

No. _____

In The
Supreme Court of the United States

—◆—
MARK G. WHITE,

Petitioner,

v.

METROPOLITAN WASHINGTON AIRPORTS
AUTHORITY

Respondent.

—◆—
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED FOR REVIEW

1. Did the fourth circuit err in finding that employer did not retaliate against petitioner after petitioner assisted another employee.
2. Did the Fourth Circuit err in finding that the employee did not violate Petitioner's FMLA right to be reinstated when employer refused to reinstate petitioner to his original position.
3. Did the Fourth Circuit err in finding that the employer did not violate Petitioner's Title VII ADA discrimination rights.
4. Did the Fourth Circuit err in finding that the employer did not violate Petitioner's Title VII right by making an unlawful medical inquiry.
5. Did the Fourth Circuit err when it affirmed the summary judgement of the district court that was issued because of discriminatory, unlawful medical inquiry was not returned to employer's contracted physician.

PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption. Petitioner has no corporate affiliations. To the best of Petitioner's knowledge, Respondent Metropolitan Washington Airport's Authority is an arm of District of Columbia, Maryland, and Virginia with no corporate affiliations.

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INTRODUCTORY PRAYER

Petitioner Mark White prays that this Court grants his petition and vacate the Motion for Summary Judgment granted by the District Court and affirmed by the United Circuit Court of Appeals for the Fourth Circuit, most the order of November 7, 2017 denying Petitioner's petition for rehearing. Petitioner also prays that this case is remand back to District Court and tried on the merit of Petitioner's evidence which shows that Defendant did violate numerous of Petitioner's protected rights: FMLA 29 C.F.R. Section 825.312; Title VII of the Civil Rights of 1964, 42 U.S.C. section 2000e, et seq.; Retaliation and Unlawful Medical Inquiry.

PROCEEDINGS AND OPINIONS BELOW

This Petition seeks review of the Motion for Summary Judgment hearing which occurred on April 7, 2017 in the United States District for the Eastern of Virginia; and the decision of the District Court to grant the Defendant's Motion for Summary Judgment. Petitioner also seeks a review of the decision of the United States Court of Appeals for the Fourth Circuit that affirmed the Motion for Summary Judgment of the District Court, denying Mark White Petition to Vacate the Motion for Summary Judgment. The Circuit Court's affirmance

of the District Court's denied Petitioner's claims of Retaliation, Discrimination, Unlawful Medical Inquiry, and FMLA Violation.

JURISDICTION

This Honorable Court's Jurisdiction is founded on 28 U.S.C. section 1254(1), as it seeks review of the actions of the United States of Appeals for the Fourth Circuit in matter involving a substantial questions of constitutional, regulatory and statutory interpretation. The last decision from appeal is taken was the order of November 7, 2017, denying a rehearing to Petitioner.

STATUTES INVOLVED

Family Medical Leave Act, 29 U.S.C. § 2613

Second Opinion:

In general. In any case which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (c) or (d) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approve by the employer concerning any

information certified under subsection (b) of this section for leave.

(2) Limitation. A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of Conflicting Opinion: (1) In general. In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (1) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

Family Medical Leave Act, 29 U.S.C. § 2614
Employment and Benefit Protection: (a) Restoration to Position: (1) In general. Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(a) To be restored by the employer to the position of employment held by the employee when the leave commenced; or (b) To be restored to an equivalent position with equivalent employment benefits, pay, and other terms and condition of employment. (2) Lost of Benefits. The taking of leave under section

2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. (3) Limitations. Nothing in this section shall be construed to entitle any restored employee to— (a) The accrual of any seniority or employment benefits during any period of leave; or (b) Any right, benefit, or position of employment other than any right, benefit, or position which the employee would have been entitled had the employee not taken the leave. (4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(d) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid state or local law or a collective bargaining agreement that governs the return to work of such employees.

29 C.F.R. § 825.214 Employee right to reinstatement:

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position

has been restructured to accommodate the employee's absence.

29 C.F.R. § 825.220 Protection for employees who request leave or otherwise assert FMLA rights: (a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceeding or inquiries relating to an employee's rights. More specifically, the law contains the following employee protection: (1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or the attempts to exercise) any rights provided by the act. (2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the act. (3) All person (whether or not employer) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has— (i) Filed and charge, or has instituted (caused to be instituted) any proceeding under or to this act; (ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this act; (iii) Testify, or is about to testify, in any inquiry or proceeding relating to a right under this act. 42 U.S.C.A § 2000e -3 Other Unlawful Employment Practices (1) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to

discriminate against any employees or applicants for employment, for an employment agency, or joint labor—management committee controlling apprenticeship of other training, or retraining including on-the-job training programs, to discriminate against any individual or for a labor organization to discriminate against any member there of or applicant for membership, because he has opposed any practice made an unlawful employment by this subchapter, or because he has made a charge, testified, assisted, investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 12112 Discrimination

(A) General rule. No covered entity shall discriminate against a qualified individual to the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, condition, and privileges of employment.

(B) Construction. As used in subsection (1) of this section, the term, “Discriminate against a qualified individual on the basis of disability” includes— (2) Participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee apprenticeship program) (3) Utilizing

standard, criteria or methods of administration— (A) That have the effect of discrimination on the basis of disability; or (B) That perpetuate the discrimination of others who are subject to common administration control.

(4) Excluding or otherwise denying equal jobs or benefits to a qualified individual because the known disability of an individual with whom the qualified individual is known to have a relationship or association. (B) Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairment of the employee or applicant. (C) Using qualification standards, employment tests or other selected criteria that screen out or tends to screen out an individual with a disability or a class individuals with disabilities unless the standard, test, or other selected criteria, as used by covered entity, is known to be job-related for the position in question and is consistent with business necessity; and, (D) Medical examination and inquiries; (1) In general. The prohibition against discrimination as referred to in subchapter (A) of this section shall include medical examination and inquiries. (4) Examination and inquiry: (A) prohibited examination and inquiry: A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an

individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

American with Disabilities Act of 1990, as amended, 42 U.S.C § 12102, *et seq.*

Definition of disability as used in this chapter: (1) Disability: the term "Disability" means, with respect to an individual— (A) A physical or mental impairment that substantially limits one or more major life activities of such individual; (B) A record of such an impairment; or (C) Being regarded as having such an impairment (as described in paragraph (3)) (2) Major life activities (A) In general. For the purposes of paragraph (1), major life activity also includes the operation of the major bodily function, including but not limited to, function of the immune system, normal cell growth, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive function. (3) Regarded as having such impairment: (A) An individual meets the requirement of "Being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual perceived physical or mental impairment whether or not the impairment limits or perceived to limit a major live

activity.

STATEMENT OF THE CASE

In 2016 Petitioner Mark White (White) brought Title VII Retaliation, FMLA Retaliation, Illegal Medical Inquiry, and Wrongful Discharge Claims in Federal Court against his employer Metropolitan Washington Airports Authority (MWAA) after his employer used an illegal and discriminatory medical inquiry by its contracted practitioner to force White from the workplace. MWAA forced White to take FMLA leave; but MWAA did not allow White to exercise his FMLA protected right to be reinstated to his original position. After White had made numerous complaints about being denied his protected rights, MWAA's contracted practitioner created a second illegal discriminatory medical inquiry to be used as the legitimate reason for denying White's right to reinstatement. This second illegal inquiry was subsequently used as the impetus of MWAA's pretext investigation and the basis for MWAA's Summary Judgment.

On March 10, 2015 White filed a complaint to assist an employee whose protected rights were violated. White's complaint was directed to Vice President of Public Safety Bryan Norwood. After the complaint was filed, the employee was reinstated to his position, and the two supervisors that White accused of violating the employee's protected rights were relieved from their positions. MWAA has not

dispute that White had filed a complaint on March 10, 2015. White has proven the prima facie evidence of retaliation.

On August 17, 2015; White took his annual employment physical examination. The examination was administered by Dr. Joshi, MWAA's contracted practitioner. White passed the examination, and Dr. Joshi gave White a clearance letter, which state that White was cleared to return to work without restrictions; but Dr. Joshi also gave White another letter that made an unlawful inquiry about White's past medical history. This letter was Dr. Joshi first illegal medical inquiry; it stated that White was "significant for diabetes". This letter is also the only document that White was ask to take to his primary physician. White gave the letter to his primary in August 2015, and it was returned to Dr. Joshi on September 10, 2015 and September 18, 2018. White's claim that no one has contact him after August 17, 2015 is substantiated by the alleged order written by Norwood on December 22, 2015. Norwood writes, "You have been reminded several times of the December 22, 2015 deadline for submission of the required information from your treating physician, most recently August 17, 2015." Actually the letter that was given to White on August 17, 2015 and it needed to be return by September 17, 2015; it was returned on September 10, 2015.

MWAA was aware of the protected activity; MWAA have not demonstrated a legitimate non-

retaliatory motive for the challenged action. Such as, White's poor performance, unqualified for the job position, misconduct, similar – situated employees who did not engaged in protected activity were similarly treated, or that there were a reduction in force, or that “But – for” causation standard applies, there is evidence that the challenged adverse action would have occurred anyway, despite the existence of a retaliatory motive. Dr. Joshi did not discovered a problem with White's diabetes during the process of White's physical examination, and the information she sort did not have anything to do with White's ability to perform the functions of his job. MWAA has not address the nature of White's medical condition or how it prevented White from performing his functions as a police officer. Dr. Joshi's assertion of “Significant for diabetes” and her subsequently assertion of “Poorly controlled DM [diabetes mellitus]” are not only illegal inquiries into White's past medical history, but they are also diabetes discrimination.

MWAA and Dr. Joshi have not made any attempt to rebut or to legitimize Dr. Joshi's unlawful inquiry about White's past medical history. That is, MWAA has not shown that the inquiry was job – related or how it was consistent with business necessity; this inquiry was only used to force White from the workplace.

MWAA has not produced a document that states that White is or was unfit for duty; but, on September 18, 2015, Dr. Joshi was able to use her illegal inquiry to coerced Dr. Wallen to say that White was unfit for duty. But when White received a clearance letter from Dr. Wallen and presented it to MWAA on September 21, 2015; he was forced to take FMLA leave. MWAA did not place White on FMLA leave to protect his job. White was placed on FMLA leave because MWAA had no intention of letting White return to work. White was placed on FMLA leave on September 23, 2015; and White immediately exercised his FMLA right to be reinstated.

After White was placed on FMLA leave, he made numerous request to be reinstated to his original position. White filed a complaint on September 24, 2015; the subject of the complaint was Diabetes Discrimination; White asked to be reinstated on September 24, 2015. White writes:

I do not have a medical condition that will prevent me from performing my duties as a police officer. Therefore, I should not have been sent home when I came in to work overtime, and I should have been allowed to report to work my normal working hours. Consequently, I must be paid the overtime as well as the night differential and Sunday pay for the days that I was falsely compelled to

stay away from my job. I am also asking to be reassigned to full duty expeditiously, your fair and unbiased decision in this matter will be greatly appreciate.

Not only was White not reinstated, but MWAA did not investigate White's complaint; and MWAA did not make any effort to stop violations of White's protected rights.

On October 7, 2015 White's health care provider sent a completed certificate of health to MWAA. Dr. Wallen had indicated on the certificate that White was "Okay to perform job function if current A1C meets employers standards." MWAA does not have a standard in place that governs when an employee with diabetes cannot work. In part (A) section (3) of the certificate the following question was asked: "Is the employee unable to perform any of his/her job functions due to the condition:[?]" Dr. Wallen indicated 'no'. MWAA did not question the validity of the certificate or asked Dr. Wallen for clarity. MWAA also did not asked that White be re-evaluated by a non-contracted practitioner. White was a qualified employee on FMLA leave; White asked to return to work but he was not reinstated. MWAA stated that it needed more information about White's medical history before White could return to work.

U.S.C. § 12112(4)(A) Examination and inquiry:

(A) Prohibited examination and inquiries: a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is job – related and consistent with business necessity.

White filed another complaint on November 18, 2015. The subject of the complaint was Diabetes Discrimination/Retaliation. In the complaint White writes:

Dr. Joshi needs to explain the nature of my illness. You must make her do what you have paid her to do. If she is claiming that have a medical condition, then she is obligated to explain the nature and severity of this medical condition to both you and me. I do not know what she has told MWAA, but she has never explain anything to me. I have been held out of work for two months when I know that there is not anything wrong with me.

White also asked to be reinstated, but MWAA ignored White's complaint and willfully continued violating White's protected rights. White writes:

I have been unjustly held out of work. Consequently, I must be paid night differential and Sunday premium for the days I was forced to stay away from work, and all of my sick leave must be put back on the books. I must also immediately be allowed to return to full duty as a police officer. Your fair and impartial remedy to this problem will be greatly appreciated.

Despite White's plea for assistance to every level of MWAA's management, White was not reinstated to his position as a police officer. For a period of more than six months, White endured MWAA's willful and continual disregard to the numerous violations of his protected rights.

On November 24, 2015 White filed an EEOC complaint at the Washington D.C. office. In this complaint, White stated that MWAA had retaliated and discriminated against him because he filed a complaint to assist another employee. White also stated that MWAA had discriminated against him because of his diabetes. On March 22, 2016 EEOC issued a letter, which gave White the right to sue; the suit was timely filed in the District Court on June 16, 2016.

On January 4, 2016; after White had filed a complaints with the EEOC and numerous complaints

to every level of MWAA's management, MWAA sent White a letter as if it was totally oblivious to the multiple complaints that were filed by White. The letter was written by Bryan Norwood; he had full knowledge of each of the complaints that was filed by White. The letter reads:

You have been reminded several times of the December 22, 2015 deadline for submission to the required information from your treating physician, most recently on August 17, 2015. Your continued failure to provide this information constitutes a disobedience of orders. If you are uncertain of what information must be provided please contact INOVA Occupational Health – Alexandria Hospital at 703-504-6600. You must provide all required documentation to INOVA by January 5, 2016. Failure to meet the deadline may result in disciplinary action, up to and including termination of employment.

This letter does not give any clear instruction, but its intent is very clear: it was going to be used as an order to discharge White. This letter is merely a continuation of the unlawful and discriminatory inquiry made by Dr. Joshi on August 17, 2015. Note the December 22, 2015 and the due date on Dr. Joshi's second unlawful inquiry; also note that it is not written anywhere in this letter that White was

ordered to send a clearance letter to Dr. Joshi. If White only needed to send a clearance letter from his physician to Dr. Joshi, it should have been clearly stated in the alleged order. MWAA wants the Court to believe that after it had willfully violated numerous of White's protected rights, it was seeking information about a physical examination that occurred more than four months earlier. The information that MWAA sort did not have anything to do with White's ability to perform the functions of his job; MWAA has not made any attempt to show that the information is job-related or consistent with business necessity. MWAA has not given White any orders, set any deadlines, made any threats of termination, or ask for any documents prior to White filing the numerous rights complaints about not being reinstated, or before White filed a charge with EEOC. MWAA was working retroactively to gain impunity from the numerous rights violations it had committed against White.

MWAA had violated White's FMLA rights by failing to reinstate White to his original position; however, when White's FMLA leave expired on January 26, 2016; MWAA alleged that White was absent without leave (AWOL) and initiated a pretext investigation. There is a direct connection in the numerous FMLA violations and White being AWOL. If MWAA had not violated White's FMLA rights, White would not have been AWOL on January 26, 2016. MWAA used the direct effect of its violations as

a mean to punish White. At the conclusion of the pretext investigation, White was also charged for disobeying an order; but prior to White filing the numerous complaints about the violations of his protected rights, there was no investigation or allege charges of AWOL or disobeying an order.

On April 22, 2016; White was discharged for allegedly being AWOL and disobeying an order, but MWAA could not make these charges against White without ignoring its own rules and standards for these violation. White was charged because MWAA wanted to force White to retire to gain impunity from the numerous rights violation that it had committed against White.

On June 16, 2016 White filed a suit against MWAA for the numerous violations of his protected right. The suit was filed in The United States District Court for The Eastern District of Virginia Alexandria Division.

At the conclusion of Depositions, MWAA filed a Motion for Summary Judgment on March 10, 2017. MWAA's Motion for Summary Judgment was framed around the premises of White's "poorly controlled DM [diabetes mellitus]". After White's had filed numerous complaints about violations of his protected rights, MWAA's contracted practitioner had created a letter which stated that White was "Significant for poorly controlled DM" to be used as

the legitimate reason for denying White's reinstatement.

On April 14, 2015, the Motion for Summary Judgment was argued in the District Court; Judge Brinkema presided over the hearing. MWAA argued that the letter which stated that White was "Significant for poorly controlled DM" should have been taken to White's physician and returned to MWAA's physical by December 22, 2015. The facts that the letter was an unlawful medical inquiry and discriminatory were totally irrelevant. Judge Brinkema believes that White did not need to question the legality of the letter, he simply needed to follow the generic instructions of the letter. Judge Brinkema had granted the Summary Judgment before White could speak a single word of rebuttal. After the Summary Judgment was granted, White argued that the letter was the fulcrum of MWAA's argument and that the letter was unlawful and the assertion of "Poorly controlled DM" was discriminatory. How could there be no material facts for trial when the premises of MWAA's Motion for Summary Judgment is an unlawful medical inquiry and discriminatory. The information sort by the letter did not pertain to White's ability to perform the functions of his job, and it was not consistent with business necessity.

White appealed to The United States Court of Appeal for The Fourth Circuit on May 25, 2017; the Summary Judgment was Affirmed by Circuit Court

Judge Niemeyer, Judge Floyd, and Senior Judge Hamilton on October 5, 2017.

White filed a Petition for rehearing on October 19, 2017; the Petition for Rehearing was denied on November 7, 2017 by Judge Floyd, Judge Niemeyer, and Senior Judge Hamilton.

REASONS FOR GRANTING THE WRIT

Did the Fourth Circuit erred in finding that employer did not retaliated against Petitioner after Petitioner had assisted another employee, and after Petitioner filed a charge with EEOC; did the Fourth Circuit erred in finding that the employer did not violate petitioner's FMLA right to be reinstated whenit refused to reinstate Petitioner to his original position; did the Fourth Circuit erred in finding that employer did not violate Petitioner's Title VII ADA discrimination protected right; did the Fourth Circuit erred in finding that employer did not violate Petitioner's Title VII right when employer made an unlawful medical inquiry about Petitioner's past medical history; did the Fourth Circuit erred when it affirmed the Summary Judgment that was issued by the District Court because a discriminatory unlawful medical was not returned to employer's contracted

physician; and did Judge Brinkema of the District Court denied Petitioner his due process of law when she did not let Petitioner argue his case in the Motion for Summary Judgment hearing. These are important questions implicating the application and interpretation of congressional statutes of FMLA, Title VII ADA, and Federal Court Procedures on which the circuits are split, and this court's guidance is urgently warranted. The Fourth Circuit and the District Court decisions conflict in various respects with the holding of other Circuits.

The Fourth Circuit's decision in this case stands alone among the circuit in that it allows employers to retroactively use administration procedures create proffers so it can gain impunity for numerous violations of an employee's protected rights.

This split among the circuits requires resolution; for the lasting ramification of the Fourth Circuit's decisions are significant. Left undisturbed, the Fourth Circuit's decision will affect the willingness of employees to assist other employees whose rights are violated, as well as, cause wide spread apprehension amongst employees and prevent employees from complaining about or reporting unlawful employment practices; employers will also be able to use stereotypes and prejudices to indiscriminately force employees it regards as disable from the work place with impunity.

There is, of course, the Constitutional right of Congress to legislate and create laws and regulations to protect employees and applicants from unlawful employment practices. Such as, retaliation, discrimination, unlawful medical inquiry, and ADA and FMLA violations.

42 U.S.C § 2000e – 3(A) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings: It shall be an unlawful employment practice for an employer to discriminate against any of his employee or applicants for employment, for an employment agency, or labor-management committee controlling apprenticeship or other training, including on-the-job training program, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

White had assisted an employee whose protected rights were violated. White voiced his protest against MWAA's unlawful employment practices on March 10, 2015; and after numerous complaints to MWAA about violation of White's FMLA right to be reinstated, White filed a charged with EEOC on November 24, 2015. MWAA has not

dispute that White assisted an employee and filed a charge on the dates listed.

MWAA has not address that White filed a charge with EEOC on November 24, 2015; but MWAA does try to escape the penalty of White's assisted act on March 10, 2015 by showing the length of time between the date of White's assisted act and the date of White's discharged on June 30, 2015. *See. Robinson v. S.E. Pa. Transp. Authority, 982 F. 2d 894 – 95 (3d Cir. 1993)*, which states:

We have held that the “Mere passage of time is not legally conclusive proof against retaliation” (Holding that the evidence was sufficient to demonstrate retaliation for activities that occurred two years prior to the termination).

Even though the passage of time is irrelevant, MWAA's first adverse action against White happened on August 17, 2015 when its contracted physician made an unlawful medical inquiry into White's past medical history.

Review of this case is essential to decide and interpret the laws created by Congress to protect employees and applicants who oppose employer' unlawful employment practice. White passed a physical examination on August 17, 2015, but MWAA allowed its primary physician to make an unlawful inquiry about White's medical history. MWAA has made no attempt to show that the

information it sort was job-related or consistent with business necessity. The Fourth Circuit does believe that this unlawful inquiry is a violation of White's protected rights.

42 U.S.C § 12112(4)(A) Examination and inquiry

(A) Prohibited examination and inquiries: A covered entity shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is job-related and consistent with business necessity.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE INTERPRETATION OF FMLA AND TITLE VII LAWS.

A. Did Employer Retaliate Against An Petitioner For Assisting Another Employee.

The Fourth Circuit ruling is at odd and conflicts with FMLA and Title VII ADA legislations and regulations.

Congress enacted the Family Medical Leave Act and Title VII ADA to protect employees and applicants from unlawful employment practices.

42 U.S.C § 2000e-3 Other Unlawful Employment Practices: (1) Discrimination for

making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship of other training, or retraining including on-the-job training programs, to discriminate against any individual or for a labor organization to discriminate against any member there of or applicant for membership, because he has opposed any practice made an unlawful employment by this subchapter, or because he has made a charge, testified, assisted, investigation, proceeding, or hearing under this subchapter.

White filed a complaint to assist an officer on March 10, 2015; after White assisted the officer, MWAA's contracted physician made an unlawful medical inquiry about White's medical history on August 17, 2015. The information MWAA's physician sort was not job-related or consistent with business necessity. This unlawful medical inquiry was an adverse action against White, and MWAA used the unlawful medical inquiry to force White from the workplace. MWAA has not dispute that White filed a complaint on March 10, 2015. *See. Donnellon v. Fruehauf Corp., 794 f. 2d 598, 601 (11th Cir. 1986)*, which states:

As the District Court properly concluded, the plaintiff in this case established prima facie proof of retaliation. No one disputes that she engaged in a protected activity and was subsequently discharged. The casual connection between the two events is disputed by defendant. The short period of time, however, between the filing and the discrimination complaint and the plaintiff discharge belies any assertion by the defendant that the plaintiff failed to prove causation, the plaintiff carried her initial burden.

**B. Did Employer Retaliate And
Discriminate Against Petitioner For
Making A Charge.**

On September 23, 2015 White was placed on FMLA leave. MWAA did not dispute that White was placed on FMLA leave. White was a qualified employee and he was entitled to all of the rights and benefits of FMLA. White attempted to exercise his right to be reinstated on numerous occasions. White asked to be reinstated on the following dates: September 24, 2015; October 7, 2015; October 23, 2015; and November 18, 2015. After MWAA had denied each of his request for reinstatement, White filed a charge with EEOC on September 24, 2015.

MWAA did not address or dispute that White filed a charge with EEOC. After White filed the charge, MWAA began its effort of working retroactively to create proffer so it could gain impunity from the violations it had committed. MWAA initiated a pretext investigation; and, at the end of that investigation White was discharged for being absence without leave (AWOL) and disobeying orders. Prior to White making the charge with EEOC, there was no investigation for White being AWOL or disobeying orders. Independent of the violations that MWAA has committed against White, MWAA could not make these charges. If MWAA had not violated White's FMLA right to be reinstated, White would not have been AWOL on January 26, 2016; and If MWAA had not allowed its contracted physician to make the discriminatory unlawful medical inquiry about Whites past medical history, no order would have been given. *See. Gunther v. Washington County, C.A. 9 (Or.) 1979, 623 f. 2d 1303*, which states:

In order to establish prima facie violation of this section making it an unlawful employment practice for employer to discriminate against employee because he has opposed an unlawful employment practice, plaintiffs must show more than that they protested practices contrary to Title VII and that they were subjected

to adverse action by employer; plaintiffs have made such showing, defendant have the burden of establishing legitimate non – discriminatory reason for taking action adverse to plaintiffs.

**C. Did Employer Interfere With
Petitioner's FMLA Right To Be
Reinstated.**

**29 C.F.R. § 825.214 Employee Right to
Reinstatement**

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

**29 U.S.C. § 2614(a)(1)(a)(b) Employment and Benefit
Protection:**

(a) Restoration to Position: (1) In general. Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave— (a) To be restore by the employer to the position of employment held by the employee when the leave

commenced; or (b) To be restored to an equivalent position with equivalent employment benefits, pay, and other terms and condition of employment.

White was placed on FMLA leave On September 23, 2015. White was a qualified FMLA employee, and he was entitled to all the benefits and rights under FMLA. White filed a complaint and asked to return to be reinstated on September 24, 2015. MWAA did address are dispute that White asked to be reinstated on September 24, 2015. White received a clearance letter from his primary physician on September 21, 2015; White gave the letter to MWAA on the same date. The letter stated, "You are fit for duty if your A1C of 9.3 is medically acceptable per guidelines for your employer, state and federal recommendations." MWAA does not have guidelines, or regulations in place that governs when an employee can work with diabetes; and there are no state and federal regulations that govern the required A1C level of police officer. White asked to return to work, and he was able to perform all of the functions on his job as a police officer. MWAA has not produce any material evidence to show that White could not perform the functions of his job on September 24, 2015.

On October 7, 2015; MWAA received a certification of health from White's health care provider. The certificate cleared White to return to work. MWAA has not address or dispute that it had received the certificate. The certificate stated, "Okay

to perform job function if current A1C meets employers standards.” White asked to return to work on October 7, 2015; but he was not reinstated. MWAA did not address or dispute that White asked to be reinstated on October 7, 2015. MWAA did not ask for clarity of the certificate. White was cleared to return to work; he was able to perform all of the functions of his job as a police officer; he asked to return to work, but he was not reinstated. MWAA has not produced any material evidence that show that White was unfit for duty on October 7, 2015. *See. Miller v. AT&T, S.D.W. Va. 1999, 60 f. Supp. 2d 574 Affirmed 250 f. 3d 820*, (Holding. Upon submission of sufficient medical certification, employee is entitled to protection under Family Medical Leave Act (FMLA) unless and until there is contrary medical evidence.) MWAA has not produced any medical evidence the White was unfit for duty. *Also see.*

On October 23, 2015; White called MWAA and asked to be reinstated. White was still held out on FMLA leave on October 23, 2015. MWAA has not address or dispute that White was on FMLA leave on October 23, 2015; and he asked to return to work. White was able to perform all of his job function as a police officer on October 23, 2015. MWAA has not produced any material evidence to show that White was not fit for duty on October 23, 2015.

On November 18, 2015; White filed a complaint to MWAA’s CEO and President John

Potter. White was still held out on FMLA leave. White asked to be reinstated on November 18, 2015; and he has produced documented material evidence that he asked to be reinstated on November 18, 2015. MWAA has not address or dispute that White was on FMLA leave on November 18, 2015; and White asked to return to work. White was able to perform all of the functions of his job as a police officer on November. MWAA has not produced any documented material evidence to show that White was not fit for duty on November 18, 2015. White was unlawfully held out of work because MWAA claimed that its physician needed to clear White to return to work, but MWAA's physician aided and abetted MWAA in its efforts to use White's diabetes as a means to punish White. *See. Langlios v. City of Deerfield Beach, Florida, S.D. Fla. 2005, 370 F. Supp. 2d 1233*, which states:

Firefighter was entitled under FMLA to reinstatement after providing certification from his psychologist and health care provider declaring him fit for duty, despite city's contention that city's employee handbook required firefighters to obtain clearance from city's physician, where city placed firefighter on FMLA leave, firefighter was never terminated and handbook did not carry force of law.

**D. Did Employer Violated Petitioner's
Title VII ADA Discrimination Rights.**

42 U.S.C § 12102, *et seq.*

Definition of disability as used in this chapter: (1) Disability: the term "Disability" means, with respect to an individual— (A) A physical or mental impairment that substantially limits one or more major life activities of such individual; (B) A record of such an impairment; or (C) Being regarded as having such an impairment (as described in paragraph (3))

(2) Major life activities (A) In general. For the purposes of paragraph (1), major life activity also includes the operation of the major bodily function, including but not limited to, function of the immune system, normal cell growth, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive function. (3) Regarded as having such impairment: (A) An individual meets the requirement of "Being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual perceived physical or mental impairment whether or not the impairment limits or perceived to limit a major live activity.

On August 17, 2015 MWAA's physician Dr. Joshi made an unlawful inquiry about White's

medical history. Dr. Joshi signed a clearance letter which stated the White was "Significant for diabetes". She made no attempt to explain the nature of White's medical condition, or how it would prevent White from working as a police officer. Dr. Joshi's assertion of "Significant for diabetes" standing alone without any explanation, indicates that she believes that White's diabetes prevented him from working as a police officer; because she did not explain why White could not work as a police officer, clearly indicates that she and MWAA believed that White was disable, and his disability would prevent him from performing a broad range of jobs; for just as Dr. Joshi did not need to explain how or why White could not work as a police officer, no other employer or doctor would need to explain how White diabetes will prevent him from performing the functions of their jobs. Dr. Joshi's discriminatory assertion had an adverse effect on White, for it was used to force White from the workplace.

On October 27, 2015 White received a second unlawful discriminatory medical inquiry from Dr. Joshi. The language of the unlawful inquiries is similar, but this time Dr. Joshi asserts that White was "Significant for poorly controlled DM [diabetes mellitus]" Dr. Joshi was operating under the auspice of MWAA when created these discriminatory inquiries. The first assertion was used to force White from the workplace; the second assertion was used to prevent White from returning to the workplace.

MWAA used Dr. Joshi's assertions of "Significant for poorly controlled DM" as it legitimate reason for not reinstating White. *See. Rodriguez v. ConAgra Grocery products Co.*, 436 f. 3d 468, 477 (5th Cir. 2005) which states:

Rodriguez has adduced sufficient evidence to establish that: (1) He was "Regarded as" substantially impaired in major life activity by ConAgra; and (2) ConAgra withdrew its offer to employ him because of his perceived disability, as we explain more fully below, ConAgra's argument that Rodriguez's "Failure to control" his diabetes obviates the protection of ADA is a red herring. This case not about "Failure to control"; rather, it is a garden variety "Regarded as disabled" case. In such case, the question of control is never relevant; any rule requiring that plaintiff exercise some level of control over impairment assuming arguendo that such a rule even exists – is relevant and applies only in actual disability case. At its core, this case is about the TCHRA/ADA emphasis on treating impaired job applicant as individuals. ConAgra's blanket policy of refusing to hire what it characterizes as "Uncontrolled" diabetes violates this fundamental tenet of ADA

law: it embraces what ADA detests: reliance on “Stereotype and generalizations” about an illness when making employment decision.

E. Did Employer Violated Petitioner’s Title VII Rights When It Made An Unlawful Medical Inquiry Into Petitioner’s Past Medical History.

42 U.S.C. § 12112(4)(a) A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

White completed his physical examination on August 17, 2015; and Dr. Joshi cleared White to return to work without restrictions. Dr. Joshi also gave White a document which inquired about White’s diabetes. During the process of White’s physical examination, Dr. Joshi did not discovered anything wrong with White’s diabetes. MWAA and Dr. Joshi have not explain or address how the information that Dr. Joshi sort relates to White being fit for duty. White never had a diabetic episode, he did not asked for accommodation, and there is no record of White needing to be out of work because of his diabetes. MWAA has not produced any documented material fact that Dr. Joshi found a medical condition that

prevented White from working as a police officer. This is how the entire sentence of Dr. Joshi's first unlawful medical inquiry reads, "Your medical examination performed on 8/17/15 for your position as a police officer was significant for diabetes unless your personal physician can provide more information about this condition by 9/17/15 we will not be able to complete the medical determination for your employer." Dr. Joshi implied that she had found something wrong with White's diabetes, but she has not produced a medical document of her implicit finding. *See. Conroy v. New York Department Correction Services*, 333 F. 3d 88, 92, 95-96 (2nd Cir. 2003), which stated:

The case law on inquiries directed toward individual employees thus demonstrates that the Courts will rarely find a business necessity if an employer can demonstrate that a medical examination inquiry is necessary to determine 1) whether the employee can perform job-related duties when the employer can identify legitimate non-discriminatory to doubt the employee's capacity to perform his or her duties (Such as frequent absence or request for an absence, or a known disability that had previously affected the employee's work) or 2) whether an employee's absence or request for

absence is due to legitimate medical reasons, when the employer suspect abuse of attendance policy.

F. Whether Petitioner's Seventh Amendment Rights Was Denied When Judge Brinkema Of The District Court Denied Petitioner The Right To Argue His Case During The Motion For Summary Judgment Hearing; And Granted The Summary Judgment.

Since early January 2017, White has been a Pro'se filer in this case. On March 20, 2017 MWAA a Motion for Summary Judgment; the Motion for Summary Judgment hearing was scheduled for April 14, 2017. MWAA had framed its cased around Dr. Joshi's second unlawful medical inquiry. MWAA's summary brief chronicled White's diabetes from his original diagnosis to when White was held out of work. The premises of MWAA's Motion was that White did not take the inquiry to his primary physician after he was order to do so. During the summary hearing, Judge Brinkema asked White why he did not have a lawyer, and why he did not have an expert witness; she then stated that she was granting the Summary Judgment because the inquiry should have been taken to White's physician. Judge Brinkema opined that White should not have questioned the unlawfulness of the inquiry; he only needed to follow the generic instruction that was written on the document. White asked to speak

before Judge Brinkema had finished announcing her ruling. White argued that the inquiry was discriminatory and unlawful; White also mentioned Dr. Joshi's assertion of "Significant for poorly controlled DM"; and asked Judge Brinkema to see several cases pertaining to his argument. There exist a material fact for trial when the basis of MWAA's Motion for Summary Judgment was an unlawful discriminatory medical inquiry that was not job-related and consistent with business necessity. Also note that unlawful inquiry was created in October 2015, and back dated to September 18, 2015. Dr. Joshi did not have any physical contact with White since August 17, 2015. So, how could she determined that White was "Significant for poorly controlled DM" in October 27, 2015.

II. THE STATUTORY SCHEME ESTABLISHES A BALANCE BETWEEN EMPLOYER'S AND EMPLOYEE'S NEEDS.

Some of the goals of FMLA and Title VII ADA are to protect employees from unlawful employment practices. Such as, retaliation, discrimination, unlawful medical inquiries, and from interfering with qualified employee entitlements and benefits. These laws were created by Congress to prevent employers from relying on stereotype and hypotheses when making employment decisions. *See. Siefken v. Village of Arlington Heights, C.A. 7 (Ill.) 1995, 65 f. 3d 664* ("Perceiving that employers were basing employment decision on unfound stereotypes

Congress enacted the American with Disabilities Act (ADA) to level the playing field for disabled people.”)

Section 825.214 protects the employee right to be reinstated to his original position; section 825.220 prohibits the interfering with reinstatement or the denying the exercise of any rights provided by FMLA, it prohibits employers from discharging or discriminating against employees who opposed or complained about unlawful employment practices, and it also prohibits employers from discriminating against any employee because he or she has filed a charge, or has institute any proceeding.

Section 2614 allows employer to have a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee before the employee can return to work.

In some instances, where there are conflicting opinions, section 2613 allows employer to require, at the expense of the employer, to obtain the opinion of a second health care provider designated and approved by the employer. This section also allows employer to obtain, at the employer's expense, the opinion of a third health care provider designated and joint approved by the employer and employee concerning certified information.

In section 2613 Congress have provided avenues that the employer can take to resolve

conflicts of certification or when an employee is fit for duty. But, what is not allowed by the laws of FMLA and Title VII ADA, is that employer cannot willfully violate an employee protected rights and then work retroactively to create proffer. This is what the Fourth Circuit has allowed to happen in this case which necessitate this Court's review.

III. THE FOURTH CIRCUIT'S APPROACH CONFLICTS WITH THAT OF OTHER CIRCUITS

The courts below have reach conclusions which opposed to that of other courts, including the decision in *Holiday v. City of Chattanooga*, 2006 F. 3d 637, 645 (6th Cir. 2000), which stated:

A substantially brief that anyone with, HIV infection is limited in a major life activity is conclusion about the effects of the impairment and only secondarily about the particular employee, an employer with such a belief is failing to make an individualized determination, as the ADA requires, and thus acts at its peril. If an employer believes that a perceived disability inherently precludes successful performance of the essential function of the job, with or without accommodation, the employer must §correct about the affected employee's ability to perform the job in

order to avoid liability; there is no defense of reasonable mistake. Any other outcome would defeat the ADA's attempt to eradicate what may be deeply noted seemingly rational presumptions about the abilities of the disabled.

This Court looked beyond the stereotype of the employer and adhered to 42 U.S.C. § 12102(3)(A), and considered the applicant's ability to perform the functions of the job despite of her disability. This Court understands the intent of ADA to remove these presumptive fear about disabilities in the workplace as well as society.

But this is not what the Fourth Circuit has done in this case. The Fourth Circuit has allow the employer to use the assertions of "Significant for diabetes" and "Significant for poorly controlled DM" to force Petitioner from the workplace, to deny Petitioner reinstatement, and to obtain Summary Judgment. Also see. *Taylor v. Pathmark Store, Inc.*, 177 F. 3d 180, 193 (3rd Cir. 1999) (Noting that, "Under the ADA, it is the employer's burden to educate itself about the varying nature of impairments and to make individualized determination about affected employee").

In *Fierros v. Department of Health*, 274 F. 3d 186, 192 (5th Cir. 2001), which stated:

Even assuming that Fierros had present only circumstantial evidence and thus that the McDonnell Douglas framework applies, she would have raised a factual issue precluding Summary Judgment. Fierros Circumstantial evidence is certainly sufficient under the initial "Much less stringent than 'but for' standard to establish a prima facie showing of causation. See. Long, 88 F. 3d. at 306 (Concluding that in light of the evidence that the employer knew about the protected activity and took the adverse employment action thereafter, " We have no trouble finding sufficient evidence, for the purposes, to establish a casual link"). Because TDH has not offered a non-retaliation reason for denying Fierros pay increase that would rebut the inference of retaliatory animus raised by Fierros prima facie case, Fierros need not establish more than a prima facie case of retaliation to survive Summary Judgment.

This Court recognized that Fierros had engaged in a protected activity and weighed the importance of the employer knowing about the protected activity before it took the adverse action.

This Court also considered the fact that the employer did not challenged Fierros's retaliation claim which was sufficient to establish the casual link.

In this case Fourth Circuit ignored that Petitioner has shown that he had engaged in a protected activity; he also has stated the effectiveness of that activity: two highly rank supervisor were relieved of their position. The Fourth Circuit ruling implies that Employer did not need to address the Petitioner's retaliatory evidence. Throughout entirety of this case, the Fourth Circuit has inferred in favor of the Employer. See. *Burch v. City of Nacogdoches*, 174 F. 3d 615, 619 (5th Cir. 1999)

(Holding that all doubts shall be resolved in favor of the nonmoving party, and any reasonable inferences shall also be drawn in favor of that party). See. *Taylor v. Pathmark Store, Inc.*, 177 F. 3d 180, 193 (3d Cir. 1999)(Noting that "under the ADA, it is the employer's burden to educate itself about the varying nature of impairment and to make individualized determination about affected employee").

◆

CONCLUSION

For all the reasons stated above, Petitioner Mark Gary White, respectfully urges this Honorable Court to accept his petition, grant the writ of certiorari, and move forward to correct the erroneous and dangerous path the courts below have chosen.

Respectfully submitted,
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