the statute of limitations has run, since the grand jury may have legitimate reasons to inquire about such events aside from an expectation of returning an indictment charging those events as crimes. *United States V Chen, 933 F. 2d 793, 797 (9th Cir.1991); United States V Nazzaro, 889 F. 2d 1158, 1165-66 (1st Cir. 1989)*
The United States Supreme Court granted Certiorari in *Johnson V. United States, 65 U.S.LW 3364 (No. 96-203)* (ruling below *United States V. Frost, 77 F. 3d 1319 (11th Cir,1996).*

On the question of whether the United States Court of Appeals for the Eleventh Circuit correctly affirmed, under the Plain Error Rule, Fed. R. Crim. P. 52(b), petitioner's *perjury* conviction in which the trial court, without objection, resolved the ***materiality*** issue and said.." *no reasonable jury could have found petitioner's false testimony to have been immaterial.*

Civil cases to determine the materiality question, as under Gaudin, Appellate courts have addressed materiality in perjury cases, and recently have extended Gaudin to require

jury determination of materiality. *United States V.. Waldemar, 98 F. 3d 306, 313 (7th Cir. 1996); United States V. Keys, 95 F. 3d 874, 880-81 (9th Cir. 1996) (en banc), petition for cert. Filed, No.96-1089 (Jan.9, 1997); United States V. Littleton, 76 F.3d 614,617 (4th Cir. 1996). Faragher and Faragher v City of Boca Raton (524 U.S. 775 {1998}).* If the harasser is a "supervisor," and the supervisor's harassment culminates in a tangible employment action, then the employer is vicariously liable.

5th and 14th Due Process Violations
No Prior Notice No notice of what Thatcher was accused of, or to whom for 30 days. Ordered to be interviewed for a Fact Finding. Never knew what was in it. Never given an opportunity to refute allegations. Was never given a copy of it. There were no remedial procedures afforded Thatcher and were 100% Constitutionally inadequate.

My property interest in my profession was stripped from me.I was an Advanced Registered Nurse Practitioner ARNP, earning over $100,000 year and I was forced to go to an annex off Bay Pines, 40 minutes away, stripped of access to my Hospice, Patients and Nurse Practitioner duties, where I did prognostications, and checked medical orders etc. Relegated from my large corner office with a private bathroom, in the Hospice unit, to a tiny cubicle, assigned telephone survey calling duties.

I was denied access to Bay Pines period, a large Medical complex with thousands of employees, with all the social and cultural and educational benefits I had enjoyed for decades. I made four job applications to try and continue my career in another service area, but I never received an answer to my applications, never offered any Reasonable Accommodation, HR Williams testified that he thought that the disciplinary removal location **was** my Reasonable Accommodation. I was unable to keep my ARNP license current as you have to attest to working Nurse Practitioner duties and practice hours.

With decades of exemplary conduct, nationally recognized with a Shining Star award for assisting Veterans in knowing their benefit and rights they have with Bay Pines Hospice care. My census was at record high levels, in the nation which was a National Directive and Initiative which was a concern for then Director Klinker and aspiring Director Williams.

As soon as I went on FMLA leave for my neck operation Dr Williams boasted that he saved Bay Pines over $ one million dollars, by diverting eligible Veterans to Medicare outside of the VA budget.inpatient care at Bay pines. That is why I was denied computer access and not named on the team Dr Williams said I was going to be on, when I made the Hostile Work reports and refused to break National Policies on the Home Hospice Benefits for Veterans..

Months earlier Dr Frucci, who was present when I received my Shining Star award, tried to warn me by saying I should listen to the ones that are writing your paychecks.I didn't realize doing an outstanding job was in direct conflict with their budget, so I lost big time.

literally less than 24 hrs was the false sexual touching allegation by Dr Krygowski, then her retraction, but the VA used the Polic Reort, as evidence, falsely accused with seven counts of bogus conduct charges and Dr Williams, who lied repeatedly that he Recused himself, was front and center in soliciting ten emails the VA still wont reveal, even after requests for them. and the VA and the 11th Circuit still justify what they did to me saying I was a disciplinary problem, with Williams adding a serious, totally unfounded charge that accused me of lying to the Fact Finding a gross misconduct charge, totally unfounded and unsubstantiated.

Thatcher loved her job and it is unconscionable what they did to her and nobody seems in the slightest bit interested. I was so naive, I didn't realize what was going on, scared that I was going to be arrested or fired so I was trusting and compliant thinking it was all a misunderstanding.

If that wasn't enough I was still recovering from my upper back and neck surgery, titanium pins in my neck, with two Doctors notes saying I wasn't to drive more than 15 minutes and one

year later they were adamant I wasn't going back to Bay Pines so every day a 45 minute trip to Largo during road construction, but the VA had and still has "deliberate indifference" both for my health, career and for violating ADA regulations and my 5th and 14th Amendments,

In Cleveland Board of Education v. Loudermill, 470 U.S. at 536 "held that because the very statute that created Loudermill had a ***property right*** *in continued employment also specified the procedures for discharge...."*
In *Cleveland Board of Education v. Loudermill, 470 U.S. at 541 (1985)* the Supreme Court ruled: **"that the Constitution guarantees that if there must be a cause to remove the individual from his or her job, then there is automatically a *due process* requirement to establish that the cause has been met".**

Erickson, 522 U.S. at 266 (citing Loudermill when explaining the due process rights of federal civil servants in his employment.)
Stone, 179 F.3d at 1375-76 (holding in the context of Federal employment that the "process due a public employee prior to removal from office has been explained in Loudermill")

There are two significant cases relying on Loudermill that have highlighted the extent to which the Constitution requires an opportunity **to *respond*** before an adverse action can be effectuated: *Ward v. U.S Postal Service 634 F.3d 1274 (Fed. Cir.2011)*: and (2) *Stone v. Federal*

Deposit Insurance Corporation, 179 F.3d 1368 (Fed. Cir.1999). They are sometimes referred to jointly by the label "Ward/Stone"
Because of the extent to which they share a common legal concept, namely, that if a deciding official is exposed to information affecting the outcome of his decision making process **without the employee being told of the information** and **given the opportunity to respond** is fundamentally flawed and will fail to meet the constitutional requirements of *Loudermill. Ward,634 F.3d at 1280; Stone,179F.3d at 1377*

Thatcher absolutely was denied access to or knowledge of the information solicited by Dr. Leonard Salvatore Williams,which he gave to the Fact Finding. Dr Leonard Williams on multiple occasions, including when he again perjured himself by saying he had recused himself from Thatcher's Fact Finding, when in fact Dr Leonard was fully involved from the very beginning of this case involving Thatcher.
See Thatcher's Initial and Reply Brief to the 11th Circuit Court of Appeals record references.
Williams recommended the "impartial
" Social Worker" to lead the Fact Finding.
Solicited Reports of Contact, *not related to the reason for the Fact Finding,* from the very people involved in taking over Thatcher's position, and Thatcher was **not privy** to the information collected by the Fact Finder, never given an opportunity to rebut the information used, nor given an opportunity to confront her accuser Dr Brenda Krygowski, or

those that provided the information, to rebut their assertions, *prior to* the Fact Finding making their final determination.

All was in violation of Thatcher's procedural Due Process rights under her 5th and 14th amendments of the U.S. Constitution and in violation of *Block v Hirsh 256. 135,159* (1921) *"the national government by the Fifth Amendment to the Constitution and the States by the Fourteenth Amendment are forbidden to deprive any person of life, liberty, or property, without due process of law"* similarly in *Kaiser v. Wilkie, 139 S.Ct 240 (2019)*

Instead Thatcher was banned from the Bay Pines Medical Center, Dr Brenda Krygowski even went as far, after Thatcher was exiled to an annex of BayPines, Dr Brenda Krygowski again contacted the Bay Pines Police Department saying she **"heard"** Thatcher had a gun and was in fear for her life, and Bay Pines Police were instructed with a flag on employees computers to inform them if Thatcher was seen on the premises.

The Bay Pines Police also for a time were ensuring that Dr Brenda Krygowski's ingress and egress at work was patrolled. Dr Brenda Krygowski had set in place every effort to deny Thatcher access to Bay Pines Medical Center where she was an Advanced Registered Nurse Practitioner ARNP

The **"deliberate indifference to fundamental fairness"** by the Veterans Administration is an abuse of power and authority in violation of employees Due Process Constitutional rights afforded by the Fifth and Fourteenth Amendments of the United States Constitution.

REASONS FOR GRANTING THE PETITION

Civil Rights, Due Process "issues of importance beyond the individual case."Thatcher's basic civil rights were violated. Perjury, false statements and a false police report that ended someone's career are not **meritless** as the Appeals Court has ruled.

It is factually not true when the 11th Circuit says there are no genuine disputes of material facts These facts were presented to the lower courts, are in the evidence in the dockets and have thus far been ignored.
The lower courts make no reference to the false statements that were made under oath in the false federal police report and the multiple depositions, made by but not limited to, Dr. Leonard Williams and Brenda C.Krygowski.

Nor did the Appeals Court address the perjurious statements, directed at them saying Dr Williams had recused himself from Thatcher's Fact Finding, instead soliciting 10

emails used against Thatcher, recommending all the charges, including one that formally charged Thatcher with lying to the Fact Finding, but no reason ever given why, or for Thatcher to reply or confront or appeal the decision, with the Appeals Court still validating that Thatcher had *"engaged in misconduct in multiple ways"* on page 10. Perjury and Fraud on the Court by the VA Attorneys saying Williams recused himself from the Fact Finding is ignored by the 11th Circuit. *Ward v. Postal Service, 634 F.3D 1274 (Fed. Cir. 2011) (*holding that if a deciding official without providing the employee with an opportunity to respond, then the employee's due process rights *are* violated)

The Veterans Administration's actions towards Thatcher, were at the least with "deliberate indifference" *Albright v. United States, 732 F. 2d 181, 189 (CADC 1984)* ...where the Government actions, at the least, acted with *deliberate indifference.*

It was Dr Leonard Williams who solicited negative Reports of Contact just prior to the Fact Finding, recommended a list of charges to charge Thatcher with and gave them to the "impartial" social worker Fact Finder (hand picked and recommended by Dr Williams). Thatcher was unaware of whatever information was being gathered against her. Thatcher did not even know who was complaining against her or what the charges were until weeks later for the less than 30 second visit Thatcher made to

the adjoining office of Dr Krygowski and Joanne Correira,(who took over her job)

Mere weeks after her back and neck surgery, Thatcher with papers in her hand to discuss a patient billing, pointing at the Carreira's computer when Dr Krygowski left the office.

The next day after Thatcher's letter complaining of a hostile work environment on August 16th 2013 at 2.30 pm, two hours later Thatcher was constructively discharged, never allowed to return to the VA , District Court and 11th Circuit all return to the main complex,"while your misconduct remained the subject of a pending investigation.

Thatcher was never granted any Due Process rights under the 5th and 14th Amendments, when she was immediately removed from Bay Pines Medical Center, never allowed to return. Dr Williams ordered a biased Fact Finding. This created a hostile work environment with conduct so severe and pervasive and punitively reassigned her 45 minutes away from her job, against her Doctor's orders, doing telephone surveys, stripping her privileges, duties of her career and her dignity, causing delayed healing and undue stress, until she was forced to resign, one year later.

Thatcher **strongly disagrees** with the 11th Circuit statements and characterization of the case saying that, *"no genuine issue of material*

fact exists. But, as we explain below, even assuming she has implicitly preserved such a challenge it is ***meritless"***.
Perjury was materially detrimental to the Fact Finding investigation's conclusions. Thatcher's "Fact Finding" also was conducted without Due Process:

The required Fitness for Duty test was in violation of the Rehab Act of 1973, 29 USC §701 *ADA Act 42 U.S.C - 12010 et seq ADA (1990)*

Williams ordered the test.. See page 32 - 34 Thatcher Reply Brief to 11th Circuit Court of Appeals. USCA11 Case: 20-12476 Date Filed 07/12/2021

Thatcher's 5th and 14th Amendment Due Process, liberty and property rights in continued employment, were unconstitutionally denied Thatcher. Almost 10 years later, still no justice.

Chapter 75 of Title 5 U.S.C. §4303 and §4303 (b)(1) which states under Chapter 75 or Chapter 43 *"the agency's decision will not be sustained if there was a harmful error due to agency procedures, prohibited personnel practices, or not in accordance with the law"*. Thatcher was entitled to 30 days advance notice, prior to Thatcher's IMMEDIATE removal from Bay Pines, with the outlining of the critical elements of the employees position involved in **each instance of unacceptable behavior** None of which occurred.

In *Gilbert 520 U.S at 931-935* The court noted charges were dropped against the individual on Sept 1st, yet the suspension continued without a hearing until Sept 18th. The court held that *"once the charges were dropped, the risk of erroneous deprivation increased substantially" Accordingly it remanded the case to the court of appeals to determine whether, under the facts of the case, the hearing was sufficiently prompt to satisfy the requirements of Due Process"*

Thatcher was far more egregiously denied, requiring the Supreme Court's intervention. The Veterans Administration's actions towards Ellen Thatcher, at Bay Pines Medical Center, falls squarely within:
Albright v. United States, 732 F. 2d 181, 189 (CADC 1984) ...where the Government actions, at the least, acted with *deliberate indifference. Lamon v. Mcdonnell Douglas Corp The Supreme Court of Washington. En Banc Jan 4, 1979 91 Wn. 2d 345 (Wash. 1979*

The United States Supreme Court defined this standard which applies to review of district court fact findings: *"A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"*

Under these circumstances this Court's discretionary powers are warranted, as

adequate relief cannot be obtained in any other form or from any other Court.

Asking for the Supreme Court to give directions regarding Thatcher's compensatory damages *"to compensate persons for injuries that are caused by the deprivation of Constitutional Rights."* Carey v. Piphus, *435 U.S. 247, 254 (1978) (emphasis added)* and to provide *"compensation for injuries caused to the plaintiff by defendant's breach of duty"* F. Harper, F. James, & O. Gray, *Law of Torts §25.1 at 490 (2d ed. 1986) (emphasis in original).*

***Namely** but not limited to:*
*Impairment of reputation and personal humiliation.
*Loss of earnings of just under $100,000 /year from the VA from Jan 2014 to present - can be confirmed by (Thatcher's tax returns.)
*$170,000 out of pocket expenses for attorney fees, in seeking justice. (bills/receipts, to confirm).

To compensate persons for injuries that are caused by the deprivation of Constitutional Rights. ***Punitive damages are also warranted*** *under recklessness, maliciousness or deceitfulness by the VA towards Thatcher.*

"The more important the right at stake and the more egregious the violation the more likely it is that the victory serves a ***public purpose.*** *An*

award of punitive damages, therefore, is strong evidence that the victory served a public purpose."

Cartwright v. Stamper, *7 F.3d 106, (7th Cir1993): see also Estate of Borst V. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992) (punitive damage award reflects "both the value of the victory in finding a violation of Constitutional Rights and the deterrence value of the suit."*

Ustrak v. Fairman, *851 F.2d 983, 989 (7th Cir. 1988) ("A judicial decision that finds a violation of Constitutional Rights and punishes the perpetrator with an award of punitive damages not only vindicates Constitutional principles but is a deterrent to future violations, to the benefit not only of the plaintiff* ***but of others in similar situations.)"***

Petition seeks redress for the Veterans Administration's *willful indifference* of Thatcher's Federal employee's civil rights. This case should rightfully *"shock the conscience"* of the Court.
Rochin V. California, *342 U.S. 165 (1952)*

CONCLUSION

The Court is asked to issue a writ of certiorari to reverse the VA's summary judgment, and grant it in favor of Ellen Tracy Thatcher and provide appropriate directives.

Respectfully Submitted,
Ellen Tracy Thatcher

Ellen Tracy Thatcher
May 9, 2022