

Supreme Court, U.S.
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No. 22-35

In The
Supreme Court of the United States

YUFAN ZHANG,

Petitioner,

v.

UNITEDHEALTH GROUP,
SUJATHA DURAIMANICKAM,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the evidence Zhang used to have as proof of his claims was taken away and destroyed by UnitedHealth Group at time Zhang was fired because UnitedHealth Group considered Zhang's evidence as the company's intellectual property. Therefore, UnitedHealth Group prohibited Zhang from keeping or taking any evidence with him.

However, Arbitrator Keyes and the District Court of Minnesota required Zhang to provide "clear and convincing evidence" to support or prove his claims, but the Judge and the district court did not require the Respondents to provide any "clear and convincing evidence" to support their claims. Even the Respondent's declaration, which did not have any material evidence to support it, was used by the District Court to rebut Zhang's claims.

Moreover, any findings of fact were set aside as long as they conflicted with the Arbitrator's decision, even though Zhang declared that his findings could be proved by the job-related evidence which UnitedHealth Group possesses, and Zhang even proved them via preponderance of the evidence.

Therefore, the questions presented are:

1. Whether it is in error, or in violation plaintiff's right of equal protection of the laws, that the lower court imposed the burden of proof with clear and convincing evidence on the plaintiff when the Plaintiff demonstrated, based on both parties' testimonies, how the Respondents intentionally omitted or

concealed the material facts for misdirection, in the cases,

- (a) where the relevant evidence the plaintiff used to have was already taken away and destroyed by respondents; and
- (b) where the respondents possess the same or relevant evidence, but refuse to disclose any of the relevant evidence they possess to prove or disprove the findings presented by either the Plaintiff or the Respondents, and even though the Respondents have revealed that they know what the relevant evidence is and where to get the evidence; and
- (c) where the Respondents have no objections to the findings of fact presented by plaintiff; and
- (d) where the Respondents reject to declare that the facts they presented are accurate and complete.

2. Whether it violates a party's right of Equal Protection of the Laws under the 14th Amendment when the arbitrators or the courts set aside a finding of fact without having a hearing for "Findings of Fact and Conclusion of Law", or meeting the standard set by the US Supreme Court, see *Anderson v. Bessemer City*, 470 US 564 (US 1985).

3. Whether the Court shall resolve the factual issues first before making a decision when there are evident conflicts between Plaintiff's findings and Defendant's findings?

A subsidiary question is whether it violates the 14th Amendment (depriving personal property) when employers do not pay employees' unused Pay Time Off ("PTO") due to the employees' job being suddenly terminated, resulting in a lack of opportunities for the employees to use their PTO.

PARTIES TO THE PROCEEDING

The Petitioner Yufan Zhang was the appellant in the United States Court of Appeals for the Eighth Circuit, and the plaintiff in the district court of Minnesota.

The Respondents UnitedHealth Group and Sujatha Duraimanickam were the appellees in the United States Court of Appeals for the Eighth Circuit, and the defendants in the district court of Minnesota. Sujatha Duraimanickam is the Petitioner's ex-manager in UnitedHealth Group.

RELATED PROCEEDINGS

Yufan Zhang v. UnitedHealth Group and Sujatha Duraimanickam, Case No. 0:18-cv-01454-MJD (D. Minn.) (denying the Plaintiff's motion to vacate an arbitration award) (opinion issued by judge Michael J. Davis, and judgment entered on April 26, 2021, doc. 63).

Yufan Zhang v. UnitedHealth Group and Sujatha Duraimanickam, Case No. 21-2054 (8th Cir.) (affirming judgment of district court) (opinion issued by Circuit Judges: BENTON, KELLY, and KOBES,

and judgment entered on December 29, 2021, entry ID: 5112146).

Yufan Zhang v. UnitedHealth Group and Sujatha Duraimanickam, Case No. 01-19-0001-0069(AAA) (making award in favor of Respondents) (opinion issued by Arbitrator Jeffrey J. Keyes, and judgment entered on October 05, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Yufan Zhang, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in denying Appellant Zhang's appeal, entered on December 29, 2021, see App.1. And the order denying the Appellant Zhang's petition for rehearing en banc, entered on February 15, 2022, see App.18. (8th Cir. Case No. 21-2056).

The district court's opinions in denying Plaintiff Zhang's motion for vacating arbitration award under 9 U.S. Code §10(a), entered on April 26, 2021, see App.3. (D. Minn. Case No. 0:18-cv-01454-MJD)

JURISDICTION

On April 26, 2021, the US District Court of Minnesota denied Petitioner's motion for vacating the arbitration award (See App.3).

On December 29, 2021, the Court of Appeals for the Eighth Circuit denied Petitioner's appeal for reversing district court's denial of appellant's motion for vacating arbitration award (See App.1).

On February 15, 2022, the Court of Appeals entered the denial of Petitioner's timely petition for

rehearing en banc (See App.18). This petition is filed timely pursuant to Supreme Court Rule 13.1 and Rule 29.2. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves **the Amendment XIV to the United States Constitution**, section 1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

2. Section 15(a) of the **Age Discrimination in Employment Act of 1967 (“ADEA”)**, 29 U.S.C. § 633a(a), provides in pertinent part: *“All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age.”*

3. Section 717(a) of **Title VII of the Civil Rights Act of 1964** (hereafter, “**Title VII**”), 42 U.S.C. § 2000e-16(a), provides in pertinent part: *“All*

personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

4. **29 U.S.C § 10 (a)** - Same; vacation; grounds; rehearing

"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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."

5. **18 U.S. Code § 1001** - Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;*
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or*
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;*

shall be fined under this title, imprisoned not more than 5 years...

STATEMENT OF THE CASE

On November 14, 2016, Respondent UnitedHealth Group suddenly terminated Petitioner Yufan Zhang's job without advanced notice. UnitedHealth Group HR affirms the reason that Zhang was fired is because Respondent Sujatha Duraimanickam, Zhang's ex-manger, told HR that Zhang's job performance was not good throughout the period from October 24, 2016, to November 14, 2016. After announcing the termination, UnitedHealth Group, like most employers, prohibited Zhang from keeping and taking any job logs and relevant working records, including meeting notices, which are direct evidence regarding Zhang and his teammates' job performances, by declaring that they are the company's intellectual property.

Zhang filed appeals to dispute the Respondents' termination decision by demonstrating that UnitedHealth Group's reasons for firing Zhang were based on partial facts along with untrue and misleading statements presented by Duraimanickam.

Zhang declared that his rebuttals and relevant findings can be supported by the evidence possessed by the Respondents and asked UnitedHealth Group to verify his claims with that evidence, because (1) the evidence which Zhang used to possess had been destroyed by Respondents; (2) the Respondents admitted they possess the same relevant evidence as Zhang had before; and (3) the Respondents consent that such evidence is the direct evidence to show Zhang and his teammates' job performances. The evidence includes Duraimanickam's team members' daily job logs and relevant service records. However, the Respondents ignored Zhang's requests and refused to disclose any evidence.

Zhang first filed a charge to the EEOC, Due to Respondents refusal to disclose material evidence, the EEOC was unable to determine which party was at fault, so they issued Zhang the right to sue. Therefore, Zhang filed a lawsuit to the District Court of Minnesota against UnitedHealth Group and Sujatha Duraimanickam for wrongful termination, creation of a hostile working environment, age discrimination, and defamation. Later the court granted defendants' motion for compelling arbitration.

In the arbitration, the Arbitrator had a tendency to believe the Respondents. The Arbitrator did not require the Respondents to provide material

evidence to support their findings or statements of fact. In contrast, the Arbitrator did not take Zhang's findings or the statements of fact into consideration unless Zhang could support them with clear and convincing evidence.

When Zhang was able to prove that Sujatha Duraimanickam had performed defamation, Duraimanickam would not submit any opposition to rebut Zhang's claims, but the Respondents kept using Duraimanickam's untrue statements to support their arguments in their Responses to arbitration and to the courts.

In this case, almost all the "FACTS" presented to arbitration by Duraimanickam are originally from Duraimanickam's two "Corrective Action Form" documents, one opened on September 19, 2016 and closed on November 03, 2016, and the other opened on October 24, 2016 and closed on November 14, 2016. The Respondents named these two documents "CAP" ("Corrective Action Procedure").

A. Legal Background

There are two issues that make this case complicated, and requires the US Supreme Court to make the final decision.

1. The issues on Evidence

When firing an employee, like most employers, the UnitedHealth Group will prohibit their employee from retaining or taking any evidential or evidentiary items, especially when they are related to the company's work or employee's performance. However,

firing employees often results in some legal problems, including litigation. As a legally weaker party, the terminated workers have a difficult time winning the case due to a lack of legal knowledge and litigation experience, plus a lack of funding with which to hire lawyers. The Supreme Court's decision would have a large impact on the weaker party's rights under equal protection.

In this case, Zhang is that terminated worker. Zhang won the UnitedHealth Group's most outstanding performance award in 2015. Less than one of thousand employees can receive such an award each year, yet his termination reason is he is "lacking fundamental knowledge required for his jobs and having poor job performance throughout the period from October 24, 2016, to November 14, 2016" Here, poor job performance means 'unable to complete jobs on time. However, the truth is that the system was created by Zhang, so he has the greatest knowledge about the system he created, and in that period only Zhang could complete his jobs, while the other younger teammates missed deadlines. The performance review was written by the manager, so Duraimanickam could easily distort the truth and have it be taken as fact .

There were other systems which keep track of the employee's job performance, such as the "BaseCamp" and "Service-Now" systems. However, Duraimanickam refused to disclose those system records, and only disclosed her written material documents as evidence.

Pursuant to *Federal Rules of Civil Procedure Rule 26*, Duraimanickam had to disclose all relevant evidence, but she refused to do so.

Pursuant to *Federal Rules of Evidence Rule 1007*, Duraimanickam needed to disclose all relevant evidence to prove his statement contents, but she refuses to do so.

Pursuant to *Federal Rules of Civil Procedure Rule 106*, Duraimanickam needed to disclose the rest of evidence when she presented a small part of job logs to arbitration, but she refused to do so.

Pursuant to *Federal Rules of Civil Procedure Rule 37*. Failure to Make Disclosures result in sanction, but the circuit court says: No.

Pursuant to *Federal Rules of Evidence Rule 1007*, Duraimanickam needed to disclose all relevant evidence to prove his statement contents, but she still refused to do so.

In this case, how could the laws protect the workers who are in the weaker legal position?

2. The issues on Findings

Federal Rules of Civil Procedure Rule 52 (a)(6):

“Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.”

However, what findings of fact can be set aside depending on the arbitrator's or judge's preference.

Therefore, having “findings of fact and conclusion of law” is very important. But this is also based on the arbitrator’s or the judge’s preference. Are there any rules or standards to follow?

In this case, the Arbitrator only includes the findings of fact which support his opinions, while the findings which conflict with his opinions are all excluded from his arbitration memo unless Zhang could provide “clear and convincing evidence to support his claims. But Zhang’s evidence was taken away and destroyed by the Respondents.

Written findings of fact and conclusions of law are required in all actions tried without a jury, whether or not requested by a party under *Federal Rules of Civil Procedure 52(a)(1)*. In this case, the Respondents did not submit any material evidence to support their findings or statements of fact. They merely provided self-declared statements and the Arbitration Award. Zhang claimed that the Arbitration Award was procured by fraud. That implies the Arbitrator’s findings would be wrong or unjust. That also implies the accuracy or sufficiency of the Arbitrator’s findings could be challenged. But the standard for challenging the Arbitrator’s findings is not found.

There is not any evidence available to support the Arbitrator’s opinion that the reason for the Respondents for termination of Zhang’s job was true, because the reason is “*Zhang’s job performance was not good during the period from October 24, 2016, to November 14, 2016*”, and none of the evidence or documents presented to the Arbitrator by the

Respondents are related to the events or Zhang's performance on or after October 24, 2016.

The Arbitrator considered all Duraimanickam's statements to be true when he just found one or two of Duraimanickam's statements to be true. The Arbitrator stated Duraimanickam's findings or statements of fact are true unless Zhang can provide "clear and convincing evidence to disprove them. Obviously, the Arbitrator applied logical fallacy when he made his arbitration decision. And that conflict with case of *Anderson v. Bessemer City*, 470 US 564 (US 1985), in which, the US Supreme Court stated that "*a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" That means that although the Arbitrator found the evidence to support his findings. But when considering all evidence, the Arbitrator's conclusion based on his findings might not be correct. Therefore, the District court should verify the Arbitrator's findings before accepting Arbitrator's conclusions.

B. Facts and Procedural History

Zhang claimed that Duraimanickam intentionally omitted or concealed many material facts in these two "CAP" documents, such that, they led to misdirection in the arbitration.

In the initial "CAP", Duraimanickam first used four examples to show that Zhang's job performance was not good by misleading or lying information; see the plaintiff's "Amended Brief" filed to D. Minn. by Zhang (§§13,14,15) and appellant's Motion for

excluding evidence, filed to the 8th Cir. by Zhang (Argument §2).

In her **example 1**, Duraimanickam stated: Zhang had not demonstrated that he could use the tool developed by a younger developer to work on OMC (“Optum Marketing Cloud”) deployment task. However, Duraimanickam intentionally concealed the fact that **at the time when Duraimanickam wrote down her comment above, the younger developer had not completed her development job yet**. How could Zhang show he is able to use a tool that does not exist? Not to mention that younger developer had a failure rate of more than 50% in her tool developing history.

In her **example 2**, Duraimanickam stated: Zhang did not validate a backup file in “OMC” deployment which let to six people working for four extra hours on a week-end (September 11, 2016) unnecessarily. However, Duraimanickam intentionally concealed the fact (1) the validation job was not assigned to Zhang because he had no access to the backup file; (2). Zhang’s job is to remind the younger deployment engineer to do the file backup before starting deployment; (3) the root cause is that Duraimanickam requested deployment engineers to work on system upgrades without getting approval first, which not only made deployment time longer, but also violated the company’s deployment policy.

In her **example 3**, Duraimanickam stated: Zhang did not validate “Optum Deveper” website and led to the issue existing until the next day. However, Duraimanickam intentionally concealed the material fact that the validation was not the job assigned to

Zhang and that the issue was caused by a younger deployment engineer who made change to a file by mistake.

However, later Zhang told Duraimanickam that he found a solution for fixing a production issue after he spent some hours on it after the work day, yet, Duraimanickam said Zhang had poor job performance because he worked on a task not assigned to him even although he worked on it during his off time.

Here, no matter if Zhang worked on the troubleshooting or not, Duraimanickam always considered his job performance as poor.

In her **example 4**, Duraimanickam stated: that Zhang worked on an Admin tool development task which was one week development job and Zhang spent seven weeks on Admin tool development, while another developer, Shown Woods, had gotten the job done in a week. Here, Duraimanickam intentionally concealed the facts: (1). The “one week development job” was Zhang’s one of his three job assignments; (2). Zhang spent seven weeks on three tasks: “Development”, “Testing”, and “Deployment”, (3) Woods spent a week on one task on “Development” only. And his additional two weeks he spent on “Testing” and “Deployment” were mentioned by Duraimanickam.

On September 12, 2016, to comply with the company IT service management policy, Zhang had submitted a report to UnitedHealth IT service management team indicating Duraimanickam’s team took extra hour worked on the deployment, as mentioned on above example 2. However,

Duraimanickam said Zhang's report had impact on her reputation, and asked Zhang to modify the report to show her team as completing the job on time. When Zhang refused to lie several times, Duraimanickam issued the initial "CAP" on September 19, 2016, and requested Zhang to modify the deployment end-time on his report, otherwise she would fire Zhang. The fact that Zhang complies with company policy has been distorted by Duraimanickam into poor job performance and written down on her issued "CAP".

Duraimanickam requested Zhang must complete the task of fixing a "Penetration Testing" issue in two weeks, otherwise he would be fired; and this task was initially assigned to younger team members who had spent almost two months and finally still could not figure out how to do it. But later when it was reassigned to Zhang, Zhang took two weeks to get it done. That is a good example to show Zhang could get the job done very quickly, but Duraimanickam twisted the fact in her issued "CAP" by saying (1) "Penetration Testing" issue was not fixed in September, 2016; (2) Zhang worked on fixing "Penetration Testing" issue; therefore, Zhang's job performance did not meet the expectation. Here, Duraimanickam concealed two facts, (1) Zhang started to work on fixing "Penetration Testing" issue in October 2016. (2) Before that time, other younger engineers worked on it. Although Duraimanickam did not lie in her two sentences, it is only a half truth.

The Court of Appeals for the Eighth Circuit holds that no basis is found for reversing the district court's denial of Zhang's motion to vacate an arbitration award, by citing the case *Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith*

Barney, LLC, 894 F.3d 894, 897 (8th Cir. 2018). However, the case cited by the circuit court is about the arbitrator not disclosing information which had no or minor impact on the arbitration decision; while in this case, the undisclosed information is not from the arbitrator. Therefore, the two cases are not comparable. In this case, depending on whether the ignored findings are taken into consideration or not, it would result in opposite decisions.

1. The District Court overlooked Plaintiff's demonstration that the Arbitration Award was procured by fraud

The District Court held "*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*", see App.3. Page 8-9.

A petitioner seeking to vacate an arbitration award on the basis that it was procured by fraud must plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration.

See *Sorghum Inv. Holdings Ltd. v China Commercial Credit, Inc.* - 2019 NY Slip Op 31265 (U)

In this case, Zhang had argued with Duraimanickam many times, and claimed Duraimanickam's comments about Zhang's performance were not correct. In the arbitration

hearings, Duraimanickam has been cross-examined regarding the untrue and misleading comments written by Duraimanickam in her two “CAP” documents. In the hearing, Zhang had testified, and been cross-examined, that his claims about the false statements written by Duraimanickam can be verified on the job logs stored in UnitedHealth. When Zhang, via lawyer, requested that evidence, the Respondents refused to disclose any relevant evidence.

The Plaintiff claimed that the untrue and misleading comments written by Duraimanickam in her two “CAP” documents had misled the arbitrator so that the award was procured by fraud. The District Court found, in Respondents’ reply brief, “In any event, the claims were not raised during the proceeding.” That is a false statement because Zhang had pointed out the untrue and misleading comments written by Duraimanickam in her “CAP” documents in arbitration and informed everyone that the untrue and misleading comments can be verified on the job logs stored in “BaseCamp” and “Service-Now” internal system which the Respondents have access to obtain them. It is not the matter whether the Respondents disclose that evidence or not. The matter is the Respondents already knew there are untrue and missing leading comments on Duraimanickam’s documents, but the Respondents still presented them to arbitration. And the Arbitrator had been told in the hearing which of Duraimanickam’s comments are untrue and would be misled by missing information. But the Arbitrator still chose to believe them.

Zhang used to have the relevant evidence, such as job logs and deployment service records, etc. But

the evidence was taken away and destroyed by the Respondents at the time they had announced Zhang's termination. Zhang has declared many times that the Respondents possess the same or similar evidence that Zhang used to have, and that evidence can support Zhang's claims. However, the Respondents refused to disclose the relevant evidence to prove their claims or to disprove Zhang claims. The court knows the Respondents did not disclose any material evidence to support Respondents claims, but still unjustly asked the Plaintiff to provide the evidence which was already taken away and destroyed by the Respondents.

Moreover, the district court judge overlooked the section (Plaintiff's Amended Brief, §13) that the plaintiff demonstrated how the defendant Duraimanickam told lies, and how her statements of fact are misleading. The plaintiff used the evidence presented by UnitedHealth and testimonies from UnitedHealth's witnesses to prove Duraimanickam had lied. The Plaintiff not only used his own testimony as the evidence to prove Duraimanickam's lies, but also used Duraimanickam's own testimony to prove Duraimanickam's lies. (See Dist. Doc. 56-0, §13), one of the good examples is on page 50, §13 (7) (Dist. Doc. 56-0).

In Plaintiff's Amended Brief, §13, and the argument section of Appellant's Amended Motion for Excluding, filed on November 03, 2021, the Plaintiff has demonstrated with detail to show how Duraimanickam presented the untrue and misleading information to Arbitration.

2. The Arbitrator erred in setting aside the true facts and considered Duraimanickam's testimony was credible based on his logical fallacy reasoning

The District Court stated: "*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).)*"

From the above statement, it is not hard to see that the District Court used Respondent's lawyer's declaration as its argument ground without considering there is no relevant evidence to support her findings or statements of fact in her declaration. In contrast, the District Court requires Zhang to provide "clear and convincing evidence to support each finding or statement of fact once it conflicts with respondents' findings or statements of fact. That is unjust and violates Zhang's right of Equal Protection of the Laws under the Fourteenth Amendment.

The District Court only considered the findings and the statements from the Arbitrator and the Respondents as true findings, but ignored the facts that the Respondents only presented Duraimanickam statements, and they used Duraimanickam statements to prove the other Duraimanickam statements. The Plaintiff had declared many times that all of his claims can be verified by the evidence that the Respondents possess. Since the evidence that the Plaintiff used to have was taken away and destroyed by the Respondents, when the Plaintiff

requested the Respondents to disclose material evidence to prove his findings, the Respondents always refused to disclose any material evidence.

3. The District Court made decision based the Arbitrator findings and conclusions without considering whether there is sufficient evidence to support the Arbitrator's opinions or not

The District Court stated: "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."

Here, the District Court did not notice two facts:

(1). The reason for HR to fire Zhang is because Duraimanickam told HR that Zhang's performance was not good throughout the period from October 24, 2016, to November 14, 2016. The Respondents do not provide any evidence or detailed information to show how Zhang's performance was not good.

(2). Duraimanickam said that "performance not good" means "the assigned jobs are not completed in time. The dispute documents which Zhang filed to UnitedHealth Group HR are disclosed to the arbitration and the district court. These dispute documents indicate that, during that specified period

from October 24, 2016, to November 14, 2016, only Zhang completed the jobs assigned to him, while all the other younger team members could not complete their job in time. HR also has no objection to this fact after they finished the internal investigation. Evidently, the Arbitrator findings and conclusion are wrong because there is no basis in fact; see *Renz v. Spokane Eye Clinic*, which outlined the following standard for proving pretext:

An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that:

- (a) the reasons have no basis in fact, or
- (b) even if based in fact, the employer was not motivated by these reasons, or
- (c) the reasons are insufficient to motivate an adverse employment decision

(See *Renz v. Spokane Eye Clinic*)

(3) The Arbitrator consents that the employees can be treated unfairly. However, one of the element to prove age discrimination is “younger employees are treated more favorably”, See *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 931 (8th Cir. 2000).

4. On June 07, 2021, Zhang filed a motion for oral argument, along with his Appellant Brief, to the 8th circuit court in order to resolve the factual issues. Zhang claimed Respondents presented many untrue or partial true findings to District and Circuit courts. Therefore he wanted to raise the issue and let the circuit court know what the real truth is. But the 8th

circuit court denied his motion without giving any opinions. The Respondents also rejected it.

5. On September 22, Zhang filed a motion to request the Respondents to affirm or declare that the statements of fact they presented to the courts are accurate and complete, since the Respondents refused to disclose any relevant evidence. But the Respondents rejected it.

6. On September 22, 2021, Zhang filed a motion to request the Respondents to retain the evidence since they refused to disclose, but Zhang does not want them to destroy the evidence. However, the Respondent objected.

7. On November 03, 2021, Zhang filed a motion for excluding evidence presented by Duraimanickam and demonstrated which statements of fact are untrue or for misdirection. And request the court to exclude it as evidence since the Respondents refused to prove it with the relevant evidence they possess. The circuit court denied it without giving opinions.

8. On November 13, 2021, Zhang filed a motion for sanctions to request the 8th circuit court to affirm the findings presented by Zhang if the Respondents still refuse to disclose the relevant evidence to prove or disprove Zhang's findings of fact. This motion was rejected by the Respondents and the circuit court.

9. On December 16, 2021, Zhang filed a motion for resolving the factual issues. Zhang demonstrated what untrue, or partial true, or confused information are presented by the Respondents to the both district and circuit courts and requested the 8th circuit court do one of following:

- (a). Remand the case to the district court; or
- (b). Exclude Duraimanickam's two "Corrective Action Form" documents as evidence for supporting Appellees' claims or defenses, such that, it would result in reversing the district court's order (Doc. 63) dated on April 26, 2021 since the arbitration award was made based on Duraimanickam's statements of fact; or
- (c). Request Defendants-Appellees to comply with arbitration evidence rule and Federal Rules of Evidence 301 by producing evidence to meet their burden of proving the statements of fact presented by Duraimanickam in her two "Correct Action Form" documents, and producing evidence to meet their burden of rebutting Plaintiff-Appellant Zhang's refutations; or
- (d). Grant the motion for compelling oral arguments filed by Appellant on June 21, 2021 (along with Appellant's Brief), and on July 09, 2021 (along with Appellant's Amended Brief) for determining whether there are Unfair Prejudices, Confusions and Misleading Information presented by Duraimanickam in her two "Corrective Action Form" documents before making judgment.

10. On February 02, 2022, Zhang filed a petition for Rehearing En Banc after his appeal for vacating arbitration award was denied on December 29, 2021 with the opinion "no basis found for reversal". The most important questions represented to the Circuit Court are

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

Whether the Defendant has obligation to disclose the original evidence when:

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

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

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

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

The circuit denied this motion with no opinions.

REASONS FOR GRANTING THE WRIT

The Arbitrator does not include all the findings of fact in his arbitration award and memo, such that, it makes all of his decision sound perfect and unbeatable, when, in reality, he may have acted wrongly. For example, the Arbitrator made a conclusion saying that the reason for UnitedHealth Group terminating Zhang's job is the true reason, but in fact it is not because the UnitedHealth Group HR said the reason to terminate Zhang's job is "Zhang's

job performance was not good throughout the period of the final 'CAP', which is from October 24, 2016, to November 14, 2016. Here, the reason contains two factors, WHEN occurred and WHAT occurred to Zhang. However, none of the Respondents' evidence or testimonies contain the events related to Zhang on or after October 24, 2016. How does the Arbitrator know if Zhang's performance was good or not after October 24, 2016? Therefore, the Arbitrator set aside the finding of fact about the termination details and the Respondents also did not present these facts to the District Court, so that the court would know nothing about the real termination.

To evoke the analysis of the fact findings, many findings that have big impact on making conclusion are not mentioned by the Arbitrator, such that, the post review would not be just or fair. The Arbitrator did not include Zhang's written testimony in his by saying:

"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."

Without telling what information in Zhang's written testimony, How the court know the Arbitrator's opinion is acceptable or not? The worse thing of all is that the findings are all set aside by the Arbitrator Keyes without additional opinions, no matter they are from Zhang's note, or Respondents' witness' testimonies, or Respondent

Duraiamanickam's testimony, or the dispute documents.

It is obvious that the Arbitrator's opinion does not meet "clearly erroneous" standard held by the US Supreme Court, *Anderson v. Bessemer City*, 470 US 564 (US 1985). However, the District Court of Minnesota affirms the Arbitrator Keyes' opinion, and ignores following facts:

- i. Zhang declared his findings of fact can be supported by the evidence the Respondents possess. And Respondent Duraiamanickam consents she knows what the evidence and where to find the evidence, but the Respondents refused to disclose the evidence.
- ii. The Respondents merely provided statement evidence to support their claims or defenses, but refuse to disclose material evidence to support their claims even they consent they have such relevant evidence.
- iii. The Respondents merely agreed to testify in arbitration, but have objections to rehearing in court, or declaring that their findings are accurate and complete under 18 U.S.C. §1001.
- iv. The relevant evidence that Zhang used to have was taken away and destroyed by the Respondents.
- v. Respondents merely claimed Zhang had no evidence to support his claims, but did not rebut the facts presented by Zhang.

Above facts show Zhang has preponderance of evidence to support his findings. While the evidence presented by Duraiamanickam belongs to "Hearsay" because it is the statements without testified in the

court, and hearsay is not admissible, see *FRE 801 & FRE 802*.

Therefore, the District Court of Minnesota erred in setting aside Zhang's findings, and only considering the Arbitrator's findings and Respondent's declaration when Zhang claimed (1). The Respondents intentionally omitted or concealed some material facts for misdirection; (2). The Arbitrator's conclusion of law was made by applying logical fallacies, see above section for more details.

Therefore, how to take care of the fact findings is the key factor in this case. Hearing this case would let this court set up a rule to protect more employees under the Equal Protection of the Laws.

A. Refuse to Disclose Relevant Evidence during Lawsuit Violates the 14th Amendment

During the time when the Petitioner communicated with the EEOC about his employment discrimination issues, one sentence he often heard is "*We know there's a lot of employment discrimination happening, but it's hard to find evidence*". One of the reasons is employers have more powers to control the evidence in civil case.

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 use the relevant evidence to support her statements

of fact, or to rebut Zhang's claims, even Zhang told Defendants where to find the evidence in UnitedHealth and Duraimanickam knows what evidence 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

The 14th Amendments protects US citizen's right to be equal before the law. The Respondents took over the Petitioner's evidence relevant to his job performance and at the same time, refused to disclose the same or similar evidence, such would lead to one party losing his/her right to be equal before the laws. This court shall resolve the issue on how to avoid a party having more power to control opposite party's evidence during lawsuit.

B. Partial findings might result in two conflict conclusion

Federal Rules of Civil Procedure Rule 52 (a)

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Based on *FRCP 52(a)(5)(6)*, Zhang may question the sufficiency of the evidence, and his findings must not be set aside unless they are clearly erroneous. The Supreme Court stated that “a finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” see *Anderson v. Bessemer City*, 470 US 564 (US 1985).

Completeness and accuracy play a 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 erred in concluding that Zhang had poor performance.

Analysis: why is it an error?

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 NOT assigned to Zhang until 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 possible to rebut them in a single document due to the word count limit. Therefore, finding missing facts is significant important in this case.

C. The District Court overlooked Plaintiff demonstration about why the Arbitration Award was procured by fraud

The District Court states "*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*", see App.3. Page 8-9.

The evidence Zhang used to have was taken away and destroyed by the Respondents. In addition, Respondents refused to disclose the relevant evidence to prove their claims or to disprove Zhang claims. The court knows the Respondents did not disclose any material evidence to support Respondents claims, but unjustly asked Plaintiff to show the evidence which was taken away by the Respondents.

Moreover, the district court judge overlooked the section where the plaintiff demonstrated how the Respondents told lies, or

how he was misled by defendants' memo. The plaintiff used the evidence presented by UnitedHealth and testimonies from UnitedHealth's witnesses to prove Duraimanickam lied. The Plaintiff did not use his own testimony as the evidence to prove Duraimanickam's lies. The plaintiff just used Duraimanickam's own testimony to prove Duraimanickam's lies. (See Dist. Doc. 56-0, §13), one of the good example is on page 50, §13 (7) (Dist. Doc. 56-0).

D. The Arbitrator erred in setting aside the true facts and considered Duraimanickam's testimony was credible based on his logical fallacy reasoning

The District Court stated: "*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).)*"

The District Court only considered the findings and the statements from the Arbitrator and the Respondents, but ignored the facts that the Respondents only presented Duraimanickam statements or used Duraimanickam statements to prove the other Duraimanickam statements. When Plaintiff requested the Respondents to disclose material evidence to prove their findings, the Respondents refused to disclose any material evidence.

Therefore, granting the writ would allow this court the chance to see how the errors on setting aside the findings of fact without right procedure would result in unjust.

- E. The District Court only looked at the Arbitrator findings and conclusions without considering what evidence the Arbitrator used to support his opinions

The District Court stated: “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.’*”

Here, the District Court did not notice two facts:

(1). The reason why HR fired Zhang is because Duraimanickam told HR that Zhang’s performance was not good throughout the period from October 24, 2016, to November 14, 2016. The Respondents do not provide any evidence or detailed information to show how Zhang’s performance was not good.

(2). Duraimanickam said that “performance not good” means “the assigned jobs are not completed in time. Zhang had submitted the dispute documents to arbitration and to district court, and these dispute documents indicate only

Zhang completed the jobs assigned to him, while all the other younger team members could not complete their job on time during that specified period. HR also has no objection to this fact after the internal investigation. Evidently, the Arbitrator findings and conclusion are wrong because there is no basis in fact, see *Renz v. Spokane Eye Clinic*, that case outlined the following standard for proving pretext:

An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that:

- (a) the reasons have no basis in fact, or*
- (b) even if based in fact, the employer was not motivated by these reasons, or*
- (c) the reasons are insufficient to motivate an adverse employment decision*

(3) The Arbitrator consents that the employees can be treated unfairly. However, one of the element to prove age discrimination is “younger employees are treated more favorably”, See *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 931 (8th Cir. 2000).

- F. The Court of Appeals erred in holding “No basis found for reversal”
 - 1. The Court of Appeals for the Eighth Circuit erred in reading of this case and cited an inappropriate case, *Ploetz v. Morgan Stanley Smith Barney*, 894

F.3d 894, 897 (8th Cir. 2018), to support its decision (see attached App.1)

The grounds of the argument in Ploetz case are totally different from the grounds in this case.

- In Ploetz case, Petitioner Ploetz argued that Arbitrator Goldman's failure to disclose his service as mediator in the earlier MSSB matter required vacating the arbitration award for "evident partiality".
- In this case, Petitioner Zhang sought vacatur of the adverse arbitration award on the ground that the Respondents intentionally omitted or concealed the crucial facts that led to arbitrator making the opposite conclusion,

Therefore, these two cases are unrelated.

2. Setting aside the findings and applying the higher standards of proof on Petitioner might violate the Petitioner's rights under 14th Amendments

(a). Not based on fact, but based on fallacies in his logical reasoning, Arbitrator Keyes stated that the reason for the Respondents to fire the Petitioner is true, even the Respondents did not provide any examples or evidence to demonstrate or support their reason to fire the Petitioner. Therefore, Arbitrator Keyes' judgements may sound convincing, but are based on fallacies or faulty logic and are therefore invalid

(b). Arbitrator Keyes' applied different standards of proof for petitioner and respondents. Arbitrator Keyes did not require the Respondents to

provide material evidence to support their claims, but holds that the Respondents' statements of fact are all true unless the Petitioner could provide clear and convincing evidence to disprove Respondents' claims. However, Both D. Minn. Court and the 8th Cir. Court have overlooked the findings of fact that the Respondents took away all of the relevant evidence that the Petitioner used to have when they used the arbitrator prejudiced findings as the ground to deny petitioner's motion for vacating arbitration award.

(c). The Respondents cannot lie under any circumstances, even the Appellant does not ask them for the evidence to prove their findings or statements of fact.

The whole, entire, complete truth is what the American court system is all about.

“The people have a right to the truth as they have a right to life, liberty and the pursuit of happiness.”

The right to the truth has emerged as a legal concept nationwide, and relates to the obligation of the court to provide information to appellants or to appellees or even society as a whole about their opinions based on which they make a decision.

“The right to the truth” is a legal right, and shall be equally protected.

Grant this writ would let this court know how the lower courts can be cheated.

3. The Arbitrator erred in considering Duraimanickam's statements as credible without

clear and convincing evidence to support, even after knowing she told lies

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

The Arbitrator conclusion is wrong because:

(a). 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)*.

(b). 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 (concluding 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*.

(c). 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 a 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*.

Grant the writ would let this know what the arbitrators do might allow a party to violate the US Rules

4. The material evidence to prove Duraimanickam lying is overlooked by the District Court

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.

5. 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

(a). 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 his job termination. The final CAP was issued by Duraimanickam on October 24, 2016. From that day until Zhang was fired on November 14, 2016, only Zhang completed his jobs while other teammates did not. See Zhang's response to Hughes' above statement in Dist. Doc. #45-3, page 1~5

6. 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 reason for termination was true just based upon feeble or scanty evidence, suspicion, guess, or imagination.

7. 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 would he 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 grounds for the arbitrator to disprove Plaintiff's claims on age discrimination, when these grounds are dismissed, there will be no sufficient grounds to support the arbitration award. See *9 U.S. Code §10(a)*.

CONCLUSION AND PRAYER FOR RELIEF

It's very common for employers to take away every piece evidence that employees have when the employees are fired. In this case, there is no standard

found for arbitrators or for lower court judges to follow in order to determine what findings can be set aside, and what findings cannot. Therefore, whether a finding is set aside or not is completely dependent on arbitrators' or judges' preference, such that it would very easily lead to unequal protections of the law in arbitration, followed by a misleading of the lower courts if there is no hearing for "Finding of Fact and Conclusion of Law". Granting the writ to this case would help the court to understand how an employer could win the cases by cheating.

Therefore, this Court should grant certiorari to review the Eighth Circuit's judgment of denying the Petitioner appeal.

July 08, 2022. Respectfully submitted,
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