

23-5872
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
AUG 21 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Aubrey J. El, pro se
— PETITIONER
(Your Name)

United States Dept. of VS.
Commerce, Honorable Gina
Raimondo, Secretary
— RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

US Court of Appeals for the Fourth Circuit, US District Court for the Eastern District of Virginia, Norfolk Division

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____
_____, or

a copy of the order of appointment is appended.


(Signature)

RECEIVED
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SUPREME COURT, U.S.

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Aubrey J. El, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0.0	\$ N/A	\$ 0.00	\$ N/A
Self-employment	\$ 0.00	\$ N/A	\$ N/A	\$ N/A
Income from real property (such as rental income)	\$ 0.00	\$ N/A	\$ N/A	\$ N/A
Interest and dividends	\$ 0.00	\$ N/A	\$ N/A	\$ N/A
Gifts	\$ 0.00	\$ N/A	\$ N/A	\$ N/A
Alimony	\$ 0.00	\$ N/A	\$ N/A	\$ N/A
Child Support	\$ 0.00	\$ N/A	\$ 0.00	\$ N/A
Retirement (such as social security, pensions, annuities, insurance)	\$ 1,122.00	\$ N/A	\$ 1,122.00	\$ N/A
Disability (such as social security, insurance payments)	\$ 0.00	\$ N/A	\$ 0.00	\$ N/A
Unemployment payments	\$ 0.00	\$ N/A	\$ 0.00	\$ N/A
Public-assistance (such as welfare)	\$ 240.00	\$ N/A	\$ 240.00	\$ N/A
Other (specify): <u>SSVF Vets Program</u>	\$ 526.50	\$ N/A	\$ 526.50	\$ N/A
Total monthly income:	\$ 1888.50	\$ N/A	\$ 1888.50	\$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A

4. How much cash do you and your spouse have? \$ 40.00

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Checking	\$ 10.00	\$ N/A
Savings	\$ 50.00	\$ N/A
N/A	\$ N/A	\$ N/A

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home N/A
Value _____

Other real estate N/A
Value _____

Motor Vehicle #1 2002 Chrysler Town
Year, make & model & Country
Value \$250.00

Motor Vehicle #2 N/A
Year, make & model _____
Value N/A

Other assets N/A
Description _____
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	\$ N/A	\$ N/A
N/A	\$ N/A	\$ N/A
N/A	\$ N/A	\$ N/A

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 1,083.00	N/A \$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No N/A		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ N/A	\$ N/A
Home maintenance (repairs and upkeep)	\$ N/A	\$ N/A
Food	\$ 340.00	\$ N/A
Clothing	\$ 20.00	\$ N/A
Laundry and dry-cleaning	\$ 20.00	\$ N/A
Medical and dental expenses	\$ N/A	\$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 40.00	\$ N/A
Recreation, entertainment, newspapers, magazines, etc.	\$ 60.99	\$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 5.92/mo	\$ N/A
Life	\$ N/A	\$ N/A
Health	\$ N/A	\$ N/A
Motor Vehicle	\$ 90.60/mo	\$ N/A
Other: _____ N/A	\$ N/A	\$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
City of Richmond Property (specify): _____ Tax	\$ 3.75/mo	\$ N/A
Installment payments		
Motor Vehicle	\$ N/A	\$ N/A
Credit card(s)	\$ N/A	\$ N/A
Department store(s)	\$ N/A	\$ N/A
Other: _____ DMV Reinstatement fee	\$ 25.00	\$ N/A
Alimony, maintenance, and support paid to others	\$ N/A	\$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ N/A	\$ N/A
Other (specify): _____ N/A	\$ N/A	\$ N/A
Total monthly expenses:	\$ 226.26	\$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

I really don't know how to answer this question because while I am generally optimistic, I am severely disappointed in havin to pursue the current action given the Respondent's lack of a legitimate defense and the failing of the District Court and the Fourth Circuit.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____ N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? _____ N/A

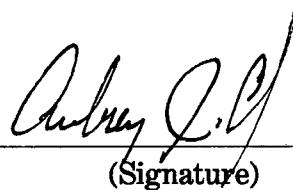
If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

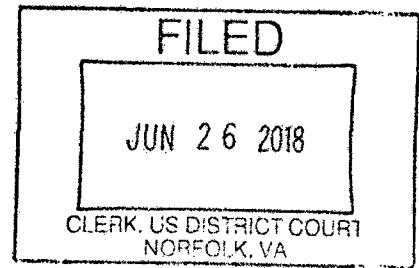
I cannot pay the cost of this case because of the discrimination and retaliation I have suffered from the Respondent in this case United States Department of Commerce. Further, I have aged from one form of discrimination, namely race to another, age.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 10/20, 2023


(Signature)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division



AUBREY J. EL,

Plaintiff,

v.

ACTION NO. 2:18cv190

**THE UNITED STATES
DEPARTMENT OF COMMERCE,
Honorable Wilbur Ross, Secretary,**

Defendant.

ORDER

This matter is before the Court on the following two motions filed by *pro se* Plaintiff Aubrey J. El (“Plaintiff”): (i) Plaintiff’s second Long Form IFP Application (“Second Long Form IFP Application”), and (ii) Plaintiff’s request for e-noticing registration (“E-Noticing Request”). For the reasons set forth below, Plaintiff’s motions are **GRANTED**.

I. IFP Application

On April 9, 2018, Plaintiff filed an “Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)” (“Short Form IFP Application”), along with a proposed Complaint and a proposed E-Noticing Request. Short Form IFP Appl., ECF No. 1. Upon review of Plaintiff’s Short Form IFP Application, the Court determined that it did “not contain sufficient information to allow the Court to determine whether Plaintiff qualifies for IFP status.” Order at 1, ECF No. 2. In an Order dated April 11, 2018, the Court (i) denied Plaintiff’s Short Form IFP Application, (ii) directed Plaintiff to either pay the requisite filing fees or submit a Long Form IFP Application to the Court within thirty days, and (iii) deferred ruling on Plaintiff’s proposed E-Noticing Request pending the resolution of the fee payment issue. *Id.* at 1-2.

On April 24, 2018, Plaintiff filed a Long Form IFP Application. Long Form IFP Appl., ECF No. 3. Upon review of Plaintiff's submission, the Court determined that "questions remain[ed] regarding Plaintiff's financial situation." Order at 1, ECF No. 4. In an Order dated May 3, 2018, the Court (i) highlighted its remaining questions regarding Plaintiff's financial situation, (ii) denied Plaintiff's Long Form IFP Application, (iii) directed Plaintiff to either pay the requisite filing fees or submit another Long Form IFP Application to the Court within thirty days, and (iv) continued to defer ruling on Plaintiff's proposed E-Noticing Request pending the resolution of the fee payment issue. *Id.* at 1-2.

On June 4, 2018, Plaintiff filed a second Long Form IFP Application ("Second Long Form IFP Application"). Second Long Form IFP Appl., ECF No. 5. Based upon the information contained in Plaintiff's Second Long Form IFP Application, the Court is satisfied that Plaintiff qualifies for IFP status. Accordingly, the Court **GRANTS** Plaintiff's Second Long Form IFP Application, ECF No. 5, and the Clerk is **DIRECTED** to file Plaintiff's Complaint and E-Noticing Request.

The Clerk is **FURTHER DIRECTED** to (i) issue summons in this action, (ii) prepare three packets containing a summons, a copy of the Complaint, and this Order, and (iii) deliver these packets to the United States Marshal. The United States Marshal is **DIRECTED** to serve the summons, Complaint, and this Order to the Attorney General of the United States, the United States Attorney, and the United States Department of Commerce, in accordance with Federal Rule of Civil Procedure 4(i)(2). If the United States Marshal elects to use registered mail to effect service, the United States Marshal is **REQUESTED** to use registered mail, return receipt requested. The copy for the United States Attorney may be delivered to Kent Porter at the Norfolk, Virginia, Office of the United States Attorney.

II. E-Noticing Request

With the fee issue resolved, the Court will address Plaintiff's E-Noticing Request. In his E-Noticing Request, Plaintiff: (i) provided the requisite contact information, (ii) consented to receiving notice of filings pursuant to Rule 5(b) of the Federal Rules of Civil Procedure via the Court's electronic filing system; (iii) waived service and notice by first class mail of all electronically filed documents to include orders and judgments; (iv) agreed to be responsible for immediately notifying the Court in writing of any change of e-mail address; and (v) agreed to register for a PACER account. Because Plaintiff complied with all of the Court's E-Noticing registration requirements, Plaintiff's E-Noticing Request is **GRANTED**. Plaintiff is REMINDED that, as stated in the "Important Notice" section of the Court's E-Noticing Registration Request packet, electronic service registration has the following effects:

1. You will no longer receive documents in the mail.
2. If you do not view and download your documents during the "free look" and within 15 days of when the Court sends the e-mail notice, you will be charged for looking at the document(s).
3. This service does *not* allow you to electronically file your documents.
4. It will be your duty to regularly review the docket sheet of your case.
5. You will still be required to serve paper documents on opposing counsel or pro se litigants by mail unless the parties agree to accept service by e-mail in lieu of a paper document or the document is one that is exempt from electronic case filing such as a sealed document.
6. You will be responsible for immediately notifying the Court in writing of any change of your e-mail address.

In addition to the instructions listed above, the Clerk is **DIRECTED** to add Plaintiff's e-mail address to this case and docket this Order in the Court's electronic filing system. The

electronic filing system will automatically generate an e-mail message containing a Notice of Electronic Filing (NEF), with a hyperlink to this Order, that will be sent to the e-mail addresses of all individuals who have registered to receive electronic filings in this case, including Plaintiff.

IT IS SO ORDERED.

Norfolk, Virginia

June 26 , 2018


Robert G. Douma
Senior United States District Judge

23-5872

No. 23-_____

ORIGINAL

FILED
AUG 21 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Aubrey J. El, *pro se*
Petitioner

v.

**United States Department of Commerce,
The Honorable Gina Raimondo, *Secretary***
Respondent

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

PETITION FOR WRIT OF CERTIORARI

AUBREY J. EL, *pro se*
P.O Box 7939
Richmond, Virginia 23223
Telephone: (804) 664-4052
Email: aubrey_el@yahoo.com

QUESTIONS PRESENTED

Federal employees right to be free from workplace discrimination and retaliation, are protected by Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2 et seq, including 42 U.S.C. § 2000e-16.

QUESTION:

Does the plain language of Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2 et seq., including 42 U.S.C. § 2000e-16(a), require successful employment discrimination plaintiffs, including those in the federal-sector, to plead and prove the existence of comparators or replacement outside of plaintiffs' protected class as an element of discrimination claims?

QUESTION:

Does the language plain language of 42 U.S.C. § 2000e-16(a) provide the same protections to federal-sector race and gender discrimination and retaliation plaintiffs as age?

QUESTION:

Does the plain language of 42 U.S.C. § 2000e-16(e) holding "...any agency or official of its or his primary responsibility to assure nondiscrimination in employment..." make directors, managers, supervisors and other officials

responsible in their official capacities to prevent discrimination when they are made aware of such discrimination?

QUESTION:

Are federal agency adverse personnel actions, taken against federal-sector employees, void for failure to comply with the mandatory procedures and requirements of 5 C.F.R. § 250.101, Office of Personnel Management (OPM) "Guide to Processing Personnel Actions, and federal agency personnel regulation, including lack of cause and notice requirements?

LIST OF PARTIES

All parties to the instant case are shown in the caption:
Petitioner, Aubrey J. El; the Respondent, is the United States
Department of Commerce, the Honorable Gina Raimondo,
Secretary of the United States Department of Commerce
(USDOC).

RELATED CASES

The instant case began in the United States District Court for the Eastern District of Virginia as Aubrey J. El v. United States Department of Commerce, the Honorable Wilbur Ross, Secretary; Case No. 218cv190-RGD-DEM. The style of the case was amended to reflect the appointment of the Honorable Gina Raimondo, as Secretary of the Department of Commerce.

Appellant Aubrey El made an interlocutory appeal, in the instant case, to the United States Court of Appeals for the Fourth Circuit from the District Court's denial of Appellant's motion for preliminary injunction as Case No. 21-1431.

The instant Petition for Certiorari is from the *per curiam* "Opinion" of United States Court of Appeals for the Fourth Circuit as Case No. 22-1775, affirming the District Court's decisions.

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OPINIONS BELOW

This Petition is a result of the Court of Appeals for the Fourth Circuit’s unpublished *per curiam* “Opinion,” entered on March 20, 2023, is set out in Appendix A (App A). The Fourth Circuit’s “Opinion” affirmed the District Court’s “Order” entered on November 7, 2019 (App B); “Dismissal Order” entered on February 8, 2022 (App C); and “Final Order” entered June 27, 2022 (App D). The Fourth Circuit’s unpublished Order denying Appellant’s petition for rehearing and rehearing *en banc* was entered on May 22, 2023, is set out in Appendix E.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this petition, pursuant to 28 U.S.C. § 1254, from the May 22, 2023 decision of the United States Court of Appeals for the Fourth Circuit, denying Petitioner’s timely petition for rehearing and rehearing *en banc*. Petitioner’s timely petition for rehearing was from the Fourth Circuit’s March 20, 2023 *per curiam* “Opinion” affirming the decisions of United States District Court for the Eastern District of Virginia, (Norfolk Division). The Fourth Circuit affirmed the District Court’s “Final Order,” entered on June 27, 2022; “Dismissal Order” (Rule 56(c) summary judgment), entered on February 8, 2022, and “Order” (Rule 12(b)(6) dismissal), entered on November 7, 2019.

STATUTORY & REGULATORY PROVISIONS OF THIS CASE

Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2(a) et seq. states in pertinent part:

“It shall be an unlawful employment practice for an employer-

(1) 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..."

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a), makes retaliation an unlawful employment practice, states in pertinent part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...to discriminate against any individual...because he has opposed any practice made an unlawful employment...because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. § 2000e-16(a) states 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."

42 U.S.C. § 2000e-16(e) states in pertinent part:

"Nothing contained in this Act shall relieve any Government agency or official of its of his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal opportunity in the Federal Government.

The Age Discrimination in Employment Act of 1967, 42 U.S.C. § 633a(a), states in pertinent part:

"All personnel actions affecting employees or applicants for employment who are at least 40 years of age...in executive branch agencies as defined in section 105 of title 5...shall be made free from any discrimination based on age."

The authority for agency personnel actions including Respondent USDOC is conferred by Office of Personnel Management regulations authorized by the 5 C.F.R. § 250.101 (App I2) including authority of the “Guide to Processing Personnel Actions” (App I5-44)

The Department of Commerce Travel Card Handbook (App I45) is the controlling authority for all USDOC employees for administration and use of government travel cards. The NOAA Travel Regulations Travel Monitor Guide (App I, I69) is the authority for official travel by NOAA employees, defines travel card misuse as use of a government travel card when not in an official travel status or making purchase not authorized under the travel card regulations.

PETITION FOR WRIT OF CERTIORARI

Petitioner Aubrey El, respectfully petitions this Honorable Court for a writ of certiorari to determine whether the plain language of Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2 et seq., require successful employment discrimination plaintiffs to plead and prove the existence of comparators or replacement outside of the protected class, when there is other evidence of discrimination pleaded and placed into the record.

Petitioner is seeking review from the United States Court of Appeals for the Fourth Circuit’s *per curiam* “Opinion” affirming, without explanation, the decisions of the United States District Court for the Eastern District of Virginia. The District Court’s dispositive and other decisions contradict the extant precedential decisions of this Court and the courts of appeals including the Fourth Circuit by requiring employment discrimination plaintiffs to plead and prove comparators or replacement outside of the protected class when other facts constituting elements of discrimination are pleaded, and that evidence of discrimination placed in the record.

The Court should grant this petition because this case poses fundamental questions important to all employment discrimination plaintiffs including those in the federal-sector. This case provides the Court with the opportunity to finally resolve this conflict among federal circuit courts, who are requiring successful employment discrimination plaintiffs to plead and prove evidence of comparators or replacement from outside of the protected class, even when other evidence of discrimination is pleaded and placed in the record. This case also presents the Court with an opportunity to apply its holding in *Babb v. Wilkie*, 589 U.S. __, 140 S.Ct. 1168, 206 L. Ed. 2d 432 (2020) that federal-sector employees have expanded protections against discrimination by federal agencies, as mandated by the plain language of 42 U.S.C. § 2000e-16(a); to include race and gender discrimination, as well as age.

Finally, this case underscores the application of the Court’s holding in *Babb* relating to ‘but for’ causation in federal-sector race, gender and age employment discrimination. “But for” causation applies because Respondent USDOC lacked any legal justification or authority for the discriminatory and fraudulent act of terminating Petitioner El by sending the unauthorized “Memorandum of Termination” (App H1). Moreover, when authorization was belatedly sought two months later, it was clearly discriminatory and retaliatory, because of Petition’s protected status and EEO complaint. Respondent had no legal or evidentiary justification for its adverse personnel action against Petitioner El under federal law.¹

Petitioner El seeks this Court’s intervention as the Fourth Circuit’s March 20, 2023, *per curiam* “Opinion” (App A), nor the record provides any explanation justifying its affirmation of the District Court’s erroneous decisions. Despite Petitioner’s “Supplemental Informal Opening

¹ 5 C.F.R. § 250.101

Brief of Appellant" specifying the District Court's errors of law and fact before the Fourth Circuit, Petitioner is unable to discern any legal reasoning supporting the Fourth Circuit's affirmation. The Fourth Circuit's failure to explain its Order has left Petitioner with the firm conviction the Fourth Circuit has abandoned its supervisory role to ensure the District Court applied the appropriate legal standards when considering motions pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(6) (motion to dismiss for failure to state a claim), Rule 56(c) (motion for summary judgment) and Rule 59(e) (motion to reconsider). The Fourth Circuit's Order have resulted in sustaining decisions by the District Court that are in direct conflict with established precedential ruling of this Court and the various federal courts of appeals, including the Fourth Circuit.

This case raises additional pertinent questions concerning the validity of federal agency personnel actions that are not only illegal for being discriminatory, but fraudulent and violate federal law by lacking evidence, justification and procedural due process.

STATEMENT OF THE CASE

This case raises questions of whether or not successful discrimination and retaliation plaintiffs are required to plead and prove evidence of comparators or replacement outside of their protected class.

The evidence in this case is the Respondent USDOC violated the Federal Travel Regulations, the Department of Commerce Travel Card Handbook (App I), the Code of Federal Regulations (App I), and the OPM "Guide for Processing Personnel Actions" (App I) to discriminate and retaliate against Petitioner Aubrey El.

This case presents question of fundamental importance to the rights of all employment discrimination and retaliation plaintiffs, especially federal-sector, in vindicating their rights to be

free of discrimination in the workplace, in particular those in the federal-sector. This case presents this Court with an opportunity to finally address the fundamental issue in employment discrimination jurisprudence by deciding if Title VII of the Civil Rights Act of 1964 (as amended) requires successful employment discrimination plaintiffs to plead and prove evidence of comparators or evidence of replacement outside of their protected classes, in particular as applied to the federal-sector.

Another question posed by this case is whether circumstantial evidence standing alone is sufficient to prove employment discrimination and retaliation whether applied using the *McDonnell Douglas* burden-shifting analysis or not. Also, this case poses the question: what constitutes sufficient evidence of legitimate nondiscriminatory and nonretaliatory explanations and when employment discrimination defendants' explanations are insufficient as a matter of law?

This case necessitates the intervention of this Court to correct misapplication of the Federal Rule of Civil Procedure, specifically Rule 12(b)(6), Rule 56(c), Rule 59(e) and the Federal Rules of Appellate Procedure. The Court of Appeals for the Fourth Circuit's unexplained *per curiam* affirmation of the District Court's clear errors of law and fact, is perplexing given the detailed treatment of those errors in El's "Supplemental Informal Opening Brief of Appellant."² El's brief meticulously presented evidence from the record clearly demonstrating the District Court's errors of law. El's analysis making it all the more confounding that the Court of Appeals failed to address or provide any explanation for its affirmation. Petitioner requested the Fourth Circuit's opinion,

² Fourth Circuit Record, ECF No. 9.

in his “Appellant’s Petition for Rehearing & Rehearing *En Banc*,” (App G) in an effort to understand the Fourth Circuit’s reasoning.³

The District Court, in its November 7, 2019 “Order” (App B) dismissed nine of ten counts of “Plaintiff’s Amended Verified Complaint” (App F) by departing from the standard of Rule 12(b)(6) plausibility analysis. The District Court did not presume the truth of relevant facts pleaded in Petitioner’s “Plaintiff’s Amended Verified Complaint,” instead the accepted Respondent’s erroneous and implausible assertions made in Respondent’s “Defendant’s Motion to Dismiss.” The District Court didn’t conduct any recognizable plausibility analysis of Petitioner’s Complaint under Rule 12(b)(6), but simply accepted Respondent’s erroneous assertions of the insufficiency of Petitioner’s claims of discrimination due to failure to plead comparators. The District Court erroneously accepted Respondent’s assertion El’s claims of retaliation failed to plead causation.

The Fourth Circuit’s unexplained affirmation of the District Court’s erroneous rulings sanctioned decisions reached by errors of law in applying Rule 12(b)(6) and Rule 56(c) FRCP and abuse of discretion in applying Rule 59(e). The Fourth Circuit’s affirmation, and the District Court’s decisions are contrary to this Court’s established precedents, those of the Fourth Circuit and other courts of appeals. The Fourth Circuit further compounded the need for this Court’s intervention, by its failure to consider the application to this case to the Court’s recent holdings in *Babb v. Wilkie*, 589 U.S. __, 140 S.Ct. 1168, 206 L.Ed.2d 432 (2020) and *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014)

³ ‘Appellant’s Petition for Rehearing & Rehearing *En Banc*,’ App G, Page 3 & 17.

Petitioner Aubrey El is a man of African descent⁴ who was over fifty years old at all times relevant this case. On December 12, 2013, the United States Department of Commerce (USDOC), and its employee, LCDR Jennifer Pralgo (El's supervisor) sent Petitioner, a "Memorandum of Termination" (Memorandum), dated December 11, 2013 (App H). The Memorandum of Termination was not authorized by any previous "Request for Personnel Action" (SF-52).⁵ The Memorandum informed El his employment with USDOC was being terminated for misuse of his government travel card, effective December 13, 2013. The Memorandum did not contain any facts or other evidence supporting the accusation of travel card misuse or provide El with any opportunity to respond to the accusation.

Petitioner Aubrey J. El's "Plaintiff's Amended Verified Complaint" (Complaint, App F) plausibly alleges claims of employment discrimination, culminating with El being sent the Respondent's "Memorandum of Termination" on December 12, 2013. Petitioner's Complaint also alleges discriminatory terms of employment and retaliation before and after December 12, 2013. Respondent United States Department of Commerce (USDOC) and its employee LCDR Jennifer Pralgo sent El the unauthorized and fraudulent "Memorandum of Termination" dated December 11, 2013 (App H, Page 1), falsely accusing El of travel card misuse as the reason for his discriminatory termination. Respondent USDOC not only failed to produce any evidence El misused his government travel card in the Memorandum, but throughout the Agency and EEOC Office of Federal Operations administrative investigations. Respondent never produce any evidence of misconduct attributable to El during the District Court proceeding. The District

⁴ African American or Black.

⁵ See 5 C.F.R. § 250.101 and OPM "Guide to Processing Personnel Actions," and SF-52, App I.

Court's dispositive findings and conclusions are not supported by law or evidence in the record of this case.⁶ Furthermore, Respondent USDOC and its employees committed multiple acts of intentional misconduct in their efforts to discriminate against Petitioner El. These acts, in addition to employment discrimination and retaliation, include false accusations of misconduct against El, intentional falsification of official documents, fraudulent submission of travel claim documents, and obstruction of an official federal investigation.

FACTUAL BACKGROUND

Petitioner Aubrey El, a veteran from the United States Coast Guard, commenced his preference eligible excepted service appointment with the National Oceanic and Atmospheric Administration (a bureau of Respondent USDOC), on September 9, 2013. El assumed the position of General Vessel Assistant (GVA).⁷

El successfully participated in Respondent's new employee orientation (NEO) from September 9, 2013 to September 20, 2013 (App I). Respondent's NEO included travel card training that included the Federal Travel Regulations, the Department of Commerce Travel Card Handbook (App I) and the NOAA Travel Regulations (excerpt App I) as instruction materials. El successfully completed travel card training on September 10, 2013, and NEO on September 20, 2013. Following the conclusion of NEO, El received his first temporary duty (TDY) assignment to the NOAA Ship *Ferdinand Hassler*, New Castle, NH. USDOC issued travel orders (App J) to El and a document entitled "Assignment Letter," which provided additional information, including the contact information for Lt. Samuel Greenaway the executive officer of the *Hassler*. El

⁶ See *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), standing for the proposition the factual findings of district courts are "clearly erroneous" if those findings are "implausible" or contradicted by objective evidence in the record.

⁷ "Plaintiff's Amended Verified Complaint," App F.

contacted Lt. Greenaway in advance to obtain reporting information. Lt. Greenaway directed El to check in to the Americas Best Inn, Portsmouth, NH, on September 23, 2013.

On the evening of September 23, 2013, El arrived at the Americas Best Inn. Finding no reservation under his name or NOAA, El used his government travel card, which was mandatory for official travel-related expenses (App I, Page I-52; Travel Card Handbook, Chapter 3), to check in and secure a single occupancy hotel room. The following morning, El reported to the *Hassler* and met with Lt. Greenaway. After discussing El's arrival, the previous evening, Lt. Greenaway informed El that he would be sharing a hotel room with another NOAA employee temporarily assigned to the ship, Reese Fullerton. Inquiring about the room sharing arrangement, El asked if it was mandatory for El to share the hotel room with Fullerton. Lt. Greenaway responded that sharing the room was not mandatory, but the ship would not cover the room cost otherwise. Accepting Greenaway's conditions, El decided to retain the single occupancy hotel room for the duration of his TDY assignment. Subsequently during his TDY assignment, El learned the two other NOAA employees temporarily assigned to the *Hassler*, Robert Wilson and Reese Fullerton, were not required to share a hotel room. Furthermore, Fullerton informed El that before his arrival, Lt. Greenaway had asked Fullerton and Wilson if they would mind sharing a hotel room with El. Curiously, Greenaway never addressed a similar inquiry to El.

El's TDY assignment to the *Hassler* ended on September 30, 2013, and Respondent USDOC issued travel orders for El to report to his next TDY assignment aboard the NOAA Ship *Okeanos Explorer* (App J). El would remain in a TDY status until November 13, 2013 (App J).

On December 12, 2013 the United States Department of Commerce (USDOC), and its employee, LCDR Jennifer Pralgo (Petitioner El's supervisor) sent to El, at his residence, a

Memorandum of Termination (Memorandum),⁸ dated December 11, 2013. The Memorandum informed El his employment with USDOC was being terminated for misuse of his government travel card, effective December 13, 2013. The Memorandum did not contain any evidence supporting the accusation of travel card misuse or provide El with any opportunity to respond to the accusation.

Immediately after receiving LCDR Pralgo's Memorandum, Aubrey El promptly attempted to contact LCDR Pralgo, by telephone and email, for clarification as to the factual basis for the accusation of travel card misuse. Despite El's earnest efforts, LCDR Pralgo never responded to El's inquiries, leaving him without any explanation or opportunity to address the serious allegation of travel card misuse levied against him.

While waiting for a response from LCDR Pralgo, El closely scrutinized all documents El had received from USDOC during travel card training, in an effort to discern the reasons behind LCDR Pralgo's Memorandum. After reviewing USDOC's travel and travel card use documents without finding any indication supporting the accusation in LCDR Pralgo's Memorandum, El attempted to contact Ms. Lara Gaston, Employee and Labor Relations Specialist, cited in the Memorandum, for additional information. However, Ms. Gaston's response to El's inquiry via email failed to provide any information pertaining to any evidence supporting the travel card misuse accusation. In fact, Ms. Gaston's response seemed to be intentionally, nonresponsive.

Petitioner El, after failing to receive any response from his supervisor LCDR Pralgo, and Lara Gaston's evasive response to El's inquiry about the charge of travel card misuse, El concluded that the accusation was likely false and he was facing a discriminatory termination. Recognizing

⁸ Appendix "H." 'Memorandum of Termination,' dated December 11, 2013.

the likely significance or the cited events, El timely contacted the NOAA Civil Rights Office (NCRO) for assistance on December 19, 2013, in compliance with mandatory procedures. This marking the initiation of the NCRO's informal administrative investigation. The NCRO's informal investigation ended on January 9, 2014 followed by El's January 13, 2014 request for a formal investigation to the Department of Commerce Office of Civil Rights. El's formal investigation request was accepted on January 31, 2014. The formal investigation was completed in April 2014 and the EEO investigation continued before the EEOC Office of Federal Operations on or about August 8, 2014. After completion of EEO investigation before the EEOC Office of Federal Operations, the Agency Final Order was issued on or about January 10, 2018.

PROCEEDINGS BEFORE THE DISTRICT COURT

Petitioner El, *pro se*, timely filed his claims for discrimination and retaliation against Respondent USDOC on April 9, 2018, as case number 2:18-cv-00190-RGD-DEM, in the United States District Court for the Eastern District of Virginia (Norfolk Division). El's claims were filed after issuance of the final order of the Equal Employment Opportunity Commission, Office of Federal Operations on January 10, 2018.

The District Court had jurisdiction to hear El's employment discrimination and retaliation claims conferred by statutes as a federal question, civil rights violations, pursuant to 28 U.S.C. §§ 1331, 1343 and as federal employment discrimination claims pursuant to Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2 et seq.

Petitioner El filed his "Plaintiff's Amended Verified Complaint" (Complaint, Appendix F (App F)), by Order of the District Court on March 13, 2019. On November 7, 2019, the District Court entered its Rule 12(b)(6) dismissal "Order" (App B) on Respondent's motion, dismissing

nine of ten counts of El’s Complaint. Despite Petitioner’s “Plaintiff’s Opposition to Defendant’s Motion to Dismiss” (ECF No. 40), Count VIII was the sole count that remained. The District Court dismissed Petitioner’s claims of discrimination because El did not allege evidence of comparators and other reasons irrelevant to the contents of El’s Complaint. The District Court “Order” dismissed El’s claims of retaliation for failure to allege causation. See App B.

Petitioner objected to the District Court’s “Order” in his “Plaintiff’s Motion to Amend the Order of this Court entered on November 7, 2019...” (ECF No. 60).⁹ Petitioner’s motion to amend objected to the District Court dismissing nine counts of Petitioner El’s Complaint without accepting as true the factual allegations of El’s Complaint, including allegations evidence of discrimination discovered during the administrative EEO investigations. The District Court made the erroneous finding El was required to plead comparators, other fact-finding inconsistent with El’s Complaint and without conducting any recognizable Rule 12(b)(6) plausibility analysis.

The District Court erroneously accepted Respondent’s conclusions and misrepresentations regarding the insufficiency of El’s Complaint. The District Court’s legal errors included accepting Respondent’s unsupported assertions that simply stated conclusions of implausibility of Petitioner’s Complaint without any plausibility analysis based on the plain language of Title VII, without accepting as true, and construing the factual allegations of Petitioner’s Complaint in totality.

Petitioner’s Motion to Amend (ECF No. 60) requested reinstatement of the dismissed counts of El’s Complaint. The District Court denied El’s motion in its Order (ECF No. 64), entered

⁹ Proposed Motion to Amend ECF No. 49-1, filed on December 6, 2019, then filed as ECF No. 60 by Order of the District Court entered on April 14, 2020 (ECF No. 58).

on June 26, 2020. Petitioner filed his “Plaintiff’s Statement of Objections,” as ECF No. 70, on October 5, 2020.

The District Court, after discovery, entered its “Dismissal Order” on February 8, 2022 (App C), dismissing Petitioner’s remaining Count VIII on Respondent’s “Defendant’s Motion for Summary Judgment” (ECF No. 100). Petitioner filed on March 8, 2022, his “Plaintiff’s Motion for Reconsideration Pursuant to Rule 59(e) and Statement of Objections to the District Court’s Order of Dismissal Entered on February 8, 2022” (ECF No. 124). El amended his Motion for Reconsideration that was filed on May 18, 2022. Petitioner’s amended Motion for Reconsideration (ECF No. 132) moved the District Court to vacate and amend its “Dismissal Order” of February 8, 2022. El’s Motion requested the District Court to issue an order reopening the case and substitute his proposed “Plaintiff’s Amended Complaint to Conform to the Evidence and Statement of Undisputed Facts” (ECF No. 133). Petitioner’s Motion for Reconsideration (ECF No. 132) objected to the District Court’s errors of law and the District Court’s fact-finding for lack of support in the record. The District Court’s errors of law included, among others, those committed in the District Court’s November 7, 2019 Rule 12(b)(6) dismissal “Order,” (App B) and its “Dismissal Order” entered on February 8, 2022 (App C) including arbitrary fact-finding that had no support in the record. The District Court entered its “Final Order” on June 22, 2022, denying El’s Motion for Reconsideration.

El’s evidence of employment discrimination and retaliation are Respondent’s admissions, responses to interrogatories, deposition testimony of Respondent’s employees and various official document attached to this Petition. This evidence was alleged in El’s “Plaintiff’s Amended

Verified Complaint”¹⁰ and “Plaintiff’s Opposition to Defendant’s Motion to Dismiss” (ECF No. 40). Petitioner presented this evidence to the District Court in “Plaintiff’s Motion for Summary Judgment” (ECF No. 111) and “Plaintiff’s Amended Verified Complaint to Conform to the Evidence and Statement of Undisputed Facts” (ECF No. 133). The District Court dismissed Petitioner’s remaining Count VIII by its February 8, 2022 summary judgment “Dismissal Order” (App C).

Petitioner El submitted to the District Court, on March 8, 2022, his original “Plaintiff’s Motion for Reconsideration Pursuant to Rule 59(e) and Statement of Objections...” (ECF No. 1) which was amended on May 18, 2022 as ECF No. 132. El’s Motion for Reconsideration included his proposed “Plaintiff’s Amended Verified Complaint to Conform to the Evidence and Statement of Facts” (ECF No. 133). The District Court denied El’s Motion for Reconsideration but allowed substitution of the proposed Complaint (ECF No. 133). It should be restated, most of the evidence verified in Petitioner’s proposed Complaint (ECF No. 133) was forecasted in “Plaintiff’s Amended Verified Complaint” (App F).

REASONS FOR GRANTING THE WRIT

A. This Court should find the plain language of Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-2 et seq., does not mandate the pleading and proof of comparators or replacement outside of the protected class, by successful employment discrimination plaintiffs, to infer discrimination.

Petitioner El respectfully submits this petition should be granted because numerous courts of appeals including the Fourth Circuit are affirming erroneous district court dismissals of valid

¹⁰ “Plaintiff’s Amended Verified Complaint,” App ‘F’

employment discrimination and retaliation claims. These erroneous decisions of district courts are imposing requirements on plaintiffs to plead and prove evidence of comparators, replacement outside of their protected classes or other elements irrelevant to particular claims of discrimination. This has resulted in unwarranted dismissal of plausible claims of discrimination and retaliation before the evidence can be placed in the record through discovery. In federal-sector cases where there may be already evidence of discrimination from the formal EEO investigation process, plaintiffs are not even given the opportunity to place their evidence in the record because the case doesn't conform to some stereotyped view of employment discrimination cases. The instant case is such a case in that Petitioner El's Complaint before the District Court alleged evidence of discrimination and retaliation probative of discrimination other than comparators or replacement outside of the protected class.

The circumstances of this case are the Fourth Circuit affirmed the District Court's dismissal (App B) of nine of ten counts of Petitioner's claims of discrimination and retaliation, because Petitioner did not plead comparators, among other reasons irrelevant to the plausibility of El's discrimination and retaliation claims. The District Court ignored the facts and evidence of discrimination and retaliation pleaded in Petitioner's "Plaintiff's Amended Verified Complaint" (App F) and the evidence subsequently discovered and placed into the record of the case by Petitioner's "Plaintiff's Motion for Summary Judgment" (ECF No. 111), "Plaintiff's Opposition to 'Defendant's Motion for Summary Judgment'" (ECF No. 107), "Plaintiff's Motion for Reconsideration Pursuant to Rule 59(e) and Statement of Objections to this Court's Order of Dismissal Entered on February 8, 2022" (ECF No. 132) including the proposed "Plaintiff's

Amended Verified Complaint to Conform to the Evidence and Statement of Undisputed Facts” (ECF No. 133).

This Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) held “each element of the *prima facie* case must have some logical connection to the inference of illegal discrimination raised” and introducing irrelevant factors into the *prima facie* case has no probative value. The Fourth Circuit in *Miles v. Dell, Inc.*, 429 F.3d 480 (4th Cir. 2005), a sex and pregnancy discrimination case, cited *O'Connor* in support of the proposition replacement outside of the plaintiff’s protected class, as a matter of law, is not required as an element of the *prima facie* case. Similarly, the Fourth Circuit’s decision in *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536 (4th Cir. 2003) held plaintiffs are not required to prove evidence of comparators if there is other circumstantial evidence of discrimination. The evidence in this case includes Respondent’s objectively false accusation of travel card misuse unsupported by any competent evidence, and Respondent’s lack of a legitimate nondiscriminatory explanation.

This Court has not precisely addressed whether successful employment discrimination plaintiffs must plead and prove evidence of comparators, but the Court’s holding in *O'Connor* suggests employment discrimination plaintiffs are only required to plead sufficient facts to plausibly allege the elements constituting employment discrimination relevant to their case. The Title VII statute provides both the cause of action and the elements of employment discrimination derived from the plain language of the statute as: a) the plaintiff is a member of a protected class, b) has suffered discriminatory termination, discriminatory conditions of employment or in the federal-sector, a discriminatory workplace related adverse personnel action, and c) the

circumstances raise an inference of discrimination. There is nothing in the plain language of Title VII, or the precedents of this Court, that require successful employment discrimination plaintiffs to plead and prove evidence of comparators or replacement outside of plaintiffs' protected class if those elements are irrelevant to plaintiffs' claims. Similarly, this Court's precedents prior to and after *O'Connor*, has consistently emphasized the *prima facie* case, as applied in the *McDonnell Douglas* burden-shifting frame work, is specific to the factual context of the particular employment discrimination case and was "...never intended to be rigid, mechanized, or ritualistic..."¹¹ The only evidentiary requirement of Title VII is proof by a preponderance of evidence the plaintiff suffered discrimination in hiring, firing, conditions of employment or adverse personnel actions because of or motivated by the plaintiff's protected status.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), a unanimous Supreme Court rejected the Second Circuit's imposition of pleading *prima facie* discrimination to survive Rule 12(b)(6) dismissal. In *Swierkiewicz* the Court of Appeals for the Second Circuit dismissed the *Swierkiewicz* Plaintiff's age and national origin complaint for failure to allege facts constituting *prima facie* discrimination. This Court rejected the Second Circuit, holding because the *prima facie* case is an evidentiary standard and not a pleading standard. The District Court in the instant case is requiring Petitioner to plead the existence of comparators to survive Rule 12(b)(6) dismissal when only one count of Petitioner's Complaint alleges the existence of specific comparators.¹² Petitioner's other claims of discrimination were based upon

¹¹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1(2002); *St.Marys Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) citing *Aikens; U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 n.13 (1973),

¹² Complaint, App F, Count II.

Respondent's discriminatory and fraudulent personnel actions based upon Respondent's false accusation of misconduct, discriminatory conditions of employment, and discriminatory and retaliatory personnel actions (Complaint App F). The Fourth Circuit's *per curiam* affirmation of the District Court's decisions is in direct opposition to this Court's unanimous decision in *Swierkiewicz v. Sorema N.A.*, *Id.*, that was cited with approval in *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Fourth Circuit has sustained the District Court requiring Petitioner El to plead a *prima facie* case of employment discrimination to survive Rule 12(b)(6) dismissal, and sustained the District Court transforming the *prima facie* case into a "rigid" pleading and evidentiary standard requiring El to plead comparators regardless of the relevance to any of the claims of discrimination and retaliation in his case. The District Court ignored Petitioner's non-comparator evidence of discrimination and retaliation pleaded in El's Complaint (App F).

B. The Fourth Circuit's *per curiam* affirmation of the District Court's Orders, entered on November 7, 2019, February 8, 2022 and June 22, 2022, does not provide any indication the Fourth Circuit conducted *de novo* review of the District Court's dispositive orders.

Petitioner's El respectfully requests this Court intervene in this case due the Fourth Circuit abrogating its supervisory duty over district courts by failing to conduct the appropriate standard of review of the District Court's erroneous dispositive and discretionary decisions. The District Court's decisions were reached using procedures in direct contradiction to established precedents set forth by this Court and various courts of appeals, including the Fourth Circuit itself. The Fourth Circuit's *per curiam* Opinion (App A) affirmed, without explanation, the District Court's clearly erroneous Rule 12(b)(6), Rule 56(c) dismissals and other decisions, manifestly abandoning its role

as a critical steward of judicial consistency, fairness and proper application of the law. The Fourth Circuit’s errors of law underscore the urgency for this Court to intervene in this case.

The District Court’s errors of law, in its November 7, 2019 “Order” dismissing nine of Petitioner El’s claims of discrimination and retaliation was reached by failing to conduct any recognizable Rule 12(b)(6) analysis. Instead, the District Court simply accepted Respondent’s wrong conclusions as to the insufficiency of El’s claims. The procedures used by the District Court are not only in contravention of precedential decisions of this Court and the Fourth Circuit,¹³ as applied in the Rule 12(b)(6) motion to dismiss, but are not permitted at all.

The District Court ignored the factual allegations in “Plaintiff’s Amended Verified Complaint” (App F) in determining if Petitioner’s claims were plausibly alleged. Instead, the District Court gave credence to Respondent’s implausible arguments in its “Defendant’s Motion to Dismiss (ECF No. 36) that El’s claims of discrimination and retaliation failed to state claims.

The District Court ignored the plausible claims of discrimination in Counts I, III, and VI against Respondent for discriminatory terms of employment including violations of federal travel regulations by intentionally delaying all of Petitioner’s travel claims reimbursements beyond the thirty days required by law without any justification; refusal to reimburse El’s authorized travel claims and expenses; all for discriminatory reasons. Count II plausibly alleges Petitioner’s claim of discrimination against Respondent by disparate treatment. Petitioner alleged Respondent violated its travel regulations by refusing to provide Petitioner with a paid single-occupancy hotel room, while providing the same accommodation for El’s two white male co-workers. Count IV and V alleges Respondent and its employees conspired to discriminate against El in the terms of

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employment in furtherance of a plan to subject El to a discriminatory personnel action by terminating El solely because of his protected status and without cause. Count VII and VIII plausibly alleges Petitioner's claims of retaliation against Respondent because of El's official complaints of discrimination. Count IX plausibly alleged Respondent and its employee Ms. Jamie Johnson's discriminatory obstruction of the formal EEO investigation as documented in the Report of Investigation. Count X plausibly alleges claims for discriminatory and retaliatory failure of duty by Respondent and its employees, the Directory of OMAO, Commanding Officer of MOP-A and the OMAO Employee relations manager Ms. Jamie Johnson, all who received El's January 27, 2014 letter complaining of employment discrimination.¹⁴

The District Court compounded its previous errors on summary judgment by accepting Respondent's misrepresentations and conclusions that lacked evidence relevant to Petitioner's remaining claim of retaliation @Count VIII. Respondent in its "Defendant's Motion for Summary Judgment" and memorandum (ECF No. 100 & 101) intentionally misrepresented to the District Court, Petitioner's claim @Count VIII was not an adverse personnel action because El's claim is Respondent refuse to settle El's claims of discrimination. Petitioner El clearly created an issue of material fact by providing evidence from the record proving false Respondent's assertion that El's remaining claim, @count VIII, was not an adverse personnel action.¹⁵ El alleged and provided evidence of Respondent's retaliatory personnel action by reinstating others similarly situated but refusing to reinstate El because of his EEO complaints.¹⁶ Petitioner's evidence is the District Court's own orders (App B), "Plaintiff's Amended Verified Complaint," (App F) and

¹⁴ See 42 U.S.C. § 2000e-16(e).

¹⁵ 'Plaintiff's Opposition to Defendant Motion for Summary Judgment,' ECF No. 107.

¹⁶ "Plaintiff's Amended Verified Complaint," Count VIII, App F.

Respondent's own "Memorandum in Support of Defendant's Motion to Dismiss."¹⁷ Petitioner El, in his "Supplemental Informal Opening Brief of Appellant" and his "Appellant's Petition for Rehearing & Rehearing *En Banc*" (App G) provided detailed analysis, evidence and argument for the errors of law committed by the District Court in dismissing most of El's claims in its "Order" entered on November 7, 2019 (App B); and dismissing El's remaining Count VIII in its "Dismissal Order," entered on February 8, 2022 (App C). Petitioner also directed the Fourth Circuit's attention to the record showing the District Court's abuse of discretion in denying El's Rule 59(e) motion for reconsideration and other motions in its "Final Order," entered on June 22, 2022 (App D). Petitioner's detailed analysis of the District Court's dispositive orders,¹⁸ provided evidence and argument for the District Court's errors of law and clear factual errors based on the precedents of this Court and the Fourth Circuit.

The Fourth Circuit's failure to perform its duty to apply *de novo* review to the District Court's errors of law are made clear from the face of the record, and the refusal of the Fourth Circuit to articulate any justification for its *per curiam* affirmance including lack of sufficient factual evidence in the record for the District Court's factual and legal conclusions.¹⁹

¹⁷ See 'Plaintiff's Opposition to Defendant's Motion for Summary Judgment,' ECF No. 107 and 'Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint,' ECF No. 36.

¹⁸ See 'Plaintiff's Motion for Reconsideration Pursuant to Rule 59(e)...,' ECF No. 132; 'Supplemental Informal Opening Brief of Appellant' and 'Appellant's Petition for Rehearing & Rehearing *En Banc*, App G.

¹⁹ *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

C. Respondent USDOC's Adverse Personnel Action against El was void *ab initio* due to lack of evidence, Respondent's Memorandum of Termination, dated December 11, 2013 was unauthorized, all violations of Office of Personnel Management, Respondent's own regulations and federal law, including lack of notice to Petitioner.

Respondent USDOC's was void *ab initio* because Respondent never had any justification for an adverse personnel action of any kind against Petitioner El, much less for accusing El of misusing his government travel card. Further, Respondent's adverse action against Petitioner violated federal law and did not comply with Respondent's own regulations

The evidence in the record of this case shows LCDR Jennifer Pralgo, a white woman, Respondent's employee and El's supervisor, sent El the Memorandum of Termination, dated December 11, 2013 (App H). The Memorandum contained no evidence sufficient to inform El of the basis for the accusation. Ultimately, Respondent never provided any evidence to support its accusation of travel card misuse against El, and therefore never provided any legitimate nondiscriminatory or nonretaliatory explanation for its.²⁰

Respondent USDOC, in addition to lacking evidence and justification for an adverse personnel action against Petitioner El, never served El with a valid notification of termination, as required by OPM regulations,²¹ because no "Request for Personnel Action" (SF-52) had been made on or before the effective date of the Memorandum of Termination.²² The reason Respondent had no cause to terminate El's employment is because there was never any evidence El committed any act of malfeasance, misfeasance or nonfeasance, at all, much less justifying his termination. Respondent lacking evidence justifying any adverse personnel action against El,

²⁰ "Plaintiff's Motion for Summary Judgment" (ECF No. 111).

²¹ "Guide for Processing Personnel Actions," App I.

²² "Request for Personnel Action," (SF-52) App H.

standing alone, is sufficient evidence of Respondent's discriminatory intent. But when considered in the context Respondent and its employees falsified official documents, false accusation of travel card misuse against El, and sending El a fraudulent and unauthorized memorandum of termination, Respondent's termination of El is void as well as discriminatory. Petitioner presented this evidence and argument before the District Court²³ and the Fourth Circuit Court of Appeals.

This Court held in *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959) that executive agencies must adhere to their own regulations when terminating employees. Employee dismissals that do not comply with agency regulations are deemed 'illegal and of no effect.' See also *Doe v. U.S. Department of Justice*, 753 F.3d 1092, 1098 (D.C. Cir. 1985) citing *Vitarelli*; *McNeill v. Butz*, 480 F.2d 314 (4th Cir. 1973) n.1 citing *Vitarelli*. Respondent USDOC, as an agency of the executive branch, is subject to the regulations of the Office of Personnel Management (OPM). 5 C.F.R. § 250.101 (App I), makes mandatory the substantive and procedural requirements of OPM "Guide to Processing Personnel Actions" (Guide).²⁴ Chapter 3 of the Guide makes certain personnel actions void. Specifically, a void personnel action "... is an action which should never have occurred or because of an absolute statutory bar to it..."²⁵ While the Guide describes void personnel actions in terms of actions by an employee, the language is not exclusive. Respondent's adverse personnel action against Petitioner El is void because there is no evidence of misconduct attributable to El of any kind, much less travel card misuse nor any authority for taking unauthorized personnel actions. Therefore, Respondent violated federal law, its own regulations and the procedural requirements for taking an adverse personnel action. LCDR

²³ "Plaintiff's Motion for Summary Judgment," ECF No. 111, Plaintiff's M

²⁴ "Guide" App I.

²⁵ "Guide to Processing Personnel Actions," Chapter 3, App I, Page I22-I34 to

Pralgo's 'Memorandum of Termination' (App H) was fraudulent as she falsely accused El of misconduct without cause, without evidence supporting the accusation, without notice sufficient to inform El of the charge, and without authorization pursuant to OPM and USDOC personnel regulations (Guide, App I, Chapter 4, I35-I44). Respondent USDOC, LCDR Pralgo, or any other employee of Respondent ever produce any evidence Petitioner El misused his government travel card as misuse is defined in the Travel Card Handbook (App I, I45) and the NOAA Travel Regulations, See NTR, App I, I69. There is nothing in federal law or Respondent's regulations that authorize personnel actions for discriminatory, false and fraudulent reasons.

Federal employees, including probationary and trial period employees have constitutional protected property rights and interests in their employment conferred by federal law and regulations. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Petitioner, as a federal employee, had constitutionally protected rights and interest in the substantive and procedural requirements for adverse personnel actions, in particular under the Travel Card Handbook,²⁶ the NTR and the Code of Federal Regulation.²⁷ The evidence in this case is Respondent USDOC sent Petitioner El the "Memorandum of Termination" (App I) on December 12, 2013 without cause, authority or notice calculated to inform Petitioner of the evidence supporting the adverse action. The evidence provides no evidence Respondent ever made a fitness determination of any kind with regard to El, much less determining El was unfit for federal employment.²⁸ The evidence in the record of this case is Respondent never produced any evidence Petitioner violated the Department of Commerce Travel Card Handbook (Travel Card Handbook,

²⁶ See Department of Commerce Travel Card Handbook, Chapter 10, App I

²⁷ 5 C.F.R. § 315.805, App I.

²⁸ *Id.*, App I.

App I) or the NOAA Travel Regulations, (NTR, App I) by using his government travel card when he was not in an official travel status or making purchases not authorized by the Travel Card Handbook (App I, Chapter 4) or the NTR. Respondent's tardy "Request for Personnel Action" (SF-52, App H) or "Notification of Personnel Action" (SF-50, App H) contains no evidence Petitioner misused his government travel card. Respondent's *post hoc* allegation that the document entitled "Assignment Letter" was evidence Petitioner violated the travel card regulations is insufficient, as a matter of law, because the document had no controlling authority above the travel regulations as to be an element of travel card misuse. First, Respondent's admission is in the record, the "Assignment Letter" has no controlling authority under the Department of Commerce Travel Card Handbook (App I, I-45-I68), the NOAA Travel Regulations, (App I, I69-I72) and the statement contained the "Assignment Letter" is directly contradicted by the Travel Card Handbook, other USDOC Departmental and NOAA Administrative Orders.²⁹ Respondent never made any request for a personnel action (SF-52) at all prior to or on December 13, 2013 (App H2-H3). When Respondent made its tardy request for a personnel action against El on February 12, 2014, Respondent had no cause under federal law and Office of Personnel Management regulations.³⁰ Additionally, the request for personnel action was clearly falsified, a retaliatory act and because of El's EEO and letter complaining of discrimination dated January 13 and January 27, 2014 respectively.³¹ USDOC's retaliatory and fraudulent request for El's termination (SF-52) has never been served on El, much less containing any evidence of misconduct attributable to El, or providing El an opportunity to respond to the charges, in violation of the Code of Federal

²⁹ See "Plaintiff's Amended Verified Complaint to Conform to the Evidence..." ECF No. 133, Pages 15-26.

³⁰ See "Plaintiff's Amended Verified Complaint," App F referencing 5 C.F.R. § 250.101 and the OPM "Guide to Processing Personnel Actions," Pages 26-29.

³¹ See *Id*, App F.

Regulations (App I, Page I4) and the Travel Card Handbook (App I, Page I68). The Fourth Circuit's *per curiam* "Opinion" has sanctioned the District Court's errors of law including ignoring Petitioner's evidence of Respondent's discriminatory and void termination of Petitioner El as being illegal and fraudulent. Additionally, the Fourth Circuit has sanctioned the District Court's acceptance of the Respondent's intentional and clearly false representations in dismissing Petitioner's remaining retaliation claim. Petitioner El respectfully requests this Court's grant of certiorari and intervention to correct these injustices.

CONCLUSION

Petitioner El respectfully moves this Court to grant this petition for certiorari for the reasons previously stated.

Respectfully Submitted,

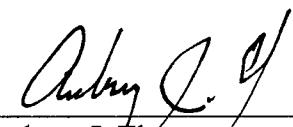


Aubrey J. El, *pro se*

CERTIFICATION

I, Aubrey J. El, Petitioner in this case, certify under penalty of perjury that this Petition meets the word and page count requirements of the Clerk's Office of the Supreme Court of the United States.

Signed this 21st day of October 2023



Aubrey J. El, *pro se*