No. 12-20471

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOBBI-ANNE TOY,

Plaintiff-Appellant,

v.

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, CIVIL NO. 4:10-CV-05155

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be denied. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. FED. R. APP. P. 34(a)(2)(C).

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Eric H. Holder, Jr., Attorney General, United States Department of Justice, files this brief in response to that of Plaintiff-Appellant Bobbi-Anne Toy.

STATEMENT OF JURISDICTION

Bobbi-Anne Toy ("Toy") appeals from the final judgment entered by the district court (Hittner, J.) on May 18, 2012. (R. 858).[1] The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964 ("Title VII"). (R. 5). Toy filed a timely notice of appeal on July 6, 2012 (R. 861-62), FED. R. APP. P. 4(b)(2), thereby vesting this Court with jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

> Whether the district court properly dismissed Toy's claims of discrimination and retaliation, given (1) the Supreme Court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988), and (2) the explicit "national security" exemption in Title VII.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

This is an employment case. On December 22, 2010, Toy filed this action in the United States District Court for the Southern District of Texas against Attorney General Eric H. Holder, Jr. ("Defendant"). (R. 5). Defendant filed a combined motion to dismiss and for summary judgment on February 1, 2012. (R. 29).

[1] "R." refers to the record on appeal; the number following refers to the page.

Toy filed her response on February 27, 2012. (R. 284). In support of his motion to dismiss, Defendant filed a reply on March 22, 2012. (R. 582). On this date, Defendant also requested an extension of time from the district court to file a reply in support of his summary judgment motion. (*Id*.)

On March 24, 2012, Toy filed a sur-reply in which she both addressed the arguments made by Defendant in his reply and challenged Defendant's request for an extension of time. (R. 595). Despite Toy's challenge, Defendant filed a reply in support of his summary judgment motion nine days later, on April 2, 2012. (R. 599).

In an order dated May 18, 2012, the district court granted Defendant's motion to dismiss and entered final judgment. (R. 841, 858). On July 6, 2012, Toy filed a timely notice of appeal. (R. 861).

B. Statement of facts

1. Toy's assignment and job responsibilities

In mid-2000, Toy was hired by an independent contractor, DynCorp, Inc. (R. 5, 56, 187).[2] DynCorp had a contract with the United States Department of Justice ("DOJ") to provide certain staffing for the

[2] At some point, DynCorp changed its name to Computer Sciences Corporation. (R. 187). For the sake of simplicity, Defendant will refer to this company as "DynCorp."

Beaumont Regional Intelligence Center ("BRIC"), an initiative connected with DOJ's Asset Forfeiture drug interdiction program. (R. 37, 64). The objective of the BRIC was to provide proactive drug intelligence investigations, analysis, and major case support to all local, state, and federal agencies operating in southeast Texas. Investigators and analysts at the BRIC prepared target packages on drug trafficking organizations, operated a centralized database to support law enforcement agencies in their investigations of major drug trafficking enterprises, and helped to identify and locate criminal suspects, property, and businesses. (R. 59). The BRIC was overseen by Federal Bureau of Investigation ("FBI") personnel. (R. 128).

Toy was assigned by DynCorp to work at the BRIC as an analyst. (R. 36-37, 60, 842). In her position, she was responsible for analyzing telephone toll records, initiating and monitoring telephone pen registers, processing database inquiries, analyzing financial records and other records, and preparing reports and charts. Her activities were limited to office-type work, and she was granted security access to FBI space. (R. 140-41, 187). These duties were distinct from those assigned to FBI Special Agents, whose job responsibilities included planning and

conducting investigations of suspects, developing and managing confidential human sources, interviewing and interrogating witnesses and suspects, serving warrants and subpoenas, and coordinating and participating in raids, searches, seizures, and arrests. (R. 161-63).

The contract between DOJ and DynCorp provided that there was no employer/employee relationship between the federal government and DynCorp employees. (R. 81). The contract also stated that DynCorp employees could not be directly hired, supervised, directed, or evaluated by a federal employee, nor could DynCorp employees represent that they were employees of the federal government orally or in writing. (R. 81, 83). Moreover, DOJ retained the right to require DynCorp to terminate the services of or to refuse access to any contract worker who acted contrary to DOJ guidelines or who posed a security risk. (R. 85).

Despite these contractual provisions, Toy contends that DynCorp did not oversee her work. (R. 5-6). Rather, she claims that she was supervised by FBI personnel and that the methods and manner of her work were dictated by FBI personnel. (R. 6). Accordingly, in her Complaint, she states that she "was an employee of the FBI for purposes of Title VII." (*Id.*)

2. Toy acted outside the scope of her duties.

In March 2003, Bret Davis became the FBI Supervisory Special Agent ("SSA") with direct oversight of the BRIC. (R. 128). One of his superiors was Carlos Barron, an FBI SSA located in the FBI's Houston office. Barron was responsible for overseeing intelligence programs and personnel within the Houston Division of the FBI, including those of the BRIC. (R. 139-40).

In May 2003, Barron learned that Toy was representing herself as an FBI employee to numerous law enforcement agencies in the Beaumont area. Barron met with Toy and told her to discontinue this practice. Toy agreed. (R. 141-42, 188-89).[3]

Nevertheless, Toy continued to flout FBI policies and procedures. For instance, in September 2003, Davis was told that Toy had been working outside the BRIC in an operational capacity, rather than as an analyst. Davis was instructed by Barron to interview the individuals

[3] This was not the first time that Toy was reprimanded. Even around mid-2000, at the time of her hiring, Toy was counseled about her failure to follow proper security procedures and about the proper role of an analyst. For example, Cheryl Lynn Bowers, who supervised Toy as an analyst, testified that Toy would continually do things that were not approved, such as access the FBI computer using someone else's password, have telephone lines installed without proper approval, load software onto unsecure computers, and purchase items that had not been approved. (R. 187-88).

with knowledge of Toy's alleged activities and to report any security concerns that he had regarding Toy, given that Toy had been granted security access to FBI space. (R. 130-31, 143). Davis's agents conducted the interviews, during which they learned that Toy had participated in tactical narcotics operations with Narcotics Task Force officers during actual undercover "buys." (R. 131, 143, 189-90). The interviews also revealed that Toy had participated in an undercover capacity inside a local strip club with several Task Force officers for the purpose of a narcotics investigation. (*Id.*) Toy had not sought authorization to participate in these activities, nor had she reported her participation in them. (R. 131). Davis forwarded the results of his investigation to Barron. Barron then met again with Toy and instructed her that she was not to participate in activities that were outside the scope of her contracted responsibilities. (R. 131, 144, 190).

In July 2004, Davis learned of additional issues regarding Toy. He was told that she was dating the son of an FBI subject in an ongoing investigation, that she had interviewed a source on several occasions, and that she had called a police chief, identifying herself as an FBI employee, to inquire about what could be done to help the son of a

source who had been arrested. (R. 131, 144, 190-91).[4] After conducting an investigation at Barron's behest, Davis determined that these allegations were true. (R. 132, 144, 190-91).

3. Toy submits a job application to the FBI.

On or about July 7, 2004, Toy submitted an application for employment with the FBI to be considered for an Intelligence Analyst position. (R. 196-213, 221). Toy's application was processed outside the BRIC, by individuals who did not work at either the BRIC or the FBI's Houston Division. (R. 220-24).

4. The FBI withdraws Toy's access to FBI space and confidential information.

On July 13, 2004, Toy was called to a meeting in Houston with Davis, Barron, Supervisory Intelligence Analyst Cheryl Lynn Bowers, and Security Officer Martha Stewart. DynCorp Regional Supervisor George Ofiesh participated via speakerphone. (R. 133, 145, 191). Barron advised Toy and Ofiesh that the FBI was withdrawing Toy's security access and that she was not to return to the BRIC.[5] He noted

[4] Just two weeks prior, Davis had instructed Toy to discontinue her conversations with a cooperating source who was reporting information related to an ongoing drug investigation. (R. 132, 144, 190-91).

[5] Toy states that all the FBI did was revoke her "building access." (Pl. Br. at 8.) This characterization is incorrect. The record makes clear that the FBI revoked her

that Toy had shown a pattern of poor judgment and cited specifically (1) the fact that she interviewed a source on several occasions, (2) that she had identified herself as an employee of the FBI to a law enforcement official, and (3) that she had been having a personal relationship with the son of an FBI subject. (*Id*.) Barron made clear that the FBI was withdrawing Toy's security access not because of her performance as an analyst, but because the FBI had security concerns about her. (*Id*.) Based on the revocation of Toy's security access, DynCorp terminated Toy's employment. (R. 844).

5. Toy receives a conditional job offer, which is soon withdrawn.

On or about July 22, 2004, because of a critical need to hire intelligence analysts, the FBI telephonically offered Toy a conditional offer of employment as an Intelligence Analyst in the FBI's Houston Division. (R. 146, 191-92, 221). This offer was contingent upon the existence of a vacant funded position and successful completion of a background investigation, which included a personnel security

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access to (1) FBI national security information, (2) the FBI's secured computer/data system, and (3) secured FBI building space. (R. 133, 145, 191, 593-94).

interview, pre-employment polygraph examination, and urinalysis drug test. (R. 221).

On her application, Toy had listed several individuals whom the FBI could contact for the purpose of a background investigation, including Barron and SSA Norman Townsend. Townsend did not recommend Toy for employment. (R. 214-15, 222). Similarly, on July 28, 2004, Barron sent an electronic communication requesting that Toy's background investigation be discontinued based on his July 13 decision to revoke her security access. (R. 147, 218-19, 222).

As a result of the comments by Townsend and Barron regarding Toy, personnel associated with the Support Applicant Processing Unit ("SAPU") – the FBI unit responsible for processing Toy's application – prepared a letter dated September 17, 2004 rescinding Toy's conditional offer of employment. The letter was signed by Therese E. Rodrique, who at the time was the SAPU Unit Chief. (R. 220, 222, 226-27).

6. Toy files administrative and judicial complaints.

Toy then filed an EEO complaint with the FBI, citing both the July 13 revocation of her security access and the September 17 letter rescinding her conditional offer of employment. She claimed

discrimination based on sex (gender) and retaliation. Her grievances were eventually heard by an EEOC administrative judge ("AJ"). On August 5, 2010, the AJ issued a decision finding no discrimination or retaliation. (R. 233-63). DOJ issued a final order on September 20, 2010, adopting the AJ's decision. (R. 228-32).

On December 22, 2010, Toy filed a complaint in the United States District Court for the Southern District of Texas. (R. 5-11). She alleged that the conduct of the FBI violated Title VII in that (1) she was terminated as a result of gender discrimination, and (2) her conditional offer of employment was revoked as a result of gender discrimination and retaliation. (R. 8).

Defendant filed a combined motion to dismiss and for summary judgment. (R. 29-55). As a basis for dismissal, Defendant argued that the district court's consideration of Toy's discrimination and retaliation claims were barred both under this Court's decision in *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (which was derived in large part from the Supreme Court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988)), and the specific "national security" exemption in Title VII. *See* 42 U.S.C. § 2000e-2(g). (R. 35). As a basis for summary judgment,

Defendant noted that Toy could not establish a *prima facie* case of discrimination or retaliation. In addition, Defendant stated that he had advanced legitimate, non-discriminatory reasons for the challenged adverse actions and these reasons were not pretextual. (R. 36).

On May 18, 2012, the district court granted Defendant's motion to dismiss. (R. 841-57). The district court stated that it lacked jurisdiction to consider Toy's claims, since doing so "would invariably require [it] to second guess the FBI's revocation of [Toy's] security access." (R. 856). Such "second-guessing" was impermissible under the principles set forth in the *Egan* and *Perez* cases and under the "national security" exemption in Title VII. (R. 848, 850, 856). This appeal followed. (R. 861-62).

SUMMARY OF ARGUMENT

The district court correctly dismissed Toy's claims of discrimination and retaliation. Consideration of Toy's claims would have required the district court to evaluate the merits of the FBI's decision to revoke Toy's security access. This is impermissible pursuant to the Supreme Court's decision in *Egan*. In *Egan*, the Supreme Court stated that judicial review of such decisions is improper, because

Executive Branch agencies – not courts – possess the expertise required to make predictive judgments regarding an individual's future behavior and because courts must defer to such agencies in matters concerning national security. Although Toy argues that these principles apply only to decisions to revoke security clearances, and not to decisions to revoke an individual's security access, she has provided this Court with no valid reason to distinguish the two.

The district court also properly dismissed Toy's claims under the terms of the "national security" exemption in Title VII. Because the occupancy of Toy's position and her access to FBI premises were subject to a requirement imposed in the interest of the national security under a security program in effect pursuant to an Executive Order, and Toy failed to satisfy that requirement, neither the termination of her employment nor the revocation of her conditional offer can be deemed "unlawful employment practices" under Title VII.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED TOY'S CLAIMS OF DISCRIMINATION AND RETALIATION, GIVEN (1) THE SUPREME COURT'S *EGAN* DECISION AND (2) THE "NATIONAL SECURITY" EXEMPTION IN TITLE VII.

A. Standard of review

The question of whether the Supreme Court's *Egan* decision or Title VII bars consideration of Toy's claims is one that relates to the subject matter jurisdiction of the district court. *See Perez v. FBI*, 71 F.3d 513, 515 (5th Cir. 1995) (*Egan)*; *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 6 (D.D.C. 2004) (Title VII).

A party contesting subject matter jurisdiction may make either a "facial" attack, where the allegations in the complaint are insufficient to invoke federal jurisdiction, or a "factual" attack, where the facts in the complaint supporting subject matter jurisdiction are questioned. As Toy notes in her brief, Defendant in this case made a factual challenge to the district court's jurisdiction. (Pl. Br. at 6). In a factual attack, the court may consider any evidence, including affidavits, testimony, and other documents submitted by the parties that is relevant to the issue of jurisdiction. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.

1981). The district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 233 (5th Cir. 2012). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Chatham Condominium Ass'ns v. Century Village, Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979). Moreover, "a factual attack under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist." *Menchaca v. Chrysler Credit. Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).[6]

[6] The district court seemed to have considered the case under standards applicable to Fed. R. Civ. P. 12(b)(6), rather than Fed. R. Civ. P. 12(b)(1). Defendant had moved for dismissal pursuant to Rule 12(b)(6), and the district court accordingly did not consider extrinsic evidence. (R. 848). There was no need, however, for the district court to so limit its review. As Toy herself noted in her brief before this Court, Defendant was making a factual attack on jurisdiction, and both parties submitted extrinsic evidence to the district court to address this attack. (Pl. Br. at 6). Even the district court treated the issue as a jurisdictional one. *See* R. 856; *see also Molerio v. F.B.I.,* 749 F.2d 815, 820 (D.C. Cir. 1984) (stating that "[a]lthough the defendants styled their motion as one brought under Rule 12(b)(6), no one treated it as such" and holding that the appellate court could therefore consider evidence outside the pleadings). In any event, this Court can affirm the district court on any basis supported by the record and need not follow the same mode of analysis or consider the same evidence as the district court. *See Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

When addressing a dismissal for lack of subject matter jurisdiction, this Court reviews the district court's application of law *de novo* and disputed factual findings for clear error. *Rodriguez v. Christus Spohn Health System Corp.*, 628 F.3d 731, 734 (5th Cir. 2010); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009). "A district court's factual findings are clearly erroneous only if, after reviewing the record, this Court is firmly convinced that a mistake has been made." *Allstate*, 560 F.3d at 376.

B. Application of the standard of review

In her brief on appeal, Toy makes a single argument – that the Supreme Court's holding in *Egan* and the "national security" exemption in Title VII apply only to employees who are stripped of their security clearances, and not to employees like herself who are stripped of their security access to FBI space. (Pl. Br. at 7.) This argument is without merit.

1. *Egan* Bars Judicial Review of Executive Branch National Security-Related Decisions

In *Egan*, the plaintiff, a civilian, had been hired to work at a naval nuclear submarine facility contingent on "satisfactory completion of security and medical reports." 484 U.S. at 520. The Navy, however,

denied Egan a security clearance because he had prior criminal convictions for assault and for being a felon in possession of a gun, because he failed to disclose two earlier convictions for carrying a loaded firearm, and because of his admission that he had had drinking problems in the past. *Id.* at 521. Because the job required this security clearance, Egan was discharged as ineligible to work at the facility.

Egan appealed his discharge to the Merit Systems Protection Board ("MSPB"), which concluded it was without authority to review the clearance. Egan then appealed to the Federal Circuit Court of Appeals, which reversed the MSPB and remanded for review of the clearance decision. The Supreme Court granted certiorari and reversed the Federal Circuit, holding that the MSPB lacked authority "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." *Id.* at 520. The Court's rationale is worth quoting at length:

> [A security clearance] is … an attempt to predict [an individual's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. … The attempt to define not only the

> individual's future actions, but those of outside and unknown influences renders the grant or denial of security clearances ... an inexact science at best.
>
> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For reasons ... too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. As noted above, this must be a judgment call.

Id. at 528-29 (internal quotation marks and citations omitted).

The Court in *Egan* also noted that "[t]he authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief." *Id.* at 527. And it explained that the authority to "control access" to national security information is "committed by law" to the President, "flow[ing] primarily from [his] constitutional ... power[s] ... and exist[ing] quite apart from

any explicit congressional grant." *Id.* Given the President's exclusive constitutional authority over access to national security information, the Court refused to indulge the "general proposition of administrative law" that a presumption favoring appellate review arises from the absence of a provision precluding such review. *Id.* at 526-27. Instead, the Court held that such decisions "must be committed to the broad discretion of the agency responsible." *Id.* at 529.

The holding in *Egan*, and these policies underlying it, have been extended to other contexts. Several circuit courts – including this one – have held that *Egan* applies in a Title VII action to preclude a "nonexpert body" – whether administrative or judicial – from resolving a discrimination claim based on an agency security clearance decision. *See Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996); *Perez v. F.B.I.*, 71 F.3d 513 (5th Cir. 1995); *Brazil v. United States Dep't of Navy*, 66 F.3d 193, 195 (9th Cir. 1995). Citing *Egan* as well as the burden allocation scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applicable to Title VII claims, these courts reasoned that consideration of whether an employer's proferred reason for an adverse employment action was

legitimate or pretextual (at the second and third steps of the *McDonnell Douglas* scheme) would require them to review the merits of an agency's security clearance decision.[7] Because such an inquiry would require courts to second-guess the "predictive judgment" of Executive Branch officials concerning the security risks presented by an individual, the courts have consistently held that *Egan* precludes such claims. *See, e.g., Ryan*, 168 F.3d at 524 (stressing that "a court cannot clear the second step of *McDonnell Douglas* without running smack up against *Egan"*); *Perez*, 71 F.3d at 514-15; *Brazil*, 66 F.3d at 197.

The issue in this case is whether the principle that courts may not second-guess Executive Branch predictive judgments with regard to security clearances applies equally to predictive judgments by the Executive Branch with regard to other security determinations – here, whether a contractor employee's access to secure FBI facilities should be revoked. Although Toy contends that *Egan* and *Perez* should be limited to "security clearances or their equivalent," Pl. Br. at 11, no

[7] Under the first step of *McDonnell Douglas*, the plaintiff must establish a *prima facie* case of discrimination. If the plaintiff succeeds in establishing a *prima facie* case, the second step of the *McDonnell Douglas* framework shifts the burden to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action. If the defendant does so, then under the third step of *McDonnell Douglas*, the plaintiff must produce evidence showing that the defendant's proffered reason is but a pretext for discrimination.

sound basis exists for such a narrow construction of those decisions. As explained below, the decision to revoke Toy's security access to FBI space involved the same type of predictive judgment regarding security risks that the Supreme Court in *Egan* held it was "not reasonably possible for an outside nonexpert body to review," *Egan*, 484 U.S. at 529, and the district court thus correctly concluded that *Egan* barred Toy's Title VII claims.

In Toy's case, the FBI had received numerous reports about her failure to follow proper procedures. For example, she repeatedly represented herself as an FBI employee, she participated in undercover operations without authorization, and she was dating the son of an FBI subject in an ongoing investigation. Once these and other reports were investigated and substantiated, the FBI came to the conclusion that Toy's continued access to the agency's information would likely pose a danger to the FBI and its mission. This was a decision within the FBI's particular competence. The FBI – and not an outside body like the district court – was in the best position to evaluate the agency's mission, the particular projects in question to which Toy had access,

and the degree of harm that would be caused if these projects were compromised by Toy's infractions.[8]

That the information involved in the matters cited by the FBI may not have been classified or protected by a security clearance is of little moment. The important fact is that Toy had access to classified national security information in her position – information that was potentially compromised by her behavior. *See, e.g.,* R. 57-58 (recommending Toy for access to national security information), 198 (Toy stating on her FBI application that she had a "top secret" security clearance in her position with DynCorp), 314 (Toy admitting that her job required a "top secret" clearance), 587-88 (a "Classified Information Nondisclosure Agreement" signed by Toy), 589-90 (a nondisclosure agreement signed by Toy in which she acknowledges that "unauthorized disclosure of information in the files of the FBI or information I may acquire as a Task Force/Contractor employee of the FBI could result in impairment of national security"), 591-92 (certifications signed by Toy in which she acknowledges that she has been "entrusted with the

[8] That the FBI chose only to revoke Toy's security access to its facility, rather than take steps to revoke her full security clearance, does not demonstrate that her infractions were minor. Rather, the FBI's limited action was an attempt to provide a quick solution to the most acute problem before it – that of Toy compromising ongoing FBI operations.

management, operation, or use of an [FBI] computer system processing sensitive and/or classified information"), 593 (requesting that Toy be removed from the list of people having access to FBI national security information). It was the duty of the FBI to make a predictive assessment about her ability to safeguard that information for the sake of the nation's security.

Even if Toy did not have access to classified national security information, *Egan* would still be applicable. This was a point made explicitly by the Federal Circuit in a recent decision in *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012). In *Conyers*, the court evaluated two cases where the MSPB had held that *Egan* did not apply in cases where security clearance determinations are not at issue. *Id.* at 1227. The Federal Circuit reversed, writing that "*Egan* cannot be so confined" to security clearance determinations. *Id.* at 1228. The *Conyers* court noted that *Egan*'s analysis is predicated broadly on national security information, not merely on classified information required to be protected by a security clearance. *Id.* at 1231-32. The court wrote that "predictive judgments are predicated on an individual's potential to compromise information, which might be unclassified" and stressed that

"[i]t is naïve to suppose that employees without direct access to already classified information cannot affect national security." *Id.* at 1233-34.[9]

As *Conyers* illustrates, Toy's argument that no court has ever held that *Egan* and its progeny apply to something less than the denial of a security clearance, Pl. Br. at 10, is simply wrong. Moreover, many other courts have likewise emphasized that it is not merely the actual revocation or denial of security clearances that is unreviewable under *Egan* but also decisions that are equivalent or "tantamount" to such actions. *See, e.g.*, *Bennett v. Chertoff*, 425 F.3d 999, 1003-1004 (D.C. Cir. 2005) (holding that even "suitability" determination can be unreviewable under *Egan* because the decision was based, in part, on "national security" concerns); *Ryan*, 168 F.3d at 523 (*Egan* precludes judicial review of agency refusal to waive security background checks); *Becerra*, 94 F.3d at 148-49 (*Egan* precludes Title VII challenge to agency's decision to initiate security investigation); *Brazil*, 66 F.3d at 195 (holding that *Egan* bars Title VII challenge to revocation of employee's certification under "Nuclear Weapons Personnel Reliability Program"); *Beattie v. Boeing Co.*, 43 F.3d 559, 564-67 (10th Cir. 1994)

[9] The *Conyers* court also noted that the task of exercising "predictive judgment" was one entrusted to the agency (and the Executive Branch generally) by the Constitution.

(relying on *Egan* to reject First Amendment *Bivens* challenge to denial of access to area surrounding President's Air Force One planes).[10] In sum, no distinction for *Egan* purposes can be drawn between a decision to revoke a security clearance and a decision to revoke security access to a facility.

Unable to identify a principled basis for carving out predictive judgments by the FBI regarding access to secure space from *Egan*, Toy resorts to speculation and policy arguments, suggesting that the district court's ruling would allow any federal agency to "immunize itself from scrutiny under Title VII simply by revoking a fired employee's building access and then invoking the national security exception." Pl. Br. 5; *see also id.* at 12 ("A federal agency need only revoke 'secured building access' or 'access to secured information,' and the courts instantly lose

[10] In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), the D.C. Circuit recently confirmed that *Egan* bars Title VII claims predicated upon the allegedly discriminatory initiation of a security investigation that did *not* result in the revocation of an FBI employee's security clearance. Although a sharply-divided panel of that court held that *Egan* did *not* foreclose claims that a report of security concerns was "knowingly false," the government filed a petition for rehearing en banc and Judge Kavanaugh has indicated that he intends to "urge the full Court to grant it." *Id.* at 776. Even if that petition is ultimately denied, *Rattigan* confirms that *Egan* precludes review of the predictive judgment of agency officials that a security investigation was warranted, even though the plaintiff's security clearance in that case was never revoked. Similarly, *Egan* precludes review of the FBI's predictive judgment that Toy's access to secure FBI space should be revoked, even though her security clearance itself was not revoked.

jurisdiction over any Title VII claim."). These are gross overstatements, and they find no support in the record in this case. As explained above, the FBI acted on valid security concerns that came to its attention *before* it revoked Toy's access to secure FBI facilities, and the record is replete with evidence that concerns about national security were a contemporaneous reason for the FBI's decision to revoke Toy's security access. *See* R. 128-38, 139-148, 186-94. In such circumstances – where security concerns were a contemporaneous reason for the agency's actions – *Egan* plainly bars Title VII claims. *See, e.g., Bennett*, 425 F.3d at 1003-04.

It also bears mention that in *Perez*, this Court addressed the concern that limiting judicial review of security-related decisions was ripe for abuse. The Court wrote:

> We also understand the concern of federal agents, whose employment is conditioned on security clearances, that the lack of judicial review creates the potential for abuse by the agencies and bureaus employing them. This result, however, is required by the fact that security clearance determinations are "sensitive and inherently discretionary" exercises, entrusted by law to the Executive. "Predictive judgments of this kind" properly are left to "those with the necessary expertise in protecting [the sensitive material,]" rather than in the hands of "an outside nonexpert body" or the equally nonexpert federal courts. Accordingly, review of these decisions is left to the respective departments of the

> Executive Branch, which have internal administrative procedures in place for adjudicating employee complaints of discrimination and appeals therefrom. We must stress, therefore, that the Executive Department – in this instance, the Attorney General, the Department of Justice, the Director of the FBI, and the Inspector General – bears a heavy responsibility and special duty of fairness to ensure that its agencies and bureaus do not trample the rights of their employees in employment matters.

Perez, 71 F.3d at 515 n.6 (5th Cir. 1995) (internal citations and quotation marks omitted); *see also Conyers*, 692 F.3d at 1235-36 ("Some rights of government employees are certainly abrogated in national security cases. The Board and Respondents must recognize that those instances are the result of balancing competing interests as was the case in *Egan* and as is the case here.").

In sum, the principles expressed by the Supreme Court in *Egan* – the expertise required in making predictive judgments and the deference that courts must afford Executive Branch agencies in matters concerning national security – apply equally to a decision to revoke an employee's security access to FBI space. Toy has provided this Court

with no valid reason to distinguish the two.[11] On this basis alone, the Court should affirm the decision of the district court.

2. Dismissal Was Also Proper Under Title VII And Consistent With Congressional Intent.

Although it is clear under *Egan* that Toy's claim should be dismissed, this conclusion is reinforced by Title VII's express language exempting employment actions based on national security requirements. 42 U.S.C. § 2000e-2(g) states:

> (g) National security
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –
>
> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to **any**

[11] Toy merely states the following: "(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,' and (3) Building access is not governed by 'a statute of the United States' or an 'Executive Order.'" (Pl. Br. at 8.) However, as noted above, the FBI revoked much more than Toy's mere "building access." The FBI revoked Toy's access to (1) FBI national security information, (2) the FBI's secured computer/data system, and (3) secured FBI building space. (R. 133, 145, 191, 593-94). The revocation was effectuated after a predictive assessment based on security concerns raised by Toy's behavior.

> requirement imposed in the interest of the national security of the United States under **any** security program in effect pursuant to or administered under **any** statute of the United States or **any** Executive order of the President; and
>
> (2) such individual has not fulfilled or has ceased to fulfill that requirement.

42 U.S.C. § 2000e-2(g) (emphases added). The D.C. Circuit has explained that this clear expression of congressional intent "fortifie[s]" the conclusion that judicial review is unavailable for these types of claims. *See Ryan*, 168 F.3d at 524 n.3.[12]

Executive Order 12829 (Jan. 6, 1993) established a National Industrial Security Program ("NISP") to safeguard information that is released to contractors, licensees, and grantees of the United States government. The Executive Order states that when the United States government contacts with nongovernmental organizations and such arrangements require access to sensitive information, "the national

[12] Indeed, in 1972, when Congress expanded Title VII to cover federal employees, it stressed that it did not intend "to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interest of the United States." H. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2138. Consistent with this desire to repose national security decisions in the hands of the Executive Branch, Congress made the statutory language of 42 U.S.C. § 2000e-2(g) exceptionally broad. The repeated use of the word "any" in the statute ("any requirement," "any security program," "any statute of the United States," or "any Executive order of the President") demonstrates that Congress intended the exemption to be particularly expansive.

security requires that this information be safeguarded in a manner equivalent to its protection within the executive branch of Government." Executive Order 12829 (preamble). The NISP is applicable to all executive branch departments and agencies, including the FBI. Executive Order 12829, § 101.

That Toy was subject to the NISP is evident from the record. *See, e.g.,* R. 57-58, 198, 314, 587-94 (showing that Toy was subject to the NISP and that she had access to national security information). As part of the NISP, Executive Order 12829 required the creation of a National Industrial Security Program Operating Manual ("NISPOM"), which prescribes the requirements, restrictions, and safeguards that contractors are to follow to prevent the unauthorized disclosure or compromise of information. Executive Order 12829 § 201. The NISPOM[13] contains the following rule: "Contractor employees at government installations shall follow the security requirements of the host." NISPOM, § 6-105.

Toy clearly failed to satisfy this requirement. As was discussed above, she was counseled repeatedly about her failure to follow the

[13] DoD 5220.22-M, available online at http://www.dss.mil/documents/odaa/nispom2006-5220.pdf.

FBI's security protocols and procedures. Toy's continued employment and her access to FBI premises, however, were conditioned on her ability to follow these protocols and procedures. The contract between DynCorp and DOJ made this clear. *See* R. 94 ("During all operations on Government premises, the Contractor's personnel shall comply with the rules and regulations governing the conduct of personnel and the operation of the facility."); R. 85 (stating that DOJ retained the right to require DynCorp to terminate the services of or to refuse access to any contract worker who acted contrary to DOJ guidelines or who posed a security risk).

Therefore, the terms of the exception in 42 U.S.C. § 2000e-2(g) are satisfied. Both the occupancy of Toy's position, and her access to FBI premises, were subject to a requirement imposed in the interest of the national security of the United States under a security program in effect pursuant to an Executive Order of the President, and Toy failed to satisfy the requirement.[14] Since Toy had ceased to be able to fulfill

[14] Importantly, the statute does not mandate that the actual conditioning of occupancy or access occur per the terms of a "security program," "statute of the United States," or "Executive Order of the President." For example, the statute does not read as follows: "The occupancy ... or access..., is subject, *per the terms of any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President*, to any requirement imposed

the NISP requirements, the FBI was within its rights to revoke her security access, and the subsequent termination of her employment and the revocation of her conditional offer were not "unlawful employment practices" under Title VII, pursuant to 42 U.S.C. § 2000e-2(g).[15] Dismissal under *Egan* is thus supported by the congressional intent apparent in 42 U.S.C. § 2000e-2(g).

CONCLUSION

As the district court stated, it is clear from the case law that "the National Security Exemption [to Title VII] and *Egan* prohibit courts from passing judgment on an executive agency's decision to revoke or deny access *to confidential and secure information*." (R. 852) (emphasis added). Toy has offered no valid reason to limit *Egan* and the statutory "national security" exemption in Title VII to those who possess security

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in the interest of the national security of the United States under the aforementioned security program." The statute mandates only that the *requirement* derive from the security program. There is nothing in the statute to prevent the actual conditioning of occupancy or access from deriving from an external document, as was true in this case.

[15] As the district court points out, it was DynCorp that terminated Toy as an analyst based on the revocation of her FBI security access. (R. 844). DynCorp was Toy's formal employer. (R. 5). Nevertheless, Toy claims in her Complaint that she "was an employee of the FBI for purposes of Title VII." (R. 6). If that is the case, then the FBI is to be considered her employer for determining the applicability of the "national security" exemption in Title VII, and Toy should be estopped from arguing otherwise.

clearances. Accordingly, the decision of the district court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kenneth Shaitelman, Assistant United States Attorney, hereby certify that on October 23, 2012, an electronic copy of Appellee's Brief was served by notice of electronic filing via this Court's ECF system upon opposing counsel, David C. Holmes.

Upon notification that the electronically-filed brief has been accepted as sufficient, and upon the Clerk's request, seven paper copies of this brief will be submitted to the Clerk. *See* 5th Cir. R. 25.2.1; 5th Cir. R. 31.1; 5th Cir. ECF filing standard E(1).

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7007 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: October 23, 2012