No. 17-____

IN THE

Supreme Court of the United States

ROXANN J. FRANKLIN-MASON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should exercise its power of supervisory review to resolve the circuit split created by Federal Rule of Appellate Procedure 36, which allows a minority of circuit courts to issue one-word affirmances of district court opinions without any explanation of the basis for the affirmance?

2. Whether the circuit split created by Federal Rule of Appellate Procedure 36, which allows a minority of circuit courts to issue unexplained judgments, violates the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution by denying meaningful appellate review to a class of litigants based solely on the random accident of geography?

PARTIES TO THE PROCEEDING BELOW

There were no parties to the proceedings below other than the parties listed on the cover page of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The United States Court of Federal Claims granted the government's motion for summary judgment on March 30, 2016. *Mason v. United States*, 126 Fed. Cl. 149 (Fed. Cl. 2016). In a per curiam judgment pursuant to Fed. Cir. R. 36, the Federal Circuit issued a one-word affirmance of the United States Court of Federal Claims' decision. *Franklin-Mason v. United States*, 692 Fed. Appx. 633 (2017). The Federal Circuit later denied a panel rehearing in a non-precedential per curiam order. These opinions are unpublished and reproduced in the Appendix ("App,") at A1.

JURISDICTION

The United States Court of Appeals for the Federal Circuit adopted the reasoning and affirmed the decision of the United States Court of Federal Claims on July 14, 2017. *Franklin-Mason*, 692 Fed. Appx. at 633. A timely petition for rehearing was denied on October 11, 2017. Petitioner was granted an extension of time to file a petition for writ of certiorari until March 5, 2018. This Court has jurisdiction to review cases from the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

This case involves Rule 36 of the Federal Rules of Appellate Procedure (hereinafter "FRAP 36"). FED. R. APP. P. 36. FRAP 36(b) provides that a judgment is entered even when it is "rendered without an opinion, as the court instructs." *Id.* This case deals with this federal rule and the local circuit rules that allow courts of appeals to enter judgments without opinions. Of the local rules, this case will specifically analyze the Federal Circuit Rule 36 (hereinafter "Rule 36"), which provides that "[t]he court may enter a judgment of affirmance without opinion." Fed. Cir. R. 36 (affirmance without opinions).

STATEMENT OF THE CASE

FRAP 36 presents courts of appeals with a choice to enter judgments with or without opinions, as the courts deem appropriate. While eight of the thirteen circuits provide an explanation for their decisions, five circuits allow entry of judgments without opinions. This procedural choice has caused a functional split among the circuits such that litigants' access to the judicial system in general, and capacity to seek meaningful review to this Court in particular differs widely based on the random accident of geography.

When a court can dismiss a litigant without providing an explanation, a new body of precedent is created in the form of "hidden law." Five federal circuits have adopted rules that allow the court to enter judgments without an opinion, leaving litigants with no guidance for why the court ruled against them or in their favor. This practice cuts against the purported goals of judicial transparency,

accountability, and accuracy. It deprives litigants of their fundamental right of full access to the courts and undermines public confidence in the federal judiciary.

Judgments without opinion constitute an extreme form of hidden law. In the context of unpublished opinions, Justice Stevens refers to this phenomenon as "secret law", describing the problem as "decision-making without the discipline and accountability that the preparation of opinions requires." *Cty. of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting). An opinion is evidence of the court fulfilling its obligation to guide litigants and develop law. As Karl Llewellyn notes, an opinion "serves as a steadying factor," to "show how like cases are properly to be decided in the future." *Id.* (citing Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 26 (1996)).

Hidden judgments not only raise concerns of judicial transparency and risks of judicial error, but also violate litigants' Due Process and Equal Protection rights under the Fifth and Fourteenth Amendments. Access to the courts is a fundamental right, *Bounds v. Smith*, 430 U.S. 817 (1977), among the key guarantees implicit in the text of the Constitution. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579–80 (1980). Access to courts has been interpreted to not only provide physical access but also the realistic possibility of engaging in purposeful communication with the courts. *See*, *e.g., Stevenson v. Reed*, 391 F. Supp. 1375, 1381 (N.D. Miss. 1975), *aff'd and adopted*, 530 F.2d 1207 (5th Cir. 1976). Judgment without opinion does not constitute purposeful communication with the courts because its hides one side of the conversation.

Furthermore, FRAP 36 allows some litigants to have purposeful communication with the courts while denying it to others. This court has held that where appellate review is made available, it cannot be afforded in a way that discriminates against some over others. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Affording some litigants a meaningful right to an appeal while denying it to others violates the Equal Protection Clause. *See Lindsay v. Normet*, 405 U.S. 56, 77 (1972); *see also Bounds*, 430 U.S. at 821–23.

The Federal Circuit significantly outpaces every other circuit that allows the practice of judgment without opinion. Although authorized to do so by FRAP 36, the Federal Circuit utilizes its local Rule 36 to issue judgments without opinion excessively. Rule 36 has a disproportionate effect on the development of law in certain substantive areas. Patent cases, regardless of their jurisdictional roots, are reviewed by the Federal Circuit. Commentators estimate that in more than one out of every three cases affirmed by the Federal Circuit, the judgment is entered without an opinion.[1] Even though considered "non-precedential", these hidden judgments impact the development of patent law. As demonstrated by unpublished cases in which this Court has granted certiorari, non-precedential opinions have the potential to develop law in the future. *See*, *e.g.*, *Kling*, 474 U.S. at 936. Changes in patent law, in turn, have

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[1] Matthew Bultman, *Federal Circuit Issuing More 'Hidden Decisions' Amid Case Influx*, LAW360 (Mar. 1, 2017), https://www.law360.com/articles/894024; Jason Rantanen, *Federal Circuit Now Receiving More Appeals Arising from the PTO than the District Courts*, PATENTLYO (Mar. 2, 2016), https://patentlyo.com/patent/2016/03/receiving-appeals-district.html.

led to the increased use of Rule 36 by the Federal Circuit in patent and non-patent cases alike. This practice disproportionately subjects non-patent petitioners to judgments without explanation from similarly situated petitioners in other circuits.

Nothing illustrates the utter arbitrariness of this form of hidden law more than the petitioner's case. Roxann Franklin-Mason filed a Title VII suit in United States District Court for the District of Columbia on October 16, 1996, alleging race-based and sex-based discrimination by her then-employer, the United States Navy. After the parties entered into a settlement agreement, docketed by the court on April 15, 1999, the Navy breached the terms of the agreement, and Ms. Franklin-Mason brought suit in the United States District Court for the District of Columbia to enforce the agreement. The Navy, arguing that the Tucker Act, 28 U.S.C. §1491, controlled jurisdiction to enforce a settlement contract against the United States, sought to have the case moved to the United States Court of Federal Claims. The United States Court of Appeals for the District of Columbia Circuit settled the question by transferring jurisdiction to the Court of Federal Claims, which granted the Navy's motion for summary judgment on March 30, 2016. Ms. Franklin-Mason appealed to the Federal Circuit, which issued a one word affirmance under FRAP 36 on July 14, 2017.

To put it plainly, had the Navy's motion for summary judgment been decided by the District Court for the District of Columbia, Ms. Franklin-Mason would have had the benefit of an opinion in an appeal to the Court of Appeals to the District of Columbia Circuit, which does not permit one-word

summary affirmances. But because Ms. Franklin-Mason's appeal was lodged about one mile away in the Federal Circuit, which relies on one-word affirmances more than any other circuit court, her claim was summarily dismissed with no opinion and no guidance for a meaningful appeal to this Court.

Ms. Franklin-Mason is not the first to petition the Court to resolve the functional split among the circuits in the practice of one-word affirmances without opinion. To date, at least twenty four separate petitioners have sought a grant of certiorari on this very issue. We respectfully submit that the time has come for the Court to resolve the question of whether the hidden law practice of FRAP 36 cuts against the goals of judicial transparency, accountability, and accuracy, and deprives litigants of their fundamental right of full access to the courts and undermines public confidence in the federal judiciary.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 31, 1996, Roxann Franklin-Mason, an African-American female, brought a Title VII action against her former employer, the United States Navy, in the United States District Court for the District of Columbia, alleging that the Navy discriminated against her on the basis of sex and race when it denied her a position for which she applied. The parties later entered into a settlement agreement, under which the Navy would appoint Ms. Franklin-Mason as a Senior Financial Analyst/Advisor and would not assign her to be supervised by certain named individuals. The District

Court entered the settlement agreement as a final order on April 15, 1999.

However, upon Ms. Franklin-Mason's return to work, the Navy breached the terms of the agreement, forcing her to bring suit to enforce the agreement on December 10, 1999. The Navy, arguing that the Tucker Act, 28 U.S.C. §1491, controlled jurisdiction to enforce a settlement contract against the United States, sought to have the case moved to the United States Court of Federal Claims. After a series of decisions in which the District Court for the District of Columbia and the United States Court of Federal Claims disagreed on jurisdiction, the Court of Appeals for the District of Columbia Circuit settled the question and held that jurisdiction laid in the United States Court of Federal Claims. After assuming jurisdiction, on March 30, 2016, the United States Court of Federal Claims, upon motion from the Navy, dismissed Ms. Franklin-Mason's claim on summary judgment, as is increasingly and regrettably common for employment discrimination claims. *See Mason v. United States,* 126 Fed. Cl. 149 (Fed. Cl. 2016).

Ms. Franklin-Mason timely appealed but the Federal Circuit, citing Rule 36, summarily affirmed without opinion on July 14, 2017. *Franklin-Mason v. United States*, 692 Fed. Appx. 633 (2017). Upon motion for rehearing, the Federal Circuit again affirmed its judgment without opinion on October 11, 2017. Ms. Franklin-Mason was granted an extension of time to file her writ of certiorari until March 3, 2018.

REASONS FOR GRANTING THE WRIT

I. FRAP 36(a)(2) Has Created A Circuit Split Whereby Five Circuits Permit Affirmances of District Court Orders or Judgments With No Written Opinion or Explanation, and Eight Circuits Prohibit Appellate Panels from Rendering Decisions Without Guidance to the Litigants

Federal courts of appeals can affirm a district court's order or judgment without a written opinion explaining the reasoning of their decision. FRAP 36 provides that a clerk must enter a judgment "after receiving the court's opinion" or "if a judgment is rendered without an opinion, as the court instructs." FED. R. APP. P. 36(a)(1), (2). Furthermore, Rule 47 of the Federal Rules of Appellate Procedure authorizes the federal circuits to adopt local rules for the courts of appeals within their jurisdiction. The rule states that "[a] local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 [The Rules Enabling Act]." FED. R. APP. P. 47(a)(1).

Based on these two provisions, five circuits have adopted local rules that allow the courts of appeals to affirm a district court's order or judgment without a written opinion and no explanation for the rationale of their affirmance. *See* Fed. Cir. R. 36; 5th Cir. R. 47.6; 8th Cir. R. 47; 10th Cir. R. 36.1.[2] On the other hand, seven circuits have established rules

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[2] David F. Johnson, *"You Can't Handle the Truth!" – Appellate Courts' Authority to Dispose of Cases Without Written Opinions*, 22 APP. ADVOC. 419, 419 (2010).

which prevent an appellate panel from rendering a decision without providing at least some guidance as to the reasoning for the decision. *See* 1st Cir. R. 36; 4th Cir. R. 36.3; 6th Cir. R. 36; 9th Cir. R. 4.3a; 11th Cir. R. 36-1 (rescinded Aug. 1, 2006); D.C. Cir. R. 36(b).[3] The result is a lack of uniformity among the circuits; some promulgate decisions whose suitability for review by this Court can be ascertained, while others, including the Federal Circuit in this case, find their grounding in FRAP 36 and effectively make themselves courts of last resort.

A. The 3rd, 5th, 8th, 10th And The Federal Circuit Constitute The Minority Of Circuit Courts That Allow Affirmances Without An Opinion Or Any Explanation For Their Ruling

Federal Circuit's Rule 36 allows the appellate panel to summarily affirm any trial court opinion in any case, no matter how meritorious, for any reason, without providing any guidance as to its rationale or citation to any authority beyond the rule itself. *See* Fed. Cir. R. 36. Paragraph (c) of the Rule provides that the trial court decision may be summarily affirmed when "the record supports summary judgment, directed verdict, or judgment on the pleadings." *Id.*

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[3] The Seventh Circuit does not have a local rule that supplements FRAP 36. The court in practice does not enter judgments without opinions and at least includes a paragraph explaining the panel's rationale. *See*, *e.g., Thomas v. WGN News*, 637 F. App'x 222, 223 (7th Cir. 2016) (providing a brief explanation for affirming the district court's decision to dismiss plaintiff's complaint).

The Fifth and the Eighth Circuits rules mirror most of the language from the Federal Circuit rule. *See* 5th Cir. R. 47.6; 8th Cir. R. 47B. Fifth Circuit Rule 47.6 provides:

> The judgment or order appealed may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion enter either of the following orders: "AFFIRMED" or "ENFORCED".

See 5th Cir. R. 47.6. The Eighth Circuit uses all the same factors except for (4) regarding summary judgments.

The Tenth Circuit provides that "[t]he court does not write opinions in every case." Office of the Clerk, 10th Cir., Practitioners' Guide to the United States Court of Appeals for the Tenth Circuit (2018). 10th Cir. R. 36.1. Further, it allows the courts to "dispose of an appeal or petition without written

opinion." *Id.* Relying on this language, the Tenth Circuit panels "need not write an extensive disposition in every appeal but may, in its discretion, use a terse judgment such as the one word 'affirmed.'"

The Third Circuit encourages its appellate panels to provide explanations for their decisions, but the rule is not mandatory. The local rules of the circuit do not provide guidance on the required substance of a judgment. However, the Internal Operating Procedure states that "[a] judgment order may state that the case is affirmed by reference to the opinion of the district court or decision of the administrative agency and may contain one or more references to cases or other authorities." 3d Cir. I.O.P. 6.3.2. In recent years the court has not entered a judgment of affirmance without an opinion. *See*, *e.g.*, *Birth v. United States*, 958 F.2d 362 (3d Cir. 1992) (the last available case where the Third Circuit entered a one-word affirmance). Thus, it appears that the Third Circuit is departing from its practice that resulted in disparate treatment for litigants.

B. The Majority Circuits – 1st, 2nd, 4th, 6th, 9th, 11th and D.C. – Require The Appellate Panels To Provide At Least Some Guidance Regarding The Reasoning Of Their Decisions

In the vast majority of circuits, the rule is opposite. The Ninth Circuit, the largest and the one with the heaviest caseload, allows its panels to enter judgment in only one of three ways: opinion, memoranda or orders. *See* 9th Cir. R. 36-1. A memorandum disposition is the shortest form of judgment and is designed to provide the parties and

the district court with at least a concise explanation of the Court's decision. *See* 9th Cir. Gen. Order 4.3.a. The rule further requires a recitation of "information crucial to the result," which includes the decisive facts and citation to relevant precedent. *Id.* Similarly, in the Fourth Circuit, local Rule 36(b) allows the court to enter summary decisions. *See* 4th Cir. R. 36(b). However, the court requires the summary decisions to "identif[y] the decision appealed from, set[] forth the Court's decision and the reason or reasons therefor, and resolve[] any outstanding motions in the case." *See* 4th Cir. I.O.P. 36.3.

The First, Second, Sixth and D.C. Circuits also have similar requirements for opinions. The D.C. Circuit rule allows for "abbreviated dispositions" when the decision is not precedential. However, the rules state that "while according full consideration to the issues" the court may "dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision . . . containing a notation of precedents or accompanied by a brief memorandum." *See* D.C. Cir. R. 36(d).

The First Circuit's rules also indicate that its summary decisions should reveal the basis of the reasoning applied by the panel. *See* 1st Cir. R. 36(a) ("An opinion is used when the decision calls for more than a summary explanation.") (emphasis added); *see*, *e.g., Benefield v. United States*, 98 F.3d 1333 (1st Cir. 1996) (including brief comments regarding each issue argued before the court). The Sixth Circuit rules allow the Court to "announce its decision in open court when the decision is unanimous and each judge of the panel believes that a written opinion would serve no

jurisprudential purpose." This framing of the rule, although different from the other circuits, contemplates that the judges will state the reasoning for their rulings. *See* 6th Cir. R. 36.

Prior to 2006, the Eleventh Circuit also permitted affirmances without opinion. Eleventh Circuit Rule 36-1 was substantially the same as Federal Circuit Rule 36. *See* 11th Cir. R. 36-1 (prior to Aug. 1, 2006). However, the Circuit rescinded its own rule and no longer permits its panels to do what the minority of circuits, including the Federal Circuit in this case, continue to practice.[4]

The circuits therefore are split. This lack of uniformity results from the Federal Rules of Appellate Procedure allowing the courts to enter a judgment without an opinion but does not provide any guidance regarding the minimum requirement that is consistent with "the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (holding that the discretion to adopt local rules is not without limits and must be consistent with the "principles of right and justice"). This split among the circuit rules is functionally no different from a split among the circuit case holdings. In each instance, the result of litigation in federal court may be determined by the circuit in which the suit happens to be filed. Thus, just as it is the court's responsibility to resolve circuit splits regarding case holdings, it is the court's duty to ensure procedural consistency. *See Wright v. North Carolina*, 415 U.S. 936, cert. den. (Douglas, J.,

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[4] In proposing the elimination of the rule, the Eleventh Circuit stated: "The rule is proposed to be rescinded, since only a miniscule portion of appeals are currently terminated in this manner." Table of Proposed Revisions to the Eleventh Circuit Rules (Apr. 3, 2006) at 139.

dissenting) (stating that the Court is "the only source of resolution for this [circuit] conflict and it is our obligation to provide uniformity on such important federal constitutional questions.").

This division in the federal circuits presents the Court with an important reason to grant certiorari. *See* SUP. CT. R. 10(a). The Supreme Court annually hears about 100 cases and rejects about 7,000 requests for review.[5] Thus, in the vast majority of cases, the decisions made by the courts of appeals are the last word. But when the last word of a court conflicts with the other circuits, this causes concerns for disparate treatment. Unless the legislature takes action, this Court is the only source of resolution for conflicts among intermediate courts of appeal. However, in this case, the Court's review of the issue is even more crucial because FRAP 36 was promulgated by the Court itself. Thus, if the court denies review today, this circuit split will remain unresolved.

II. FRAP 36(a)(2) Conflicts With The Principles Of Appellate Jurisprudence Because It Limits Judicial Guidance For Practitioners, Increases the Risk of Judicial Error, And Hinders Judicial Transparency and Accountability

The Court should review the validity of FRAP 36 because it fails to comport with the basic tenet of

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[5] *See* UNITED STATES COURTS, *U.S. Courts of Appeals and Their Impact on Your Life: What are the U.S. Courts of Appeals and what is their role?,* http://www.uscourts.gov/educational-resources/educational-activities/us-courts-appeals-and-their-impact-your-life.

appellate jurisprudence. It's a long tradition in our common law system that appellate courts should issue opinions that provide the parties with a basis for a court's decision because opinions: (1) provide a mechanism by which parties are better positioned to act in response; (2) provide a party with a more meaningful opportunity for further review by a higher court;[6] (3) assure parties that their participation in the justice system was meaningful; (4) require a court to justify its decision in a more systematic, logical way and avoid risk of error; and (5) provide an "informational regulation" that places a check on judicial behavior.[7]

In addition to overseeing the lower courts and entering judgments, a vital aspect of appellate jurisprudence is to provide guidance, through opinions, to future litigants and practitioners on the interpretation of the law. Judges and lawyers are utterly dependent upon opinions to perform their essential legal tasks including researching, evaluating, arguing, and deciding cases. Thus, the practice of resolving appeals without any statement of reasons has been roundly condemned by judges, commentators and practitioners.[8] Justice Cardozo

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[6] Indeed, there is a far less chance that this Court would accept a petition for writ of certiorari from a court of appeals' judgment where there is no opinion. *See* Johnson, *supra* note 2, at 421.

[7] *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions As Informational Regulation*, 58 FLA. L. REV. 743, 743 (2006).

[8] William Reynolds & William Richman, *The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals,* 78 COLUM. L. REV. 1167, 1174 (1978) ("A key characteristic of decisions without opinions is their failure to provide the parties or the court below with any

explained that long appellate tradition favors explanatory opinions. Thus, the role of appellate courts is not simply "declaring justice between man and man, but of settling the law."[9] Similarly, courts have commented on the importance of opinions with articulated reasoning. *See*, *e.g., United States v. Costa*, 356 F. Supp. 606, 608 (D.D.C.), *aff'd,* 479 F.2d 921 (D.C. Cir. 1973) ("Public has right to know reasons which underlie decisions of those people to whom is granted public trust, be they elected officials, administrative heads, or tenured judges"). In *Ayres v. United States*, the Court of Federal Claims stated that the requirement of written opinions was a "cardinal principle of Anglo-Saxon jurisprudence." 44 Ct. Cl. 48, 51 (1908).

The effectiveness of FRAP 36's authorization of judgment without opinion also warrants the Court's review because the rule increases the risk of judicial error. Expressing concerns regarding the risk of judicial error, the Second Circuit in *United States v. Forness*, stated that:

> as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are

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hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges.")

[9] Benjamin N. Cardozo, *Jurisdiction of the Court of Appeals* (2d ed. 1909) § 6 (quoted in Dennis Crouch, *Wrongly Affirmed Without Opinion*, WAKE FOREST L. REV. 52 (2017), University of Missouri School of Law Legal Studies Research Paper No. 2017-02.).

> thus-and-so gives way when it comes to expressing that impression on paper.

See 125 F.2d 928, 942 (2d Cir. 1942). The rendering of judgments without any explanation or reasoning unnecessarily increases the risk of appellate error. Without the need to commit any of its reasoning to paper, there is a real risk that the courts will overlook or inadequately consider critical issues. There also will be less opportunity, or even need, for a judge on the panel to test his or her reasoning against the views of the other panelists in a disciplined fashion. Nor will any given panelist have a full opportunity to evaluate critically the particular reasoning that other panelists may find persuasive.

FRAP 36 is also inconsistent with the principles of appellate decision-making because it hinders judicial transparency and accountability. Opinions "are what courts do, not just what they say; they are the substance of judicial action."[10] Courts ensure the legitimacy of their decisions by preparing and publishing opinions that explain and justify their reasoning. Thus judicial opinions also function as a transparency and accountability enhancing mechanism. The essence of accountability is answerability – having the obligation to answer questions regarding decisions and actions. Because life-tenured judges are not held accountable at the ballot box, their accountability stems from the reasoned explanations they produce in their opinions. Thus opinions ensure basic monitoring and imply a one-way transmission of information from lower-court judges to appellate judges as well as to the public

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[10] Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961).

generally. They limit judicial discretion by ensuring that written decisions or at least some record of the proceedings can be read and reviewed by higher courts. By allowing judgments without opinions, FRAP 36 takes away this Court's ability to review a circuit court decision without remanding the case. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (the Court ordered the Fifth Circuit to issue an opinion with reasons so that the Court could determine whether to accept a petition for certiorari).

There are also epistemic justifications for requiring judicial opinions. One aspect of judicial accountability refers to the transparency needed both for the general public to know the law and for reviewing courts to verify that judges are carrying out their obligations adequately. Transparency in adjudication may be thought of as an individual right, not just as a feature of the judicial hierarchy and the need for lower courts to create a record for higher courts to review. From this perspective, judicial opinions are not only addressed to the litigants and the reviewing court, but potentially aimed at the entire citizenry.[11]

III. By Allowing Federal Courts of Appeals to Affirm Without Opinion, FRAP 36 Creates Due Process and Equal Protection Concerns Under the Fifth and Fourteenth Amendments, Warranting this Court's Review

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[11] Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 506–10 (2015).

FRAP 36 implicates important questions of constitutional law, warranting review by this Court. *See*, *e.g., Florida v. Nixon*, 543 U.S. 175, 186 (2004) (granting certiorari to resolve an important question of constitutional law). As this Court has recognized on numerous occasions, access to the courts is a fundamental right. *See infra,* section III.A. Infringements upon fundamental rights are subject to strict scrutiny under both the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[12] U.S. Const. amend. V, XIV; *see also Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669-70 (1966). Where government action denies or impairs a fundamental right, that action is unconstitutional unless the government can demonstrate that it can be justified by a narrowly tailored compelling government interest. *See*, *e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). FRAP 36 impairs meaningful access to the courts and cannot be justified by a compelling government objective, warranting review by this court.

A. Access To The Courts Is A Fundamental Right

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[12] *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."); *Adarand Constructors, Inc. v. Penã*, 515 U.S. 200, 217–218 (1995); *see also United States v. Windsor*, 570 U.S. 744, 774 (2013) ("While the Fifth Amendment itself withdraws from Government the power to degrade or demean . . . the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.")

For over four decades, this court has recognized that access to the courts is a fundamental right, protected by the Fifth and Fourteenth Amendments. *See*, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 377–79 (1971) (noting a well-established Due Process principle that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts) (internal citations omitted); *see also Tennessee v. Lane*, 541 U.S. 509, 532–34 (2004); *Bounds v. Smith*, 430 U.S. 817, 821–23 (1977).

The fundamental right of access to the courts is among the key unenumerated guarantees implicit in the Constitution, and thus, must be afforded the same constitutional protections as the text's enumerated guarantees. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579–80 (1980) (stating that fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined). The ability to seek redress in the courts is undoubtedly the type of fundamental right that is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). By allowing judgment without opinion, FRAP 36 raises serious concerns about this longstanding fundamental right of access to courts.

B. FRAP 36 Denies Litigants Meaningful Access To The Courts

Judgments without opinion impair the right to access the courts by detracting from the meaningfulness of appellate review. The constitution's protections of fundamental rights extend beyond outright denial of a right to the

unjustified impairment of those rights. *See Zablocki*, 434 U.S. at 388. To be sure, there is no federally guaranteed right to appellate review. However, where that right is made available, it cannot be afforded in a way that discriminates against some over others. *Griffin*, 351 U.S. at 18. Affording some litigants the right to an appeal and arbitrarily or capriciously denying it to others violates the Equal Protection Clause. *Lindsay*, 405 U.S. at 77.

This Court has recognized several affirmative obligations encompassed within the right to access the courts. Importantly, these cases extend beyond actual access to the courts and establish a right to meaningful access to the courts. *Bounds*, 430 U.S. at 821–23. Meaningful access requires evaluation of a particular case as a whole, but a central principle is whether parties have a realistic possibility of engaging in purposeful communication with the courts. *See Stevenson*, 391 F. Supp. at 1381.

In *Bounds*, this Court held that prison authorities must provide prisoners with adequate access to law libraries or assistance for persons trained in the law in order to ensure meaningful access to the courts. *Id.* at 828. The Court found that adequate law libraries were one constitutionally acceptable means by which inmates could be assured meaningful access to the courts. *Id.* Other affirmative obligations include the duty to waive filing fees in certain family law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants, even where these impose costs and inconveniences upon the court. *Lane*, 541 U.S. at 532–33 (internal citations omitted). Similarly, this court has held that requiring indigent

prisoners to pay docket fees in order to file appeals and habeas corpus petitions effectively foreclosed those individuals from accessing the courts and thus, ran afoul of the Fourteenth Amendment. *Smith v. Bennett*, 365 U.S. 708, 708–09 (1961), *Burns v. Ohio*, 360 U.S. 252, 257 (1959). This Court has also held that counsel must be appointed to give indigent inmates a meaningful appeal from their convictions, *Douglas v. California*, 372 U.S. 353, 357–58 (1963), and even where there is no constitutional right to appointed counsel, indigent defendants must have an adequate opportunity to present their claims fairly. *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

In *Burns*, the state of Ohio argued that whereas in *Griffin*, the Illinois Supreme Court recognized leave to appeal as a matter of right, leave to appeal to the Supreme Court of Ohio is a matter of discretion. However, this Court emphasized that *Griffin*'s logic applied and thus, Ohio's practice of denying indigents the opportunity to move for leave to appeal and have that motion considered on its merits violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Burns*, 360 U.S. at 257–58.

FRAP 36 impermissibly permits some courts to hide their reasoning, thereby denying litigants like Ms. Franklin-Mason the opportunity for purposeful communication with the court. Permitting courts to issue a judgment without opinion renders litigants' communication one-way and detracts from the meaningfulness of appellate review. Litigants expend significant time and resources filing an appeal and detailing their reasoning to the court. Yet parties like petitioner, whose cases arose in circuits that permit the federal courts of appeals to issue a judgment

without opinion, can be denied any reasoning for the appellate court's affirmance. For these reasons, FRAP 36 impairs litigants' meaningful access to the courts.

C. FRAP 36 Cannot Survive Heightened Scrutiny

Laws that impair fundamental rights are justifiable only by compelling state interests that are narrowly tailored to the governmental interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993), *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Even assuming for the sake of argument that the interest in judicial efficiency promoted under FRAP 36 is a compelling one, the use of judgment without opinion is not narrowly tailored to the least discriminatory means of achieving this objective. In fact, as discussed *infra*, section D, FRAP 36 does not even bear a rational relationship to the objective of judicial efficiency. Thus, it is unlikely that courts could not utilize other, reasonably discernible, less discriminatory and less restrictive means of achieving the goal of judicial efficiency.

D. Even Under Rational Basis Review, FRAP 36 Must Be Struck Down

Even if rational basis scrutiny is applied in the present matter, FRAP 36 cannot survive. Supporters of the judgment without opinion rule[13] cite concerns about heavy judicial caseloads and the resulting time constraints on judges and judicial staff as

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[13] *June 1975 Commission Report*, 67 F.R.D. 195, 258 (1975) (considering the judicial efficiency argument but rejecting it: "saving of judicial time cannot be the sole criterion of any rules governing opinion writing.").

justifications for FRAP 36. Yet, the circuits with the lightest caseloads use judgment without opinion with the greatest frequency. *See*, *supra* Part I.B. While judicial caseloads are undoubtedly a rational justification, and potentially even a compelling one, FRAP 36 is not sufficiently related to this purpose. Requiring courts to provide, at minimum, a single sentence explaining the reasons for their affirmances would add at most, a negligible burden to the court's time constraints. These serious constitutional concerns warrant review of FRAP 36 by this Court.

IV. Excessive Use Of Federal Circuit Local Rule 36 Necessitates Supervisory Review

When the Federal Circuit was created in 1982, the court initially adopted a rule that provided for an opinion in all cases. *See* Fed. Cir. R. 18 (1982) ("Disposition of appeals shall be with a published opinion or an unpublished opinion."). Chief Judge Markey noted at the First Annual Judicial Conference of the Court of Appeals for the Federal Circuit that there would be an opinion explaining enough to tell parties what the law is in every case. He explained, "[i]t is tradition. It is a requirement of the courts of this land, thank God. We do not issue fiats. We do not just render a one-worded decision and go away. We explain our decisions. It is one of the great keys of the American judicial system."[14] This reasoning comported with the Commission on Revision of the Federal Court Appellate System, which recommended in 1975 that "in every case there

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[14] *Proceedings of the First Annual Jud. Conf. of the U.S. Ct. of App. For the Fed. Cir.,* 100 F.R.D. 499, 511 (1983) (Markey, C.J.).

be some record, however brief, and whatever the form, of the reasoning which impelled the decision."[15]

Despite Chief Judge Markey's sound logic, seven years later the Federal Circuit adopted Rule 36. This local rule, which permits the court to issue judgments without opinion, has been widely criticized in the time since its adoption.[16] Undeterred, the court has increasingly relied upon Rule 36 to dispose of cases on its docket.[17] As the only circuit court tasked with patent appeals, heightened use of Federal Circuit Rule 36 has a disproportionate effect on this area of law. For non-patent claimants like the Petitioner, in turn, the disproportionate use of judgments without opinion results in inequitable treatment from similarly situated petitioners in other circuits. In the employment discrimination context, this inequitable treatment is compounded by the overutilization of summary judgment to dispose of claims across the federal judiciary. The split among

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[15] *June 1975 Commission Report*, 67 F.R.D. at 258 (considering the judicial efficiency argument but rejecting it: "saving of judicial time cannot be the sole criterion of any rules governing opinion writing."), *supra* note 13.

[16] Reynolds, *supra* note 9; *see*, *e.g., The Ninth Annual Jud. Conf. of the U.S. Ct. of App. For the Fed. Cir.* 140 F.R.D. 57, 71 (1991). In a panel discussion at the Ninth Annual Judicial Conference of the CAFC, Judge Avern Cohn of the US District Court for Eastern District of Michigan pointedly asked Federal Circuit judge and fellow panelist: "[I]f you're going to require us to be rational and explain and justify, why do you reserve to yourself the privilege of simply saying, 'Affirmed,' for one of five reasons which you don't differentiate?" *Id.*

[17] *Eight Year Report of the U.S. Ct. of App. For the Fed. Cir.* 336 (1990) (discussing the significant rate at which the Federal Circuit disposed of cases without opinion since the rule was implemented in 1989).

circuits, inequitable treatment of similarly situated petitioners, and "hidden law" that proliferates as a result of FRAP 36 has left the law in a state of chaos. Supervisory review on this issue has been requested repeatedly over the course of the last quarter century and will not be resolved on its own without guidance from the Court.

A. The Federal Circuit's Use Of Local Rule 36 Is Excessive

The Federal Circuit's use of Local Rule 36 to issue judgments without opinion outpaces every other circuit.[18] As the graph below illustrates, between 2013 and 2016, the percentage of cases in which the Federal Circuit used Rule 36 was more than double

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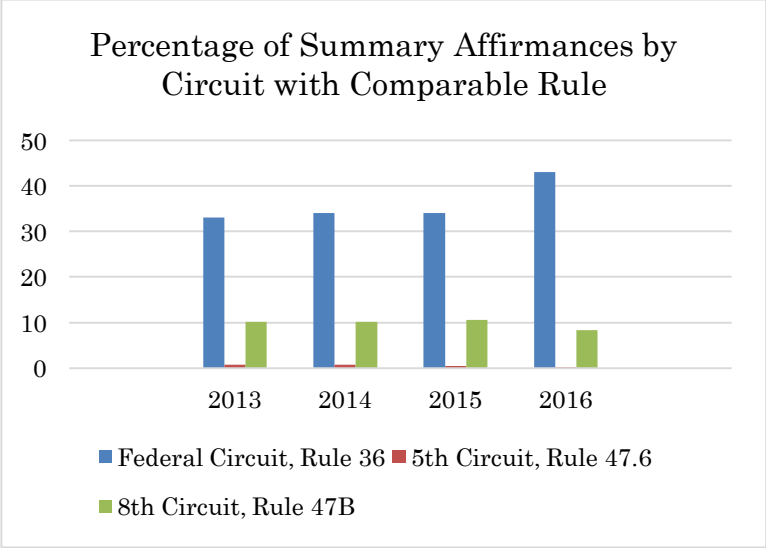
[18] *See Brief for Fed. Cir. Bar Ass'n as Amicus Curiae, CPC Int'l Inc., v. Archer Daniels Midland Co.,* Nos. 94-1045, 94-1060 (Fed. Cir. Sep. 22, 1994), *reprinted in* 4 FED. CIR. B.J. 269, 273–74 (1994) ("A comparison of statistics published by the Administrative Office of Courts reporting dispositions of cases in Circuit Courts and those compiled by the Federal Circuit Administrative Office demonstrate that from October 1, 1991 through September 30, 1993, eight to eleven Circuit Courts of Appeals disposed of less than 3% of cases without opinion. In contrast, [the Federal Circuit] issued 299 Rule 36 opinions out of 798 cases, about 37% of the cases."); Ted L. Feld, "*Judicial Hyperactivity" in the Federal Circuit: An Empirical Study,* 46 U.S.F. L. REV. 721, 745–46 (2012) ("the Fifth Circuit uses this tool much less often than the Federal Circuit. For example, from July 1, 2010, through June 30, 2010, the Fifth Circuit issued only 15 summary affirmances out of 3192 total cases-i.e., approximately 0.5% of all cases."); *Federal Judicial Caseload Statistics,* United States Courts (2016); *Federal Court Management Statistics, December 2016,* United States Courts (Dec. 31, 2016).

that of the Fifth and Eighth Circuits, where summary affirmances are also available for use.[19]



Perhaps in response to developments in patent law, the Federal Circuit has increased the use of judgments without opinion in recent years. "[T]he use of Rule 36 summary affirmances is indeed rising, both in absolute numbers and as a percentage of dispositions."[20] This is made clear by the graph below.[21]

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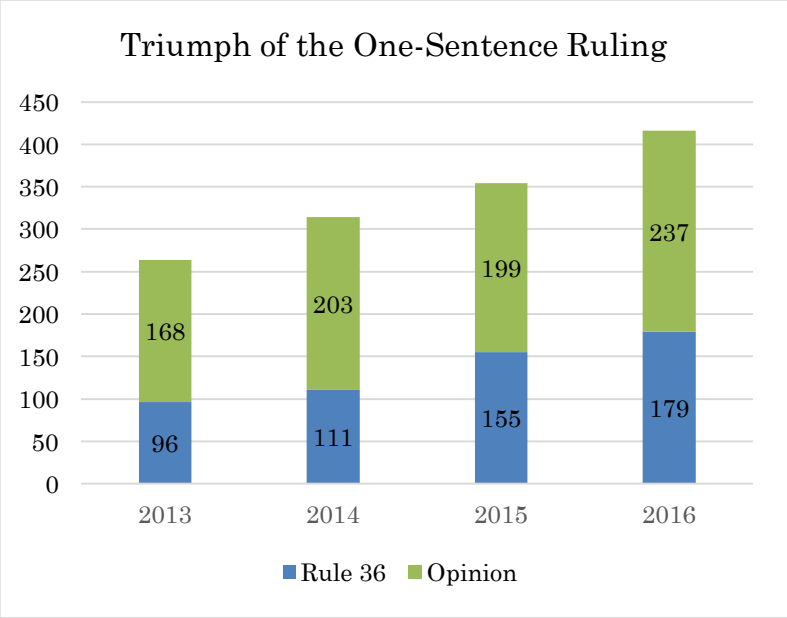
[19] Data compiled from LEXIS, https://www.lexisnexis.com (last visited Feb. 26, 2018) and Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, PATENTLYO, (Jun. 2, 2016), https://patentlyo.com/patent/2016/06/circuit-appeals-decisions.html.

[20] *See* Rantanen, *supra* note 19.

[21] *See* Bultman, *supra* note 1.



B. Local Rule 36 Disparately And Unfairly Impacts A Class Of Petitioners Based Solely On The Location Of the Circuit In Which Their Appeal Is Heard

As a result of FRAP 36, similarly situated petitioners have access to different levels of appellate justice based on the circuit in which their appeal is heard. This disparity is demonstrated dramatically by petitioner's plight, in which her claim was initially filed within the District of Columbia Circuit, the local rules for which would have guaranteed her more than a one-word affirmance. D.C. Cir. R. 36(b) (permitting "abbreviated dispositions" but expressly requiring that the disposition contain "notations of precedents" or be "accompanied by a brief memorandum."). The fact that judgments without opinion are granted so

disproportionately by the Federal Circuit also distorts the impact upon and development of entire areas of law.

The excessive issuance of judgments without opinion by the Federal Circuit and the court's refusal to reconsider this practice particularly effects the field of patent law. As the only appellate court with jurisdiction to hear patent case appeals, the Federal Circuit's local rules uniquely impact developments and are influenced by statutory changes in patent law. In 1990, the cases that the Federal Circuit disposed of without issuing an opinion spanned the entire range of the court's jurisdiction.[22] This continues to be true and during the intervening time, statutory changes have dramatically altered the patent appeals process.[23] Likely in response to these developments, the Federal Circuit has been increasing its use of unexplained affirmances.[24] In

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[22] *See* Eight Year Report of the U.S. Ct. of App. for The Fed. Cir. 3 (1990); *Astronics Corp. v. Patcell,* 968 F.2d 1226 (Fed. Cir.), *cert. filed,* 1992 WL 12073570, n. 15 (U.S. Sep. 2, 1992) (92-396), *cert. denied,* 506 U.S. 967 (1992).

[23] Daniel Harris Brean, *Pro Se Patent Appeals at the Fed. Cir.,* 21 STAN. TECH. L. REV. 1, 2 (2017) ("The Federal Circuit is being inundated with an unprecedented flood of patent appeals raising critical questions about the interpretation and implementation of the 2011 America Invents Act ... Even the raw number of patent cases being appealed has been sharply increasing since the enactment of the 2011 America Invents Act."); *Id.* at 4–5 ("The AIA overhauled core provisions of the Patent Act and created new adjudicatory proceedings in the USPTO, including inter partes review ("IRP") proceedings, heard by the newly-created Patent Trial and Appeal Board ("PTAB").").

[24] *Id.* at 2 ("To stay on top of this docket … the Federal Circuit has managed its increasingly heavy caseload by offsetting it with more summary affirmances.").

2016, the Federal Circuit issued Rule 36 judgments in more than fifty percent of appeals from the Patent Office, but more than forty percent of appeals overall.[25] The increased use of judgments without opinion across the docket therefore means that both patent and non-patent claims have a higher chance of being disposed of without explanation.

For non-patent claimants like the petitioner, the increase and relative frequency of unexplained affirmances in the Federal Circuit results in inequitable treatment from similarly situated petitioners in other circuits. This unfair treatment is compounded for the petitioner by the overutilization of summary judgments for employment discrimination claims.[26] District Court Judge Mark

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[25] Rantanen, *supra* note 19.

[26] *See* Kerri Lynn Stone, *Shortcuts in Employment Discrimination,* 56 ST. LOUIS U. L. J. (2011) (compiling research regarding judicial hostility to employment discrimination claims: Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Courts,* 1 J. EMPIRICAL LEGAL STUD. 429 (2004) ("Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of case during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 HARV. C.R.-C.L. L. REV. 99 (1999) (analyzing statistics of 615 ADA cases terminated between 1992 and 1998 and finding that 92.7% of those cases were won by defendants, and of those, 38.7% were resolved on summary judgment); *see generally* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,* 34 B.C. L. REV. 203 (1993) (observing the difficulties that employment discrimination

Bennett of the Northern District of Iowa describes how over the last four decades, "the federal judiciary has become increasingly unfriendly toward employment discrimination cases going to trial."[27] An anti-plaintiff shift has been widely discussed in the employment law field, but put simply, "jobs cases proceed and terminate less favorably for plaintiffs than other kinds of cases" and "the district court result usually meet affirmance on appeal."[28] One study revealed over eighty percent of defendant

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plaintiffs face on summary judgment); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment,* 81 NOTRE DAME L. REV. 889, n.49 (2006) (discussing statistics demonstrating that employment discrimination plaintiffs are seldom successful); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation,* 59 RUTGERS U. L. REV. 705 (2007) (observing that seventy-three percent of summary judgment motions in employment discrimination cases are granted, and that nearly all are in favor of defendants); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?,* 61 LA. L. REV. 555, 574 (2001) (arguing that "employment discrimination cases are unusually difficult to win, contrary to the reigning perspective, and that the various biases courts bring to the cases deeply affect how courts analyze and decide cases"); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to the Hon. Michael Bylson, U.S. Dist. Court Judge, E.D. Pa. (June 15, 2007) (analyzing 17,969 cases terminated in the seventy-eight federal district courts and finding that seventy-three percent of summary judgment motions in employment discrimination cases are granted, while the average for all civil cases is just sixty percent).

[27] Hon. Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective,* 57 N.Y.L. SCH. L. REV. 685, 697 (2012/2013).

[28] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?,* 3 HARV. L. & POL'Y REV. 103, 106 (2009).

motions for summary judgment in the employment discrimination cases are either granted or granted-in-part when decided by the district court.[29] For petitioner, the disproportionate use of opinions without explanation by the Federal Circuit and the overuse of summary judgment for employment discrimination cases combined to significantly diminish her opportunity to equitably access justice.

C. Supervisory Review Is Overdue

Petitioners began questioning the validity of Federal Circuit local Rule 36 in the patent context almost immediately after it was implemented in 1989. The second question presented in the 1996 petition for certiorari in *Donaldson Co., Inc. v. Nelson Indus., Inc.,* was "[w]hether an Appeals Court may summarily affirm a district court judgment . . . without rendering an opinion to provide guidance regarding its reasoning." 62 F.3d 1433 (Fed. Cir.), *cert. filed,* 1995 WL 17035471, *I (U.S. Nov. 1, 1995) (95-734), *cert. denied,* 516 U.S. 1072 (1995). The drumbeat of requests for supervisory review has remained steady in the time since, with at least twenty-four petitions for certiorari filed on related issues.[30] Considering the split among the appellate

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[29] Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases,* 2009, U. ILL. L. REV. 1011, 1015 (2009).

[30] *See generally Leaks Survey, Inc. v. FLIR Sys., Inc., cert. denied,* 138 S. Ct. 325 (2017); *In Re: Celgard, LLC,* 671 Fed. Appx. 797 (Fed. Cir. 2016), *petition for cert. docketed,* 16-1526 (Jun. 21, 2017); *Shore v. Lee, cert. denied,* 137 S. Ct. 2197 (2017); *Cloud Satchel, LLC v. Barnes & Noble, Inc., cert. denied,* 136 S.Ct. 1723 (2016); *Concaten, Inc., v. AmeriTrak Fleet Solutions, LLC, cert. denied,* 137 S. Ct. 1604 (2016); *Hyundai Motor America, Inc. v.*

circuits and continuing requests for clarity by petitions, we respectfully submit that the time has come for this Court to take up the question whether judgments without opinion sanctioned by FRAP 36 and analog local rules are inconsistent with "the principles of right and justice." *Frazier*, 482 U.S. at 645.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Clear With Comput., LLC, 134 S. Ct. 619 (2013); *Max Rack, Inc. v. Hoist Fitness Sys., Inc.,* 132 S. Ct. 54 (2011); *White v. Hitachi, Ltd.,* 132 S. Ct. 115 (2011); *Romala Stone, Inc. v. Home Depot U.S.A., Inc.,* 131 S. Ct. 1055 (2011); *Wayne-Dalton Corp. v. Amarr Co.,* 130 S. Ct. 503 (2009); *Tehrani v. Polar Electro,* 129 S. Ct. 2384 (2009); *City of Gettysburg, South Dakota v. United States,* 549 U.S. 955 (2006); *Hancock v. Dep't of Interior,* 549 U.S. 885 (2006); *DePalma v. Nike, Inc.,* 549 U.S. 811 (2006); *Bivings v. Dep't of Army,* 541 U.S. 935 (2004); *Laberge v. Dep't of the Navy,* 541 U.S. 935 (2004); *Bowen v. Board of Patent Appeals and Interferences,* 530 U.S. 1263 (2000); *Donaldson Co., Inc. v. Nelson Indus., Inc.,* 516 U.S. 1072 (1996); *Schoonover v. Wild Injun Prod.,* 516 U.S. 960 (1995); *Pirkle Therm-Omega-Tech v. Ogontz Controls Co.,* 516 U.S. 863 (1995); *U.S. Surgical Corp. v. Ethicon, Inc. Johnson & Johnson,* 517 U.S. 1164 (1996); *Intermediacs, Inc., v. Ventritex Co., Inc.,* 513 U.S. 876 (1994); *Astronics Corp. v. Patecell,* 506 U.S. 967 (1992); *In re Bucknam,* 502 U.S. 1060 (1992).

Respectfully Submitted,

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March 5, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 09-640
Filed: March 30, 2016

ROXANN J. FRANKLIN MASON,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

28 U.S.C. § 1491, (Tucker Act Jurisdiction); Rule 56 of the United States Court of Federal Claims, (Summary Judgment).

Lisa Alexis Jones, Lisa Alexis Jones, PLLC, New York, New York, Counsel for Plaintiff.

Shelley Dawn Weger, United States Department of Justice, Civil Division, Washington, D.C., Counsel for the Government.

MEMORANDUM OPINION AND FINAL ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE GOVERNMENT'S CROSS- MOTION FOR SUMMARY JUDGMENT

BRADEN, **Judge.**

I. RELEVANT FACTUAL BACKGROUND.[1]

A. Plaintiff's Initial Employment With The United States Department Of The Navy.

In 1978, Roxann Franklin Mason was hired as a General Schedule ("GS") 5 employee in the United States Department of the Navy ("Navy"), as a Statistical Assistant in the Office of the Comptroller, Statistics Division of the Military Sealift Command ("MSC"). Am. Compl. ¶ 5. By 1987, she achieved the position of GS-12 Statistician. Am. Compl. ¶¶ 6–9.

In June 1987, a GM-13 Statistician position was advertised and Ms. Franklin Mason applied. Am. Compl. ¶ 11. On January 27, 1988, she was informed that the GM-13 Statistician position was cancelled and that Donald Petska, a white male, was being transferred from the Budget Division into the Statistics Division to fill that position, without competition.[2] Am. Compl. ¶ 13.

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[1] The relevant facts were derived from: Plaintiff's March 9, 2015 Amended Complaint ("Am. Compl."); Plaintiff's June 18, 2015 Motion For Summary Judgment ("Pl. Mot."); the Government's September 18, 2015 Cross-Motion For Summary Judgment ("Gov't SJ") And Response To Plaintiff's June 18, 2015 Motion For Summary Judgment ("Gov't Opp.") and the Government's October 6, 2015 Corrected Appendix ("Gov't App. A1–578"); Plaintiff's January 13, 2016 Corrected Opposition To The Government's Cross-Motion And Reply Memorandum ("Pl. Opp. & Reply") together with an attached Appendix ("RFM 1–1620"); and the Government's January 14, 2016 Reply ("Gov't Reply").

[2] The March 9, 2015 Second Amended Complaint alleges that Donald Petska had substantially less experience and training than Ms. Franklin Mason. Am. Compl. ¶ 13.

B. Plaintiff's Title VII Claim Before the Equal Employment Opportunity Commission.

In 1988, Ms. Franklin Mason filed a Title VII claim with the Equal Employment Opportunity Commission ("EEOC"). Am. Compl. ¶¶ 14, 31. On August 10, 1989, she tendered her resignation that was considered a constructive termination. Am. Compl. ¶ 30.

In August 1995, the EEOC convened hearings on the Title VII claim. Am. Compl. ¶ 31. On July 3, 1996, the Administrative Law Judge ("ALJ") issued a post-hearing decision in favor of Ms. Franklin Mason. Am. Compl. ¶ 31. On September 6, 1996, the Navy rejected the ALJ's findings of discrimination and issued a Final Agency Decision, determining that Ms. Franklin Mason failed to establish a *prima facie* case of discrimination. Am. Compl. ¶ 34.

C. Plaintiff's Complaint In The United States District Court For The District Of Columbia And Stipulation Of Settlement And Order.

On October 31, 1996, Ms. Franklin Mason ("Plaintiff") filed a Complaint in the United States District Court for the District of Columbia ("District Court") against the Navy for violating Title VII. Am. Compl. ¶ 34.

On April 7, 1999, a Stipulation of Settlement ("Settlement Agreement") was filed with the

District Court requiring the Navy to pay $400,000 to Plaintiff as back pay. RFM 1. In addition:

- Paragraph 2 of the Settlement Agreement required the Navy to reinstate Plaintiff's employment with the MSC and to appoint Plaintiff as "Senior Financial Analyst/Advisor to the Financial Manager of the Naval Fleet Auxiliary Force (NFAF) Program (PM1) of the MSC." RFM 1.

- Paragraph 6 of the Settlement Agreement required the Navy to "make a savings account[3] available to Plaintiff." RFM 2. $36,000 of the back pay award was to be deducted and allocated to the thrift savings account. RFM 2.

- Paragraph 9 of the Settlement Agreement required the Navy "to provide Plaintiff with orientation and other related activities to assist her in carrying out the duties and responsibilities of the position." RFM 3. Paragraph 9 also required the Navy to consider Plaintiff "for any and all educational benefits afforded to personnel employed at her grade/level." RFM 3.
- Paragraph 10 of the Settlement Agreement prohibited the Navy from Plaintiff "to work directly for or be supervised by William Savitsky, Robert Hoffman, or

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[3] "The Thrift Savings Plan is a retirement savings plan for federal employees 'similar to 401(k) plans offered to private sector employees.'" Gov't Opp. at 19 (quoting *Summary of the Thrift Savings Plan* 3, TSP.GOV, https://www.tsp.gov/PDF/formspubs/tspbk08.pdf).

Donald Petska in the normal course of her duties." RFM 3. Paragraph 10 also prohibited "these individuals [and] any other personnel in the Office of the Comptroller [from being] involved in any way with the formal evaluation of Plaintiff's work performance or in decisions made regarding Plaintiff's employment status." RFM 3.

- Paragraph 11 required that "Plaintiff's resignation of employment effective August 11, 1989 . . . be rescinded." Paragraph 11 also required the Navy, within 60 days, to expunge from Plaintiff's records, "any information and/or reference to the notice of proposed removal issued to Plaintiff, all medical records associated with the proposed removal, as well as the AWOL [Absent Without Official Leave] status and LWOP [Leave Without Pay] status for the time period of February 28, 1988 to June 6, 1988." RFM 3.
- Paragraph 16 provided that the Settlement Agreement "contain[ed] the entire agreement between the parties and supersed[ed] any and all previous agreements, whether written or oral, between the parties relating to this subject matter." RFM 4.

On April 15, 1999, the District Court approved and entered the Stipulation of Settlement And Order. RFM 14.

D. Plaintiff's Post-April 1999 Employment

With The Navy.

In April 1999, Plaintiff also returned to work as a GS-13, Step 10 Senior Financial Analyst/Advisor to the NFAF's Financial Manager. Am. Compl. ¶ 59. On December 10, 1999, Plaintiff filed an Emergency Motion to enforce the terms of the April 15, 1999 Settlement Agreement. Am. Compl. ¶ 90. On May 12, 2000, the District Court denied the Emergency Motion and ordered the parties to resolve the implementation of the Final Order. Am. Compl. ¶ 90.

On May 7, 2001, Plaintiff filed a second Motion For Order To Enforce The Final Order. Am. Compl. ¶ 91. On October 24, 2001, the District Court denied Plaintiff's May 7, 2001 Motion. Am. Compl. at ¶ 91. On November 9, 2001, Plaintiff filed a third Motion To Enforce The Final Order And For Sanctions. Am. Compl. ¶ 91.

On July 8, 2002, the assigned United States District Court Judge recused himself from further proceedings and the case was reassigned. Am. Compl. ¶ 93. On January 30, 2003, the case was referred to a United States District Court Magistrate Judge. Am. Compl. ¶ 93.

On September 9, 2003, the Magistrate Judge issued a Preliminary Report And Recommendation denying the alleged violations of Settlement Agreement Paragraphs 6 (requiring the Navy to establish a thrift savings account available to Plaintiff) and 9 (requiring the Navy to provide Plaintiff with orientation and activities to assist with her job responsibilities). Gov't App. A286, 293. The Magistrate Judge also determined that "[a]n

evidentiary hearing in this matter is necessary to resolve . . . claims regarding paragraphs 2 and 10 [of the Settlement Agreement]. I will, therefore, issue a separate Order setting such a hearing." Gov't App. A293.

> In June 2004, Plaintiff again resigned from the Navy.[4] Am. Compl. ¶ 94.

On February 2–5, 2005 and April 8, 2005, the Magistrate Judge convened evidentiary hearings. RFM 21. On March 21, 2006, the Magistrate Judge issued a Report And Recommendation on Plaintiff's November 9, 2001 Motion To Enforce the Final Order And For Sanctions. Am. Compl. ¶ 95.

On May 22, 2009, the District Court issued a Memorandum Opinion Transferring Plaintiff's Motion To Enforce The Settlement Agreement To The United States Court Of Federal Claims. *See Franklin-Mason v. Penn*, 616 F. Supp. 2d 97, 99 (D.D.C. 2009) ("Because this court lacks jurisdiction over Franklin–Mason's claim to enforce the settlement agreement, her motion to enforce the settlement agreement will be transferred to the United States Court of Federal Claims.").

II. PROCEDURAL HISTORY.

A. Proceedings Before The United States Court Of Federal Claims During 2009–2010.

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[4] The March 9, 2015 Amended Complaint alleged that Plaintiff's second resignation was considered a constructive discharge. Am. Compl. ¶ 94.

On September 29, 2009, the case was transferred to the United States Court of Federal Claims. On October 27, 2009, Plaintiff filed a Transfer Complaint.

On February 26, 2010, the Government filed a Motion To Dismiss. On March 25, 2010, Plaintiff filed a Reply Opposing Defendant's Motion To Dismiss And, In The Alternative, Remand Back To The United States District Court For The District Of Columbia. On April 13, 2010, the Government filed a Reply.

On July 23, 2010, the court issued a Memorandum Opinion and Final Order Transferring Case To The United States District Court For The District Of Columbia. *See Franklin-Mason v. United States*, No. 09-640 at *7 (July 23, 2010) ("[T]he Clerk of the United States of Federal Claims is directed to transfer this case to the United States District Court for the District of Columbia.").

B. Proceedings Before The District Court And The United States Court Of Appeals For The District Of Columbia During 2010–2014.

On September 16, 2010, the case was transferred from the United States Court of Federal Claims back to the District Court. RFM 26.

On January 27, 2012, the District Court issued a Final Order, dismissing Plaintiff's Title VII discrimination claims and denied Plaintiff's Motion To Enforce The Settlement Agreement. RFM 26. Plaintiff appealed.

On February 14, 2014, the United States Court of Appeals for the District of Columbia issued an Opinion, affirming the District Court's decision and holding that the United States Court of Federal Claims has exclusive jurisdiction over the case. *See Franklin-Mason v. Mabus*, 742 F.3d 1051, 1058 (D.C. Cir. 2014) ("We conclude [that] the [United States] Court of Federal Claims has jurisdiction over Franklin–Mason's [M]otion [T]o [E]nforce[.]"). The United States Court of Appeals for the District of Columbia remanded the case to the D.C. District Court with "instructions to transfer [the case] to the [United States] Court of Federal Claims." *Id*.

C. Proceedings Before The United States Court Of Federal Claims From 2014– Present.

On October 2, 2014, the case was transferred back to the United States Court of Federal Claims.

On March 9, 2015, Plaintiff filed an Amended Complaint. On April 27, 2015, the Government filed an Answer. On June 18, 2015, Plaintiff filed a Motion For Summary Judgment. On September 18, 2015, the Government filed a Cross-Motion For Summary Judgment And Response To Plaintiff's June 18, 2015 Motion For Summary Judgment. On November 24, 2015, Plaintiff filed an Opposition To The Government's Cross-Motion For Summary Judgment And Reply Memorandum.

On January 13, 2016, Plaintiff filed a Consent Motion To Amend/Correct Response To Cross Motion and attached a corrected Opposition.

That same day, the court granted Plaintiff's Consent Motion. On January 14, 2016, the Government filed a Reply.

III. DISCUSSION.

A. Jurisdiction.

1. The Government's Argument.

The Government argues that the United States Court of Federal Claims does not have jurisdiction over the March 9, 2015 Amended Complaint, because Plaintiff was constructively discharged from the Navy in 2004. Gov't Reply at 6. "If [Plaintiff] believed that her retirement was involuntary, she could have appealed with the MSPB [United States Merit Systems Protection Board]." Gov't Reply at 6. "Because the issue of an involuntary retirement is within the MSPB's jurisdiction, this [c]ourt does not have jurisdiction over that issue." Gov't Reply at 7 (citing *Pueschel v. United States*, 297 F.3d 1371, 1378 (Fed. Cir. 2002) ("[T]he [United States] Court of Federal Claims does not have jurisdiction over a case that could be heard by the MSPB.").

2. Plaintiff's Response.

Plaintiff did not respond.

3. The Court's Resolution.

The United States Court of Federal Claims has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, "to render judgment upon any claim against

the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . . [T]he Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976).

To pursue a substantive right under the Tucker Act, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act[.]"); *see also Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc*) ("The Tucker Act . . . does not create a substantive cause of action; . . . a plaintiff must identify a separate source of substantive law that creates the right to money damages. . . . [T]hat source must be 'money-mandating.'"). Specifically, a plaintiff must demonstrate that the source of substantive law upon which he relies "can fairly be interpreted as mandating compensation by the Federal Government[.]" *Testan*, 424 U.S. at 400. And, the plaintiff bears the burden of establishing

jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question . . . . [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.").

The March 9, 2015 Amended Complaint does not include a claim for constructive discharge, but alleges a breach of the Settlement Agreement and breach of the duty of good faith and fair dealing. "Tucker Act jurisdiction may be exercised in a suit alleging breach of a Title VII settlement agreement[.]" *Holmes v. United States*, 657 F.3d 1303, 1312 (Fed. Cir. 2011). In addition, the March 9, 2015 Amended Complaint alleges misrepresentation in the inducement. Am. Compl. ¶ 119. The United States Claims Court has held that "a tortious breach of contract styled as a misrepresentation in the *inducement* . . . does *not* fall outside of this court's Tucker Act jurisdiction." *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 526 (1986) (emphasis added). As such, the court has jurisdiction over the claims alleged in the March 9, 2015 Amended Complaint.

B. Plaintiff's June 18, 2015 Motion For Summary Judgment.

1. Whether The Navy Breached The Settlement Agreement.

a. Plaintiff's Argument.

Plaintiff argues that the Navy breached the

Settlement Agreement in five ways: (1) by failing to appoint her as "Senior Financial Analyst/Advisor to the *Financial Manager* of the Naval Fleet Auxiliary Force (NFAF) Program (PM1) of the MSC," Pl. Mot. at 25 (emphasis added); (2) by failing to expunge her Official Personnel File ("OPF") within 60 days of the Settlement Agreement, because the Navy lost her OPF and had to reconstruct it; (3) by allocating a retirement contribution into the G Thrift Savings Fund rather than the C fund; (4) by failing to provide Plaintiff with educational and training opportunities; and (5) by requiring Plaintiff to interact with the Comptroller Office. Pl. Mot. at 23–33.

First, Plaintiff argues that Paragraph 2 of the Settlement Agreement required that Plaintiff be appointed as "Senior Financial Analyst/Advisor to the *Financial Manager* of the Naval Fleet Auxiliary Force (NFAF) Program (PM1) of the MSC." Pl. Mot. at 25 (citing RFM 1) (emphasis added). But, the Navy never hired a Financial Manager. Pl. Mot. at 25. Because there was no Financial Manager, Plaintiff worked for a Deputy Program Manager. Pl. Mot. at 25. "[A]bsolutely nothing in the Settlement Agreement stat[ed] that [Plaintiff] would be the Senior Financial Analyst/Advisor *to the Deputy Program Manager*[.]" Pl. Mot. at 25 (emphasis in original). As such, "the Navy breached the plain language of the agreement when it failed to place a Financial Manager in which she was to report." Pl. Mot. at 26.

Second, Plaintiff asserts that the Navy lost her personnel file and had to "reconstruct" it. Pl. Opp. & Reply at 16 (citing RFM 1614) (1/26/15 e-

mail from Assistant United States Attorney Fred E. Haynes to Plaintiff's attorney) ("I am pretty sure that we have her reconstructed OPF[.]"); *see also* RFM 1616 (7/13/00 e-mail from Government personnel to Plaintiff) ("I had gotten what I could find in the files . . . and had sent that to HRSC-Cap to start reconstruction of an OPF for you."). "[T]he Navy has not and indeed cannot verify that . . . Mrs. Franklin Mason's OPF was expunged with[in] 60 days of Judge Sullivan's approval, *if ever*." Pl. Opp. & Reply at 35.

Third, Plaintiff contends that "[t]he Navy breached ¶ 6 of the [Settlement Agreement] by causing a contribution to be made in the 'G' Thrift Savings Fund, not the 'C' fund, and as directed by [Plaintiff]." Pl. Mot. at 31. During settlement negotiations, Plaintiff and her counsel "*insisted* that [Plaintiff] had a right to make an allocation of her choosing . . . and the Navy could not require that she waive that right." Pl. Opp. & Reply at 33 (emphasis in original). Plaintiff, on an April 19, 1999 TSP form, allocated 10% of her retirement contribution to the G Fund and 90% to the C Fund. RFM 39. The Navy, however, allocated 100% to the G Fund. Pl. Opp. & Reply at 16.

Fourth, Plaintiff argues that the Navy breached Paragraph 9 of the Settlement Agreement by failing to provide her with adequate educational and training opportunities. Pl. Mot. at 31. The purpose of including education and training in the Settlement Agreement was "to resume Mrs. Franklin Mason's professional progression as close to Donald Petska, who had received a Masters degree paid for by the Navy. The Navy consistently

refused to offer her education opportunities similar [to] that [of] her comparator" and denied training requests. Pl. Opp. & Reply at 36 (citing RFM 1545–46).

Fifth, Plaintiff argues that the Navy breached the Settlement Agreement by requiring her to interact with the Comptroller's Office. Pl. Mot. at 28. Specifically, one of Plaintiff's supervisors, Captain Larry Penix stated that feedback from Comptroller staff may have been reflected in Plaintiff's performance evaluation. Pl. Opp. & Reply at 14 (citing RFM 611) (2/4/05 Penix Cross-Examination[5]) ("A. Well, if there was a project that [Plaintiff] was working on with N8[6] [and she gave it to N8 and N8 said, gee, that was a great job, I would consider that as much as if they would have said, hey, we got this late, can you speed it up[.]")). Plaintiff also contends that, in June 2001, the Navy was re-organized, so that "all [500 series] personnel handling funds or budgets, like Mrs. Franklin Mason, were to report to the Comptroller." Pl. Opp. & Reply at 17. (citing RFM 170) (2/2/05 Plaintiff Direct Examination) ("A. There was an e-mail . . . [and] the gist of it was that everyone under the 500 series must report directly to the Office of the Comptroller. . . . It meant that I reported to the Office of the Comptroller.")). Although Mr. Barry Nelson, the head of PM-1 at the time, advised Plaintiff that she was exempt from the re-organization, RFM 192, there is no evidence that a

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[5] Direct and Cross Examinations referenced herein refer to the evidentiary hearings before the Magistrate Judge that took place in Washington, D.C. on February 2–5, 2005 and April 8, 2005.

[6] N8 refers to the Office of the Comptroller. RFM 1336.

Navy official who had the authority to exempt Plaintiff actually made that decision. Pl. Opp. & Reply at 17–18 (citing RFM 194–95) (2/2/05 Plaintiff Direct Examination) ("A. No. I didn't receive anything that told me in writing that I was exempt from working directly for the Office of the Comptroller.")). As such, the Navy breached the Settlement Agreement by requiring Plaintiff to work for the Comptroller and using feedback from the Comptroller in Plaintiff's performance evaluations. Pl. Opp. & Reply at 17–18, 28.

b. The Government's Opposition.

The Government counters that the Navy was unable to hire a Financial Manager, because MSC never approved Mr. Nelson's request for one. Gov't Opp. at 16 (citing Gov't App. A123– (4/14/04 Nelson Dep.). In any event, the Navy's inability to hire a Financial Manager was not a material breach of the Settlement Agreement, because the Navy substantially complied with its duties there. Gov't Opp. at 17. In addition, the Navy provided Plaintiff with supervisors with financial backgrounds: Captain Penix has a B.S in Business Administration and his job duties included reviewing budgets; Captain Michael Herb has a background in financial analysis, management, and performed budget and financial analyst work; Mr. Nelson was responsible for administering a $1.2 billion budget. Gov't Opp. at 18 (citing Gov't App. A93–94) (4/6/04 Penix Dep.); Gov't App. A100–06 (4/7/04 Herb Dep.); Gov't App. A217–19 (2/2/05 Craig Direct Examination). "Moreover, [Plaintiff] was reporting to . . . individuals who were more senior and who carried more responsibilities than

any individual who might fill the financial manager position." Gov't Opp. at 19.

The Government also insists that the Navy properly expunged Plaintiff's OPF. Gov't Opp. at 32. In accordance with Paragraph 11 of the Settlement Agreement, Plaintiff's OPF "does not contain 'any information and/or reference to the notice of proposed removal to [her], [any] medical records associated with the proposed removal, [or] the AWOL status and LWOP status for the time period of February 28, 1988 to June 6, 1988.'" Gov't Opp. at 32 (citing Gov't App. A3) (Settlement Agreement Paragraph 11); and Gov't App. A418–578 (Plaintiff's OPF). In addition, at the February 4, 2005 Evidentiary Hearing convened in Washington, D.C. before the Magistrate Judge, Gabriela Weimann, an employee in the Navy Human Resources Office, testified that Plaintiff's OPF did not contain any adverse information about Plaintiff's departure from MSC. Gov't Opp. at 33 (citing Gov't App. A230–31) (2/4/05 Weiman Direct Examination); *see also* RFM 532–34 (same). Moreover, contrary to Plaintiff's argument that the Navy lost and reconstructed her OPF, the Director of the Department of the Navy Office of Civilian Human Resources, Operations Center-Norfolk submitted a signed affidavit stating that Plaintiff's OPF "appears to be an original OPF. There is no obvious indication that the file has been reconstructed and there is no form in the OPF that indicates that the filed reviewed has been reconstructed." Gov't App. A90.

Next, the Government points out that on February 15, 2000, the Navy provided a check for $36,000 to the Thrift Savings Plan ("TSP")

Administrator along with a letter instructing "the TSP to deposit the funds into Ms. Mason's TSP account in connection with a back pay award. . . . [O]n April 24, 2000, the TSP posted $36,000 to Ms. Mason's newly established TSP account." Gov't App. A394 (8/9/00 Letter from Patrick J. Forrest, Attorney for the Federal Retirement Thrift Investment Board, to Alexander Shoaibi, Assistant United States Attorney). Although Plaintiff argues that the Navy should have deposited the funds in the C Fund instead of the G Fund, the Navy's actions were appropriate, because the Settlement Agreement contains "*no* language regarding the type of fund into which the $36,000.00 was deemed to have been invested from January 1990 through April 11, 1999." Gov't Opp. at 21. Moreover, "at the time that the parties entered into the [S]ettlement [A]greement, an Office of Personnel Management ('OPM') regulation required that when . . . the Government places funds into a TSP upon an employee's return to duty, the money is deemed to have been invested in the G Fund in the period between the employee's departure from service and her return." Gov't Opp. at 21 (citing 5 C.F.R. § 1605.4 (1999)).[7] "[B]ecause the Navy fully complied with its obligations under the [S]ettlement [A]greement regarding [Plaintiff's] thrift savings account, and because an OPM regulation required the Navy to calculate lost earnings based upon the

[7] Plaintiff countered that 5 C.F.R. § 1605.4 was inapplicable, because this regulation established allocation procedures for the correction of administrative errors in calculating lost wages and other pay miscalculations. Pl. Reply at 34 (citing 5 C.F.R. § 1605; *see also Garcia v. United States*, 996 F. Supp. 39 (D.C. Cir. 1998)). "The Navy has cited no controlling authority for the premise that back-pay damages in a Title VII claim is a 'correction' of an administrative error[.]" Pl. Reply at 34. Therefore, 5 C.F.R. § 1605.4 is inapplicable. Pl. Reply at 34.

interest rates earned by the G Fund . . . the [c]ourt should grant summary judgment for [the Government] on this claim." Gov't Opp. at 23.

The Government also argues that Plaintiff failed to produce evidence to support the claim that the Navy did not provide her with adequate educational and training opportunities. Gov't Opp. at 23–24. The Navy met its affirmative obligations to provide training and education:

- Ms. Lucy Austin, the Business Manager for the NFAF Program Office, provided [Plaintiff] with orientation. Gov't App. A34.
- Ms. Austin also provided Plaintiff with oral briefings, an overview of the NFAF Program, financial briefs, financial reports, and the NFAF business plan. Gov't App. A34.
- Ms. Austin also scheduled a trip to San Diego for Plaintiff, so she could meet with the NFAF Program field office there. Gov't App. A34.
- Plaintiff also was afforded and took advantage of numerous professional development seminars such as attending the American Society of Military Comptrollers' Professional Development Institute and the NFAF Financial Management Conference. Gov't App. A34.
- Plaintiff also attended training courses and graduate-level university courses. Gov't App. A34–35.

As to the two times Plaintiff's requests were denied, "Captain Penix considered her requests,

explained the reasons for denying her requests, and recommended that she take courses related to her job duties." Gov't Opp. at 25 (citing Gov't App. A401, 403). When Captain Herb became Plaintiff's supervisor, he "did not recall denying any of [Plaintiff's] requests for training." Gov't Opp. at 26 (citing Gov't App. A120). "Because [Plaintiff] attended or participated in orientation and numerous training activities related to her position and because her supervisors considered her for all of the training she requested—even if those requests were denied—the Navy fully complied with its obligations regarding training[.]" Gov't Opp. at 26.

Moreover, there is no evidence in the record that Plaintiff worked directly for or was directly supervised by Mr. Savitsky, Mr. Hoffman, or Mr. Petska. Gov't Opp. at 27 (citing Gov't App. A184) (2/2/05 Smith Direct Examination (former attorney for the MSC)) ("[Plaintiff] was assigned in PM-1, the Naval Fleet Auxiliary Force. She wasn't assigned in the Comptroller directorate. She didn't work for Mr. Savitsky. She didn't work for Mr. Hoffman, did not work for Mr. Petska."). Likewise, Plaintiff was never supervised by personnel in the Comptroller's Office. Instead, Captain Penix directly supervised Plaintiff "from the time she returned to the MSC in 1999 until Captain Penix left MSC in 2002, and then by Captain Herb from 2002 until [Plaintiff] left the MSC in 2004." Gov't Opp. at 27 (citing Gov't App. A37) (Penix Decl. ¶ 4); Gov't App. A48 (Herb Decl. ¶ 2). Plaintiff's second-line supervisor was Mr. Nelson (Gov't App. A99) and "[Plaintiff] has acknowledged that Mr. Nelson was the head of the NFAF and that he did not report to Mr. Savitsky, Mr. Hoffman, or Mr. Petska." Gov't Opp. at 27

(citing Gov't App. A167) (2/2/05 Plaintiff Direct Examination).

In fact, although the MSC was restructured in 2001, so that all individuals doing financial work were to report to the Comptroller (Gov't Opp. at 27) "Mr. Nelson and Mr. Savitsky agreed . . . that Plaintiff was exempt from this requirement." Gov't Opp. at 28 (citing Gov't App. A154–55) (4/14/04 Dep. of Barron Nelson). Indeed, there is no evidence that Mr. Savitsky, Mr. Hoffman, Mr. Petska, or any other Comptroller personnel were involved in evaluating Plaintiff's work performance or deciding her employment status. Gov't Opp. at 28. For example, "[Plaintiff's] performance evaluations do not contain signatures or any other indications that anyone from the Office of the Comptroller was involved in evaluating her work performance." Gov't Opp. at 28 (citing Gov't App. A75–78) (9/21/00 MSC Performance Plan And Appraisal Form For Plaintiff)). "[Plaintiff] has even admitted that she does not know whether anyone from the Office of the Comptroller had ever had any involvement with the formal evaluation of her work performance." Gov't Opp. at 29 (citing Gov't App. A171) (2/2/05 Plaintiff Direct Examination) ("[Magistrate Judge]: But the point I'm trying to make, Ms. Franklin Mason, is, during this evaluation process . . . did the evaluation on its face indicate that the Comptroller's office has expressed some view of opinion in the manner in which you performed your duties? [Plaintiff]: I would have no way of knowing that.").

The Government adds that the court should disregard Plaintiff's argument that the Settlement

Agreement prohibited *any* contact with *any* personnel from the Comptroller. Gov't Mot. at 30 (citing Pl. Mot. at 20–21). Specifically:

> [t]he [S]ettlement [A]greement does not preclude [Plaintiff] from having any interaction whatsoever with Mr. Savitsky, Mr. Hoffman, Mr. Petska, or other personnel in the Office of the Comptroller; rather, the [S]ettlement [A]greement protected [Plaintiff] form 'working directly for or being supervised by' Mr. Savitsky, Mr. Hoffman, and Mr. Petska, and prevented any personnel from the Office of the Comptroller to have any involvement with 'the formal evaluation . . . or in decisions made regarding [her] employment status.'

Gov't Opp. at 30–31 (quoting Gov't App. A3) (Paragraph 10 of the Settlement Agreement).

C. The Court's Resolution.

i. Standard Of Review For Summary Judgment.

On a motion for summary judgment, the moving party must establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Amergen Energy Co. ex rel. Exelon Generation Co. v. United States*, 779 F.3d 1368, 1372 (Fed. Cir. 2015) (quoting Rule 56(a) of the Rules of the United States Court of Federal Claims ("RCFC")) ("Summary judgment is appropriate when, drawing all

justifiable inferences in the nonmovant's favor, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'"). Only genuine disputes of material fact that might affect the outcome of the suit preclude entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). The "existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Id.* at 247–48 (emphasis in original). "[C]ourts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

ii. Whether The Navy Violated Paragraph 2 Of The Settlement Agreement By Failing To Appoint Plaintiff As "Senior Financial Analyst/Advisor To The Financial Manager."

As a threshold matter, there are no genuine disputes of material fact with respect to the Navy's Obligation under Paragraph 2 of the Settlement Agreement that "Plaintiff shall be appointed as a Senior Financial Analyst/Advisor to the Financial

Manager of the Naval Fleet Auxiliary Force (NFAF) Program (PM1) of the MSC." RFM 1.

As a matter of law, "[n]ot every departure from the literal terms of a contract is sufficient to be deemed a material breach of a contract requirement." *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1550 (Fed. Cir. 1992). Whether a breach is material "depends on the nature and effect of the violation in light of how the particular contract was . . . bargained for[.]" *Id*. at 1551.

For these reasons, the court has determined that the Navy's failure to hire a Financial Manager was not a material breach of Paragraph 2 of the Settlement Agreement's requirement since she performed comparable work for supervisors with financial backgrounds. Gov't App. A93–94, 100–06, 217–19.

iii. Whether The Navy Violated Paragraph 11 Of The Settlement Agreement By Failing To Expunge Plaintiff's OPF.

The Navy was required to expunge "any information and/or reference to the notice of proposed removal issued to Plaintiff, all medical records associated with the proposed removal, as well as the AWOL status and LWOP status for the time period of February 28, 1988 to June 6, 1988." RFM 3. Plaintiff's OPF, however, does not contain any references to Plaintiff's proposed removal nor does it reference AWOL or LWOP status. Gov't App. A418–577 (Plaintiff's OPF). Plaintiff's OPF reflects

only that Plaintiff worked at the Department of the Navy without interruption from September 25, 1978 to June 3, 2004. Gov't App. A431. Therefore, even if the Navy lost Plaintiff's OPF and then "reconstructed" it, this dispute is not material. *See Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

For these reasons, the court has determined that the Navy did not violate Paragraph 11 of the Settlement Agreement.

iv. Whether The Navy Violated Paragraph 6 Of The Settlement Agreement By Allocating 100% of Plaintiff's Thrift Savings Account Funds To The G Fund.

Paragraph 6 of the Settlement Agreement requires the Navy to "make a thrift savings account available to Plaintiff." RFM 2. The Navy provided Plaintiff with a thrift savings account as required by Paragraph 6. The Settlement Agreement, however, did not require the Navy to allocate the contributions to any particular Fund. Moreover, the Settlement Agreement includes a merger clause. RFM 4 ("This Stipulation of Settlement and Order contains the entire agreement between the parties and supersedes any and all previous agreements, whether written or oral, between the parties relating to this subject matter."). Therefore, Plaintiff's use of parol evidence to establish that the Settlement Agreement required the Navy to allocate contributions as Plaintiff desired is

inadmissible. *See McAbee Const. Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1999) ("[W]e conclude that the agreement was fully integrated. Consequently, the parol evidence rule prohibits the use of extrinsic evidence to add to or to modify its terms.").

For these reasons, the court has determined that the Navy did not violate Paragraph 6 of the Settlement Agreement.

v. Whether The Navy Violated Paragraph 9 Of The Settlement Agreement By Failing To Provide Plaintiff With Educational And Training Activities.

Paragraph 9 of the Settlement Agreement required the Navy "to provide Plaintiff with orientation and other related activities to assist her in carrying out the duties and responsibilities of the position." RFM 3. The record shows that the Navy provided Plaintiff with orientation as well as training opportunities. Gov't App. A33–35. But, the Settlement Agreement did not require the Navy to grant Plaintiff's every request for education and training. *See TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) ("When the contract's language is unambiguous it must be given its "plain and ordinary" meaning and the court may not look to extrinsic evidence to interpret its provisions.").

For these reasons, the court has determined that the Navy did not violate Paragraph 9 of the Settlement Agreement.

vi. Whether The Navy Violated Paragraph 10 Of The Settlement Agreement By Requiring Plaintiff To Interact With The Comptroller's Office Contrary To The Settlement Agreement.

Paragraph 10 of the Settlement Agreement provided that:

> Plaintiff shall not be required to work directly for or be supervised by William Savitsky, Robert Hoffman, or Donald Petska in the normal course of her duties. The [Navy] further agrees that none of these individuals or any other personnel in the Office of the Comptroller shall be involved in any way with the formal evaluation of Plaintiff's work performance or in decisions made regarding Plaintiff's employment status.

RFM 3.

The court interprets the plain language of this provision to mean that Plaintiff could *interact* with the Comptroller's Office and with Mr. Savitsky, Hoffman, and Petska. But, the Settlement Agreement prohibited these individuals, as well as Comptroller personnel, from participating in Plaintiff's formal evaluations or in decisions regarding her employment with the Navy. RFM 3.

At the February 4, 2005 hearing in Washington, D.C. before the Magistrate Judge, Captain Penix testified, "Well, if there was a project that [Plaintiff] was working on with N8 and she gave it to N8 and N8 said, gee, that was a great job, I would consider that as much as if they would have said, hey, we got this late, can you speed it up[.]" RFM 611. But, Captain Penix testified that he did not receive any direct input from the Comptroller's Office and that Plaintiff was not required to work directly for Mr. Savitsky, Hoffman, or Petska. RFM 563 (2/4/05 Penix Direct Examination). After Captain Penix left the Navy in 2002, Captain Herb was Plaintiff's supervisor. RFM 1378. Captain Herb testified that he did not ask for any direct input from the Comptroller's office when evaluating Plaintiff's job performance. RFM 1437 (4/7/04 Herb Dep.). Although the Navy re-organized, so that financial employees like Plaintiff reported to the Comptroller's Office, nothing in the record evidenced that Mr. Savitsky, Hoffman, Petska, or anyone else in the Comptroller's Office participated in evaluating Plaintiff's job performance or decided her employment status.

For these reasons, the court has determined that the Navy did not violate Paragraph 10 of the Settlement Agreement.

2. Whether The Navy Breached The Duty Of Good Faith And Fair Dealing.

a. Plaintiff's Argument.

In the alternative, Plaintiff argues that the

Navy breached the duty of good faith and fair dealing, because Plaintiff was never given the appropriate assignments and supervision for her position. Pl. Mot. at 27–28 (citing RFM 173–75). Despite the Settlement Agreement's requirement that Plaintiff work as a GS-13 Senior Financial Analyst/Advisor to the Financial Manager of the Naval Fleet Auxiliary Force Program (PM-1) of MSC, Plaintiff was not given substantive financial assignments. Pl. Opp. & Reply at 29. An example of a non-financial assignment Plaintiff was given "involved cutting and pasting historical information about Naval ships from a book for display, alongside the ship's photograph, in the lobby." Pl. Opp. at 19 (citing RFM 1410–13). In fact, "[Captain] Herb did not believe he could assign financial work to [Plaintiff] because it would require her to interact with the Comptroller's office[.]" Pl. Opp. & Reply at 19 (citing RFM 707) (2/4/05 Herb Cross-Examination) ("[I]n counsel with Ms. [Marva] Riley, [a Navy personnel official], we made as a concession that I could . . . come up with some work that was nonfinancial in nature."). "Throughout his supervision of [Plaintiff], [Captain] Herb gave her a total of three assignments, only one of which was refused." Pl. Opp. & Reply at 20 (citing RFM 1415) (4/7/04 Herb Dep.) ("I think those are the only three [assignments] that I can remember because she was on sick leave a pretty substantial amount during that time frame[.]").

The financial assignments that Plaintiff did receive were from the Comptroller's Office, in violation of the Settlement Agreement. Pl. Opp. & Reply at 12 (citing RFM 198) (2/2/05 Plaintiff Direct Examination) ("[Plaintiff]: It was [financial] work

that came from the Office of the Comptroller and it was, you know, filtered down[.]"); RFM 200; RFM 1549 ("[Plaintiff]: There are assignments that come from the Office of the [C]omptroller that I am asked to do which is in violation of my [S]ettlement [A]greement[.]").

b. The Government's Opposition.

To the extent that the March 9, 2015 Amended Complaint alleges "that the Navy acted in bad faith by failing to assign her job duties and responsibilities consistent with her job title[,] . . . [h]er failure to clearly assert specific acts of alleged bad faith preclude a finding of summary judgment in her favor." Gov't Opp. at 43–44 (citing *S. Cal. Edison v. United States*, 58 Fed. Cl. 313, 325 (2003) (finding that the complaint "must allege facts which if proved would constitute malice or an intent to injure.")). Indeed, "Captain Herb tried to address [Plaintiff's] complaints about not getting work . . . by giving her financial work." Gov't Opp. at 45 (citing Gov't App. A265–66) (2/4/05 Herb Direct Examination). And, "on various occasions, [Plaintiff] refused to sign a performance plan outlining financial job duties, complete financial assignments, or taking training to assist her in completing her job duties." Gov't Opp. at 45 (citing Gov't App. A268– 71). The Magistrate Judge also "found that the Navy personnel tried to give her work consistent with her position description[.]" Gov't Opp. at 46 (citing Gov't App. A317) (Report And Recommendation, No. 96cv2505 (D.D.C. Mar. 21, 2006)). Moreover, Plaintiff's "supervisors struggled with giving her additional work[,] because she was on extended leave and working on a reduced work schedule . . . and did not foster positive relationships with her coworkers." Gov't Opp. at 44. Specifically, in

2001, Plaintiff was out of the office for most of August and September due to surgery. Gov't App. A40–41. In 2002, Plaintiff also was out of the office for a significant portion of January, February, and March, and all of April through October. Gov't Opp. at 44 (citing Gov't App. A79–80) (4/12/05 Wright Decl.)). Plaintiff's "work attendance limited the duties that her supervisors could assign to her." Gov't Opp. at 45.

Notwithstanding Plaintiff's absence, the Government argues that the Navy provided Plaintiff with numerous financial assignments commensurate with her job title. Gov't Opp. at 7. Plaintiff was asked "to perform analyses of ships' financial performance . . . as well as charts, graphs, and briefs for Mr. Nelson." Gov't Opp. at 7 (citing Gov't App. A254–55) (2/4/05 Austin Cross Examination)); *see also* RFM 644–45. If the Navy struggled to provide Plaintiff her desired assignments, it was because Plaintiff "was 'reluctant to interact with other members of the staff' and because she 'took a lot of time off,' which led [her supervisor, Captain Penix] to 'give [assignments] to other people to meet the deadlines.'" Gov't Opp. at 7 (quoting Gov't App. A39– 40) (12/10/01 Penix Decl. ¶ 13)); Gov't App. A243 (2/4/05 Penix Direct Examination). In addition, the record does not support the claim that Plaintiff received financial assignments from the Comptroller's Office. Gov't Opp. at 47. "Such conclusory allegations and '[m]ere speculation on the part of the plaintiff [are] insufficient bas[es] to meet the rigorous test to establish bad faith.'" Gov't Opp.at 47 (quoting *J. Cooper & Assocs., Inc. v. United States*, 53 Fed. Cl. 8, 25 (2002)).

In sum, "the evidence shows that, although [Plaintiff] was dissatisfied with her job, Navy personnel acted in good faith and consistent with the [S]ettlement [A]greement[.]" Gov't Opp. at 46.

a. The Court's Resolution.

The United States Court of Appeals for the Federal Circuit has held that a breach of the duty of good faith and fair dealing does not require a plaintiff to prove specific targeting or specific bad intent. *See Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984, 993 ("[S]pecific targeting is not a general requirement."). But, "[t]he implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that . . . are inconsistent with the contract's purpose and deprive the other party of the contemplated value." *Id.* at 991. The record shows that Plaintiff received financial and non-financial assignments. Gov't App. A254–55 (2/4/05 Austin Cross Examination); *see also* RFM 198, 644–45, 1410–13. Although Plaintiff may have been unhappy with some of the assignments she received, the Settlement Agreement does not require job satisfaction. The record also shows that Plaintiff's supervisor, Captain Herb, was responsive to Plaintiff's concerns and developed a performance plan with financial management assignments for Plaintiff. Gov't App. A264–71. Plaintiff, however, refused to contribute any input to the performance plan and she refused to sign the plan. Gov't App. A271. As such, the record demonstrates that the Navy acted in good faith to provide Plaintiff assignments commensurate with her position.

For these reasons, the court has determined that the Navy did not breach the duty of good faith and fair dealing.

3. Whether The Navy Committed Misrepresentation In The Inducement.

a. Plaintiff's Argument.

In the alternative, Plaintiff also argues that the Navy's assurances about the GS-15 Financial Manager and the creation of the Financial Management office, [and] its promise of an imminent promotional opportunity were persuasive, and [Plaintiff] reasonably relied on these material representations given that the agreement was not only being reduced to writing, but was subject to Judge Sullivan's review. Pl. Mot. at 30.

Specifically, in March 1999, Plaintiff attended a meeting with her husband, Douglas Mason; her counsel at the time, Abbey Hairston; the Program Manager of PM1, Barron Nelson; the Deputy Program Manager, Captain Larry Penix; and the Navy's counsel, Greg Smith. Pl. Mot. at 9; *see also* RFM 135, 144. On this occasion, she was advised she would work at a "Financial Office" separate from the Comptroller's Office and that Armand Ridolfi would be her supervisor. Pl. Opp. & Reply at 7–8 (citing RFM 150) (2/2/05 Plaintiff Direct Examination). Nevertheless, Navy officials "knew in January 1999" *before* Plaintiff entered into the Settlement Agreement with the Navy, "that there . . . *would never* be a 'Financial Office,' . . . , or 'financial manager' and that Ridolfi had never even been hired as represented." Pl. Opp. & Reply at 8

(citing RFM 302) (2/2/05 Smith Direct Examination) ("[Magistrate Judge]: Counsel's point is, on the day of the settlement agreement . . . there was no such human being occupying that position and her question is. Did you not, therefore, offer her a, as she put it, a position that did not exist in the same sense that if you appointed as assistant to the chief judge and there was not a chief judge. I'm getting a job [that] doesn't exist until they appoint a chief judge.

[SMITH]: In that sense, yes."). This representation was critical, because "a reporting structure that would allow her to perform financial duties consistent with her experience and training without involvement from the Office of the Comptroller was *of the essence* for Mrs. Franklin Mason." Pl. Mot. at 26 (emphasis in original).

Navy officials also represented that there was a GS-14 financial manager position that had not been filled. Pl. Opp. & Reply at 9 (citing RFM 148) ("[Plaintiff:] [T]hat there was an opening, a vacancy for a financial manager, GS-14. Q. What did they tell you with respect to your ability to compete for that position? [Plaintiff:] They said that since I, obviously since I was GS-13 that, you know, I would be considered for that position."). "[T]he representation was critical to [Plaintiff] who believed that . . . there would be an *impending* advancement opportunity." Pl. Opp. & Reply at 9. Navy officials, however, only "intended to . . . bring [Plaintiff] 'back on the rolls and give[] [her] work to do.'" Pl. Opp. & Reply at 11 (citing RFM 303) ("[Greg Smith]. And she was brought back on the rolls and given work to do. She was paid.").

a. The Government's September 18, 2015 Cross-Motion And Response To Plaintiff's Motion For Summary Judgment.

The Government responds that "there is a dispute of material fact as to whether anyone made any misrepresentation to [Plaintiff] regarding whether Mr. Ridolfi had been hired to fill the GS-15 position, whether the GS-14 position was available, and whether a separate financial office had been created[.]" Gov't SJ at 50. Mr. Nelson testified that he did not tell Plaintiff that Mr. Ridolfi had been hired. Gov't SJ. at 50 (citing Gov't App. A220–21) (2/3/05 Nelson Direct Examination)). Captain Penix and Mr. Smith also do not remember telling Plaintiff that Mr. Ridolfi had been hired. Gov't SJ. at 50 (citing Gov't App. A172–75) (2/2/05 Smith Direct Examination); Gov't App. A96 (4/6/04 Penix Dep.); Gov't App. A159 (11/9/04 Smith Dep.). They also testified that they did not tell Plaintiff that a GS-14 position was available. Gov't SJ. at 50 (citing Gov't App. A223) (2/3/05 Nelson Direct Examination); A245–46 (2/4/05 Penix Cross Examination); Gov't App. A139–40 (4/14/04 Nelson Dep.). In addition, Mr. Smith did not remember telling Plaintiff or Plaintiff's attorney that a separate financial office was being created. Gov't SJ. at 50–51 (citing Gov't App. A173–74) (2/2/05 Smith Direct Examination); Gov't App. A194–96 (2/3/05 Smith Direct Examination). Because there material facts are at issue, Plaintiff is not entitled to summary judgment on this issue. Gov't SJ. at 50.

Instead, the Government argues that it is entitled to summary judgment on

misrepresentations, because the integration clause expressly states that the Settlement Agreement constitutes "the *entire agreement* between the parties and *supersedes any and all previous agreements, whether written or oral*[.]" Gov't SJ. at 51 (citing Gov't App. A4). The United States Court of Federal Claims has held that a plaintiff cannot prove justified reliance on a misrepresentation where a contract contains an integration clause. Gov't SJ. at 51 (citing *Morris v. United States*, 33 Fed. Cl. 733, 746 (1995) (determining that the plaintiff unjustifiably relied on oral representations when the contract specifically stated that "[n]o oral statements or representations' were a part of the contract); *see also Nematollahi v. United States*, 38 Fed. Cl. 224, 233 (1997) (determining that, when the contract stated "the parties would not be bound by any representations, oral or written, not contained in this contract," the plaintiff was not justified in reliance); *Detroit Hous. Corp. v. United States*, 55 Fed. Cl. 410, 416 (2003) (finding that "[p]laintiff was not justified in relying on any alleged representation[,] because they were not part of the contract.").

Even if the court determines that Plaintiff has established misrepresentation in the inducement, the appropriate remedy is not money damages. Gov't SJ. at 52. "A party who has been induced to enter into a contract by a material misrepresentation of fact has the option of either ratifying or avoiding the contract at his election." Gov't SJ. at 52 (quoting Pac. Architects & Eng'rs, Inc. v. United States, 491 F.2d 734, 742 (Ct. Cl. 1974)). If Plaintiff rescinds the Settlement Agreement, then she would have to return all

settlement proceeds. Gov't SJ. at 54 (citing Gov't App. A346) (Franklin-Mason, 742 F.3d at 1056 n.5)). But, even if Plaintiff was willing to rescind the Settlement Agreement and return the settlement proceeds, it is too late. Gov't SJ. at 54. "By continuing to work for years after she discovered the alleged problems . . . , [Plaintiff] ratified the [S]ettlement [A]greement." Gov't SJ. at 55. "The option to avoid a contract for fraud or misrepresentation is lost if after acquiring knowledge thereof the injured party continues with performance. He is deemed to have affirmed or ratified the voidable contract." *Pac. Architects*, 491 F.2d at 742–43.

b. The Court's Resolution.

The Government is correct that contested facts typically preclude summary judgment. But as previously discussed, the disputed facts are not material to the outcome of this case.[8] *See Anderson*,

[8] Specifically, the witnesses in this case disagree on whether a meeting happened prior to settlement and disagree on what was said during that meeting. Specifically, in her February 2, 2005 testimony before the Magistrate Judge, Plaintiff stated that she attended a meeting prior to signing the Settlement Agreement. RFM 142–43. Plaintiff stated that the Navy personnel at the meeting—Greg Smith, Barron Nelson, and Larry Penix—promised that a new financial office would be created and that Armand Ridolfi would be her supervisor. RFM 146–48. Greg Smith, the MSC attorney at the time, testified that the meeting happened after the Settlement Agreement was signed. RFM 283. Greg Smith also testified that he did not recall saying that Armand Ridolfi would be her supervisor or that a separate financial office had been created. RFM 286–87. Moreover, at the February 3, 2005 evidentiary hearing, Barron Nelson, the then-program manager of the MSC, testified that he did not tell Plaintiff

477 U.S. at 248 ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

In the alternative, the Government's Cross Motion For Summary Judgment argues that any claim for misrepresentation in the inducement has been waived. The RESTATEMENT (SECOND) OF CONTRACTS § 164 cmt. a (1981) ("RESTATEMENT") provides, as a matter of law, that a misrepresentation may void a contract if the following requirements are met: "First, the misrepresentation must have been either fraudulent or material . . . . Second, the misrepresentation must have induced the recipient to make the contract. . . . Third, the recipient must have been justified in relying on the misrepresentation." RESTATEMENT § 164 cmt. a. In this case, however, 2, 2005 testimony before the Magistrate Judge, Plaintiff stated that she attended a meeting prior to signing the Settlement Agreement. RFM 142–43. Plaintiff stated that the Navy personnel at the meeting—Greg Smith, Barron Nelson, and Larry Penix—promised that a new financial office would be created and that Armand Ridolfi would be her supervisor. RFM 146–48. Greg Smith, the MSC attorney at the time,

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that Armand Ridolfi would be her supervisor. RFM 497, 502. He also testified that he did not tell Plaintiff that the financial manager position had been established. RFM 505. At the February 4, 2005 evidentiary hearing, Captain Penix testified that he did not remember the exact date of the meeting. RFM 550. He also testified that Plaintiff was not told that she would be made a manager. RFM 551. He also testified that no one told Plaintiff that Armand Ridolfi would be her supervisor. RFM 556.

testified that the meeting happened after the Settlement Agreement was signed. RFM 283. Greg Smith also testified that he did not recall saying that Armand Ridolfi would be her supervisor or that a separate financial office had been created. RFM 286–87. Moreover, at the February 3, 2005 evidentiary hearing, Barron Nelson, the then-program manager of the MSC, testified that he did not tell Plaintiff that Armand Ridolfi would be her supervisor. RFM 497, 502. He also testified that he did not tell Plaintiff that the financial manager position had been established. RFM 505. At the February 4, 2005 evidentiary hearing, Captain Penix testified that he did not remember the exact date of the meeting. RFM 550. He also testified that Plaintiff was not told that she would be made a manager. RFM 551. He also testified that no one told Plaintiff that Armand Ridolfi would be her supervisor. RFM 556.

"A representation need not be fraudulent in order to make a contract voidable under the rule stated in this Section. However, a non-fraudulent misrepresentation does not make the contract voidable unless it is material, while materiality is not essential in the case of a fraudulent misrepresentation." RESTATEMENT § 164 cmt. b. the alleged misrepresentation is not "material" nor supported by facts that rise to the level of "fraud."

If the meeting at issue happened after the Settlement Agreement was executed, then Plaintiff could not have been induced into signing the contract. But, assuming *arguendo* that a pre-settlement meeting occurred and the Navy made misrepresentations, Plaintiff would have known that the Navy's promises were not being honored

when she returned to work in 1999. RFM 168–171. It is well-established that when a party discovers a breach, "[the] injured party may either cancel a contract based on a breach, or it may instead continue the contract[.]" *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360 (Fed. Cir. 2004). Although Plaintiff filed several Emergency Motions to enforce the Settlement Agreement, RFM 14–17, Plaintiff never repudiated it. *See Dow Chem. Co. v. United States*, 226 F.3d 1334, 1344 (Fed. Cir. 2000) ("Repudiation occurs when one party refuses to perform and communicates that refusal distinctly and unqualifiedly to the other party. . . . The injured party can choose between terminating the contract or continuing it.") (citations omitted). Nor did Plaintiff return the $400,000 in back pay received under the Settlement Agreement. Instead, Plaintiff kept the money and continued to work at the Navy for five years until 2004. Am. Compl. ¶ 94. "[B]y continuing to perform, [a party] waive[s] any claim with respect to a prior material breach or material misrepresentation." *Barron Bancshares, Inc.*, 366 F.3d at 1383 (Fed. Cir. 2004).

For these reasons, the court has determined that Plaintiff waived any claim for misrepresentation in the inducement.

IV. CONCLUSION.

For the reasons discussed, the court **denies** Plaintiff's June 18, 2015 Motion For Summary Judgment and **grants** the Government's September 18, 2015 Cross-Motion For Summary Judgment. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN Judge

APPENDIX B

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

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692 Fed. Appx. 633 (Mem)

This case was not selected for publication in West's Federal Reporter. *See* Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. *See also* U.S. Ct. of App. Fed. Cir. Rule 32.1.

Roxann J. FRANKLIN-MASON, Plaintiff-Appellant v.
UNITED STATES, Defendant-Appellee

2016-1985
|
July 14, 2017

Appeal from the United States Court of Federal Claims in No. 1:09-cv-00640-SGB, Chief Judge Susan G. Braden.

Attorneys and Law Firms

***634** LISA ALEXIS JONES, Lisa Alexis Jones, PLLC, New York, NY, argued for plaintiff-appellant.

COURTNEY D. ENLOW, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., REGINALD T. BLADES, JR. (Lourie, Moore, and O'Malley, Circuit Judges).

JUDGMENT

Per Curiam

THIS CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

All Citations

692 Fed. Appx. 633 (Mem)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTE: This order is non-precedential.

ROXANN J. FRANKLIN-MASON,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2016-1985

Appeal from the United States Court of Federal Claims in No. 1:09-cv-00640-SGB, Chief Judge Susan G. Braden.

ON PETITION FOR PANEL REHEARING

Before LOURIE, MOORE, and O'MALLEY, *Circuit Judges.*

PER CURIAM.

O R D E R

Appellant Roxann J. Franklin-Mason filed a petition for panel rehearing.

FRANKLIN-MASON v. UNITED STATES

Upon consideration thereof, IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on October 11, 2017.

FOR THE COURT

October 4, 2017 /s/ Peter R. Marksteiner
Date Peter R. Marksteiner
Clerk of Court