No. 08-____

In the

Supreme Court of the United State

Yong Li,

Petitioner,

v.

Raytheon Company, Ian C. Mitchell, and Arthur Buliung,

Respondents.

Civil Appeal To the
United States Court of Appeal
For The First Circuit

Petition for Writ of Certiorari

Yong Li (pro se)
[redacted]
Sudbury MA 01776
pro se petitioner

QUESTIONS PRESENTED

1. Whether the absence of temporal proximity between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII, 42 U.S.C. 2000e-3(a).

(The First Circuit's decision conflicted with the Third, Sixth, and Ninth Circuits' decisions on the same issue).

2. Whether the discovery rule is applicable in Title VII cases.

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PETITION FOR A WRIT OF CERTIORARI

Yong Li hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in Yong Li v. Raytheon, No. 07-1185 (January 17, 2008).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit, dated September 10, 2007, is reproduced at Petition's Appendix page 4 ("Pet App 004"). The order the court of appeals denying the petition for rehearing en banc by majority judges, dated January 17, 2008, is reproduced at Pet App 009. The opinion of the United States District Court for the District of Massachusetts, dated November 30, 2006, is reproduced at Pet App 002.

JURISDICTION

The opinion and judgment of the court of appeals were issued on September 10, 2007. A timely petition for rehearing en banc was denied on January 17, 2008. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C § 1291.

Justice Souter allowed the petitioner's application for an extension of time to file a petition for write of certiorari to and including May 16, 2008 (Pet App

011). The present Petition for Writ of Certiorari is filed timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

STATUTORY PROVISION INVOLVED

The Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-3(a) prohibit employment discrimination or retaliation against employees. This provision is set forth in full at Pet App 001.

INTRODUCTION

This case presents two questions. The first question is whether the elapse years between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII. The Court of Appeal held that "*There must be some temporal proximity between the protected conduct (...) and the alleged retaliation,* (Pet App 007, ¶2)" despite of the fact that the petitioner was in another state during the time and the respondents did not have an opportunity to retaliate until the petitioner returned. In so ruling, the First Circuit acknowledged conflict with the Sixth, Ninth, and Third circuits' decisions. See, *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*

(the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a find of a cause connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions); *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)* (The lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement FBI, [because Reutter had no authority or supervisory power over Dixon and was not in a position to legitimately interfere with his employment]); *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*) (the five-month interval between the protected activity and the adverse employment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)* (internal quotation marks omitted).

Despite these precedents, the Court of Appeals ruled that two-year gap disproves the causation element of the prima facie case and the panel did not touch on the specific fact that the petitioner was in another state during the time. In so ruling, the First Circuit creates an irreconcilable conflict with the Third, Sixth, and Ninth circuits' decisions. This Court's

intervention is necessary to bring the First Circuit into conformity with others, to resolve the conflict between the circuits, to effectuate anti-retaliation claims under Title VII, and to ensure that the millions of employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory discrimination that Congress provided for in 42 U.S.C. 2000e.

The second question is whether the discovery rule is applicable in discrimination cases. This issue has never been addressed in the U.S. Supreme court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) In the petitioner's case, when the petitioner was withheld assignment and asked to relocate, and was told that her name was on a layoff list, the petitioner had no reason to suspect the manager's suggestion until later the manager denied his layoff statement and claimed that there was no layoff plan. According to discovery rule, the statute of limitation should start to run when the employee was aware of the truth and realized the damage. The case in hand provides an occasion to address the issue of discovery rule.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Yong Li ("Li") is a native Chinese. She completed a B.A. degree in Meteorology and a Master's Degree in Geophysics in China. She and her husband immigrated to England where they lived for seven years. In 1998, she left her successful post in England and moved to US, where she and her husband were recruited to work at the Air Traffic Control Division of Raytheon located Marlborough Massachusetts. Li was a senior software engineer. According to the performance review, she was "a valuable employee," "an asset of the team", "contributed greatly", "friendly and pleasured to work with."

In 2001, Li was working in a database management group, in which full of woman leads. Technically, Li was much advanced than these leads, and Li had finished the complicated programming but never gained respect. One group leader, who was specialized French literature, had difficult to understand Li's short efficient software-code. Another group lead requested Li to make formative expand [1]. Li found the expanded code caused unnecessary repetition, so that Li sent an email to search opinions from group members. To resolve this dispute, the team manager, Jen Lewis,

[1] Gayle McEleney had French literature degree and worked as the software group leader. Another group leader, Belinda A Gunn, was a 25 years old young girl. A copy of the internal complaint with the code discussion is provided in Pet App 101-103.

cornered Li into a small meeting room. Ms. Lewis got rid of Li's supportive co-workers out of the room, and then accused Li of using the technical discussion to attack the group leader. Li, the only Chinese in that group, tried to apology to Ms. Lewis for improving the relationship. Soon after, Li left that the group and transferred to Raytheon's Sudbury (a neighbor town) facility. Lamentably, the 2001 confrontation was reflected in Li's 2002 performance review. Li refused to sign the negative performance review, and also requested an apology from Ms. Lewis. However, Li was told that Ms. Lewis would become a very high level person in Raytheon, and Li would make an enemy if requesting apology. Spurred into action, Li filed a racial discrimination complaint to Raytheon's Equal Employment Opportunity office (EEO). The EEO made an investigation, but failed to interview Li's co-worker William Kerr who had stated in his email that Li was treated unfairly[2]. Also, the EEO declined to let Li see the investigation report[3].

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[2] Li's complaint to EEO included Mr. Kerr's email "When we first went out to Marlborough, it very quickly became clear to both Conall and myself that you were not being fairly treated especially by Gayle. I was surprised that in the US above all places, that such behavior would be tolerated… (Pet App 102)"

[3] In 2005, Li received a copy from EEOC. Li found out that the investigator merely collected negative opinions from people Li had complained about.

Shortly after, Li was voluntarily transferred to Langley, Virginia. In Langley, Li requested the EEO to interview William Kerr for a thorough investigation, but the EEO failed to do so.

In 2004, upon her return to Marlborough, Li claimed that she began to suffer widespread retaliation for filing the prior EEO complaint. She was withheld from permanent assignments, was asked to relocate to Towson, Maryland, was suggested that she should leave Raytheon because of the prior problems with the ex-team manager Jen Lewis. Li's supervisor directly told her that the company was going to layoff and Li's name was on the layoff. After Li found an assignment by herself, her supervisor denied his layoff statement and claimed that there was no layoff plan, and Li was shocked. The supervisor also laughed at Li: "when Jen Lewis becomes the lab manager, you will be in trouble." Li responded "Bill Clinton became the president, Paula Jones was safe," and the supervisor said "Shame!" Li immediately reported her supervisor's conduct to human resources (HR) office. HR, however, did not inform Li of whether there was a layoff plan or her name was on a list. Rather, HR constantly blamed Li for her lack of security clearance and difficult finding an assignment. The HR never explained to Li why there were about 26 engineers (including the department manager Ian C. Mitchell)

who had no security clearance, but Li was the only one was asked to leave[4].

Further, from the beginning of Li's return to Marlborough, the ex-team manager Jen Lewis aggressively stared at Li in the hallway and attempting to intimidated her whenever they were alone (the staring incident is a finding of fact in Li's workers comp case[5]). After eight months of abuse Li became worried about her personal safety and approached HR for guidance.

HR officer Arthur Buliung set a meeting in his own office on August 3, 2004, into which he embedded a mental evaluation without Li's express knowledge and consent. Li assumed the counselor was an investigator. During the meeting, the counselor did not ask why Li felt unsafe. Instead, he asked "Do you want to kill someone" and repeatedly pointed his finger at Li and stared at Li. Gripped with panic, Li was traumatized and felt raped. She could not function properly since then.

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[4] Li's department manager Ian C. Mitchell confirmed in his Answer of Li's Interrogatory: "there were no layoffs in the Company's Marlborough facility in May, 2004. Moreover, there was no list of people who would be laid off if there was to be a layoff. (Pet App 086 §6)"

[5] Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007.

On the following days, the HR officer Mr. Buliung stopped Li reporting the trauma event to Raytheon Asian Pacific Association ("RAPA"), but Mr. Buliung himself emailed to RAPA and claimed that the issue had been resolved. When Li told the director of Raytheon's software centre that the counselor's accusation caused her want to commit suicide, the director answered "it's not intentional" and demanded Li "stop sending emails" and "move forward". Tortured the stress disorder, Li reported the trauma event to Raytheon's CEO, Bill Swanson, on August 30, 2004. On the next day, Li was put on administrative leave and ordered to see a psychiatrist.

The psychiatrist diagnosed that Li suffered from an acute mental illness with "psychotic features"[6] and not fit to work. Raytheon, however, refused to release the evaluation to Li and her Chinese doctors[7]. Further,

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[6] Li did not know her mental evaluation was fixed until September 2005 she received a copy of evaluation from worker comp court. In 2004, Raytheon surreptitiously sent the secret EEO investigation report of 2002 to the psychiatrist. Based on the negative opinions in the secret report, the doctor concluded that Li suffered "personality disorder" and induced employment problems.

[7] Raytheon refused to give Dr. Reade's report to petitioner, but agreed to send a copy to petitioner's primary physician Dr. Monica Gomez. However, Dr. Gomez told Li that she could not give Li a copy because this report belongs to Raytheon, and Li should request a copy from Raytheon.

Raytheon sent a letter and threatened to terminate Li's employment if she did not return to work immediately. Meanwhile, Li's own doctor diagnosed her with Post-Traumatic Stress Disorder (PTSD), although Li had no history of mental illness before.

Li never went back to work. She had been hospitalized multiple times and eventually became long-term mentally disabled. Her husband left her in 2006.

II. Proceedings Below

A. The District Court

The District Court granted Raytheon's Motion for Summary Judgment without providing a hearing. The opinion is only a few lines and merely referred to Raytheon's conclusion. The Order barely ruled "Li presents no competent evidence of retaliatory acts." The District Court denied Li's Motion for explanation of this Order, and did not indicate that on which element of Title VII claims Li had failed to proffer evidence. The District Court declined Li's various state-law claims. (Pet App 002)

B. The Court of Appeal

The Court of Appeal ("panel") affirmed and wrote down detail opinions. With respect to the alleged adverse action occurred in 2004, the panel ruled that the events in early 2004 (the withholding assignment, pushing Li to quit or to relocate, claiming Li's name

was on a layoff list, and the constant staring incident etc.) are outside of statute of limitation, and the events in later 2004 (imposed mental evaluation [violated her right of consent], accusing Li of wanting to kill someone, putting Li on administrative leave, hid doctor's report while warning Li to go back to work, and hindered Li's application for short term disability benefit etc.) have no causal connection to Li's prior EEO complaint in 2002, the panel ruled the two-year gap defeated the claim. (Pet App 007)

The panel ruled that "too many gaps" from the protected activity in 2002 to the alleged retaliatory events in 2004. The panel did not touch on Li's argument that she was in Langley Virginia during the time and the managers had no opportunity to retaliate until her return to Marlboro in 2004. The panel upheld that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation*," and relied on the cases "*Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001) (two year gap between protected conduct and alleged retaliation defeated claim); Miller v. New Hampshire Dept. of Corrections, 296 F. 3d 18, 19 (1st Cir. 2002) (same); Mesnick v. General Electric Co., 950 F. 2d 816, 828 (1st Cir. 1991) (nine month gap defeated retaliation claim).*" (Pet App 007)

The panel's ruling of failure to establish the causal connection resulted in the "absence of separate and

timely violation of Title VII", thus the panel preemptied the argument of whether the "discovery rule" applies to this case. (Pet App 007)

C. The Order for Rehearing En Banc

Li's Petition for Rehearing En Banc indicated that the panel's decision conflicts with the authoritative decisions of United States Courts of Appeals in other circuits which have addressed the same issue. See, *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005); Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; The Petition for Rehearing En Banc readdressed whether the discovery rule is applicable in discrimination case.

On January 17, 2008, the majority judges denied Li's Petition for Rehearing En Banc, and they did not disclose either the per curiam or dissenting opinions. (Pet App 009)

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with the Sixth, Ninth, and Third circuits' decisions in *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*; *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)* on the issue of causal connection to

establish a prima facie case in retaliation claims under Title VII.

Further, the Court should grant the petition because whether discovery rule is applicable in Title VII claims had never been addressed before.

I. Standard of Review for Summary Judgment

In the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the unanimous U.S. Supreme Court reaffirmed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same." *Reeves*, at 2110. This Honorable Court held that, although all of the evidence should be reviewed by the court, not all evidence should be given weight. The court "must disregard all evidence favorable to the moving party that the jury is not required to believe. See *Wright & Miller*, at 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.' " *Reeves*, at 2110. In the present case, a jury question is present because the petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the alleged retaliatory conducts in 2004 linked to the prior racial discrimination complaint in 2002.

II. The Decision Below Conflicts with The Rulings of Three Other Circuit Courts On the Issue of Whether the Elapse Years between the Protected Activity and the Adverse Employment Action Disproves the Causal Connection Element of A Prima Facie Case in A Retaliation Claim

In this case, the court of appeal held that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation,*" the panel disregarded that Li was in another state and the managers had no opportunity to retaliate until Li returned. This decision conflicted with the Third, Sixth and Ninth Circuits' decisions on the causal connection matter in retaliation claims.

In Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007), Dixon argues that the district court erred by focusing narrowly on the ten-year period that elapsed here and failing to take into account the surrounding facts. In particular, Dixon argues that a finding of causal connection is not foreclosed because Reutter [Dixon's ex-supervisor] did not have the ability to retaliate against him until Reutter's views on Dixon were solicited during the FBI's reinstatement investigation. Dixon claims that from the time Reutter was removed from his position in the Applicant Program in 1982 until Dixon left the FBI in 1988, Reutter "had no authority or supervisory power over [Dixon] and was not in a position to legitimately interfere with [his]

employment." Dixon argues that Reutter retaliated against him at the first opportunity he had and as such, the lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement to the FBI.

The Sixth Circuit agreed with Dixon insofar as a mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality, this is especially true in the context of a *reinstatement* case, in which the time lapse between the protected activity and the denial of reinstatement is likely to be lengthier than in a typical employment-discrimination case. Id.

In Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005), the plaintiff brought suit alleging that she was retaliated against because she complained about sexual harassment. *Id. at 887*. The plaintiff reported her complaints in 1995 but the alleged retaliation-the denial by the plaintiff's alleged harasser of her various requests for transfers-did not occur until 1998. *Id. at 887-89*. In rendering its decision, the Ninth Circuit first cited approvingly from the Third Circuit's decision in *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997), in which the Third Circuit emphasized that causation is a fact-specific inquiry and is not reducible merely to a measurement of temporal proximity:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

*Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)*.

The Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a finding of a causal connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions. *Id*. at 895.

In *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002),* the Sixth Circuit determined that the five-month interval between the protected activity and the adverse employment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period. *Id.* at 554-55.

In the instant case, Li filed an internal discrimination complaint at the end of 2002. Then she voluntarily went to another state. Upon her return to original facility in January 2004, her ex-team manager, who was subjected to the prior complaint, started staring at Li when they met alone. Once the ex-team manager Jen Lewis' office mate, Ian Mitchell, became Li's department manager, Li was immediately withheld assignment, pushed to quit or to relocate, and told her name on a layoff list though such list did not exist. When Li worried about her personal safety, she was trapped into an interrogation interview and was accused of wanting to kill someone. When she reported the trauma event to the CEO, she was put on administrative leave and ordered to see a psychiatrist. Li followed the order to see the psychiatrist. Raytheon, however, did not let Li know the psychiatrist's conclusion, but asked Li to go back to work and threatened to terminate Li's job, which hindered Li's short term disability application. All the events occurred as a chain of actions with no gap among them. The Court of Appeal simply ruled "*two years gap between protected conduct and alleged retaliation defeated claim,*" Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001); the court of appeal did not touch on the specific fact that Li was in another state in 2003. The majority judges of First Circuit denied Li's petition for hearing en banc without disclosure of the opinions.

In short, the First Circuit Court merely measured the temporal proximity between the protect activity and the alleged retaliatory conduct, while the Third, Sixth, and Ninth Circuits adopted a fact-specific inquiry and emphasized that it is causation, not temporal proximity itself, that is an element of the prima facie case. This Court should grant the petition to compel conformity with other circuits and to ensure that the petitioner and other employees working in the jurisdictions covered by the First Circuit are afforded the full measure of protection from retaliation that Congress both intended and provided for in §2000e-3(a).

III. The Court Should Make A Decision on Whether the Discovery Rule Is Applicable in This Cases.

Another reason the panel affirmed the summary judgment was that some of the misconducts alleged in this case were outside of the statue of limitation. The panel simply ruled that the events (withholding assignment, pushed to quit or relocate, and claiming Li's name was on a layoff list) were timely barred. The panel did not touch on Li's argument about discovery rule.

When Li was withheld permanent assignment and pushed to quit or to relocate, and was told her name was on a layoff list, she had no reason to suspect the conduct was harbored retaliatory animus until her supervisor denied his layoff statement and claimed there was no layoff plan. Li immediately reported her

supervisor's conduct to Raytheon HR. However, HR never clarified the falsity of the layoff statement until the pretrial discovery. According to discovery rule, the statute of limitation should start to run on the day when her supervisor claimed no layoff plan.

Whether the discovery rule is applicable in discrimination cases has never been addressed in the U.S. Supreme Court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) This case proffers a good occasion for this Court to address this issue.

Li made her argument in her brief, "[that several circuits] applied a three-factor test; the most important factor concerned whether 'the nature of the violations should trigger an employee's awareness of the need to assert her rights.'" *Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1415 and n.6 (10th Cir. 1993)* ; see also *West v. Philadelphia Elec. Co., 45 F.3d 744, 755 and n.9 (3d Cir. 1995) ; Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983) ; Bell v. Chesapeake & Ohio Ry., 929 F.2d 220, 223-25 (6th Cir. 1991) ; Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 801 (11th Cir. 1998)*.

Obviously, the continuing violation doctrine is not very suitable in this case because Li's supervisor's denial of layoff comment does not like an anchor event.

The closest rule to resolve this problem is the third type of continuing violation doctrine in *Place v. Abbott Lab, 215 F.3d 803, (7th Cir. 06/01/2005)*:

> We have recognized three types of continuing violations: (1) where the exact day of the violation is difficult to pinpoint because the employer's decision making process takes place over a period of time; (2) where the employer has a systematic, openly espoused policy alleged to be discriminatory; and (3) where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent. (numbers added)

As the Seven Circuit indicated, the third type "*where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent*" is more analogous to the "discovery rule." Li attempted to expend the analogized discovery rule to be the normal discovery rule in order to anchor the time barred conducts in 2004, including withholding assignment, pushing to quit or to relocate, and told her name on a layoff list.

Another formulation, crafted in the Seventh Circuit, applied the continuing violations doctrine to cases

where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996)*. This approach was adopted or cited with approval by the First, Fourth, and Federal Circuits. See *Sabree v. United Bd. of Carpenters & Joiners, Local 33, 921 F.2d 396 (1st Cir. 1990)* ; *Emmert v. Runyon, No. 98-2027 (4th Cir. 1999)* (cited with approval) *; Bosley v. Merit Systems Prot. Bd., 162 F.3d 665, 667 (Fed. Cir. 1998)*.

Li's issue is distinguishable from all of the precedents. In those cases, the continuing violation triggered the victims' awareness based on the pattern, frequency and permanency of the unlawful practice. In this case, Li's awareness was triggered solely depending on the denial of layoff statement.

The U.S. Supreme Court also noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should applied and the limitation period run from when it wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the

outcome in her case, we have no occasion to address this issue.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. Li's case proffers a good occasion for this Court to address this issue.

IV. **The Questions Presented are Two Important Issues Under Title VII**.

The two questions presented in this case involve important issues of federal law. Congress has long recognized the importance of eliminating discrimination and retaliation in employment. In enacting sections §2000e-2 and §2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by any kinds of discrimination and retaliation. (Pet App 001)

Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Labor Standards Act of 1938, 29 U.S.C. §215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act,

38 U.S.C. §4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).

The U.S. Supreme Court had accepted that temporal proximity maybe sufficient in a narrow set of cases. See Clark County, 532 U.S. at 273 (referencing "cases that accept mere temporal proximity . . . as sufficient evidence of causality to establish a prima facie case" and noting that those cases "uniformly hold that the temporal proximity must be 'very close'") (citations omitted) However, the Supreme Court had never have an occasion to embrace the premise that in certain distinct cases like *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*; *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997),* where temporal proximity between the protected activity and the adverse employment action does not exist. The Court should clarify that "it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." *Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)*, for conformity to the decisions of the Circuit Courts with respect to the element of causation under Title VII claim.

Also, the U.S. Supreme Court noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should applied and the limitation period run from when it wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. A dissent of three justices, while agreeing that the application of the discovery rule was not at issue in *National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061, 153 L.Ed.2d 106 (U.S. Supreme Court, 2002)* , nonetheless stated their opinion that the discovery rule would be applicable to the Title VII statutory limitation. Petitioner respectfully requests this Court to concern about whether the discovery rule, under which doctrine, is applicable based on the facts in this case.

Finally, the first question presented in this case is very important because of the inequitable disparities it creates within the America employment sector. The rights and remedies afforded an employee faced with retaliatory harassment should not depend on where she happens to work. Accordingly, the Court should grant the petition to ensure that all employees in USA enjoy

the full measure of protection Congress granted them in §2000e-2 and §2000e-3, and to ensure that employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as employees working in the states judicially covered by the Third, Sixth, and Ninth Circuits Court.

CONCLUSION

For the foregoing reasons, the petition for a writ certiorari should be granted.

Respectfully submitted,

YONG LI (pro se)

/s/ 

Name: Yong Li
Address: [redacted]
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pro se petitioner

Date: May 12, 2008

CERTIFICATE OF COMPL. WITH RULE 33

Booklet format: 6 1/8-by 9 1/4; text field: not exceed 4 1/8 by 7 1/8; text appear on both sides of the page; Words less than 9000;

Respectfully submitted,

/s/_

Name: Yong Li (pro se)

Dated: May , 2008

CERTIFICATE OF SERVICE

Petitioner, Yong Li, hereby certifies, under penalties of perjury, that I have made service, on this date _____, of the Petition for Writ of Certiorari. Service was made upon counsel for each other party by hand depositing in the counsel office, addressed as follow:

Mr. Michael Bernardo,
Conn Kavanaugh Rosenthal, Peisch & Ford, LLP,
10 Post Office Square, 4th Floor,
Boston, MA 02109

Respectfully submitted,

/s/_

Name: Yong Li (pro se)

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Civil Appeal To the
United States Court of Appeal
For The First Circuit

Petition for Writ of Certiorari

Yong Li (pro se)
[redacted]776
pro se petitioner

QUESTIONS PRESENTED

1. Whether the absence of temporal proximity between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII, 42 U.S.C. 2000e-3(a).

(The First Circuit's decision conflicted with the Third, Sixth, and Ninth Circuits' decisions on the same issue).

2. Whether the discovery rule is applicable in Title VII cases.

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PETITION FOR A WRIT OF CERTIORARI

Yong Li hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in Yong Li v. Raytheon, No. 07-1185 (January 17, 2008).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit, dated September 10, 2007, is reproduced at Petition's Appendix page 4 ("Pet App 004"). The order the court of appeals denying the petition for rehearing en banc by majority judges, dated January 17, 2008, is reproduced at Pet App 009. The opinion of the United States District Court for the District of Massachusetts, dated November 30, 2006, is reproduced at Pet App 002.

JURISDICTION

The opinion and judgment of the court of appeals were issued on September 10, 2007. A timely petition for rehearing en banc was denied on January 17, 2008. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C § 1291.

Justice Souter allowed the petitioner's application for an extension of time to file a petition for write of certiorari to and including May 16, 2008 (Pet App

011). The present Petition for Writ of Certiorari is filed timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

STATUTORY PROVISION INVOLVED

The Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-3(a) prohibit employment discrimination or retaliation against employees. This provision is set forth in full at Pet App 001.

INTRODUCTION

This case presents two questions. The first question is whether the elapse years between the protected activity and the adverse employment action disproves the causal connection element of a prima facie case in a retaliation claim under Title VII. The Court of Appeal held that "*There must be some temporal proximity between the protected conduct (...) and the alleged retaliation,* (Pet App 007, ¶2)" despite of the fact that the petitioner was in another state during the time and the respondents did not have an opportunity to retaliate until the petitioner returned. In so ruling, the First Circuit acknowledged conflict with the Sixth, Ninth, and Third circuits' decisions. See, *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*

(the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a find of a cause connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions); *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)* (The lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement FBI, [because Reutter had no authority or supervisory power over Dixon and was not in a position to legitimately interfere with his employment]); *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*) (the five-month interval between the protected activity and the adverse employment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)* (internal quotation marks omitted).

Despite these precedents, the Court of Appeals ruled that two-year gap disproves the causation element of the prima facie case and the panel did not touch on the specific fact that the petitioner was in another state during the time. In so ruling, the First Circuit creates an irreconcilable conflict with the Third, Sixth, and Ninth circuits' decisions. This Court's

intervention is necessary to bring the First Circuit into conformity with others, to resolve the conflict between the circuits, to effectuate anti-retaliation claims under Title VII, and to ensure that the millions of employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory discrimination that Congress provided for in 42 U.S.C. 2000e.

The second question is whether the discovery rule is applicable in discrimination cases. This issue has never been addressed in the U.S. Supreme court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) In the petitioner's case, when the petitioner was withheld assignment and asked to relocate, and was told that her name was on a layoff list, the petitioner had no reason to suspect the manager's suggestion until later the manager denied his layoff statement and claimed that there was no layoff plan. According to discovery rule, the statute of limitation should start to run when the employee was aware of the truth and realized the damage. The case in hand provides an occasion to address the issue of discovery rule.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Yong Li ("Li") is a native Chinese. She completed a B.A. degree in Meteorology and a Master's Degree in Geophysics in China. She and her husband immigrated to England where they lived for seven years. In 1998, she left her successful post in England and moved to US, where she and her husband were recruited to work at the Air Traffic Control Division of Raytheon located Marlborough Massachusetts. Li was a senior software engineer. According to the performance review, she was "a valuable employee," "an asset of the team", "contributed greatly", "friendly and pleasured to work with."

In 2001, Li was working in a database management group, in which full of woman leads. Technically, Li was much advanced than these leads, and Li had finished the complicated programming but never gained respect. One group leader, who was specialized French literature, had difficult to understand Li's short efficient software-code. Another group lead requested Li to make formative expand [1]. Li found the expanded code caused unnecessary repetition, so that Li sent an email to search opinions from group members. To resolve this dispute, the team manager, Jen Lewis,

[1] Gayle McEleney had French literature degree and worked as the software group leader. Another group leader, Belinda A Gunn, was a 25 years old young girl. A copy of the internal complaint with the code discussion is provided in Pet App 101-103.

cornered Li into a small meeting room. Ms. Lewis got rid of Li's supportive co-workers out of the room, and then accused Li of using the technical discussion to attack the group leader. Li, the only Chinese in that group, tried to apology to Ms. Lewis for improving the relationship. Soon after, Li left that the group and transferred to Raytheon's Sudbury (a neighbor town) facility. Lamentably, the 2001 confrontation was reflected in Li's 2002 performance review. Li refused to sign the negative performance review, and also requested an apology from Ms. Lewis. However, Li was told that Ms. Lewis would become a very high level person in Raytheon, and Li would make an enemy if requesting apology. Spurred into action, Li filed a racial discrimination complaint to Raytheon's Equal Employment Opportunity office (EEO). The EEO made an investigation, but failed to interview Li's co-worker William Kerr who had stated in his email that Li was treated unfairly [2]. Also, the EEO declined to let Li see the investigation report[3].

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[2] Li's complaint to EEO included Mr. Kerr's email "When we first went out to Marlborough, it very quickly became clear to both Conall and myself that you were not being fairly treated especially by Gayle. I was surprised that in the US above all places, that such behavior would be tolerated… (Pet App 102)"

[3] In 2005, Li received a copy from EEOC. Li found out that the investigator merely collected negative opinions from people Li had complained about.

Shortly after, Li was voluntarily transferred to Langley, Virginia. In Langley, Li requested the EEO to interview William Kerr for a thorough investigation, but the EEO failed to do so.

In 2004, upon her return to Marlborough, Li claimed that she began to suffer widespread retaliation for filing the prior EEO complaint. She was withheld from permanent assignments, was asked to relocate to Towson, Maryland, was suggested that she should leave Raytheon because of the prior problems with the ex-team manager Jen Lewis. Li's supervisor directly told her that the company was going to layoff and Li's name was on the layoff. After Li found an assignment by herself, her supervisor denied his layoff statement and claimed that there was no layoff plan, and Li was shocked. The supervisor also laughed at Li: "when Jen Lewis becomes the lab manager, you will be in trouble." Li responded "Bill Clinton became the president, Paula Jones was safe," and the supervisor said "Shame!" Li immediately reported her supervisor's conduct to human resources (HR) office. HR, however, did not inform Li of whether there was a layoff plan or her name was on a list. Rather, HR constantly blamed Li for her lack of security clearance and difficult finding an assignment. The HR never explained to Li why there were about 26 engineers (including the department manager Ian C. Mitchell)

who had no security clearance, but Li was the only one was asked to leave[4].

Further, from the beginning of Li's return to Marlborough, the ex-team manager Jen Lewis aggressively stared at Li in the hallway and attempting to intimidated her whenever they were alone (the staring incident is a finding of fact in Li's workers comp case[5]). After eight months of abuse Li became worried about her personal safety and approached HR for guidance.

HR officer Arthur Buliung set a meeting in his own office on August 3, 2004, into which he embedded a mental evaluation without Li's express knowledge and consent. Li assumed the counselor was an investigator. During the meeting, the counselor did not ask why Li felt unsafe. Instead, he asked "Do you want to kill someone" and repeatedly pointed his finger at Li and stared at Li. Gripped with panic, Li was traumatized and felt raped. She could not function properly since then.

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[4] Li's department manager Ian C. Mitchell confirmed in his Answer of Li's Interrogatory: "there were no layoffs in the Company's Marlborough facility in May, 2004. Moreover, there was no list of people who would be laid off if there was to be a layoff. (Pet App 086 §6)"

[5] Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007.

On the following days, the HR officer Mr. Buliung stopped Li reporting the trauma event to Raytheon Asian Pacific Association ("RAPA"), but Mr. Buliung himself emailed to RAPA and claimed that the issue had been resolved. When Li told the director of Raytheon's software centre that the counselor's accusation caused her want to commit suicide, the director answered "it's not intentional" and demanded Li "stop sending emails" and "move forward". Tortured the stress disorder, Li reported the trauma event to Raytheon's CEO, Bill Swanson, on August 30, 2004. On the next day, Li was put on administrative leave and ordered to see a psychiatrist.

The psychiatrist diagnosed that Li suffered from an acute mental illness with "psychotic features"[6] and not fit to work. Raytheon, however, refused to release the evaluation to Li and her Chinese doctors[7]. Further,

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[6] Li did not know her mental evaluation was fixed until September 2005 she received a copy of evaluation from worker comp court. In 2004, Raytheon surreptitiously sent the secret EEO investigation report of 2002 to the psychiatrist. Based on the negative opinions in the secret report, the doctor concluded that Li suffered "personality disorder" and induced employment problems.

[7] Raytheon refused to give Dr. Reade's report to petitioner, but agreed to send a copy to petitioner's primary physician Dr. Monica Gomez. However, Dr. Gomez told Li that she could not give Li a copy because this report belongs to Raytheon, and Li should request a copy from Raytheon.

Raytheon sent a letter and threatened to terminate Li's employment if she did not return to work immediately. Meanwhile, Li's own doctor diagnosed her with Post-Traumatic Stress Disorder (PTSD), although Li had no history of mental illness before.

Li never went back to work. She had been hospitalized multiple times and eventually became long-term mentally disabled. Her husband left her in 2006.

II. Proceedings Below

A. The District Court

The District Court granted Raytheon's Motion for Summary Judgment without providing a hearing. The opinion is only a few lines and merely referred to Raytheon's conclusion. The Order barely ruled "Li presents no competent evidence of retaliatory acts." The District Court denied Li's Motion for explanation of this Order, and did not indicate that on which element of Title VII claims Li had failed to proffer evidence. The District Court declined Li's various state-law claims. (Pet App 002)

B. The Court of Appeal

The Court of Appeal ("panel") affirmed and wrote down detail opinions. With respect to the alleged adverse action occurred in 2004, the panel ruled that the events in early 2004 (the withholding assignment, pushing Li to quit or to relocate, claiming Li's name

was on a layoff list, and the constant staring incident etc.) are outside of statute of limitation, and the events in later 2004 (imposed mental evaluation [violated her right of consent], accusing Li of wanting to kill someone, putting Li on administrative leave, hid doctor's report while warning Li to go back to work, and hindered Li's application for short term disability benefit etc.) have no causal connection to Li's prior EEO complaint in 2002, the panel ruled the two-year gap defeated the claim. (Pet App 007)

The panel ruled that "too many gaps" from the protected activity in 2002 to the alleged retaliatory events in 2004. The panel did not touch on Li's argument that she was in Langley Virginia during the time and the managers had no opportunity to retaliate until her return to Marlboro in 2004. The panel upheld that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation*," and relied on the cases "*Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001) (two year gap between protected conduct and alleged retaliation defeated claim); Miller v. New Hampshire Dept. of Corrections, 296 F. 3d 18, 19 (1st Cir. 2002) (same); Mesnick v. General Electric Co., 950 F. 2d 816, 828 (1st Cir. 1991) (nine month gap defeated retaliation claim).*" (Pet App 007)

The panel's ruling of failure to establish the causal connection resulted in the "absence of separate and

timely violation of Title VII", thus the panel preemptied the argument of whether the "discovery rule" applies to this case. (Pet App 007)

C. The Order for Rehearing En Banc

Li's Petition for Rehearing En Banc indicated that the panel's decision conflicts with the authoritative decisions of United States Courts of Appeals in other circuits which have addressed the same issue. See, *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005); Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; The Petition for Rehearing En Banc readdressed whether the discovery rule is applicable in discrimination case.

On January 17, 2008, the majority judges denied Li's Petition for Rehearing En Banc, and they did not disclose either the per curiam or dissenting opinions. (Pet App 009)

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with the Sixth, Ninth, and Third circuits' decisions in *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*; *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)* on the issue of causal connection to

establish a prima facie case in retaliation claims under Title VII.

Further, the Court should grant the petition because whether discovery rule is applicable in Title VII claims had never been addressed before.

I. Standard of Review for Summary Judgment

In the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the unanimous U.S. Supreme Court reaffirmed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same." *Reeves*, at 2110. This Honorable Court held that, although all of the evidence should be reviewed by the court, not all evidence should be given weight. The court "must disregard all evidence favorable to the moving party that the jury is not required to believe. See *Wright & Miller*, at 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.' " *Reeves*, at 2110. In the present case, a jury question is present because the petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the alleged retaliatory conducts in 2004 linked to the prior racial discrimination complaint in 2002.

II. The Decision Below Conflicts with The Rulings of Three Other Circuit Courts On the Issue of Whether the Elapse Years between the Protected Activity and the Adverse Employment Action Disproves the Causal Connection Element of A Prima Facie Case in A Retaliation Claim

In this case, the court of appeal held that "*There must be some temporal proximity between the protected conduct (filing the EEO complaint) and the alleged retaliation,*" the panel disregarded that Li was in another state and the managers had no opportunity to retaliate until Li returned. This decision conflicted with the Third, Sixth and Ninth Circuits' decisions on the causal connection matter in retaliation claims.

In Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007), Dixon argues that the district court erred by focusing narrowly on the ten-year period that elapsed here and failing to take into account the surrounding facts. In particular, Dixon argues that a finding of causal connection is not foreclosed because Reutter [Dixon's ex-supervisor] did not have the ability to retaliate against him until Reutter's views on Dixon were solicited during the FBI's reinstatement investigation. Dixon claims that from the time Reutter was removed from his position in the Applicant Program in 1982 until Dixon left the FBI in 1988, Reutter "had no authority or supervisory power over [Dixon] and was not in a position to legitimately interfere with [his]

employment." Dixon argues that Reutter retaliated against him at the first opportunity he had and as such, the lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 recommendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement to the FBI.

The Sixth Circuit agreed with Dixon insofar as a mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality, this is especially true in the context of a *reinstatement* case, in which the time lapse between the protected activity and the denial of reinstatement is likely to be lengthier than in a typical employment-discrimination case. *Id.*

In Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005), the plaintiff brought suit alleging that she was retaliated against because she complained about sexual harassment. *Id. at 887*. The plaintiff reported her complaints in 1995 but the alleged retaliation-the denial by the plaintiff's alleged harasser of her various requests for transfers-did not occur until 1998. *Id. at 887-89*. In rendering its decision, the Ninth Circuit first cited approvingly from the Third Circuit's decision in *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997), in which the Third Circuit emphasized that causation is a fact-specific inquiry and is not reducible merely to a measurement of temporal proximity:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

*Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)*.

The Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a finding of a causal connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions. *Id*. at 895.

In *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002),* the Sixth Circuit determined that the five-month interval between the protected activity and the adverse employment actions did not foreclose a finding of a causal connection because the plaintiff was under the control of a different supervisor during this period. *Id.* at 554-55.

In the instant case, Li filed an internal discrimination complaint at the end of 2002. Then she voluntarily went to another state. Upon her return to original facility in January 2004, her ex-team manager, who was subjected to the prior complaint, started staring at Li when they met alone. Once the ex-team manager Jen Lewis' office mate, Ian Mitchell, became Li's department manager, Li was immediately withheld assignment, pushed to quit or to relocate, and told her name on a layoff list though such list did not exist. When Li worried about her personal safety, she was trapped into an interrogation interview and was accused of wanting to kill someone. When she reported the trauma event to the CEO, she was put on administrative leave and ordered to see a psychiatrist. Li followed the order to see the psychiatrist. Raytheon, however, did not let Li know the psychiatrist's conclusion, but asked Li to go back to work and threatened to terminate Li's job, which hindered Li's short term disability application. All the events occurred as a chain of actions with no gap among them. The Court of Appeal simply ruled "*two years gap between protected conduct and alleged retaliation defeated claim,*" Dessler v. Daniel, 315 F. 3d 75, 79-80 (1st Cir. 2001); the court of appeal did not touch on the specific fact that Li was in another state in 2003. The majority judges of First Circuit denied Li's petition for hearing en banc without disclosure of the opinions.

In short, the First Circuit Court merely measured the temporal proximity between the protect activity and the alleged retaliatory conduct, while the Third, Sixth, and Ninth Circuits adopted a fact-specific inquiry and emphasized that it is causation, not temporal proximity itself, that is an element of the prima facie case. This Court should grant the petition to compel conformity with other circuits and to ensure that the petitioner and other employees working in the jurisdictions covered by the First Circuit are afforded the full measure of protection from retaliation that Congress both intended and provided for in §2000e-3(a).

III. The Court Should Make A Decision on Whether the Discovery Rule Is Applicable in This Cases.

Another reason the panel affirmed the summary judgment was that some of the misconducts alleged in this case were outside of the statue of limitation. The panel simply ruled that the events (withholding assignment, pushed to quit or relocate, and claiming Li's name was on a layoff list) were timely barred. The panel did not touch on Li's argument about discovery rule.

When Li was withheld permanent assignment and pushed to quit or to relocate, and was told her name was on a layoff list, she had no reason to suspect the conduct was harbored retaliatory animus until her supervisor denied his layoff statement and claimed there was no layoff plan. Li immediately reported her

supervisor's conduct to Raytheon HR. However, HR never clarified the falsity of the layoff statement until the pretrial discovery. According to discovery rule, the statute of limitation should start to run on the day when her supervisor claimed no layoff plan.

Whether the discovery rule is applicable in discrimination cases has never been addressed in the U.S. Supreme Court . See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) This case proffers a good occasion for this Court to address this issue.

Li made her argument in her brief, "[that several circuits] applied a three-factor test; the most important factor concerned whether 'the nature of the violations should trigger an employee's awareness of the need to assert her rights.'" *Martin v. Nannie & the Newborns, Inc., 3 F.3d 1410, 1415 and n.6 (10th Cir. 1993)* ; see also *West v. Philadelphia Elec. Co., 45 F.3d 744, 755 and n.9 (3d Cir. 1995) ; Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983) ; Bell v. Chesapeake & Ohio Ry., 929 F.2d 220, 223-25 (6th Cir. 1991) ; Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 801 (11th Cir. 1998)*.

Obviously, the continuing violation doctrine is not very suitable in this case because Li's supervisor's denial of layoff comment does not like an anchor event.

The closest rule to resolve this problem is the third type of continuing violation doctrine in *Place v. Abbott Lab, 215 F.3d 803, (7th Cir. 06/01/2005)*:

> We have recognized three types of continuing violations: (1) where the exact day of the violation is difficult to pinpoint because the employer's decision making process takes place over a period of time; (2) where the employer has a systematic, openly espoused policy alleged to be discriminatory; and (3) where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent. (numbers added)

As the Seven Circuit indicated, the third type "*where the employer's discriminatory conduct is so covert that its discriminatory character is not immediately apparent*" is more analogous to the "discovery rule." Li attempted to expend the analogized discovery rule to be the normal discovery rule in order to anchor the time barred conducts in 2004, including withholding assignment, pushing to quit or to relocate, and told her name on a layoff list.

Another formulation, crafted in the Seventh Circuit, applied the continuing violations doctrine to cases

where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996)*. This approach was adopted or cited with approval by the First, Fourth, and Federal Circuits. See *Sabree v. United Bd. of Carpenters & Joiners, Local 33, 921 F.2d 396 (1st Cir. 1990)* ; *Emmert v. Runyon, No. 98-2027 (4th Cir. 1999)* (cited with approval) *; Bosley v. Merit Systems Prot. Bd., 162 F.3d 665, 667 (Fed. Cir. 1998)*.

Li's issue is distinguishable from all of the precedents. In those cases, the continuing violation triggered the victims' awareness based on the pattern, frequency and permanency of the unlawful practice. In this case, Li's awareness was triggered solely depending on the denial of layoff statement.

The U.S. Supreme Court also noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should applied and the limitation period run from when it wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the

outcome in her case, we have no occasion to address this issue.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. Li's case proffers a good occasion for this Court to address this issue.

IV. **The Questions Presented are Two Important Issues Under Title VII**.

The two questions presented in this case involve important issues of federal law. Congress has long recognized the importance of eliminating discrimination and retaliation in employment. In enacting sections §2000e-2 and §2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by any kinds of discrimination and retaliation. (Pet App 001)

Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Labor Standards Act of 1938, 29 U.S.C. §215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act,

38 U.S.C. §4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).

The U.S. Supreme Court had accepted that temporal proximity maybe sufficient in a narrow set of cases. See Clark County, 532 U.S. at 273 (referencing "cases that accept mere temporal proximity . . . as sufficient evidence of causality to establish a prima facie case" and noting that those cases "uniformly hold that the temporal proximity must be 'very close'") (citations omitted) However, the Supreme Court had never have an occasion to embrace the premise that in certain distinct cases like *Dixon v. Gonzales, 481 F. 3d 324 (6th Cir. 2007)*; *Porter v. California Dep's of Corr., 419 F. 3d 885 (9th Cir. 2005)*; *Ford v. General Motors Corp., 305 F. 3d 554-55 (6th Cir. 2002*); *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997),* where temporal proximity between the protected activity and the adverse employment action does not exist. The Court should clarify that "it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." *Porter, 419 F.3d at 895 (*quoting *Kachmar, 109 F.3d at 177)*, for conformity to the decisions of the Circuit Courts with respect to the element of causation under Title VII claim.

Also, the U.S. Supreme Court noted that an issue might arise as to whether the limitation period begins to run when the incident occurs or if the discovery rule should applied and the limitation period run from when it wrongful action is discovered. See Footnote 10, *Ledbetter v. Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (U.S. 05/29/2007)* (Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.) Although the Court recognized this as a potential issue, it declined to provide any guidance toward a resolution. A dissent of three justices, while agreeing that the application of the discovery rule was not at issue in *National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061, 153 L.Ed.2d 106 (U.S. Supreme Court, 2002)* , nonetheless stated their opinion that the discovery rule would be applicable to the Title VII statutory limitation. Petitioner respectfully requests this Court to concern about whether the discovery rule, under which doctrine, is applicable based on the facts in this case.

Finally, the first question presented in this case is very important because of the inequitable disparities it creates within the America employment sector. The rights and remedies afforded an employee faced with retaliatory harassment should not depend on where she happens to work. Accordingly, the Court should grant the petition to ensure that all employees in USA enjoy

the full measure of protection Congress granted them in §2000e-2 and §2000e-3, and to ensure that employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as employees working in the states judicially covered by the Third, Sixth, and Ninth Circuits Court.

CONCLUSION

For the foregoing reasons, the petition for a writ certiorari should be granted.

Respectfully submitted,

YONG LI (pro se)

/s/ 

Name: Yong Li
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pro se petitioner

Date: May 12, 2008

CERTIFICATE OF COMPL. WITH RULE 33

Booklet format: 6 1/8-by 9 1/4; text field: not exceed 4 1/8 by 7 1/8; text appear on both sides of the page; Words less than 9000;

Respectfully submitted,

/s/_

Name: Yong Li (pro se)

Dated: May , 2008

CERTIFICATE OF SERVICE

Petitioner, Yong Li, hereby certifies, under penalties of perjury, that I have made service, on this date _____, of the Petition for Writ of Certiorari. Service was made upon counsel for each other party by hand depositing in the counsel office, addressed as follow:

Mr. Michael Bernardo,
Conn Kavanaugh Rosenthal, Peisch & Ford, LLP,
10 Post Office Square, 4th Floor,
Boston, MA 02109

Respectfully submitted,

/s/_

Name: Yong Li (pro se)