No. 25-_____

IN THE
SUPREME COURT OF THE UNITED STATES

QINGHUA ZHANG; STEVEN CRAIG HEILAND,

Applicants,

v.

FEDERAL HOME LOAN BANK OF TOPEKA

Respondent.

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

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Justice Neil Gorsuch, Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Under this Court's Rules 13.5 and 22, Applicants Qinghua Zhang and Steven Craig Heiland request an extension of fifty nine (59) days in which to file a petition for a writ of certiorari in this case. The U.S. Court of Appeals for the Tenth Circuit issued its decision and judgement on February 14, 2025. *See Zhang, et al. v. Federal Home Loan Bank of Topeka* (Appellate Case: 24-3029, 10th Cir. 2024). App. 1. Unless extended, the time to file a petition for certiorari will expire on May 15, 2025. With the requested extension, the petition would be due on and including July 13, 2025.

This application is being filed more than 10 days before the petition is due. *See* S. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). In support of this application, Applicant states:

1. This case is a serious candidate for review. It involves interpretation of Federal Rule of Evidence (FRE) 408 which prevented plaintiffs from presenting key pretext evidence to the Jury in addition to plain errors in jury instructions which affect substantial rights and seriously affect the fairness, integrity, or

public reputation of judicial proceedings.

The overwhelming majority of lawsuits filed are settled rather than tried. This greatly reduces court congestion, delays, costs and dockets. FRE 408, regarding compromise offers and negotiations, aims to encourage settlements by making evidence of settlement discussions inadmissible to prove the validity or amount of a disputed claim. This is driven by a strong public policy that favors the settlement of disputes by enabling the parties to make full and frank disclosures without fear that their statements will later be used against them as an admission of liability or the amount of liability. Hence, Rule 408 precludes the admission of settlement agreements when they are used to "prove or disprove the validity or amount of a disputed claim." If a case does not settle, litigants are protected from having their settlement efforts used against them at trial. Although FRE 408 does preclude some settlement evidence from being admitted at trial, it is not a blanket protection. Courts have recognized that Rule 408 should not exclude "more than required" to effectuate its goals, which would contradict the fundamental policy favoring the admission of all relevant evidence. If there is no disputed claim available when evidence occurs, FRE 408 shouldn't apply to the evidence.

Also for consideration, it's the trial court's ultimate responsibility to provide clear and accurate instructions to the jury on the law applicable to the case. Federal Rule of Civil Procedure 51(d) addresses jury

instructions and includes a plain error provision. Specifically, Rule 51(d)(2) allows a court to review unpreserved errors in jury instructions, such as those not objected to under Rule 51(c), if the error affects substantial rights. This provision is known as the "plain error" rule.

2. Both applicants had worked for respondent or defendant by more than 12 years before their termination. Zhang was the director of Quantitative Analysis and Heiland was the director of Market Risk Operations of the Market Risk Analysis department at the Federal Home Loan Bank of Topeka (Bank). In November 2018, Zhang surprisingly received verbal counseling from his supervisor. He was told that one of his female director reports, Peg Schultz, complained to Bank human resources (HR) about Zhang's behavior right before her retirement in September. She reported that Zhang made derogatory remarks about women and directed administrative work to her. Schultz was the only non-minority on Zhang's team. Zhang was shocked by the verbal counseling since Zhang's other direct reports often reported Schultz's discriminatory behaviors. Heiland observed Schultz's behavior as well. Both Zhang and Heiland reported to their supervisor, Michael Surface. Surface had never seriously done anything to address the issue. Zhang replied to the verbal counseling, saying he was discriminated against based on his race since the defendant treated complaints differently and Schultz's complaints were not thoroughly investigated. Also, neither Zhang nor his minority direct

reports had been interviewed before issuing the verbal counseling to him. Zhang met with HR and complained about Surface's discriminatory behaviors over the years. None of Zhang's complaints were investigated by the defendant. Zhang discussed this with Heiland. Heiland warned Zhang that no investigation was a sign of retaliation. On March 1, 2019, Zhang and Heiland complained to Surface that a report from Surface's direct report was fraudulent and it should be reported to appropriate authorities. On March 5, 2019, which was one business day after reporting fraud, Zhang was terminated for "Inconsistent communication". After litigation started, defendant changed the reason to "Insubordination". Heiland was shocked by the defendant's behavior against Zhang and his resulting termination. He sent an email to Surface complaining about the surprise and shocking termination. Zhang was offered a severance package at termination which offered him 6 month salary and 2 months insurance coverage in exchange for confidentiality and the release of all kinds of claims including whistleblowing which potentially violated SEC 21F-17(a) and section 7 of NLRA. Following termination, Zhang tried to negotiate a better severance package through his counsel. He provided some email exchanges among Craig Heiland, Michael Surface and him. These emails show that both plaintiffs reported Peg's discriminatory behaviors and some potential fraudulent activities of defendant to Surface. The negotiation wasn't successful. At about 2:00 PM of April 11, 2019, Zhang notified FHLB

he would not sign the severance documents and would proceed with filing suit. The very next day at about 10:00 AM of April 12, 2019, Craig Heiland was put on administrative leave for unidentified "Multiple bank policy violations" and also nearly within just a few regular business hours for reporting another serious concern on the valuation of certain Bank investments. He told HR and Legal of defendant that it was retaliation against him and Zhang if their reasons involved Zhang's situation. On April 29, 2029, Heiland was terminated and offered a severance package which includes 6 months salary and 6 months insurance coverage in exchange for confidentiality and the release of all kinds of claims including whistleblowing which potentially violated SEC 21F-17(a) and section 7 of NLRA. According to the defendant's severance policy, both plaintiffs don't qualify for any severance benefits if they had wrongdoings. They both qualified for at best a 3 month salary even if they were terminated without wrongdoings. Defendant ultimately claimed both plaintiffs were terminated due to wrongdoings.

3. Zhang and Heiland brought suits in the United States District Court of Kansas. First, Zhang claims the Bank discriminated against him on the basis of his race by terminating his employment. Second, Zhang claims the Bank retaliated against him by terminating his employment after he raised claims of discrimination based on race. Third, Zhang claims his employment was wrongfully terminated in

violation of public policy because he reported alleged violations of rules, regulations or the law pertaining to public health, safety, and the general welfare by the Bank. Heiland claims the Bank retaliated against him by terminating his employment after he raised claims of discrimination based on race and engaged in protected activity opposing discrimination and retaliation against Zhang. Heiland also claims his employment was wrongfully terminated in violation of public policy because he reported alleged violations of rules, regulations or the law pertaining to public health, safety, and the general welfare by the Bank.

All of Plaintiffs' claims survived motion for summary judgement. Since there was no direct evidence, the district court followed burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." and identified a voluminous amount of evidence of pretext including the severance agreement from defendant. Right before the trial, plaintiffs had proposed a jury instruction including Title VII law and Kansas common law whistleblower retaliation. Those languages educate Jury what activities are unlawful for defendant. Plaintiff also proposed pretext language to educate the Jury they are authorized to return a verdict to plaintiff if they find weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reason. The

pretext language is required in ten circuits. See Townsend v. Lumbermens Mutual Casualty Co 294 F.3d 1232 (10th Cir. 2002). Additionally, Plaintiffs included language elaborating preponderance of evidence and clearing and convincing evidence which are very important for the jury to understand so that they could make accurate decisions. However, the jury instruction from the district court unreasonably left all these languages out but included languages sounding almost like a blanket protection in much favor for the defendant. The jury instruction conflicts with the ruling of summary judgement from the same district court. A reasonable person with some knowledge of employment law could tell the jury instruction is very biased and unbalanced. Plaintiffs filed an objection to the bias of the jury instruction. With unreasonable reason, the court ignored plaintiffs' objection in writing. During the 5 day trial, the court unreasonably and mistakenly barred plaintiff from presenting their severance package to Jury due to FRE 408. The defendant didn't object to Plaintiffs' severance agreement in their motion in limine. They suddenly objected to evidence due to FRE 408 when plaintiff was ready to show jury. Plaintiffs were not able to prove pretext using the severance agreements for which the district court used to rule summary judgement in the favor of plaintiffs. The severance agreement conflicts with severance policy. Also, severance agreements included languages

potentially violating SEC 21F-17(a) and section 7 NLRA. It shows the defendant risked violation the law to cover up retaliation intent. Due to the deficiency of the jury instructions, Jury asked two questions about jury instructions during deliberation, one specifically involving whether the violation of Bank policies is considered a violation of the law (which is very important since the Bank is highly regulated and typically policy violations can likely be a violation of law since policies must be strictly followed). When answering the question, despite the plaintiffs' objections, instead of directly answering jury's question, the court unreasonably reminded the Jury about the blanket protection language in much favor for the defendant in the jury instruction. The biased answer misled the jury and discouraged the jury from returning a verdict to plaintiff. Given the very biased jury instruction, there is no surprise the jury didn't return a verdict to plaintiffs. However, they did find both plaintiffs had protected activities and that plaintiffs voiced their concerns about fraud in good faith. Without pretext language as it is used in summary judgement by the district court, jury didn't know they were authorized to return a verdict to plaintiff given the evidence plaintiffs presented since there is no direct evidence that was discovered at the time of Plaintiffs' terminations. Plaintiffs filed a motion for a new trial based on several serious plain errors and the admission issue of their severance agreements. The district court denied motion for new trial because plaintiff didn't preserve the error and even if plaintiffs did,

the district court affirm the Jury instruction is accurate. In addition, district court doesn't think the answers to Jury's question were misleading. Finally, district court confirmed its decision of barring the severance agreement.

4. Plaintiffs filed the appeal based on the plain error of the jury instruction and mistake on barring severance package. Plaintiff showed that they presented substantial evidence of pretext at trial. Jury didn't know they were authorized to return a verdict to plaintiffs due to lack of pretext language in the jury instruction. The plain error affected Zhang and Heiland's substantial rights and also conflicted with summary judgement ruling from the same district court. The circuit court agreed there is plain error but affirmed the district court's decision.

5. This case raises an important question of law on which the courts of appeals are divided. FRE 408 applies only to offers made in an attempt to compromise a disputed "claim," It doesn't apply to offers such as severance agreements provided to employees at termination when there is no claim yet asserted. See Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1342-1343 (9th Cir. 1987). It is obvious that tenth circuit conflicts with ninth circuit. There are several plain errors in the jury instruction and answers to Jury questions. Plaintiff proposed those languages and filed an objection. All those were ignored by the district court unreasonably and also the ignorance conflicted with its own

summary judgement ruling which included those important languages. On the contrary, the district court clearly included almost a blanket protection against defendant. Without the language plaintiff proposed, it is so obvious that the jury instruction is very imbalanced and biased. Those unreasonable errors or mistakes of district court are so egregious that they affect the fairness, integrity, or public reputation of the judicial proceedings and shouldn't be tolerated. Defendant claims that Zhang was terminated due to insubordination and Heiland was terminated due to inappropriate email discussions. However, the undisputed testimony and evidence presented at trial established that FHLB did not even search Plaintiffs' emails for after acquired evidence until after Plaintiff Zhang filed his EEOC -- claim, which was much later in May, 2019, two months after Zhang's termination and the month after Heiland's termination. Plaintiff Zhang's termination occurred the next business day morning following his email to his boss reporting discrimination and violation of laws by FHLB. Heiland's leave of absence and resulting termination occurred the very next morning nearly simultaneously following Plaintiff Zhang's rejection of FHLB's severance package and shortly thereafter of his reported concerns on a serious significant valuation issue with the Bank's investments, which unlawfully required he keeps the terms confidential, and in which Plaintiff Zhang identified Plaintiff Heiland

as a witness to his claims.

Due to the circuit split on Rule 408 and several egregious plain errors which unreasonably conflict with trial court's own ruling in summary judgement, there is a reasonable prospect that this court will grant the petition, such that it warrants this additional time for these important questions to be fully addressed.

6. This application for a fifty nine days extension seeks to accommodate Applicant's legitimate needs. Applicants are actively working on the Writ of Certiorari and also actively seeking counsel to represent them, which is not an easy accomplishment whatsoever given the growing complexity of this case. The extension is needed given all the challenges and many other obligations of applicants. Without the extension, applicants would face difficulties completing the challenging tasks by the current due date.

For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be at least extended to and including July 13, 2025.

Respectfully submitted,

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