No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHIRLEY J. ESLINGER, PETITIONER

vs.

MASSCHUSETTS COMMISSION AGAINST DISCRIMINATION
and et al,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO
MASSACHUSETTS APPEALS COURTS

BOOKLET 1 OF 3
PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether the "fox can guard the hen house?" When the Equal Employment Opportunity Commission (EEOC) allows a state's Fair Employment Practices Agency (FEPA) to adjudicate a state employee's employment discrimination complaint against another state agency of the same state, whether an inherent conflict of interest exists which jeopardizes the employee's Constitutional right of due process, guaranteed by the 14th Amendment and subjects such discrimination complaint to the arbitrary exercise of bias government, violating an employee's rights to a "full and fair opportunity to show an employer's unfair treatment," McDonnell Douglas Corp. v. Green 411 U.S. 792, 805 (1973)?

PARTIES TO THE PROCEEDING

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner and Plaintiff:

Shirley J. Eslinger

Respondents:

Massachusetts Commission Against Discrimination (MCAD)

and

Massachusetts Department of Transportation (MassDOT)

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IN THE

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PETITION FOR WRIT OF CERTIORARI

Shirley Eslinger, a Massachusetts Registered Professional Structural Engineer, respectfully requests this court for a writ of certiorari to review the judgment of the Massachusetts Court of Appeals (Appendix C).

OPINIONS BELOW

The August 23, 2022 response to the petition to the United States Court of Appeals for the First Circuit, Misc. Case number 22-8017 appears at Appendix A. (Dismissed on August 23, 2022 for lack of jurisdiction.)

The June 30, 2022 response to the petition to the highest state court, Massachusetts Supreme Court, to review the merits appears at Appendix B to the petition. (Notice for Further Appellate Review was denied.)

The May 6, 2022 opinion of the Massachusetts Appellate Court, case number 21-P-653 appears at Appendix C.

The May 10, 2021 opinion of the Massachusetts Superior Court, case number 2072CV00282 appears at Appendix D.

The June 24, 2020 opinion of the Full Commission of Massachusetts Commission Against Discrimination (MCAD) case number 10BEM02076, appears at Appendix E to the petition and is reported online at https://www.mass.gov/lists/mcad-hearing-decisions#2020-decisions-

The February 24, 2017 opinion of the Hearing Officer of Massachusetts Commission Against Discrimination (MCAD) case number 10BEM02076, appears at Appendix F to the petition and is reported online at https://www.mass.gov/lists/mcad-hearing-decisions#2017-decisions

JURISDICTION

A timely petition to the United States Court of Appeals for the First Circuit for Review of case, 22-8017, was dismissed on **August 23, 2022** for lack of jurisdiction: A copy of the order appears at Appendix A.

A timely petition to the Massachusetts Supreme Court for Further Appellate Review was denied on June 30, 2022. A copy of that information appears at Appendix B. (The order received by mail had errors with information about this case and another case. Notice was sent concerning this error but a corrected copy has not been received to date.)

The date on which the highest state court decided the case, 21-P-653, was on May 6, 2022 by the Massachusetts Appellate Court. A copy of that decision appears at Appendix C.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1) due to the date of the dismissal of case, 22-8017, of the federal Court of Appeals for Circuit 1, (**August 23, 2022** less than 90 days from submittal to Supreme Court) and 28 U.S.C. 1257(a) due to the decision of the Massachusetts Appellate Court. The adjudication of Petitioner's employment discrimination complaint was repugnant to the Petitioner's rights guaranteed by the U.S. Constitution 14th Amendment and USC Volume 42 Title VII .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution 14th Amendment: "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.

Title VII of the Civil Rights Act and U.S. Federal Code Volume 42 Section 2000e "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin..."

250 Code of Massachusetts Regulations (CMR) Board of Registration of Professional Engineers (effective 2009–2010) (Appendix G)

Massachusetts General Laws (MGL) Part 1 Title XVI Chapter 112 Section 81D defines practice of engineering

804 CMR Massachusetts Commission Against Discrimination (Effective 1/1/1999)

STATEMENT OF THE CASE

This complaint originated as a gender discrimination employment complaint, a prima facie case, of violation of Title VII of the Civil Rights Act and U.S. Federal Code Title 42 Section 2000e with the Petitioner's termination on March 1, 2010 without cause.

The Equal Employment Opportunity Commission (EEOC) and the state's Fair Employment Practices Agency (FEPA) adjudication resulted in prejudicing the Petitioner and violating the Petitioner's U.S. Constitution 14th Amendment rights of due process and a fair and impartial hearing. An employee's responsibility to prove pretext is made impossible if the employee does not know the employer's purported claims, a timely investigation does not determine an impartial factual and documented record of the party's actions, and employee is not allowed to rebut employer's spurious false accusations.

The fundamental right to be heard under the Constitution "require[s] that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg v. Kelly 397 U.S. 254 (1969). Petitioner's career and livelihood free of discrimination is a statutory right and

not a privilege and should be treated with the same importance as an individual's welfare benefits.

REASONS FOR GRANTING THE PETITION

Implementation of discrimination laws are undermined when the administrative process for adjudication of a state employee complaint is the responsibility of a state agency reviewing another state agency's actions and both are under the oversight of the Attorney General's Office, all of which are appointed by the Governor of the state. The need exists to restrict the administration and adjudication of these types of discrimination complaints to completely eradicate the arbitrary and capricious input of inherently bias actors.

Massachusetts' FEPA was the Massachusetts Commission Against Discrimination (MCAD). MCAD was not objective in handling this complaint and proved to be a bias state agency reviewing the actions of another state agency. MCAD performed an ineffective investigation, allowed delinquent and incomplete interrogatory responses, and performed no depositions, in spite of informing the Petitioner they would perform depositions and there would be three opportunities to submit interrogatories. MCAD allowed the

Respondents over six years to create false, unchallenged, undocumented and unsubstantiated testimony of pretext to cover up the employer's discriminatory actions.

Petitioner notified MCAD Full Commission and EEOC on March 6, 2017 in a timely appeal of the single Hearing Officer's decision. "The [Petitioner] has been prejudiced...It appears that because MCAD is a state agency, same as Respondent, MCAD could not be objective in handling this claim." (Appendix J, pages 2,4,5). Petitioner elaborates further in an appeal, to the Full Commission and EEOC, details of how she had been prejudiced. Petitioner exhausted the path for administrative remedies pleading her complaint to the Massachusetts Superior Court (Appendix I, page 10), Massachusetts Appellate Court (Appendix H pages 6,8-12), Massachusetts Supreme Court (Appendix B) and United States Court of Appeals for the First Circuit (Appendix A) All residing in Massachusetts..

MCAD's Full Commission responded to Petitioner's timely appeal stating "there is no judicial review of the Commission's investigation...the Hearing Officer held a public hearing,,, provided [Petitioner] with notice and the opportunity to be heard...Commission counsel was not [Petitioner's] attorney" (Appendix E, pages 4-5). The Appeals Court stated, "[Petitioner] had the opportunity to pursue a purely private

right of action...The proceedings at issue here were conducted on behalf of the public..." (Appendix C, page 16) implying that an adequate investigation to develop an impartial factual record is not necessary and such proceedings do not need to permit the employee an opportunity to prove pretex to subsequent testimony by the employer. 804 Code of Massachusetts Regulations (CMR) 1.02 states "[MCAD's] task is to work for the public good of eliminating and preventing discrimination and to educate the citizens of the Commonwealth with regard to their rights and duties under the Commonwealth's anti-discrimination statutes."

Evidence shows that only after the three-year statute of limitations to remove the complaint to state court had passed, did the FEPA inform the Petitioner that the FEPA determines the trial strategy; which witnesses and how many witnesses would be called.

Administrative Record includes "Complainant's Pre-Hearing Memorandum" showing a list of witnesses including the Director of ABP and the other two MassHighway Deputy Chiefs, which the Decision Maker purported to have complained about the Petitioner; however, no depositions were taken nor were these individuals allowed to testify to repudiate the Decision Maker's testimony.

Following a Probable Cause finding, whether the employer is a private or public

agency, the venue for eradicating discrimination should not impact minimal requirements of an investigation or the allowance of an employee to rebut an employer's slander given as undocumented testimony on the final days of the Hearing or the venue should not exist.

The Petitioner was not allowed to have witnesses testify on her behalf or provide rebutting evidence. Although FEPA claimed Petitioner was an intervenor there is no documentation that she was anything other than a witness. FEPA states they were not Petitioner's attorney.

The Petitioner was not "given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [her] rejection were in fact a coverup for [gender] discriminatory decision." McDonnell Douglas Corp. v. Green 411 U.S. 792, 805 (1973). (The case was cited in the Hearing Officer's Decision.)

The complaint process ensured that the employee could not prove employer's pretext because she was not informed of the purported reasons as to why the white male was promoted to the Deputy Chief position and the Petitioner was demoted to a District position which violated the Massachusetts Professional Engineering Regulations (Appendix G). Petitioner was the only employee who had to violate the governing Professional Engineering Regulations or have

her employment terminated. The purported "reassignment" position was not filled

Petitioner, a state employee, filed a timely employment discrimination complaint with the FEPA and also a separate complaint with the EEOC against a state agency. The Petitioner received no response from the EEOC. After two years, FEPA found Probable Cause but allowed the employer to "not offer an explanation for why the [white male] was chosen over Complainant ...and offers no evidence that he was more qualified than Complainant." Wheelock College v. Massachusetts Comm'n Against Discrimination, 381 Mass. 130, 136 (1976) states "articulating a reason...requires the employer to produce not only evidence of the reason for its action but also underlying facts in support of that reason."

For an employer to claim "reorganization and consolidation" does not explain why the Petitioner was specifically chosen for "reassignment" or termination.

Petitioner expected an investigation would develop an objective and impartial factual record. However, the FEPA's investigation of the discrimination complaint lacked the "careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended." Respondent never produced any "documented fairly administered selection process for employment positions" Mastro v.

Potomac Elec. Co., 447 F.3d 843, 855 (D.C. Cir. 2006).

Petitioner contacted EEOC because employer failed to respond to Interrogatories and Document requests. With the expiration of two motions to extend discovery to October 18, 2013 then to January 16, 2014, Petitioner requested that a Final Request for responses to Interrogatories and Documents be sent to employer for the complaint to move forward. FEPA refused to do so and provided no explanation. No response to the Petitioner's inquiry was received from the EEOC, and as a result, response from employer to Interrogatories was not received for an additional two years. MCAD stated the responses were received on December 30, 2015; however, the Petitioner was not allowed to view the responses until May 2, 2016 (seven days before Hearing). According to MCAD, a state attorney would vet the responses for "any information damaging to the state" before the Petitioner was allowed to view the responses.

FEPA allowed employer over six years for Respondent to provide unsubstantiated false testimony utilizing information not known in December 2009, as an explanation for why Petitioner's replacement, who was illegally representing himself as a Massachusetts Professional Engineer, was chosen over Complainant. This testimony was provided on the final two days of the hearing.

The Petitioner employee was not allowed to rebut this testimony, introduce evidence, or call a witness. The Hearing Officer only sought information from the supervisor and other management witnesses for the employer.

Although FEPA had requested a list of individuals who could substantiate the Petitioner's claims and was provided a list of more than 30 employees, FEPA performed no depositions. FEPA allowed only the Petitioner to testify on her own behalf at the first day of the Hearing, while allowing the Petitioner's supervisors and Secretary of Transportation to testify on behalf of the employer. In Julius P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162827 (March 6, 2018), the employee provided the EEO investigator with a list of six witnesses to interview. The investigator failed to interview any one of these witnesses. Instead, the investigator only sought information from the supervisor and other management witnesses. In this case the EEOC found that this investigation unfairly restricted employee's ability to prove discrimination.

Failure to conduct an adequate and objective investigation in a timely manner not only deprives the employee of the opportunity to obtain evidence to support a discrimination claim, it prevents the EEOC from effectively overseeing compliance with the anti-discrimination laws.

By allowing a state agency to adjudicate a state employee's employment discrimination complaint against another state agency, the employee was subjected to the arbitrary exercise of bias government power which violated employee's due process, guaranteed by the 14th Amendment.

The Hearing Officer's Decision was arbitrary, capricious and based on false, unsubstantiated information first presented as Respondent testimony at the Hearing over six years after the discrimination occurred. The Hearing Officer misapprehended the laws governing the Petitioner's Professional Engineering License, Code of Massachusetts Regulations, CMR Title 250 (effective 2009-2010) (Appendix G).

The actions of the MCAD with the investigation and Hearing for this complaint has prejudiced the Petitioner and ensured the employer would prevail.

An unbiased objective investigation would have secured the following factual information:

Petitioner is a Massachusetts Registered Professional Structural Engineer who began her career in 1973, has over 30 years of bridge experience, and takes her professional responsibilities very seriously.

Massachusetts General Laws Title XVI Chapter 112 Section 81D defines practice of engineering as "any professional service or creative work requiring engineering

education, training and experience and application of special knowledge of the mathematical, physical and engineering sciences to such professional services ...as investigation, evaluation..." in addition to design and construction.

Massachusetts Professional Engineering Regulations 250 CMR Section 3.05 (7) "The burden of proof of competence rests upon the registrant...(Appendix G page 2)

Massachusetts Professional Engineering Registration was required for the Director of the ABP and the Petitioner's Deputy Chief position as indicated by the Director of the ABP job posting ("SPECIAL REQUIREMENTS") and Engineering Directives E-09-004 and E-11-004 requiring Registered Professional Engineers in Civil Engineering or Structural Engineering in the Commonwealth of Massachusetts.

Petitioner experienced discrimination when she was the only employee demoted from her Deputy Chief position to a position that violated Massachusetts Professional Regulations and termination of her employment without cause on March 1, 2010 and replaced with a white male, illegally representing himself as a Massachusetts Professional Engineer.

Petitioner had only positive documented and verbal performance evaluations during her career, including her

employment at MassHighway and MassDOT. Evidence existed at MassDOT stating she was a proven leader with strong management and technical skills and a successful performer. No evidence was provided to substantiate the negative performance evaluation first given in unsubstantiated testimony on the final day of the Hearing. Witnesses were available to rebut this testimony

June 4, 2008, Secretary of Transportation announced publicly (in front of approximately a 100 people) the Petitioner was to be the Director of the Governor's new Accelerated Bridge Program, ABP, but Chief Engineer Tramontozzi subsequently met with Petitioner and stated the Deputy Chief position (the Petitioner's current position) and the new temporary Director of the ABP position were two positions and she would have to choose one.

Comparators which Respondent attempted to utilize were not similarly situated in all relevant aspects concerning comparison of their "performances, qualifications and conduct". The Petitioner challenged the selection of employees laid off and not the manner in which the layoffs were effectuated. None of the purported comparators in this case were Registered Professional Engineer employees reassigned to a position that violated Massachusetts Professional Engineering Regulations (Appendix G). No other Deputy Chief was

required to take the reassignment or their employment terminated. The position was never filled although Respondent's purports the position was a "high level management position required by the Transportation Reform Bill."

Administration Record for Hearing included MassDOT Affirmative Action Plan signed by MassDOT's Secretary of Transportation on March 9, 2010, eight days after Respondent's employment termination, indicates a history of "Areas of Significant Underutilization" and both Black and Female are marked as "overlooked areas that must be considered and addressed if this Division [MassDOT] is to ensure equitable representation of all protected class groups in all job categories."

Petitioner's employment was targeted to be terminated at a time when MassHighway and then MassDOT were actively hiring and in need of experienced bridge engineers and had not met their Affirmative Action diversity goals. The Petitioner was never offered any demotion or reassignment that did not include direct structural responsibility of the tunnels which she immediately informed the Decision Maker she had professional conflicts with accepting the position in District 6.

Title VII of the Civil Rights Act includes discrimination through adverse employment or actions that cause a significant change in employment status, such as hiring, firing,

failing to promote, and reassignment with significantly different responsibilities as in this case.

Although the Decision Maker claims to have followed the direction of not being allowed "redundant or duplicate positions", Petitioner's position was not duplicate or redundant of the white replacement male. However, the other two MassHighway Deputy Chiefs' positions were redundant.

The white male replacement of the Petitioner had a higher salary than the Petitioner, an additional week of vacation, a state car, and paid parking than the Petitioner. Employer purports that the Petitioner and white replacement male had duplicate employment responsibilities (which they were not). The employer purports the white male was paid more because he made more at his previous position in the Washington D.C. area.

Direct evidence existed of the Decision Maker being questioned as to why she wanted to get rid of the Petitioner. The witness to such a conversation should have been deposed or allowed to testify, but neither occurred. The Complainant's Pre-Hearing Memorandum stated he would be a witness along with others.

In this case, the Petitioner's job was not eliminated nor were the job responsibilities combined as the employer and courts have attempted to claim. Petitioner's position

responsibilities were not redundant or duplicate to other positions. The white male replacement's position was redundant and duplicate to the other two existing Deputy Chiefs. Documentation exists showing his responsibilities would be later returned to the other two Chiefs that were not terminated. Documentation shows he would be left with the Petitioner's responsibilities from the purported combined position. He would resign prior to completion of the Accelerated Bridge Program which he had been hired to be Director; and, the accolades of success of the program were not the Director's accomplishment.

The Petitioner was never told why she was removed as a Deputy Chief. She was never told that her position was purportedly "combined". She was asked to consider a position which was documented to be directly responsible for maintaining the structural integrity of tunnels. Petitioner could not accept the position according to the Massachusetts Regulations for Professional Engineers since she lacked experience or knowledge of tunnels (Appendix G, Pages 1,2,5 and 6).

In the public interest of eradicating discrimination, one must also question MCAD's judgment. During the time MCAD attorney claimed workload was an issue, he would email, during working hours on a government computer, what was subsequently

argued to be a "comedic" email to the Petitioner. This email was inappropriate and sexist. The email was unsolicited and certainly not welcomed nor was it comedic. This email indicates that MCAD lacked the proper unbiased judgment essential for a professional organization handling discrimination complaints. The Petitioner's motion was rejected by the court and the MCAD email of "comedic humor" was not allowed into Petitioner's appeal. However Massachusetts Code of Judicial Conduct, Rule 2.3 "Bias, prejudice, and harassment Comment (3) As used in this Rule, examples of manifestations of bias or prejudice include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based upon stereotypes. . ."

Petitioner's unredacted employee file was used as a Hearing Exhibit disclosing personal identifying information. When the Petitioner pleaded with the FEPA to redact the information, the FEPA's response was they would not do so without a court order. Although there are specific regulations that the FEPA must protect personal identifying information, the FEPA stated the Petitioner had caused the information to become public information because she had filed an appeal to the discrimination complaint.

Prior to the Petitioner's termination, a male, unknown to the employee, unexpectedly and without any previous appointment,

notification, or contact, stopped by Petitioner's office. He introduced himself to the Petitioner as a mediator. He took no notes. At a later time, he would fabricate a document "To: File" with "RE: Interview-[Petitioner]" containing false information which was never discussed but purported to be a summary of their discussion. The document was included as an Exhibit at the Hearing; however, Petitioner was allowed to initially view only after the Hearing had concluded. The Exhibit contained a redacted "Proposed Course of Action". Although material to the complaint, the reason for the redaction of the "Proposed Course of Action" was never questioned or investigated by MCAD.

Although the Decision Maker, nor anyone else, testified that she did not inform the Petitioner she would be terminated if she did not accept the "reassignment", the Hearing Officer's Decision arbitrarily and falsely states otherwise. Hearing Officer makes additional false and unsubstantiated statements in her findings.

The only discussion about any layoffs during November, 2009 through March, 2010 were "Voluntary layoffs".

Although the Decision Maker would testify "[Petitioner] wasn't the only woman in the senior engineering", no females were added to the senior engineering management for MassDOT within two levels of the Decision Maker.

When forming MassDOT, the statistical results were the Chief and Deputy Chief levels of senior management were increased from four positions to six positions; the female Petitioner's employment was terminated without cause, and the selections made were all white males. The statistical result of a person's actions verses their rhetoric is the irrefutable objective Performance Measure. Decision Maker decreased the diversity in the Engineering Management team, by removing the only female and increasing the number of white males. Justice Anthony Kennedy (in reference to Texas Dept of Housing & Community Affairs v. The Inclusive Communities Project, Inc., 576 S.Ct. 519 (2015) stated "...focusing on the disparate impacts of a policy, rather than disparate treatment acknowledges the role of the unconscious prejudices and disguised animus that escape easy classification as disparate treatment."

To understand the motive or intent for the discrimination in terms of this complaint, one must look at the Decision Maker's actions, the content of her communication, and the effects of her actions and decisions. There is a tendency to believe that individuals cannot be biased against members of their own group. But the fact is they often are. A woman leader in a male-dominated industry, instead of using her power to help other women advance, can undermine her female colleagues to ensure the

preservation of her elevated position. The nature of discrimination today is dramatically different from the overt discrimination that existed prior to the passage of the Civil Rights Act. Today's discrimination is much more subtle in nature, but the effects are no less damaging to diversity in our society and employers are being given a pass and a procedure to cover up discrimination.

This petition should be granted for the eradication of employment discrimination because current processes for investigating employment discrimination allow certain employer's discrimination to flourish. Either the courts should be truthful and acknowledge that discrimination has always existed and always will or changes need to be made for adequate investigations and hearings to ensure that all employers, including state and local governmental agencies, are compliant with the anti-discrimination laws.

CONCLUSION

In this case, an ineffective investigation by a state agency failed to develop an objective and impartial factual record, failed to document and secure testimony, and allowed another state agency years to fabricate benign subjective justifications without documentation for their illegal behavior.

If discrimination is to be eradicated, investigations must have minimal

requirements. Currently, proof of such discrimination by a state agency is allowed to be swept under a rug or totally ignored because the "fox is allowed to guard the hen house.".

Shirley J. Eslinger respectfully requests that this Court grant this petition to correct a system allowing behavior that can cover up discrimination and even harass the employee.

Respectfully submitted,
Shirley J. Eslinger, Pro Se

October 28, 2022