No. _____

In The
Supreme Court of the United States

BOBBI-ANNE TOY,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID C. HOLMES
LAW OFFICES OF DAVID C. HOLMES
13201 Northwest Freeway, Suite 800
Houston, Texas 77040
(713) 586-8862
dholmes282@aol.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the statutory national security exemption in Title VII of the Civil Rights Act of 1964 bars a discrimination suit by a civilian contractor for the FBI, even though (1) the civilian contractor never lost her top-secret security clearance, and (2) the FBI officials responsible for security clearances never determined that the civilian contractor posed a risk to national security.

2. Whether the routine revocation of building access for a terminated FBI contractor triggers the statutory national security exemption in Title VII of the Civil Rights Act of 1964.

3. Whether low-level supervisors at a federal agency can unilaterally immunize themselves from discrimination suits under Title VII of the Civil Rights Act of 1964 simply by characterizing an ordinary termination as a matter involving "national security."

RULE 14.1(B) STATEMENT

All of the parties in the proceeding in the court whose judgment is sought to be reviewed are contained in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Bobbi-Anne Toy respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit dated April 29, 2013, is officially reported at 714 F.3d 881 (5th Cir. 2013) and is reproduced in the Appendix at App. 1-13.

The district court's opinion and order of dismissal filed May 18, 2012, is not officially reported and is reproduced in the Appendix at App. 14-31.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on April 29, 2013. The order denying rehearing was entered on July 2, 2013. The petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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 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).

STATEMENT OF THE CASE

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.

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[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 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.

After exhausting her administrative remedies, Ms. Toy filed suit in district court under Title VII. The district court had jurisdiction over the case because the claims present a federal question and because an agency of the United States is a party. 28 U.S.C. §§ 1331, 1346.

The FBI invoked the national security exemption to Title VII and moved to dismiss the lawsuit. R43. The district court agreed and dismissed the case. App. 14. The Fifth Circuit affirmed. App. 1.

REASONS FOR GRANTING THE WRIT

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

Even though Title VII was enacted half a century ago, only a handful of cases have ever discussed the statutory national security exemption. The exemption has four elements:

> (1) The "requirement" element: The plaintiff's occupancy of a government position or access to the government premises must be subject to "a requirement."
>
> (2) The "security program" element: The "requirement" must be imposed in the interest of the national security of the United States under a security program.
>
> (3) The "statute or executive order" element: The security program must be pursuant to or administered under a statute or executive order.
>
> (4) The "non-fulfillment" element: The plaintiff must not have fulfilled (or have ceased to fulfill) the "requirement."

These elements can be found in the text of the statutory national security exemption:

> 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 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) (emphasis added).

The statutory national security exemption does not bar cases in which the government makes generalized "national security" claims. Instead, it is limited to cases involving employees who are subject to specific "requirements" that are not "fulfilled."

In the present case, the relevant "requirement" is a top-secret security clearance. As a civilian contractor,

Ms. Toy was required to have a top-secret security clearance. If she ceased to fulfill that requirement (*i.e.*, if the security clearance was revoked), then she could not work at the FBI, and she could not bring a Title VII action to challenge the decision.

However, it is undisputed that 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."

(4) Ms. Toy did not "cease to fulfill" any "requirement" imposed by a statute or Executive Order for building access.

In sum, the statutory national security exemption has clearly defined boundaries. It applies to security clearances or the functional equivalent. It does not apply to every termination of an employee. The present case does not implicate the national security exemption.

II. The Legislative History and Administrative Interpretations of the Statutory National Security Exemption Show That the Exemption Is Limited to Security Clearances.

The reference in the statutory text to a "requirement" that ceases to be "fulfilled" is intentional. Congress could have passed a broad, general provision that exempted "cases involving national security" or something to that effect. Instead, Congress limited the national security exemption to cases involving "requirements" imposed by security programs. The "requirement" in question is a security clearance, or something functionally equivalent to a security clearance.

This point is made clear by the legislative history of Title VII. When Senator Humphrey introduced

the amendment on the floor of the Senate, he stated:

> A new section 703(g) provides that it shall not be an unlawful employment practice for a job to be decided, or a person to be fired, **because of his inability to obtain a security clearance when the position involved requires such a clearance**. . . . Actually, this provision is intended to cover the obvious situation where a person, for one reason or another, is simply not able to obtain **a required security clearance**.

110 Cong. Rec. 12723 (June 4, 1964).

Likewise, the EEOC has issued formal guidance on the application and interpretation of the statutory national security exemption. EEOC, *Policy Guidance on the Use of the National Security Exemption* (May 1, 1989) (available at http://www.eeoc.gov/policy/docs/national_security_exemption.html). The EEOC's guidance refers only to the "requirement" that employees have security clearances:

> **The Federal government, in the interest of national security, may require that entities performing or engaging in business with the government, assign only persons with security clearances to work on government projects.** However, "no one has a 'right' to a security clearance." Security clearances are granted at the discretion of the designated agency official. The general standard is that a clearance may be granted only when it is "clearly consistent

> with the interests of the national security." Agencies may evaluate an individual's request for a security clearance on the basis of past or present conduct or on concerns unrelated to conduct such as having relatives residing in a foreign country controlled by a government whose interests or policies are hostile to or inconsistent with those of the United States.
>
> . . . .
>
> The legislative history of § 703(g) indicates that this provision was only intended to except from Title VII liability situations where employers refuse to hire or discharge persons **who are unable to obtain a required security clearance.**

(Emphasis added).

In sum, both the legislative history and the administrative interpretation of the statute indicate that the "requirement" and "non-fulfillment" language is meaningful. The exemption relates to the denial or revocation of security clearances (or the functional equivalent) that are required to hold a position, not to situations in which an employment decision might be based on a claim of generalized national security concerns.

III. The Fifth Circuit Erroneously Held That the Statutory National Security Exemption Applies to the Mere Revocation of Building Access for a Civilian Contractor.

A. As a Threshold Matter, the Fifth Circuit Correctly Held That the Non-Statutory Rule Adopted by This Court in *Egan* Is Inapplicable.

In order to understand the Fifth Circuit's error with respect to the statutory exemption, it is helpful to first consider the Fifth Circuit's analysis of the parallel non-statutory exemption. While Title VII contains a statutory national security exemption, many other statutes governing federal employees contain no such provision. This Court recognized a non-statutory 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).

Prior to the Fifth Circuit's decision, no court had ever found that there was any substantive difference between the statutory and non-statutory exemptions. In fact, many courts have treated the two exemptions as if they were a single exemption.

In the lower courts, the FBI relied primarily on the rule from *Egan*. The FBI noted that many lower courts have applied *Egan* to bar Title VII claims. However, those courts have uniformly applied the same restrictions that are found in the statutory exemption. In particular, the lower courts have applied *Egan* only in cases involving security clearances (or

similar requirements that are the functional equivalent of a security clearance), and they have refused to apply *Egan* to decisions made by lower-level employees that do not follow the procedures for the revocation of security clearances. For example, in *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), the District of Columbia Circuit rejected the application of *Egan* to a Title VII case involving security concerns expressed by lower-level FBI employees:

> In other words, employees outside the Security Division are expected to refrain from making sensitive, predictive judgments and it is "not their place" to make the kinds of decisions that *Egan* shields from review. Given this, and for the reasons set forth in our earlier opinion, **we adhere to our holding that *Egan's* absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns**.

689 F.3d at 768 (emphasis added).

Likewise, the Fifth Circuit held that *Egan* does not extend beyond security clearances or the functional equivalent. In fact, the Fifth Circuit identified some of the policy reasons behind that limitation:

> None of the cases cited by the government is particularly persuasive. No court has extended *Egan* beyond security clearances,

> and we decline to do so. Security clearances are different from building access; security-clearance decisions are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions. There is also significant process involved in granting security clearances, the kind of process that allows agencies to make the deliberate, predictive judgments in which they specialize.
>
> That is not the case, as aptly demonstrated here, where building access is concerned. Building access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions. An FBI security clearance, on the other hand, may be granted or revoked only by the FBI's Security Division, a group that specializes in making security-clearance decisions and to which authority to make those decisions is explicitly delegated by the director. A lack of oversight, process, and considered decision-making separates this case from *Egan*, which therefore does not bar Toy's suit.

App. at 8-9. The Fifth Circuit thus correctly rejected the FBI's arguments based on the rule in *Egan*.

B. The Fifth Circuit Erroneously Found That the Statutory National Exemption Was Triggered by Two Executive Orders That Do Not Impose a "Requirement" That Ms. Toy "Ceased to Fulfill" and That Do Not Involve Security Clearances.

Having rejected the application of *Egan*, the Fifth Circuit nonetheless found that Ms. Toy's claim was barred by the statutory national security exemption. The Fifth Circuit pointed to two Executive Orders that apply specifically to civilian employees. However, the Fifth Circuit failed to apply the elements of the national security exemption, in particular whether Ms. Toy was subject to a "requirement" that she ceased to "fulfill." Instead, the Fifth Circuit held that the statutory national security exemption barred Ms. Toy's claim merely because the Executive Orders regulated building access. This is contrary to the plain language of the statute, the legislative history, and the administrative interpretation of the statute.

The Fifth Circuit cited several provisions of the National Industrial Security Program ("NISP") (Executive Order 12829) in support of its ruling, but none of those provisions impose a "requirement" that Ms. Toy ceased to "fulfill." In fact, NISP is not a security program at all. It simply refers to preexisting security programs.

First, the Fifth Circuit noted that the NISP manual requires that a procedure be established for removal of building access when an employee is

terminated or when "the individual's PCL [personal security clearance] is suspended or revoked." App. at 11. A security clearance is indeed a "requirement," but it is not imposed by NISP. Furthermore, Ms. Toy's security clearance was never suspended or revoked, and it is undisputed that none of the local FBI personnel had authority to do so. There is no "requirement" that Ms. Toy ceased to "fulfill."

Second, the Fifth Circuit noted that the manual states that it does not "affect" the authority of the head of an agency "to limit, deny, or revoke access to classified information." App. at 11. That provision does not create a "requirement" that Ms. Toy ceased to fulfill. In fact, that provision makes it clear that any such "requirement" would come from the head of an agency, not from NISP. Furthermore, the local FBI personnel were not "the head of the agency" (in this case, the Attorney General). While the FBI does have procedures for revoking access to classified information, none of those procedures were invoked with respect to Ms. Toy.

Third, the Fifth Circuit noted that the manual provides that a "contract employee" must "follow the security requirements of the host." App. at 11. However, that provision is not itself a "requirement." Instead, it is just a reference to requirements that may exist elsewhere. There is no "requirement" that Ms. Toy ceased to "fulfill."

In sum, NISP does not – and cannot – satisfy the "requirement" element of the statutory national

security exemption. NISP does not impose a "requirement," but instead refers only to requirements that are imposed by other programs. Ms. Toy did not "cease to fulfill" any such requirement.

The Fifth Circuit also refers to Executive Order 12968. App. at 12-13. The full text of the provision cited by the court is as follows:

> Eligibility for access to classified information shall not be requested or granted solely to permit entry to, or ease of movement within, controlled areas when the employee has no need for access and access to classified information may reasonably be prevented. Where circumstances indicate employees may be inadvertently exposed to classified information in the course of their duties, agencies are authorized to grant or deny, in their discretion, facility access approvals to such employees based on an appropriate level of investigation as determined by each agency.

60 Fed. Reg. 40245 § 2.1(b)(1). This has no apparent application to this case. Ms. Toy had a top-secret security clearance, and this was a requirement of her job. However, she did not "cease to fulfill" that requirement. No one requested a security clearance so that she would have "ease of movement" within the office. There was no danger that she would be "inadvertently exposed" to classified information "in the course of [her] duties." Finally, there is no indication

that the FBI required a "facility access approval" for employees such as Ms. Toy, that the FBI ever granted a "facility access approval" to Ms. Toy, or, if such a procedure existed, that the FBI exercised its discretion as an agency to revoke Ms. Toy's approval "based on an appropriate level of investigation as determined by" the FBI. Instead, the only applicable FBI procedure is the security clearance process, and there is no dispute that the FBI never invoked that procedure with respect to Ms. Toy. Executive Order 12968 has no application to this case.

In sum, the only "requirement" that would satisfy the statutory national security exemption is the requirement that Ms. Toy have a top-secret security clearance. Because Ms. Toy's security clearance was never revoked, the exemption is inapplicable because Ms. Toy did not "cease to fulfill" that requirement. As a matter of law, the mere fact that a lower-level supervisor revoked Ms. Toy's building access does not implicate the exemption.

C. The Fifth Circuit Erroneously Failed to Apply the Elements of the National Security Exemption and Instead Focused on the Mere Existence of the Executive Orders.

The Fifth Circuit summed up its reasoning by pointing out that the various regulations existed and

covered building access, but the Fifth Circuit did not apply the elements of the statute:

> Because EO 12829 applies restrictions on employees to contract employees as well, EO 12968 applies to Toy – the agency has the ability to grant or deny access to facilities within its discretion based on considerations of national security. Thus, there are multiple relevant "national security programs" arising under EOs that relate to access to secured premises. [The statutory national exemption] applies to Toy's building access revocation, and review is therefore barred.

App. at 13.

Assuming for sake of argument that the two Executive Orders qualify as security programs, there were still two other critical elements of the statutory exemption that were not met. First, the statute mandates that the Executive Orders impose a "requirement." Second, the statute mandates that Ms. Toy must have failed to "fulfill" the requirement. Those elements are not satisfied just because the Executive Orders regulate building access.

In sum, the Fifth Circuit misconstrued the statute and made the statutory national security exemption applicable to a mere denial of building access. This is contrary to the language of the statute, the legislative history, and the administrative interpretation of the statute.

IV. The Fifth Circuit's Ruling Is Contrary to Public Policy and Merits Review by This Court.

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 Supreme Court Building 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 building.

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. In many cases, building access for both contractors and employees will be regulated by some statute or Executive Order.

Under the Fifth Circuit's reasoning, the statutory national security exemption potentially 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 if the agency can identify some statute or Executive Order that applies. This was not the intent of Congress.

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. Under the Fifth Circuit's reasoning, however, those employees successfully invoked a doctrine that is rooted in the separation of powers in order to save themselves from scrutiny. They needed only to revoke building access, which is not subject to higher level scrutiny within the FBI.

The Fifth Circuit's ruling is not limited to Ms. Toy. Instead, it potentially applies to every civilian contractor for every agency or department of the United States government, and it is likely that it applies to many direct government employees as well. There are many different statutory schemes and executive orders relating to government employees and civilian contractors that could be deemed to be "security programs" under the Fifth Circuit's broad interpretation of that term. It is likely that an agency such as the FBI could always find a way to base the termination of an employee on some sort of national security concern, and then deny building access to the terminated employee.

For example, a lower level supervisor at an agency could claim that tardiness raised security concerns because the employee was unreliable, or could claim that personality conflicts raised security concerns because the employee had poor judgment. **If the statutory national security exemption applies, the courts lack jurisdiction to review the validity of any of those explanations.** In effect, the

Court's ruling allows federal agencies to voluntarily exempt themselves from Title VII by casting personnel decisions in terms of "national security."

This was not the intent of Congress, and it is contrary to the language of the national security exemption. Furthermore, there are few procedural safeguards when only building access is at issue. The Fifth Circuit acknowledged this:

> Building access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions. An FBI security clearance, on the other hand, may be granted or revoked only by the FBI's Security Division, a group that specializes in making security-clearance decisions and to which authority to make these decisions is explicitly delegated by the director.

App. at 9. The Fifth Circuit's ruling thus creates a perverse result: the statutory national security exemption applies because Ms. Toy was fired on a ground for which there are no procedural protections for the employee and no oversight by higher ranking officials at the FBI who are authorized to make security decisions.

While national security is of course an important public policy, Title VII also reflects significant public policies. Congress balanced the competing public policies through the language of the national security exemption. The government cannot avoid scrutiny under Title VII merely by claiming that it fired an

employee because of "national security" concerns. Instead, Congress limited the exemption to situations in which an employee (whether a government employee or a civilian employee) ceases to fulfill a requirement imposed by a security program. Ms. Toy did not cease to fulfill any requirement.

Congress intended that the statutory national security exemption be limited to security clearances or something that is functionally equivalent. The Fifth Circuit expanded the scope of the statutory national security exemption far beyond the intent of Congress, far beyond the administrative interpretation, and far beyond the dictates of public policy. The FBI is not exempt from Title VII, but the Fifth Circuit has effectively given it such an exemption. This is not a proper construction of the statute.

The Fifth Circuit's decision is bad law and bad policy. This Court should grant this petition and reverse the decision of the Fifth Circuit.

CONCLUSION

For the reasons set forth above, the Court should grant this petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DAVID C. HOLMES
LAW OFFICES OF DAVID C. HOLMES
13201 Northwest Freeway, Suite 800
Houston, Texas 77040
(713) 586-8862 (telephone)
(713) 586-8863 (telecopier)
dholmes282@aol.com

Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-20471

BOBBI-ANNE TOY,

Plaintiff-Appellant.

versus

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

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Apr. 29, 2013)

Before REAVLEY, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge.

Bobbi-Anne Toy, a contract FBI employee, sued the Attorney General ("the government") under Title VII of the Civil Rights Act of 1964, alleging sex discrimination and retaliation. She claimed that the FBI had revoked her access to its offices as a result of discriminatory animus. The government moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for summary judgment, arguing that the national security exception to Title

VII precluded Toy's claims. The district court dismissed, and we affirm.

I.

For a Rule 12(b)(6) dismissal, we take plausible facts alleged in the complaint as true. *See In re Katrina Canal Breaches Litig.,* 495 F.3d 191, 205 (5th Cir. 2007). Toy was employed by independent contractor DynCorp to work as a data and intelligence analyst at the FBI's regional office in Beaumont. While there, she received numerous commendations and positive reviews. She also applied for direct employment with the FBI and was given a conditional offer of employment.

Things changed, however, when the director of the Beaumont office was replaced by Brett Davis. Toy alleged that Davis was "abrasive," "had problems with women," and wished to fire her. Davis eventually wrote a memo in which he outlined various complaints regarding Toy, primarily that she had participated in undercover operations despite lacking approval to do so and had falsely held herself out as an FBI employee. The government's motion for summary judgment outlined additional complaints, including Toy's improper use of FBI computers to install software and purchase unapproved items, her use of other employees' passwords to access computers, and her alleged romantic involvement with the son of the target of an investigation.

Toy denied all of those allegations. Based on Davis's memo, however, Toy's direct supervisor revoked her access to the Beaumont office and purported to revoke her security clearance as well.

DynCorp then terminated Toy's employment. Her conditional offer of employment was revoked after individuals from the Beaumont office, including her direct supervisor and Davis, provided negative references and recommended that her background investigation be terminated. Toy filed a complaint with an Equal Employment Opportunity Commission counselor and eventually sued.

II.

We review dismissal under Rule 12(b)(6) *de novo,* "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Bustos v. Martini Club Inc.,* 599 F.3d 458, 461 (5th Cir. 2010) (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "[1]

[1] *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). *See generally* 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04[1][b] (3d ed. 2012).

III.

Title VII makes it unlawful for an employer to engage in certain employment practices, which includes "discharg[ing] any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Toy claims that her building access revocation amounted to discharge and that it was motivated by her sex.

Title VII, however, provides an exception where employment actions are based on national-security considerations. Under subsection (g), it is not an unlawful employment practice

> for an employer to discharge any individual from 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 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.

Id. § 2000e-2(g).

In addition to this explicit statutory exemption for cases of national security, the Executive Branch has broad power to determine whether to grant or revoke access to secure information. In *Dep't of Navy*

v. Egan, 484 U.S. 518, 529 (1988), the Court held that "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." For this reason, courts may not review decisions to grant access to sensitive information made by the executive. *Id.* This maxim derives from the Constitution's grant of presidential authority, which includes "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information." *Id.* at 527.

Though *Egan* arose in the context of the Merit Systems Protection Board, we have applied it in the context of Title VII. In *Perez v. F.B.I.,* 71 F.3d 513, 514-15 (5th Cir. 1995), we held that examination of "legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking [an] employee's security clearance" in a Title VII challenge would be "an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security." We therefore did not have jurisdiction to consider the Title VII claims. *Id.* at 515.[2]

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[2] *See also Ryan v. Reno,* 168 F.3d 520, 524 (D.C. Cir. 1999) ("[U]nder *Egan* an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

The district court focused primarily on the constitutionally derived *Egan* national security exemption in holding that Toy's building-access revocation could not be examined by the court. That strategy follows the majority approach – it seems that no appellate court has addressed Title VII's explicit national-security exemption. Each previous case has revolved around some form of denial or revocation of a security clearance, which falls under *Egan* and is jurisdictional.[3]

Egan's holding that security-clearance decisions could not be reviewed was premised on necessary "[p]redictive judgment[s]" that must be made in relation to security clearances and the "necessary expertise" that agencies have in making them. *Egan,* 484 U.S. at 529. The Navy had provided Egan with several layers of consideration and review related to his security clearance. That process, coupled with the necessity of the judgments and the agency's expertise, led the Court to conclude that it could not review the security decisions.

The district court concluded, and the government urges us to affirm, that a security clearance is essentially identical to building access and that other courts have expanded *Egan* beyond security clearances. The government cites *Brazil v. United States*

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[3] *See, e.g., Bennett v. Chertoff,* 425 F.3d 999 (D.C. Cir. 2005) (analyzing a Tittle VII security exemption claim under *Egan* rather than subsection (g)).

Department of Navy, 66 F.3d 193 (9th Cir. 1995) as an example of that court's expanding the meaning of the national security exemption beyond security clearances to cover a separate certification program. That opinion, however, is unhelpful, because the court treated a certification program as a security clearance only because the parties had agreed to treat it as such.[4]

The government also cites *Becerra v. Dalton,* 94 F.3d 145, 148 (4th Cir. 1996), in which the court held that the instigation of an investigation of a security clearance, rather than revocation, was covered under *Egan*'s national-security exemption. The plaintiff had claimed that the investigation of his suitability for a security clearance was impermissibly retaliatory, but the court held that the investigation was tied to the clearance and thus was covered under *Egan. Id.* Again, that case is unhelpful because of the inextricable connection to security-clearance determinations.

Finally, the government cites *Beattie v. United States,* 949 F.2d 1092, 1095 (10th Cir. 1991), in which the plaintiff had been denied access to the Air Force One secured area and thereafter was terminated. The court did not decide whether revocation of access to the premises was akin to a revocation of a security

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[4] *Brazil,* 66 F.3d at 195 n. 1 (explaining that the court would "treat PRP certification and security clearance decisions as equivalent for purposes of this opinion").

clearance under *Egan* – it only hinted at that in *dictum*.[5]

None of the cases cited by the government is particularly persuasive. No court has extended *Egan* beyond security clearances, and we decline to do so. Security clearances are different from building access; security-clearance decisions are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions.[6] There is also significant process involved in granting security clearances,[7] the kind of

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[5] The government offers one further case to support a broad reading of *Egan* to encompass revocation of building access. The government cites *Berry v. Conyers,* 692 F.3d 1223, 1226 (Fed. Cir. 2012), reh'g en banc granted, opinion vacated, 2013 WL 262509 (Fed. Cir. Jan. 24, 2013), which held that *Egan* applied not only to security clearances but also to determinations of "eligibility of an individual to occupy a sensitive position, which may not necessarily involve access to classified information." Because of the en banc rehearing, the government cannot derive support from *Conyers.*

[6] Security determinations in particular are delegated by the President to agency heads or their designees, not to any employee or supervisor in an agency. *See, e.g.,* Exec. Order No. 10,450, 18 Fed. Reg. 2489 (April 27, 1953) (making agency heads and their designees responsible for ensuring that employees act in the interests of national security); Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (requiring the agency head or his designee to make a "determination of eligibility for access" to classified information).

[7] *See* Exec. Order No. 12,968, 60 Fed. Reg. 40245 § 5.2 (August 2, 1995) (describing process for review of denial or revocation of a security clearance).

process that allows agencies to make the deliberate, predictive judgments in which they specialize.

That is not the case, as aptly demonstrated here, where building access is concerned. Building access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions. An FBI security clearance, on the other hand, may be granted or revoked only by the FBI's Security Division, a group that specializes in making security-clearance decisions and to which authority to make those decisions is explicitly delegated by the director.[8] A lack of oversight, process, and considered decision-making separates this case from *Egan,* which therefore does not bar Toy's suit.[9]

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[8] This decision is in accord with *Rattigan v. Holder,* 689 F.3d 764, 768 (D.C. Cir. 2012), which somewhat limited *Egan's* scope. Rattigan, an FBI employee, sued under Title VII claiming that he was discriminated and retaliated against. His claim was based on a complaint made by the Office of International Operations ("OIO") to the FBI's Security Division. A co-worker had voiced concerns to the OIO, which then referred the matter to the Security Division. *Id.* at 766. Rattigan claimed that the colleague's complaint and its referral to the Security Division were not protected under *Egan,* and the court agreed. It held that *Egan* applies only to "security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns." *Id.* at 768. FBI "employees outside the Security Division are expected to refrain from making sensitive, predictive judgments and it is 'not their place' to make the kinds of decisions that *Egan* shields from review." *Id.*

[9] "[T]he lack of judicial review [of security clearance decisions] creates the potential for abuse by the agencies and

(Continued on following page)

Subsection (g), however, does: Its plain language creates an exception to Title VII where granting "access to the premises" of a secure location is related to national security. 42 U.S.C. § 2000e-2(g). Access must be "subject to any requirement imposed in the interest of the national security . . . under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President." *Id.*

There is no doubt that "access to the premises" is at issue here. The question is whether that access is subject to any applicable statute or executive order ("EO") that administers a "national security program." As a matter of first impression, we interpret a "national security program" broadly to mean any set of regulations related to matters of national security. There must be a specific statute or EO, however, requiring or implementing such regulations.

The government points to EO 12829 establishing the National Industrial Security Program ("NISP"), which governs national security related to contractors. That EO broadly states that contractors shall be subject to the same security requirements as are members of the Executive Branch, and it directs that

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bureaus employing them." *Perez,* 71 F.3d at 514 n. 6. That result is required by *Egan,* because "security clearance determinations are 'sensitive and inherently discretionary' exercises, entrusted by law to the Executive." *Id.* (quoting *Egan,* 484 U.S. at 527-29). That lack of judicial review and increased possibility of abuse are not required in the case of building-access decisions.

an implementation manual be written. The resulting manual requires that a procedure "be established for removal of the individual's authorization to enter the [secure] area upon reassignment, transfer or termination, or when the individual's PCL [personnel security clearance] is suspended or revoked." Operating Manual § 5-313(d).[10] The manual also repeatedly states that "[n]othing in this Manual affects the authority of the Head of an Agency to limit, deny, or revoke access to classified information." *Id.* § 1-105. The government points to an additional section that requires "contract employees" to "follow the security requirements of the host." *Id.* § 6-105.

The EO establishing the NISP creates a "national security program" – it directs agencies to take steps to control sensitive information. That program unquestionably applies to Toy, a contract employee. It and the operations manual together require agencies to ensure that contractors abide by security regulations applicable to employees and lays out concrete steps that must be taken.

A logical step related to that security program is revocation of a contract employee's building access. There is an abundance of security-related confidential information at FBI offices, and access to a building would mean access to that information. Moreover,

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[10] National Industrial Security Program Operating Manual, February 28, 2006, available at http://www.dss.mil/documents/odaa/nispom2006-5220.pdf.

access to the premises would allow access to computer networks, which contain even more classified information, the release of which might be a threat to national security – the government contended in its motion to dismiss that Toy had accessed secure information on FBI computers using other employees' credentials.

The contract between DynCorp and the Department of Justice contemplated building access as a part of security arrangements; it makes clear that access to an office could be refused to a contract worker who acted contrary to the Department's guidelines. Even if the Beaumont office had asked for a revocation of Toy's security clearance, which would have invoked the protections of *Egan,* common sense dictates that the FBI be allowed to suspend building access to a person who allegedly committed grave security breaches during that process. This is explicitly contemplated by the operations manual produced pursuant to EO 12829.

A related security program not advanced by the government arises under EO 12968, which provides that agencies may "grant or deny, in their discretion, facility access approvals" where employees might be exposed to classified information inadvertently. 60 Fed. Reg. 40245 § 2.1(b)(1). That program again is a "national security program" insofar as it is designed to safeguard classified information in the interest of national security. It explicitly contemplates national security and entrusts to agencies the ability to grant

or deny building access to government employees based on security considerations.

Because EO 12829 applies restrictions on employees to contract employees as well, EO 12968 applies to Toy – the agency has the ability to grant or deny access to facilities within its discretion based on considerations of national security. Thus, there are multiple relevant "national security programs" arising under EOs that relate to access to secured premises. Subsection (g) applies to Toy's building access revocation, and review is therefore barred.

IV.

In summary, subsection (g) creates a security exemption to Title VII where access is denied to a premise where secure information is kept. EOs 12829 and 12968 create security programs related to securing information, and the government advances numerous reasons for the revocation of Toy's access to the building where that information was kept, all of which are directly related to security breaches she allegedly committed. Toy therefore cannot be granted relief under Title VII. The judgment of dismissal is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOBBI-ANNE TOY, Plaintiff,	§	
v.	§	Civil Action No. H-10-5155
ERIC H. HOLDER, JR., ATTORNEY GENERAL,	§	
Defendant.	§	

ORDER

(Filed May 18, 2012)

Pending before the Court is Defendant Eric H. Holder, Jr.'s Motion to Dismiss and for Summary Judgment (Document No. 10). Having considered the motion, submissions, and applicable law, the Court determines that the motion to dismiss should be granted.

I. BACKGROUND

This is a Title VII discrimination and retaliation case. On December 22, 2010, Plaintiff Bobbi-Anne Toy ("Plaintiff") filed an Original Complaint (the "Complaint") against Attorney General Eric Holder, Jr. ("Defendant") as head of the Department of Justice, under which the Federal Bureau of Investigation (the "FBI") operates.[1] Plaintiff alleges that the FBI

[1] *Complaint,* Document No. 1.

violated Title VII of the Civil Rights Act of 1964 by discriminating against her based on her gender. Specifically, Plaintiff claims that the FBI revoked her security access to an FBI facility based on discriminatory animus related to her gender. In addition, Plaintiff claims that the FBI revoked her conditional offer of employment as a result of gender discrimination and as an act of retaliation in response to Plaintiff's filing of discrimination charges with the Equal Employment Opportunity Commission (the "EEOC"). Defendant denies these allegations and moves for dismissal of the Complaint.

Plaintiff is a female that was employed by an independent contractor, Dyncorp Inc., to work as a data and intelligence analyst for the FBI at their regional office in Beaumont, Texas. Although she was employed by a private contractor, Plaintiff contends that she was directly supervised by and worked with FBI employees.[2] During the time at issue, Carlos Barron ("Barron"), an FBI agent located in the Houston office, acted as the supervisor of several intelligence programs, including those on which Plaintiff

[2] Plaintiff states that "at all times, her work was controlled by FBI personnel and the methods and manner in which she performed the work was dictated by FBI personnel in Beaumont and Houston." *Complaint,* Document No. 1 at 2, ¶ 5. Consequently, Plaintiff argues that she "was an employee of the FBI for purposes of Title VII." *Id.* Defendant does not dispute this contention.

worked, while Brett Davis ("Davis") acted as the head of the Beaumont facility.[3]

Plaintiff contends that the alleged discriminatory conduct began when Davis became the head of the Beaumont office. Plaintiff claims that Davis "had problems with women" and that Plaintiff was a "strong willed, independent young woman working in a male-dominated hierarchy."[4] Plaintiff also asserts that Davis made several attempts to have Plaintiff terminated.[5] Defendant, on the other hand, claims that a conflict begin to arise between the Plaintiff and Davis, not because of any opinions Davis had of women, but because Plaintiff failed to follow FBI regulations and policies. Specifically, Defendant claims that "Plaintiff engaged in activities of a FBI agent without the permission of her supervisors."[6] For instance, Defendant asserts that Plaintiff was "representing to others outside the FBI that she was an employee of the FBI" and that she had been participating in tactical narcotics operations by going undercover with FBI agents without the authorization

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[3] Plaintiff contends that Barron was her direct supervisor, not Davis. *Id.* at 2, ¶ 8.

[4] *Id.* at 2, ¶ 6.

[5] Specifically, Plaintiff contends that "Davis was abrasive and ultimately proved to be unstable. He also had problems with women." *Id.* at 2, ¶ 7; *see also id.* at 2, ¶ 8.

[6] *Defendant Eric H. Holder, Jr.'s Motion to Dismiss and for Summary Judgment*, Document No. 10, at 7.

or knowledge of Davis or Barron.[7] In addition, Defendant contends that Davis was notified in July 2004, that Plaintiff "was dating the son of a FBI subject."[8] Plaintiff refutes these contentions and argues that she did "nothing inappropriate."[9]

Notwithstanding the parties' disagreement as to the source of the confrontation, it is undisputed that during this time, tension arose between Plaintiff and Davis. It is also undisputed that eventually Barron, after discussion with Davis, revoked Plaintiff's access to the Beaumont office.[10] Based on the revocation of her security access to the Beaumont office, Dyncorp terminated Plaintiff as an analyst. Plaintiff then filed an Equal Employment Opportunity ("EEO") complaint, alleging gender discrimination.

Meanwhile, during the same time period, Plaintiff submitted an application to be formally employed by the FBI and received a conditional offer of employment. Unit Chief Therese Rodrique, the individual

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[7] *Id.* at 8. Defendant also says that Plaintiff "would access FBI computers using passwords that did not belong to her, have telephone lines installed without having proper approval, load software onto unsecured computers, and purchase items that were not previously approved." *Id.*

[8] *Id.* at 9.

[9] *Complaint,* Document No. 1 at 2, ¶ 5.

[10] The parties dispute whether Plaintiff's security clearance, in its entirety, was revoked, or whether the revocation was only minimal and only applied to her access to the building. This distinction will be discussed in greater detail in Part III.

who processed Plaintiff's formal FBI application for employment, contacted Barron and Agent Townsend, another agent with whom Plaintiff worked, to discuss Plaintiff and her job performance. Both Barron and Townsend submitted negative references for Plaintiff. Barron also informed Rodrique that Plaintiff's security clearance had been revoked. Consequently, Plaintiff's conditional offer of employment with the FBI was rescinded. Plaintiff contends that the conditional employment offer was rescinded in retaliation of her filing the EEO complaint and because of discriminatory references given by Barron and Townsend. Defendant, on the other hand, argues that no discrimination or retaliation occurred and that Rodrique did not have knowledge of the EEO complaint when she revoked the conditional offer. Instead, Defendant claims that the revocation occurred because Plaintiff's security clearance had been revoked.

Defendant now moves to dismiss Plaintiff's Complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiff's alleged cause of action is precluded by the National Security Exemption of Title VII of the Civil Rights Act of 1964, the Supreme Court's *Egan* opinion, or both. *See* 42 U.S.C. § 2000e-2(g) (setting forth a statutory exception to Title VII claims) (hereinafter the "National Security Exemption"); *see also Dept. of the Navy v. Egan,* 484 U.S. 518 (1988). Defendant argues that even if the National Security Exemption is not applicable, the Plaintiff has failed to establish a

prima facie case for either her discrimination or retaliation claims, and therefore summary judgment is proper. Plaintiff, on the other hand, contends that the National Security Exemption is not applicable and that she has met her burden of establishing a *prima facie* case under both the discrimination and the retaliation frameworks.

II. STANDARD OF REVIEW

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "'[A] formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly,* 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breeches Litig.,* 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit,* 369 F.3d 464, 467 (5th Cir. 2004)). To survive the motion, a plaintiff must plead "enough

facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly,* 550 U.S. at 558).

III. LAW & ANALYSIS

Defendant moves, under Rule 12(b)(6), to dismiss this case, arguing that Title VII of the Civil Rights Act of 1964, as amended, exempts causes of action against an employer when the claim is premised on the revocation or denial of a national security clearance and that, here Plaintiff's security clearance was revoked. Plaintiff responds by arguing that Barron did not revoke her security clearance in its entirety, he only revoked her access to the Beaumont office, and moreover, that Barron did not have authority to revoke her security clearance in its entirety. Plaintiff argues that the mere revocation of her building access was not a security program "administered under any statute of the United States or any Executive Order of the President," as is required to invoke the National Security Exemption, and therefore, this Court retains jurisdiction to hear the dispute.

As an initial matter, the Court notes that the parties disagree on whether Plaintiff's security clearance was revoked in its entirety or whether only

her building access was revoked.[11] As discussed above, on a 12(b)(6) motion the Court must assume that all factual allegations of Plaintiff's are true. Therefore, the Court will, as it must, assume that only Plaintiff's security access to the Beaumont office was revoked when deciding the motion to dismiss. The threshold issue presented, therefore, is whether this Court has jurisdiction to adjudicate Plaintiff's claims based solely on Plaintiff's alleged facts.

A. The National Security Exemption and Fifth Circuit Precedent

The National Security Exemption of Title VII specifically states:

> **(g) National Security**
>
> Notwithstanding any other provision of this subchapter, it shall ***not*** be an unlawful

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[11] Defendant argues that Plaintiff's assertion "that only her access to the building was revoked, and not her security clearance or access to sensitive data, is patently false" and attached evidence to its motion and reply, tending to show that the revocation of building access was just one part of the security clearance revocation. *Defendant Eric H. Holder, Jr.'s Reply in Support of its Motion to Dismiss and Request for Extension of Time to File Reply in Support of its Summary Judgment Motion,* Document No. 14 at 3. When deciding a motion to dismiss under Rule 12(b)(6), however, extrinsic evidence is not taken into consideration. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Therefore, for purposes of this Rule 12(b)(6) motion, the Court will not consider the exhibits attached to either Defendant's motion to dismiss or to Plaintiff's response.

> 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 to any individual for employment in any position, if –
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> (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 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) (emphasis added). In addition, the Supreme Court has made clear that courts should not question Executive Branch decisions to deny or revoke national security clearances, as this would be an impermissible intrusion onto matters of national security. *See Dept. of the Navy v. Egan,* 484 U.S. 518 (1988) (holding, in a non-Title VII case, that courts should not review executive agency decisions to deny security clearances). Neither party has cited, nor has this Court found, any Fifth Circuit precedent directly interpreting the National Security Exemption. However, the Court of Appeals for the Fifth Circuit has applied the Supreme Court's *Egan* decision to Title

VII claims. *Perez v. Fed. Bureau of Investigation,* 71 F.3d 513 (5th Cir. 1995), *cert denied* 517 U.S. 1234 (1996). In *Perez,* a plaintiff sued the FBI, alleging that "the FBI took acts of retaliation against him by revoking his top-security clearance and firing him." *Id.* at 514. The FBI, on the other hand, argued that the Plaintiff's security clearance in *Perez* was revoked, not as a retaliatory measure, but because he "(1) fabricated official reports, and (2) disclosed classified information to unauthorized representatives of the Cuban Government." *Id.* The Fifth Circuit determined that the courts did not have jurisdiction over this dispute. *Id.* at 515.

Applying the Supreme Court's *Egan* analysis, Fifth Circuit explained:

> Because the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision. . . . [and] such scrutiny is an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security. . . .

Id. at 514-15. In making its decision, the Fifth Circuit in *Perez* relied solely on the *Egan* precedent. Therefore, the Court must consider both the National Security Exemption laid out in Title VII, as well as the *Egan*/*Perez* progeny.

The Defendant in this case argues that *Perez* is directly on point, and that this Court should dismiss these Title VII claims because this Court is not permitted to analyze Barron's decision to revoke the Plaintiff's building access. Plaintiff argues that this case is distinguishable from *Perez* because it was not a denial of a full-fledge security clearance, and that the prohibition of the National Security Exemption does not apply. The Fifth Circuit has yet to analyze whether *Perez* applies more broadly than full security clearance denials or revocations. Therefore, this Court will look to other circuits for guidance.

B. Applications of Egan and the National Security Exemption in Other Circuits

Other circuits, like the Fifth Circuit, have made clear that courts do not have jurisdiction to consider Title VII claims premised on the denial or revocation of a security clearance. *See, e.g., Ryan v. Reno,* 168 F.3d 520 (D.C. Cir. 1999); *Becerra v. Dalton,* 94 F.3d 145, 149 (4th Cir. 1996); *Brazil v. U.S. Dep't of Navy,* 66 F.3d 193, 196-97 (9th Cir. 1995).[12] In addition, the

[12] When addressing this issue, some courts have acknowledged both sources of judicial constraint. *See Ryan v. Reno,* 168 F.3d 520, 524-25 (D.C. Cir. 1999). In *Ryan v. Reno,* the D.C. Circuit relied upon the *Egan* reasoning, but added that its decision was "fortified by Title VII's express language exempting employment actions based on security clearance possession." *Id.* at 525 n.3. Although it analyzed both *Egan* and the National Security Exemption, the *Ryan* Court failed to explain the overlap of these two doctrines. *See id.* Therefore, this Court acknowledges

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Court of Appeals for the Ninth Circuit and the Fourth Circuit have extended this prohibition of adjudication beyond pure "security clearance" revocations or denials. *Becerra,* 94 F.3d at 149; *Brazil,* 66 F.3d at 196-97. Specifically, the Ninth Circuit applied the Supreme Court's *Egan* analysis and determined that the courts did not have jurisdiction over a plaintiff's Title VII claim that was premised on the revocation of something other than a formal "security clearance." There, the plaintiff was denied a Nuclear Weapons Personnel Reliability Program Certification, which was a prerequisite to the plaintiff's employment. *Brazil,* 66 F.3d at 196-97. Moreover, the Fourth Circuit has held that even the ***instigation of an investigation*** into whether or not to revoke a security clearance is not subject to judicial scrutiny. *Becerra,* 94 F.3d at 149. In *Becerra,* the Fourth Circuit stated, "the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference." *Id.* Considering *Egan* and earlier Fourth Circuit opinions, the court in *Becerra* explained that courts should not inquire into the Executive Branch's "authority to grant or deny access to national security information." *Id.* (quoting *Guillot v. Garrett,* 970 F.2d 1320, 1324 (4th Cir. 1992)). Moreover, the Tenth Circuit has suggested in dicta that a contract employee's denial of access to a secured space would be precluded from adjudication

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that both *Egan* and the National Security Exemption may preclude adjudication and will address the two concurrently.

in a federal court based on *Egan. See Beattie v. United States of America,* 949 F.2d 1092, 1095 (10th Cir. 1991) (dismissing the case as moot, but suggesting that *Egan* would preclude the Court's jurisdiction when an employee of a airplane company under contract with the U.S. Air Force was denied access to an Air Force One project area).

C. Application of the National Security Exemption and Egan

What is clear from both *Perez* and case law from other circuits is that the National Security Exemption and *Egan* prohibit courts from passing judgment on an executive agency's decision to revoke or deny access to confidential and secure information. While the Plaintiff argues that her security clearance was not revoked in whole, the Court finds that even assuming that only Plaintiff's building access was revoked, current case law would still prohibit this Court from delving into the murky waters of analyzing the FBI's denial of access to the Beaumont office.[13] Further, the Court finds that based on the current state of case law on this issue, adjudication of both

[13] In fact, even courts that have determined that *Egan* or the National Security Exemption to Title VII are inapplicable in certain cases, have acknowledged that these limitations apply beyond the scope of security clearance revocations or denials. *See Jones v. Aschcroft,* 321 F. Supp. 2d 1, 8 (D.D.C. 2004) ("[T]his Court does not hold that section 2000e-2(g)'s exemption is necessarily limited only to security clearance determinations. . . .").

the discrimination and retaliation claims would require the Court's intrusion into the merits of the security access determination, at least peripherally.

1. Plaintiff's Discrimination Claim

In her discrimination claim, Plaintiff alleges that Barron's revocation of her security access to the Beaumont office was the adverse employment action that occurred as a result of discriminatory animus. In order to determine whether that action, itself, was based on discrimination, the Court would have to investigate and weigh the FBI's rationale for revoking access to the office. Therefore, the Court finds that it cannot adjudicate Plaintiff's discrimination claim without violating the *Egan* prohibition, and therefore, the Court has no jurisdiction over the claim. Accordingly, Plaintiff's discrimination claim is dismissed.

2. The Retaliation Claim

Plaintiff's retaliation claim is slightly more attenuated. In her Complaint, Plaintiff claims that the revocation of her conditional offer of employment constitutes an adverse employment action that was taken because of retaliatory animus.[14] Later, in her Response, Plaintiff argues that Barron's and Townsend's negative references to Rodrique were part of

[14] The Complaint asserts that "Ms. Toy's conditional offer of employment was revoked as a result of gender discrimination and retaliation." *Complaint,* Document No. 1 at 4, ¶ 17.

the retaliatory animus as well.[15] Defendant responds with a non-retaliatory reason for revocation of the offer. Specifically, Defendant contends that the conditional offer of employment was revoked because Plaintiff's security clearance, or at the least her access to a secure FBI facility, had been revoked.

Plaintiff's retaliation claim is based on an action that is one step removed from the security access decision. Therefore, while the Fifth Circuit's *Perez* decision makes clear that *Egan* might foreclose a claim of retaliation under Title VII, there is a distinction between *Perez* and the case at bar: In *Perez* the "adverse employment action" was the revocation of the security clearance itself. Here, Plaintiff's claim is one step removed – the revocation of security access is the proffered "non-retaliatory" reason for the adverse employment action; it is not the action itself.

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[15] Despite having originally contended that the revocation of the conditional offer was the adverse employment action, in her Response, Plaintiff contends that "The Negative References Were Retaliatory." *Plaintiff's Response to Defendant's Motion to Dismiss and for Summary Judgment,* Document No. 13 at 15 (Heading to Part VI). The Court construes Plaintiff's argument to be that the negative references given to Rodrique imputed any retaliatory animus of Barron and Townsend onto Rodrique, who revoked the offer of employment. *See Gee v. Principi,* 289 F.3d 342, 346 & n.2 (5th Cir. 2002) (holding that a decision-maker may be imputed with the retaliatory animus of someone they relied upon when making the decision to enforce the adverse employment action in a Title VII retaliation case).

The Court finds the D.C. Circuit's opinion in *Ryan v. Reno* to be instructive.[16] There, the D.C. Circuit faced a similar situation. The Plaintiff in *Ryan* was given a conditional offer of employment with the Immigration and Naturalization Service ("INS"), which was later revoked after he could not obtain the property security clearance. *Id.* at 523-24. Plaintiff claimed that he was being discriminated against, however the INS argued that the revocation of the conditional offer was based on its inability to conduct an adequate security clearance background investigation on plaintiff. *Id.* at 524. The D.C. Circuit explained that the plaintiff could not challenge the proffered reason's authenticity without challenging its validity as well and decided that the court could not adjudicate the case. *Id.* The court held that "an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII." *Id.*

Similarly, even assuming that the Plaintiff in this case presents a *prima facie* case of discrimination, the

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[16] The *Ryan* court stated that its holding was "limited to Title VII discrimination actions and does not apply to actions alleging deprivation of constitutional rights." *Ryan*, 168 F.3d at 524. This Court finds that the D.C. Circuit was attempting to preclude application of its analysis to claims involving constitutional violations, not other Title VII claims because, in making this statement, the D.C. Circuit cites *Webster v. Doe,* 486 U.S. 592, 603 (1988), a case that directly dealt with constitutional claims. Therefore, while *Ryan* is not identical to the present case, this Court draws analogy to *Ryan* for both Plaintiff's discrimination and retaliation claims.

Court or a jury would inevitably have to determine whether the Defendant's proffered non-retaliatory reason for revoking the conditional offer – the revocation of security access – was valid or was merely pretextual. Such a determination would invariably rub against the prohibition set forth in *Egan*. Therefore, until a more clear delineation is drawn by the circuit courts, and specifically the Fifth Circuit, this Court determines that it is precluded from adjudicating the merits of Plaintiff's retaliation claim based on the National Security Exemption and the Supreme Court's *Egan* opinion.

In sum, all of Plaintiff's claims revolve directly around the revocation of her security access to the Beaumont office – the revocation led to her immediate termination and, according to the Defendant, led to the revocation of her conditional offer of employment. For this Court to analyze either of Plaintiff's claims would invariably require the Court to second guess the FBI's revocation of her security access, and therefore, dismissal of all claims is proper.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendant Eric H. Holder, Jr.'s Motion to Dismiss and for Summary Judgment (Document No. 10) is GRANTED. The Court further

ORDERS that Plaintiff's claims are DISMISSED.

SIGNED at Houston, Texas, on this 18 day of May, 2012.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-20471

BOBBI-ANNE TOY,

Plaintiff-Appellant

v.

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

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Jul. 2, 2013)

Before REAVLEY, JOLLY, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge