No. 22-1244

ORIGINAL

In The Supreme Court of the United States

ANGELA JOSEPH,

Petitioner,

v.

DENIS RICHARD MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether summary judgment under Federal Rule of Civic Procedure Rule 56 standard was improperly granted to dismiss a case of employment discrimination where the employee was wrongfully terminated for poor job performance which did not exist. The case has broader implications for permanent employee members of a protected class, who may be removed from their jobs despite no wrongdoing on their part.

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United States Court of Appeals for the Sixth Circuit Order denying Petition For Rehearing *En Banc*, dated March 15, 2023

JURISDICTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq. which prohibits discrimination in the workplace and F.R.C.P. Rule 56, which governs Summary Judgments in civil litigations.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq. which prohibits discrimination in the workplace and F.R.C.P. Rule 56, which governs Summary Judgments in civil litigations.

STATEMENT OF THE CASE

The Petitioner, Angela Joseph, M.D. comes before the Court seeking guidance and review of her complaint against the Respondent Aleda E. Lutz VA Medical Center, Saginaw, Michigan, a facility of the Veterans Administration. At the heart of the conflict is the disputed fact of job performance. Did poor job performance actually exist or was it a convenient tool, a pretext, to replace the Petitioner with an employee who was not a member of her protected class.

The Petitioner is a South Asian-American U.S. citizen of Indian origin who is a Duke University fellowship trained physician in Intensive Care Medicine. The Petitioner worked as an ICU physician at the Detroit VA facility before coming to the Saginaw VA facility. On June 29, 2016, the Petitioner accepted a permanent full-time Title 38 physician employee position at Aleda E. Lutz Saginaw. VA facility. Documented evidence shows that the Petitioner had met all the agency requirements and was converted by the Human Resources department to the full-time salaried position on August 25, 2016, through a Compensation Panel Action as required by VA HANDBOOK 5005/129 PART III CHAPTER 5, III-66, where the change in assignment was documented on VA Form 10-0432A, Compensation Panel Action. See ECF No. 52, Page ID.1495, and approved by facility Director Ginny Creasman on August 26, 2016. See ECF No. 52 PageID. 1496.

On November 6, 2018, the Respondent sent the Petitioner a letter stating their final decision and to report the findings of the Appeals Panel Board they had appointed to consider the matter of job performance: "The Panel found no findings of substandard care, professional misconduct, or professional incompetency regarding the three cases presented. Due to the findings of this Panel there will be no report in your name to the National Practitioner Data Bank, or to the State Licensing Board of Michigan where you hold a medical license, per VHA Handbook 1100.19. Your privileges will be expired in good standing as of August 27, 2018." See Appendix B

VA HANDBOOK 5005/129 PART II CHAPTER 3, II-68 to II-69 defines VA policy for the purpose of a probationary period. The policy gives direction as to separation and retention of a probationary employee: "The employee may be separated from the service if not found fully qualified and satisfactory." The Petitioner was found fully qualified and satisfactory by the VA's defined standards per VHA HANDBOOK 1100.19 on the day of separation.

Thus, the Respondent violated its own stated policies and procedures in considering the Petitioner a probationary period employee, and even when considered a probationary employee, violated its policy in failing to retain a fully qualified and satisfactory employee in good standing on the day she was removed.

The Respondent's proffered legitimate nondiscriminatory reason for the Petitioner losing her job is poor job performance. The issue of whether job performance was poor or satisfactory has given rise to a dispute which is material to the case and precludes dismissal of the case by application of F.R.C.P. Rule 56.

SYNOPSIS OF THE CASE

The case involves three areas for analysis: adherence to the statute prohibiting Title VII discrimination, application by the courts of F.R.C.P. Rule 56, and the standard of medical care provided.

Starting in November 2015 while still working at the Detroit VA facility, the Petitioner began covering shifts at the Saginaw VA facility. As

already mentioned, the Saginaw facility offered the Petitioner permanent full-time work in June 2016 and per VA policy was converted within sixty days to a salaried, permanent position on August 25, 2016. The Petitioner worked continuously in the same department, medicine, with the same supervisors and was paid a full-time salary from August 2016 onwards. The Petitioner worked continuously for over two years in the medicine department and had high-satisfactory evaluations and no complaints until May 7th and 8th 2018.

In late April 2018, another physician who was not a member of the Petitioner's protected class wanted the Petitioner's night-time hospitalist shift. There were only four approved hospitalist positions at the Saginaw facility, two for the day and two for the night. The other physician had recently acquired U.S. citizenship, a requirement for a permanent position at the VA. Within two weeks of this event, the Saginaw facility took steps to remove the Petitioner and replace her position with the other physician. Nurse supervisor Christina Tokarski began sending cases for the Chief of Medicine Dr. Anthony Albito to consider against the Petitioner. See ECF No. 30-35, PageID. 1123. When Dr. Albito left on vacation for three weeks, Assistant Chief of Medicine nurse practitioner Sally Lewis directly asked staff to file complaints alleging wrongdoing by the Petitioner in two cases. Later a third case was added for a total of three cases.

The medical cases did not involve any medical mismanagement and did not meet the VA's criteria for reporting cases but were made to appear as if they did. Case 1 involved a nonveteran dental

employee who had chest pain. The Petitioner treated the patient according to American Heart Association guidelines, and the patient was transferred to a local hospital and did well. There was confusion among the nursing staff on the use of a defibrillator as a cardiac monitor, but the Petitioner followed the standard of care for such a patient. Nurse practitioner Sally Lewis made an addendum to the Petitioner's note falsely stating that the Petitioner was not present to care for the patient, that the patient's condition had worsened, and a Code Blue had been called for that reason. See ECF No. 27-12, PageID. 401, 402. The nurses report did not agree with her note, but three nurses and a respiratory therapist did file reports as requested mainly stating that the Petitioner should have used the defibrillator as a cardiac monitor. A defibrillator is used to jump start the heart when a person is unresponsive due to a heart rhythm inconsistent with life, which was not the situation in this case. Case 2 dealt with a veteran who had respiratory distress, the Petitioner transferred this patient to a local hospital where he also did well overall. In this case a Respiratory Therapist Noelita Cincinelli who was off-duty and did not take care of the patient filed a report stating that she discussed the case and use of oxygen with the Petitioner. There is no evidence to support her complaint, and the Petitioner only spoke with the Respiratory Therapist Edgar Escobar who took care of the patient and followed the Petitioner's orders. See ECF No. 27-5, PageID. 278. Case 3 involved a veteran patient who was not seen by the Petitioner because the nurses discharged him home before any physician could evaluate him. See ECF No. 27-11, PageID. 395.

On May 10, 2018, just two days after these three cases occurred, and without any investigation or discussion with the Petitioner, supervisor Sally Lewis asked Chief of Staff Dr. Barbara Bates to suspend the Petitioner. On May 17, 2018, an email exchange between Dr. Bates, and VA Central Office Administrator Mariann Chick shows the planning on how to suspend the Petitioner. Ms. Chick advised Dr. Bates that an administrative suspension was not an appropriate procedure for an adverse action to take against the Petitioner who had no administrative duties, when the allegations were supposedly of a clinical nature. See ECF No. 27-25, PageID. 552-PageID.553.

On May 21, 2018, when the Petitioner arrived to begin her nighttime shift, Dr. Albito handed her a letter of administrative suspension of her clinical privileges to practice medicine alleging wrongdoing in two cases. Earlier on the same day the letter of suspension was signed by Nursing Administration Mr. Steven Haag who thought that the Petitioner was African-American or Black due to her dark skin color. Mr. Haag was covering as Acting Director of the facility while the actual Director was in a meeting. See ECF No. 30-22, PageID. 1010, 1011. As the decision maker, he did no investigation to figure out what happened but believed that the Petitioner was an "imminent danger" or threat to patients.

On May 22. 2018, the Petitioner filed a complaint with the facility EEOC office. She was assigned to nonclinical work, to develop a pain management program and write two standard operating procedures, while the other physician Dr. Galina Gladka was placed in the Petitioner's shift

and was hired permanently on July 22. 2018 even before a resolution and final decision could be made on the Petitioner's status. Dr. Gladka only worked in the Petitioner's shift until the medical unit was closed about two years later.

In order to remove a Title 38 physician employee VA policy stipulates that a summary suspension be used, which involves doing an investigation as to the complaints, and presenting an Evidence File for the basis for the suspension before an adverse action is taken against the employee. In the Petitioner's case she was suspended first, then an inappropriate investigation was conducted, and almost two months later an Evidence File was given to her with notice of a Summary Board Review to be held on July 30, 2018. This initial review panel was composed of a Psychiatrist, Dr. Nazzareno Liegghio, two Family Practice out-patient clinic physicians, Dr. John MacMaster, and Dr. Mark Greenwell and a Nurse Practitioner, Virginia Rolland. The board was not composed as defined in VA policy, because the physicians needed to be from the same practice area and not simply be physicians so that they could evaluate the cases by correct medical standards. VA HANDBOOK 5005/70 PART II CHAPTER 3, II-87. According to the Michigan State Licensing Board a nurse practitioner has some independent authority but is not considered the same as a physician. When Human Resources Specialist Edward Graham sent an email alarm stating that the review board may have been compromised by including a nurse practitioner, NP Roland was asked not to sign the report. Instead of forming a new compliant board per policy, they simply hid the fact that a nurse practitioner was involved.

The SRB met with Sally Lewis before meeting with the Petitioner on July 30th, and their impartial decision is questionable. Dr. Bates accepted the initial review board's decision to separate the Petitioner. She also accepted a complaint from Dr. Albito who had been on vacation when the medical cases occurred and based his complaint on hearsay and conjecture. He stated that the Petitioner intimidated staff after Respiratory Therapist Cathy Archenbault stated that she was intimidated by the Petitioner in a case of a veteran who was having a seizure when the Petitioner had asked her to give him oxygen and ventilate the patient better. See ECF No. 30-36, PageID. 1128.

As part of the investigation, Dr. Bates sent two of the cases to Dr. Richard Schieldhouse at the Ann Arbor facility. On June 19, 2018, Dr. Schieldhouse sent an email stating that he had limited access to the patient charts, and he would only be able to give a cursory review of the cases. See ECF No. 27-28, PageID 563, 564. He gave a rating to the cases which meant that they were to be used for quality review not disciplinary review. From his limited computer access to the patient charts he did not realize that the Petitioner had never evaluated one of the patients who had been discharged by the nurses, and the other patient was transferred out of the facility and was treated per standard with oxygen as discussed by the Petitioner and the ER physician at the outside hospital. In the case of another hospitalist, Dr. Alan Patterson, Dr. Bates sent his cases through the defined Peer Review process, thus treating the Petitioner in a disparate manner by getting a cursory review in her case. In the case of Radiologist Dr. Ross Waterfield, Dr. Bates sent 200

of his cases for review by the Radiology department at the Detroit VA, again treating the Petitioner differently when her three cases were reviewed by members who did not practice hospital-based Internal Medicine.

On August 3, 2018, Dr. Bates sent a letter of termination which stated that the Petitioner's date of hire was September 1. 2016. See ECF No. 27-35, PageID. 663, 664. This date contradicts with the Form SF-50 created by HR Specialist Daniel Savino appointed after the Petitioner was removed which stated that the Petitioner's date of hire was October 30, 2016. The Petitioner's Personnel File (eOPF) as of August 27, 2016, did not include a Form SF-50 or Notification of Personnel Action. Mr. Savino based his date of hire on a Memorandum dated October 16, 2016, stating that a correction was being made to the Petitioner's appointment on June 29, 2016, as a temporary employee and not as a permanent employee, pending the Petitioner meeting agency regulations within 60 days. These agency requirements were completed in June 2016 and the Petitioner was converted to a full-time permanent position on August 25, 2016, by a HR Compensation Panel Action per VA policy. No other action to convert the Petitioner took place after August 2016, thus, to accept the October 30, 2016, would not be compliant with VA policy since a board action to appoint the Petitioner would have to have taken place earlier within 60 days, which again would be calculated back to August 2016. Most importantly, per VA policy a temporary position is creditable towards the probationary period as long as it is continuous service in the same position, as it was in the Petitioner's case. See ECF No. 52, PageID. 1507

or VA HANDBOOK 5005/70 PART II CHAPTER 3, II-67b.

The Saginaw facility further discriminated against the Petitioner by not giving her credit for her continuous service which was afforded to other Title 38 employees and by continuing to identify her as a probationary period employee. By doing so the Petitioner did not have appeals rights that were available to other Title 38 employees.

The Petitioner requested a fair hearing to review the SRB's decision. The Appeals Panel Board was organized by Acting Chief of Staff Dr. Thomas Campana and was composed of three Internal Medicine physicians, two of whom were also hospitalists. As already stated , the panel found no poor job performance on the part of the Petitioner. Dr. Bates took the final action to not report the Petitioner to the SLB and NPBD, but also to reinstate the Petitioner's clinical privileges and expire them in good standing on August 27, 2018. Again, this is a violation of VA policy, because the Petitioner did not meet the criteria for separation of a Title 38 physician employee who was found fully qualified and satisfactory.

Dr. Bates final action also challenges the Respondent's honest belief of the proffered reason of poor job performance, because if the facility honestly held this belief, they should have reported the Petitioner and not reinstated her clinical privileges to practice medicine in good standing. First, Dr. Bates did not wait for the full process to be completed before terminating the Petitioner, and then, she chose not to report her because there

would have been further investigation by the SLB and NPDB as to the reasons for such a report.

Dr. Bates also made disparaging remarks to the EEOC investigator June Perkins stating that the Petitioner was "nasty and belligerent", and during deposition testimony she stated that the Petitioner stalked her, of which there is no evidence, since the Petitioner only met Dr. Bates once on the request of Dr. Albito to submit her report on the three cases in question.

Since, the VA's decision-making process is based on a chain-of-command procedure where subordinates report their complaints to their supervisors who then forward them to the facility administrators, it would be irrelevant to lay blame at the foot of the subordinates who had no decision-making ability. The decision makers can reject or accept complaints, investigate, and review while following policies and procedures as defined by the VA Handbooks and Directives. In this case there is a pretense of following some policies and procedures which the District Court and the Circuit Court accepted in favor of the Respondent, so much so, that Magistrate Judge Anthony Patti even confused the evidence of two cases, and in the case of the employee with chest pain stated that the patient had a heart attack, and a Code Blue was called because of a heart attack. See A26. These are completely unsupported statements and constitute manufactured evidence made to place the Petitioner in a negative light.

Finally, it is the decision makers who failed to follow the VA's policies and procedures in violating the Petitioner's Title VII rights by replacing her

without cause with an employee who was not a member of her protected class. Mr. Haag, who acted as the Director and decision maker took the adverse action of suspension without investigation or deliberation simply because he viewed the Petitioner as a threat. Dr. Bates terminated the Petitioner when the due process afforded to the Petitioner had not been completed, where the proffered reason was found to be nonexistent and is a pretext for unlawful discrimination.

SPECIFICS IN THE CIRCUIT COURT'S DECISION

The Circuit Court believes that the Petitioner has failed to show pretext because she has not explained how the evidence relating to her probationary status casts doubt on the proffered reason for her termination in 2018. See A5

a. The proffered reason of poor job performance was found by a panel of Internal Medicine experts to be not true, therefore, even if the Petitioner was considered a probationary status employee, a cause for separation did not exist. VA policy states that only a Title 38 employee who is fully qualified and satisfactory can be retained. Here it was determined by the facility that the Petitioner could not be reported to SLB and NPBD and restored her clinical privileges. Other Title 38 employees were not removed without cause during their probationary period; thus, the Petitioner's removal was pretextual.

b. Being considered a probationary employee, the Petitioner was denied appeals rights with the Merit Systems Protection Board and Disciplinary Appeals Board which may have recognized the manufactured complaints made to remove the Petitioner. The Petitioner was treated in a disparate manner by denying her rights for redress afforded to other Title 38 employees.

c. The Petitioner's probationary period was calculated incorrectly by the Saginaw facility based on the conversion to permanent status by the Compensation Panel Action, and then, she was denied credit towards her probationary period when she had continuous service in the same position. Again, the Petitioner was treated unequally to other Title 38 employees.

The Circuit Court has stated that the Petitioner's argument fails to show pretext based on the composition of the initial review board, the SRB. See A5

a. On the composition of the SRB, VA policy defines that members come from the same medical specialty to avoid mistakes in analysis of the medical cases. The Respondent's argument that they were physicians is not sufficient, because they did not practice medicine in the same area. If we are to accept such an argument, then why did Dr. Bates not send 200 Radiology cases for review by a Psychiatrist, two Family Practice

physicians and a nurse practitioner in the case of Dr. Waterfield, another Title 38 physician. Treating one Title 38 physician differently than another Title 38 physician is discrimination.

b. A nurse practitioner is not considered the same as a physician by any medical licensing board. To include the nurse practitioner and then ask her not to sign the report is hiding their failure to follow VA policy in composing a proper review board. A properly composed board review should have been afforded to the Petitioner.

c. The board was also not a qualified board because Dr. Greenwell was a new employee undergoing training to become the Urgent Care Chief, and he had not practiced medicine a single day at the facility. Dr. MacMaster and Dr. Liegghio were also not qualified to work as hospitalists because they were not certified to manage cardiopulmonary emergencies.

The Circuit Court also asks how the solicitation of Dr. Shieldhouse's consult was pretextual. See A6

a. Soliciting Dr. Schieldhouse to give a superficial review of cases he had limited access to was clearly a violation of VA's Peer Review policy. If we are to accept this argument, then Dr. Patterson, also a hospitalist should also have had his cases sent to Dr. Schieldhouse for a cursory review instead of the proper Peer Review procedure.

b. To treat one Title 38 physician differently than another Title 38 physician, and to fail to apply the same VA policies and procedures is pretext for discrimination and is evidence that the proffered reason is more than likely false.

The Circuit Court has stated that the decision of the Appeals Panel Board was "an alternative assessment" regarding the finding of satisfactory performance by the Petitioner. See A6

a. This opinion may be considered plausible if the Saginaw facility had not acted based on the decision of this panel. Since poor job performance, the proffered legitimate reason was not found, the Petitioner was not reported to the SLB or the NPBD, and her clinical privileges were expired in good standing.

b. Alternate or "alternative" itself implies that there is a contradiction. It cannot be considered a rational argument to show lack of disputed material fact or to overlook factual evidence.

c. Dr. Bates decision was pretextual because VA policy stipulated that the final decision should be made after the employee has exhausted all due process steps available. Dr. Bates in her haste to place another physician in the Petitioner's position failed to do so.

Under the "honest belief rule", the employer must make "a reasonably informed and considered decision before taking the adverse employment action". Mr. Haag as Acting Director did not make

an informed and considered decision before suspending the Petitioner, rather his belief was based on the Petitioner being perceived as Black and a threat. Dr. Bates acceptance of manufactured complaints which were later discredited, planning an adverse action, acceptance of Dr. Albito's hearsay report, Dr. Shieldhouse's superficial review, and an ill-composed SRB cannot support an honestly held belief in the Petitioner's job performance. Documented evidence and submitted exhibits support that Dr. Bates made an intentional decision to replace the Petitioner.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court in denying appeal of the District Court's grant of motion for summary judgment was incorrect and should be reversed.

On appeal, the United States Court of Appeals for the Sixth Circuit upheld the District Court's decision to grant a motion for summary judgment and dismiss the case. The issue of how summary judgment is granted is paramount to the outcome of this case. In *Kline v. TVA*, 128 F. 3d 337 (6th Cir.1997) set forth the standard of review in the appeals court for a Motion for Summary Judgment, which is that, "A district's court's conclusions of law are reviewed *de novo*."

The court reviews a grant of summary judgment *de novo*, viewing all facts and inferences drawn therefrom in the light most favorable to the appellant. Reversal is warranted if the appellant can demonstrate the existence of a genuine issue of

material fact. *Plott v. General Motors Corp., Packard Elec. Div.* 71 F. 3d 1190 (6th Cir. 1995).

Watson v. Ciena Healthcare Mgmt., 2013 U.S. Dist. (E.D. Mich. 2013), set forth the following, "Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail on a motion for summary judgment, the non-moving party must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First American Bank*, 916 F. 2d 337, 341-42 (6th Cir. 1990). Drawing all reasonable inferences in favor of the non-moving party, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celetox Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact, and summary judgment is appropriate. *Simmons-Harris v. Zelman*, 234 F. 3d 945, 951 (6th Cir. 2000)."

In *Blair v. Henry Filters, Inc.*, 505 F. 3d 517 (6th Cir. 2007) the Circuit Court stated "Assuming that Blair lacks direct evidence of discrimination, we consider whether he has offered sufficient evidence to create a genuine issue of material fact regarding those elements of the *prima facie* case that are in dispute. "The burden of establishing a prima facie case of disparate treatment is not onerous." Generally, at the summary judgment stage, a plaintiff's burden is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action", "under circumstance which give rise to an inference of unlawful discrimination." *Tex. Dep't of Cmty Affairs v. Burdine,* 450 U.S. at 253.

The *McDonnell Douglas Corp. v. Green*, 411 U.S. 702, 802-04 (1973) framework applies to this Title VII case for employment discrimination. "To establish a prima facie case of employment discrimination, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees."

(1) Petitioner is a member of a protected class; she is South Asian-American perceived by several staff to be African-American.

(2) Petitioner was qualified for the job, having undergone VA's credentialling and privileging process.

(3) Petitioner suffered an adverse employment decision when her clinical privileges to practice medicine were suspended.

(4) Petitioner was replaced by Dr. Gladka, who was not a member of a protected class. She was placed in the Petitioner's tour of duty per schedule, and she was hired on July 22, 2018, and stayed in the nighttime position until the unit was closed almost two years later.

In considering *Lowe v. City of Monrovia*, 775 F. 2d 998, 1009 (9th Cir. 1985), the Ninth Circuit Court of Appeals stated "Once a prima facie case is established either by the introduction of actual evidence or reliance on the McDonnell Douglas presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination, *Burdine*, 450 U.S. at 255 n.8.". The D.C Circuit Court of Appeals stated, "factual disputes in most Title VII cases preclude summary judgment", *McKenzie v. Sawyer*, 684 F. 2d 62, 67 (D.C. Cir. 1982).

"Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse action." *Cooley v. Carmike Cinemas, Inc,* 25 F. 3d 1325, 1329 (6th Cir. 1994), 25 F. 3d at 1329. If the employer meets its burden, the burden shifts back to the plaintiff to establish that the proffered reason was merely pretext for unlawful discrimination. *Ibid.* To establish pretext, a plaintiff may show that the defendant's reason "(1) has no basis in fact, (2) did not actually motivate the

defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Carter v. Univ. of Toledo* 349 F.3d at 274 (quoting *Seay v. Tenn. Valley Auth.,* 339 F.3d 454, 463 (6th Cir. 2003)).

The burden then shifted to the Respondent to articulate a legitimate nondiscriminatory reason for taking an adverse employment decision. The Respondent failed to establish their reason because the Saginaw VA facility decision maker Director Dr. Bates stated in her final action that no performance issues were found by an Appeals Panel Board, a panel of experts in the same medical specialty of Internal Medicine. Most importantly the Petitioner's clinical privileges were expired in good standing on the day she was removed, that is, there was no cause found for the separation. The reason of poor job performance did not actually exist but was in fact a convenient tool, a pretext, to replace the Petitioner with an employee who was not a member of her protected class.

The Circuit Court has also stated that, "The plaintiff may also demonstrate pretext by offering evidence which challenges the reasonableness of the employer's decision to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was the actual motivation." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 578 (6th Cir. 2003) (en banc).

The Petitioner has presented substantial evidence which demonstrates that the adverse employment action had no basis in fact, was not the actual reason, and was insufficient to explain the employer's action. The Respondent's reliance on the

"honest-belief rule" does not apply in this case because the belief was not honestly held. Nursing Administrator Mr. Haag testified that he took an adverse action against the Petitioner on May 21, 2018, while acting as the Saginaw facility Director and decision maker when he signed a letter of suspension against the Petitioner which was given to her a few hours later that evening by supervisor Dr. Albito. There is no evidence of an investigation done by decision maker Mr. Haag in the five or six hours from when he took the adverse action and when the Petitioner was served with it. Mr. Haag testified that he signed the letter of suspension because he believed the Petitioner was an "imminent danger", a threat to patients although there had never been such a report since the Petitioner returned to the facility almost three years ago. The only fact he was certain about regarding the Petitioner having seen her about the medical center was that he perceived her to be African-American because of her dark skin color.

The "honest-belief-rule" also does not apply to the actions of the final decision maker Dr. Bates who failed to follow VA policies and directives to separate the Petitioner. Dr. Bates testified that she relied on Dr. Albito, who was on vacation at the time, Dr. Schieldhouse who admitted to doing a superficial review, an inappropriately composed SRB, who were not members of the same medical specialty as the Petitioner, and also included a nurse practitioner. Besides, the decision of the SRB was superseded by the higher-level Appels Panel Board of Internal Medicine physicians. Dr. Bates treated other comparable physician employees differently than the Petitioner and failed to give her credit for continuous

service per VA policy for probationary period employees.

Finally, the Petitioner refers to the Tenth Circuit Court of Appeals, "Plaintiffs can, for example, present evidence that the defendant's stated reasons for taking the adverse action was false; the defendant acted contrary to a written policy setting forth the action the defendant should have taken under the circumstances; or the defendant acted contrary to an unwritten policy or practice when making the decision." *Plotke v. White,* 405 F. 3d 1092, 1102 (10th Cir. 2005).

VA HANDBOOK 5021 PART II CHAPTER 1, II-12,

d. Arriving at a Final Decision.

6. (b) A procedural defect is detrimental to the employee's substantive rights when it is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

Had Mr. Haag acting as the Director followed the correct procedure instead of believing the Petitioner to be African-American and a threat, the proffered reason would not exist. Had Acting Director Dr. Bates followed correct VA policy in the composition of the initial review board as did Acting Chief of Staff Dr. Campana in composing the second review panel, the proffered reason would not exist. The proffered reason is pretext for unlawful discrimination, and the case should not have been dismissed when the dispute was not resolved.

CONCLUSION

The Petitioner has presented her case in this petition and respectfully requests that her petition for writ of certiorari be granted and the case be remanded for a jury trial.

DATED this 16th day of June 2023.

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