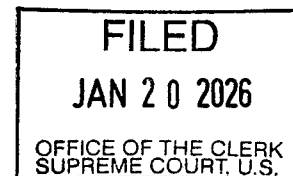


No. 26-409



IN THE
Supreme Court of the United States

HIEN THI NGUYEN,

Petitioner,

v.

JOHN PHELAN, in his official capacity as Secretary of the Navy,

Respondent.

**On Petition for a Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

HIEN THI NGUYEN
Petitioner, Pro Se
17763 LULL STREET
RESEDA, CA 91335
(818) 926-7885
bichhien999@gmail.com

QUESTIONS PRESENTED

Whether the district court and the Ninth Circuit misapplied Title VII and the Age Discrimination in Employment Act by granting and affirming summary judgment:

1. on Petitioner's hostile work environment claim, by failing to apply the proper "terms and conditions of employment" framework and totality-of-the-circumstances analysis to evidence that Petitioner's assigned supervisor refused to assume required supervisory responsibility at the outset of employment under the Engineer and Scientist Development Program ("ESDP"), and that Petitioner was denied workplace access, required to attend a security training class despite no security violation, denied meaningful tour assignments, and denied required supervisory duties under ESDP; and

2. on Petitioner's discriminatory and retaliatory performance appraisal claim, by failing to analyze Petitioner's timely challenge to the FY2010 NSPS performance appraisal and its use in subsequent performance-based actions, including termination, despite agency investigative records documenting "Prior EEO Activity" during her tours and reflecting that Petitioner's May 2010 report of age and gender discrimination was treated as prior protected activity and a reprisal theory.

PARTIES TO THE PROCEEDING

The following proceedings are directly related to this case:

Petitioner Hien Thi Nguyen was the plaintiff-appellant in the court of appeals.

Respondent John Phelan, in his official capacity as Secretary of the Navy, is the successor to Carlos Del Toro, who was the defendant-appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

Hien T. Nguyen v. Carlos Del Toro, No. 2:21-cv-04327-VAP-ASx, United States District Court for the Central District of California. Judgment entered June 27, 2023.

HIEN THI NGUYEN, v. JOHN PHELAN, in his official capacity as Secretary of the Navy, No. 23-55632, United States Court of Appeals for the Ninth Circuit. Judgment entered April 11, 2025; rehearing and rehearing en banc denied August 21, 2025.

Petitioner is not aware of any other directly related proceedings within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hien Thi Nguyen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's order granting summary judgment to Respondent is not reported and is reproduced at Pet.App.8a. The United States Court of Appeals for the Ninth Circuit's memorandum disposition is unpublished and is reproduced at Pet.App.1a. The court of appeals' order denying rehearing and rehearing en banc is unpublished and is reproduced at Pet.App.45a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 11, 2025. The court of appeals denied rehearing and rehearing en banc on August 21, 2025. On November 14, 2025, Justice Kagan granted Petitioner's application, No. 25A570, extending the time to file a petition for a writ of certiorari to January 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII's federal-sector provision, 42 U.S.C. § 2000e-16(a), provides in pertinent part:

All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Title VII's antiretaliation provision, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(a), provides:

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments as defined in section 102 of title 5 . . . shall be made free from any discrimination based on age.

STATEMENT OF THE CASE

I. Hiring, Initial Assignment, and the Structured Supervisory Framework of the Engineer and Scientist Development Program

Petitioner Hien Thi Nguyen, a Vietnamese female, age 57, earned a Master of Science in Electrical Engineering in 2009 and was hired by the Department of the Navy at the Naval Air Warfare Center Weapons Division ("NAWCWD") as an Electronics Engineer (YD-0855-01) under the Federal Career Intern Program ("FCIP"). (Dkt. 149-3, p. 12). She qualified for participation in the Navy's Engineer and Scientist Development Program ("ESDP"), which at the time was governed by NAWCWD Instruction 12410.2A (the "Instruction" or "ESDP policy"). See Dkt. 149-3, p. 12; Dkt. 141-4, pp. 45-50; Dkt. 141-5, pp. 1-17.

Human Resources ("HR") notified Petitioner on February 10, 2010 that she had been placed in the Countermeasures Systems Branch, Code 454300E, with Manwah Luk identified as her supervisor. (Dkt. 137, p. 13). Under the ESDP, participants are initially assigned to a Home Code ("HC") for orientation and for the planning of required developmental tours. (Dkt. 141-4, p. 47). Accordingly, Code 454300E was Petitioner's assigned branch and HC for initial orientation and tour planning under ESDP policy. (Id.)

The Instruction requires that an Engineer and Scientist Development Plan—defined as the schedule for rotational developmental assignments ("tours"), and also referred to in the Instruction as the planning of tours/assignments—be jointly established by the participant and the HC supervisor within the first six weeks of employment. (Dkt. 141-4, pp. 45, 47; Dkt. 141-5, p. 9). Under the ESDP, each participant is required to perform a minimum of three and a maximum of five developmental tours, each lasting two to three months. These tours are to be planned, performed, and evaluated with the assistance of the HC supervisor and assignment (tour) supervisors during the first one to two years of employment. (Dkt. 141-4, p. 47).

For each tour, the ESDP requires tour supervisors to provide meaningful tour assignments; discuss tour objectives and expected results, the participant's responsibilities, evaluation factors, and training; and inform the HC supervisor of the participant's progress during the tour. Problems encountered during the tour are to be discussed with the HC supervisor, competency management, and the Department Coordinator, as needed. Tour supervisors are further required to review and evaluate

the tour results with the participant as close to the end of the tour as reasonably possible and to ensure that this evaluation is reported as required. (Dkt. 141-5, p. 5).

The Instruction further provides that, for each rotational assignment, a performance plan, performance appraisal, developmental checklist, and tour review forms will be completed. (Dkt. 141-5, p. 9).

Under the ESDP, the performance plan documents the work assignments that require increasing responsibility on the part of the participant. (Dkt. 141-5, p. 10).

In addition, the Instruction requires the HC supervisor to conduct a performance-based retention review for each ESDP participant at approximately nine months of employment, and participants who fail this review are subject to termination of NAWCWD employment. (Dkt. 141-4, p. 49).

The Instruction distinguishes between the HC supervisor and the tour supervisor. The HC supervisor is responsible for planning, oversight, and retention assessment, while the tour supervisor directs the participant's work during a specific tour and evaluates the participant's performance for that tour. (Dkt. 141-5, pp. 3-5). In the administrative investigation record ("ROI")¹, the term "team lead" ("tour supervisor") is used to refer to the tour supervisor role. (Dkt. 141, p. 26; Dkt. 141-5, pp. 3-5).

¹ "ROI" refers to the EEOC Report of Investigation (Exhibit 1), part of the administrative record below.

II. Supervisory Denial at the Outset and Absence of Required Planning

A. Pre-entry circumstances

Before Petitioner entered on duty, the record reflects that Petitioner's resume circulated internally through connections involving Ken Tran and other employees working under Luk's supervision. (Dkt. 134, pp. 72-74).

B. Background

Luk decided not to interview or hire Petitioner after reviewing her resume in July 2009, but was later informed by supervisors Rothberg and Gabaldon in August 2009 that Petitioner would be hired based on a professor's referral and assigned to him. (Dkt. 141-1, p. 2). Luk questioned that decision while seeking approval to mentor her. (Id.)

C. Ratings context

During FY 2010, ESDP participant Ken Tran (age 28, HC 454299E) toured in Code 454300E under Luk's supervision and received a recommended rating of 3. (Dkt. 141-4, p. 8). Petitioner's Tour 1 recommended rating was 2. (Dkt. 141-4, p. 7). During FY 2010, ESDP participant Leroy Jr. ("Lee") Simmons (age 50, HC 454300E) received recommended ratings of 3 and 3 for two tours, but final ratings of 2 and 2. (Dkt. 141-4, pp. 8, 9). Luk testified that he served as Simmons' HC supervisor and recommended Simmons' rating as 2. (Dkt. 149-2, p. 13). Luk terminated Simmons' employment due to performance. (Dkt. 141-5, p. 21).

D. Supervisory Denial

Prior to Petitioner's March 1, 2010 entry on duty, HR designated Luk as her supervisor for Code 454300E. (Dkt. 137, p. 13). A few days after her March 1, 2010 start date, Luk denied being Petitioner's supervisor, stating, "I am not your supervisor." (Dkt. 141, p. 30; Dkt. 134, p. 74). When Petitioner asked office manager Nga Vu why she had no supervisor, Vu replied, "Because you're old enough to supervise yourself." (Dkt. 134, p. 5).

Although Charles Zhang asserted months later that he had served as Petitioner's HC supervisor from March 1, 2010 (Dkt. 149-1, p. 4), contemporaneous records conflicted with that assertion: Petitioner was excluded from Zhang's March 8, 2010 supervisory email to his group (Dkt. 149-1, p. 12), and a March 6, 2010 NMCI UAIF update listed Luk as Supervisor's Name (Dkt. 137, p. 17). Only after Petitioner's termination did Luk testify that she was confused about the supervisor-team lead distinction (Dkt. 149-2, p. 5), despite the Agency's admission that he had denied being her supervisor (Dkt. 141, p. 30). Because no individual performed HC supervisory functions during the early weeks following Petitioner's entry on duty, the required orientation and joint planning of tours under ESDP policy did not occur at the outset of her employment. (Dkt. 141-4, p. 47). Although Zhang later appeared as the HC supervisor within the six-week window, the required establishment of the Engineer & Scientist Development Plan was never initiated.

E. Absence of Required Engineer & Scientist Development Plan (Six-Week Requirement)

ESDP policy requires that the Engineer & Scientist Development Plan (tour schedule) be jointly established by the participant and the HC supervisor within six weeks of entry on duty. (Dkt. 141-5, p. 9; Dkt. 141-4, p. 47). During FY 2010, Petitioner worked on two developmental tours—Tour 1 and Tour 2. For Petitioner, this required planning period ran from March 1 to April 12, 2010. No such Plan or tour schedule exists in the record.

Tour 1. On March 17, 2010, Zhang confirmed Petitioner's interim Secret clearance to Luk (Dkt. 149-1, p. 34), yet no assignment followed. Luk arranged a meeting only after a second-level supervisor became involved. (Dkt. 149-1, p. 34; Dkt. 137, p. 19). In a March 29, 2010 email replying to Zhang and cc'ing Petitioner and Luk, Rothberg directed that "Hien [Petitioner] will work with Manwah [Manwah Luk] to form NSPS job objectives... until she makes it into the NSPS system." (Dkt. 149-1, p. 12). Petitioner received her first assignment that day (Dkt. 149², p. 35), conveyed through a meeting invitation labeled "Peer Review." (Dkt. 137, p. 19). The first task—testing v2—did not begin until April 12, 2010. (Dkt. 149, p. 36; Dkt. 137, p. 142). Discovery produced no Tour 1 job objectives or performance plan. (Dkt. 85, pp. 25–26, 28–29; Dkt. 94, p. 5; Dkt. 102, p. 50).

Tour 2. Around May 18, 2010, Tour 1 Team Lead Manwah Luk contacted Tour 2 Team Lead Ngoc Nguyen to arrange Petitioner's Tour 2 assignment. (Dkt. 137, p.

² Although Dkt. 149 was later stricken as untimely (Order 151), Petitioner cites it because she has consistently maintained that Order 108 permitted submission of supporting evidence.

23). This occurred after the six-week ESDP planning period had expired, therefore confirming that the required timely Engineer & Scientist Development Plan was never established. (Dkt. 137, p. 23).

III. Developmental Tours and ESDP Supervisory Failures Affecting the Terms and Conditions of Employment

A. Tour 1 (April 1 – June 18, 2010): Absence of Assigned NSPS Work, Workplace Access Restrictions, Prior EEO Activity, and ESDP Supervisory Failures

(1) Task assignment and working conditions

From March 1 through late March 2010, Petitioner received no engineering assignments (Dkt. 149-1, p. 12; Dkt. 137, pp. 140–141).

On March 29, 2010, Tour 1 Team Lead (“TL1”) Manwah Luk assigned Petitioner to work on the ALR-67(V)2 (also “v2”) with Greg Chang (Dkt. 137, p. 140; Dkt. 149, p. 37). She received written Tour 1 Job Objectives (“JOs”) on May 10, 2010 (Dkt. 149-1, p. 13). The JOs did not include expected results, participant responsibilities, evaluation factors, or required training, as required under ESDP policy (Dkt. 85, pp. 38–39; Dkt. 94, p. 7; Dkt. 102, p. 50 ¶ 3). She reviewed Chang’s materials on March 29, Luk’s ALR-67(V)2 materials on April 6, and began testing on April 12, 2010 (Dkt. 134, p. 82; Dkt. 149, p. 36; Dkt. 137, p. 142).

On April 12, 2010—the first day of ALR-67(V)2 testing (Dkt. 134, p. 82)—Petitioner was excluded from the Strong Room (“SR”) lab by Greg Ball, who was assigned the lab that day, thereby altering her ability to perform assigned duties (Dkt. 134, p. 77; Dkt. 137, pp. 127–128 (Mike Lutfi’s testimony)). The court denied Petitioner’s request to compel Ball’s job assignments in Code 454300E, finding it

irrelevant and thereby preventing verification of those access restrictions (Dkt. 85, pp. 40–41; Dkt. 94, p. 6 (denied)).

From April 12 until the April 2010 SR security violation, Petitioner was excluded from the SR lab by Michael Lutfi, Phuong Tran, and Greg Ball (all under Luk's supervision), thereby limiting her ability to perform assigned testing work on the ALR-67(V)2 (Dkt. 134, pp. 80, 82). Lutfi testified that his group had higher priority during this period (Dkt. 137, p. 128). She asked TL1 to establish a lab schedule so she could perform her assignment, but he declined, stating he preferred flexibility (Dkt. 134, p. 80). After Petitioner's termination, Luk testified that "[m]ost labs' periods are pre-assigned/pre-scheduled by users' requests and by priority" (Dkt. 137, p. 105). The court denied the request for their job assignments in Code 454300E from April 12 to June 18, 2010, finding it irrelevant and thereby preventing verification of the asserted access restrictions (Dkt. 85, pp. 41–42; Dkt. 94, p. 6 (denied)).

From the April 2010 SR security violation through May 5, 2010, TL1 denied Petitioner SR access and required her to attend security training on May 5 with Phuong Tran, despite no misconduct alleged against her, thereby preventing her from performing her assigned work during that period (Dkt. 134, p. 82; Dkt. 149-2, p. 9). Petitioner heard that Zhang reported the violation (Dkt. 134, p. 82). Post-termination, Luk testified that the incident involved another employee and did not affect Petitioner's work or SR access (Dkt. 149-2, p. 9). The court denied the request for

documents on the April violation and May 5 training after defendant confirmed no responsive documents existed (Dkt. 85, pp. 32–34; Dkt. 94, p. 20 (denied)).

Petitioner sought to verify her exclusion from the SR lab and its effect on her ability to perform assigned work, including by showing that a similarly situated employee (Ken Tran) retained access while she was denied, and to refute Zhang's testimony that she showed him a dragon picture in the SR in early March 2010. She therefore requested SR access logs (Mar. 1, 2010–Feb. 17, 2011) and daily SR sheets (Mar. 1–Jun. 18, 2010). The court granted in part, requiring a declaration confirming no responsive documents existed (Dkt. 85, pp. 35–36; Dkt. 94, pp. 6–7; Dkt. 102, p. 50 ¶ 4).

After the May 5 training, Vu denied Petitioner SR access while allowing Phuong Tran immediate entry, reflecting unequal access to the work environment required to perform assigned duties (Dkt. 134, p. 82). On May 6, Petitioner was allowed lab entry for ALR-67(V)2 work, but Chang assigned her an older machine, stating, "We're old, so we work on older machines. Younger ones work on the new machine." The machine failed within minutes, and although Lutfi promised repairs, none were made. Petitioner informed Luk that the equipment was not operational (Dkt. 134, pp. 79, 82).

Post-termination, TL1 testified Petitioner's initial task was to learn/read INTEL data and test the ALR-67(V)2 against it, but it was re-scoped and she was removed from testing because: (1) she struggled with full emitter threat characteristics due to lack of engineering/technical thinking (a reasonable entry-level

task others completed without issue), often analyzing partial data; and (2) project conflicts limited ALR-67(V)2 system (not lab) availability, preventing testing without full INTEL understanding (Dkt. 149-2, p. 8).

Petitioner requested documents on TL1's discussions during Tour 1 with the Home-Code Supervisor regarding problems encountered, including assignment of a broken machine. The court granted in part (Dkt. 94, p. 7); the agency certified full production (Dkt. 102, p. 50 ¶ 3). However, production appears incomplete, lacking records to clarify the assigned machine or verify TL1's testimony that re-scoping occurred because Petitioner could not perform testing.

Luk's accounts of Petitioner's May 11 reassignment are materially inconsistent

The May 11 email (sent/approved by Luk) assigned her to "work with Lee on writing the DEWS instruction and take over the document task from Lee [Simmons]" (DEWS = Digital Electronic Warfare Simulator for ALR-67(V)2/APR-39) (Dkt. 149, p. 37; Dkt. 137, p. 106). Later testimony claimed she did not write those, but was tasked with unrelated NAWCWD STRIKE and ASSAULT DEVELOPMENT TEST PROCEDURES (Dkt. 137, p. 106), or "strike ALR-67(V)2" and "assault APR-39" with Lutfi, Phuong Tran, and Ball (Dkt. 149-2, p. 9), or "RWR test procedure with Lee Simmons" (Dkt. 137, p. 41). These conflicts contradict documents and each other on systems, personnel, and tasks.

Petitioner requested documents/communications on Tour 1, Task 2 (writing ALR-67(V)2/APR-39 procedures with Lee Simmons), including objectives, instructions, results, responsibilities, and evaluation factors (Dkt. 85, pp. 45-46);

contested assignment details (Dkt. 85, p. 47); and TL1's discussions of Task 2 problems with the Home-Code Supervisor (Dkt. 85, pp. 47-48). The court granted in part (Dkt. 94, p. 7); the agency certified full production (Dkt. 102, p. 50 ¶ 3). However, production appears incomplete, lacking key records on the DEWS assignment's relation to ALR-67(V)2 and APR-39 systems. Defendant was ordered to provide a declaration confirming production of all responsive documents regarding Petitioner's second task (Dkt. 94, p. 7; Dkt. 102, p. 50 ¶ 3).

(2) Prior EEO Activity

Agency records document "Prior EEO Activity" during Tour 1 and Tour 2 and confirm an accepted claim concerning "Tours," treating Petitioner's May 2010 report of age and gender discrimination as prior protected activity (Dkt. 141-4, p. 7; Dkt. 141-5, p. 31; Dkt. 149-1, p. 1; Dkt. 134, pp. 72-80).

On May 21, 2010, Petitioner met with Home-Code supervisor Charles Zhang and informed him of the main issues: (i) lack of supervisory support after TL1 Luk denied responsibility at her start, and (ii) exclusion from the SR lab and access restrictions following the April 2010 security violation in which she was not involved (Dkt. 134, pp. 71, 74-76, 77, 78-79, 80-82).

The next day, May 22, 2010, Zhang asked Petitioner to meet with second-level supervisor Diane Rothberg, who advised her to file a formal complaint; Petitioner, fearing repercussions, declined. During this May 22 meeting, Petitioner led Zhang into the SR to show him, as an additional element of the hostile environment, a picture on coworker Chang's SR cubicle wall depicting a dragon surrounding a

headless, limbless human corpse, accompanied by a threatening quote (Dkt. 141-4, p. 5).

However, in his declaration, Zhang testified that Petitioner reported a different image—a PowerPoint chart on the lab wall depicting a dragon with armor and a dropped sword, captioned “No matter how hard I work, the dragon always wins”—shortly after her start in early March 2010, which she said made her feel like a second-class citizen (Dkt. 137, Zhang Decl. at 36–37).

Petitioner had her first meeting for her first assignment in the SR on March 29, 2010 (Dkt. 149-1, p. 12; Dkt. 137, pp. 140, 141). The lab is inside SR 1310 (Dkt. 149-1, p. 38).

To verify these events and the agency’s response, Petitioner sought in discovery:

- SR access logs (Mar. 1, 2010–Feb. 17, 2011) and daily SR sheets (Mar. 1–Jun. 18, 2010); the court granted in part, requiring a declaration confirming no responsive documents existed (Dkt. 85, pp. 35–36; Dkt. 94, pp. 6–7; Dkt. 102, p. 50 ¶ 4).

- Documents/communications on Luk’s and Zhang’s handling of the dragon picture complaint; the court granted in part, requiring a declaration (Dkt. 85, pp. 54–55, 73–74; Dkt. 94, pp. 10, 13; Dkt. 102, p. 50 ¶ 3).

- Documents/communications on Zhang’s handling of Petitioner’s May 2010 hostile work environment complaint and her May 2010 EEO complaint; the court granted in part, but the agency produced only a declaration claiming all

responsive documents were provided (Dkt. 85, pp. 83–84; Dkt. 94, p. 14; Dkt. 102, p. 50 ¶ 3) and provided no documents for the May 2010 EEO complaint (Dkt. 85, pp. 85–86; Dkt. 94, pp. 14–15).

- Documents/communications on NAVAIR management’s handling of the dragon picture complaint and May 2010 EEO complaint (Dkt. 85, pp. 67–68, 68–70; Dkt. 94, p. 12; Dkt. 102, p. 50 ¶¶ 3, 5).

- Documents/communications on Mr. Price’s handling of the dragon picture complaint and Petitioner’s May 2010 hostile work environment complaint; the court granted in part, but the agency produced only a declaration claiming all responsive documents were provided (Dkt. 85, pp. 93–94; Dkt. 94, p. 16; Dkt. 102, p. 51 ¶ 7) and provided no documents for the May 2010 EEO complaint (Dkt. 85, pp. 95–96; Dkt. 94, p. 16).

(3) Supervisory Failures Under ESDP Requirements (Absence of Performance Plan, Feedback, and Evaluation)

Contemporaneous records show emails transmitting Tour 1 JOs and the new task (APR-39/ALR-67 test procedure writing) but contain no task descriptions, expected results, responsibilities, evaluation factors, or training provisions (Dkt. 134, pp. 81–83; Dkt. 85, pp. 28–29, 38–39, 45–47, 51–52; Dkt. 94, pp. 5, 7, 8, 9; Dkt. 102, p. 50 ¶ 3; Dkt. 149-1, p. 13).

No contemporaneous record exists of: (i) Tour 1 feedback or documented performance issues concerning communication, computer skills, or interpersonal skills (Dkt. 85, pp. 30–31; Dkt. 94, p. 5); (ii) TL1 discussion of problems with the HC supervisor, especially regarding task 2 (Dkt. 85, pp. 44–45, 45–47, 47–49; Dkt. 94, pp.

8-9; Dkt. 102, p. 50 ¶ 3); or (iii) documentation of TL1's evaluation of Petitioner's Tour 1 results or joint evaluation with the HC supervisor (Dkt. 85, pp. 49-51, 52-54; Dkt. 94, pp. 9-10; Dkt. 102, p. 50 ¶ 3).

ESDP policy requires a performance plan for each rotational assignment (Dkt. 141-5, p. 9), yet no Tour 1 performance plan appears in the record (Dkt. 85, pp. 25-26; Dkt. 94, p. 4; Dkt. 102, p. 50 ¶ 3).

Tour 1 Recommended Rating

No contemporaneous record exists of: task descriptions, expected results, responsibilities, evaluation factors, or training provisions (Dkt. 134, pp. 81-83; Dkt. 85, pp. 28-29, 38-39, 45-47, 51-52; Dkt. 94, pp. 5, 7, 8, 9; Dkt. 102, p. 50 ¶ 3; Dkt. 149-1, p. 13). No contemporaneous record exists of: documentation of TL1's evaluation of the Petitioner's Tour 1 results or joint evaluation with the HC supervisor (Dkt. 85, pp. 49-51, 51-52, 52-54; Dkt. 94, pp. 9-10; Dkt. 102, p. 50 ¶ 3). The Petitioner's Tour 1 Recommended Rating was 2 (Dkt. 141-4, p. 7).

Beyond the FY2010 annual performance review timeframe (Dkt. 141-4, p. 18), Luk responded on Sunday, November 7, 2010, to Zhang's November 5, 2010 email regarding Petitioner's ratings, stating: M1: met but not at a YD-1 level 3 performance; M2/M4/M5: not rated; lab access was limited and UDF WI had reset problems due to a UDFG issue; and M3: met but not at a YD-1 level 3 performance. (Dkt. 149-1, p. 29). Zhang's ratings differed. (Dkt. 149-1, p. 29; compare Dkt. 149-1, p. 30).

B. Tour 2 (June 21 – September 30, 2010): Unusual Referral, Meaningless Tour Assignments, and ESDP Supervisory Failures and Prior EEO Activity

(1) Unusual Referral

Under ESDP policy, the HC supervisor is responsible for planning developmental tours for the ESDP participant (Dkt. 141-5, p. 4). During the relevant period, Luk was the Petitioner's TL1 (Tour 1 supervisor). He arranged Tour 2 for Petitioner under tour supervisor Ngoc Nguyen in Code 45P300E (Dkt. 149-2, p. 14 (Luk testimony)).

(2) Meaningless Tour Assignments

The ESDP tour supervisor's responsibility is to provide meaningful tour assignments for ESDP participants (Dkt. 141-5, p. 5). However, the Petitioner was not assigned any emitters or other substantive work during Tour 2, leaving her without substantive work assignments under the ESDP framework (Dkt. 134, p. 84). During Tour 2, TL2 Ngoc Nguyen did not assign Petitioner substantive work and did not provide feedback to the HC supervisor, instead deleting, without reading, the email forwarding the HC supervisor's request for feedback, and did not review or evaluate the tour results with Petitioner, as the Agency admits in discovery, leaving no contemporaneous evaluation record (Dkt. 149, pp. 48–49; Dkt. 141, p. 28; Dkt. 85, pp. 61–62; Dkt. 94, p. 11; Dkt. 102, p. 50 ¶ 3). TL2 Nguyen testified that “The record number of the threat simulations that were completed by the Complainant during the tour is still available in the simulation database” (Dkt. 149-2, pp. 20–26).

a. Inconsistencies in TL2's Testimony

- He claimed to provide performance feedback on the Complainant's assigned tasks during Tour 2, but the record shows that Petitioner had forwarded HC supervisor Zhang's email directing employees to obtain feedback from their leads and requested that TL2 provide such feedback, yet TL2 deleted, without reading, the email forwarding that request (Dkt. 149, pp. 48–49), and no contemporaneous record exists of any feedback provided to the HC supervisor (Dkt. 85, pp. 56–57; Dkt. 94, p. 10; Dkt. 102, p. 50 ¶ 3).

- James Huynh was described as an ESDP employee (Dkt. 149-2, pp. 25–26), but he was a YD-2, not YD-1 (Dkt. 149-2, pp. 7, 10; cf. Dkt. 141-4, p. 2).

- Jagpal Gill's recommended ratings did not meet level 3 performance (Dkt. 149-2, p. 26), but his actual ratings were 4 and 4 (Dkt. 149-2, pp. 7, 10) in FY10.

- TL2's name appears as Nguyen, Ngoc Duc in records (Dkt. 134, p. 64) but as Ngoc Nguyen in testimony (Dkt. 149-2, p. 17).

- Position title is SUPV ELECTRONICS ENGINEER (Dkt. 134, p. 64) but Simulation Team Lead, 855, YF-2 in testimony (Dkt. 149-2, p. 17).

- On whether Complainant's EEO activity was a factor: "I am not sure" (Dkt. 149-2, p. 20) vs. "I believe so" (Dkt. 149-2, p. 27).

b. Record Evidence Concerning Tour 2 Assignments

The Petitioner requested all documents and communications containing data on assignments to the Complainant during June 21–September 30, 2010, including productivity reports. The court partially granted, requiring a declaration of full

production (Dkt. 85, pp. 56-57; Dkt. 94, p. 10; Dkt. 102, p. 50 ¶ 3). No contemporaneous records of assignments exist.

Edgar Tomines testified in the Report of Investigation ("ROI"): "Mr. Nguyen [Ngoc Nguyen] did not assign her any tasks for about 2/3 of her tour... during the last 1/3 of her tour, Ms. Nguyen [Petitioner] appeared willing to work, but was seemingly under-tasked." (Dkt. 149-3, p. 28).

At the EEOC hearing, Tomines confirmed that the contractor responsible for assignments, Leroy Frederich, was absent for much of the tour and testified, "So he [Ngoc Nguyen] was not there to assign Petitioner anything." (Dkt. 133, p. 86). He further stated that "there was nothing assigned" during the final third of the tour despite Petitioner's willingness to work. (Dkt. 133, p. 87). Tomines also described Petitioner as capable and competent, noting that during her limited tasking she identified and corrected errors in master documents. (Dkt. 149-3, p. 27; Dkt. 133, p. 83).

(3) Supervisory Failures

ESDP policy requires a performance plan for each rotational assignment (Dkt. 141-5, p. 9), but none appears for Tour 2 (Dkt. 85, pp. 25-26; Dkt. 94, p. 4; Dkt. 102, p. 50 ¶ 3). No contemporaneous records exist of: (i) Tour 2 feedback or issues re: communication/computer/interpersonal skills (Dkt. 85, pp. 64-65; Dkt. 94, p. 11; Dkt. 102, p. 50 ¶ 3); (ii) TL2 discussions with HC supervisor (Dkt. 85, pp. 59-60; Dkt. 94, p. 11-12; Dkt. 102, p. 50 ¶ 3); or (iii) TL2's evaluation or joint evaluation (Dkt. 85, pp. 61-62, 65-67; Dkt. 94, pp. 11-12; Dkt. 102, p. 50 ¶ 3). TL2

confirmed that he did not review and evaluate Petitioner's Tour 2 results with her (Dkt. 141, p. 28).

Tour 2 Recommended Rating

Nevertheless, Agency data recorded a Tour 2 recommended rating of 2 (Dkt. 141-4, p. 9). No contemporaneous documentation identifies TL2 as providing that rating; his comments came only on November 9, 2010, in response to Zhang's email regarding Petitioner's ratings, after the FY2010 appraisal period had ended (Dkt. 149-1, pp. 31–33).

(4) Prior EEO Activity

The Petitioner reported lack of emitter assignments to her HC supervisor (Dkt. 134, p. 84). On August 3, 2010, she forwarded TL2 the HC supervisor's feedback request by September 30, 2010; records show TL2 Nguyen deleted it unread (Dkt. 149, pp. 48–49). She reported this to Zhang (Dkt. 134, p. 87). TL2 Nguyen did not meet the HC supervisor despite attempts (Dkt. 134, p. 84). Agency records document Prior EEO Activity during Tour 1/Tour 2, with an accepted claim concerning "Tours" (Dkt. 141-4, p. 9; Dkt. 141-5, p. 31; Dkt. 134, pp. 72–80).

IV. NSPS Appraisal Process Issues

A. 2010 NSPS Performance Management Calendar Key Dates (Dkt. 141-4, pp. 17–18)

- September 17, 2010: Final employee self-assessment due
- September 30, 2010: 2010 rating cycle ends

- October 8, 2010: Final RO assessments with Higher-Level Reviewer (HLR) approval due
- October 25, 2010: Pay pool panel meetings begin
- October 30, 2010: 2011 performance plan must be entered in PAA for employees on roll as of October 1, 2010

B. Tour 1 NSPS Performance Rating

(1) Official Rating Based on Outdated Job Objectives

The record identifies two primary assigned tasks for Tour 1: (1) testing the ALR-67(V)2 in the Strong Room ("SR") laboratory, and (2) writing APR-39 and ALR-67(V)2 test procedures (Dkt. 137, p. 142; Dkt. 149-2, pp. 8-9; Dkt. 134, p. 81; Dkt. 149, p. 37). Team member Lutfi confirmed these tasks (Dkt. 149-3, pp. 16, 17).

Tour 1 performance was evaluated on measures M1, M2, and M3 (Dkt. 137, p. 48). Petitioner received Tour 1 Job Objectives ("JOs") from Home-Code supervisor Zhang on May 10, 2010; these JOs lacked start/end dates and matched the FY2010 appraisal JOs (Dkt. 149-1, p. 13; compare Dkt. 137, p. 48). Work on the assigned tasks had already begun prior to issuance of the JOs (Dkt. 149, p. 36; Dkt. 137, p. 142).

The May 11, 2010 task assignment email omitted descriptions, expected results, responsibilities, evaluation factors, and training provisions, and deviated from the M3 objective in the FY2010 JOs (Dkt. 149, p. 37; Dkt. 149-1, p. 29). Despite these deficiencies, the FY2010 appraisal rated Petitioner on M3 (Dkt. 137, p. 48).

2. The second section focuses on the role of communication in project management. It highlights the need for clear, concise, and timely communication between all stakeholders involved in a project. The author provides practical advice on how to facilitate effective communication, such as holding regular meetings and using collaborative tools.

3. The third part of the document addresses the challenges of resource allocation. It discusses how to identify and prioritize tasks, allocate resources efficiently, and manage potential bottlenecks. The text includes several examples and case studies to illustrate successful resource management strategies.

4. The final section covers the importance of risk management. It explains how to identify potential risks, assess their impact, and develop mitigation strategies. The author stresses that proactive risk management is crucial for ensuring the success of any project or initiative.

(2) Official Rating Despite Absence of Any TL1 Evaluation Report

See Dkt. 85, pp. 49–50; Dkt. 94, p. 9 (partial grant); Dkt. 102, p. 50 ¶3 (produced all responsive).

(3) Official Rating Based on Absence of Any Interim, Mid-Term, or End-Cycle Reviews/Discussions

See Dkt. 85, pp. 74–76; Dkt. 94, p. 13 (partial grant); Dkt. 102, p. 50 ¶ 3 (produced all responsive).

(4) Official Rating Based on Team Lead Feedback

Zhang testified that he relied on Team Lead feedback in assigning NSPS ratings (Dkt. 137, p. 75). However, discovery produced no contemporaneous TL1 evaluation report (Dkt. 85, pp. 49–51; Dkt. 94, p. 9; Dkt. 102, p. 50 ¶ 3), and no contemporaneous TL1 feedback documentation (Dkt. 85, pp. 30–31; Dkt. 94, p. 9).

C. Tour 2 NSPS Performance Rating

Although TL2 assigned no emitters (Dkt. 134, p. 84; Dkt. 133, p. 86; Dkt. 133, p. 87), the FY2010 NSPS appraisal rated Petitioner on several emitters for Tour 2 (Dkt. 137, p. 50).

D. FY 2010 NSPS Appraisal Mechanism and PAA Functionality

Performance Appraisal Documentation, including Job Objectives and Employee Self-Assessment, auto-populates when the form is generated in the Performance Appraisal Application (PAA) (Dkt. 137, p. 44).

2. The second part of the document focuses on the role of communication in achieving organizational goals. It highlights the importance of clear and concise communication, both internally and externally. The text provides examples of effective communication strategies, such as regular team meetings, open-door policies, and the use of various communication channels like email, phone, and face-to-face interactions. It also discusses the importance of listening and understanding the needs and concerns of all stakeholders.

5. The fifth and final part of the document provides a summary of the key points discussed and offers some concluding thoughts. It reiterates the importance of maintaining accurate records, effective communication, time management, and continuous learning. The text ends with a call to action, encouraging individuals to implement the strategies discussed and strive for excellence in their work.

(1) Tour 1 NSPS Appraisal Issue

- Tour 1: April 1, 2010 – June 18, 2010 (Dkt. 137, p. 48)
- Tour 1 JOs received: May 10, 2010 (Dkt. 149-1, p. 13)
- Tour 1 Task 2 (New Task) started: May 12, 2010 (Dkt. 149, p. 37)
- Final Employee Self-Assessment due: September 17, 2010 (Dkt. 141-4, pp. 17–18)
- Tour 1 NSPS Appraisal Last Modified: May 11, 2010 (Dkt. 137, p. 48)
- Tour 1 Employee Self-Assessment must appear in the PAA between May 12, 2010, and September 17, 2010. (Dkt. 149, p. 37; compare Dkt. 141-4, pp. 17–18)

(2) Tour 2 NSPS Appraisal Issue

- Tour 2: June 21, 2010 – September 30, 2010 (Dkt. 137, p. 50)
- Tour 2 JOs received: June 17, 2010 (Dkt. 137, p. 25)
- Tour 2 started: June 21, 2010 (Dkt. 137, pp. 12, 25)
- Tour 2 NSPS Appraisal Last Modified: June 17, 2010 (Dkt. 137, p. 50)

(3) NSPS Higher Level Reviewer Issue

The Higher Level Reviewer is listed as Gabaldon, Grace T., who signed October 12, 2010, in the ANNUAL ASSESSMENT column (Dkt. 137, p. 85). Mark Roth assumed Gabaldon's position in June 2010 (Dkt. 134, p. 57; Dkt. 149-2, p. 38).

E. Termination Decision-Making Process

In October 2010, deciding official Mark Price decided to terminate Petitioner's employment (Dkt. 149-2, p. 34; Dkt. 137, p. 100). Price participated in the "end of year performance evaluation (Oct. 2010)," and HR testified that termination discussions

began during the annual performance review process and focused on Petitioner's "performance rating of 2" (Dkt. 149-2, pp. 32, 34; Dkt. 137, pp. 100, 118). HC supervisor Charles Zhang issued the official performance ratings, which Price later relied upon in terminating Petitioner (Dkt. 137, p. 45). Agency records identify "Prior EEO Activity" during both Tour 1 and Tour 2 and confirm an accepted EEO claim concerning "Tours," recognizing Petitioner's May 2010 report of age and gender discrimination as prior protected activity.

F. Receipt of NSPS Appraisal and EEO Contact

Petitioner received the NSPS Performance Appraisal on January 10, 2011 (Dkt. 137, p. 92). Petitioner contacted EEO Counselor Rosa on February 9, 2011 to challenge her NSPS appraisal as discriminatory and retaliatory. (Dkt. 141-1, p. 37).

V. Termination and Stated Reasons

A. Notice of Termination

On February 16, 2011, Petitioner received a Notice of Termination, effective February 17, citing (1) poor performance ratings and (2) inability to secure a third tour assignment (Dkt. 141-5, pp. 25-27).

The Notice attributed deficiencies—including poor grammar, limited vocabulary, deficient documentation, and inadequate communication—to feedback from both Tour 1 and Tour 2 Team Leads (Dkt. 141-5, pp. 25-27). But Tour 2 involved emitter-simulation work, not a document-writing assignment: its Job Objective concerned emitter simulation development (Dkt. 137, p. 50), and Edgar Tomines testified that the group built emitter simulations and that TL2 assigned Petitioner

no emitters (Dkt. 133, pp. 86–87). Discovery produced no contemporaneous Tour 2 feedback or evaluation documentation supporting those alleged deficiencies (Dkt. 85, pp. 64–67; Dkt. 94, pp. 11–12; Dkt. 102, p. 50 ¶ 3).

The second stated reason conflicted with the ESDP, which required the HC supervisor to assist the participant in planning tours and provided that developmental assignments would be planned, performed, and evaluated with assistance of the HC and assignment supervisors during the first 1–2 years (Dkt. 141-5, p. 4; Dkt. 141-4, p. 47). Yet the required six-week Development Plan establishing Petitioner's tour schedule was never completed. Tour 2, Code 45P300E, was outside Petitioner's Home Code, satisfying the requirement that one tour be outside the Home-Code department (Dkt. 141-3, p. 49; Dkt. 141-4, p. 47). Petitioner thereafter worked briefly on the ALE-50/55 decoy before that work stopped for lack of funding (Dkt. 149-1, pp. 21–22), further undermining the stated inability to secure a third tour.

B. Additional Policy and Procedural Matters

ESDP policy requires a performance-based retention review at 9 months of employment, with termination for those who fail (Dkt. 141-4, p. 49). No record exists of any such review during Petitioner's first 9 months (Dkt. 85, pp. 76–78; Dkt. 94, p. 13 (partial grant); Dkt. 102, p. 50 ¶3 (all responsive documents produced)).

The SF-52 form was signed by HR official Elain Tersigni in February 2017, approximately six years after termination (Dkt. 102, pp. 20–21).

VI. District Court and Ninth Circuit Proceedings

A. District Court Proceedings

In the district court proceedings, Respondent moved for summary judgment. The district court granted summary judgment in Respondent's favor. (Pet.App.8a). The district court's analysis did not address key evidence supporting Petitioner's preserved theories, including evidence concerning supervisory deprivation and conditions-based hostile work environment. The district court's discovery and evidentiary rulings limited the record available to oppose summary judgment, including rulings in Order 108 concerning Exhibit 1 issues, and Order 151 striking materials identified by Petitioner as Exhibit 1. (Orders 108, 151)

B. Ninth Circuit Proceedings

Petitioner appealed. The Ninth Circuit affirmed by memorandum disposition. (Pet.App.1a). The Ninth Circuit also granted Respondent's motion to strike certain exhibits submitted on appeal. (Order granting motion to strike). Petitioner sought rehearing and rehearing en banc, which the Ninth Circuit denied on August 21, 2025. The Ninth Circuit did not analyze Petitioner's preserved evidence and theories concerning the discriminatory FY2010 NSPS appraisal, SF-52 anomalies, and prior EEO activity. (Pet.App.1a).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Misapplied This Court's Hostile-Work-Environment Framework by Failing to Analyze Conditions Altering the Terms and Conditions of Employment

The Ninth Circuit affirmed summary judgment without applying this Court's totality-of-the-circumstances analysis to Petitioner's preserved evidence that (1) mandatory ESDP supervisory functions governing her developmental work and evaluation were denied throughout her tours, and (2) her assigned work was separately restricted and disrupted. By reducing the supervisory-denial issue to confusion over "managerial structure" while leaving the work interference unanalyzed, the court failed to address the conditions under which Petitioner actually worked and was evaluated. (Pet.App.4a-6a).

The error began with the district court's description of Luk's supervisory designation as occurring only "before she started." (Pet.App.12a). But a March 6 record—after Petitioner's March 1 entry on duty—still identified Luk as her supervisor, and the Agency later admitted that Luk denied serving as her supervisor. (Dkt. 137, p. 17; Dkt. 141, p. 30). The Ninth Circuit followed that narrowed framing, asking why TL1's denial that he was Petitioner's "supervisor" was itself "objectively offensive" and suggesting that Petitioner misunderstood her "managerial structure." (Pet.App.6a). It separately addressed the "Dragon" incident and characterized remarks concerning age, Petitioner's master's degree, and the men's restroom as insufficient or ordinary workplace tribulations. (Pet.App.5a-6a). But Petitioner did not rely on the supervisor denial as independently offensive; she challenged the

resulting and continuing denial of mandatory ESDP supervisory functions governing the conditions under which she worked and was evaluated.

The ESDP defined those functions. The HC Supervisor was responsible for orientation and workplace resources, establishing the Engineer & Scientist Development Plan within six weeks, assisting in planning and evaluating developmental assignments, and evaluating retention during the first nine months; Tour Supervisors were responsible for providing meaningful assignments, discussing objectives, expected results, responsibilities, evaluation factors, and training, reporting progress and problems, and reviewing and evaluating tour results with the participant. (Dkt. 141-5, pp. 3-5, 9; Dkt. 141-4, p. 47). These requirements governed the conditions under which Petitioner's developmental work was planned, supervised, and evaluated.

The supervisory irregularities continued during Petitioner's first month. Although she entered on duty March 1, she was not included in the HC Supervisor's March 8 NSPS Plan/Interim Review distribution; on March 17, the HC Supervisor advised TL1 that Petitioner was cleared and "ready to go for your project." By March 29—two days before the Interim Review deadline—second-level supervisor Rothberg stated that Petitioner would work with TL1 to form NSPS objectives for his work, and later that morning Petitioner received her first assignment through an invitation labeled "Peer Review." (Dkt. 149-1, pp. 12, 34; Dkt. 137, p. 19). Thus, nearly a month after entry, her developmental objectives and assignment were still being arranged.

The supervisory noncompliance continued through Tour 1. The HC Supervisor did not establish the required six-week Development Plan, and no Tour 1 performance plan was produced. Nor did discovery produce contemporaneous documentation of the required task descriptions, expected results, responsibilities, evaluation factors, training, feedback, problem discussions, or evaluation of Tour 1 results. (Dkt. 141-5, p. 9; Dkt. 85, pp. 25-31, 38-39, 44-54; Dkt. 94, pp. 4-5, 7-10; Dkt. 102, p. 50 ¶ 3). Yet the Agency later reported a recommended Tour 1 rating of 2. (Dkt. 141-4, p. 7).

The same noncompliance continued into Tour 2. After the six-week planning period expired without the required Plan, TL1 arranged Petitioner's Tour 2 assignment. (Dkt. 149-2, p. 14; Dkt. 137, p. 23). Although the ESDP required meaningful tour assignments, TL2 did not assign Petitioner a specific emitter simulation to perform under her Tour 2 Job Objective; Petitioner instead sought already-completed work from coworkers to practice and learn. (Dkt. 141-5, p. 5; Dkt. 134, pp. 84-86). No Tour 2 performance plan or contemporaneous documentation of required feedback, HC-supervisor discussions, or evaluation was produced, and TL2 did not review or evaluate the tour results with Petitioner. (Dkt. 85, pp. 25-26, 59-62, 64-67; Dkt. 94, pp. 4, 11-12; Dkt. 102, p. 50 ¶ 3; Dkt. 141, p. 28). Yet the Agency later reported a recommended Tour 2 rating of 2. (Dkt. 141-4, p. 9).

The noncompliance continued through the NSPS performance process. No Interim, Mid-Term, or End-Cycle Review was produced, yet the HC Supervisor ultimately assigned ratings of 2 to both tours. (Dkt. 85, pp. 74-76; Dkt. 94, p. 13; Dkt.

102, p. 50 ¶ 3; Dkt. 137, pp. 48, 50). Thus, the same supervisory failures governing Petitioner's developmental work also affected the conditions under which that work was officially evaluated.

Separate from those supervisory failures, Petitioner's assigned work was directly interfered with. She was excluded from the Strong Room containing the ALR-67(V)2 laboratory needed for assigned testing and required to attend security training despite no violation attributed to her. (Dkt. 134, p. 82; Dkt. 149-2, p. 9). These acts separately restricted her ability to perform assigned work and must be considered with the continuing supervisory noncompliance under the totality of the circumstances.

The courts' narrowed approach conflicts with this Court's framework. *Harris* requires consideration of all circumstances affecting the conditions of employment, including interference with work performance. 510 U.S. at 22–23. *Faragher* requires workplace conduct to be evaluated in context, 524 U.S. at 787–88, and *Morgan* recognizes the cumulative effect of related conduct. 536 U.S. at 115–17. The courts therefore could not isolate Luk's supervisor-denial remark while leaving unanalyzed the continuing supervisory noncompliance and separate interference with Petitioner's assigned work.

Viewed as a whole, Petitioner's evidence concerned the conditions under which she was required to work and be evaluated—not merely “managerial structure.” The continuing denial of mandatory ESDP supervision affected how her developmental work was planned, assigned, supervised, and evaluated, while separate interference

restricted her ability to perform that work. By failing to consider those conditions cumulatively, the courts bypassed the required terms-and-conditions and totality-of-the-circumstances inquiry. Certiorari is warranted.

II. The Courts Below Failed to Analyze Petitioner's Preserved Challenge to the FY2010 NSPS Performance Appraisal as a Retaliatory Action Under the Pretext Framework

"Prior EEO activity" refers to Petitioner's protected complaints of age and gender discrimination during her ESDP tours in 2010, as reflected in agency investigative records (Dkt. 141-4, pp. 7, 9; Dkt. 141-5, p. 31; Dkt. 149-1, p. 1), which are distinct from her February 9, 2011 contact with an EEO counselor challenging the FY2010 NSPS performance appraisal.

The district court and the Ninth Circuit granted and affirmed summary judgment by accepting the agency's asserted "poor performance" justification without analyzing Petitioner's preserved discriminatory and retaliatory challenge to the FY2010 NSPS performance appraisal that supplied that justification.

The record reflects that the FY2010 NSPS performance appraisal was issued on January 10, 2011 (Dkt. 137, p. 92), and the agency's Precomplaint Worksheet identifies that same date as the "date of action giving rise to complaint," confirming that the appraisal was the triggering event for Petitioner's February 9, 2011 EEO contact (Dkt. 141-1, p. 37). Petitioner timely contacted an EEO counselor on February 9, 2011 to challenge that appraisal while still employed. Only after the termination notice was issued on February 16, 2011, effective February 17, 2011, did Petitioner add termination as a separate issue during counseling, at the counselor's request and

upon Petitioner's express election. In an April 5, 2011 email, Petitioner stated: "I want to include Termination from employment as an issue in my current informal complaint," and the agency's EEO report records this amendment as "Email from Complainant adding Termination as basis of complaint" (Dkt. 141-2, pp. 3, 28).

These were distinct claims—an earlier appraisal-based challenge and a later-added termination claim—but the courts below treated them as one and failed to analyze whether the appraisal itself constituted a retaliatory action following Petitioner's prior EEO activity.

Petitioner also presented record evidence undermining the agency's asserted inability to secure a third tour. The record reflects that required tour planning assistance was not provided under ESDP policy (Dkt. 141-5, p. 4; Dkt. 141-4, p. 47). At the same time, Petitioner had already satisfied the ESDP requirement that "[o]ne tour must be taken outside the Home-Code department" (Dkt. 141-4, p. 47). Consistent with that eligibility, Petitioner began working for a few days on the ALE-50/55 decoy, but was then stopped for lack of budget (Dkt. 149-1, pp. 21–22). These facts further demonstrate that the courts below accepted the agency's asserted justification without analyzing record evidence bearing on its credibility.

The district court referenced the appraisal only as background and as support for the agency's asserted performance deficiencies (Pet.App.24a–27a), and relied on those asserted deficiencies to reject discrimination claims (Pet.App.27a–33a). But it did not analyze Petitioner's challenge to the validity of the appraisal process itself, including evidence from the record that the ratings lacked defined performance

criteria, that no contemporaneous evaluation was reflected for either tour, and that the ratings were derived from assessments recorded after the work was completed (Dkt. 137, pp. 47–50; Tour 1 evaluation: Dkt. 85, pp. 49–51; Dkt. 94, p. 9; Dkt. 102, p. 50 ¶ 3; Tour 2 evaluation: Dkt. 85, pp. 61–62, 65–67; Dkt. 94, pp. 11–12; Dkt. 102, p. 50 ¶ 3; Dkt. 141, p. 28), despite governing ESDP requirements that such evaluations be conducted and documented (Dkt. 141-4, pp. 45–50). For example, Petitioner’s Job Objectives lacked defined evaluation factors, no interim review report was generated, and no tour evaluation report exists for Tour 2; for Tour 1, the agency identified only informal verbal or email feedback rather than a documented evaluation report. These records show that no contemporaneous evaluation reports were created and that the appraisal entries instead reflect after-the-fact assessments, including timing inconsistencies with the tours (Dkt. 137, pp. 47–50; Dkt. 141, pp. 26–28).

The district court did not analyze retaliation with respect to the FY2010 NSPS performance appraisal. Instead, it confined its retaliation analysis to the termination action, focusing on Petitioner’s February 9, 2011 EEO contact and a “dragon” poster complaint, and concluding that Petitioner failed to establish protected activity or a causal connection to the termination, without addressing whether the appraisal itself could constitute retaliatory conduct (Pet.App.39a–43a). In doing so, the court failed to address record evidence of Petitioner’s prior protected EEO activity during her ESDP tours, including a May 2010 discrimination report identified in the agency’s reprisal analysis (Dkt. 141-4, p. 7, 9; Dkt. 141-5, p. 31; Dkt. 149-1, p. 1). By limiting its analysis to termination and omitting this prior EEO activity, the court failed to

consider whether earlier actions—particularly the FY2010 NSPS appraisal—could constitute retaliatory conduct.

The district court also did not address record evidence that the removal decision arose during the October 2010 annual review process, as reflected in testimony linking that decision directly to Petitioner's FY2010 performance rating (Dkt. 149-2, p. 34), and corroborated by contemporaneous evidence that management was documenting alleged underperformance in the performance evaluation system in October 2010 (Dkt. 137, p. 100). Yet the subsequent Notice of Termination, issued on February 16, 2011, added an asserted inability to secure a third tour as a basis for removal (Dkt. 141-5, pp. 25–27). The district court did not analyze this sequence or consider whether the asserted justification bore on the credibility of the employer's stated basis for termination.

The Ninth Circuit repeated these omissions. It addressed retaliation only with respect to the February 17, 2011 termination, holding that Petitioner failed to establish protected activity or a causal connection between her February 9, 2011 EEO contact and that action (Pet.App.6a–7a). In doing so, the court likewise did not consider record evidence that the removal decision arose during the October 2010 annual review process and was tied to Petitioner's FY2010 performance rating (Dkt. 149-2, p. 34), nor did it analyze whether the FY2010 NSPS performance appraisal itself constituted a retaliatory action. It also did not consider whether the asserted termination rationale—including the later-added inability to secure a third tour—reflected post hoc reasoning bearing on the credibility of the employer's stated basis

for termination, thereby limiting its analysis to the final termination while ignoring earlier actions arising from the same appraisal process.

Petitioner also presented record evidence of prior EEO activity and retaliation in her petition for rehearing and rehearing en banc, but the court denied rehearing without addressing whether the FY2010 NSPS performance appraisal itself constituted a retaliatory action.

Under this Court's pretext framework, once a plaintiff challenges the factual basis of an employer's justification, courts must evaluate whether that justification is unworthy of credence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000). By collapsing the challenged appraisal into the later termination action and accepting the performance-based justification without examining the validity of the underlying appraisal process or considering record evidence bearing on the timing and credibility of the employer's stated reasons, the courts below failed to apply that framework.

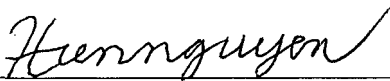
This case presents an important and recurring question concerning summary judgment in employment discrimination cases: whether courts may accept an employer's later performance-based termination rationale without analyzing a plaintiff's preserved challenge to the discriminatory and retaliatory appraisal process that generated the ratings used to support that action, or considering record evidence bearing on the timing and credibility of that rationale. The decision below permits courts to bypass the pretext inquiry required by *Reeves v. Sanderson Plumbing Products, Inc.* by treating disputed performance appraisals and related termination

justifications as undisputed facts rather than contested employment actions. Review is warranted to ensure that courts properly evaluate appraisal-based evidence and do not insulate potentially discriminatory or retaliatory performance systems from judicial scrutiny. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Hien Thi Nguyen
Petitioner, Pro Se
17763 Lull Street
Reseda, CA 91335
(818)926-7885
bichhien999@gmail.com

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