No. ______

IN THE

Supreme Court of the United States

ROBERT M. MILLER,

Petitioner,

v.

MARTIN J. GRUENBERG, CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 19, 2018

QUESTIONS PRESENTED

1. Whether frivolous allegations of sexual harassment, pre-investigation punishment, and a severely deficient investigation by a (federal) employer violate due process and equal protection rights of the accused and create an unconstitutionally vague and overbroad infringement of the right to free speech.

2. Whether the lower courts erred with a drive-by jurisdictional ruling that recast a request for grievance reviews as an Unfair Labor Practices claim in order to summarily dismiss Petitioner's claim.

3. Whether the *Same Actor Inference* is a mandatory presumption as applied here by the Fourth Circuit, a rebuttable presumption as applied by other circuits, a mere piece of evidence as applied by other circuits, or a completely unsupported and prejudicial doctrine that must be struck down by this Court.

4. Whether this Court should modify or overturn *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), because of its vagueness, subjectivity, and deleterious impact on civil rights claims, different treatments by various circuit courts of appeal, and apparent conflict with this Court's holding in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)

5. Whether, in a retaliation claim, a district court's requirement for a plaintiff to plead direct evidence of knowledge of prior protected

disclosures conflicts with this Court's unanimous decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), and also precludes meritorious claims under a "cat's paw" theory of retaliation.

6. Whether the district court's dismissal of discrimination complaints for undeserved performance evaluations merely because those evaluations conferred some bonuses or pay raises conflicts with the plain meaning of Title IV of the Civil Rights Act of 1964 and its implementing statutes and regulations.

7. Whether the district court's dismissal of discrimination complaints for non-selection to training and duties that confer no pay raise or promotion, but develop skills and required qualifications for promotion and which are commonly used as a justification for promotion conflicts with the plain meaning of Title IV of the Civil Rights Act of 1964 and its implementing statutes and regulations.

8. Whether a long series of adverse tangible employment actions and adverse impacts on an employee's health, performance, and well-being can state a claim for a hostile work environment in the absence of any allegations of threatening, humiliating, or demeaning speech or abusive conduct because of the employee's protected characteristics.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Robert M. Miller, is an individual, and thus there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert M. Miller, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit issued its per curiam opinion on October 20, 2017. Pet. App. 1a. The district court issued its Memorandum Opinion on March 31, 2017. Pet. App. 3a.

JURISDICTION

The Fourth Circuit affirmed the district court's opinion on March 31, 2017. Petitioner did not request rehearing. On December 28, 2017, the Chief Justice granted Petitioner's application to extend the time to file this petition until March 19, 2018, and this petition is timely filed before that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"Congress shall make no law...abridging the freedom of speech..." U.S. Const. amend. I.

"No person shall...be deprived of life, liberty, or property, without due process of law..." U.S. Const. amend. V.

"It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin..." 42 U.S. Code § 2000e-2.

"It shall be unlawful for an employer— (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S. Code § 623.

STATEMENT OF THE CASE

I. INTRODUCTION

Two weeks prior to questioning Petitioner about allegations of sexual harassment, Respondent took personnel actions against him. Violations of due process do not get any more obvious than this.

The allegations were false, frivolous, and untimely. Respondent made *no attempt whatsoever* to investigate the facts or veracity of the complaints, the totality of the circumstances, the elements of sexual harassment, or to identify witnesses.

When Respondent later questioned Petitioner, the allegations were so vague he could not possibly have recognized or responded to them.

When Petitioner learned of these violations of due process, he filed a grievance. The persons who violated Petitioner's rights designated *themselves* as the grievance officials and exonerated themselves with more than *one hundred* material misrepresentations of fact and self-serving misinterpretations of law.

During the grievance and for the next seven years, Respondent blocked Petitioner from promotion, removed key duties from him, denied him training and details, reduced his performance evaluations, isolated him professionally, and created a hostile work environment through intimidation.

In the instant case, Petitioner filed numerous claims seeking relief. The most important of these claims was a request for judicial review of his grievances.

In a drive-by jurisdictional ruling, the court construed Petitioner's request for a grievance review as an unfair labor practices claim and dismissed it as filed in the wrong forum.

The district court was required to hold all of Petitioner's factual allegations as true and to draw all reasonable inferences in Petitioner's favor. Instead, the court ignored hundreds of facts, invented false facts, reached *ipse dixit* conclusions, misapplied well-established law, and drew inferences in Respondent's favor.

On appeal, the Fourth Circuit issued a perfunctory, one-page summary affirmance that didn't even attempt to analyze the issues and errors raised by Petitioner.

This case proceeds to this Court on two levels.

First, the law and facts fully support Petitioner. While this Court is not ordinarily in the business of error correction, the errors below are so obvious, egregious, and numerous as to call for the exercise of this court's supervisory power.

The lower court's opinion also conflicts with prior opinions of this Court, the Fourth Circuit's own precedents, the Equal Employment Opportunity Commission's guidance, and decisions of other circuit courts of appeal.

Second, the lower courts have so obviously given short shrift to the complaint and pleadings of a *pro se* litigant as to demonstrate deep-seated bias which also calls for this Court to exercise its supervisory power.

II. PROCEEDINGS BELOW

A. On July 5, 2016, Petitioner timely filed a complaint for age and sex discrimination, reprisal, and a hostile work environment

(HWE) for nonselection for a 2012 Financial Economist position. Dkt. No. 1.

B. On August 6, 2016, Respondent moved to dismiss under Rule 12(b)(1) for failure to exhaust administrative remedies for the sex, reprisal, and hostile work environment claims. Respondent did not raise any challenges for the age discrimination claim. Dkt. No. 8-9. Petitioner timely opposed and Respondent replied. Dkt. No. 13, 15.

C. The district court held a hearing on the motion to dismiss on October 14, 2016. Even though Respondent raised no 12(b)(6) motion, the court admonished Petitioner regarding this Court's holding in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) without providing any specific notice of deficiencies. The district court also admonished Petitioner about proceeding *pro se*, specifically citing the importance of "rules." The court dismissed the complaint without prejudice with leave to amend. Dkt. No. 16-18.

D. On November 14, 2016, Petitioner amended his initial complaint for age discrimination in his First Amended Complaint. Dkt. No. 19. Petitioner also amended his sex, race, and hostile work environment claims. Petitioner also added additional claims that became exhausted of administrative remedies in the interim.

E. In due course within 21 days, Petitioner submitted a Second Amended Complaint (SAC) as permitted by Rule 15(a)(1)(A), Fed. Rule. Civ. Proc. See Dkt. No. 22.

F. On December 19, 2016, Respondent moved to dismiss the SAC, this time based on both Rule 12(b)(1) and 12(b)(6). Petitioner opposed the motion and Respondent replied. Dkt. No. 23-24, 30, 31.

G. The court held a hearing for the second MTD on February 24, 2017. See Dkt. No. 32. The court gave Petitioner no notice of deficiencies or opportunity to amend his complaint.

H. On February 24, 2017, Petitioner supplemented his pleadings with information that a selecting official *admitted* someone attempted to influence Petitioner's nonselection for a position not in the instant claim.

I. On May 31, 2017, the court granted the Respondent's motion, dismissing Petitioner's SAC in its entirety with prejudice.

J. Petitioner timely appealed on May 30, 2017. The parties fully briefed the appeal.

K. On October 20, 2017, the Fourth Circuit affirmed the lower court's opinion in a one-paragraph summary disposition, but it modified the judgment for the grievance review to dismissal without prejudice.

III. STATEMENT OF THE FACTS

At all times relevant to this petition, Petitioner was an Economic Analyst, in the Division of Insurance and Research (DIR) for the Federal Deposit Insurance Corporation (FDIC). Petitioner was hired in March 2008 at grade CG-09 by his manager, Shayna Olesiuk. Petitioner was promoted in 2009 to grade CG-11, and was promoted again in 2010 to grade CG-12, the full-performance level of his position. At the time of his hiring, Petitioner had a Ph.D. in Economics, and was a disabled veteran eligible for preference in federal hiring.

In 2009 and 2010, Petitioner received performance ratings of IV (on a scale from I to V) from his manager, Olesiuk.

On February 22, 2011, Olesiuk stated her intention to promote Petitioner to grade 13 either by offering a competitive vacancy or through a desk audit. A desk audit is an administrative review to reclassify a position. DIR had previously used desk audits to promote Economists on three separate occasions.

Also in February 2011, Olesiuk informed Ryan Wat, an Economist, that she intended to promote him to grade 13 but that Petitioner would be promoted first.

In mid-March 2011, Wat resigned from the FDIC creating a vacant Economist position. Petitioner asked Olesiuk whether the vacancy would make it easier for him to be promoted. Olesiuk smiled and said, "It might."

On April 1, 2011, a *former* student intern, Corin Daly, alleged that:

(1) Petitioner made the statement, "The only reason the FDIC hires female interns is so there's something nice to look at in the office."

(2) When she wore a skirt to the office, Petitioner would go to her desk often and stare at her legs for prolonged periods.

Both of these allegations are completely false. Daly had not worked for the FDIC since May 2010, the allegations were untimely, and the allegations may have allegedly occurred *after* her employment ended and were thus beyond the reach of Title VII.

Daly and Olesiuk both attended St. Mary's College, a small, private liberal arts college. They were also both members and scholarship recipients of the Financial Women's Association of San Francisco.

Olesiuk spoke with two male employees but she never asked them questions about the specific allegations. Olesiuk crafted a false memorandum stating that these men "confirmed" the allegations when, in fact, they had no knowledge of the allegations whatsoever.

Based on the advice of six other female managers and Human Resources officials, Olesiuk sought additional allegations from "current" female student interns. These officials recommended Olesiuk not put Petitioner on detail to "maintain a surprise element" for the investigation.

On April 13, 2011, student intern Adria Moss telephoned Olesiuk who was in Arlington, VA. Moss alleged that:

(3) Petitioner made "comments about the clothing that female employees wear to the office and would specifically note that [he prefers] when female employees wear shorter dresses or skirts and low cut shirts."

(4) Following lunch with a "co-worker" who had a young baby, Petitioner leaned over Moss' chair and whispered in her ear that there is nothing like having sex when you are trying to get pregnant.

(5) Petitioner complained about a lack of intimacy with his wife and tried to ask Moss about her own personal life in this area.

All of Moss' allegations are false or materially misrepresented. The comments in (3) had two witnesses that Olesiuk failed to identify, and Petitioner could not offer witnesses without knowing details of the allegation.

Moss and Olesiuk both grew up on the same small town of 4,000 people, went to the same high school, and knew many of the same people.

On April 13, 2011 – the *very same evening* after receiving the second set of allegations from Moss – Olesiuk decided to offer the vacant Economist position at grade 9 instead of grade 13. Just *minutes* after receiving a follow-up e-mail from Moss, Olesiuk decided to remove Petitioner from the key duty of performing presentations.

Two weeks later, on April 25, 2011, Olesiuk questioned Petitioner about the allegations. The allegations did not tell Petitioner who made the complaints, what he actually said in his "comments," when the incidents occurred, where they occurred, or who witnessed them. Olesiuk did not know this information because she *never investigated it.*

Petitioner was unable to recognize any of the allegations and denied all of them. Olesiuk asked Petitioner why the complainants might lie, but he could not respond without knowing who they were.

On May 3, 2011, Olesiuk issued Petitioner a Letter of Warning (LOW). This letter described the allegations and stated that, "You have denied making the remarks outlined in this memorandum. However, reports of these statements attributed to you were brought to management's attention by two different individuals." The letter also threatened Petitioner's career saying, "If you fail to behave in accordance with these expectations, you will be subject to disciplinary action up to and including removal from the federal service."

Neither the LOW nor the transmitting e-mail identified the LOW as an informal action. Petitioner mistook the LOW for a formal Letter of Admonition which does have a right to appeal or grieve. When Petitioner demanded Olesiuk abide by the CBA, Olesiuk responded in an angry e-mail and directed Petitioner to attend a course called "Communicating with Tact and Diplomacy" that overlapped a presentation he was scheduled to give.

After learning the position would be offered at grade 9, on May 26, 2011 Petitioner asked Olesiuk whether she offered the vacant position at grade 9 instead of grade 13 because of the allegations. Olesiuk responded, "In part." Petitioner asked Olesiuk whether she would assign him to perform any more presentations. Olesiuk responded, "Management is hesitant to allow you to perform presentations because they are afraid of what you might say." Petitioner immediately notified Olesiuk he intended to file a grievance.

On May 29, 2011, Petitioner filed a grievance under the collective bargaining agreement (CBA) for "Matters Relating to Terms of Employment, Breach of Agreement, and Violations of Law and Policy."

Petitioner's grievance alleged that Olesiuk, violated Petitioner's right to due process when she decided to not promote him and removed duties from him without conducting a prompt, thorough, and impartial investigation. Petitioner's grievance also identified as subjects of the grievance his second- and third- level managers, Kathy Kalser and Richard Brown as well as HR Specialist Patrick McKenna. Petitioner also identified as subjects of his grievance any other party who "provided management, direction, advice, assistance, decisions, or determinations in the sexual harassment investigation."

Olesiuk designated *herself* as the Step 1 grievance official. The MSPB has held that it is an "abuse of authority" for the subject of a grievance to decide on the matter of their own guilt. See *Loyd v. Department of the Treasury*, 69 M.S.P.R. 684.

Olesiuk denied all relief in a response containing dozens of false statements of material fact and self-serving misinterpretations of well-established law. Olesiuk stated that "due process implies a charge which needs to be defended...you were not charged, and thus no further due process was necessary." Olesiuk stated her decision to offer the vacant position at grade 9 was based on "workload drivers and available resources." This statement was contrary to Olesiuk's admission on May 26, 2011. The San Francisco Region was the largest FDIC region and had the *largest* workload, yet it was the *only region* that did not have a grade 13 economist.

Olesiuk designated Kathy Kalser, as the Step 2 official, another abuse of authority. Kalser missed her deadlines for both the hearing and her response, and she issued a hasty and untimely response that agreed with Olesiuk's false facts.

Kalser designated Petitioner's third-level manager, Richard Brown, as the Step 3 official, another abuse of authority. Petitioner demanded a letter of delegation from the true Step 3 official, Director Arthur Murton, which Kalser refused to provide. Petitioner sent his grievance directly to Murton who delegated his authority to Deputy Director Diane Ellis.

As the grievance progressed, Respondent removed Petitioner from the leadership of a working group, offered a vacant CG-14 position in Chicago at grade 9, denied Petitioner presentations, and ceased inviting him to the editing session of an executive newsletter.

On October 6, 2011, Ellis denied all relief in a grievance response containing more than 40 false statements of material fact and misinterpretations of law. Ellis claimed Olesiuk decided to offer the vacant position at grade 9 *before* receiving the harassment allegations. Evidence shows that Olesiuk and Kalser made this decision *eleven days after* the first complaint, and the *very same evening* as the second complaint. Ellis claimed two vacancies were offered at grade 9 because of a "practice" that whenever the Regional Manager is an economist, the economist position is offered at a lower grade. No such practice ever existed. In 2007, Olesiuk offered a grade 13/14 economist position despite being an economist. Olesiuk informed Petitioner and Ryan Wat in February 2011 that she intended to promote *both of them* to grade 13. Ellis falsely claimed Petitioner was "still in receipt" of an invitation to the newsletter editing session when she knew Petitioner had not received the invitation for twelve weeks.

The step officials were assisted by HR Specialist Barbara Pfaffenberger who reported directly to Joy Crosser, an unidentified subject of the grievance; this is yet another abuse of authority. Pfaffenberger *wrote* the Step 3 decision and likely wrote the other decisions as well.

The step officials were assisted by Assistant Director Andrea Woolford-Eley and Labor Relations Specialist Lisa Lander, both of whom had advised and assisted Olesiuk in violating Petitioner's right of due process.

With the exception of McKenna, all of the persons involved in the grievance and harassment investigation were women. Petitioner did not learn this fact and their involvement until months after his grievance ended.

Petitioner requested that his labor union take the grievance to arbitration, and the union never responded, thus the grievance ended after Step 3.

In January 2012, Petitioner applied for a Financial Economist position, grade 12/13/14, in the FDIC's headquarters. Petitioner was referred as Best Qualified. On January 21, 2012, Petitioner was contacted by Cathy Wright, an administrative assistant working directly for Krista Hughes and Woolford-Eley, two persons who had knowledge of Petitioner's prior protected activity.

Wright informed Petitioner that he would be required to present the results of his "recent" research on Friday, January 23, at 9:00 a.m. Wright required Petitioner to submit his presentation no later than noon on Thursday, January 22. Because Petitioner would be traveling on Thursday, the de facto deadline was Wednesday, January 21.

Petitioner was the *first* person scheduled to interview but he was the *last* person Wright notified, giving Petitioner less notice than any other applicant. All of the younger applicants had been given as much as three months of notice of the requirement to present their research, while Petitioner received less than 48 hours of notice. Each of the younger applicants were already prepared to present their research for the American Economics Association meetings. The younger applicants' research was necessarily "recent" because it was part of their recently completed doctoral dissertations.

On January 21, Wright called Petitioner, and Petitioner told Wright that he couldn't finish a presentation of "recent" research in the time allowed, and that he wanted to reschedule the interview for a later week. Wright responded, "That's not possible." Petitioner told Wright that it would be "pointless" to travel to Washington, D.C. if he didn't have anything to present. Wright asked Petitioner for a Letter of Withdrawal. Wright was not authorized to ask for this letter, and she later lied in an affidavit that she never requested it. Wright also lied in that Petitioner never asked for additional time. Respondent allowed an applicant under age 40 (and ultimate selectee) to interview nearly a month later. Another applicant over age 40 – Ailene Sampson – withdrew from competition because she did not possess "recent" research.

On January 13, 2012, Petitioner requested a "desk audit" to reclassify his position to grade 13. On January 28, 2012, Olesiuk denied her support, claiming she believed the position was appropriately classified. A year earlier, Olesiuk had suggested a desk audit as one method of promoting Petitioner indicating her belief Petitioner was already doing the job of a grade 13 Economist.

On March 13, 2012, Olesiuk issued Petitioner a performance rating of III for his 2011 performance. This rating was lower than Petitioner's ratings of IV in 2009 and 2010, and it was below-average for Petitioner's job cohort. No Economic Analyst received a rating of I or II. This rating of III was unjustified based on Petitioner's exemplary performance throughout 2011. From 2012 through 2017, Petitioner continued to receive below average ratings of III.

Olesiuk also included a comment in this performance evaluation that Petitioner's ongoing research was "not a recurring duty." Petitioner alleges this comment was directly targeted to the desk audit that was examining his "regular and recurring duties." Based on this comment and Olesiuk's opinion, the FDIC denied the reclassification.

For the next four (now seven) years, Petitioner applied to more than 20 vacancies within the FDIC with promotion potential to grade 13 or above. Despite Petitioner's Ph.D. in economics and his preference as a disabled veteran, Petitioner was not selected for any of these vacancies. The FDIC used a variety of methods to avoid selecting Petitioner: (1) coercing him into withdrawing; (2) selecting lesser qualified applicants from the Merit Promotion roster that does not apply veterans' preference; (3) finding Petitioner unqualified for a job that he previously performed; (4) marking Petitioner's examination score down from Category A to Category B; (5) canceling a vacancy and refusing to fill other vacancies.

Petitioner had been selected as a facilitator for the Corporate Employee Program (CEP) in 2008-2011. After the sexual harassment allegations and Petitioner's grievances, Respondent did not select Petitioner to participate in this program in 2012 or 2013. The CEP work would have contributed to a higher performance evaluation.

Petitioner requested every year from 2011 through 2015 that Olesiuk allow him to perform details in Washington, DC as he had done in 2009, but Olesiuk made no effort to arrange for such details. Details would have provided Petitioner with additional skills and experience for promotion as well as professional exposure.

Olesiuk and Kalser refused to publish three of Petitioner's research papers in 2011 and 2012 without providing any meaningful editorial comments. These papers would have contributed to Petitioner's performance evaluations.

Petitioner applied for the Executive Potential Program (EPP) in 2015. The EPP is a highly selective program that helps participants develop the Executive Core Qualifications (ECQs) necessary for selection to Senior Executive Service (SES) positions. Respondent selected two candidates outside of Petitioner's protected classes who were both substantially less qualified than Petitioner. Both of the selectees for the EPP were subsequently selected for management positions, and another EPP candidate was selected over Petitioner for a management position in 2018. Respondent's stated reasons for not selecting Petitioner was that his application packet was "not put together well" and that his (discriminatory) performance evaluation rating of III was lower than the other applicants'.

Respondent assigned Petitioner menial duties appropriate for an intern, not for a person with a Ph.D. in Economics. Petitioner alleged that such duties had the intent and effect of depriving Petitioner of the building blocks for promotion and an above-average performance evaluation.

REASONS FOR GRANTING THE PETITION

I. The rights of persons accused of sexual harassment are a timely and exceptionally important national issue that this Court should decide.

The question of the rights of persons accused of sexual harassment was subsumed in Cause of Action Six. Petitioner alleged that Respondent violated his right to due process and Equal Protection of the laws, and imposed an unconstitutionally vague and overbroad infringement on his right to free speech.

In the past year, hundreds of allegations of sexual harassment have come to light involving high-profile celebrities and politicians. These accused persons have been fired from their jobs, forced to resign, paid millions of dollars in settlements and legal fees, and had their reputations permanently damaged.

The rights of sexual harassment victims have been well-represented by celebrity attorneys and protected for decades by this Court. Millions of women protested in the "Women's March" against such misconduct. The "Me Too" and "Time's Up" movements were named *Time Magazine* Person of the Year for 2017. Other contemporary movements urge people to "Believe Women" to the obvious exclusion of believing men's side of the story.

On the other hand, no one defends the rights of persons accused of sexual harassment except highly-paid private defense attorneys. Petitioner is acting *pro se* not because he wants to, but because none of dozens of attorneys he contacted would take his case.

Some accused persons did not concur in their culpability. Senator Al Franken resigned after being accused of sexual misconduct, stating, "Some of the allegations against me are simply not true. Others I remember very differently."

A female political candidate also taken down by allegations of sexual misconduct stated, "We are in a national moment where rough justice stands in place of careful analysis, nuance, and due process."

Sexual harassment allegations are often frivolous, vague, conclusory, untimely, and unsupported by evidence. The allegations often rely on subjective terms such as "inappropriate." Allegations of sexual harassment are often conflated with sexual assault, "sexual misconduct," rape, and "street harassment" which is beyond the reach of Title VII.

It has been 30 years since this Court appropriately ruled that sexual harassment is a form of sex discrimination under Title VII. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57. Since then, courts have frequently visited issues relating to what constitutes sexual harassment, and under what conditions an employer can be held liable. See *Burlington Industries, Inc. v. Ellerth*, 524 US 742; *Faragher v. City of Boca Raton*, 524 U.S. 775; *Harris v. Forklift Systems, Inc.*, 510 U.S. 17.

In all that time, no court has ever addressed the rights of persons accused of sexual harassment. Some courts have been downright hostile to accused persons seeking remedies for violations of their rights. In the instant case, the district court demonstrated its hostility by calling Petitioner's claim a "perversion" of the hostile work environment standard.

Had Petitioner been accused of some garden-variety workplace misconduct, e.g. damaging an office copy machine, Respondent's violations of due process would be as clear as the summer sun. But because the allegations were for *sexual harassment*, the investigation, punishment, and remedial schemes became supercharged with sex-based prejudices, vendettas, and salacious details.

This Court must restore due process and equal protection to a progression that is running amok based on prejudice and emotions instead of facts, logic, evidence, and the rule of law.

II. There is a circuit split in the application of *Same Actor Inference* to discrimination cases that this Court should resolve.

The lower courts dismissed several of Petitioner's complaints using the *Same Actor Inference* which holds that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." *Proud v. Stone,* 945 F.2d 796 (4th Circuit 1991). Most of the other circuit courts have adopted the *Same Actor Inference*, in various forms. See *Bradley v. Harcourt Brace and Company*, 104 F.3d 267 (9th Cir. 1996)

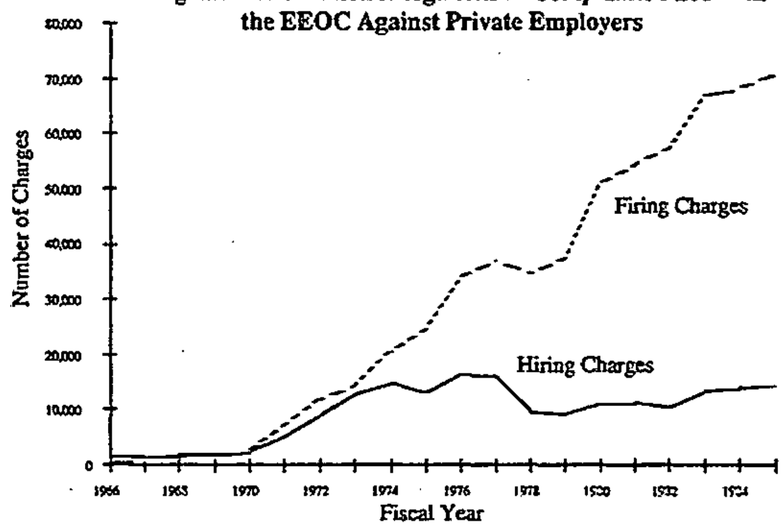
The *Same Actor Inference* has no basis in fact, was misapplied to a Rule 12(b)(6) motion in this case, and there are substantial circuit splits as to how this inference is applied.

A. <u>The *Same Actor Inference* is fallacious, unsupported by theory or data, and relies on pure conjecture and prejudice.</u>

In *Proud*, the Fourth Circuit relied upon a paper by Donohue & Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 Stan.L.Rev. 983, 1017 (1991). See *Proud v. Stone*, 945 F.2d 796 (4th Circuit 1991).

In that paper, the authors present a chart showing complaints for discriminatory firings were rising sharply while complaints for discriminatory hiring were flat. *Id.* at p. 1016.

Figure 6
Hiring and Termination Allegations in Complaints Filed with the EEOC Against Private Employers



Source: 1966-1985 EEOC ANN. REP.

To explain this anomaly, the authors considered the question, "Has discrimination in hiring decreased and discrimination in firing increased?" The authors asserted their belief that:

> Claims that employer animus exists in termination but not in hiring seem irrational: It hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job. Such behavior seems doubly irrational given that the expected penalties for terminating a worker are probably much higher than for failing to hire her.

In *Proud*, the Fourth Circuit failed to recognize that this assertion contained no empirical or theoretical support. The authors even provided a counterexample to the inference.

Even assuming data exists to support the general conclusion of the authors, applying that conclusion to individual cases commits the *Ecological Fallacy* of drawing inferences about the nature of an individual deduced from inferences about the group to which the individual belongs. The authors' conclusions are unmoored from any consideration of the facts of individual cases.

B. The lower courts erroneously applied the *Same Actor Inference* to a motion to dismiss.

The Respondent and district court relied on precedential opinions applying the *Same Actor Inference* at the *summary judgment* stage. Not one case cited applied the inference to a motion to dismiss, and Petitioner is aware of no such cases. This deprived Petitioner of the opportunity to conduct discovery to develop additional rebuttal evidence.

C. The Circuit Courts are split on whether the *Same Actor Inference* is a mandatory or rebuttable presumption, and split on the strength of the presumption.

The district court applied the *Same Actor Inference* in the instant case as a mandatory presumption, summarily rejecting Petitioner's rebutting facts that:

1. The actor who took adverse personnel actions was virtually required to hire and promote Petitioner because of his veterans' preference, his Ph.D., and the CBA.

2. A lengthy period of time between hiring Petitioner and taking the adverse personnel actions.

3. Petitioner's protected class changed when he was accused of sexual harassment.

4. The Respondent *admitted* taking adverse personnel actions because of unproven harassment allegations, and Respondent's stated reasons for these actions do not withstand scrutiny.

D. The Circuit Courts are split over the strength, effect of time, and rebuttal of the *Same Actor Inference.*

The Sixth and Second Circuits have held that the length of time between hiring and firing weakens the inference. See *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir.1995); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29 (2d Cir. 1994) at 38.

The Fourth Circuit affords a strong inference to the presumption, and applies it in dismissing claims in summary judgment. *Montgomery v. Ruxton Health Care, IX, LLC*, 2007 WL 1229708 (E.D. Va. Apr. 26, 2007) (unreported).

The Eighth Circuit considered the *Same Actor Inference* fatal to a plaintiff's claim **only after** considering the weakness of the plaintiff's other evidence. *Lowe v. J.B. Hunt Transport Inc,* 963 F.2d 173 (8th Cir. 1992).

The Sixth Circuit "reject[s] the idea that a *mandatory* inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003).

The Eleventh Circuit has held that it is improper to grant summary judgment based on the *Same Actor Inference*, but a jury can consider same-actor evidence in determining the issue of pretext." *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438 (11th Cir. 1998). The Third Circuit has held that *Same Actor Inference* is "simply evidence like any other and should not be afforded presumptive value." *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995).

III. This Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) unduly denies relief to plaintiffs in civil rights cases and conflicts with this Court's other decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

Petitioner's SAC pleaded more than 300 detailed facts and a framework of legal conclusions supported by those facts in a plausible narrative describing the harm caused by the Respondent and Petitioner's entitlement to relief. The Respondent's crimes and torts are as obvious as a lump of coal in a bag of diamonds.

The district court ignored strong evidence of retaliation that an unidentified person walked up to a selecting official in the hallway, asked if

Petitioner had applied for a particular position, and then said, "Don't hire him." That same witness admitted to knowing about Petitioner's performance review grievance even though he was not a party to that grievance.

The district court ignored that while the Respondent was *required by law* to investigate charges of retaliation, Respondent's contracted EEO investigator *did not even ask* the responsible management officials whether they had knowledge of Petitioner's prior EEO activities.

The district court ignored circumstantial evidence of retaliation such as the implausibility of Respondent's stated reasons for not selecting Petitioner, including Petitioner's superior qualifications and veterans' preference rights.

The district court erroneously stated that "Plaintiff has not alleged that this [2011 performance] review was reprisal." The court also ignored the *unbroken series* of adverse personnel actions from 2011 to the present running concurrently with all the adverse personnel actions.

A. This case is an excellent vehicle for demonstrating how *Iqbal* pleading standards lead to dismissal of meritorious cases for lack of discovery.

The district court dismissed all of Petitioner's retaliation claims because he failed to plead *direct evidence* that the actors had knowledge of his prior EEO complaints.

Plaintiffs are *not* required to plead the elements of a prima facie case in order to survive a motion to dismiss. *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). While acknowledging this fact, the district court claimed that it could use a prima facie case "as a guide." Dkt. No. 34, p. 22. See also *McCleary-Evans v. Maryland Dept. of Trans.,* 780 F.3d 582, 585 (4th Cir. 2015) However, there is no distinction in the opinion between requiring prima facie allegations and merely being guided by them.

Petitioner can prevail on the merits by discovering direct evidence or proving knowledge through circumstantial evidence. Both of these possibilities counsel restraint in dismissing the complaint prior to discovery.

Assuming Respondent *actually* retaliated against Petitioner and was clever enough to not actually say so, how could Petitioner possibly plead his case to survive a motion to dismiss? If this Court cannot answer this question, then its pleading standards in *Iqbal* are too restrictive on plaintiffs and lead to dismissal of meritorious cases.

B. Other Circuits show more solicitude in *Iqbal* pleading standards.

Unlike the Fourth Circuit, the Second Circuit has held that, even after *Twombly* and *Iqbal*, a plaintiff may aver facts "upon information and belief," where the facts are peculiarly within the possession and control of the Respondent. See *Arista Records LLC v. Doe*, 604 F.3d 110, 120-21 (2d Cir. 2010).

The Seventh Circuit has stated, "As we understand it, the [Supreme] Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together." *Swanson v. Citibank NA.*, 614 F.3d 400, 2010 WL 2977297 (7th Cir. July 20, 2010),

Petitioner's 90-page story most certainly holds together. It demonstrates a *multi-year* campaign of Respondent taking *dozens* of adverse actions against Petitioner for unlawful reasons.

IV. The actions of the lower courts have so far departed from the usual course of proceedings as to call for an exercise of this Court's supervisory authority.

A. <u>The lower courts dismissed petitioner's request for grievance reviews in a drive-by jurisdictional ruling.</u>

Petitioner requested judicial review of two agency grievance decisions. Cause of Action Six, Dkt. No. 22, ¶ 383-391.

In the first grievance, Petitioner alleged, *inter alia*, that the Respondent violated his right to due process in the harassment investigation. In the second grievance, Petitioner alleged that he received an undeserved 2011 performance evaluation.

In both of those grievances, the labor union failed to proceed to arbitration. To satisfy the exhaustion requirement without arbitration, Petitioner pleaded facts demonstrating that the labor union failed in its duty of fair representation. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

This Court has held that federal employees must raise issues of constitutional torts under the Civil Service Reform Act (CSRA). See *Bush v. Lucas*, 462 U.S. 367 (1983).

This court has also held that federal courts have jurisdiction to review grievances denied by agencies. See *Whitman v. Department of Transportation*, 547 U.S. 512 (2006).

Notwithstanding Petitioner's clear explanation to the court in his Opposition, the court declared Petitioner's Cause of Action Six as a ULP claim against the Respondent, and dismissed it as filed in the wrong forum. The court did not identify, and there does not exist, any subsection in 5 U.S.C. § 7116 that provides an exclusive remedy for Petitioner's claims. Therefore Petitioner's claim *could not be* a ULP.

B. <u>The district court relied on false facts, ignored dozens of facts, reached *ipse dixit*</u>

conclusions, and drew inferences in favor of the moving party in a motion to dismiss.

The district court failed to hold all of Petitioner's well-pleaded factual allegations as true and to draw all reasonable inferences in favor the Petitioner.

1. The district court improperly dismissed Petitioner's disparate impact claim for age discrimination.

Petitioner alleged Respondent had a facially neutral policy of requiring applicants for certain positions to present "recent research," and this requirement had a disparate impact on applicants because of their age. At the time of his application, Petitioner's dissertation was ten years old. Meanwhile, younger Ph.D. candidates' dissertations were less than one year old.

Petitioner pleaded that Respondent asked him for "recent research" for identical positions in 2012 and 2015. Petitioner proffered that Cathy Wright admitted asking for recent research, and that "recent" meant "something in the last few years. We don't want something that is twenty years old." Respondent also *admitted* asking for recent research by claiming Wright was reading a "script" that had been used for several years.

The court dismissed this complaint stating, erroneously, that "Plaintiff has not alleged that a 'recent research' policy exists..." To the contrary, the existence of this policy was the central fact in Petitioner's disparate impact claim!

The district court stated, "Plaintiff's [eight year old] research paper would not offend this 'standard' because it is not twenty years old." The court ignored the *first* part of Wright's statement. While an eight year old paper is not more than twenty years old, it is arguably not "in the last few years." Wright's statement demonstrates the *existence* of this policy. While the court *must* hold Respondent's hearsay statements against interest as true, the court *may not* hold Respondent's self-serving hearsay statements as true at the pleading stage even if those statements are proffered by Petitioner.

Petitioner pleaded that for lack of "recent" research, both he and *another applicant* over age 40 withdrew from competition for these positions in 2012. Petitioner also proffered the fact that an agency director denied such a requirement exists, demonstrating: (1) Respondent can't keep his stories straight, both admitting and denying that the policy exists, and (2) Respondent has no legitimate business purpose for asking for "recent" research.

The court ignored that Respondent targets his recruitment efforts at the annual meetings of the AEA which are flooded with younger applicants, but Respondent does not interview applicants at other times of the year when younger applicants are not on the job market.

The district court ignored the fact Respondent overwhelmingly hires these "freshly minted" Ph.D.s who are mostly under age 40.

Petitioner pleaded that a different selecting official asked for "recent research" in 2015. The court reached the erroneous conclusion that, "Plaintiff's use of the same 2004 paper in support of his successful 2015 application suggests that the policy itself is not being used in a manner intended to discriminate against older applicants."

First, Petitioner's 2015 application was *not* successful; Petitioner withdrew when offered another higher-graded position and never interviewed for the 2015 position.

Second, a selecting official in 2015 accepting the non-recent paper *does not imply* that a different selecting official would have done so in 2012.

Third, in 2015 Respondent had already been put on notice of the disparate impact claim in this case. It is unconscionable to give credit to Respondent's self-serving willingness to accept Petitioner's non-recent paper in 2015 to defend against a claim for Respondent's actions in 2012.

Fourth, the 2004 paper was *not acceptable* because the selecting official required Petitioner to present "recent" research *in addition* to the 2004 paper, a requirement no other applicant had.

2. <u>The district court improperly dismissed Petitioner's disparate treatment claim for age discrimination.</u>

Petitioner's SAC proffered facts that Respondent treated Petitioner, a person over age 40, differently than persons under age 40.

- Respondent gave younger applicants up to three months notice of the requirement to present research, but gave Petitioner less than 48 hours of notice.

- Respondent knew younger applicants already possessed recent research in their dissertations but Petitioner did not.

- Respondent scheduled Petitioner for the *first* interview time, but notified him *last*; giving Petitioner the least amount of notice.

- Respondent denied Petitioner's request for additional as "not possible," but Respondent interviewed an applicant under age 40 (and ultimate selectee) a month later.

- Wright asked Petitioner for a letter of withdrawal, she was not authorized to request this letter and she lied about not asking for the letter.

- Petitioner had superior qualifications to the other applicants and would have been selected by virtue of his veterans' preference rights. The Respondent also left seven of the ten positions vacant.

Even though Petitioner is *not required* to plead the elements of a prima facie case, he has done so. Petitioner: (1) is a member of a protected class by age; (2) was qualified for and applied for the position; (3) was referred as Best Qualified; (4) was forced to withdraw from competition because of conditions imposed on him by the Respondent that were not imposed on applicants outside his protected class; (5) would have been selected for the position by virtue of his superior qualifications and veterans' preference rights.

3. The district court's decision and Fourth Circuit precedent in *James v. Booz-Allen & Hamilton*, 368 F.3d 371 (4th Circuit 2004) directly conflicts with Title VII of the Civil Rights Act of 1964.

Petitioner claimed that, because of his sex and in reprisal for EEO activity, Respondent gave him undeserved performance evaluation ratings of III in 2012-2014. These evaluations were below the median rating of IV for his job cohort and were lower than his ratings of IV prior to the sexual harassment allegations and his complaints. For several years the rating of III was the *lowest* rating given to any employee in

Petitioner's cohort. Because of the rating of III, Petitioner received lower pay raises and bonuses than the majority of his peers.

Petitioner pleaded that immediately after receiving the sexual harassment allegations, Respondent began to strip him of duties that would have supported higher ratings, and assigned him "menial duties."

The district court dismissed these claims on the basis that Petitioner's ratings of III conferred some pay raises and bonuses, relying on the Fourth Circuit's holding in *James v. Booz-Allen & Hamilton*, 368 F.3d 371 (4th Circuit 2004).

The Fourth Circuit's holding conflicts with the statute that permits claims for actions that *affect* the compensation, terms or conditions of employment. 42 U.S. Code § 2000e-2, and Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352). "Affect" does not apply solely to circumstances where pay goes down but includes positive pay raises that are lower than those an employee would have received absent of discrimination.

4. <u>The district court erroneously dismissed Petitioner's claim for nonselection to the Executive Potential Program (EPP) based on false facts.</u>

Petitioner applied for one of four nominations to the Executive Potential Program (EPP). This program is a major stepping stone by helping participants obtain the Executive Core Qualifications (ECQs) necessary for promotion to the Senior Executive Service (SES) of the federal government.

Petitioner was part of a protected class by sex, age, race, disability, and prior protected EEO activity. Petitioner was supremely well qualified for this nomination with his Ph.D., eight years of FDIC service, and more than 20 years of leadership and management experience.

Respondent selected two persons for the four nominations, both of whom were substantially less qualified than Petitioner. Respondent left two nominations vacant. The first nominee and ultimate selectee was a minority female approximately half Petitioner's age with zero leadership experience, no professional publications, only a bachelor's degree, and only four years of FDIC service, all of which was at a lower level than Petitioner. The second nominee had less job experience than Petitioner, no management experience, and only a Master's degree. Both of these nominees were later selected for management positions.

Respondent's vague explanation for not selecting Petitioner was that his application packet was "not put together well." In fact, Petitioner was the *only* applicant to describe his experience and accomplishments in is application essays with the required C-C-A-R format – Challenge, Context, Actions, Results.

In the EEO investigation, Respondent *refused* to identify members of the panel who recommended nominees; some or all of whom would have had knowledge of Petitioner's prior EEO activities.

In dismissing the complaint, the court stated erroneously that "the pace of Plaintiff's promotions and pay raises continue unabated notwithstanding the non-selection for the program. Plaintiff was promoted to Grade 15 – receiving raises at each juncture. Thus the non-selection for the Executive Potential Program cannot form the basis of an adverse employment action." The court's facts and inferences are all wrong.

First, Petitioner was *not* promoted to any *management* positions subsequent to his non-selection for the EPP, but the selectees *were* selected for management positions. Second, Petitioner was *not* promoted to Grade 15; he remains a grade 14 and thus has had no pay raises for grade increases. Third, completion of the EPP confers a *continuing* benefit throughout one's career. Even if Petitioner had been promoted to grade 15, not completing EPP deprived him of the ECQs necessary for *future* promotions to the SES.

5. <u>The lower courts failed to give Petitioner notice of deficiencies and an opportunity to amend his complaint.</u>

The district court dismissed Petitioner's SAC in its entirety, with prejudice. The Memorandum Opinion states:

> During the hearing, the Court advised Plaintiff that he needed to plead more than conclusory allegations that the reason he suffered the alleged adverse employment actions was because of Respondent's desire to discriminate against him. Dkt. No. 24, p. 7.

This statement by the court is false. The court gave absolutely no notice of deficiencies and did nothing more than make a brief and vague reference to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

While the court did rely on *some* arguments by the Respondent in its opinion, it predominantly relied on facts, arguments, and legal authorities of the court's own selection that first appeared in the Memorandum Opinion.

The court stated: "Plaintiff has taken multiple opportunities to amend his Complaint already but has not addressed the infirmities identified by the Court." Dkt. No. 34, p. 26.

Again, this statement by the court is false. While Petitioner was able to amend his claim of age discrimination and hostile work environment, the remainder of Petitioner's claims were not even included in the original Complaint and thus were never amended.

Petitioner alleged he was not selected for a position as a Financial Analyst in 2014 because of his sex, age, race, and in retaliation for prior protected EEO activity. The district court stated:

> This claim must be dismissed because Plaintiff has failed to assert facts establishing the plausibility of the claim. Plaintiff invites the Court to infer that because Hanrahan reports to individuals named in Plaintiff's EEO complaints that they unduly influenced Hanrahan to not select Plaintiff. Plaintiff also invites the Court to infer that Plaintiff was more qualified despite offering no information about the qualifications for the position or of any other applicants. Dkt. No. 34, p. 18.

Even if Petitioner's proffered facts were insufficient to state a claim, the details the court required are precisely the type of information that a plaintiff could provide in an amended complaint.

Contrary to the judgment of the district court, the judge *never* informed Petitioner of any deficiencies in pleading Claim 1 for Age Discrimination. The Respondent did not make a Rule 12(b)(6) motion at all in his first Motion to Dismiss. See Dkt. No. 8-9. At hearing on the Motion to Dismiss, the judge briefly mentioned, *sua sponte*, the pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) without providing Petitioner any specifics about deficiencies.

During the amendment period, several other claims being heard by the EEOC became exhausted, and Petitioner added those claims to his First Amended Complaint. See Dkt. No. 19. These claims included a grievance review and remedies for nonselections, removal of key duties, denial of training opportunities, and a hostile work environment.

Within 21 days, Petitioner submitted his Second Amended Complaint (SAC) in due course, in accordance with Rule 15(A)(1)(a). This was the first and only time Petitioner amended Causes of Action 2 through 6.

Respondent claimed and the district court intimated that Petitioner violated Rule 15 by submitting his SAC without leave of the court. At worst, the wording of Rule 15 is ambiguous about whether a plaintiff may amend a complaint in due course after a court has granted leave for an amendment.

The Ninth Circuit has specifically held that Rule 15 permits plaintiffs to receive leave to amend a complaint, and then to subsequently amend the resubmitted complaint in due course, without leave. See *Ramirez v. County of San Bernardino, et. al.*, D.C. No. 5:13-cv-00573-JFW-SP.

6. <u>The district court erroneously dismissed the hostile work environment claim based on false facts.</u>

<u>*ipse dixit* conclusions, and erroneous application of the law.</u>

Nearly every fact relied upon by the court in dismissing the HWE claim was incorrect, the court drew inferences in favor of the Respondent, and the court ignored hundreds of pleaded facts. The district court stated:

> Plaintiff's charge that he was subjected to a hostile work environment by the accusations made against him in the sexual harassment investigation is a perversion of the hostile work environment standard. Respondent investigated reports that Plaintiff had placed other employees in unwelcome situations because of sex. The fact that Respondent thoroughly investigated those claims and brought them to Plaintiff's attention, while protecting the identities of the accusers, does not afford Plaintiff a claim for a hostile work environment. To find otherwise would hamstring an employer's ability to investigate harassment claims in the workplace in a fashion which balances the interests of due process and protecting victims. Dkt. No. 34, p. 26.

Petitioner *did not* allege that he was subjected to a hostile work environment because of the accusations made against him. Petitioner alleged a hostile work environment because of the Respondent's *failure* to investigate those allegations and for *punishing* and *threatening* Petitioner without such an investigation for *frivolous* allegations.

The district court concluded *ipse dixit* that Respondent conducted a "thorough" investigation. Petitioner pleaded dozens of facts that Respondent *did not* thoroughly investigate the allegation and *did not* give Petitioner notice of those allegations and an opportunity to respond. In fact, Petitioner's Cause of Action Six was a claim that Respondent failed to thoroughly investigate.

The complainants against Petitioner *did not* have any legal right to have their identities withheld from Petitioner. It was *impossible* for Petitioner to adequately respond to the allegations against him without knowing who the complainants were. Moreover, since the allegations were false, Petitioner had a *right* to pursue a tort claim of defamation against these complainants and Respondent had a *duty* to fire and prosecute them for making false statements.

Petitioner's complaint *does not* "hamstring" the employer's ability to investigate. The Respondent could have protected the complainants, protected the rights of the Petitioner, and protected himself from vicarious liability merely by conducting a prompt, thorough, and impartial investigation.

In dismissing the HWE claim, the district court judge relied on his *own* nonprecedential decision in *Spida v. BAE Sys. Info. Sol. Inc.*, 2016 WL 7234088 (E.D. Va. Dec. 14, 2016). In that case, the judge did not refer to any case law or the statutes relating to hostile work environment claims.

The district court dismissed both of these complaints relying solely on the fact that the plaintiffs did not allege any threats, disparaging comments, physical contact, or verbal abuse. Dkt. No. 34-35, p. 25. While such conduct is *sufficient* to state a claim of a hostile work environment, it is not *necessary*.

EEOC Guidance states that "Offensive conduct may include, **but is not limited to**, offensive jokes, slurs, epithets or name calling, physical assaults or threats, **intimidation**, ridicule or mockery, insults or put-downs, offensive objects or pictures, and **interference with work performance**." [Emphasis added]

Petitioner pleaded that as a result of Respondent's tortious actions, he sought employment outside of the FDIC and in other divisions of the FDIC to escape a discriminatory environment. Petitioner requested administrative transfers to a different manager that Respondent repeatedly denied.

Petitioner alleged that Respondent threatened Petitioner's employment because of allegations that Petitioner could not even recognize and were *not harassment even if they were true*. This threat was not a legitimate warning of an employer to an employee whose conduct needed to be regulated. It was an *illegitimate* threat for nonexistent and benign conduct that was unfalsifiable; it was not necessary for Petitioner to *actually* commit this conduct in the future, but merely to be *accused* of it.

Petitioner pleaded facts that subsequent to the false harassment allegations, sham investigation and rigged grievance process, Petitioner was unable to sleep, suffered depression, sought behavioral health counselling, suffered worsening of his existing disabilities and developed new disabilities. Petitioner pleaded that because of Respondent's discriminatory actions, Petitioner and his wife were separated for a year.

Petitioner pleaded that when he objected to the manner in which Olesiuk issued the Letter of Warning, Olesiuk *intimidated* Petitioner by punishing him with corrective training and removed him from a presentation.

Petitioner pleaded that Respondent's treatment unreasonably interfered with his work performance. Before the improper investigation Petitioner routinely worked overtime and accumulated leave, but afterward he ceased working overtime and began to exhaust all his leave. Petitioner's performance evaluations dropped from ratings of IV in 2009 and 2010 to ratings of III in 2011 and thereafter. Even assuming that Petitioner's performance evaluations were *not* discriminatorily reduced, these reduced ratings represent the *effects* of Respondent's discrimination.

Petitioner properly pleaded that Respondent did not take appropriate action regarding his HWE claims. Rather than discipline people who intimidated him and violated his rights, Respondent refused to investigate them and *promoted* them.

"So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive... there is no need for it also to be psychologically injurious." *Harris v. Forklift Systems, Inc.*, 510 U.S. (1993). Petitioner contends that any reasonable man who is accused of harassment he didn't commit, is denied a thorough investigation, is denied notice and opportunity to respond, is threatened with termination for benign and unfalsifiable conduct; and is repeatedly denied promotions, awards, transfers, duty assignments and details; has suffered from a hostile work environment because he is male.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted:

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