24-6179

ORIGINAL

STEVEN D'AGOSTINO Plaintiff-Appellant v. BUNCE ATKINSON Defendant – Appellee	BELOW: U.S. THIRD CIRCUIT COURT OF APPEALS, **DOCKET NO: 22-2835** BELOW NO: **1: 19-cv-281-RBK-AMD** PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

On appeal from final order on Aug 16, 2024 by
The U.S. Court of Appeals for the Third Circuit

PLAINTIFF-APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

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DATED: Nov 4, 2024

QUESTIONS PRESENTED

1) Did the Third Circuit err by failing to transfer the appeal to the Federal Circuit, even though the Tucker Act was irrefutably involved in the District Court's rulings?

2) What recourse (if any) does a federal employee have if, for a given pay period, he is paid at an hourly rate that is (far) below the hourly rate that was promised by the federal employer, but which is still greater than the federal minimum wage?

A) Assuming if the federal employee does have a remedy, is that remedy equitable or legal in nature? Given this Court's recent rulings in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), would the federal employee have a right to a jury trial?

3) Does the "single week" calculation set forth in 29 C.F.R. § 778.104 apply equally to non-overtime / regular pay calculations? Namely, when a federal employee is paid on a biweekly basis (once every 2 weeks), and then for a given 2-week pay period he is paid nearly nothing for his first-week's 40 hours but then paid more than double the federal minimum wage on his second-week's 40 hours, or vice versa, would the federal employee then have a valid FLSA claim? Or would the 2-week average negate a claim?

For example, suppose if a federal employee was paid hourly at $20/hour, but then in a given 80-hour pay period, for the first week of that pay period he was only paid at $1.50/hour for those 40 hours (i.e. $60); and then on the second week of that same pay period, he worked another 40 hours for which he was paid his full $20/hour rate (i.e. $800); and then a few days later he received a single check, for both of those weeks, in the amount of $860 (i.e. gross pay, before deductions). Would this federal employee then have a valid FLSA claim?

4) Should a U.S. Court of Appeals hastily affirm (in literally just 25 hours) both a novel jurisdictional issue, as well as very complex bench trial verdict? *And in particular, do so for a verdict that was the exact opposite of the evidence presented at trial?*

LIST OF PARTIES

1) The Secretary of the United States Air Force (a federal employer); and

2) Steven D'Agostino (a civilian federal employee)

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CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The U.S. District Court of Camden New Jersey had subject-matter jurisdiction to hear the Plaintiff's (Steven D'Agostino's) claims of hostile work environment, wrongful and retaliatory discharge, and unpaid wages by his federal employer (the United States Air Force). The Plaintiff shall hereinafter refer to himself in the first person. After rendering a bench verdict in favor of the Defendant, I assumed that the U.S. Court of Appeals for the Third Circuit then had appellate jurisdiction over the Camden NJ U.S. District Court. However, the Third Circuit clerk asked the parties' for supplemental briefing as to jurisdiction, since the appeal involved the Tucker Act. The parties then submitted supplemental briefing, where both parties indicated their belief that jurisdiction should lie with the Federal Circuit instead. Shortly before the appeal was to be submitted, I filed an unopposed motion seeking for leave to amend my brief, in the event if the Third Circuit should decide that it has jurisdiction (i.e. if the appeal was to be transferred to the Federal Circuit, then I would automatically get an opportunity to amend my brief). But that motion to amend my brief would later be essentially ignored.

The Third Circuit appeal was submitted, on paper, at 8:49 AM on Mar 20, 2024. Just 25 hours later, at 9:50 AM on Mar 21, 2024, the Third Circuit had not only decided the jurisdictional issue (which surprisingly it found that it did have jurisdiction), but further despite the complexity of the case, had also affirmed all of the District Court's rulings.

On May 6, 2024, a timely petition for rehearing / en banc rehearing was filed the Third Circuit. On Aug 8, 2024, the Third Circuit denied rehearing and en banc rehearing. A mandate was then issued on Aug 16, 2024.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

- 28 U.S.C. § 1295
- 28 U.S.C. § 1346(a)(2)
- 28 U.S.C. § 1631
- 29 C.F.R. § 778.104

CONCISE STATEMENT OF THE CASE

The following facts are not refuted.

In 2013 I was hired by my immediate supervisor Charles Monty Dunn, on behalf of the marketing department (this department was formerly known as Morale, Welfare and Recreation) of the U.S. Air Force, as a visual Information Specialist (basically my job was to do "data entry" for the marketing department's commercial website).

During my job interview I mentioned that I had a sleep disorder and that I would need an accommodation of a later-than-average starting time. But for the most part, this wasn't needed.[1] Aside from the specifics, there is no dispute that an accommodation was provided to me, without the need for me to produce any medical documentation.[1]

[1] Mr. Dunn said we were allowed to come and go as we pleased, as long as we put in 8 hours (if we wanted to get paid for 8 hours). We each chose our normal ballpark starting times, with input from Mr. Dunn. My consistent testimony was that it was supposed to be 10AM for the first 2 months, then changing to 12 noon thereafter; while Mr. Dunn's testimony about it fluctuated all over the place – both as to what it was supposed to be, as well as when and how the accommodation began. However the accommodation itself was effectively only a very minor one, as the only real impact of this "accommodation" occurred only occasionally, when Mr. Dunn wanted to have an impromptu team meeting in the morning. That is, since everybody else chose to arrive normally no later than 9AM, it was only a slight accommodation that they would have to wait for me to arrive on those sporadic instances. But still, they resented me for this minor accommodation.

Because my job consisted almost entirely of doing "data entry", where only once a month the new list of upcoming events would be published (and because I could be enter all of those new upcoming events in a single day), every month I had essentially 29 days where I was just sitting there idly at my desk with absolutely no work to do at all.

I had repeatedly offered my help to my coworkers, but they did not want it at all. Further, they resented my accommodation, so they completely avoided talking to me and excluded me from all their conversations they were having amongst themselves, they would ignore me even when I spoke to them, and would not even say "God bless you" if I sneezed. And be aware that of our six-person team, four of us were directly facing each other with no partition cubicle wall or anything in between us, so it was very awkward and unpleasant for me to just sit there and listen to them all talk and laugh and joke with each other, yet whenever I would try to join a conversation in any capacity, the conversation would immediately end. And the very rare instances when they did speak to me (out of necessity), they were also very rude and disrespectful to me, and spoke to me in condescending tones (the way some people speak to their dogs).

But yet because I needed a job, I took all this on the chin - and for 8 hours each day, 5 days a week, I had to just sit silently at my desk and try to amuse myself on the computer without talking to anyone - as I had no work to do at all, and I couldn't even offer my help to anybody else. And the office was unpleasantly dirty, as the building had air quality issues (including mold), plus we had significant bug and rodent problems.

But I just dealt with this week after week, until all this came to a head in September of 2013. On Tuesday September 3rd, Mr. Dunn (my supervisor) had just returned from a

two-week vacation, and at the end of the day when was just me and him left in the building, I went to his office and talked to him about the issues. As it would later turn out, I fortunately also had the good sense to use a covert pen camera to secretly record that conversation. We spoke for about 45 minutes, where we acknowledged the issues of my co-workers' resentment towards me, and the minor issues on my part (which were my repeatedly offering my help when it wasn't wanted, and my mistakenly counting my lunch breaks on base as part of my official time). At the end of this meeting, everything was resolved amicably with a positive outlook for the future. The next two days (Wednesday September 4th and Thursday September 5th) were both completely uneventful.

However the next day, Friday September 6th at a little past 12:00 noon I downloaded my pay stub, and saw that almost 75% of my expected pay (for that 80-hour pay period) was missing. And then as soon as Mr. Dunn came back to his office, I turned on my pen camera I went over to speak to him about it. But instead of saying that he would fix it right away, he gave me a hard time about it, which turned it into an argument, where finally after about 5 minutes, at 12:34 PM, I threatened to file a formal grievance against him and his assistant if this didn't get fixed immediately. He then responded by saying: "we're done", "goodbye", and "nobody ever threatens me". And as it would later turn out, less than 2 hours later, he created the draft version of his request for my removal.

Six days later (on Thursday September 12th), he presented me with the formal termination notice, which was effective the following day. Between September 6th and September 12th, I had already initiated the EEOC grievance process.

A few months later the EEOC assigned an investigator, who sent written questions to myself, Mr. Dunn, and my coworkers in 2014 - to be answered as our sworn testimony under penalty of perjury. And because Mr. Dunn had not yet been aware of my secret recordings, he committed numerous instances of perjury in his written responses (i.e. thinking that it would be just my word against his, and that I could never prove otherwise). But my secret recording, as well as the defendant's own documents, would later ultimately reveal his repeated perjury, and even reveal his fabrication of evidence.

He admitted to the EEOC investigator that I mentioned my intention to file a grievance on Sep **6**th, but then in response to the next question, he gave the perjurious answer that his verbatim response to me was: "That's your right", when in truth it was nothing at all even close to that – instead it was: "goodbye", "we're done" (repeatedly), "nobody ever threatens me", and "nobody threatens anyone on my staff – EVER".

Moreover, in that same sworn document, he repeatedly lied by saying that he had transmitted his removal request the day before (i.e. Sep **5**th). And he had went even further with that perjury, to also explicitly state to the EEOC investigator that he was not aware of my intention to file a grievance when he requested my removal.

It eventually took over 5 years before I finally got the "right to sue" letter from the Air Force, but I then timely filed my complaint in the US District Court of Camden New Jersey. Early discovery in the case revealed that Mr. Dunn's 2014 repeated sworn statements to the EEOC were perjuries! He repeatedly told the EEOC that he had sent his request for my removal on Sep 5th, but his own email shown that he had actually sent it on Friday Sep 6th at 4:14 PM, which was just 3 hours and 40 minutes after I

threatened to file the grievance. Mr. Dunn then changed his story to be that although he didn't actually transmit it until after I threatened the grievance, that he nonetheless had prepared it the day before, pointing to the filename (which he had typed himself) of the file that was attached to that September 6th email. However subsequent discovery revealed that this was yet more perjury, and that he had fabricated the creation date of this document. It further shown that although Mr. Dunn had tried (via two separate means) to pass this document off as supposedly being created on September 5th, the independently verifiable computer properties of the file revealed that it had been actually first created at 2:33 PM on September 6th - exactly 1 hour and 59 minutes after I threatened to file the grievance. And the independently verifiable computer properties also revealed that then, for about the next hour and a half (until 4:07 PM), that file was modified. And 7 minutes after that, it was attached to the 4:14 PM September 6th email that he sent to the Human Resources Office (HRO).

So in addition to his perjury, this was proof that he actually manufactured false evidence! And the remainder of his few other supporting documents (which he referred to as "reports") all existed only on paper, which were never transmitted or shared with anyone, at any time prior to my removal. So all of these other "reports" were easily created after the fact, by Mr. Dunn simply opening a blank document, then typing up some pretextual gripe about me, then printing it out and signing it. He did not produce any of the electronic files (where the dates could then be independently verified) used to create these handful of other pretextual reports. Given that he was caught red-handed in fabricating the creation date of the one document (i.e. the only one of his documents

that the creation date could actually be verified), at a minimum it certainly should have called into serious doubt the authenticity of his other documents.

Moreover, the Air Force manual required that first line supervisors must issue written warnings for unsatisfactory performance, and other personnel requirements dictated that updated personnel forms must be submitted whenever a given employee is not performing in a satisfactory manner. Yet, Mr. Dunn never did any of this – which is yet another clear indication that the decision to fire me was his impulsive spontaneous reaction to my threat to file a grievance against him.

Further still, it should have been obvious that if I was such a bad employee, particularly if I was under-skilled at my job and had no desire to improve, then why was I kept on for 5.5 months (and only fired after the grievance threat, just 2 hours later)?

And on top of all that, at trial Mr. Dunn was caught in a number of other lies and other instances of perjury, while in stark contrast my testimony was 100% unassailable - the defendant could not find even just one inconsistency in any of my trial testimony, my deposition testimony, my pleadings, or within my numerous prior written statements to the EEOC.

Yet the district court judge simply ignored all of this; and instead rendered a verdict that was completely opposite of the weight of the evidence. And then when the Third Circuit ruled on these issues, plus the jurisdictional issue with the Tucker Act, they hastily rendered a decision on everything, in literally just 25 hours. I then timely filed a petition for rehearing, which was denied on Aug 8, 2024. This petition for a writ of certiorari is being timely filed with this United States Supreme Court on Nov 4, 2024.

ARGUMENTS

1) The Third Circuit lacked jurisdiction to hear the appeal, because the appeal involved the Tucker Act

At the time when I filed the appeal, I naturally assumed that the Third Circuit would have jurisdiction, as at that time I had not been aware of the requirement that, due to the Tucker Act being involved, it needed to be brought in the Federal Circuit instead.

The defendant's counsel (i.e. the US attorney's office) apparently also was not aware of this either, as there was no mention of this made within the Appellee brief.

However, this issue was then brought to our attention via notice from the Third Circuit's Clerk, who observed that the Tucker Act was involved. The Clerk's notice required the parties to submit supplemental briefing, of no more than 7 pages, as to why jurisdiction should not lie within the Federal Circuit (because of the Tucker Act).

The parties submitted supplemental briefing, where both of us seemed to agree that the controlling authorities most likely required the matter to be transferred. I pointed out that I did not plead my unpaid wages claim as a Tucker Act claim, and that initially the defendant had argued that it was properly raised under N.J. State statute 34:11 (which affords all parties with the right jury trial). However, after the District Court partially granted the defendant's motion for summary judgment, wherein my "hostile work environment" claim was dismissed, the defendant then did a 180-degree change of position, and then wanted to transform my unpaid wages claim into a contractual claim under the Tucker Act, solely to deprive me of a jury trial (i.e. since I was not entitled to a jury trial on my primary claim of retaliatory discharge, and I would not be entitled to a jury trial under a Tucker Act claim either).

When the Third Circuit ruled on this jurisdictional issue, it held that the District Court erred by transforming my unpaid wages claim under the Little Tucker Act (i.e. *28 U.S.C. § 1346*), and therefore it did have jurisdiction over the appeal. (Pa196)

But I respectfully submit that this was error, given the undeniable fact that the District Court (at the behest of the defendant) decided to transform my claim for unpaid wages to a claim under the Little Tucker Act, which was included in the bench verdict.

So whether or not if the District Court had done so rightly or wrongly, the Third Circuit's assumption of jurisdiction was contrary to this Court's rulings in *Christianson v. Colt Industries Operating Corp.*,486 U.S. 800, 823 (1988), as the Tucker Act certainly was involved in the District Courts rulings. And therefore as such, the Third Circuit lacked jurisdiction to hear my appeal; the Third Circuit was required to transfer it to the Federal Circuit instead (i.e. pursuant to *28 U.S.C. § 1295* and *28 U.S.C. § 1631*).

That is, in *Christianson v. Colt Industries Operating Corp.*,486 U.S. 800, 823 (1988), this U.S. Supreme Court held:

> If a patentee should file a two-count complaint seeking damages (1) under the antitrust laws and (2) for patent infringement, the district court's jurisdiction would unquestionably be based, at least in part, on *§ 1338(a)*. If, however, pretrial discovery convinced the plaintiff that no infringement had occurred, and Count 2 was therefore dismissed voluntarily in advance of trial, the case that would actually be litigated would certainly not arise under the patent laws for purposes of appellate jurisdiction. Even though the district court's original jurisdiction when the complaint was filed had been based, in part, on *§ 1338(a)*, the case would no longer be one arising under the patent laws for purposes of Federal Circuit review when the district court's judgment was entered. Conversely, if an **original complaint** alleging only an antitrust violation **should be amended** after discovery **to add** a patent-law claim, and if the plaintiff should be successful in proving that its patent was valid and infringed but unsuccessful in proving any basis for recovery under the antitrust laws, the district court's judgment would sustain a claim arising under the patent laws even though the complaint initially invoking its jurisdiction had not mentioned it, and **an appeal would properly lie in the Federal Circuit**. [emphasis added]

Similar to the above-cited portion of this Court's rulings in *Christianson v. Colt*, here in this case my claims were **amended** to add a cause of action based on the Tucker Act. The verdict of the District Court, which I appealed, was based on the Tucker Act. And although the complaint was **amended** by the court over my protests (i.e. and not voluntarily by me), unless that distinction is material to the issue, the *Christianson v. Colt* opinion clearly suggests that this appeal should have been transferred.

Likewise, as with *In re Innotron Diagnostics*, 800 F.2d 1077 (Fed. Cir. 1986), an appeal that challenged a district's court rulings that separated a matter involving both a jury trial issue and a patent infringement issue, the Federal Circuit held that it had "exclusive jurisdiction of an appeal from the final judgment in the case." The Federal Circuit therein held that its exclusive jurisdiction under *28 U.S.C. § 1295(a)(1)* would apply equally in both patent and Tucker Act cases (i.e. "when the jurisdiction of that court was based, in whole or in part, on 28 U.S.C. § 1338 or 28 U.S.C. § 1346, (The Little Tucker Act),respectively").

2) I should have a remedy for my unpaid wages claim, as well as my back pay claim.
It seems that the Third Circuit confused / conflated my claim for **back pay** (i.e. the wages I would have earned for hours I should have worked, if not for the retaliatory discharge) with my claim for the $273 in **unpaid wages** (i.e. for the hours that I did actually work, but wasn't paid for). The Third Circuit seemingly treated them both as one, and then held that the District Court erred by exercising "Little Tucker Act

jurisdiction the back pay claim", and instead should have dismissed the claim outright "on the grounds of sovereign immunity" (See Pa196).

As I interpreted this ruling, this meant that I had no remedy at all for my unpaid wages claim, as long as my hourly rate did not fall below the federal minimum wage.

The Court also seemed to be confused by the arguments in my supplemental brief, wherein I stated that I had never specified either the FLSA or state law for my unpaid wages claim of $273, and then erroneously considered all of this as "back pay".

And as to the FLSA, although the decision did not phrase it as such, it appears that the Court had also presumed that my unpaid wages of $273 would fall into the category of "gap time", as defined in *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3d Cir. 2014). It should be noted that this $273 amount was the difference in my net pay, not my gross pay, where gross pay would clearly be the correct choice for the purposes of the FLSA. However, the correct choice is not clear for the following FLSA scenario.

On the first week of the pay-period, I was paid at my regular rate of $18/hour, but the second week I received almost nothing, resulting in a difference of $273 in net pay. So if the 2-week average was the correct calculation, then it fell within the definition of "gap time"; but if each week was to be treated as a stand alone entity (i.e. as in the case of overtime), then it would have been a violation of the FLSA. The Court never clarified this, so we were never able to establish whether or not the FLSA should apply here.

But if the FLSA should have applied, this U.S. Supreme Court has explicitly held that "it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held." *Lorillard*

v. Pons, 434 U.S. 575, 580 & n. 7, 98 S.Ct. 866, 870 & n. 7 (1978). See also *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir.1983) (holding that the EEOC and employees were entitled to a jury trial); and *Lewis v. Times Publ'g Co.*, 185 F.2d 457, 457 (5th Cir. 1950) (concluding that an FLSA action in which the plaintiff sought a monetary award for unpaid wages required a jury trial).

Moreover, it would seem that the distinction is moot – according to authority from the Second Circuit, it appears that I would still be entitled to a jury trial regardless. In *Brock v. Superior Care, Inc*, 840 F.2d 1054, 1063 (2d Cir 1988), the Second Circuit held:

> **Suits by an employee or by the Secretary for back wages under section 16, in contrast, have been considered to be actions at law, and the employer has a right to a jury**. *See Lorillard v. Pons*, 434 U.S. 575, 580 & n. 7, 98 S.Ct. 866, 870 & n. 7 (1978); *E.E.O.C. v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir.1983); *Marshall v. Hanioti Hotel Corp., supra*, 490 F.Supp. at 1023; 5 *Moore's Federal Practice* ¶ 38.27, at 38-220 to 38-221 (2d ed. 1986). [Emphasis added]

Further, as this Court held in *Teamsters v. Terry*, 494 U.S. 558, 570-571 (1988):

> In this case, the only remedy sought is a request for compensatory damages representing backpay and benefits. Generally, an action for money damages was "the traditional form of relief offered in the courts of law." *Curtis v. Loether*, 415 U. S. 189, 196 (1974). This Court has not, however, held that "any award of monetary relief must *necessarily* be 'legal' relief." *Ibid.* (emphasis added). See also *Granfinanciera, supra*, at 86, n. 9 (WHITE, J., dissenting). Nonetheless, because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal.

Additionally, if the remedy is even partially legal in nature, as this Court recently held in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), it should then afford the federal employee with the right to a jury trial. And if so, then I would be entitled to a jury trial - and not just for the wages, but ALL of my claims. As this Court held in *Lytle v. Household Mfg. Inc*, 494 U.S. 545, 522-553 (1990):

> Such a holding would be particularly unfair here because **Lytle was required to join his legal and equitable claims to avoid the bar of res judicata**. See *Harnett v. Billman*, 800 F. 2d 1308, 1315 (CA4 1986) (holding that prior adjudication barred a claim that arose out of the same transactions and that could have been raised in prior suit).

> Our conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues. In such cases, we have never accorded collateral-estoppel effect to the trial court's factual determinations. **Instead, we have reversed and remanded each case in its entirety for a trial before a jury**. See *Meeker v. Ambassador Oil Corp.*, 375 U. S. 160 (1963) (per curiam) (reversing trial court's decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts); *Tull v. United States*, 481 U. S. 412 (1987) (reversing and remanding claims for monetary penalties and injunctive relief because trial court improperly denied plaintiff a jury trial on the claims for monetary penalties); *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33 (1989) (reversing and remanding Bankruptcy Court's judgment because petitioners were denied a jury trial and according no weight to trial judge's factual findings). [emphasis added]

And even more recently, in an unpublished decision by the Seventh Circuit, that Court agreed with the Appellant in that "the district court erred in denying it a jury trial." See *Overwell Harvest, LTD. v. Trading Technologies International, Inc.*, No. 23-2150.(7th Cir. Decided August 12, 2024) (affirmed on other grounds):

> Overwell sought both legal relief (compensatory and punitive damages) and equitable relief (disgorgement of Trading Technologies' benefits from the sale). As the case neared trial, the district court rejected Overwell's jury demand, concluding that it had no right to a jury trial because its aiding and abetting claim was equitable, despite that it sought (in part) legal relief. After a bench trial, the court found for Trading Technologies. Overwell appealed, arguing that **the district court erred in denying it a jury trial. We agree** with Overwell: though it raised only an equitable claim, because it sought legal relief, it had a right to a jury trial.

But I believe that either way, I am entitled to some remedy for this, even assuming if I was not entitled to a jury trial for this claim (and/or the back pay claim). At a minimum, it would seem to me that I would have an action sounded in contract for the failure of my federal employer to compensate me at the mutually-agreed-upon hourly rate.

3) I believe I should also be entitled to both "back pay" and "front pay" for the all of the hours that I was prevented from working by the unlawful retaliatory discharge.
The largest portion of the monetary damages I sought fell into this category. Defendant asserted in its own answer that any award of damages was controlled by *29 U.S.C. §*

794a, which provides in pertinent part: "The remedies procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e–16*), including the application of sections 706(f) through 706(k) (*42 U.S.C. 2000e–5(f)* through *(k)*), shall be available to any [aggrieved] employee." The remedies of *42 U.S.C. § 2000e–5(f) through (k)* provide in relevant parts: "(f) Civil action by ... person aggrieved ... "; and "(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. (1) If the court finds ... the court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate." [*emphasis added*] Similarly, the provisions within *42 U.S.C. § 2000e–16* also provides for the remedy of back pay, amongst other relief.

In *Hiler v. Brown*, 177 F. 3d 542, 545 n.4 (6th Cir. 1999), the Sixth Circuit held that "an aggrieved **federal employee** alleging ... retaliation **can** ... **seek monetary ... relief** under the Rehabilitation Act". See also *Roller v. Megan J. Brennan, Postmaster General*, 2018 WL 4405834 (holding that federal employees could avail themselves "of the full panoply of Title VII remedies, which include equitable relief, back pay, and compensatory damages"); *Lyons v. Patrick R. Donahoe, Postmaster General*, 2016 WL 1070856 (holding that "Title VII and the Rehabilitation Act provide for ... monetary and equitable relief"); *White v. General Services Administration*, 652 F. 2d 913, 917 (9th Cir 1981) (holding that *§2000e-3* is equally applicable to private employers and the federal government).

However, the Third Circuit never even really got to this issue raised in my appeal, as it had instead hastily and incorrectly affirmed the bench verdict, which was truly opposite of the evidence, especially with respect to the retaliatory discharge claim.

In the next point heading, I will elaborate on a number of the critical factual issues, to demonstrate, with specificity, that the bench verdict really was the exact opposite of the evidence (i.e. and that I am not just pulling this argument out of thin air).

4) The verdict was not just against the weight of the evidence, but further it was the **exact opposite** of the evidence.

I presume that this Court will be highly skeptical of this argument. But I implore this Court to keep an open mind while reading through the following illustrative examples. I made a video for the Third Circuit to help explain my petition for rehearing. This Court can still see it on my website at this link: https://stevedagostino.biz/PetitionRehearing.mp4

A. Just a few examples of the proven perjury of Mr. Dunn (my supervisor)

Example 1

Shortly after my termination, the EEOC sent him written questions, which he responded to in writing and under penalty of perjury. For example, as shown in my P8 (appendix Pa85):

Name: Charles Dunn

Declaration under Penalty of Perjury

I, Charles Dunn, in accordance with 28 U.S.C. Section 1746, make the following statement:

In this sworn written response to the EEOC investigator, he therein admitted that I had made my threat to file an EEO complaint on (or about) ***Sep 6th***:

Regarding Complainant's allegation of discrimination based on reprisal

Q: Complainant alleges his prior EEO activity is the formal complaint he filed on September 11, 2013. When and how did you learn Complainant had filed this complaint?

R: Complainant told me on or about September 6.

*But then he repeatedly stated that he had transmitted his request for my removal on Sep **5th**:*

Q: Complainant states that the adverse action that occurred as a result of him filing his EEO complaint was that on September 12, 2013, he was fired the day after he filed his EEO complaint. How do you respond?

R: I requested his removal for just cause on September 5th

Q: How do you respond to this allegation?

R: No. I had requested his removal for just cause on September 5.

Q: When was the decision made to terminate Complainant?

R: I made the decision on Sept 3 2013, submitting the request to remove on Sept 5 to HRO.

Moreover, he specifically stated that he was not aware of my intention to file the EEO grievance when he transmitted his request for my removal:

Q: Was Complainant's EEO complaint a factor regarding the decision to fire him? Please explain.

R: I was not aware of complainant's intention to file any EEO complaint when I requested his removal.

*However, early discovery in this litigation revealed that he had transmitted it on 4:14PM on Sep **6th** (which was exactly 3 hours and 40 minutes **AFTER** I threatened to file a grievance):*

DUNN, CHARLES M CIV USAF AMC 87 FSS/FSK

From: DUNN, CHARLES M CIV USAF AMC 87 FSS/FSK
Sent: Friday, September 06, 2013 4:14 PM
To: MCKAY, SANDRA A GS-11 USAF AMC 87 FSS/FSMH
Cc: LITTLE, WILLARD T GS-13 USAF AMC 87 FSS/CD
Subject: DAGOSTINO TERMINATION
Attachments: PROBATION SEP DAGOSTINO draft 090513.docx

Sandy:
Here's the write up to remove Steve D'Agostino from FSK.
Let me know what else I need to provide.
v/r
Monty Dunn
Director of Marketing & Sponsorship, 87FSS/FSK

I will discuss more on this point within another section of this brief, as **it would be later proven that he had also falsified the document that was attached to this email!**

Example 2

At trial, Mr. Dunn testified that I didn't even mention my sleep disorder until sometime after I started working there. Even during my cross examination, he had continued to maintain this false statement:

that you have a sleep disorder, yes.
Q. According to your testimony, if I recall correctly, you had said that you learned about it after I had already started working?
A. That's what I recall, yes.

It wasn't until I had him read his own written statement, which he had made to the EEOC, wherein he had testified: "During his interview, plaintiff claimed he had sleep apnea ...", did Mr. Dunn then change his story to admit that I had told him about it during my job interview:

My response: During his interview, plaintiff claimed he had sleep apnea but never provided documentation of the fact. Complainant said it made it hard for him to get up early.

Example 3

At trial, Mr. Dunn testified that my initial work schedule had a 7:30 AM starting time (before changing to 9:30 AM, before then changing to 10:00 AM). (See Tr.219:18-220:24; Tr.266:20-22; Tr.300:12-22). *On direct, Mr. Dunn stated that initially, my start time was 7:30am:*

Q. When he first began working, what was his time schedule?
A. All employees start 7:30 to 4:30. That is an eight-hour day with a one-hour nonpaid lunch.
Q. And was -- did Mr. D'Agostino work from 7:30 to 4:30?
A. He began with that, yes.

He repeated this again, even during my cross examination:

Q. In your direct testimony, you stated that I initially was supposed to start -- my initial starting time was at 7:30 a.m.
Do you recall?
A. I recall, yes.
Q. Okay. If I can -- and you said at some point in time, it changed, I believe, to 9:30. And then it later changed to 10:00 a.m.
Was that your testimony?
A. Could have been 9:00, 9:30.

But only after I confronted him with his own EEOC responses, did he indirectly concede that his direct testimony about my initial starting time was not accurate. That is, Mr. Dunn had inconsistently testified to EEOC: "During his interview, ...I told him to be in by 10am ...":

Q: What time should Complainant have arrived to work?

R: Office hours begin at 7:30am; he should have arrived no later than 10am. During his interview, we (Ms. Beard and myself) said we would work with him as best we could. I told him to be in by 10am and work 8 hrs from there (till 7 pm). He said he was good with that. We do have employees in the office working till 7 pm on occasion (for example, Ms. Beard)

The EEOC responses of his assistant Ms. Beard also clearly belied his trial testimony. That is, within her own sworn written responses to the EEOC investigator's questions, Ms. Beard said:"During the interview, Mr. Dunn told Mr. D'Agostino that he had to be at work by 10am":

Q: How was it determined that Complainant should arrive to work no later than 10am?

R: I sat in on the interview between Mr. Dunn and Mr. D'Agostino since I had performed the web master duties. I wanted to see if, based on his experience, he was fit for the job. During the interview, Mr. Dunn told Mr. D'Agostino that he had to be at work by 10am; and after 10am he

So clearly it was contrary to the evidence for the Court to find that Mr. Dunn had credibly testified that my starting time was 10:00 AM, when for one thing that was not his testimony, and secondly when that testimony was directly contradicted by both himself and Ms. Beard!!

Example 4

At trial, Mr. Dunn unequivocally testified that he had asked me for documentation of my sleep disorder, and that he had done so several times during my employment:

A. I still had no proof of there was any medical condition other than just your words telling me that you did.
Q. Did you ever ask me for any?
A. Yes.
Q. It's your testimony today that you asked me for medical documentation?
A. Not at your interview, no. But later, I did.
Q. When did this occur?
A. Mr. D'Agostino, we had several conversations about your inability to arrive to work on time. You said, I have sleep problems, I cannot sleep. And I said, if you can bring some sort of proof to me, either -- I just can't take your word for it. You said, I'm claiming a physical disability.

However, his own sworn statement to the EEOC reveals that this was just yet more perjury:

Q: Is it correct that you never asked Complainant to provide medical documentation regarding his sleep apnea?
R: I do not recall asking for medical documentation. It's complainant's responsibility to provide if claiming a condition.

Example 5

Background: A few months after my termination, when Mr. Dunn provided his written responses to the EEOC (under penalty of perjury), at that point in time he was not aware that I had covertly video recorded my interaction with him on both Tuesday Sep 3rd as well as Friday Sep 6th. (I had also covertly video recorded my interaction with 2 of the 3 ladies in the Human Resources Office (HRO) - namely, Michelle Little and Meghan Govin).

The EEOC investigator had asked Mr. Dunn what his response was to my threat to file a grievance. So being unaware that I would be able to catch him in this lie, his response to that question, which he put in quotes, was: "That's your right.":

R: Complainant told me on or about September 6

Q: What was your response to Complainant?

R: "That's your right"

However my covert Sep 6th video revealed that his actual response was nothing even close to that perjurious statement above. After seeing this video, the defendant was forced to admit in the Joint Final Pre-Trial Order within its own stipulated facts (see ECF-59, page 22, ¶¶74-76), *that Mr. Dunn had responded to my threat by saying: "..We're done...Nobody threatens me "*

74. As captured on Plaintiff's surreptitious recording of the conversation, Plaintiff raised his voice to Mr. Dunn, exclaiming rapidly, "I worked for you—I worked the hours! You owe me the hours! I gotta get paid for them, okay? And if this doesn't get fixed, I'm going to file a formal grievance against you and against Mika. Because I'm tired of being treated like crap! I'm tired of being the low man on the totem pole! You can't jerk me around with my damn hours here! This is what I was..." *Id.* ¶ 15.[2]

75. Plaintiff threatened to file an unspecified grievance during his conversation with Mr. Dunn regarding his pay issue. *Id.*

76. Mr. Dunn appears to say in the recording: "We're done. Goodbye. Go back to work or do whatever you want to do. We're done. Nobody threatens me; nobody threatens anybody on my staff, ever. We're done. We're done. I'll look into it; that's the best promise I'm going to give you. Other than that, we're done. We're done now." *Id.*

I could go on and on with many more examples, but the foregoing should be more than adequate to show that the verdict was against the weight of the evidence, as on one hand the defense witnesses had been caught in numerous lies and inconsistencies, while conversely I did not have a single inconsistency within any of my testimony anywhere, at anytime at all!!!!

B. All of Mr. Dunn's documents were created AFTER I threatened to file the grievance

With the exception of the attachment to his Sep 6th 4:14 PM email to HRO (which I will discuss next), all of Mr. Dunn's "documents" were just pieces of paper that he could have typed up any time (these were not stored, shared or transmitted electronically), that were not signed or dated (by anyone else other than himself), and he purports to simply have kept these self-generated pieces of paper somewhere in his own desk. So it was very easy for Mr. Dunn to fabricate all of these after the fact, solely to create a pretext to mask his true retaliatory basis for firing me, as he knew that there would be no way to prove that these documents didn't exist at all prior to my Sep 6th threat to file the grievance. *See 2 examples:*

30 August 2013:

I was on leave and received a call from Ms. Beard at 1:42pm. I did not pick up but did call back. She stated that complainant had not reported to work yet and asked me what she should do. I explained to her that he was considered AWOL, and should he show up to send him home. Arriving nearly five hours past his start time I considered his desk abandoned for the day. During the conversation, complainant arrived at his desk. Ms. Beard hung up with me and sent the complainant home as I had instructed. Complainant chose to leave an hour later.

06 September 2013:

Complainant refused to supply timecards for the period I was on leave. I did not authorize time cards for the pay periods while on leave 19-30 August 2013. When complainant told me of the shortage I immediately contacted HRO and corrected shortage. But we also discussed his earlier reset. I had them correct his time to reflect the true hours worked. They deducted the overpayment from his request and notified NAF Finance and had a check prepared. When I returned to the office I notified the complainant and he left to pick up his check.

So the Court might now be thinking: "Ok, so Mr. Dunn can't verify when these documents were created, but why should we doubt the word of Mr. Dunn?" Well the answer to that question is that even setting aside his proven perjury, as well as the countless instances of his making wildly inconsistent statements, there is still yet another reason. That additional reason is this: the only document where the creation date can be independently verified is the attachment to his Sep 6th 4:14 PM email to HRO, and for that document **he was ultimately caught red-handed with fabricating its purported date of creation!!!!!!!**

Background: To rewind a bit, after being caught in the lie about when he transmitted his request for my removal to HRO (i.e. see page 20 of this brief), Mr. Dunn then essentially changed his story to become as follows: that although he didn't actually send his removal request until after I made my threat, nonetheless he had still **"began the process"** the day before (i.e. relying on the "draft0905" filename he had typed for the attachment to that email)

This change of story was then reflected in both ECF No. 25-2 as well as ECF No. 30-2:

66. Mr. Dunn decided to terminate Plaintiff's employment on September 3, 2013, and began the process on September 5, 2013. Exhibit 4 at DAG 45; Exhibit 5 at DAG 186.

67. Mr. Dunn emailed a formal request to terminate Plaintiff's employment to Human Resources on September 6. Exhibit 4 at DAG 46.

This assertion relied on the filename Mr. Dunn had typed for the attachment to the email:

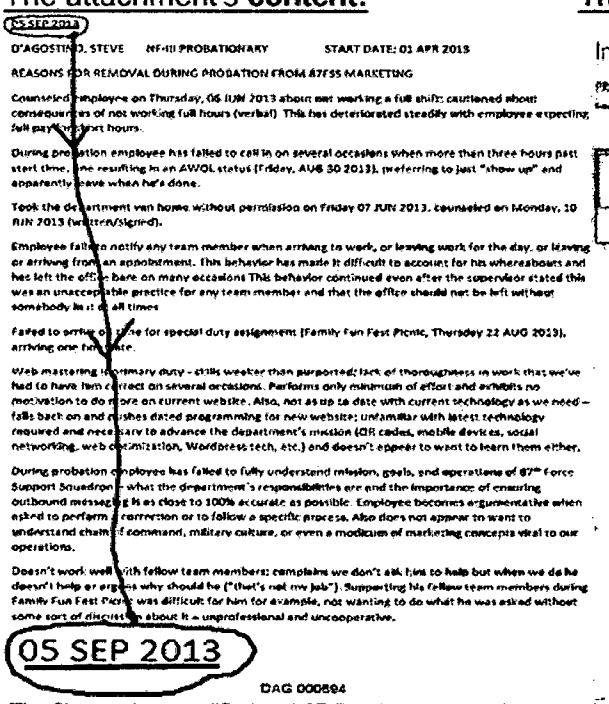
DUNN, CHARLES M CIV USAF AMC 87 FSS/FSK

From:	DUNN, CHARLES M CIV USAF AMC 87 FSS/FSK
Sent:	Friday, September 06, 2013 4:14 PM
To:	MCKAY, SANDRA A GS-11 USAF AMC 87 FSS/FSMH
Cc:	LITTLE, WILLARD T GS-13 USAF AMC 87 FSS/CD
Subject:	DAGOSTINO TERMINATION
Attachments:	PROBATION SEP DAGOSTINO draft 090513.docx

But then subsequent discovery by the defendant revealed two more important details about the attachment to his Sep 6th email: 1) the contents of that attachment, with the date of Sep 5th typed again at the top; and most importantly 2) the automatic computer-generated file properties of the attachment, which revealed that **it had actually been created on Sep 6th at 2:33 PM, which was less than 2 hours AFTER I made my threat !!!!!!**

*See **Pa131-Pa133**, defendant's DAG 00694 - 696:*

The attachment's **content:**



05 SEP 2013

D'AGOSTINO, STEVE NF-III PROBATIONARY START DATE: 01 APR 2013

REASONS FOR REMOVAL DURING PROBATION FROM 87FSS MARKETING

Counseled employee on Thursday, 06 JUN 2013 about not working a full shift; cautioned about consequences of not working full hours (verbal). This has deteriorated steadily with employee expecting full pay for part hours.

During probation employee has failed to call in on several occasions when more than three hours past start time, one resulting in an AWOL status (Friday, AUG 30 2013), preferring to just "show up" and apparently leave when he's done.

Took the department van home without permission on Friday 07 JUN 2013, counseled on Monday, 10 JUN 2013 (written/signed).

Employee fails to notify any team member when arriving to work, or leaving work for the day, or leaving or arriving from an appointment. This behavior has made it difficult to account for his whereabouts and has left the office bare on many occasions. This behavior continued even after the supervisor stated this was an unacceptable practice for any team member and that the office should not be left without somebody in it at all times.

Failed to arrive on time for special duty assignment (Family Fun Fest Picnic, Thursday 22 AUG 2013), arriving one full hour late.

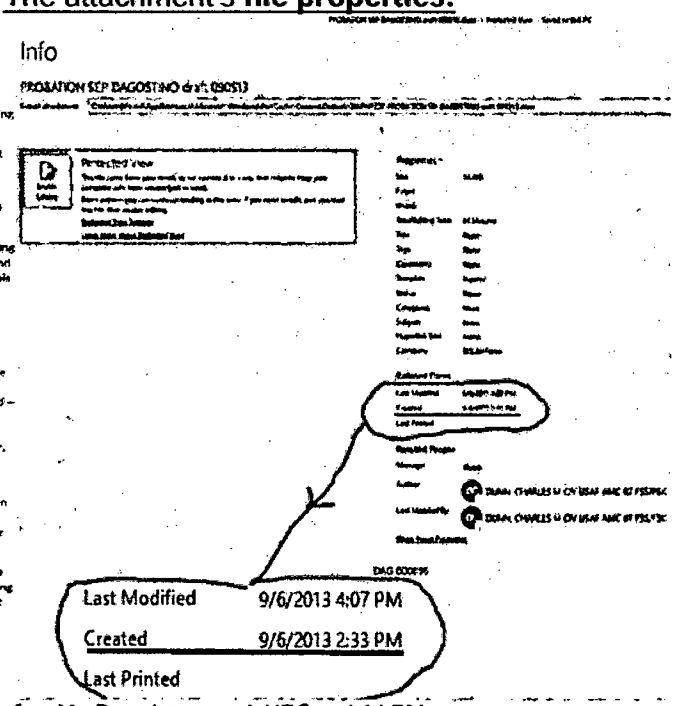
Web mastering is primary duty - skills weaker than purported; lack of thoroughness in work that we've had to have him correct on several occasions. Performs only minimum of effort and exhibits no motivation to do more on current website. Also, not as up to date with current technology as we need – falls back on and relishes dated programming for new website; unfamiliar with latest technology required and necessary to advance the department's mission (QR codes, mobile devices, social networking, web optimization, Wordpress tech, etc.) and doesn't appear to want to learn them either.

During probation employee has failed to fully understand mission, goals, and operations of 87th Force Support Squadron – what the department's responsibilities are and the importance of ensuring outbound messaging is as close to 100% accurate as possible. Employee becomes argumentative when asked to perform a correction or to follow a specific process. Also does not appear to want to understand chain of command, military culture, or even a modicum of marketing concepts vital to our operations.

Doesn't work well with fellow team members; complains we don't ask him to help but when we do he doesn't help or argues why should he ("that's not my job"). Supporting his fellow team members during Family Fun Fest Picnic was difficult for him for example, not wanting to do what he was asked without some sort of discussion about it – unprofessional and uncooperative.

DAG 000694

The attachment's **file properties:**



Info

PROBATION SEP DAGOSTINO draft 090513

Last Modified 9/6/2013 4:07 PM

Created 9/6/2013 2:33 PM

Last Printed

DAG 000695

The file was last modified at 4:07 PM, just seven minutes before Mr. Dunn later sent it HRO at 4:14 PM.

At trial, Mr. Dunn tried to explain this away by saying that he must have copied the text from some old file (from Sep 5th) and then pasted that into a new final file on Sep 6th. And if that testimony isn't incredulous enough by itself, on cross examination he could not explain why he hadn't saved the supposed "old" file, nor could he explain why he hadn't typed "**06** SEP 2013" (instead of "**05** SEP 2013") at the top of this "new" file, nor could he explain why he hadn't named the purported "final" version of this file as "**final0906**," rather than "**draft0905**."

So for the only one of Mr. Dunn's documents for which the creation date could be independently verified, we see that he had repeatedly lied about it - and further that he had fabricated this "document" to make it appear as a pre-threat document, when in truth it undeniably was a post-threat document. **Thus he deliberately falsified the date of this document, making it appear as being created pre-threat, when it was made post-threat!**

C. The Air Force manual further proves the flaws within Mr. Dunn's pretextual bases

Mr. Dunn admitted that the Air Force manual controlled his actions with my employment. However he could not give any plausible reason why I was never given any written warnings for anything that was alleged within the official Sep 12th termination letter, nor any written warnings for anything that was alleged within his Sep 6th letter (aside from using the van).

For example, Chapter 7 of the Air Force manual begins on page 78, which provides: "Performance Evaluation of Regular and Flexible Employees. 7.1. **All NAF employees must be aware of what is expected of them in their current position.**" The next subsection, 7.1.1. discusses "Performance Evaluation Objectives", which is followed by subsection 7.1.2. "Performance Standards". Within "7.1.2. Performance Standards", the last sentence (at the bottom of page 78 and at the top of page 79) provides: "The need for specific standards and a common understanding of them **is particularly important during an employee's probationary period.**" This is then immediately followed by its own subsection, "7.1.2.1. First line supervisors will:", and proceeds to enumerate 10 specific tasks that are required of all first line supervisors (i.e. like Mr. Dunn).

The ninth enumeration provides: "7.1.2.1.9. Initiate memorandums of warning and decision memorandums for unsatisfactory performance". However, Mr. Dunn never issued any such memorandums of warning, for anything but the one time when I used the van on Jun 7th. [1]

Mr. Dunn then tried to explain this away by stating that he believed that only the seventh enumeration was applicable to probationary employees (as the judge had directly suggested to Ms. McKay and Mr. Dunn). But such a contention flies in the face of reason.

For example, the second enumeration, 7.1.2.1.2., provides that a first line supervisor shall: "Continuously evaluate employee's performance"; the fourth enumeration, 7.1.2.1.4. provides that a first line supervisor shall: "Informally discuss with the employee from time to time the degree to which the employee meets, fails to meet, or exceeds the standards."; and the fifth enumeration, 7.1.2.1.5., provides that a first line supervisor shall: "Counsel employees on how to become more effective members of the team.", etc.

Thus Mr. Dunn's stated interpretation would yield an absurd result – that only after an employee has been there for a year (and somehow managed to stumble his/her way through the probationary period on his/her own), only then should the NAF employee be aware of what is expected of him/her in his/her current position, only then should the supervisor acquaint the employee with the performance standards pertinent to the employee's new position, only then should the supervisor discuss with the employee the degree to which he/she meets (or fails to meet) the standards, and only then should the supervisor counsel the employee on how to become a more effective member of the team.

So equally absurd is the contention that only after an employee has been at his/her new position for a year (and somehow managed to stumble his/her way through the probationary period on his/her own), only then should the supervisor issue a written warning for unsatisfactory performance. This is also belied by the fact of my written warning for the van.

[1] The reason why I was never given any warning is simple – namely, because Mr. Dunn never had any serious issue with me (the only issues were quite minor), which were: 1) my mistakenly counting my lunch breaks as part of my official time; and 2) my being overly eager to help my coworkers – this was made evident by my P5 exhibit, but unfortunately most of this exhibit was erroneously not allowed into evidence).

D. Other evidence that was erroneously excluded (or otherwise nullified)

During my direct case in chief, I had expected to introduce statements from Mr. Dunn, as well as statements from the 3 ladies in the Human Resources Office (i.e. given that the Air Force had clearly authorized my supervisor Mr. Dunn, as well as the ladies in HRO, to discuss with me matters relating to my pay, my working conditions, grievances, and the like).

So I was shocked when the court then clearly and harmfully erred by not allowing me to present this evidence under the party opponent doctrine. Both before trial and during trial, I had cited authority to support my position that under the party opponent doctrine, I should be able to get these statements (and exhibits) into evidence as part of my case in chief.

For example, I wanted to introduce exhibits showing the conversations I had on Friday Sep 6th with the ladies in HRO (wherein I complained about my pay, the working conditions and wanting to file a grievance, etc.), and exhibits showing their perjured testimony to the EEOC (e.g. denying any knowledge about my intention to file a grievance until Sep 13th, which was after my termination). These would have supported my allegations that Mr. Dunn had orchestrated this retaliatory discharge by calling up his supervisor, W.T. Little (who Mr. Dunn is buddy-buddy with, and who also controls HRO), and that Mr. Dunn, Mr. Little, and the 3 ladies in HRO, all then acted in cahoots with each other.

But all of this was kept out of evidence, even for Sandy McKay (the head of the HRO) who did appear to testify. [2]

Also erroneously kept out of evidence were my exhibits showing the conversation I had with Mr. Dunn after I came back from HRO, which would have further supported my allegations of his animus and retaliatory motives.

Of critical importance was my P5 exhibit, which was my testimony about the verbatim conversation I had with Mr. Dunn, on the evening of Tuesday Sep 3rd, which would have put

[2] At trial, Ms. McKay admitted that within her own EEOC response she had also misstated the wrong termination request date of Sep 5th. On cross examination, her explanations for this wandered from her purportedly relying upon Mr. Dunn's "notes" (i.e. which when I asked her to clarify, defense counsel repeatedly objected), to finally become her excuse of it purportedly being a mutual "typo" (i.e. that her "typo" was based on his "typo"). (See Tr.341:23-343:21) At a minimum, this should have alerted any reasonable fact finder to the fact that her testimony was unreliable. And it also should have suggested that she was working together with Mr. Dunn to make sure that their EEOC answers matched each other.

the entire set of disputed facts in this case into their proper context, as well as clearly disproving virtually all of the pretextual bases that were asserted by the defendant. For example, it would have established that contrary to his fabricated "reports" (i.e. his pieces of paper that he had created and printed out post-threat), there was never any discussion between him and me about my hours – during this conversation, he repeatedly stated that he didn't need to discuss my hours with me, he was not my babysitter, I was an adult, etc, and I should have known on my own that I was not putting in a full 8 hours. It would have also shown that he did not care if I worked less than 8 hours, but just that I would end up getting less than 8 hours of pay if I didn't sit at my desk for a full 8 hours each day. It would have shown that my coworkers had no reason not to ask for my help, aside from the fact they wanted to keep their own work for themselves. It would have shown that the only issue was my mistakenly counting my lunch break as part of my official time (which from my prior employment at Fort Monmouth, I had incorrectly assumed was also the accepted practice at this base as well), and not to keep volunteering my help to my coworkers. This exhibit would have also shown (perhaps most importantly) that the conversation ended on a positive note, where we had worked everything out going ahead for the future. (See P5, Pa71)

But this exhibit was completely excluded, except for the tiny portion that I was eventually able to use as impeachment evidence, and only because Mr. Dunn had expressly denied ever telling me that I could start later than 10AM.

However, immediately after I played the video, where he is clearly caught in yet another lie (i.e. he told me that I could start at 2:00 PM and work until ten o'clock at night, and that if I remembered that he had said to me during the interview that he didn't care when people gave their 8 hours, etc.), before I could ask Mr. Dunn a single question about this video, the judge then nullified this evidence by blurting out: "Frankly, you can ask questions about this, but I have a lot of difficulty understanding most of what was said." Tr. 321:8-9

THE COURT: It speaks for itself, whatever it is. Frankly, you can ask questions about this, but I have a lot of difficulty understanding most of what was said.

Mr. Dunn then took the judge's obvious hint, and then responded by saying: "To be honest with you, I can't understand anything on this tape. It's -- I mean, just every other word maybe." Tr. 324:14-16

BY MR. D'AGOSTINO:
Q. Okay. Well, Mr. Dunn, you've heard this video recording twice now.
Now that you've heard what's on this tape, do you wish to change your prior testimony?
A. To be honest with you, I can't understand anything on this tape. It's -- I mean, just every other word maybe. So...

Likewise, Mr. Dunn also took the judge's hint about my P2 video. That is, prior to trial, Mr. Dunn had admitted to my transcription of everything which was captured in that video:

74. As captured on Plaintiff's surreptitious recording of the conversation, Plaintiff raised his voice to Mr. Dunn, exclaiming rapidly, "I worked for you—I worked the hours! You owe me the hours! I gotta get paid for them, okay? And if this doesn't get fixed, I'm going to file a formal grievance against you and against Mika. Because I'm tired of being treated like crap! I'm tired of being the low man on the totem pole! You can't jerk me around with my damn hours here! This is what I was..." *Id.* ¶ 15.[2]

75. Plaintiff threatened to file an unspecified grievance during his conversation with Mr. Dunn regarding his pay issue. *Id.*

76. Mr. Dunn appears to say in the recording: "We're done. Goodbye. Go back to work or do whatever you want to do. We're done. Nobody threatens me; nobody threatens anybody on my staff, ever. We're done. We're done. I'll look into it; that's the best promise I'm going to give you. Other than that, we're done. We're done now." *Id.*

However at trial the judge made the following statements:

THE COURT: I got about three quarters of it: Nobody threatens me. I got that part of it.

MR. MAILLOUX: The audio itself of what we just heard is the best evidence of any recording of what occurred between Mr. D'Agostino and Mr. Dunn that day. And the court reporter's transcript of what she was able to surmise from what we overheard would be an accurate reflection of that.

THE COURT: She was not able to surmise anything, nor was I, from what we heard, except the part that Mr. Dunn allegedly spoke: We're done, goodbye, et cetera. I have no idea what Mr. D'Agostino said other than what he's just told us.

THE COURT: Well, the problem with the video is you can't understand Mr. D'Agostino's part of the conversation, because as he acknowledged, when he -- he tends to talk loud and that's why we can't make out what he said.

So when Mr. Dunn testified (on direct examination), then he changed his trial testimony to essentially mirror the judge's suggestions/hints:

Q. Okay. Do you recall using the word, nobody threatens me? Do you remember saying that?

A. I do. I do.

Q. Okay. And can you explain to the Judge what you meant by that?

A. Again, Mr. D'Agostino became very upset and was -- in my terms, he was yelling very loud. At some point, I took something that he had said as a threat. He was berating my team. He was berating the team. He was smarter than they were. He could do any of their jobs. He should be paid more. I shouldn't be doing this. I mean, it just kind of went on and went on and went on. And he was getting louder and louder, and I felt threatened. Something that he had said, and I said: Nobody threatens my staff. Nobody threatens me.

E. The mismatch between the 'draft' letter and the official Sep 12th termination letter

The official Sep 12th termination letter listed 4 reasons for my termination: a) for supposedly being "late" on Aug 22nd, b) for supposedly being "late" on Aug 30th, c) for supposedly not notifying anyone when I would leave from (or arrive at) the office, and d) for supposedly not working well with the rest of the team:

2. The reason for your termination is due to the following:

a. On 30 August 2013 you were marked as AWOL, preferring to show up at 1339 instead of your 1000 scheduled time for work.

b .On 22 August 2013 you were directed to a special duty assignment at the Installation Family Fun Fest. You arrived one hour late.

c. You have demonstrated a pattern of failing to notify any team member when arriving to work for the day, or leaving/returning from an appointment. I have instructed the entire staff to not abandon the office in our staff meetings on 5 May 13 and 2 August 13. This practice is unacceptable and that you must ensure your accountability at all times, however, you have continued to disregard my instruction and have not informed a co-worker of your whereabouts during the work day.

d. You do not work well wth fellow team members; you complain if you are not asked to help and argue or resist when you are.

However the "draft" letter, which was created and sent out on Sep 6th, had listed many other purported issues with me, such as my supposedly being inadequately skilled for the position, my unwillingness to improve those skills, my supposedly not having even a modicum of understanding about military culture, my supposedly not wanting to learn about it either, et cetera, et cetera, and even my improperly using the van 3 months earlier (which was a one-time event that was only due to an emergency situation). There were obviously many more than 4 gripes purported within his draft letter. (See Pa131).

So what must have happened is that the base legal office must have reviewed his "draft", and then realized that it was implausible that I would have kept my job for 5.5 months if I was inadequately skilled for it and had no desire to improve. The base legal office must have also realized that his other purported bases (such as a one-time infraction that had occurred over 3 months earlier, with no reoccurrence), would appear pretextual. Thus several of his alleged bases were removed from the official Sep 12th termination letter.

So as a result, when the EEOC investigator then asked Mr. Dunn if the Sep 12th letter had set forth the full reasons for my termination, Mr. Dunn responded: "Affirmative.":

Was Complainant retaliated against (EEO activity 5N1L13007) when on September 12, 2013, he received a Notice of Termination from Mr. Dunn, effective September 13, 2013.

Q: Does Complainant's letter of Termination fully explain the reasons for Complainant's termination?

R: Affirmative

F. The obvious

In order to believe the defendant's version of events, it would require the fact finder to conclude that it was purely coincide that Mr. Dunn had acted to terminate my employment less than 2 hours after I threatened to file a grievance (a threat which Mr. Dunn responded to by saying: "We're done". "Goodbye". "Nobody ever threatens me", etc).

The fact finder would also need to be beguiled into thinking that even though I had worked there for 5.5 months with no written warnings at all (aside from the van), that the actions which Mr. Dunn undertook to fire me were not retaliatory; but instead were all based on legitimate and non-pretextual reasons.

The fact finder would also need to ignore the several instances of Mr. Dunn's blatant perjury, in addition to the countless instances of Mr. Dunn's wildly inconsistent testimony.

The fact finder would need to further ignore the fact that there was no verifiable pre-threat documentation of Mr. Dunn's intention to fire me, and the fact finder would also need to ignore the fact that for the sole document which the creation date that could be verified, it turned out that he had repeatedly attempted to fabricate a different creation date for it, for the express purpose of trying to deceive people into believing that this document had been created pre-threat, when in fact it had been created post-threat - and at just 1 hour and 59 minutes later no less (i.e. I had made the grievance threat at 12:34 PM on Sep 6th, and his draft termination letter was created at 2:33 PM on Sep 6th).

Moreover, the suggestion that Mr. Dunn may have decided to terminate me anyway (i.e. even if I hadn't made the grievance threat) is clearly belied by the evidence (both by that which was allowed in, and even more so by the other evidence which was not allowed in).

For example, the personnel document shown below states that Mr. Dunn was required to "make appropriate entries in PART B (Supervisor's Notes) during the year", and to "record" on that form, any "comments and events occurring during the year; e.g. ..., counseling session leading to adverse or disciplinary action, performance or conduct.",

which he then was instructed to "detach and file with a new PART C, if disciplinary or performance action has been noted".

But yet there was never any such entries ever made on this form:

SUBJECT: SUPERVISOR'S EMPLOYEE BRIEF (AP FORM 971-NAF)

TO: FSK NAFI ID: 500
02

FOR SUPERVISOR OF: Steven A. D'Agostino SSAN: [redacted]

1. INSTRUCTIONS TO THE SUPERVISOR:

** Complete PART A (EMPLOYEE INFORMATION) upon receipt of this document.
** Make appropriate entries in PART B(SUPERVISOR'S NOTES)during the year.
** Additional entries in PART C (CURRENT EMPLOYEE DATA AND RECORD OF EMPLOYEE PERSONNEL ACTIONS) may be made during the year.
** However, as significant personnel changes occur, you will receive an updated PART C.
** Refer to AFMAN 36-310 for additional instructions.

PART A - EMPLOYEE INFORMATION ----------EMERGENCY INFORMATION

1. HOME ADDRESS:
25 Nautilus Dr
Barnegat NJ 08005

5.NAME:_____
6.RELATIONSHIP: _____
7.HOME ADDRESS:
_____
_____

2. HOME TELEPHONE: (609) 698-0842

8.HOME TELEPHONE: _____

3. MIL STAT: 3

9.WORK TELEPHONE: _____

4. MED INDICATOR: 1

PART B- SUPERVISOR'S NOTES: Record comments and events occuring during the year; e.g.,Letter of Appreciation,counseling session leading to disciplinary or adverse action, performance or conduct. Detach this page and file with new PART C, if disciplinary or performance action has been noted.

DATE DESCRIPTION OF EVENT

DAG 000023

SUBJECT: Supervisor's Employee Brief (AF Form NAF-971)

TO: FSK NAF ID:500-
02-

FOR SUPERVISOR OF: Steven A. D'Agostino SSAN: [redacted]

INSTRUCTIONS TO THE SUPERVISOR:
**Part C will be automatically updated as significant changes occur. Maintain with parts A and B in the employee work folder.

PART C - CURRENT EMPLOYEE DATA AND RECORD OF EMPLOYEE PERSONNEL ACTIONS:

1. CURRENT EMPLOYEE DATA

A. PAY PLAN	B. OCCUPATIONAL SERIES	C. GRADE/PAY BAND	D. STEP	E. SALARY
NF	1084	03	00	$18.00

G. POSITION TITLE VISUAL INFORMATION SPECIALIST

H. PAL ID NUMBER	I. POSITION/SEQUENCE NUMBER	J. GUARANTEED HOURS
500020005	43102.1670450	20.00

K. SUPERVISORY TRAINING

L. EMPLOYMENT CATEGORY
REG - Regular

M. SECURITY DATA

A. TYPE	B. DATE COMPLETED	C. POSITION INVESTIGATIVE REQUIREMENTS
3		3

N. PERFORMANCE

A. EVALUATION	B. DATE
3	

REPORT NAME: NAF28 1

DAG 000024

Thus, Mr. Dunn was required to contemporaneously update this form with any and all of the issues that were later purported within Mr. Dunn's supposed "reports" (i.e. that he claims had existed pre-threat, and further alleges that one of which was initially created in May).

But quite tellingly, both part B and part C of this form contain no such information at all. Moreover, even assuming arguendo if Mr. Dunn had "held off" with his making these required updates until after he had made the decision to have me terminated, nonetheless it was his repeated testimony (both to the EEOC and at trial) that as of Sep 3rd, he had already made that decision. *This was his testimony to the EEOC about when the decision was made:*

Q: When was the decision made to terminate Complainant?

R: I made the decision on Sept 3 2013, submitting the request to remove on Sept 5 to HRO.

At trial, he pushed the decision date even earlier, supposedly made while he was on leave:

Q. What decision did you make about the defendant's employment while you were on leave?
A. I decided that I needed to remove.
Q. Now, you come back to work after Labor Day. And that was 3 September; is that right?
A. Yes, sir. It was the day after Labor Day, I guess.

So even with affording Mr. Dunn every last benefit of the doubt, if he had really intended to have me terminated as of Sep 3rd (at the latest) as he had repeatedly testified to, then there should have been an update to my personnel file as of that date, which then would have been independently verifiable – but yet at no time was this ever done, even though it was required. This further shows that Mr. Dunn's decision to have me terminated was simply his knee-jerk "nobody ever threatens me" reaction, in retaliation for my threat to file a grievance.

The foregoing is aside from Mr. Dunn's virtually countless other inconsistent statements, and aside from the numerous inconsistent statements of Mr. Dunn's assistant. Even if these had stood alone, and even aside from his undeniable fabrication of evidence, it was far more than enough for any reasonable fact-finder to disbelieve his testimony. "A plaintiff's discrediting of an employer's stated reason for its employment decision is entitled to considerable weight." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290 (D.C.Cir. 1998) (en banc); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). Thus the verdict truly was the exact opposite of the evidence.

CONCLUSION

I respectfully submit that the Third Circuit improperly assumed jurisdiction of this appeal, because the Tucker Act was undeniably involved in the rulings below, and in fact it was an issue that went to trial and was clearly and undeniably referenced in the bench verdict. I respectfully submit that this error was then exacerbated when the Third Circuit made findings that pertained to the Tucker Act (as to my contractual rights to receive the agreed upon rate of pay for all hours that I had actually worked).

Worse still, it seems that in its very hasty process of making these findings, the Third Court confused / conflated my claim for back pay (*i.e. the wages I would have earned for hours I should have worked, if not for the retaliatory discharge*) with **my claim for the $273 in unpaid wages** (*i.e. for the hours that I did actually work, but wasn't*

paid for). **However this $273 amount** **was not based on Title VII**, and as such, this $273 did not constitute "equitable" relief under Title VII. Instead I believe that it was legal in nature; and in turn, since the **$273** obviously is greater than **$20,** I respectfully submit that the Seventh Amendment guaranteed my right to a jury trial. This U.S. Supreme Court very recently held this most fundamental principle to be true, even in cases that would normally go before an administrative agency (e.g. the SEC), whenever monetary relief is involved (even including a civil penalty). Thus I believe I was (and am) entitled to have a jury trial, on all issues and claims. However, even assuming arguendo that the $273 was equitable in nature (and therefore I had no right to a jury trial), I still should have some remedy for that, which would then most likely be a contractual remedy under the Tucker Act, as both the District Court and the US attorneys had concluded.

Moreover, if the FLSA "single week" calculation method for overtime (i.e. 29 C.F.R. § 778.104) also applies to regular time (i.e. rather than being treated as a weekly average because I received a check once every 2 weeks), in that scenario then the $273 difference would have been a violation of the FLSA minimum wage. But the Third Circuit never addressed this, seemingly because it had mistakenly merged together the $273 that I sought in unpaid wages as part of my Title VII retaliation claim, for which I did seek back pay (i.e. pay that I should have earned if not for the wrongful retaliatory termination). However the $273 was completely separate from that.

That is to be clear, at the risk of being unnecessarily redundant, even if I hadn't been fired, I still would have sought the $273 difference in my net pay (i.e. not gross pay). This was the $273 difference between the hours that I had actually worked, and what I

had actually received, in my net pay. So very importantly, this $273 had nothing to do with the wrongful retaliatory termination – as whether or not I kept on working there, this $273 difference would have been owed to me all the same.

And as to the retaliatory discharge, as the illustrative examples should clearly convey to this Court, undoubtedly the dismissal of that claim was the exact opposite of the evidence presented at trial.

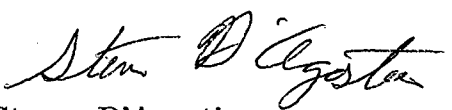
In early March of 2024, after I re-read my brief, I realized that it was inartfully worded and could be somewhat difficult to follow. I had a pending offer (albeit quite low) to partially settle an unrelated matter, which if it had went forward, would have then afforded me with sufficient funds to retain counsel to file a better-worded brief in this appeal. And I understood that if the matter was transferred to the Federal Circuit, I would automatically have the option to file an amended brief; whereas if it stayed in the Third Circuit, I would need to file a motion to do so. Thus, before taking any low-ball settlement offer, on Mar 8, 2024 I filed a motion to contingently file an amended merits brief, if the Third Circuit decided to retain jurisdiction of the appeal. I explained therein that I wanted to retain counsel to help me file a better brief (particularly because there would be no oral argument, which the Third Circuit never grants, aside from a few very rare exceptions). This motion was unopposed - yet not only was it not granted, it was never even addressed. Instead, at the very end of the Mar 21, 2024 opinion, and in the very last sentence no less, it simply states: "D'Agostino's pending motions are denied." (Pa199). This was extremely unfair, as several times I had raised my concerns about not

having oral argument (if the appeal remained in the Third Circuit), and that I would then need a much better brief to properly articulate these very complex issues on paper.

And then on top of that, not only did the Third Circuit refuse to allow me to amend my brief (or to have any oral argument), rather than choosing to take extra time to scrutinize the brief (of a pro se appellant) to try to comprehend all of the very complex factual issues and to discern the bases for my appeal, the Third Circuit instead chose to do the exact opposite – it very hastily rushed through the jurisdictional issue, as well as all of the merits of the appeal, taking only a mere 25 hours in total for everything! This resulted in several critical errors, which caused the particular harm to me of a gross and manifest injustice in my appeal. Moreover, these hasty and critical errors by the Third Circuit will undoubtedly affect many more potential plaintiffs (both presently and in the future), as even though this opinion was not published, nonetheless it will almost certainly still be cited countless times in the future (particularly as to the jurisdictional issue with the Tucker Act, and likely also as to the proper application of the FLSA).

Thus, I implore this Court to grant this petition. (Or alternately, if this Court can do so directly on this petition, I ask this Court to vacate the Third Circuit's affirmance of the appeal, and then remand for a new de novo review - either by the Federal Circuit, or by a new Third Circuit panel). Thank you.

Respectfully submitted,



Steven D'Agostino

P.S. If this Court hasn't done so already, please watch my video presentation – this will really help to explain the factual issues: https://stevedagostino.biz/PetitionRehearing.mp4