No. 22-162

In The

Supreme Court of the United States

TARIQ B. ALABBASSI,

Petitioner,

v.

CHRISTINE E. WORMUTH, Secretary,
U.S. Department of the Army,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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PREAMBLE

Pursuant to Rule 44.1 of this court, Petitioner Mr. Tariq B. Alabbassi, respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the United States District Court for the Southern District of Texas, and the judgment of the United States Court of Appeals for the Fifth Circuit.

While no discovery took place, On March 23rd, 2020, the defendant filed a Motion to for Summary Judgment. On July 29th, 2020, the court granted the defendant their Motion for Summary Judgment.

On September 16th, 2020, Mr. Alabbassi filed motion to alter or amend judgment. On December 3rd, 2020, the court denied the latest.

The Judgment of the Court of Appeals was entered on January 11th, 2022. A petition for rehearing was denied on March 14th, 2022.

This petition shows just how misleading the defendant's pleadings and briefs were, and how the courts misapprehended and misapplied the laws.

REASONS FOR REHEARING

A petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, Rule 44.2.

The court misapprehended 29 CFR 1614.105(a)(1), and 29 CFR 1614.105(a)(2) states contact with EEO counselors:

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory OR, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them.

Alabbassi contacted the EEO counselor after he became aware that the action was discriminatory. In addition, Alabbassi was not aware of the 45-day limit since the Army did not have an EEO counselor in Iraq which is a war zone deployment, and the Army never provided any training in this regards, Alabbassi informed Army of this. If EEOC choose not to investigate these complains (the Army investigated them), that does not mean that Alabbassi did not exhausted his remedies.

Alabbassi never claimed that he was not aware of the motion to dismiss hearing time and date, but when Alabbassi called into the conference phone number at the time and date set, the court system malfunctioned and Alabbassi was not allowed to join in to the hearing, thus, Alabbassi never failed to attend. Alabbassi was not aware that an ex parte hearing took place as the

court never informed him that a hearing took place and updated him with what happened.

Alabbassi discovered that an ex parte hearing took place when he ordered the transcripts as part of filling an appeal with the 5th Circuit court, therefore; the evidence will not have a proof of Alabbassi claim.

Alabbassi informed the court that he has in his position the unrebuttably proof to support his claim if the court deemed it necessary, text messages with the court clerk, and his cell phone call records.

During the ex parte hearing that took place November 7th, 2019, the defendant misled the court by asserting false information: –

Defendant: "The way he describes the issue is that he has been – he was in a position where he was re-interviewed for it every year. And he – the first two years he was rehired. The third year he was not retired and was replaced with the person of Caucasian descent . . . based on the reading of the complaint. I haven't seen any other allegations of failing to employ for another position."

This information is false. Alabbassi never applied for his own position the first two years. Alabbassi was forced to apply for his own position after over two years of serving in the position as the position was moved to the 4-star General level. After Alabbassi was discriminated against and was not selected for his the position he was holding for over two years, Alabbassi was

moved into another position, and Alabbassi was ultimately terminated later on.

During the interview for the position: –

BG Roberts asked Alabbassi "what brought you to Houston?" Alabbassi became uncomfortable, but gave him the benefit of the doubt, still answered "Houston is where I live, and I went to school, and where my family live."

BG Roberts did not like Alabbassi's answer, and he, the General, tilted his head to the side, and asked Alabbassi with a tone "where were you born?"

Alabbassi became extremely uncomfortable and had to pause for a minute or so, but still answered "Kuwait."

The reaction of BG Roberts after Alabbassi's first answer (anger), and his insistence on knowing Alabbassi national origin (place of birth) is a clear indication to nothing but intentional discrimination.

The court stated that asking where were you born and other background questions are STANDARD part of interviews.

EEOC guide to illegal interview questions: what you can't ask says employers are forbidden from asking questions about citizenship, where were you born, or any accent a candidate may have. Instead, employers can ask: "are you eligible to work in the US?

On 5/15/2020, the defendant filed a motion to strike plaintiff's exhibits. This motion was ultimately

denied by the district court. Exhibits were admitted into evidence.. The defendant never filed an appeal with the Fifth Circuit court to try again to strike the plaintiff's evidence.

The defendant mentioned that the plaintiff's evidence should be stricken in their Brief to the Fifth Circuit Court, and the Fifth Circuit Court decided to bar the plaintiff's evidence from their consideration.

Clearly the Fifth Circuit Court erred in this ruling as it is not part of the plaintiff's appeal nor it is in the defendant's appeal since the defendant never filed an appeal at all.

Not applying Alabbassi admitted evidence against the defendant's evidence and not reopening discovery hindered Alabbassi ability to fairly present his claims during his course of seeking justice as I have two strong unrebuttable evidence from generals in addition to other evidence that shows clearly that Alabbassi is "clearly better qualified" than Haddad and Alshara.

"[A] showing that the unsuccessful employee was clearly better qualified is enough to prove that the employer's proffered reasons are pretextual." *Price v. Fed. Corp.*, 283 F.3d 715, 723 (5th Cir 2002). This is enough to beat *McDonnell Douglas* framework if needed.

For a statement to constitute direct evidence, it must be made by a person involved in the challenged decision. Furthermore, the statements must directly

relate in time and subject to the adverse employment action at issue.

Here, during the plaintiff's interview, the interviewer by his hand-writing wrote Kuwait on the Plaintiff's resume this blatant remark may show nothing but the pretext discriminatory motive. And therefore this should be considered as direct evidence as it is statement by the party opponent at the time of the interview. This direct evidence is undisputed by the defendant when it was presented during the process of Motion to Dismiss and again during the process Motion for Summary Judgment. This is more than enough to beat *McDonnell Douglas* test.

Alabbassi had to apply for his own position, but he was discriminated against and was moved to another temporary position and eventually was terminated. Alabbassi termination is clearly is not same as failure-to-hire as the Fifth Circuit Court erred in its decision (see footnotes), thus Alabbassi discriminatory termination in retaliation to his complaint still stand and must be awarded as requested since the defendant never defended this claim, but they presented false information to the court during the ex parte hearing which resulted in misleading the court in its decision. The defendant's misleading statements and false assertions damaged the plaintiff's interests by creating a distorted record.

A party must make the initial disclosure at or within 14 days after the parties Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference

that initial disclosure are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. Rule 26(1)(C).

A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. Rule 26(5)(d).

Even though the defendant has undisputedly a position of the exhibits from the EEOC process which was part of exhausting Alabbassi remedies and from the resume book provided to General Roberts by the plaintiff at the time of the interview since "failure to brief and argue an issue is grounds for finding that the issue has been abandoned." *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. Unit "B" 1980).

In addition, the defendant has a position of many of the exhibits since most of the exhibits are from or awarded by the defendant and are part of the plaintiff's personal file that the defendant controls.

The defendant asserted "Alabbassi failed to provide any disclosure to defendant. As such defendant reasonably operated as though Alabbassi did not have any witness or evidence outside of what was provided to him in defendant's initial disclosure." Moreover, the defendant asserted during the Status conference hearing that they send emails, and called the plaintiff in

response to the plaintiff's first and second notice to meet and confer, yet the defendant's claim lacks evidence.

The defendant was aware of the initial disclosure deadline but the plaintiff was not aware and the plaintiff acted based on the information provided to him by the court via phone on February 24th, 2020 and the mailing that was mailed to him that same day (no other mailings from the court to over-ride that information provided to the plaintiff on 2/24/2020), yet the defendant apparently waited until after discovery was closed to raise the issue of the lack of initial disclosure from the plaintiff. Moreover, the defendant have had an opportunity to show good faith under Rule 37(a)(1) and communicate with the plaintiff to request his initial disclosure which the defendant never did.

While the defendant complain no initial disclosure was submitted by the plaintiff, no motion has been filed seeking to compel initial disclosure or discovery under Rule 37(a)(A).

The records evidence a lack of diligence in this regard. Any prejudice or harm accruing from the lack of initial disclosure was compounded, in no small part, by the defendant's lack of attention to the progress of the litigation.

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issue." *Lopez v. Beltre*, 59 A.D.3d 683, 685 (2d Dept. 2009). A motion for summary judgment, therefore, "'should not be granted where the

facts are in dispute, where conflicting inferences may be drawn from evidence, or where there are issues of credibility'" *Ruiz v. Griffin*, 71 A.D.3d 1112, 1115 (2d Dept. 2010), quoting *Scott v. Long Is. Power Auth.*, 294 A.D.2d 348, 348 (2d Dept. 2002). *See also Bykov v. Brody*, 150 A.D.3d 808, 809 (2d Dept. May 10, 2017).

The defendant Motion for Summary judgment included a separate of statements of facts that are neither material nor "facts." The court erred by not analyzing and determining whether the defendant has met its initial burden on summary judgment.

The defendant has the burden in this case and must meet the initial burden through material and undisputed facts. The defendant cannot simply cite to what amounts to evidence that may not support a material fact. The defendant failed to meet its burden as seen by the lack of material issues of facts set forth in its separate statement and failed to completely dispose of causes of actions with the issues raised as required.

Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions of summary judgment to determine quickly and efficiently whether material facts are undisputed. When defendant puts forth separate statement with facts like they did in their summary judgment, it is unreasonably wasting the court's time. This statement of fact is not a material fact, but in instead is evidence. As such, there is no material fact to dispute. The court should

have denied the defendant summary judgment since they never met their initial burden.

The plaintiff included a separate statement of undisputed facts where the defendant disputed these facts.

In addition, the defendant asserted in their Motion for summary judgment and during the hearing for the same that "'where are you from?' was not asked by BG Roberts., "Although General Roberts ***denies*** asking this question . . . " While Brigadier General Bryan Roberts replied/stated in his disposition/declaration (since his disposition and declaration are almost identical with few words changed) "I do not recall/remember asking Mr. Alabbassi where he was born. I believe that I asked where he was from or where he called home." Even though that Brigadier General Roberts never denied asking the plaintiff "where were you born?," he admitted asking the plaintiff where was he from?

Out-of-court written statements offered to prove the truth of the matter asserted constitute hearsay. Fed. R. Evid. 801, such statements are inadmissible. Defendant declaration by BG Roberts fall squarely within the definition of hearsay: they are out-of-court, written statements to prove the truth of the matters asserted. Moreover, the statements appear to be of the nature of expert testimony, and therefore are improperly before this court as there are no facts that would demonstrate that Brigadier General Roberts is qualified to provide expert testimony. Fed. R. Evid. 702. In

addition, Brigadier General Roberts's declaration lacks the evidence when it comes to Mr. Hadad's qualifications, and thus a witness cannot simply state conclusions without any evidentiary basis. Fed. R. Evid. 602; *see also Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028 (9th Cir. 2001) ("it is not enough for a witness to tell all she knows; she must know all she tells.").

Moreover, Even if the court will consider his statement as an expert's statement the expert must not reach to a conclusion.

Fed. R. Evid. 404(3) Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Brigadier General Roberts hearsay, lacks the creditability and not trustworthy because in addition of the unfair prejudice risk, he has a criminal history of moral attribute crimes including two inappropriate relationships, and improperly used government recourses which involves dishonestly and false statements.

On August 2nd, 2013, the commander, US Army Training, and Doctrine Command (TRADOC), imposed an Article 15 on Brigadier General Roberts, who is married with three children, for assault, adultery, and conduct unbecoming officer. After being found guilty of all three offenses at the Article 15 proceeding. Brigadier General Roberts appealed the finding from Article 15, but his appeal was denied. In addition, Brigadier General Roberts was engaged in two inappropriate relationships, and improperly used

government recourses (dishonesty). Brigadier General Roberts was demoted to Coronal; this is why Brigadier General Roberts or should we say COL Roberts hid his rank after retirement at his declaration's signature block.

In the light of this information and evidence, Brigadier General / COL Roberts declaration is not creditable, thus the court should have denied the Motion for summary judgment, and court should have granted the summary judgment to the plaintiff, leaving the assessment of damages to proceed to trial

Discriminating against and not hiring Alabbassi ***twice*** in the same position that Alabbassi was holding for over two years has been part of this complaint and the Army investigations since day one.

First time was during the hiring of Mr. Hadad, and the second time was during the hiring of Mr. Alshara into the position in dispute after Hadad's leaving of the position shortly after he was hired.

The defendant, Department of the Army, failed to provide any evidence to show that Alshara was more qualified. The defendant simply stated the BG Roberts did not interview Alshara when he was hired, and abounded responding to this claim.

This excuse does not relieve the defendant, Department of the Army, of it's liabilities toward the discrimination committed against Mr. Alabbassi (Doctrine of Respondeat Superior).

Alabbassi was very successful in showing prime facie, and the defendant failed to rebut and shift the burden to Alabbassi when it comes to the hiring of Alshara, thus the Department of the Army should have been found guilty here and responsible of discrimination, but the court erred by over looking these facts and dismissed the case (granted summary judgment).

The *McDonnell Douglas* frameworks, most definitely, cannot and will not apply here.

The table below shows qualification of candidates. Please note that the defendant was never able to provide a list of the desired qualifications for this position other than FMS.[1]

Qualification	Alabbassi (plaintiff)	Hadad 1st hire	Alshara 2nd hire
USA 4-year degree	BBA – Finance	None	None
FMS* work experience	3+ years	None	None
Iraqi Dialect	Yes	None	None
4-star direct support	Yes	None	None
DOD* awards	13 awards	None	None
FMS training	Yes – DISAM	None	None
Federal employee evaluations	3	None	None
Iraqi MOD* awards	1	None	None

[1] FMS= Foreign Military Sales
DOD=Department of Defense
MOD=Ministry of Defense
DISAM=Defense Institute of Security Assistance Management

The courts erred by not comparing, when were asked by the plaintiff, the two different handwritings on the interview notes of Alabbassi and Hadad that shows someone and not BG Robert wrote Hadad's note after and during the interview.

CONCLUSION

For the reasons set forth in this petition, Mr. Alabbassi respectfully requests that this Honorable Court grant rehearing and his Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF PRO SE

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR REHEARING in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 2998 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 13th day of December, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

Renee J. Goss
Notary Public

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 13th day of December, 2022, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR REHEARING in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Subscribed and sworn to before me this 13th day of December, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

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