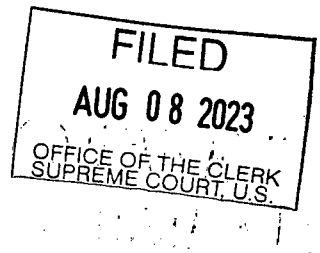
23-5783

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD FRANCIS DAVIS — PETITIONER

vs.

POWER AUTHORITY of the STATE of NEW YORK, GUY SLIKER, SANGEETA RANADE, RANI POLLACK, KRISTINE PIZZO, PAUL BELNICK, JUSTIN DRISCOLL, NANCY HARVEY, GIL C. QUINIONES — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edward F. Davis, Pro Se

2618 Liberty Ridge

New Windsor, NY 12553-4924

(845) 567-1761

QUESTION(S) PRESENTED

Petitioner and Plaintiff-Appellant, Edward Francis Davis, believes the lower courts have "so far departed from the accepted and usual course of judicial proceedings" for his Civil Rights prima facie case brought by Petitioner who appears before the court *in forma pauperis* and disabled, suffering from a chronic disease compounded by moderate depression and severe anxiety, that by his application herein calls upon this Supreme Court of the United States "an exercise of this Court's supervisory power."

Petitioner brings to question whether he was treated unfairly and unequally in light of lower court precedent for human rights cases. Moreover, Petitioner brings to question whether Respondents received preferential treatment where appropriate sanctions went unassessed for civil procedure deviations and evidence handling infractions.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] 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:

RELATED CASES

Edward Francis Davis v. The Power Authority of the State of New Yorks, et al., No. 22-488 (2nd Cir. Apr. 25, 2023). See Appendix C

Edward Francis Davis v. The Power Authority of the State of New Yorks, et al., No. 19-CV-792-KMK (N.Y.S.D. Feb. 3, 2022). See Appendix E

Edward Francis Davis v. The Power Authority of the State of New Yorks, Equal Employment Opportunity Commission - New York District, Charge No. 520-2018-04923. See Appendix L

Edward Francis Davis v. The Power Authority of the State of New Yorks, State of New York Administrative Law Judge Section Case No. 018-16741-ETN. See Appendix M

TABLE OF CONTENTS

INDEX TO APPENDICES[1]

[1] Petitioner has requested to proceed in forma pauperis. Complete court records including dockets for 2nd Circuit Court and for the District Court for the Southern District of New York, including all documents with attachments, are submitted separately to the S.C.O.T.U.S. on electronic file storage, cd/dvd.

APPENDIX F – Affirmation in Opposition to Motion for Summary Judgment[2]

APPENDIX G – Defendants Motion for Summary Judgement[3]

APPENDIX H – Court's Improper Decisions

APPENDIX I – Amended Motion for Reargument

APPENDIX J – Collection of Transcripts

APPENDIX K – 2nd Amended Complaint

APPENDIX L – 2nd Amended Complaint Attachments III and IV - EEOC Case File

APPENDIX M – NY ALJ Opinion and Decision

APPENDIX N – Hon Karas Memorandum to All Litigants

APPENDIX O – US Magistrate Judges Referrals and Consents

APPENDIX P – Motion for Reargument

---

[2] Appendix Q of Affirmation in Opposition to Motion for Summary Judgment, the NERC Concern Filing, is included for reference. The North American Electric Reliability Corporation (NERC) is an agency of the Federal Energy Reliability Commission that provides industry oversite establishing policies and procedures for the safe and reliable operation of the United States electric power grid.

[3] Included for completeness.

TABLE OF AUTHORITIES CITED

CASES: PAGE NUMBER

* * *

STATUTES AND RULES:

* * *

* * *

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix C to the petition and is

[ ] reported at_____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is

[ ] reported at_____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at_____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at_____ ;
or, [ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____ .

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 10th, 2023, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____ .
A copy of that decision appears at Appendix _____ .

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following list of Statutory Provisions below are directly from cover sheets of petitioner's standing complaint, 2nd Amended Complaint, filed with the district court:

360 – OTHER PERSONAL INJURY *Defamation

445 – AMERICANS WITH DISABILITIES – EMPLOYMENT

751 – FAMILY MEDICAL LEAVE ACT (FMLA)

376 – QUI TAM

890 – OTHER STATUTORY ACTIONS * Rehabilitation Act

STATEMENT OF THE CASE

A. Introduction

I, petitioner and plaintiff-appellant, Edward F. Davis ("Petitioner"), suffer from Crohn's Disease, a chronic illness and disability recognized by the ADA and the NY State Executive Law. The Power Authority of the State of New York ("Respondent"), the respondents and defendants-appellees, have known about my disability since at least 2012. Since then, I had requested and received intermittent Family and Medical Leave Act ("FMLA") leave to accommodate my disability.

My supervisor, Guy Sliker ("Sliker"), has made repeated adverse reference to this disability and the required accommodation of FMLA leave for medical treatment and illness. Sliker has repeatedly and agitatedly complained to me about the scheduling difficulties caused by the required accommodations, most notably in a December 2014 memorandum and an October 2016 memorandum from Sliker to myself.[4] Furthermore, Sliker attempted to write me up for attendance issues in annual performance reviews and multiple memoranda beginning in 2014 and continuing through 2017, often with the threat of termination.

B. 2012 COMPLIANCE COMPLAINT RETALIATION AND DEPARTMENT TRANSFER

In 2012, one of my projects was the NYPA's Bridge 23 Regenerative Power Project. I made all efforts to secure compliance with NYPA Corporate Policy especially as it regarded the design of the site to ensure public safety. My efforts to ensure compliance were met with obstinance by my supervisor, Michael Nash ("Nash"). Thus, in February of 2012, I submitted my concern, followed up by a North American Electric Reliability Corporation ("NERC") Concern Form regarding the compliance issues.

[4] For completeness, copies of memoranda are included at end of Appendix F.

Nash's retaliatory conduct was swift and aggressive in all aspects of my work environment. Following an attempt to have me fired, Vice President Paul Belnick ("Belnick") facilitated a transfer out from under Nash's supervision. I was transferred full time to the Research and Technology Development Department, a department I was already committed to working with fifty percent of the time providing design engineering support. Prior to completing this transfer, due to the stress of Nash's retaliation, I needed to take medical leave because of the worsening of my Chron's Disease symptoms. This relationship between the stress of my workplace and my chronic illnesses has been a constant in my life where my Generalized Anxiety Disorder (when exacerbated) causes a flare up of my physical illnesses.

Upon my return from medical leave, I found that Sliker, well known to be Nash's mentee, was my new supervisor. He immediately greeted me with the pronouncement: "I don't want you in my group," and refused to read my resume. From this point forward, Sliker refused to give me any training or guidance regarding his expectations so that I could function in his group. I worked for 5 years under Sliker's hostile work environment, which was comprised of an unrelenting series of hostile acts, including for example:

(i) The above comments;

(ii) Isolating and ostracizing me from meaningful engagement;

(iii) Writing me up on bogus attendance charges;

(iv) Not including me in senior staff meetings;

(v) Taking assignments away from me;

(vi) Violating the Employer's annual review process to ensure a negative review; And

(vii) Giving me pretextual negative performance reviews beginning with 2014.

In February of 2014, I filed a complaint of discrimination with Respondent. My complaint specifically referenced discrimination statutes and provided a comprehensive factual narrative to support my claims. It is apparent that while the Employer purported to hire a third party to investigate the complaint, nothing meaningful was actually done. In fact, Sliker complained directly to me about my complaint, expressing his agitation that he was interrogated and that Respondent was subject to review in this way.

It was at this point that the onslaught of negative performance reviews began and the hostility in the workplace nearly reached its head. Just as had happened following my harassment from Nash, my disability became exacerbated, and I needed to take additional medical leave. This state of affairs created a vicious cycle where Sliker would become even more agitated and hostile the more medical leave that I took, which only worsened my condition, thus necessitating more leave.

C. TERMINATION ATTEMPTS AND ULTIMATE TERMINATION

In and around the summer of 2016, I was forced to take a lengthy medical leave for major bowel resections, *inter alia*, that my gastroenterologist advised would solve much of the flare ups that had caused me to need to take medical leave in the first place. Despite informing the proper entities of this leave, in the middle of my recovery I was mailed papers from Respondent that I had been deemed "abandoning my job." I contested these papers, and I returned to the office in October 2016.

One year later, in October 2017, I was questioned about the use of my corporate card. It is my understanding that it had been the custom and practice within the company to use, if needed, the corporate card for personal work-related expenses and for staff to pay off the card with their own funds and then submit separately for reimbursement. I responded to their questioning honestly, and I was told that certain usage was not acceptable. Still, this was the first time anyone

said anything to me about my practice, and so I was told at the close of that meeting in October 2017: "do not worry about it, it's ok; just in the future make sure you do your expenses timelier and don't let them get so behind." Following this meeting, I stopped such usage entirely.

Despite this assurance, in early 2018 I was put on leave pending an investigation that I was told was just standard procedure. Nevertheless, on April 23rd, 2018, I was terminated from employment, solely for the usage of my corporate card per my termination letter. Respondent is on record as to the stated reason for the discharge, adding to it, that I used the corporate card for personal purchases. To my knowledge, no one else was terminated then for their corporate card use. Thus, I instantly knew this reasoning to be pretextual following the years of harassment I withstood from Sliker over my disability.

D. COMMENCEMENT AND HISTORY OF LITIGATION

I scheduled a meeting with my attorney, Charny and Wheeler P.C., immediately upon receiving the letter terminating my employment. My attorney prepared a letter to Respondent, informing them that I had a lawyer and would proceed with a lawsuit unless we could come to an amicable agreement. On May 16, 2018, he faxed and mailed the letter to Sangeeta Ranade ("Ranade"), the head of my department who originated my termination letter. We received no response from neither Ranade nor Respondent.

My attorney then filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC") in New York on July 16th, 2018. The EEOC in turn served a copy of the complaint to Respondent, making them aware of the charges and shortly after informed my attorney that they would be unable to take on my case themselves. My attorney received my right-to-sue notice from the EEOC on or about October 26th, 2018. We later filed a F.O.I.A. request to get a copy of the case file for our records and for the court. See Appendix L.

Charny and Wheeler P.C. continued to represent me in state court proceedings where Honorable Elizabeth T. Nicolato found my use of the corporate card to be insufficient to establish misconduct worthy of termination, thus entitling me to over sixteen thousand dollars in back unemployment pay from Respondent. Following these findings, I filed my complaint with the United States District Court for the Southern District of New York ("District Court") on January 24th, 2019. I sought to be reinstated to my job and damages due to discrimination and retaliation (namely bridging my salary and benefits for lost earnings).

Ultimately, after crafting a narrative that I was terminated for poor performance in conjunction with the reasons stated in my termination letter, Respondent moved for summary judgement where the District Court, Judge Karas presiding, ruled in their favor. Despite Judge Nicolato "reject[ing] as incredible" the argument in my termination letter that I was fired for my corporate card usage, Judge Karas determined that I failed to show any genuine dispute of material fact over whether Respondent's proffered (and ex post facto) reasons for my termination under the *McDonnell Douglas* burden-shifting framework were mere pretext.

On appeal to the 2nd Circuit the Tribunal summarily dismissed the case, upholding Judge Karas's opinion and order, without allowing for oral argument.

REASONS FOR GRANTING THE PETITION

I. Civil Procedural Deviations Supporting Writ of Certiorari

Judge Karas referred the appointed Magistrate Judge in this case, Honorable Paul E. Davison, to preside over and conduct Discovery, which began December 17th, 2019. Discovery ended, with some delay due to the pandemic, on September 30th, 2020, under the order of Honorable Davison who then returned proceedings over to Honorable Karas. See Appendix J – Transcripts for August 31st, 2020, p. 2, conference. On September 30th, 2020, Honorable Davison made his final decision on open requests by Petitioner. See Appendix J – Transcripts for September 30th, 2020.

A. *Lack of due process for filing of formal motion.*

Based on standards adopted by the EEOC (the commission this case was filed under recommendation by), Honorable Davison erred in his denial of requests related to interrogatories. *See* Appendix L – EEOC Case File. Per court instructions provided to Petitioner, he was entitled to object to the Magistrate Judge's decision and to request further review by the District Court Judge presiding. *See* Appendix O – U.S. Magistrate Judges Referrals and Consents (stating that "if the district judge has made such a referral, you can ask the district judge to review any magistrates judge's decision by filing an objection with the district judge within fourteen days of that decision. The district judge will rule on any timely objections that you file.").

Since Petitioner filed a letter motion with the Magistrate Judge, for which the Magistrate made his September 30th decision, Petitioner was entitled to file a formal Motion for Reargument in accordance with directions supplied all litigants by the District Judge, Honorable Karas. *See* Appendix N – Honorable Karas Memorandum to All Litigants (instructing that "for motions other than discovery motions, a premotion conference with the court is required for making any motion, except motions brought on by Order To Show Cause, motions by incarcerated *pro se* litigants,

motions for admission *pro hac vice*, motions for reargument."). On October 14, 2020, Petitioner appropriately filed this Motion for Reargument directed to Honorable Karas within 14 days of Honorable Davison's decision and after the closing of Discovery.

Respondents erroneously filed a letter response directed to Honorable Davison, and Honorable Davison ruled without direction from Judge Karas on Respondents' response. Instead, Honorable Davison should have recognized that the motion was directed to Honorable Karas, District Judge. *See* Appendix H – Court's Improper Decisions. Realizing that there had been an error in the proceedings, Petitioner prepared an Amended Motion for Reargument in hopes that it would proceed for Honorable Karas's review as required. Again, Respondents erroneously filed a letter response to Petitioner's formal motion, once more stopping it in the process. Still, Honorable Karas recognized the motion was for his review, and he should have directed Respondent to respond to the formal motion. Instead, he prematurely denied Petitioner's Formal Motion for Reargument terminating any further discussion.

Thus, Respondents twice denied Petitioner the opportunity to establish a prima facie case of retaliation when they declined to formally respond to the Formal Motion for Reargument, even though civil procedure required it. If Respondent submitted a formal response to the motion, Petitioner would have been able to argue that he established a prima facie case of retaliation in his reply to their response, which would have precluded the judge from granting Respondent's motion for summary judgement given the precedent for jury trials in prima facie civil rights cases. The appropriate time to argue whether a prima facie case had been established, if there was any doubt, was at this juncture, but Petitioner was prevented from doing so.

B. *Review and Oral Argument Denied by 2nd Circuit*

The 2nd Circuit refused to review Petitioner's appeal and refused oral argument while simply reaffirming the District Court's decision. The 2nd circuit paraphrased in their Summary Order: "'[w]hile we must ensure that employers do not act in a discriminatory fashion, we do not sit as a super-personnel department that reexamines an entity's business decisions.' Delaney v. Bank of Am. Corp., 766 F. 3d 163, 169 (2d Cir. 2014)" However, this is exactly what was required given the complexity of Petitioner's case and given Employer's discriminatory and abusive conduct.

Moreover, the 2nd Circuit states in their Summary Order that "[they] decline to address Davis's . . . . whistleblower claim, which he raises for the first time on appeal." This denial was clearly erroneous. Pursuant to L.R. 30.1(e) of the 2nd Circuit: "the procedure described in FRAP 30(f) for hearing appeals on the original record without requiring an appendix is authorized in the following classes of cases: (A) proceedings conducted *in forma pauperis*. . . ." Petitioner, appearing *in forma pauperis*, was entitled to have his case heard on the original record without having had to append this record to his brief. The whistle blower claim is found in the court record in numerous locations.[5] Petitioner raised his whistleblower claim beginning with the First Amended complaint and in the standing Second Amended Complaint, namely: (1) on the cover sheet of the complaint, (2) in the EEOC filing attached to the complaint, (3) in paragraphs 44 through 46 of Statement of Facts of the complaint (4) in paragraph 57 of the complaint, (5) paragraph 59 of the complaint, and (6) in Petitioner's Affirmation in Opposition to Motion for

[5] Petitioner stated in his appeal that the defendants "opened the door" on the whistleblower claim, which pro se held to mean Employer cannot now claim circumstances to be outside the bounds of this case. Petitioner's whistleblower status is a major factor in this case.

Summary Judgment, among others. See Appendix F and Appendix K. The 2nd Circuit was required to review these filings in the record, and therefore must have addressed the whistleblower claim under their jurisdiction as an appellate court. Furthermore, to refuse Petitioner consideration of this claim, and to deny him the chance to argue this concern at oral argument, is in direct contradiction of the established spirit of the leniency granted *pro se* litigants determined by courts across the country to be necessary for equitable access to justice.

C. *Deposition Under Severe Mental Distress*

Petitioner suffers from Crohn's disease and its common secondary symptoms, including mental illness, and as such is entitled to court accommodations—which he was also denied. *See* Allen v. Calderon, 408 F. 3d 1150, 1153 (9th Cir. 2005) (finding that "'[i]f an incompetent person is unrepresented, the court should not enter a judgment which operates as a judgment on the merits without complying with Rule 17(c).' . . . . When a substantial question exists regarding the mental competence of a party proceeding *pro se*, the proper procedure is for the district court to conduct a hearing to determine competence, so a guardian ad litem can be appointed, if necessary."); 28 U.S.C.A. § 2254.

Petitioner notified the court on at least a half dozen occasions of his chronic condition and mental illness, specifically: (1) while in court, (2) on the phone, and (3) in written correspondence with the District Court. Yet, the District Court did not offer any legal assistance beyond stating the petitioner was welcome to use the services of New York Legal Assistance Group (which does not qualify as satisfactory legal assistance for the chronically ill).

Therefore, Petitioner was subjected to a deposition without representation, or a guardian, during which time he was stifled by Respondent's examining attorney when he tried to defend

himself. Petitioner was further denied the opportunity to give responses that were in his favor. See Appendix J, Deposition of Mr. Davis, dated July 24th, 2020, p. 118 Line 5, which states:

E. Davis

A You do know that I was found innocent of any wrong doing regarding this corporate card, right?

Q Mr. Davis --

A By --

Q Mr. Davis --

A You know that.

Q Mr. Davis, this is your deposition. I'm here to ask you questions.

8.50 x 11.00 in

This is one of the instances of Petitioner being interrupted when trying to explain history behind document in question. Additionally, Petitioner, who suffers from chronic moderate depression and severe anxiety, was forced to take maximum doses of anxiety medications to tolerate the ordeal; these medications (prescribed Amitriptyline, Propranolol, and Vistaril) were later found to also be memory suppressants, and yet the testimony given by Petitioner as a result of this memory loss was held against him. Finally, Petitioner suffered from multiple factors including helplessness and fear of responding after being berated for trying to respond with detail. *See* electronic copy of Deposition of Mr. Davis, dated July 24th, 2020.

D. *Petitioner's Witnesses' Testimony*

Petitioner was instructed by the District Court that even though he, appearing *in forma pauperis*, could not afford the cost of depositions, it would not be an issue and that Petitioner would be given an opportunity to have his witnesses heard. *See* Transcripts for July 21st, 2020, conference beginning at page eight, line one; states:

MR. DAVIS: And I had listed, I had listed names of individuals that I had planned -- obviously, I don't have the money for depositions, however, I was going to request that the Court allow me to call witnesses during trial if need be.

THE COURT: I don't understand what you're saying.

Mr. Davis, you know, you don't have to depose your own witnesses.

MR. DAVIS: Okay.

THE COURT: You have to disclose them, and then it's up to defendants whether they want to depose them or not.

Thus, the District Court misled Petitioner, precluding him from seeking other sources of help in obtaining what would be necessary depositions. These misleading statements proved disastrous to Petitioner's case when taken in conjunction with the fact that Respondents skirted the lines of the law when it came to Petitioner's discovery requests, going so far as to destroy evidence. *See infra*, II. Evidence Mishandling Supporting Writ of Certiorari.

II. Evidence Mishandling Supporting Writ of Certiorari

Pertaining to Rules of Evidence:

A. *Respondents' Destruction of Evidence*

During discovery Respondents were reluctant to turn over documents and, despite being notified on two separate occasions of pending investigations, even deleted eight and a half years of petitioner's work emails and project files, substantial evidence that should have been turned over. Moreover, Respondent admitted to destroying this evidence in docket item 63, and yet the court did not assess nor order sanctions. *See Voyager Indem. Ins. Co. v. Zalman N., Inc.*, No. CV 22-3010 PA (MARx), 2023 WL 2904591 (C.D. Cal. Apr. 7, 2023) (holding "[w]here imposition of a

Rule 37(c)(1) sanction amounts to dismissal of a claim, the district court is required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith, and also to consider the availability of lesser sanctions."). The District Court failed to consider whether Respondent's noncompliance, which ultimately led to Petitioner's claim being dismissed, involved willfulness, fault, or bad faith. *See Id.*

Rather than following this procedure, Judge Davison instead instructed Petitioner that he would be entitled to have his witnesses heard during trial in lieu of depositions and in reparation for Respondent's noncompliance with rules of evidence. In relying on this assurance, Petitioner was unable to build the evidentiary record necessary for his claim to survive summary judgment, causing Judge Karas to rule in favor of Respondents before Petitioner was able to conduct the witness questioning he was led to believe he was entitled to.

B. *Courts Erroneous Decision on Establishing a Prima Facie Case of Retaliation*

Courts cannot decide whether a prima facie case of retaliation has been established without considering all of the evidence. Petitioner, representing himself *in forma pauperis*, submitted evidence to the District Court to address Respondent's narrative that Petitioner had a history of poor performance. Even still, this limited evidence provided, if taken in a fair and impartial way, should have been sufficient to create a genuine dispute of material fact that reasonable minds may differ over.

Yet, the District Court decided that a prima facie case had not been established on a small glimpse of the evidence, taken as a whole. In fact, we had not even met for a pretrial conference to establish evidence submission. Petitioner established a prima facie case for discrimination under the Rehabilitation Act, ADA and NYSHRL in response to Respondent's motion for summary judgement. Petitioner's responses with exhibits were, however, restricted to answering

Respondent's questions according to Local Rules. This also limited what we could provide that would establish prima facie. Petitioner was barred from introducing his alternate perspective, obvious retaliation of whistleblower. *See supra* Part I-B, *Review and Oral Argument Denied.*

III. Court's Precedent Supporting Writ of Certiorari

Petitioner has established a prima facie Civil Rights case.

A. *Notable Comparative Cases Tried In New York*

Respondents assert that Petitioner was not qualified for his position because he was not adequately performing his job duties as a Senior RT&D Engineer. They rely on Petitioner's disciplinary record, consisting of written warnings for unavoidable absences from work and unwarranted negative performance reviews to argue that Petitioner was not adequately performing his job. While courts may rely on performance evaluations to determine whether an employee was qualified, the 2nd Circuit has held that this determination cannot be made in a vacuum. The Court "must allow employees to show that the employer's [expectations] were illegitimate or arbitrary." *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985). Such was the case here.

The Respondents do not contest that Petitioner is disabled, and so the only elements at issue are his qualification for the position and whether he suffered adverse work events under circumstances supporting an inference that those events were caused by his disability.

1. Petitioner Has Proffered Evidence that He Was Qualified for the Position he Held at NYPA.

To establish a showing of qualification, *McDonnell Douglas* requires only a "minimum showing" of qualification. *See* Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 171–72 (2d Cir. 2006) (citing Owens v. New York City Hous. Auth., 934 F.2d 405, 409 (2d Cir. 1991.)) A plaintiff need only demonstrate that he "possesses the basic skills necessary" for the job. *Id.* Here, Petitioner has proffered evidence that he possessed far more than the basic skills needed for the job.

2. Petitioner Has Proffered Evidence that NYPA's Actions Give Rise to an Inference of Intentional Discrimination.

Petitioner has proffered sufficient evidence to make out a prima facie case that his Crohn's Disease was the but-for cause of the adverse actions he suffered. *See* Natofsky v. City of New York, 921 F.3d 337, 348 (2d Cir. 2019) ("[T]he ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the but-for cause of any adverse employment action."). Employment decisions rise to the level of adverse employment actions when they cause a "materially adverse change in the terms and conditions of employment." Sanders v. New York City Hum. Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004) ("Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation."). Accordingly, this Court has defined this term by evaluating whether an employment action is "more disruptive than a mere inconvenience or . . . . [a change in] responsibilities." *Id.*

Petitioner has presented evidence of the following adverse actions by Respondents under circumstances giving rise to an inference of disability discrimination:

- In early 2017 and 2018 he was denied the last two (2016 and 2017) annual stipends awarded to professional engineers at NYPA. *See* 56.1 Response, ¶ 10.
- He was unfairly terminated on April 24, 2018. *See* 56.1 Response, ¶ 73.

A reasonable jury could conclude that these adverse actions, which followed disability-related absences and resulted from supposed performance issues related to those absences, give rise to an inference that Petitioner's disability was the but-for cause for the adverse actions taken against him.

Mr. Davis took a significant amount of time off work from on or about May 31, 2016, to on or about September 22, 2016, because of episodic Crohn's attacks and a major life-saving surgery to remove scar tissue from his stomach. *See* 56.1 Response, ¶¶ 27-34; *see also* 56.1 Response, ¶¶ 83-85. This time period played a key role in Employer's deliberate attempt to terminate Mr. Davis on September 29, 2016. The September 29, 2016, Final Warning accused Petitioner of routinely failing to communicate his absences from work. *See* 56.1 Response, ¶¶ 25-26. But on May 27, 2016, Petitioner followed procedure by informing his director that he was going to be out of the office for a procedure to remove cancer cells. *See* 56.1 Response, ¶ 27-28. What was supposed to be a routine procedure turned into a Crohn's flare-up that resulted in an unexpected, prolonged hospital stay. *Id.* His wife subsequently communicated with HR regarding the hospitalization, as was customary when disability related incidents of this nature occurred. *Id.*; *see also* 56.1 Response, ¶¶ 86-89.

Respondents were clear that they based Petitioner's termination, in part, on communication issues relating to Petitioner's disability-related absences between May and September. *See* 56.1

Response, ¶ 73. The issuance of the Final Warning immediately upon his return to work was therefore not coincidental or innocent. Rather, the sequence of events could allow a reasonable trier of fact to conclude that the final warning letter and termination were caused by discrimination against Petitioner because of his disability and the need for disability-related leave. *See also* Genova v. City. of Nassau, No. 17CV4959SJFAYS, 2020 WL 813160, at *6 (E.D.N.Y. Feb. 19, 2020), aff'd, 851 F. App'x 241 (2d Cir. 2021) ("Often, the question of whether plaintiff meets the prima facie burden of demonstrating an inference of discrimination is indistinguishable from the question of whether the employer's actions served merely as a pretext for some disguised discriminatory animus towards the plaintiff.") (internal quotations omitted) (*citing* Chioke v. Dep't. of Educ. of the City of New York, No. 15-1845, 2018 WL 3118268, at *7 (E.D.N.Y. June 25, 2018.)

In addition, Petitioner was denied annual incentive pay for 2016 and 2017. *See* 56.1 Response, ¶ 94. Annual incentive pay is awarded to professional engineers at NYPA who receive a rating of "Partially Meets Expectations" or better for annual performance reviews. *Id.* In January of 2017, Petitioner received his 2016 negative performance review after taking several months of disability-related absences due to an acute worsening of his Crohn's. *Id.* at ¶¶ 14-15. For that year, he received an overall rating of "Below Expectations." *Id.* As a consequence, he suffered an adverse work event in the form of his loss of the annual incentive pay awarded to professional engineers that receive a rating of "Partially Achieves Expectations" or better. *Id.* at ¶ 94. Petitioner likewise failed to get annual incentive pay for 2017, since Respondents were trying to terminate him due to his disability and the leave he needed to take. While a negative performance review is typically insufficient to constitute an adverse work event, the fact that Petitioner's negative performance reviews were accompanied by an undeserved loss of material benefits gives rise to the

inference that his loss of the annual incentive pay for 2016 and 2017 constitutes an adverse employment action. *See generally* Powell v. Dep't. of Educ. of City of New York, No. 14CV2363PKCSLT, 2018 WL 4185702, at *7 (E.D.N.Y. Aug. 30, 2018) (quoting *Jantz v. Emblem Health*, No. 10-CV-6076 (PKC), 2012 WL 370297, at *9 (S.D.N.Y. Feb. 6, 2012) ("[N]egative evaluations without accompanying adverse results are not sufficient to constitute adverse employment actions.")

CONCLUSION

Petitioner has proffered numerous pitfalls in the proceedings held by the lower courts. In conjunction with flaws in the proceedings pointed to by the courts themselves through their own questioning, specifically Petitioner must be appointed an attorney, this is reason enough to reinstate petitioner's case for the sake of justice.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October 10, 2023

Edward F. Davis