No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

Yufan Zhang

Petitioner,

v.

UnitedHealth Group

Sujatha Duraimonickam

Respondents.

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

PETITIONER'S APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

CIVIC CASE

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PETITIONER'S APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

*To the Honorable **Brett M. Kavanaugh**, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:*

Petitioner, Yufan Zhang, respectfully applies to this Court for an order extending the time in which to file his petition for writ of certiorari from May 16, 2022 until July 08, 2022, a period of thirty (53) days. This Court has jurisdiction under 28 U.S.C. §1257. In support of this Application, Petitioner Mr. Zhang, states as follows:

1. Mr. Zhang filed a lawsuit against UnitedHealth Group and Ms. Sujatha Duraimonickam for wrongful termination, creating hostile working environment, age discrimination, and defamation in the United States District Court of Minnesota on May 25, 2018 (**Case No. 0:18-cv-01454-MID**). On February 14, the United States District Court granted the defendants' motion to compel arbitration. On October 05, 2020, the AAA arbitrator made arbitration award in favor of the defendants. On January 06, 2021, Zhang filed the appellant's Brief to the US District Court of Minnesota for vacating the arbitration award. On April 26, 2021, Mr. Mickael J. Davis, the judge of the United States District Court, denied Mr. Zhang's

motion for vacating the arbitration award (attached). Then, on May 07, 2021, Mr. Zhang appealed the district court's denial of his motion to vacate an arbitration award in the Court of Appeals for the Eighth Circuit (**Case No. 21-6508**).

2. On December 29, 2021, the Court of Appeals denied Mr. Zhang's appeal and all of his motions with the opinion: "*find no basis for reversal*" (see attached). On February 15, 2022, the Court of Appeal for the Eighth Circuit denied Mr. Zhang's petition for rehearing en banc with no opinion (attached).

3. Pursuant to Supreme Court Rule 13(1), Mr. Zhang has to file his petition for a writ of certiorari to review the judgment in his case within 90 days after entry of the denial on his petition for rehearing en banc on February 15, 2022, which means Mr. Zhang shall file Review on Certiorari on or before May 16, 2022 (within 90 days after February 15, 2022). So far, Mr. Zhang is still unable to find an affordable lawyer to help him with the case. As a non-legal professional, Mr. Zhang is hard to complete his filing documents by himself before that due day due to the complexity of the case.

4. As Mr. Zhang demonstrated in his petition for rehearing en banc (attached), Zhang's case raises important questions regarding the equal protection of the laws, see *the 14th Amendment to the United States Constitution*. The district court holds Plaintiff Zhang cannot provide clear and convincing evidence to support his arguments, however, the court overlooked the facts that (1) the Plaintiff's

evidence was taken over by the Defendants by saying that the evidence which the Plaintiff used to have is company's intellectual property; (2) the Defendants testified the evidence existing, but refused to disclose the evidence by saying they have the privilege against self-incrimination; (3) the Defendants refuse to declare the facts they presented to the district court and the court of appeals are accurate and complete; (4) the Defendants gave up their right to rebut or disprove the Plaintiff's arguments about what crucial facts are not disclosed and how these undisclosed facts demonstrate the arbitration award was procured by fraud. However, on the contrary, the district court holds the Defendants' declaration as true fact without considering (1). Plaintiff's claimed that Defendants intentionally omitted or concealed those crucial facts for misdirection; (2) the evidence the Defendants presented to AAA arbitration contains lies; (3) the Defendants even do not prove any evidence or provide any detailed instances to support the statements in their declaration; (4) it is the arbitrator to demonstrate Defendants' statements of fact were true based on half-true facts, which the arbitrator exceeded his power. However, even so, the Court of Appeals holds these facts cannot be the basis for reversal, - seemingly in conflict with the equal protection of the laws (*the 14th Amendment to the United States Constitution).*

5. Mr. Zhang now seeks a writ of certiorari for the United States Court of Appeals for the Eighth Circuit. This Court's jurisdiction to grant the same arises pursuant to 28 U.S. C. § 1254 (1).

6. Petitioner Zhang is trying to find a lawyer to help him with his appeal. But so far, Mr. Zhang cannot find a lawyer he can afford. Therefore, now, Petitioner Zhang has to start his preparing the petition for writ of certiorari by himself, and meanwhile he is still looking for lawyers for help. Therefore, extension of time to file his petition for a writ of certiorari will give him more time to find an affordable qualified lawyer.

7. According to Supreme Court Rule 13.3, Zhang's petition for writ of certiorari to is due on or before May 16, 2022. See Supreme Court Rule 13.3 ("the time to file the petition for a writ of certiorari . . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment"). However, the time granted by Supreme Court Rule 13 will be insufficient for Zhang, a non-legal professional, to complete the documentation for his petition for writ of certiorari. Therefore, Petitioner Zhang seeks an extension of fifty three (53) days in which to file his petition for a writ of certiorari. See Supreme Court Rule 13.5 ("[A] Justice may extend the time to file a petition for writ of certiorari for a period not exceeding 60 days").

8. In accordance with Supreme Court Rule 13.5, this Application is submitted at least ten (10) days prior to the present due date. Further, the requested extension is made in good faith and not for the purposes of delay. Also, Petitioner Zhang is unaware of any prejudice to any party that will be suffered by granting this motion. Indeed, the requested extension is made because Petitioner Zhang, as a non-legal professional, really needs more than lawyers to prepare his petition for writ of certiorari. Mr. Zhang also needs time to study US laws related to his petition for writ of certiorari. In addition, during preparing the petition, Mr. Zhang has to recall the events that he got discrimination and defamation, and such memories are very sad and painful for him; Petitioner Zhang often can't help crying, which make Zhang hard to continue his writing petition documents. Thus, it is important that petitioner be granted additional time to prepare his petition for writ of certiorari.

9. Very likely, Petitioner Zhang needs to prepare his petition for a writ of certiorari by himself due to unable to afford expensive attorney fees. Petitioner Zhang needs to work for his employer on weekdays, and he only has time to prepare his petition for a writ of certiorari in evening and weekends. Petitioner Zhang is not a legal professional; therefore, he needs more time to prepare legal documents than lawyers.

10. Moreover, English is not Zhang's first language. Petitioner Zhang needs time to study how to write a petition for writ of certiorari. Therefore, in light

of Zhang's current situation and the importance of the constitutional issues that will be presented in this case, Petitioner Zhang submits that a fifty three (53) day extension is necessary and appropriate in order to effectively and accurately prepare the petition for certiorari

Wherefore, in the interest of justice and for good cause shown, Petitioner Mr. Zhang respectfully request that this Court extend the current May 16, 2022 deadline until July 08, 2022 (53 days).

Respectfully submitted,

/s/ Zhang

Yufan Zhang (Petitioner)

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Appendices:

1. The opinion issued by the Court of Appeals for the Eighth Circuit on December 29, 2021
2. The denial of Zhang's petition for rehearing en banc issued by the Court of Appeals for the Eighth Circuit on February 15, 2022
3. The mandate issued by the Court of Appeals for the Eighth Circuit on February 22, 2022.
4. The district court's denial of Petitioner motion to vacate the arbitration award, issued on April 26, 2021
5. The Appellant's petition for rehearing en banc submitted by Petitioner Zhang on February 01, 2022.

Exhibit 1

The opinion issued by the Court of Appeals for the Eighth Circuit on

December 29, 2021

United States Court of Appeals
For the Eighth Circuit

No. 21-2056

Yufan Zhang

Plaintiff - Appellant

v.

UnitedHealth Group; Sujatha Duraimanickam

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: December 23, 2021
Filed: December 29, 2021
[Unpublished]

Before BENTON, KELLY, and KOBES, Circuit Judges.

PER CURIAM.

In this employment discrimination action, Yufan Zhang appeals the district court's[1] denial of his motion to vacate an arbitration award. After careful review of

[1]The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

the record and the parties' arguments on appeal, we find no basis for reversal. See Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney, LLC, 894 F.3d 894, 897 (8th Cir. 2018) (standard of review). Accordingly we affirm. See 8th Cir. R.47B. We also deny Zhang's pending motions.

Exhibit 2

The denial of Zhang's petition for rehearing en banc issued by the Court of Appeals for the Eighth Circuit on February 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2056

Yufan Zhang

Appellant

v.

UnitedHealth Group and Sujatha Duraimanickam

Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-01454-MJD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

February 15, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Exhibit 3

The mandate issued by the Court of Appeals for the Eighth Circuit on February 22, 2022.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2056

Yufan Zhang

Appellant

v.

UnitedHealth Group and Sujatha Duraimanickam

Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-01454-MJD)

MANDATE

In accordance with the opinion and judgment of 12/29/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

February 22, 2022

Clerk, U.S. Court of Appeals, Eighth Circuit

Exhibit 4

The district court's denial of Petitioner motion to vacate the arbitration award, issued on April 26, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Yufan Zhang,

Plaintiff,

v.

MEMORANDUM OPINION AND ORDER
Civil No. 18-1454 (MJD/KMM)

UnitedHealth Group and
Sujatha Duraimanickam,

Defendants.

Plaintiff, *pro se.*

Sandra L. Jezierski and Sarah B. Riskin, Nilan Johnson Lewis PA, Counsel for Defendants.

This matter is before the Court on Plaintiff's motion to vacate the Arbitrator's Decision. [Doc. No. 42]

I. Background

A. Plaintiff's Claims

Plaintiff was an employee of Defendant UnitedHealth Group ("UnitedHealth") from December 2014 through November 14, 2016. (Amended Complaint ¶¶ 3, 11.) In the Amended Complaint, Plaintiff asserted claims of age discrimination under the ADEA and the MHRA and a claim of defamation.

B. Arbitration

By Order dated February 14, 2019, this Court granted Defendants' motion to compel arbitration and stayed this case pending arbitration. The parties then proceeded to litigate Plaintiff's claims according to the Rules of the American Arbitration Association ("AAA"), as modified by the Policy. (Jezierski Decl. ¶ 2.) The parties were each entitled to serve up to 25 Requests for Production of Documents and conduct two eight-hour days of fact witness depositions. (Id., Ex. A, ¶¶ 14.b and 14.c.) Plaintiff was represented by counsel throughout the arbitration proceedings. (See Doc. No. 36 (Memorandum in Support of Motion to Withdraw as Counsel for Plaintiff).)

Former Magistrate Judge Jeffrey Keyes served as the Arbitrator and heard evidence over a four-day period on August 4, 5, 18 and 19, 2020. (Id. ¶ 5.) The parties also submitted post-hearing briefs.

On October 5, 2020, the Arbitrator issued his decision in favor of Defendants on all counts. (Id. ¶ 10, Ex. D.) First, the Arbitrator found that Plaintiff had failed to prove that age discrimination was the cause of his termination. (Id. at 4.) Second, the Arbitrator found that the alleged defamatory

statements concerning his poor performance in his performance review were subject to a qualified privilege and could not lead to liability absent a finding of actual malice. (Id. at 5.) The Arbitrator noted that Plaintiff's argument as to actual malice was premised on his age discrimination claim, and because Plaintiff had failed to prove his age discrimination claim, there was no showing of actual malice or improper motive to overcome the qualified privilege afforded the alleged defamatory statements in the performance reviews. (Id.) The Arbitrator also rejected Plaintiff's additional argument that his supervisor, Duraimanickam, was acting in bad faith by building a file of false statements about Plaintiff, as evidence was submitted to show there were reasonable grounds to support the alleged statements.

Plaintiff is now *pro se* and has filed a motion to vacate the Arbitrator's decision.

II. Motion to Vacate Arbitration Award

A. Standard

The Federal Arbitration Act ("FAA") provides that any agreement to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save

upon such grounds that exist in law or equity for the revocation of any contract."

9 U.S.C. § 2. The FAA further instructs, in relevant part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...

9 U.S.C. § 3.

Once an arbitrator issues a decision, the FAA provides four grounds for which a court may vacate that award upon application of any party to the arbitration. Those grounds are:

> **(1)** where the award was procured by corruption, fraud, or undue means;
> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4).

"Judicial review of the arbitrator's ultimate decision is very deferential and should not be disturbed 'as long as the arbitrator is even arguably construing or

applying the contract and acting within the scope of his authority.'" N. States Power Co. v. Int'l Broth. of Elec. Workers, Local 160, 711 F.3d 900, 902 (8th Cir. 2013) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

B. Arguments

Plaintiff moves to vacate the Arbitration Award on the following bases: that the Award was procured by fraud and that the Arbitrator engaged in misconduct by failing to consider evidence and for failing to postpone the hearing.

To prevail on his motion to vacate the arbitration award based on fraud, Plaintiff must "prove[] the fraud by clear and convincing evidence, show[] the fraud was not discoverable by due diligence either before or after the proceeding and show[] that the fraud was materially related to an arbitration issue." MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499, 345 F.3d 616, 622 (8th Cir. 2003). "Fraud is established if the plaintiff proves that 'the defendant made false representations of material fact, intended to induce plaintiff to act, the representations were made with knowledge of, or reckless disregard for, their falsity, and the plaintiff justifiably relied upon those false

representations to [his] detriment.'" Goff v. Dakota, Minnesota & Eastern R.R. Corp., 276 F.3d 992, 996 (8th Cir. 2002) (quoting Pac. & Arctic Ry. & Navigation v. United Transp. Union, 952 F.2d 1144, 1148 (9th Cir. 1991)). "But given 'the strong federal policy favoring arbitration,' fraud under the FAA demands a 'greater level of improper conduct' than is typically required." Wolfson v. Allianz Life Ins. Co. of North America., 2015 WL 2194813, at* 6 (D. Minn. May 11, 2015) (citing Goff, 276 F.3d at 996)).

Plaintiff argues the Award was procured by fraud because his supervisor, Sujatha Duraimanickam and other witnesses, lied during their testimony before the Arbitrator, and that Defendants failed to produce records from three project management databases: BaseCamp, CodeHub and service-now. As a result, Plaintiff asserts the Arbitrator was not fully informed as to the requirements of Plaintiff's job and prevented Plaintiff from proving his claims.

Defendants argue that Plaintiff has failed to demonstrate an intentional deception of material fact or any other improper conduct by Defendants or witnesses. Plaintiff was aware of the documents he requested, the documents produced and the documents identified as exhibits for the hearing. Plaintiff did not identify missing documents and took no steps to procure any missing

documents prior to the hearing. Further, Plaintiff could have sought assistance from the Arbitrator to obtain any missing documents, but he did not do so.

As to the alleged lies told by defense witnesses, Plaintiff only makes generalized statements without evidentiary support. This is not sufficient to meet his burden of providing fraud by clear and convincing evidence.

The Court finds that Plaintiff has not demonstrated, by clear and convincing evidence, that the Arbitration Award was procured by fraud. Other than his own self-serving testimony as to his job performance, Plaintiff did not present any evidence that any of the witnesses had lied during the arbitration hearing.

The Arbitrator found that Duraimanickam's testimony was credible based on his finding that Duraimanickam had demonstrated problems with Plaintiff's job performance, and that she spent a great deal of time coaching him on how to improve his performance. (Jezierski Decl., Ex. D (Arbitration Award at 3).) Further, the Arbitrator found that the "issue here is not whether there was a cause to terminate Claimant who was an at-will employee. Rather, the issue is whether Claimant has proven that intentional age discrimination was the cause of his termination. What matters is that Claimant's poor performance in his job

was the true reason for the termination even if the decision to terminate Claimant was unwise, unfair, or based on mistakes of fact. " (Id. at 4.) Ultimately, the Arbitrator found that "Claimant's claims under the ADEA and MHRA fail because he did not prove that age discrimination was the cause of his termination." (Id.)

The Court further finds that Plaintiff has failed to show the Arbitrator was guilty of misconduct by failing to postpone the hearing or in refusing to hear evidence pertinent and material to the controversy. The record demonstrates that Plaintiff never sought such evidence in discovery, and never raised the issue before the Arbitrator.

Plaintiff also complains that the Arbitrator did not give proper consideration to a compilation of contemporaneous notes he prepared regarding his work performance and meetings with Duraimanickam. As to these notes, the Arbitrator wrote:

> But Claimant's typed compilation of notes does not constitute reliable evidence supporting the claim. It was not clear when Claimant created the compilation of notes, and he did not come forward with the original documents that he relied upon in compiling the notes to prove that he recorded the content of the compilation at or near the time when Duraimanickam allegedly made the comments. Claimant's allegation that Duraimanickam made the comments that showed a bias against older

> workers is simply not enough to overcome the well-documented record of poor performance that caused Claimant's termination.

(Id. at 3-4.)

Thus, it is clear the Arbitrator considered this evidence, but found it did not constitute reliable evidence supporting Plaintiff's claim.

The Court further finds that Plaintiff has not demonstrated that he requested the Arbitrator to postpone the hearing to obtain additional documents. Failure to complain about alleged errors generally results in a waiver of such complaints. See PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship., 187 F.3d 988, 995 (8th Cir. 1999). Plaintiff claims he raised these concerns in a letter to the Arbitrator, but such letter was not provided to the Defendants, not filed with the Court and it is unclear whether it was delivered to the Arbitrator. (Jezierski Decl. ¶ 14.) In any event, the claims were not raised during the proceeding.

As to Plaintiff's claim that the Arbitrator misapplied the law on qualified privilege, it is no longer a ground to vacate an arbitration award based on a manifest disregard of the law. Air Line Pilots Ass'n Intern. v. Trans States Airlines, LLC, 638 F.3d 572, 578-79 (8th Cir. 2011) (finding the Supreme Court eliminated judicially created vacatur standards under the FAA, and finding an

arbitral award may be vacated only for the reasons enumerated in the FAA) (citing Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 576, 586-87 (2008)).

IT IS HEREBY ORDERED that Plaintiff's Motion to Vacate the Arbitration Award [Doc. No. 42] is **DENIED**. This matter is hereby dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: April 26, 2021

s/Michael J. Davis
Michael J. Davis
United States District Court

Exhibit 5

The Appellant's petition for rehearing en banc submitted by Petitioner Zhang on February 01, 2022.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Case No.: 21-2056

Yufan Zhang

Plaintiff-Appellant

v.

UnitedHealth Group, Inc. and **Sujatha Duraimanickam**

Defendants-Appellees

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

(Case No.: 0:18-cv-01454-MJD)

AMENDED PETITION FOR REHEARING EN BANC OF PLAINTIFFS-APPELLANTS YUFAN ZHANG

(Case No.: 21-2056)

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1) and 40

A panel of this Court affirmed a district court decision that the District Court denies Yufan Zhang ("Zhang")'s motion to vacate the Arbitration Award, despite the district court's findings, inter alia, that:

1. Sujatha Duraimanickam ("Duraimanickam") and UnitedHealth Group ("UnitedHealth") had destroyed the evidence that Zhang used to have. Duraimanickam also refused to disclose the evidence or used the relevant evidence to debut Zhang's claims, even Zhang told Defendants where to find the evidence in UnitedHealth. As manager, Duraimanickam knows what evidence which Zhang referred to and where to get them. Therefore, "Zhang has no evidence" cannot be the Defendants' ground of defense, *Federal Rules of Civil Procedure 37(e)(2)*.
2. Duraimanickam did not demonstrate or prove her statements of fact with clear and convincing evidence for meeting her burden of persuasion, but the Arbitrator thinks Duraimanickam's statements of fact are credible just based on his logical fallacy of reasoning. The Defendants only made a declaration, but did not submit any documents to the district court for demonstrating or proving Duraimanickam's statements of fact. The defendants declaration is considered by district court as truth even the defendants did not meet their burden of proof in supporting their statements, and their burden of producing evidence to rebut Appellant's presumption, refer *Federal Rules of Evidence 301*.

3. Without any proven instances to support, the arbitrator declares the Defendants' reason for terminating Zhang's job is true reason, not the pretext; then based on this, the arbitrator found that *"Claimant's claims under the ADEA and MHRA failed"* without considering the termination is not the required element for establishing an age discrimination claim, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), *Furnco Construction Co., v. Waters, 438 U.S. 567, 17 EPD ¶8401 (1978).*
4. Duraimanickam told lie and provided misleading information in arbitration. Duraimanickam destroyed Zhang's evidence. Duraimanickam refused to disclose the original evidence to rebut Zhang's claims or to support her statements. Duraimanickam just presented her false statements without any demonstration or explanations, which led to the arbitration produced by fraud, see *PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 991 (8th Cir. 1999).*
5. The Arbitration thinks, even though Duraimanickam's false statements were made, as part of a performance review, thus subject to a qualified privilege and cannot lead to liability absent a finding of malice. However, the arbitrator discards the facts that (1) Duraimanickam knew her statements are not complete true (just partial true), (2) Duraimanickam made such false statements to UnitedHealth HR on purpose in order to fire Zhang, (3) Duraimanickam's false statements led to Zhang losing job, *Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919-920 (Minn. 2009)* (quoting Stuempges, 297 N.W.2d at 255).

Therefore, Plaintiff-Appellant Zhang petitions this Court to rehear this case en banc, pursuant to Fed. R. App. P. 35. Zhang respectfully submit that this case raises questions of exceptional importance concerning basic principles of evidence rules, findings of fact, burden of persuasion, namely,

(1) **Whether** "*Plaintiff has no evidence*" can be the Defendant's ground of defense when the Defendant destroyed the evidence which Plaintiff used to have?

(2) **Whether** the Defendant has the burden of prove if the initial claims are from Defendant and the Plaintiff merely challenges the accuracy and completeness of the defendant's claims?

(3) **Whether** a party can refuse to disclose the evidence which is admitted by both parties as the material evidence, like applying "the Fifth Amendment right against self-incrimination" on civil case?

If Not on (3), then:

(4) **Whether** the Defendant has obligation to disclose the original evidence when:

a. The Plaintiff used to have the copy of this evidence; **and**

b. The Defendant has taken over the copy of the evidence thinking it contains company's internal information; **and**

c. The Defendant may or may not destroy the copy of the evidence that Plaintiff used to have; **and**

d. Both parties admit the evidence, no matter the copy one or is original one, can be the material evidence for proving or disproving the statements of fact presented by Not Only Plaintiff But Also Defendant?

If Not on (4), then after rehearing en banc, make En Banc Determination

(5) **Whether** the evidence presented by Duraimanickam meets the burden of proving in support Duraimanickam's statements of fact in two CAPs (See Dist. Doc. #43-3 and #44-3)?

(6) **Whether** the arbitration award should be vacated pursuant to *9 US Code §10(a)*?

(7) **Whether** the Appellant's defamation claim can be established?

Above determinations are very important because they would provide other employers guideline for whether the employers could take over, back from employees, the evidence which is not in favor of employers, whether the employers can refuse to disclose the evidence or even destroy the evidence if it is not in favor of employers, and whether employer could fire employees based on false comments.

STATEMENT OF THE CASE

UnitedHealth Group fired Zhang according to the comments about Zhang's performance from Duraimanickam in her two Corrective Action Plan ("CAP").

"Completing jobs in time or not" is the standard set by Durainmanickam for measuring a developer's performance is good or not.

Based on Durainmanickam's performance standard, Zhang thinks Duraimanickam's statements of fact about Zhang's performance presented in her issued two CAPs contains lie and misleading information (see *Appellant's Motion for resolving the factual issue*, filed to this court on December 16, 2021, and *Appellant's Amended Motion for excluding evidence*, filed to this court on November 03, 2021). Zhang argued with Durainmanickam for many times. Durainmanickam described such arguments as "She coaches Zhang how to improve his jobs". However, except the four examples, Durainmanickam only presented comments with no proven instances. Finally, Zhang got fired. Zhang filed claims to UnitedHealth HR, EEOC, the district court, and AAA arbitration. The crucial facts for this case are:

1. Duraimanickam and UnitedHealth destroyed Zhang's evidence when they fired Zhang.
2. The arbitrator and district court made the decisions in favor of defendants by only finding that Zhang has no sufficient evidence to support his claims, but not considering the fact that Defendants destroyed Zhang's evidence.
3. Both Duraimanickam and Zhang admit the original daily job logs and relevant working records are existing in UnitedHealth Group and these job logs and relevant records can be the material evidence (1) for proving or disproving Duraimanickam's statements of fact; and (2) for proving or

disproving Zhang's claim; but Duraimanickam refused to disclose any of material evidence to support her statements of fact, or to prove or disprove Zhang's claims.

4. In the witness hearing meeting, the Defendants had done cross-examining the evidence for where to find the evidence in UnitedHealth information systems to support Zhang's claims. The arbitrator saw this evidence. Duraimanickam knows where to find the relevant evidence that Zhang referred.
5. Zhang had argued with Duraimanickam about her misleading statements in her issued CAPs for many times in the one-on-one meeting between Zhang. Zhang claimed that Duraimanickam intentionally omitted or concealed some facts for misdirection on purpose. And Zhang's claims were filed to UnitedHealth, EEOC, and arbitration. Yet, Duraimanickam discarded Zhang rebuttal and still presented her statements of fact to arbitration.
6. When Zhang filed a motion to request UnitedHealth to affirm the completeness and accuracy of Duraimanickam's statements of fact in her CAPs, UnitedHealth denied. UnitedHealth only thought Duraimanickam's statements of fact were accurate.

Completeness and accuracy play very important role in this case because a half-truth is a deceptive statement that includes some element of truth. The statement might be partly true, the statement may be totally true but only part of the whole truth, or it may

use some deceptive element, such as improper punctuation, or double meaning, especially if the intent is to deceive, evade, blame or misrepresent the truth.

For instance, Duraimanickam stated in her issued CAP (Progress Updates on 09/20/2016):

(1). The task for fixing Penetration testing ("Pen testing") issues was assigned to Zhang.

(2). The "Pen testing" issues were not fixed in September 2016 (missed the deadline).

Therefore, Duraimanickam concluded that Zhang had poor performance.

Although the facts in above (1) and (2) are all true, however, Duraimanickam's conclusion is fault because she omitted the key fact that "Pen testing" task was assigned to Zhang in October 2016 when the younger experts were not able to fix the issues after their working on it for about two months. Therefore, it is the younger experts having poor job performance.

There are too many similar misleading statements of fact in Duraimanick's CAPs, so that it is not able to rebut them in a single document due to word count limit. Therefore, finding missing facts is significant important in this case.

ARGUMENT

Contrary to the panel's view (filed by 8th Cir. On December 29, 2021), the errors identified by Zhang were legal in nature – not factual challenges to the weight given evidence or testimony – because the district court misapplied governing legal principles to its findings of fact.

I. Sujatha Duraimanickam ("Duraimanickam") and UnitedHealth Group ("UnitedHealth") HR had destroyed the evidence, related job logs and service documents, etc. Zhang used to have them for disproving Duraimanickam's statements of fact.

Because it is Defendants destroyed the evidence that Plaintiff used to have, therefore, "Zhang had no evidence" cannot be Defendants' grounds of defense.

Moreover, Duraimanickam has the original evidence, but she refused to disclose the evidence or used the relevant evidence to support her statements of fact, or to debut Zhang's claims, even Zhang told Defendants where to find the evidence in UnitedHealth and Duraimanickam knows what evidence which Zhang referred to and where to get them. Pursuant to *Federal Rules of Civil Procedure 37(e)(2)*, this court should presume that the lost information was unfavorable to the Defendants-Appellees.

II. Arbitrator finds Duraimanickam's statements are credible without clear and convincing evidence to support.

However, except declaration, the Defendants did not submit any documents or demonstration to prove their declaration. So, the district court should not think they are complete true facts, partial facts might be misleading.

Arbitrator conclusion is wrong because:

1. As an experienced legal professional, the arbitrator did not think that finding whether there are any facts missed is more important than verifying whether the facts presented by Duraimanickam are true or not, especially he already knew that Zhang claimed Duraimanickam intentional omitted or concealed some facts for misdirection, for details, see Appellant's Motion for resolving actual issues filed to this court on December 15, 2021, see also Appellant's Amended Motion for excluding evidence, filed to this court on November 03, 2021, and Dist. Doc. #56-0, §13. Refer 9 U.S. Code §10(a).

   (a). The arbitrator subjectively thinks all of Duraimanickam's statements are credible by only finding one or two facts had been mentioned in Colleague Reviews and discards the facts that the missing facts might disprove Duraimanickam's statements of fact. The arbitrator errs in having logical fallacy of reasoning (conclude all statements are true when only find one or two of the statements of fact is true), and ignoring Duraimanickam's burden of proving her statements of fact no matter Zhang could prove his claims or not, refer *Federal Rules of Civil Procedure 26(a)(1)* and *Federal Rules of Evidence 301*.

(b). The arbitrator subjectively thinks all of Duraimanickam's statements are credible if Zhang could not provide material evidence to support his claims. The arbitrator errs in having logical fallacy of reasoning (thinks Duraimanickam's statements are truth if Zhang could not disprove Duraimanickam's statements with evidence), and even Duraimanickam did not meet her burden of producing evidence to rebut Zhang refutations, refer *Federal Rules of Evidence 301*.

Therefore, this court should rehear en banc to determine whether Defendants meet the burden of proof in supporting their statements.

2. There is material evidence to prove Duraimanickam lying

Zhang have demonstrated how Duraimanickam told lie in her issued CAP, see *Appellant's "Motion for resolving the factual issue" §7 (page 13~14) and §9 (page 16~18),* filed to this court on December 16, 2021. See also: more detailed analysis on Duraimanickam's testimony can be found on "*Appellant' Brief for vacating arbitration awards*", filed to the district court, received date on January 21, 2021, *Dist. Doc. #56-0, §30 and §13.*

Therefore, there are no more grounds to support the arbitrator declaration that Duraimanickam's statements of fact are credible.

So, the rehearing en banc is needed for this court to determine whether Duraimanickam's statements of fact contain lies or misleading information which led to the award was produced by fraud.

III. The Arbitrator wrongfully concluded that Claimant's poor performance in his job was the true reason for the termination based on his own surmising without supported facts

1. The Arbitrator and district court did not notice that, except Duraimanickam's comments, the Defendants did not provide any proven instances to show Zhang's performance in the final CAP period

However, when a person has discrimination against someone, her comments about the victim are often derogatory. Therefore, the Arbitrator should not just cite Duraimanickam's comments, he needs to see the proven instances, like job logs, yet, Duraimanickam refused to disclose the job logs.

UnitedHealth Group HR, manager Tanya Hughes provided the reason for terminating Plaintiff's job.

Hughes said: *"I have attached copies of your Corrective Action Plans. I would like you to look at the "progress updates" section of your Final CAP which indicates performance concerns that existed after the final CAP was issued to you which is why the decision was made to terminate your employment. Managers are expected to set the performance expectations for the employees that report to them."* (Dist. Doc. #45-3 page 6, and #56-0 §19)

Hughes' statement shows that the Plaintiff's performance during the last CAP period is the cause for terminating his job. The final CAP was issued by Duraimanickam on October 24, 2016. From that day util Zhang got fired on November 14, 2016, there is only one development cycle with the development

deadline on November 14, 2016. See Zhang's response to Hughes' above statement in Dist. Doc. #45-3, page 1~5

2. In entire arbitration proceedings, the Defendants-Appellees had not clearly stated, proved, or provided any instance or evidence about what Zhang and his teammates had done during the last CAP period. The Arbitrator should not just look at Duraimanickam's comments without verifying her comments with proven facts.

   Without knowing what Zhang did during that period, the Arbitrator thinks the Defendant's terminating reason was true just based upon feeble or scanty evidence, suspicion, guess, or imagination.

3. Duraimanickam stated Zhang had no basic knowledge required for his job

   Duraimanickam is lying. If Zhang had no basic knowledge required for his job, then why he would receive the company award for recognizing his excellent contribution. For more demonstration, refer to Zhang's ***Appellant Brief for vacating arbitration award §33***, filed to district court dated on January 21, 2021.

   Since the arbitrator's assertion is the main ground for arbitrator to disprove Plaintiff's claims on age discrimination. When this ground is dismissed, there will be no sufficient grounds to support the arbitration award. See *9 U.S. Code §10(a).*

IV. The Arbitration award was made only based on Duraimanickam's statements without any proven fact instances

The Arbitrator found "*the final thirty day plan that went into effect on October 24, 2016. However, Duraimanickam showed that the performance problems continued through to his termination in November 2016.*", see Arbitration Award (Dist. Doc. #49-2)

The arbitrator found "[Duraimanickam]*documented performance problems included: missing deadlines; failing to complete tasks thus causing delays and rework; failing to demonstrate an understanding of the requirements of team projects; working on irrelevant tasks; and failing to communicate with other team members*" (Dist. Doc. #49-2)

The district court finds "*The Arbitrator found that Duraimanickam's testimony was credible based on his finding that Duraimanickam had demonstrated problems with Plaintiff's job performance*". (Dist. Doc. #63, page 7 ¶3)

The district court also finds "*The Arbitrator found that Duraimanickam's testimony was credible based on his finding that Duraimanickam had demonstrated problems with Plaintiff's job performance*".

However, neither district court nor Arbitrator can find Duraimanickam met her burden of proof. Without finding how "Duraimanickam had demonstrated problems with Plaintiff's job performance", based on what, did the district court trust the arbitrator's declaration?

The district court has overlooked the fact that Duraimanickam has the burden of persuasion in supporting her statements of fact, and burden of producing evidence to rebut the Plaintiff presumption, see *Federal Rules of Evidence 301.*

Duraimanickam did not demonstrate or prove how her statements of fact are true with clear and convincing evidence. Duraimanickam also denied disclosing any

original evidence to prove her statements or to disprove Zhang's claims, even though she admitted that both her claims and Zhang's claims could be proved or disproved by this evidence which is the team's day-to-day job logs and service records. The facts found by district court are all from arbitrator's findings of fact which are from Duraimanickam's statements without any proven fact instance. And the defendants did not submit any documents from Duraimanickam to show how Duraimanickam demonstrates her statements of fact are true.

The district court finds "*Failure to complain about alleged errors generally results in a waiver of such complaints. See Painewebber Group v. Zinsmeyer Trusts P'ship 187F. 3d 988,955 (8th Cir. 1999)*". This case law also applies to Duraimanickam. Especially, when Zhang told Defendants that his claims can be proved with what evidence that Defendants have.

In fact, during "*the final thirty day plan*" (CAP), Zhang complete all of his work assignments, while the other developers in Duraimanickam's team did not, see Zhang's emails to UnitedHealth HR (Dist. Doc. #45-3, page 5), in which, Zhang had clearly told HR that the facts mentioned in his claims can be verified by what evidence in UnitedHealth, (see Dist. Doc. #49-9). Above evidence had been cross-examined during arbitration witness hearing. As to the fact about whether the Arbitrator knew that the evidence from "BaseCamp" and "Server-now" is missing, the district court finds "*it is unclear whether [it] was delivered to the Arbitrator. (Jesierski Decl. ¶14.) In any event, the claims were not raised during the*

proceeding.". Here, "[it]" means a letter sent to the Arbitrator for telling him about missing evidence from "BaseCamp" and "Server-now". No matter the Arbitrator received the letter or not, the information which the letter reminded the Arbitrator already knew by the Arbitrator. Therefore, it should be the Defendants' ground of defense.

As the litigant, Duraimanickam know how important the evidence from "BaseCamp" and "Server-now". And UnitedHealth HR had investigated the facts presented Zhang, and they have no doubts on most of these facts (see UnitedHealth response letter to Zhang, Dist. Doc. #47-0). And the most important is that Duraimanickam know she did not provide the complete evidence from "BaseCamp" and "Server-now" to arbitration, but just used "Cut" and "Paste" to provide a little portion of the evidence from "BaseCamp" and "Server-now" to arbitration, see Dist. Doc. #43-4, also see Appellant's Motion for resolving factual issue, filed to this court on December 16, 2021.

Therefore, the Defendants are intentionally omitted or concealed some important facts for misdirect in arbitration.

Therefore, the arbitrator determined that Zhang's claim under the ADEA and the MHRA fail only based on Duraimanickam's statements without any proven fact instance. Further, the arbitration award was made,

(1). where the award was procured by fraud, or undue means;

(2). where there was evident partiality in the arbitrators;

(3) where the arbitrator was guilty of misbehavior by which the rights of Plaintiff has been prejudiced

See *9 US Code §10(a)*

Zhang had tried his best to exercise his due diligently. However, Zhang did not know Duraimanickam still used her CAPs as evidence until Zhang saw the arbitration award which shows the arbitrator made a decision in favor of Defendants based on the misleading information presented by Duraimanickam.

Therefore, the Plaintiff petition rehearing en banc for this court to determine whether there are any facts overlooked by the district court.

V. "Qualified Privilege" is misapplied

The Arbitrator finds *"The statement that Claimant was not meeting the performance requirements of his position was made as part of a performance review and thus subject to a qualified privilege and cannot lead to liability absent a finding of malice."*

Zhang completed his assigned jobs in time, but the other developers did not. Duraimanickam said to measure a developer's performance is to see whether she or he could complete his or her jobs in time. Duraimanickam knew Zhang already completed his jobs during the last CAP period because he already demonstrated his jobs to the team, but Duraimanickam stil, on purpose, talked to HR, her supervisor, and other managers in the same division that Zhang's performance did not get

improved during the last CAP period, in order for HR to fire Zhang. Therefore, "absent a finding of malice" rule cannot be applied.

To establish a defamation claim in Minnesota, a plaintiff must establish the following three elements: (1) the defamatory statement is "communicated to someone other than the plaintiff," (2) the statement is false, and (3) the statement "tend[s] to harm the plaintiff's reputation and to lower [the plaintiff] in the estimation of the community." *Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919-920 (Minn. 2009)* (quoting Stuempges, 297 N.W.2d at 255).

Therefore, Duraimanickam meets above three elements. Duraimanickam's statements tended to terminate the Plaintiff's job, so it is not subject to a qualified privilege.

CONCLUSION

For the foregoing reasons, this Court should rehear this appeal en banc, reverse the district court, and remand for further proceedings.

Respectfully submitted,

Dated February 01, 2022.

Respectfully submitted

By: /s/ Zhang

Yufan Zhang (Appellant)

CERTIFICATE OF COMPLIANCE

The Appellant's Petition for Rehearing En Banc, dated on February 01, 2022, complies with the length limits of Federal Rules of Appellate Procedure *Rule 35(a)(2) and 40(b)(1)*. This petition contains 3,854 words, excluding the accompanying documents authorized by Federal Rules of Appellate Procedure *Rule 27(a)(2)(B)*.

Dated: February 01, 2022

/s/ *Yufan Zhang*

Yufan Zhang (Appellant)

CERTIFICATION OF SERVICE

I hereby certify that on February 01, 2022, I email the foregoing document of "*2022-02-01* ***Amended Petition for Rehearing En Banc***" which I file on February 01, 2022, for **appeals case: 21-2056**, to below participants:

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Dated: February 01, 2021,

/s/ Zhang

Yufan Zhang (Appellant)