

No. 05-1115

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**In the Supreme Court of the United States**

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MARY CATHERINE GRAHAM,  
PETITIONER

*v.*

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

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**BRIEF FOR THE RESPONDENT**

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## QUESTIONS PRESENTED

1. Whether the manner in which petitioner's background investigation was conducted qualified as a material adverse employment action sufficient to establish actionable retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the court of appeals correctly determined that petitioner failed to produce sufficient evidence to resist summary judgment on her sex discrimination and retaliation claims.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not published in the *Federal Reporter*, but is *re-printed* in 157 Fed. Appx. 139. The opinion of the district court (Pet. App. A7-A54) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 29, 2005. The petition for a writ of certiorari was filed on February 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In 1998, petitioner Mary Catherine Graham unsuccessfully applied for a Special Agent position with the Federal Bureau of Investigation (FBI). Pet. App.

A12. At that time, petitioner was an FBI Financial Analyst. *Ibid.* Edward Collins, a contract background investigator, had conducted petitioner's background investigation before petitioner was hired as a Financial Analyst. *Ibid.* After petitioner applied for the Special Agent (SA) position, she was issued a conditional letter of appointment that was contingent on her passing another background investigation. *Id.* at A13.

Collins conducted the background investigation for the Special Agent position. Pet. App. A13. Although Collins reported that "from a performance standpoint" the investigation was "favorable," he found "[q]uestions of \* \* \* inappropriate sexually oriented comments in the workplace, \* \* \* sexual promiscuity, sexually explicit video tape, [and] inappropriate dress." *Id.* at A14. At FBI headquarters, two female reviewers, Tammy Lancaster and Deborah Brennan, reviewed the background report and recommended that the FBI decline to hire petitioner as a Special Agent. *Id.* at A18. FBI Program Manager Therese Rodrique decided to deny petitioner's application for "lack of good judgment" "particularly in areas of moral character, inappropriate sexually oriented comments, sexual promiscuity and a sexually explicit video." *Id.* at A19.

In December 1998, petitioner contacted an equal employment opportunity (EEO) counselor, and, in February 1999, petitioner filed a formal gender discrimination complaint concerning the denial of the Special Agent position. Pet. App. A20. In February 1999, Deputy General Counsel Thomas A. Kelley considered the matter. *Ibid.* The "Kelley Memo" stated that the "background investigation of [petitioner] has raised some genuine concerns, not only as to her fitness for the SA position, but as to her suitability for her current employ-

ment.” *Id.* at A22. Kelley also noted that “much of the negative information referenced in the background investigation has not been substantiated.” *Ibid.* Kelley also stated that “information provided does—perhaps inadvertently—give the impression that [petitioner’s] reputedly unchaste tendencies constituted the main basis for the decision to withdraw[] her conditional offer of employment.” *Ibid.* Kelley was concerned that “[t]his impression—accurate or not—is likely to create serious problems for the FBI when this matter is reviewed by the Equal Employment Opportunity Commission.” *Ibid.* Kelley recommended additional investigation into petitioner’s background. *Ibid.*

As Kelley recommended, the FBI conducted an additional investigation of petitioner. Again, Collins conducted some of the interviews. Pet. App. A23. After the interviews were completed, Lancaster and Brennan again recommended denying petitioner the Special Agent position. *Id.* at A25-A26. In July 1999, petitioner was informed that her application was denied. *Id.* at A26. After an EEO investigation, the FBI concluded that the agency’s decision was based on petitioner’s “inappropriate” office conduct and thus was for “legitimate, nondiscriminatory and nonretaliatory reasons.” *Id.* at A27-A28.

2. Petitioner filed suit under Title VII alleging that the FBI declined to hire her as a Special Agent because of her sex and because she filed an EEO complaint. Pet. App. A7. The district court granted summary judgment in favor of the government on both claims. *Id.* at A7-A8.

The district court determined that the FBI had produced sufficient evidence that it had a legitimate nondiscriminatory motive for the decision not to appoint her as a Special Agent. Pet. App. A39-A40. The court noted

that “a female decision maker, Program Manager Therese Rodrique, found that [petitioner’s] behavior constituted poor judgment unfit for an SA.” *Id.* at A33. The court also recounted some of the incidents in which petitioner made comments “of a sexual nature” while at work. *Id.* at A35-A36. Based on those comments, the court found that “there are facts from which a reasonable employer could determine that [petitioner] exhibited poor judgment unfit for the SA position.” *Id.* at A39. The court rejected petitioner’s effort to show that the FBI’s focus on her office conduct was pretextual, finding no evidence that this conduct was not the “real reason[]” for her non-selection. *Id.* at A44.

The district court held that petitioner’s “only cognizable retaliation claim is that her application for SA was denied again in July 1999 in retaliation for her December 1998 EEO activity.” Pet. App. A44 (footnote omitted). The court concluded that petitioner’s claim failed because petitioner had failed to submit sufficient evidence of a “causal relationship between [petitioner’s] EEOC activity and the decision.” *Id.* at A45. The court noted that petitioner had alleged additional forms of retaliation, such as assigning Collins to conduct part of the background reinvestigation, the lack of an opportunity for petitioner to rebut the accusations, and the timing of the Personnel Security Interview. *Id.* at A44 n.24. The court held that those “other allegations are woefully insufficient as separate retaliation claims because they merely challenge the FBI’s business judgment with respect to certain aspects of the reinvestigation.” *Ibid.*

3. The court of appeals affirmed in a per curiam decision. Pet. App. A1-A6. The court held that the government had met its burden to produce a legitimate nondiscriminatory explanation for its rejection of petitioner’s

application to be a Special Agent—that she had exercised poor judgment in the workplace. *Id.* at A3-A4. The court also determined that petitioner had failed to introduce any significant evidence of pretext. *Id.* at A4.

With respect to petitioner’s retaliation claim, the court held that petitioner had failed to demonstrate a “causal link” between the withdrawal of the employment offer and her filing an EEO complaint. Pet. App. A5. The court noted that petitioner “claims that other events constituted retaliation, such as the timing of the investigation, the selection of the same person to perform both of her background investigations, and the failure to provide her with an opportunity to respond to the statements made about her.” *Id.* at A5 n.3. The court found that none of these “actions” were adverse employment actions because “each of the cited ‘actions’ was merely an investigation protocol used at the FBI.” *Ibid.*

#### DISCUSSION

1. Petitioner contends (Pet. 18-20) that review is warranted to resolve a conflict in the circuits on the showing that an employee must make to demonstrate an adverse employment action for purposes of a Title VII retaliation claim. In *Burlington Northern & Santa Fe Railway v. White*, No. 05-259 (argued Apr. 17, 2006), the Court granted a writ of certiorari to resolve that conflict.

This case involves Title VII’s application to a federal employer, rather than a private employer, as in *Burlington Northern*. Because of differences in the language between Title VII’s federal employer and private employer provisions, compare 42 U.S.C. 2000e-3(a) (private employer), with 42 U.S.C. 2000e-16(a) (federal employer), the decision in *Burlington Northern* will not



necessarily affect the proper disposition of the petition in this case. See Gov't Amicus Br. at 19 n.5, *Burlington Northern, supra* (No. 05-259). Nonetheless, because of the overlap in the basic issues presented, it would be appropriate to hold the present petition pending the Court's decision in *Burlington Northern*.

2. Petitioner also contends (Pet. 5-12) that review is warranted on the ground that the decision below conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). There is no conflict, however, between the decision below and *Reeves*. In *Reeves*, a plaintiff made a “substantial showing” that the employer's explanation for his discharge was false. *Id.* at 144. The Court held that “the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discrimination purpose.” *Id.* at 147. Unlike the plaintiff in *Reeves*, petitioner failed to make a substantial showing that the government's explanation for its refusal to hire her—that she made inappropriate sexual comments while at work—was false. To the contrary, petitioner conceded (Pet. App. A28) that she made those comments. Petitioner's reliance on *Reeves* is therefore misplaced. In any event, that fact-bound question does not warrant review.

3. Petitioner next contends (Pet. 13-17) that the Court should grant review to overrule *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, when an employer produces evidence of a legitimate nondiscriminatory explanation for an employment decision, the plaintiff must produce evidence that the employer's explanation is pretextual.

Petitioner contends (Pet. 13) that *McDonnell Douglas* has been overruled by *Dessert Palace Inc. v.*

*Costa*, 539 U.S. 90 (2003). That contention is without merit. In *Dessert Palace*, the Court held that a Title VII violation is established when the evidence demonstrates that both a legitimate reason and a discriminatory reason motivated an employer's decision and that direct evidence of discrimination is not necessary to prove such a mixed-motive case. *Dessert Palace* has no application to a case like this one that is litigated on the theory that the employer's decision was either discriminatory or legitimate, but not both. Instead, *McDonnell Douglas* continues to govern such single motive cases. Nothing in *Dessert Palace* remotely suggests otherwise. Indeed, *Dessert Palace* expressly limited its holding to the mixed motive context. 539 U.S. at 94 n.1.

In any event, because petitioner chose to litigate this case under *McDonnell Douglas*, neither the district court nor the court of appeals addressed the relationship between *McDonnell Douglas* and *Dessert Palace*, and this case is therefore not an appropriate vehicle to press that claim in this Court. For that reason as well, review of that question is not warranted here.

4. Petitioner also contends (Pet. 20-23) that review is warranted because the court of appeals misapplied the temporal proximity test. That contention is without merit and does not warrant review. This Court has indicated that an inference of causation can arise from the temporal proximity between a complaint and an adverse action only when the events are very close in time. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). As the court of appeals noted, in this case, the adverse action about which petitioner complains came more than eight months after she filed her complaint. Pet. App. A5.

Moreover, in this case, the court of appeals did not rely solely on the time gap between the complaint and the adverse action in finding that petitioner had failed to produce sufficient evidence of causation. The court of appeals also concluded that it was difficult to imagine how the EEO complaint could have had any appreciable effect on the decision about which petitioner complained when that decision simply reaffirmed a decision that had been made before the filing of the complaint. Pet. App. A5. That fact-bound determination does not warrant review.

5. Finally, petitioner contends (Pet. 23-30) that the court of appeals overlooked direct evidence of discrimination, pointing to the so-called Kelley memorandum. Petitioner's reliance on that memorandum is misplaced. The memorandum noted that petitioner's background investigation raised genuine concerns, but it also observed that much of the negative information had not been sufficiently substantiated. Pet. App. A22. The memorandum therefore recommended additional investigation. *Ibid.* That recommendation was heeded and the follow-up investigation confirmed the accuracy of the original investigation. *Ibid.* Indeed, petitioner admitted much of the negative information. *Id.* at A28. The court of appeals therefore correctly concluded that the memorandum did not contain direct evidence of discrimination. And, in any event, that fact-bound issue does not warrant review.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Burlington Northern & Santa Fe Railway v. White*, No. 05-259, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 2006