No. 05-1605

In the Supreme Court of the United States

RIAZ BAQIR, PETITIONER

v.

JIM NICHOLSON, SECRETARY
OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
TEAL LUTHY MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner failed to establish a prima facie case of employment discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because he failed to establish that he was performing the duties of an interventional cardiologist at a level that met the Veterans Administration's legitimate expectations at the time he was fired.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 434 F.3d 733. The opinion of the district court (Pet. App. 44-69) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42-43) was entered on January 20, 2006. A petition for rehearing was denied on March 20, 2006 (Pet. App. 70-71). The petition for writ of certiorari was filed on June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1999, petitioner was offered a temporary term of employment as an interventional cardiologist at

the Asheville, North Carolina, Veterans Administration Medical Center (VAMC).[1] Pet. App. 4. Several months later, when he failed to complete the credentialing process and obtain the medical privileges that are required to practice in this speciality, he was fired.[2] *Id.* at 13-14. He brought suit against the Secretary of Veterans Affairs alleging that his firing violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 2. Petitioner's complaint alleges that he is black, that he is a practicing Muslim, that his national origin is Pakistani, and that he was 52 years old at the time of his firing. *Id.* at 3.

All new physicians at the Asheville VAMC are proctored by other physicians when they are hired, so that the hospital can be sure that they are qualified to treat patients.[3] Before petitioner began work, the Physician Professional Standards Board and Medical Staff Executive Council (the Board) of the Asheville VAMC met and decided that petitioner could be proctored in general diagnostic cardiology at the Asheville VAMC, but would have to be proctored in interventional cardiol-

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[1] An interventional cardiologist is a physician who treats coronary artery blockages by inserting catheter wires into arteries leading to the coronary arteries and then treats the blockages with balloons, stents, or cutting devices. Pet. App. 3.

[2] The credentialing process is a review of relevant licenses, information on physical and mental health status, peer assessment of professional competence, continuing education records, and board certifications. Medical privileges are the authority to practice at the hospital in a particular field of medicine. Pet. App. 5 n.4.

[3] Proctoring is a process through which new physicians are observed to determine their competency before privileges are granted to perform medical procedures. Pet. App. 5 n.5.

ogy at the Durham, North Carolina VAMC, because there were no interventional cardiologists on staff at the Asheville facility. Pet. App. 5-6. At this same meeting, the Board noted some questions about petitioner's skills in interventional cardiology. In particular, although petitioner was recommended for a position in interventional cardiology by his superiors at a hospital in Pennsylvania where he did a one-year, unaccredited training program in interventional cardiology, one of his colleagues at a different hospital described his skills as average and refused to sign a peer appraisal form because he believed the form "grossly exaggerated" the number of procedures that petitioner had performed. *Id.* at 5.

Petitioner began work at the Asheville VAMC on July 18, 1999. Pet. App. 6. He alleges that he was subjected to a hostile work environment on his first day of work by a Hindu physician who told petitioner not to talk to him. *Id*. at 8. Several days later, Dr. Mediratta —Chief of Cardiology at the Asheville VAMC—allowed petitioner to take the lead on a diagnostic catheterization and concluded that petitioner "was not handling the catheters with confidence or accurately" and "did not know how to do the catheterization properly." *Ibid.* Dr. Mediratta informed Dr. Elliston, petitioner's direct supervisor, of his concern, and Dr. Elliston determined that petitioner should not be allowed to perform any additional catheterizations until he had been to the Durham VAMC for proctoring. *Ibid*.

Petitioner's proctoring period in interventional cardiology at the Durham VAMC took place over a several week period in October 1999. Petitioner participated in ten cases at the Durham VAMC. Pet. App. 10. The interventional cardiologists who proctored petitioner

there unanimously concluded that he was unqualified to independently perform interventional cardiology procedures. *Id.* at 11. One of the proctoring physicians, Dr. Kenneth G. Morris, an Associate Professor of Medicine at the Duke University School of Medicine, prepared a memorandum to his Chief of Staff which explained that all of the proctoring physicians had concluded that petitioner did "not currently possess the expertise to be granted privileges" in interventional cardiology. *Ibid.* Another proctoring physician observed that petitioner did "not have [a] sufficient grasp of the selection, set up or application of basic interventional devices to operate independently as an interventional attending," and that "this was not even close" because he "simply was nowhere near ready to operate as an independent interventionalist." *Id.* at 11 n.8.

On November 4, 1999, petitioner reviewed his credentialing file. He contended in response to the proctoring reports that Dr. Morris had overstated the extent of the Durham VAMC's physicians' observations of his skills, and that the visit to Durham was insufficient to assess his interventional cardiology skills. Pet. App. 12. He requested to be permitted to work with a consulting interventional cardiologist "until such time that I can be considered as [having] completed my proctorship successfully." *Id.* at 12-13.

On November 5, 1999, the VAMC Board reviewed the proctoring reports as well as the position statement submitted by petitioner and petitioner's credentials. Pet. App. 13. After reviewing and discussing these materials, the Board observed that proctoring is "used to determine competence and is not a period of training" and that petitioner was hired "as a fully trained interventional cardiologist," not a trainee. *Ibid.* The Board

voted to recommend denial of clinical privileges in interventional cardiology and voted to recommend that this action be reported to the National Practitioner Data Bank as required by VA regulations. *Ibid.* Dr. Arnold Brown, the Chief of Staff for the Asheville VAMC, advanced the Board's recommendation to James Christian, the Medical Center Director, who reviewed and approved it. *Ibid.*

Because petitioner was hired by the Asheville VAMC to be an interventional cardiologist, and because he was not granted privileges in that discipline, Christian then terminated petitioner's temporary employment. Pet. App. 14. Christian informed petitioner of his termination by letter, stating that petitioner was terminated because he was not granted the privileges necessary to fulfill the requirements of the position for which he was hired. *Ibid.*

Petitioner's wife (then Chief of Cardiology at the Wilkes-Barre Veterans Center) spoke with Dr. Elliston after the November 5 Board meeting. Pet. App. 14. According to petitioner's wife, Elliston told her that petitioner's age was "the major and only factor" for petitioner's discharge. *Ibid.* Elliston denied stating that age was the only factor in petitioner's discharge. He conceded that he told petitioner's wife that interventional cardiology was "a young man's sport," but explained that he was attempting to recommend to petitioner, in a gentle manner, that he practice in another area of cardiology for which he possessed the required skills. *Ibid.*

2. On December 15, 1999, petitioner filed an administrative complaint with the VA's Office of Resolution Management alleging discrimination. Pet. App. 15. In July 2002, having exhausted his administrative reme-

dies, petitioner brought suit against the VA. *Id.* at 17 n. 11. As relevant here, petitioner alleged that the VA terminated his employment based on race, color, religion, and national origin, in violation of Title VII; terminated his employment based on his age, in violation of the ADEA; subjected him to a hostile work environment; and retaliated against him for contacting an equal employment opportunity counselor. *Id.* at 17.

After discovery, the VA moved for summary judgment on petitioner's claims. Pet. App. 17. The district court granted summary judgment to the VA on all of petitioner's claims. *Id.* at 67. As relevant here, the district court concluded that petitioner had not raised a material dispute of fact on the question whether he could satisfy the second part of the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by demonstrating that he had met the VA's legitimate expectations at the time he was fired. Pet. App. 59. The court also concluded that petitioner failed to create a material dispute of fact as to whether his proctoring period was too short, because the VA produced evidence that the proctoring period lasts only as long as required to determine a physician's competence, and petitioner's evidence that other doctors had been given longer proctoring periods did not create a dispute of fact on this point. *Id.* at 62.

3. The United States Court of Appeals for the Fourth Circuit affirmed. Pet. App. 33. The court of appeals agreed with the district court that petitioner failed to establish that he was performing his job duties at a level that met the VA's legitimate expectations. *Id.* at 23. The court explained that petitioner was hired to serve as an interventional cardiologist, and the undisputed evidence showed that he was unable to meet the

VA's expectations for that position.[4] *Id.* at 20-23. The court rejected petitioner's contentions that he should have been given a longer proctorship in interventional cardiology and that the Durham proctors were discouraged from extending his proctorship by the prospect of having to travel to Asheville, concluding that petitioner failed to produce any evidence that a proctorship is intended as a training period as opposed to an assessment period that lasts only as long as is required to assess the skills of the proctored physician. *Id.* at 22-23.[5]

ARGUMENT

The court of appeals' decision involves the fact-bound application of settled law and is correct. The decision does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is not warranted.

1. The court of appeals correctly applied the settled framework for assessing employment discrimination claims established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, petitioner has the initial burden of establishing a prima facie case of discrimination by showing that: (1) he is a

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[4] The court explained that petitioner's contentions about his performance at Asheville could not show he was qualified to serve as an interventional cardiologist because the proctorship at Asheville was in general, diagnostic cardiology, not interventional cardiology. Pet. App. 23. Although petitioner's statement of the case discusses the proctorship in Asheville, he has not challenged the court of appeals' conclusion in this regard.

[5] The court of appeals also affirmed the district court's grant of summary judgment as to petitioner's claims for age discrimination, hostile work environment, and retaliation. See Pet. App. 27-32. The petition for a writ of certiorari does not seek review of those rulings.

member of a protected group; (2) he was meeting the VA's legitimate expectations; (3) he was discharged; and (4) the discharge occurred in circumstances that give rise to an inference of unlawful discrimination. As the court of appeals concluded, petitioner failed to establish a prima facie case of discrimination because he failed to show that he was meeting the VA's legitimate expectations for an interventional cardiologist. Pet. App. 20.

a. The undisputed evidence showed that the VA hired petitioner to be an interventional cardiologist who could "work independently and without further training." Pet. App. 20. The evidence also showed that petitioner was not able to demonstrate to the VA physicians assigned to proctor him in interventional cardiology that he could work independently as an interventional cardiologist. *Id.* at 20-21. The unanimous view of the three highly qualified physicians from the Durham VAMC who were asked to evaluate petitioner's skills was that he was not able to perform the job. *Id.* at 20. As the court of appeals concluded, because the only evidence in the record as to whether petitioner was able to meet the VA's expectations is that he could not do so, petitioner failed to satisfy this part of his burden of establishing a prima facie case of discrimination.

Petitioner contends (Pet. 11-15) that it was improper for the court of appeals to consider the evidence that the proctoring physicians concluded that he was not qualified to work independently as an interventional cardiologist during its analysis of his prima facie case, and that it should have reserved consideration of that evidence for the question whether the VA had a nondiscriminatory reason for firing him. According to petitioner, the court of appeals erred because the evidence that petitioner was incompetent "became entangled" with the

question whether petitioner made out a prima facie case of discrimination. Pet. 12. But, as the court of appeals explained, that evidence was relevant to its analysis of the prima facie case because petitioner failed to produce any evidence that he was satisfying the VA's legitimate expectations. Pet. App. 22-23.

Petitioner contended below that his experience, training, and recommendations were sufficient to show that he was meeting the VA's legitimate expectations. Pet. App. 21-22. But the question is not whether petitioner's qualifications, training, and experience *should* have prepared him to work independently as an interventional cardiologist, but rather whether they *did* actually do so. In other words, the prima facie case requires the court to assess not whether petitioner should have been able to meet the VA's legitimate expectations, but whether he was actually doing so. *Id.* at 22. Even if petitioner's evidence of his training and experience suggested he should have been able to work independently as an interventional cardiologist, it did not satisfy his burden of showing that he was meeting the VA's legitimate expectations. The court of appeals thus properly concluded that the undisputed evidence that the proctoring physicians had determined that petitioner lacked the skills to perform independently as an interventional cardiologist—because it was the only evidence on the question whether he was meeting the VA's legitimate expectations—was relevant to (and indeed determinative of) that question.[6]

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[6] Petitioner's suggestion (Pet. 14) that the court of appeals' decision is in tension with this Court's analysis in *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 717 (1983), is incorrect. While *Aikens* notes that the court of appeals "erroneously focused on the question of prima facie case rather than di-

b. Contrary to petitioner's suggestion (Pet. 12-13), the court of appeals' decision does not conflict with the decision in *Cline* v. *Catholic Diocese*, 206 F.3d 651 (6th Cir. 2000). *Cline* concerned a teacher at a Catholic school whose contract was not renewed after the school learned that she was pregnant. The teacher claimed that the school had engaged in illegal pregnancy discrimination, and the school claimed it had terminated her for engaging in premarital sex contrary to its religiously-motivated policy. The Sixth Circuit faulted the district court for "conflat[ing] the distinct stages of the *McDonnell Douglas* inquiry by using [the employer's] 'nondiscriminatory reason' as a predicate" for finding that the plaintiff failed to make out a prima facie case." *Id.* at 660. But unlike petitioner, the plaintiff in *Cline* produced evidence that she was meeting the school's legitimate expectations. The plaintiff's employer gave her a "glowing teacher performance evaluation" two months *after* it learned that she was pregnant, *id.* at 657, which the court of appeals concluded gave rise to a material dispute of fact as to whether the plaintiff was meeting the school's expectations.

In any case where the defendant's proffered nondiscriminatory reason for taking an adverse employment action has to do with job performance, there will be

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rectly on the question of discrimination," *id.* at 717, the plaintiff in *Aikens* had made out a prima facie case by showing, *inter alia*, that he had been rated as an "outstanding supervisor," *id.* at 713 n.2. Because the plaintiff in *Aiken* was able to withstand summary judgment and the case went to trial, the question was whether the failure to promote him was discriminatory. Here, by contrast, petitioner did not present any evidence that he was performing his job in accordance with the VA's reasonable expectations and thus never got past the prima facie case.

some analytical overlap between the plaintiff's prima facie case and the defendant's nondiscriminatory reason for taking the adverse employment action. Petitioner's suggestion that *Cline* holds that this analytical overlap can be avoided is incorrect. *Cline* simply holds that, in a case where the plaintiff produces evidence that—if proven at trial—would show that the plaintiff was meeting the defendant's legitimate expectations, it is improper to conclude that the plaintiff failed to make out a prima facie case, and the court should go on to analyze the "ultimate question" of discrimination. 206 F.3d at 660. *Cline* does not concern a situation, like this case, in which the plaintiff has no evidence that he was satisfying his employer's legitimate expectations, and thus it does not conflict with the court of appeals' decision here.

2. Contrary to petitioner's suggestion (Pet. 15-16), the court of appeals did not conclude that hospital employers are exempt from civil liability if they claim that a discharged medical employee was incompetent. Rather, the court of appeals concluded that petitioner had failed to produce any evidence that he was able to perform the job of an interventional cardiologist to the VA's satisfaction. Pet. App. 20. While the court of appeals commented that it was not "inclined to impugn" the proctoring physician's assessment of petitioner's capabilities, *ibid*. (citing *Freilich* v. *Upper Chesapeake Health, Inc.*, 313 F.3d 205, 218 (4th Cir. 2002) (noting that hospitals have wide discretion to make decisions regarding medical staff)), it never suggested that the hospital's decision to fire him was unreviewable. In fact, the court of appeals thoroughly reviewed the evidence on whether petitioner was able to perform as an interventional cardiologist to the VA's satisfaction, and concluded that it was undisputed that he was unable to

do so. Because the undisputed evidence showed that the VA requires all new physicians to demonstrate their skills in a proctoring period, because the unanimous view of the proctoring physicians was that petitioner lacked the necessary skills to be an interventional cardiologist, and because petitioner failed to produce any evidence that contradicted the proctoring physicians' views, the decision of the court of appeals did not depend on deference to the hospital's judgment. The question whether an employer's determination of the competence of medical or academic professionals is entitled to deference is thus not presented by this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
TEAL LUTHY MILLER
Attorneys

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