

No. 21-5886

**In the
Supreme Court of the United States**

Sasha McGarity
Petitioner,

v.

Birmingham Public Schools
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**REPLY BRIEF TO
RESPONDENT'S OPPOSITION BRIEF**

Office of:
Sasha McGarity
P.O. Box 71810
Madison Heights,
MI 48071
(586)-842-1700
saskatoonbookart@gmail.com

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	IV
ISSUES WITH RESPONDENTS	
TRUTHFULNESS IS THE STATEMENT	
OF THE CASE.....	V
ARGUMENT	
A. THREE CASES FUTHER SUPPORT PETITIONER'S ARGUMENT FOR GRANTING WRIT OF CERTIORARI IN THE MATTER OF DEFAULT JUDGMENT	VI
B. ADDITIONAL EVIDENCE AND CASES CONFIRM PETITIONER HAS MET THE BURDEN OF PROOF TO PROVE PRETEXT...vii	
C. WRIT SHOULD BE GRANTED BECAUSE PETITIONER HAS MET THE "BUT FOR CAUSE" STANDARD.....	XI
D. WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE CASES SUPPORT HARASSMENT CLAIMS ARE ACTIONABLE BASED UPON ONE SUPERIOR'S COMMENT.....	XII
CONCLUSION.....	XIII
PROOF OF SERVICE.....	XIV

TABLE OF AUTHORITIES

Cases

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 239--40 (5th Cir. 2015).....	IX
Cf. Ellison, 924 F.2d at 879. Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).....	VII
Deffenbaugh--Williams v. WalMart Stores, Inc., 156 F.3d 581, 589--90 (5 th Cir. 1998).....	X
EEOC v Eclipse Advantage.....	XII
Harris, ___ U.S. at ___, 114 S.Ct. at 371.....	XII
Holland v. Florida, 560 U. S.....	VI
Ion v. Chevron, 731 F.3d 379 (5th Cir. 2013).....	XI
Laxton v. Gap Inc., 333 F.3d 572 (5th Cir. 2003).....	IX
Maples v. Thomas 586 F. 3d 879.....	VI
McInnis v. Alamo Comm. College Dist., 207 F.3d 276, 283 (5th Cir. 2000).....	X
Miller v. Raytheon Co., 716 F.3d 138 (5th Cir. 2013).....	IX
Miller v. Illinois Dept. of Transp., 643 F.3d 190 (7th Cir. 2011).....	XI
Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004).....	VII
United States v. Scuba Retailers Association.....	VII

Rules

Fed. Rule of Civ. Procedure 5.....	VII
Fed. Rule of Civ. Rule 55(b) (2).....	VII
Fed. Rule of Civ. Procedure 77.....	VII

PETITIONER'S REPLY TO RESPONDANT'S OPPOSITION BRIEF

Petitioner files this Reply Brief to address certain fabrications in the statement of the case and legal arguments made in the Respondent's Brief in Opposition to the Petitioner's Petition for a Writ of *Certiorari* to this court

ISSUES WITH RESPNDENTS TRUTHFULNESS IN THE STATEMENT OF THE CASE

Courts recognize an employer's dishonesty is evidence of a cover up of true motives. Unlike the other paraprofessionals, McGarity made her intentions of obtaining a Masters degree in teaching and advancing from the paraprofessional position known to staff. This did not sit well with Jason Pesamoska, assistant principal already reeling at McGarity's popularity and experience with other student populations. The Respondents speak about the LRC teacher's inability to present in 25 classrooms. Since, the LRC teachers needed the support in 25 classrooms, restricting McGarity's schedule to one student in one classroom the whole school day is a contradiction and is retaliatory in nature. McGarity did not refrain from communicating with the LRC teachers so that she could work independently. Paraprofessionals are assessed based upon their ability to work with student's absence the help of LRC teachers. Respondent's claims are deceptive and desperate.

Respondents claim McGarity skipped meetings to watch shows in a vacant classroom is untruthful and expressed in bad faith. McGarity took lunch breaks in a vacant room to handle personal matters. Pesamoska's directive to meet with the LRC teachers to keep the lines of communication open occurred in December 2018. Jan 2-4th and Jan 7th-10th of 2019, there was no communication from either party nor was there directive given from Pesamoska. In fact, BPS recent posting for a LRC/CI paraprofessional requirement doesn't even list in person communication or any reporting requirements to LRC teachers or its importance in the announcement.

VACANCY ANNOUNCEMENT

POSITION: LRC/CI Paraprofessional Position	LOCATIONS: Berkshire Middle School
SALARY: 2021-22 BAP Hourly Wage Scale	POSTING DATE: October 8, 2021
SCHEDULE: 10-Month Position	DEADLINE: Until Filled
	START DATE: 2021-22 School Year

Notice is given of the vacancy in the classification of full time LRC/CI paraprofessional position for the 2021-22 school year.

REQUIREMENTS

- Be able to provide physical support to students with disabilities
- Be able to lift up to 40 pounds
- Be able to assist with health care procedures
- Be able to support students in general education classes
- Be able to support students in the community

Likewise the State of Michigan doesn't even recognize its supposed weighty importance in its paraprofessional duties.



Title I Paraprofessional Requirements

Michigan paraprofessionals are required to hold a high school diploma (or equivalent), regardless of their assignment, under Michigan law. Michigan Department of Education (MDE) does not issue a certificate or license for paraprofessionals. Additional requirements for the employment of a paraprofessional may be determined by the employing school district, public school academy or non-public school. Additionally, MDE provides a document for the appropriate utilization of noncertified personnel.

On January 8, 2002, President Bush signed the No Child Left Behind Act (NCLB), federal legislation that mandated 100 percent proficiency in reading, writing, and mathematics for all students by the 2013-2014 school year. To reach this goal, the law required that teachers and paraprofessionals meet specific requirements under the Highly Qualified provisions.

For the purposes of Title I, Part A, a paraprofessional is defined as an employee who provides instructional support in a program supported with Title I, Part A funds, either in a school-wide program or directly under a target-assisted program. This includes paraprofessionals who do the following:

1. Provide one-on-one tutoring if such tutoring is scheduled at a time when a student would not otherwise receive instruction from a teacher.
2. Assist with classroom management, such as organizing instructional and other materials.
3. Conduct parental involvement activities.
4. Provide instructional assistance in a computer laboratory.
5. Provide support in a library or media center.
6. Act as a translator.
7. Provide instructional support services under the direct supervision of a teacher.

As partners in the instructional process, paraprofessionals who work in programs supported with Title I funds must meet one of the following requirements:

- Complete at least two years of study at an institution of higher education (equal to 60 semester hours)*; or
- Obtain an associate's degree (or higher); or

Therefore, Respondent's derived performance parameter for McGarity is clearly prejudiced.

A. Three Cases Further Support Petitioner's Argument For Granting Writ of Certiorari in the Matter of Default Judgment

The Courts reasoning in *Holland v. Florida*, 560 U. S. ___ and *Maples v. Thomas* 586 F. 3d 879, clearly recognizes that an attorney's negligence is not just cause for adjusting federal rules and statutes on

time to properly serve its answer to the petitioner. These two cases although extreme in nature further illustrate the importance of granting the petitioner's writ of certiorari. The Petitioner filed her initial complaint on May 2019 via US mail. The petitioner's current address, phone number, and email were on the complaint. Respondents claims of serving the plaintiff in accordance with Fed. Rule Civ. Procedure 5 is untrue and cannot be corroborated with tangible evidence. Petitioner did not receive an answer until July 2019. This court would have to assume the electronic filing system delayed approximately 40+ days to notify counsel the petitioner wasn't a registered user. Furthermore, Respondents have not provided any extraordinary circumstances preventing proper service upon the plaintiff. Therefore, the lower courts ignored this major procedural default by seasoned attorneys. This court should address and determine whether service of an answer upon the court renders the petitioner served. Fed. Rule of Civ. Procedure 77 states, "the court has the power to rescind, alter, or change a clerk's action or inaction for good cause." In this case, the lower courts inaction violates the Federal laws. Rule 55(b) (2) which states that the court may enter default for a person who has appeared. As in the case of the United States v. Scuba Retailers Association there was no answer within the time allotted. The same is true in these proceedings.

The petitioner has been prejudice by having to continue in this lawsuit where the defendants have abused the legal system by making up its own rules. Respondents failed to adhere to the redaction rules by intentionally displaying petitioner's personal information, parading her medical health information, responding to interrogatories late, and intentionally inflicting emotional distress on the petitioner by conducting depositions of her mother and sister. There was so much abuse the petitioner filed motions for sanctions and reported counsel to the attorneys review board twice. The petitioner has been greatly prejudiced on top of prolonged suffering that could have been avoided upon granting of default which was warranted.

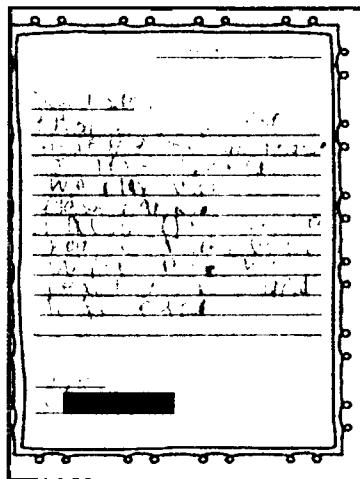
B. Additional Evidence and Cases Confirm Petitioner has met the Burden of Proof to Prove Pretext

Birmingham Public schools reasoning for terminating McGarity was lack of communication on or about October 2018. In Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004) the courts found the employment decision so subjective and ridiculous that it was practically meaningless. McGarity's evidence of pretext is as follows:

1) McGarity's phone records show communication with the LRC teachers. This court would have to presume McGarity was only talking with the special education teacher via text but not in person, which is absurd. Additionally, Theys with student V.L. presented this letter to the petitioner proving there was communication December 12, 2018. Under the law, when an employer's stated motivation for an adverse employment decision involves the employee's job performance, but there is no supporting documentation of the sort that should exist if the employee really was a poor performer, the court may reasonably infer pretext.

EXHIBIT N Allison Broadwell All (248) 535-7068 Grace Weiss (989)766-3562

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McGarity has no write ups or documentation in her personnel file to corroborate the Respondents lack of communication claims. In *Laxton v. Gap Inc.*, 333 F.3d 572 (5th Cir. 2003), Gap fired a manager allegedly based in part on employee complaints. “Yet, at trial, [The] Gap produced no contemporaneous written documentation of any employee complaints, despite testimony that the corporation abides by rigorous record-keeping policies.” Based in part of this evidence, the Fifth Circuit affirmed a jury verdict in the plaintiff’s favor.

2) Birmingham Public Schools have made a plethora of inaccurate statements. In Grace Weiss’ fraudulent declaratory statements, “No communication from the first day” contradicts no communication in October 2018 claim. Additionally, McGarity was fitted for her Halloween costume which the LRC teacher created October 30, 2018. Also, McGarity and student A.Z. was tasked with making stuffing for the annual Thanksgiving dinner. This assignment was given by Theys and Weiss to the Petitioner. Respondent’s express McGarity supposed refusal to follow Pesamoska’s orders and is therefore an insubordinate employee. Shifting justification of termination is proof of pretext. As in *Miller v. Raytheon Co.*, 716 F.3d 138 (5th Cir. 2013), affirming a seven-figure jury verdict in an age discrimination case partially because “[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement.”

Likewise, *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239--40 (5th Cir. 2015) holding that a jury may view “erroneous statements in [an] EEOC position statement” as “circumstantial evidence of discrimination.”

McInnis v. Alamo Comm. College Dist., 207 F.3d 276, 283 (5th Cir. 2000) reversing summary judgment that had been entered for the employer in a discrimination case partially because the employer's report to the EEOC contained false statement.

3) Jason Pesamoska informed McGarity his mentor was concerned that his investigation into her performance was biased and one-sided. Hence, the reason McGarity asked the question in Pesamoska's deposition.

21 Q Do you recall a conversation with Laura Mahler
22 about McGarity's performance?

23 A Yes.

24 Q Did Laura Mahler tell you that your reviews were
25 biased?

01 A No.

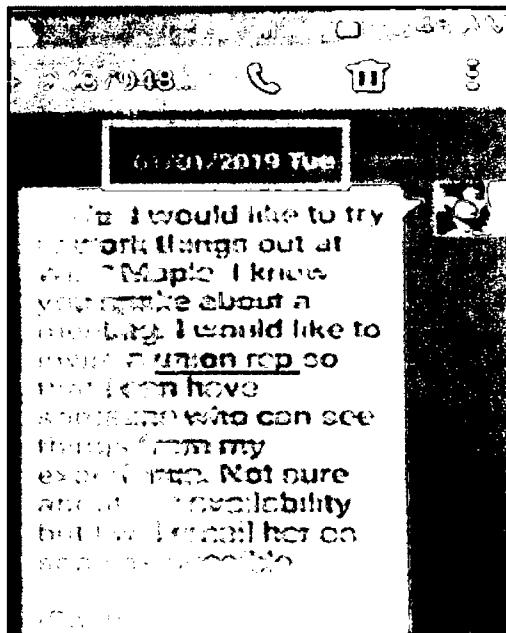
Even though Pesamoska lies to cover his discriminatory attitude, this court can infer pretext based upon circumstances surrounding the questioning. Furthermore, it would have been more difficult to fire the Petitioner once her probationary period ended on January 22, 2019. The hurriedness for the Superintendent of human resources, Pesamoska, and Mahler to terminate McGarity infer other motives.

4) Weiss, Theys, and McGarity's are similarly situated with Pesamoska as supervisor. In December 2018, Pesamoska gave McGarity directive meet with the LRC teachers to keep the line of communication open. Petitioner complied. There was no directive given to the LRC teachers to communicate with McGarity. Hence, Pesamoska's biases being displayed in this instance. After Christmas recess in 2019, Theys and Weiss made no effort to communicate with McGarity. This is a nearly identical act of misconduct. There was no further directive from Pesamoska about communication. Even if there was directive, there are 3 parties in this dispute. It is unjust to put the onus of the subordinate party "only" to make amends. As in Deffenbaugh--Williams v. WalMart Stores, Inc., 156F. 3d581,589--90 (5th Cir.1998), this information shows that lack of communication was not the true reason for terminating the petitioner.

5) A Caucasian female, Amy Tomaselli with the same amount of experience and job duties replaced McGarity. Tomaselli committed this same act of fabricated misconduct “lack of in person communication” whether by act of nature or directive from the governor. Respondent’s assertion of the criticality of in person communication fails because paraprofessionals maintained their roles during virtual learning. The paraprofessionals job can be performed absence face to face communication with LRC teachers. Tomaselli is the example. Not only is this performance parameter immeasurable, it is an unwise, unfair, and a breeding ground for employers to scapegoat their biases toward African American workers. *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190 (7th Cir. 2011) (reversing summary judgment in a retaliation case). For the reasons above, this court should grant Petitioner’s writ of certiorari.

C. Writ should be Granted because Petitioner has met the “But for Cause” Standard

Causation simply means that the current circumstances would not have occurred had an act or omission not occurred. Pesamoska revealing to McGarity Mahler’s concern about his biases and McGarity inviting a union rep to the intended reconciliation meeting sealed her termination. Had these events not occurred the situation would be different. Respondent’s claim of an intervening inaction is in fact false. Respondents have failed to address Superintendent of human resources haste to termination before McGarity’s probationary period ended. Also, human resources and the BAP union failure to conduct an independent investigation is at best suspicious and as in the case of *Ion v. Chevron*, 731 F.3d 379 (5th Cir. 2013) causes doubt on BPS reasons for termination. But for McGarity being African American, privy to Pesamoska’s racist attitude, and his distress at an invitation of a union rep, he would not have invited Mahler and Niforos in retaliation resulting in termination of the Petitioner.



D. Writ of Certiorari Should be Granted because Cases Support Harassment Claims are Actionable Based Upon One Supervisor's Comment

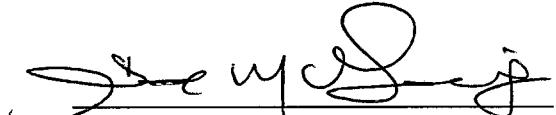
Harassment is not limited to racial slurs. Comments or actions have to rise to the standard of creating a hostile and intimidating work environment. Grace Weiss' one comment, "Put in your two weeks notice and leave" to the petitioner constitutes an environment that is abusive. Any reasonable recipient of this threat from a leader who would determine whether you remain in your current position or depart, would categorize this statement as inappropriate conduct Cf. Ellison, 924 F.2d at 879. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

Hostility must be measured based on the totality of the circumstances. The petitioner standing up the LRC teachers invoked a response of intimidation and hostility from Weiss and Theys. In the case of *EOC v Eclipse Advantage*, the employee was demoted after complaining. Likewise, petitioner's assertiveness was met with a schedule changed to service only one student in one classroom the whole work day. This is obviously a form of harassment retaliation (*Harris*, ____ U.S. at ___, 114 S.Ct. at 371). McGarity made Pesamoska aware some very hurtful things said in meeting with the LRC teachers. However, even if a hostile working environment exists, an employer is liable for failing to remedy harassment of which it knows or should know.

CONCLUSION

For the reasons set out above, Petitioner requests this court grant **the Writ of Certiorari.**

DATED: December 16, 2021



Sasha McGarity
P.O. Box 71810
Madison Heights,
MI 48071
(586)-842-1700
saskatoonbookart@gmail.com