

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 12-20471

BOBBI-ANNE TOY,

Plaintiff-Appellant

VS.

ERIC H. HOLDER, JR., Attorney General,
United States Department of Justice,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Honorable David Hittner

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Bobbi-Anne Toy (now Bobbi-Anne Larson) (Appellant)

David C. Holmes (Counsel for Appellant)

Eric H. Holder, Jr., Attorney General (Appellee)

Federal Bureau of Investigation (Agency)

Julie Searle, Assistant U.S. Attorney (Trial Counsel for Appellees)

Keith Shaitelman, Assistant United States Attorney (Trial Counsel for Appellees)

/s/ David C. Holmes
Attorney of Record for Appellant

STATEMENT CONCERNING ORAL ARGUMENT

This case presents a question of first impression in this Circuit: whether the national security exemption under Title VII of the Civil Rights Act of 1964 applies outside of the context of the denial or revocation of a security clearance (or the equivalent). Oral argument would assist the Court in deciding that issue.

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JURISDICTIONAL STATEMENT

This is a suit under Title VII of the Civil Rights Act of 1964. The district court had original jurisdiction under 28 U.S.C. § 1331 because this is a federal question case and because the defendant is a federal officer.

The district court entered a final judgment on May 18, 2012. R858. Ms. Toy filed a notice of appeal on July 8, 2012 (R861), which is within the sixty-day period provided by Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether a federal agency can exempt itself from Title VII of the Civil Rights Act of 1964 simply by revoking the building access of a terminated employee and then invoking the national security exemption in Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

This is a gender discrimination suit under Title VII. After exhausting her administrative remedies through the FBI, Ms. Toy exercised her judicial remedies by filing this lawsuit. R5. The FBI moved to dismiss the lawsuit, arguing that the district court lacked jurisdiction on account of the national security exemption in Title VII. R34. The district court granted that motion and dismissed the case. R841. Ms. Toy timely appealed. R861.

STATEMENT OF FACTS

Ms. Toy brought this action for gender discrimination and retaliation under Title VII.¹ Because the district court did not reach the merits of her claim, most of the underlying facts are immaterial to this case. The relevant facts are simple.

Ms. Toy worked as a civilian contractor at the FBI's Beaumont regional office. R5-6. She applied for a position as an FBI employee and received a conditional offer of employment. R6.

Ms. Toy had an ongoing series of incidents with the head of the Beaumont regional office (Brett Davis), which form the basis for the gender discrimination claim. On July 13, 2004, based on false information supplied by Davis, Ms. Toy's direct supervisor in Houston (Carlos Barron) canceled Ms. Toy's building access and purported to revoke her security clearance. Once this happened, the company for which Ms. Toy worked had no choice but to terminate her. R7.

Ms. Toy initiated an EEO proceeding at the FBI on the day when she was terminated. FBI personnel, including Mr. Barron, subsequently gave negative references in connection with Ms. Toy's conditional job offer. R7. The FBI withdrew the conditional job offer on the basis of those references. This is the basis for Ms. Toy's retaliation claim, as well as a part of her gender discrimination claim.

¹ After the filing of this lawsuit, Ms. Toy got married. Her legal name is now Bobbi-Anne Larson.

In fact, the FBI personnel in Houston and Beaumont had no authority to revoke Ms. Toy's security clearance. R433-44. The FBI has an extensive set of procedures for the revocation of security clearances, and none of those procedures were ever invoked. R425-30. Instead, Ms. Toy's top-secret security clearance remained intact and apparently remains in full force and effect today. R434-45.

During a prior evidentiary hearing before an EEOC administrative law judge, all of this was explained by Wylene Haase of the FBI. Ms. Haase is a special agent of the FBI in San Francisco. R424. Ms. Haase is unit chief of the analysis and investigations unit, which handles security clearances. R425-26. Ms. Haase testified that security clearances for government contractors are handled through the Defense Intelligence Security Clearance Office ("DISCO"), which is part of the Department of Defense. R426-27. In the case of a contract employee, Ms. Haase explained that DISCO holds the security clearance:

If the individual has a DISCO clearance, a top secret clearance from DISCO, DISCO holds the clearance and they pass it over to the FBI. And we would make a notation in our security system so that that contractor can come into the FBI and access our space and information.

R427. If there are security concerns about an employee, Ms. Haase's division "adjudicates" those concerns. R430-31.

Ms. Toy was a contractor, so DISCO held her security clearance. R429. Ms. Haase's division never adjudicated any security concerns regarding Ms. Toy.

R432-33. Ms. Haase testified that Ms. Toy did not lose her security clearance. R434-35. In fact, Ms. Toy's supervisors did not have authority to pull her security clearance. R434. After the FBI discharged Ms. Toy, it asked DISCO to delete the FBI from DISCO's security clearance. R436.

The FBI personnel in Houston and Beaumont had authority to revoke only Ms. Toy's access to the FBI regional office. R429. This is no different from the denial of building access to any other terminated federal employee or contractor.

Nonetheless, the FBI invoked the national security exemption to Title VII and moved to dismiss the lawsuit. R43. Surprisingly, the district court agreed and dismissed the case. R841. Ms. Toy now appeals that ruling.

SUMMMARY OF ARGUMENT

The national security exemption to Title VII forecloses judicial review of the denial or revocation of a security clearance or the equivalent by a federal agency. It does not apply to every federal employee whose building access is revoked after he or she is terminated. In fact, the national security exemption has never been applied in any case that did not involve a security clearance or the equivalent.

When the FBI fired Ms. Toy, it did not revoke her security clearance. Instead, it revoked her access to the FBI's office, which is the same thing that happens to every former employee. The national security exemption thus has no

application to this case, because this case does not involve the denial or revocation of a security clearance.

The district court's application of the national security exemption to the facts of this case is a vast and unwarranted extension of the exemption. This appears to be the first case in which a federal agency has even argued that the national security exemption applies to something other than denial or revocation of a security clearance or the equivalent. Certainly, no court has ever suggested that the exemption reaches something like denial of building access.

Under the district court's ruling, any federal agency can immunize itself from scrutiny under Title VII simply by revoking a fired employee's building access and then invoking the national security exemption. Furthermore, local employees of an agency can immunize their own actions in this manner. The district court's decision is bad law and bad policy. The Court should reverse the ruling of the district court.

ARGUMENT

I. Standard of Review

The district court characterized the FBI's motion as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). R846. Nonetheless, the district court correctly recognized that the FBI's arguments were a challenge to subject matter jurisdiction. R848 (identifying the issue as whether "this Court has

jurisdiction to adjudicate Plaintiff's claims"). Accordingly, the FBI's motion is properly treated as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

The FBI made a "factual" challenge to the district court's jurisdiction, in that the FBI presented extensive evidence outside of the pleadings in an effort to prove that the national security exemption applied. R43, 47. Accordingly, Ms. Toy had the burden of proving the existence of subject matter jurisdiction by a preponderance of the evidence. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981). The district court's determination of the issue is subject to *de novo* review in this Court. *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857 (5th Cir. 2003).

II. The National Security Exemption Applies Only to Security Clearances, Not to the Routine Revocation of Building Access for a Terminated Employee.

Title VII provides a national security exemption that applies to employees who are denied clearance under "any requirement imposed in the interest of national security of the United States under any security program pursuant to or administered under any statute of the United States or any Executive Order of the President." 42 U.S.C. § 2000e-2(g). The Supreme Court recognized a similar exemption for non-Title VII cases in *Department of the Navy v. Egan*, 484 U.S. 518 (1988) (civil service appeal to the Merit Systems Protection Board). This Court applied that exemption in *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995).

However, both the statutory exemption in Title VII and the non-statutory exemption from *Egan* apply only to security clearances or the functional equivalent. Section 2000e-2(g) in Title VII applies only to “security programs” imposed “in the interest of national security” pursuant to “any statute of the United States or any Executive Order.” In *Egan*, the Supreme Court dealt specifically with security clearances. 484 U.S. at 526-30. Likewise, this Court’s decision in *Perez* involved the revocation of a top-secret security clearance. 71 F.3d at 514-15.

Ms. Toy never lost her security clearance. As a civilian contractor, Ms. Toy received a top-secret security clearance through DISCO. R427-29. Two weeks after she was terminated, the FBI sent a memo to DISCO stating that she was no longer “required” by the FBI and that she should be deleted from DISCO’s records as having access to FBI information. R593. However, the top-secret security clearance through DISCO was never revoked. As the FBI’s own witness (Wylene Haase) acknowledged, DISCO simply deleted the FBI from its clearance. R436.

When the FBI wishes to revoke a security clearance, there is a specific procedure in place to “adjudicate” the clearance within the FBI. R429-32. The FBI did not “adjudicate” Ms. Toy’s security clearance. R432-33.

The Houston and Beaumont personnel for the FBI did not have authority to revoke Ms. Toy’s security clearance. Ms. Haase of the FBI was clear about this:

Q. . . . [T]o be very clear, the Houston personnel, Mr. Barron and Mr. Davis, those folks, the Houston/Beaumont folks, they did not have the authority to revoke somebody's top secret security clearance, correct?

A. That's correct.

R434. Instead, the local FBI personnel had authority to revoke only Ms. Toy's building access. Mr. Barron, who made the decision, admitted that he did not revoke her security clearance:

Q. Okay. You say that her clearance was revoked at the July 13th meeting. You understand that -- did you understand that you were revoking her top secret security clearance?

A. I was revoking her access to the Houston FBI space.

Q. That's different than a top secret security clearance, isn't it?

A. Yes.

R536-37.

On its face, the national security exemption has no application to the FBI's revocation of Ms. Toy's building access. This is true for several reasons:

- (1) Building access is not a security clearance. Even employees who have no security clearance at all have building access.
- (2) Building access is not part of a "security program."
- (3) Building access is not governed by "a statute of the United States" or "an Executive Order."

In sum, the revocation of Ms. Toy's building access does not implicate the national security exemption.

Notwithstanding those facts, the district court concluded that other circuits have held that the national security exemption and *Egan* apply outside of the context of a security clearance. R851-52. This is incorrect.

The first case cited by the district court is *Brazil v. Department of the Navy*, 66 F.3d 193 (9th Cir. 1995), which involved a Nuclear Weapons Personnel Reliability Program certification. The Ninth Circuit stated: "Although PRP certification is not the same as a security clearance, the Navy is anxious to treat it as such, and Brazil acquiesces. Thus we will treat PRP certification and security clearance decisions as equivalent for purposes of this opinion." *Id.* at 195 n.1. In fact, the Ninth Circuit framed the question as "whether a federal court may, in the context of a Title VII discrimination case, review the Executive's decision to revoke a security clearance or the equivalent thereof." *Id.* at 195. *Brazil* involved the equivalent of a security clearance, not the mere revocation of building access.

The second case cited by the district court is *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996). *Becerra* actually involved the revocation of a security clearance. The Fourth Circuit simply held that the instigation of a security investigation that leads to the revocation of a security clearance is within the scope of the national security exemption. *Id.* at 149.

The final case cited by the district court is *Beattie v. United States*, 949 F.2d 1092 (10th Cir. 1991). As the district court acknowledged, the discussion of the national security exemption was in dicta. In fact, the employee's security clearance had not been revoked. In a footnote, the Tenth Circuit noted that, if the employee's security clearance had been revoked, that *Egan* would impose a barrier to any recovery. *Id.*, at 1095 n.3. It is difficult to see how this supports the notion that the national security exemption extends beyond security clearances.

In sum, a review of the relevant case law under the national security exemption reveals that:

- (1) No court has ever held that the national security exemption applies to something less than the denial of a security clearance or the equivalent; and
- (2) Apparently, no federal agency (other than the FBI in this case) has ever argued that a Title VII claim was barred by the revocation of an employee's building access after their termination.

The district court expanded the scope of the national security exemption beyond the bounds of the statute, the holding in *Egan*, and all prior case law.

Having held that the national security exemption applies to the revocation of building access, the district court then opines that, in order to decide the Title VII claim, the court would need to "investigate and weigh the FBI's rationale for

revoking access to the office.” R853. This is true for every terminated federal employee. The FBI personnel in Houston and Beaumont did not have authority to revoke Ms. Toy’s security clearance or to adjudicate security concerns. If they had followed the FBI’s procedures for revocation of security clearances, and if Ms. Toy’s security clearance had been revoked, then the national security exemption would indeed apply. But that did not happen. This was just a routine firing of a civilian contractor.

In the district court, the FBI argued that it did not just revoke Ms. Toy’s building access, but also “rescinded her access to FBI information [and] computer systems.” R584. This is true for every terminated employee. Fired employees cannot come back to the FBI’s offices and access the computer systems. The national security exemption is not implicated by anything less than denial of a security clearance or the equivalent.

In sum, the national security exemption has clearly defined boundaries. It applies to security clearances and the equivalent. It does not apply to every termination of an employee. The present case does not implicate the national security exemption. The district court thus erred by dismissing this lawsuit, and this Court should reverse that decision.

III. Under the District Court's Rationale, Any Federal Agency Can Exempt Itself from Title VII Simply by Revoking a Fired Employee's Building Access.

As the Court is well aware, every federal agency has some sort of security procedure and some sort of building access procedure. If one of the Marshals at the Fifth Circuit courthouse quits or is fired, that Marshal will no longer have access to the Marshals' office, will no longer have access to the Marshals' computer systems and information, will no longer have access to secured sections of the courthouse, and will no longer have the right to carry a firearm in the courthouse.

This is true for every agency, from ICE to Social Security to the Treasury to the National Park Service. All of these agencies have secret information, all of them have private computer systems, and all of them have non-public areas. Ex-employees lose their access, just as they do in the private sector.

Under the district court's reasoning, the national security exemption swallows Title VII when it comes to federal agencies. A federal agency need only revoke "secured building access" or "access to secured information," and the courts instantly lose jurisdiction over any Title VII claim. This was not the intent of Congress in enacting the national security exemption to Title VII, as shown by the language requiring a "security program" and tying the exemption to "statutes" and Executive Orders. Likewise, the district court's reasoning finds no support in

the reasoning of the Supreme Court in *Egan*. The national security exemption is limited to actual national security issues under actual security programs enacted by Congress or the President. It does not apply to routine employee terminations.

In this case, the FBI employees who revoked Ms. Toy's building access are the same employees who she accuses of gender discrimination and retaliation. Local FBI employees are not entitled to immunize themselves from scrutiny under Title VII by revoking a security clearance. Instead, they must invoke the appropriate procedures within the agency to revoke a security clearance, and the FBI must adjudicate the issue. As shown by Ms. Haase's testimony, the FBI does not take the revocation of security clearances lightly.

Under the district court's reasoning, however, individual FBI employees can invoke a doctrine that is rooted in the separation of powers in order to save themselves from scrutiny. They need only revoke building access, which is not subject to higher level scrutiny within the FBI.

In sum, the district court's decision is both bad law and bad policy. There is no reason in the law or in common sense to permit a federal agency and its employees to immunize themselves from a discrimination or retaliation claim under Title VII. This Court should reject the district court's reasoning and reverse the dismissal of Ms. Toy's claims.

CONCLUSION

Revocation of an employee's building access does not trigger the national security exemption to Title VII. This Court should therefore reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Brief was sent to counsel for Appellee, Kenneth Lee Shaitelman, 1000 Louisiana, Suite 2300, Houston, Texas 77002, on September 24, 2012, by regular mail or electronically.

/s/ David C. Holmes

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