

NO. 24-6660

**IN THE
SUPREME COURT OF THE UNITED STATES**

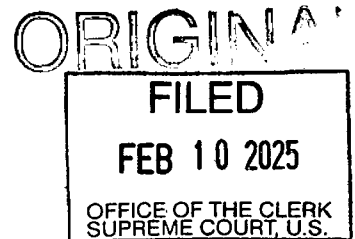
Xiaorong Lan,

Petitioner

v.

University of Texas at San Antonio,

Respondent



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

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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QUESTIONS PRESENTED

1. Should UTSA's summary judgement be granted when unsolved genuine issues of material facts are presented, and the credibility of evidence is questioned? The Court of Appeals' decision conflicts with the following court decisions:

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir.1975)

Hunt v. Cromartie, 526 U.S. 541,550-5(1999).

2. Did Lan suffer discrimination due to her national origin? The Court of Appeals' interpretation of McDonnell Douglas indirect method of proof conflicts with the following court decisions:

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973)

Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2097, 2108 (2000)

Washington v. Davis, 426 U.S. 229, 242 (1976)

3. Did Lan suffer retaliation in the reinstatement petition and re-admission inquiry? The Court of Appeals' decision conflicts with the following court decisions:

Medina v. Ramsey Steel Co. 238 F.3d 674, 684 (5th Cir. 2001);

Teague v. Williamson County, No. 22-50202 (5th Cir. 2022);

Evans v. City of Houston, 246 F.3d 344, 254 (5th Cir. 2001);

Zamora v. City of Houston, NO. 4:07-4510 (S.D. Tex. Sep. 7, 2010);

Pardo-Kronemann v. Jackson, 541 F. Supp. 2d 210 (D.D.C. 2008);

Romano v. Brown & Williamson Tobacco Corp, 284 N.J. Super. 543 (App. Div. 1995);

Kalinowski v. Gutierrez, 435 F. Supp. 2d 55 (D.D.C. 2006)

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover letter.

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

RELATED CASES

Lan v. University of Texas at San Antonio, No. 5:22-CV-769, United States District Court for the Western District of Texas, Judgement entered June 30, 2024.

Lan v. University of Texas at San Antonio, No. 24-50546, United States Court of Appeals for the Fifth Circuit, Judgement entered February 4, 2025.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Xiaorong Lan, a former Ph.D. student at UTSA, respectfully petitions the Court for a writ of certiorari to review the judgment below.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals affirming Summary Judgement appears at Appendix A to this petition and is unpublished. The opinion of the United States district court granting University of Texas at San Antonio Summary Judgement appears at Appendix B to this petition.

II. JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided my case was January 17, 2025. A timely filed petition for rehearing was denied by the Court of Appeals on February 4, 2025, and a copy of the order denying rehearing appears at Appendix E. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against or discharging an employee on account of the employee's national origin. 42 U.S.C. § 2000e-2(a)(1). Title VI of the Civil Rights Act of 1964 similarly prohibits organizations receiving federal financial assistance from discriminating based on national origin. 42 U.S.C. § 2000d. Title VI and Title VII also prohibit retaliation against any individual who engages in protected activity, such as complaining of discriminatory behavior or assisting in an investigation of such behavior. 42 U.S.C. § 2000e-3(a); 34 C.F.R. § 100.7(e).

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure

only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *see* Fed. R. Civ. P. 56(c).

IV. STATEMENT OF THE CASE

Xiaorong Lan, Chinese by national origin, was a Ph.D. student in the Accounting Department of UTSA’s Carlos Alvarez College of Business and employed as research assistant beginning in September 2019. On January 29, 2020, Dr. Sanchez had a meeting with Lan and made the remark that he “would always put Chinese student at the bottom of his list because of poor communication”.

In July 2021, Lan took the written portion of Ph.D. Comprehensive Qualifying Examination and received unsatisfactory on two of the five sections, resulting in an overall failing grade. Both sections were graded by Dr. Sanchez and Dr. Linthicum. On August 4, 2021, Dr. Linthicum stated that she stood ready to change her grade in section 2 of Student D¹ from marginal to unsatisfactory after reading Dr. Sanchez’s comments and talking with him. *ROA1027-1045*. Lan raised concern to the committee that 5 out of 8 of Dr. Sanchez’s comments in the feedback contained obvious errors. *ROA1595-1633*. One of the Dr. Sanchez comments stated “*Three RQs are provided, but **no motivation** for either*”. In contrast, Dr. Boone pointed out on September 2, 2021 that “*I would normally presume that the lengthier discussion of course readings would serve as **adequate motivation** for the hypotheses.*” *ROA1632*.² Even though none of the professors at UTSA justified the errors raised by Lan, Lan was informed that the failing grade stayed and asked to re-take the exam in September 2021.

The Ph.D. committee discussed whether the retake exam policy should be applied consistently and have Lan only take the sections with unsatisfactory grades. Dr. Roman indicated

¹ To comply with the blind grading policy, the answers of the three Ph. D. students were marked as D, E, F by Dr. Liu, Ph.D. advisor and proctor of the exam. On July 21, 2021, Dr. Asthana emailed Dr. Liu that he could see the name of student D when he opened the PDF file of her exam response for Day 2 of the written exam. This particular PDF file was addressed to the entire PhD Committee members, including Dr. Sanchez and Dr. Linthicum. Lan was marked as student D in this exam for both Day 1 and Day 2. *ROA1469-1470*

² References to “ROA” are to the appellate record from the United States Court of Appeals for the Fifth Circuit.

that it is unfair for the student to retake the entire exam and questioned the purpose of so doing. *ROA1037-1043. ROA1027-1028.* However, Lan was treated differently and took the entire sections in the retake exam. Thus, Lan failed the retake exam. On October 13, 2021, Lan was dismissed from the PhD program.

On October 7, 2021, Dr. Boone emailed the committee that *“it is a case that a different policy is being applied to Ariel (Lan) as compared to the policy that was applied to students over approximately a ten-year period”*. See Appendix F. He indicated that if Lan were not treated differently, she should have received a conditional pass. He also questioned whether Lan was graded fairly in the re-grading of the initial attempt. Ironically, on October 7, 2021, another email disclosed in the discovery was sent from Dr. Boone to Dr. Asthana where Dr. Boone made an overall academic assessment of the initial exam and a comparison of Exam answers in Sections 2 across all three participants.³ *ROA1630-1631.*

The other two students taking the same exam as Lan did not find errors in the grading. Lan raised concern about the discriminatory grading by Dr. Sanchez in light of the errors in the feedback and felt Dr. Sanchez put heightened and unexplainable scrutiny in the grading of her Ph.D. Comprehensive Qualifying Examination because of her national origin.

In November 2021, Lan initiated an academic grievance and filed a formal discrimination complaint with Equal Opportunity Services (“EOS”). EOS conducted a preliminary investigation and concluded there was no evidence of discrimination as to the grading. Accordingly, on December 29, 2021, Dr. Asthana issued a Memorandum as to grade grievance, finding that Lan’s grade grievance without merit since EOS did not find any basis of discrimination and they did not find evidence of differential treatment. *ROA1633-1637*

Thereafter, in January 2022, Lan contacted Graduate School, Dr. Sanchez, and Dr. Liu for advice on reinstatement petition and Dr. Sanchez told Lan to seek guidance from Graduate School. Lan submitted a reinstatement petition to Graduate School. On January 31, 2022, Lan was informed by the Graduate School that her petition had been submitted to the reinstatement

³ Lan raised concern about the credibility of this piece of evidence because the academic assessment made by Dr. Boone dated August 4 and September 2 conflict with his overall assessment dated October 7, 2021. *ROA1630-1633.* UTSA failed to guarantee this piece of evidence to be true and accurate. *ROA723-798.*

committee. On February 2, 2022, Lan reached out to Dr. Liu to inquire about the status of the reinstatement petition, and Dr. Liu stated that he was not aware of the reinstatement petition; thereafter, Dr. Sanchez vigorously and actively contacted Graduate school until he got the reinstatement petition back to Accounting PhD Committee for decision making; Dr. Liu was the chair of the Accounting PhD Committee and immediately informed Lan the updated achievement that her reinstatement package was at Dr. Liu's disposal after Dr. Sanchez discussed with Graduate School; in the meantime, Dr. Liu reached out to Graduate School for advice about setting up the reinstatement committee. Graduate School responded to let him seek Dr. Sanchez for guidance and insight. *ROA1638-1660*.

On March 4, 2022, Dr. Liu hosted a Ph.D. Committee meeting. In the meeting minutes, Dr. Liu listed 6 items in his discussion list, including Lan's reinstatement petition. However, on March 7, 2022, Dr. Liu issued the meeting minutes and initiated a series of discussions about Lan's reinstatement petition with PhD Committee members via email. Dr. Liu recommended to reject Lan's reinstatement petition as "Ms. Xiaorong Lan submitted Petition for Reinstatement with the following reasons: 1) personal illness or accident, 2) illness, accident, or death of family members, and 3) no utilization or unaware of academic resources. After careful discussion and deliberation, the committee found no merit in her petition for reinstatement. Committee members voted unanimously to reject the petition." Dr. Liu also invited other professors to leave comments on his decision. *ROA 1661-1667*.

Consequently, the professors in the PhD committee started a collaboration over the following days to resolve a plausible excuse or legitimate reason for Dr. Liu's decision via email. In the back-and-forth discussions, these professors intended to avoid getting into a discussion of the reasons for the rejection. Eventually, on March 12, 2022, Dr. Liu decided to put the decision as "After a careful examination of all available evidence, the committee voted **unanimously** to reject the petition". Dr. Liu instructed other committee members to sign the rejection of the Reinstatement Petition form. Dr. Asthana and Dr. Linthicum were absent from the discussion; Dr. Linthicum did not sign the rejection of Reinstatement Petition form. Meanwhile, Dr. Liu invited PhD Committee Members to sign the meeting minutes. Dr. Roman responded that meeting minutes

should not be signed but should be passed **by voice vote at the next meeting.**⁴ *ROA 1668-1686*. On March 23, 2022, Dr. Sanchez signed the Reinstatement Petition form after repeated requests from several staff and reluctantly released the Reinstatement Petition form to Graduate school. *ROA 1687-1695*. Hence, Lan was informed of the decision on March 24, 2022.

Lan timely filed complaints with the EEOC and Office of Civil rights in the Department of Education, alleging national discrimination based on discriminatory grading and the EEOC issued a right to sue letter on July 6, 2022. Lan initiated the lawsuit on July 19, 2022, in the United States District Court for the Western District of Texas, San Antonio Division, seeking relief from the unlawful discrimination and retaliation she suffered at UTSA under Title VII of Civil Rights Act of 1964.

In the hope to find peace with UTSA and continue her education, in April 2023, Lan contacted One-stop Enrollment at UTSA for readmission information and submitted an online inquiry to PhD advisor of Accounting at UTSA. Dr. Yin⁵ reached out to Lan via email to discuss her inquiry about registering for classes in summer. Lan clarified that her intention was to get back to PhD program and asked for guidance and advice. Without a second thought, Dr. Yin rejected Lan's inquiry, let alone seeking opinions from other PhD committee members or providing any further information about the application for PhD program or any further inquiry about Lan's updated information, as a PhD advisor should normally approach when a potential candidate submits an inquiry. *ROA 1549-1550*.

In October 2023, when Lan found that credibility of evidence in the discovery is questionable, she requested to reopen discovery and depose Dr. Boone, but her requests were denied. On November 6, 2023, UTSA filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law. On May 21, 2024, the District

⁴Lan raised concern that Ph.D. Committee members did not unanimously and uniformly discuss and vote Lan's reinstatement petition in the meeting on March 4, 2022. UTSA failed to provide a clear response.

⁵ Dr. Yin is the current PhD advisor in Accounting at UTSA. She is the spouse of Dr. Liu (Associate Professor in Accounting and former PhD. Advisor in Accounting, current Interim Chair of Accounting Department at UTSA), and the friend of Dr. Daniela Sanchez (Assistant Professor in Accounting at UTSA and the spouse of Dr. Manuel Sanchez, who is Professor in Accounting, member in PhD committee and Associated Dean of Graduate Study and Research in Alvarez College of Business at UTSA).

Court issued a report and recommendation to grant UTSA summary judgment. Lan filed her objection and request for trial on May 26, 2024. On June 30th, 2024, the District Court entered an Order to grant UTSA summary judgement and dismissed Lan's Complaint for the reasons set forth in the court's Memorandum and Order. On July 1, 2024, Lan timely filed her notice of appeal. However, Lan's appeal was unsuccessful. The United States Court of Appeals for the Fifth Circuit affirmed summary judgement on January 17, 2025 and denied Lan's petition for rehearing on February 4, 2025.

V. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve the conflict among the Circuits regarding the circumstances under properly granting summary judgement, interpretation of McDonnell Douglas indirect method of proof, and application of McDonnell Douglas framework. The Court of Appeals' opinion contravenes the Supreme Court of the United States jurisprudence, and conflicts with decisions of other courts of appeals, such that this Court should use this case, which cleanly presents the legal issue on a well-developed set of facts, to resolve the conflict over these important questions.

I. The Court of Appeals erred in affirming summary judgement on Lan's national origin discrimination and retaliation claims, which contravenes this court jurisprudence, and conflicts with other courts of appeals.

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also Fed. R. Civ. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"A factual dispute is material if it affects the outcome of litigation and genuine if manifested by substantial evidence going beyond the allegation of the complaint." *Hahn v.*

Sargent, 523 F.2d 461, 464 (1st Cir.1975). In ruling on a Motion for Summary Judgement, the court will never weigh the evidence or find the facts. All doubts must be resolved against moving party, all evidence will be construed in light most favorable to the non-moving party and all reasonable inference will be drawn in the non-moving party's favor. *Hunt v. Cromartie*, 526 U.S. 541,550-5(1999).

In this case, Lan raised several existing genuine issues of material fact and none of them was addressed by UTSA or resolved in district court.

1. UTSA fails to guarantee Dr. Boone's email to Dr. Asthana dated October 7, 2021 to be true and accurate.
2. UTSA fails to justify the errors in Dr. Sanchez feedback in support of Lan's unsatisfactory performance.
3. UTSA fails to explain that the errors were made for legitimate non-discriminatory reasons.
4. UTSA fails to explain the reason why Dr. Linthicum eagerly came to consistency with Dr. Sanchez even though Dr. Sanchez's feedback contains obvious errors.
5. UTSA fails to provide further evidence to justify that Ph.D. Committee members *unanimously and uniformly* voted on Lan's reinstatement petition on March 4, 2022.
6. UTSA fails to provide any response to the following questions raised by Lan:
 - Why didn't Dr. Sanchez and Dr. Liu recuse themselves from the decision-making process that involves Lan's academic decisions due to the series conflict of interest?
 - Why didn't Dr. Sanchez and Dr. Liu trust other colleagues to make the reinstatement petition decision?
 - Why did Dr. Sanchez and Dr. Liu think that they are so important in the decision-making process?
 - Why did Dr. Sanchez and Dr. Liu rigorously and actively engage in and dominate Lan's reinstatement decision-making process?
 - Did Dr. Asthana report the memorandum of Lan's grade grievance to Dr. Liu and Dr. Sanchez?

Lan could not agree with the court of appeals that Lan offered no evidence that Dr. Sanchez had the singular degree of influence required to make him functionally responsible for the failing exam scores. The reason that Lan feels that she was discriminated by Dr. Sanchez is that Dr. Sanchez's feedback used to support the failing score in the initial grading contained obvious errors. ROA1595-1633. After Dr. Sanchez initiated this failing score, the other professors followed suit to support his judgement, from Dr. Linthicum, two professors in the regrading to the faculty involved in the grade grievance. However, none of them directly justified the errors Lan raised in Dr. Sanchez feedback. Nor did they address the differential treatment in the grading policy or re-take exam policy during EOS investigation and grade grievance.

On the contrary, one error was substantiated by Dr. Boone in his comment dated September 2, 2021 where Dr. Boone stated that "*I would normally presume that the lengthier discussion of course readings would serve as adequate motivation for the hypotheses.*", which is contrary to Dr. Sanchez comment "*Three RQs are provided, but no motivation for either*". ROA1632. In addition, Dr. Boone also pointed out that Lan was graded unfairly in the re-grading. The court of appeals mentioned that Dr. Boone also reviewed Lan's score on one section and concurred with unsatisfactory grades. However, in the motions and briefs, Lan repeatedly questioned the authenticity and credibility of this document from Dr. Boone to Dr. Asthana on October 7th, 2021 while UTSA fails to guarantee it to be true and accurate in any of the series responses. Lan hereto urges this court to investigate this issue.

Ultimately, the totality of the relevant facts will determine whether the recipient has engaged in intentional discrimination in violation of Title VI. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (discussing analysis of intentional discrimination generally). In Lan's case, the prevailing evidence mentioned above indicated that Lan satisfies both the second and fourth element of McDonnell Douglas.

III. The Court of Appeals' application of McDonnell Douglas framework conflicts with decisions of the Supreme Court of the United States, the circuit, and other courts of appeals, such that consideration by this court is necessary to secure and maintain uniformity.

The court of appeals contends that Lan fails the third element of the McDonnell Douglas framework in the retaliation claim: the causal connection between the protected activity and the

adverse action. According to the Fifth Circuit, all a plaintiff must show to establish a prima facie causal link is that the protected activity and the adverse action are “not wholly unrelated.” See *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001). There are two main ways: (1) temporal proximity, (2) knowledge of the protected activity by the person who took the adverse action or recommended the adverse action. See *Teague v. Williamson County*, No. 22-50202 (5th Cir. 2022).

The district court stated that five months elapsed between the filing of EOS complaint in November 2021 and decision to deny her request for reinstatement in March 2022, which is too distant a temporal relationship to establish causal connections required for a prima facie case of retaliation. *ROAI571*. Lan argues that EOS complaint and reinstatement decision are both ongoing process from the day that she filed a complaint till the day that she withdrew the complaint, or the case was closed. Therefore, the temporal proximity between the denial of Lan’s reinstatement and her protected activities should be within 3 months after EOS complaint closed. Under Fifth Circuit case law, if an adverse action happens within four months of a plaintiff’s protected activity, prima facie causation is established. See *Evans v. City of Houston*, 246 F.3d 344, 254 (5th Cir. 2001) (“A time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes.”). If the adverse action happened more than four months later, temporal proximity can still be used, but generally a plaintiff will have to show minor actions over a period of time culminating in an actionable adverse action. See, *Zamora v. City of Houston*, No. 4:07-4510, (S.D. Tex. Sept. 13, 2012) (holding that a twenty-six month gap where the Plaintiff alleged a series of adverse actions spanning several years was sufficient to show a causal link). In this case, Dr. Sanchez and Dr. Liu rigorously and actively engaged in and dominated Lan’s reinstatement decision-making process and attempted to delay the release of the form to Graduate School at UTSA. *ROAI638-1695*.

Most importantly, Dr. Liu and Dr. Sanchez managed to ask the petition back to Ph.D. committee and retaliate against Lan at the first opportunity available for them. In *Kalinowski v. Gutierrez*, 435 F. Supp. 2d 55 (D.D.C. 2006) the court explained that, “[t]his non-selection claim does not really present a situation where the employer could have taken the challenged action at any time it wished. Instead, the timing was dictated somewhat by government hiring procedures. In other words, it is possible that defendant denied plaintiff the job at the first possible opportunity following her filing of the discrimination claim—it just happened to be three months later by virtue

of the normal timing of the hiring process.” “Especially where a defendant retaliates at the first opportunity that is presented, a plaintiff will not be foreclosed from making out a prima facie case despite a substantial gap in time.” See *Pardo-Kronemann v. Jackson*, 541 F. Supp. 2d 210 (D.D.C. 2008). “We doubt that a sophisticated employer, such as defendant, would immediately retaliate. Rather, a jury may find that...defendant’s wounds merely festered until an opportunity to terminate presented itself....” *Romano v. Brown & Williamson Tobacco Corp.* 284 N.J. Super. 543 (App. Div. 1995).

In this case, evidence also clearly showed that Dr. Liu recommended the adverse action to the committee members. ROA1667-1694. As Lan previously stated, Dr. Liu and Dr. Sanchez should be well aware of Lan’s protected activity since Dr. Asthana and the Grade Grievance committee mentioned in the memorandum that Lan filed a discrimination claim with EOS. ROA1633-1637.

For retaliation claim in the re-admission inquiry, the court of appeals misapprehended it as Lan’s effort to enroll in upper class course reserved to Ph.D. candidate. In fact, Lan contacted One-stop Enrollment at UTSA for readmission information and submitted online inquiry to PhD advisor of Accounting at UTSA. Details show that Lan simply inquired with Dr. Yin about re-admission to the Ph.D. program since Lan clarified that her original intention was to go back to the Ph.D. program and take class in the summer. ROA 1549-1550. Dr. Yin retaliated against Lan at the first opportunity available to her. And this event happened contemporary with this lawsuit.

Hence, Lan established a prima facie case of discrimination and retaliation claims.

VI. CONCLUSION

For all of the above reasons, the Court should grant the petition for a writ of certiorari.

SUBMITTED BY:

S/Xiaorong Lan

February 9, 2025

