Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 15-2543

PATRICIA VILLA,

Appellant

v.

CAVAMEZZE GRILL, LLC, *et al*,

Appellees

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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Signature: /s/ Alan R. Kabat Date: July 7, 2016

Counsel for: Metropolitan Wash. Empl. Lawyers

CERTIFICATE OF SERVICE

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I certify that on July 7, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Alan R. Kabat
(signature)

July 7, 2016
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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 330 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes.

MWELA respectfully submits this amicus brief to aid this Court in addressing whether it should create a new defense at the summary judgment stage based on the sincerity with which an employer asserts a pretextual reason for its challenged actions. The disposition of this issue could have an important effect on the ability of employees to enforce their statutory rights without fear of retaliation, and on the public interest in allowing employees to report workplace harassment and discrimination.

For these important reasons, MWELA respectfully submits this amicus brief.

Statement Pursuant to Rule 29(c), Fed. R. App. P.

Pursuant to Rule 29(c), Fed .R. App. P., *amicus* states that:

(A) *Amicus* alone authored the entire brief, and no attorney for a party authored any part of the brief;

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on

appellant's side have paid for their membership in *amicus* MWELA; and

(C) No person, other than the *amicus curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

The employer here fired Ms. Villa after determining, wrongly, that her report to her chain of command that a subordinate employee claimed to have been propositioned with *quid pro quo* sexual harassment was fabricated. On this record, the employer was wrong in its belief; a jury could find that plaintiff acted properly and truthfully in relaying her subordinate's complaint. The district court nevertheless granted summary judgment, finding that the employer's mistaken belief was honestly held. In these circumstances:

1. Where an employee engages in a statutorily protected activity, such as reporting the sexual harassment of a subordinate, and her employer takes adverse action against her in the mistaken belief that she was not engaged in protected activity, does the employer's mistake of fact trump the employee's statutory entitlement to protection?

2. Is permitting the district court to determine that the employer's mistaken belief regarding an employee's report of a harassment complaint by a subordinate employee is, as a factual credibility matter, honestly and sincerely held, consistent with Rule 56 and *McDonnell Douglas* and its progeny?

SUMMARY OF FACTS RELEVANT TO *AMICUS* BRIEF[1]

One of Villa's subordinates reported that she (the subordinate) had been propositioned by the General Manager, offering a promotion in exchange for sex. This constituted *quid pro quo* sexual harassment and is prohibited by Title VII. Villa reported this complaint to her Operations Manager. The Operations Manager testified that he decided -- before conducting any investigation -- that he was going to fire either Villa for making the report or the General Manager for making the proposition, depending on what he determined the facts were. When questioned by senior management, Villa's subordinate recanted and denied making a harassment complaint. The Operations Manager determined that Villa made a false report and purportedly fired Villa based on that determination.

In discovery, Villa's subordinate recanted her previous recantation and testified that she had, in fact, reported the harassment to Villa but then falsely denied doing so when questioned by senior management. On this record, Cavamezze Grill ("Cava") concedes that Villa acted appropriately in reporting the harassment complaint to the Operations Manager, but maintains that it reached the opposite conclusion in good faith and should not be held liable.

[1] This highly distilled factual summary is based on the appellant's brief, and so contains no individual record citations.

SUMMARY OF ARGUMENT

Both the Supreme Court and this Court recognize that anti-retaliation provisions are crucial to civil rights laws because they are designed to encourage employees to oppose and report unlawful behavior without fear of retaliation. Otherwise, employees would have good reason to fear losing their jobs and would refrain from speaking out against workplace discrimination. The rule adopted by the District Court below would vitiate much of this crucial legal protection, because it is undisputed that Villa made the sort of disclosure that the law was designed to encourage, yet she was fired expressly because she made that disclosure. Worse, the trial court deprived her of any opportunity to show that her firing was unlawful retaliation, wrongly holding that the employer's subjective—but incorrect—conclusion that she made a false report was incontestable. *Amicus* MWELA respectfully submits that the trial court's holding was wrong for several reasons.

1. The rule adopted below imposes retroactive consequences on an unsuspecting employee. It is clear on this record that her conduct was protected at the time it occurred and she could not be fired for it. The District Court allowed actions taken (a) after Villa reported the EEO complaint, and (b) by people outside of her control, to *retroactively* deprive Villa's conduct of legal protection. Because the anti-retaliation laws are designed to encourage employees to report suspected violations, the question of whether Villa's report was protected must be evaluated in light of what

she knew at the time. Instead, the trial court effectively removed protection retroactively based on the actions of others (a subordinate's recantation; a manager's credibility determination). This approach would lead to illogical results. An employee could never be confident that a disclosure would be protected because that protection could be stripped from her by her employer's subsequent actions and beliefs. This is neither true to the statutory language or purpose, nor to controlling precedent.

2. *Amicus* MWELA's members routinely handle employment cases and note that, while the facts in the case at bar are unusual, the legal rule urged by Cava could apply quite broadly with unintended but pernicious results.

Consider a more typical case where the purported victim reports the harassment, which is denied by the alleged harasser. This results in a "he said, she said" situation. Note that situations where the harassing conduct is admitted or witnessed by others rarely end up in litigation, so a summary judgment standard must lead to correct results in those cases that nonetheless remain "he said, she said" through the summary judgment stage.

Under Cava's proffered rule, if someone in the company interviews both the accuser and the accused and then chooses to believe the harasser's denial, that after-the-fact decision, taken by an interested party, would strip the anti-retaliation protections away from the complaining employee and permit the employer to fire her

without liability merely for reporting harassment. This is not far-fetched, as Cava argued below that a court may not second-guess the quality of the investigation or the business judgment exercised in deciding whom to believe. This would insulate sham investigations from challenge. But even a legitimate investigator would feel pressure to exonerate the accused. Moreover, harassment is usually based on a power differential, so the accused harasser is typically the more senior employee, better known and trusted, while the intended victims are targeted because of their relative powerlessness. Harassment is already underreported, and adopting the rule used below would vitiate most of the remaining vitality in the anti-retaliation provisions.

3. Affirming the district court's decision would dramatically chill reports of discrimination. This would achieve the opposite of what the Supreme Court and this Circuit have recognized is the important purpose of anti-retaliation provisions, to protect and encourage opposing discrimination and harassment.

Here, Cava's behavior is apt, because the Operations Manager responded to Villa's protected activity by deciding that someone was going to get fired, either her or the accused harasser. This put Villa in a position of playing "Russian Roulette." No matter how confident she was in the correctness of her actions, she placed her job in jeopardy by reporting her subordinate's harassment complaint.

If this Court adopts Cava's proffered rule, then it would be permissible for employers to make the Operations Manager's "reaction" their official policy.

Consider the effect it would have on complaints if anti-harassment policies stated: "Any employee who reports discrimination or harassment is subject to immediate termination if the company later decides to believe the accused official's denial."

4. Cava argued below, and the trial court agreed, that an employee must prove something beyond the three elements of retaliation, *i.e.*, that "retaliatory animus" or a hostile attitude must also be shown. An employer who fires an employee "because of" protected activity has violated the statute, regardless of whether or not that decision is accompanied by hostility.

5. The real question in cases involving termination for an apparently false complaint is not whether there is a causal link between the termination and the protected activity—there obviously is—but whether the employee forfeited the protection of anti-retaliation statutes due to her alleged misconduct.

Analytically, the district court focused on the wrong element of retaliation. The elements of a retaliation claim are: (1) protected activity, (2) adverse action;[2] and (3) causal connection. Here, Cava conceded there was sufficient evidence of both protected activity and adverse action, so the only element that Cava sought summary judgment on was causation.

Because of the unusual facts in this record, Cava argued and the district court

[2] The type of "adverse action" sufficient for the second element is any employment action that might reasonably dissuade an employee from pursuing legal action. *Burlington Northern & Santa Fe R. Co. v. White*, 548 U.S. 53, 68 (2006).

agreed that the third element—causation—was somehow lacking. But that makes no sense. To survive summary judgment, Villa only had to show "but for" causation, and here, the first link in the chain of causality was reporting her subordinate's complaint. "But for" Villa's report, she would not have been fired. The Operations Manager's determination—made long after the fact—that Villa acted improperly is not a break in the chain of causation. Accordingly, adducing sufficient evidence of "but for" causation to survive summary judgment was trivially easy.

In order to preserve the protections of Title VII, an employer who wishes to terminate an employee for what it believes is a wrongful report of harassment must, at a minimum, bear the burden of showing that the employee's conduct was so outrageous as to forfeit the protection of Title VII. A false and malicious report of sexual harassment might fall into this category, but the employer must have the burden to demonstrate that the employee's report was *actually* false and malicious. A rule that permits, and even rewards, an employer for choosing to believe its own manager and disbelieve the accuser, leads to its own morass of problems and perverse incentives.

6. Implicit in the trial court's ruling was a credibility determination that the decision maker fired Villa for the reason he claimed. Whether an interested witness's testimony about his own state of mind is "honest" is a credibility determination reserved to the jury. If courts were required to accept as true the sworn testimony of a

defendant facing trial as to whether his state of mind had the specific intent required then no case would ever survive summary judgment.

Whether the decision maker fired Villa for the reason claimed in a summary judgment affidavit (usually drafted by the employer's counsel) or for some other, possibly unlawful reason, is a credibility determination that cannot be made on a paper summary judgment record. Yet the district court below granted summary judgment to the employer based on the court's – not the jury's – determination that an interested witness's testimony as to his own state of mind was honest. This violates Rule 56, Fed. R. Civ. P., and a long line of Supreme Court cases.

ARGUMENT

I. ANTI-RETALIATION PROVISIONS ARE CRUCIAL TO THE PROTECTION AND ENFORCEMENT OF CIVIL RIGHTS LAWS

Civil rights laws depend on private attorney generals to enforce them. For these laws to work, the anti-retaliation provisions must be broadly construed to protect individuals and avoid deterring employees from asserting their rights or the rights of others. Conduct that is legally protected from retaliation is known as "protected activity."

The Supreme Court has repeatedly acted to ensure broad protection for employees against retaliation. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (extending anti-discrimination prohibitions of Title IX to protect retaliation for opposing discrimination); *Burlington Northern & Santa Fe R. Co. v. White*, 548

U.S. 53 (2006) (reach of Title VII's anti-retaliation provision must be broader than reach of anti-discrimination provisions because it is designed to encourage conduct, not protect status); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (extending 42 U.S.C. § 1981 to encompass retaliation against opposition activity); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (extending anti-retaliation protection to Federal employees who oppose age discrimination); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271 (2009) (extending Title VII's opposition clause to employees who only answer questions in employer-conducted interview); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (extending anti-retaliation protections to former employees); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011) (extending anti-retaliation protections to third parties who did not engage in protected activity but were associated with the person who engaged in protected activity).

In *Burlington Northern*, the Supreme Court held that Title VII's anti-retaliation provisions afford *broader* protection to employees than its substantive anti-discrimination provisions. This is because anti-discrimination law only "seeks to prevent injury to individuals based on who they are, *i.e.*, their status." 548 U.S. at 63. In contrast, the "antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Because the Title VII anti-retaliation provisions are designed to encourage specific conduct – to

encourage employees to oppose or report conduct they otherwise might not – a broad construction is necessary:

> A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms."

Burlington Northern, 548 U.S. at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). "The anti-retaliation provision . . . prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, *and their employers*." *Id.* at 68 (emphasis added).

The same policy identified in *Burlington* led this Court to its *en banc* decision in *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015), which emphasized that the statutory framework must be interpreted to ensure that employees feel free to oppose potentially discriminatory conduct:

> As the *Burlington Northern* Court explained, Title VII must be read "to provide broader protection for victims of retaliation than for [even] victims of race-based, ethnic-based, religion-based, or gender-based discrimination," because "*effective enforcement could ... only be expected if employees felt free to approach officials with their grievances*."

Id., at 283 (quoting *Burlington Northern*, 548 U.S. at 66-67) (emphasis added).

Accordingly, both this Court and the Supreme Court have emphasized the need to avoid judicial constructions that would deter employees from notifying their employers of potentially discriminatory conduct. The district court in the case at bar failed to adhere to this fundamental stricture.

II. "ANIMUS" IS NOT REQUIRED TO PROVE RETALIATION; "BUT-FOR" CAUSATION IS SUFFICIENT

An employer may not proffer a good faith reason for retaliation. The law prohibits firing an employee "because" she engaged in protected activity. Nothing more is required than showing the three elements cited above: (1) protected activity; (2) adverse or negative employment action; and (3) causal connection.

Cava wrongly argued below that there is a fourth criterion: that the decision maker had to have animus which it equated with hostility or a "retaliatory attitude." JA.377 (Def. Reply Br., at 4). This is wrong. Firing an employee for engaging in protected activity is unlawful regardless of the firing official's "attitude." "Animus" in the sense of hostility is not required. All that is required is but-for causation, showing that the employment action was taken "because of" the protected activity.

If an employee engages in protected activity and his employer disciplines him for a reason so related to the protected activity that, but for the protected activity the discipline could not have occurred, then the discipline and protected activity are so inextricably connected "that they cannot be considered independently." *Womack v. Munson*, 619 F. 2d 1292, 1297 (8th Cir. 1980). Firing an employee for making a false EEO report is still firing an employee for making an EEO report.

The notion of whether "animus" means having an angry or hostile attitude was addressed by the D.C. Circuit in *Forman v. Small*, 271 F.3d 285 (D.C. Cir. 2001). There, the plaintiff was denied promotion for reasons he alleged were discriminatory,

and he filed an EEOC charge. While that EEOC charge was being litigated, he was again up for a similar promotion. One of the managers (Hoffman) who had previously supported Dr. Forman's promotion that was being litigated chose not to act on Dr. Forman's subsequent promotion package because he believed that the EEOC litigation would decide whether or not Dr. Forman was entitled to promotion. The district court granted summary judgment, but the D.C. Circuit reversed, noting that even though Hoffman was not "hostile" to Dr. Forman, his action in not processing the subsequent promotion package could be viewed as unlawful retaliation:

> It is true that Hoffman supported Dr. Forman's promotion. And *it may be true that his failure to forward the complaint to the Secretary was in good faith. But motive, in the sense of malice, is not required for liability* under the ADEA. . . . "[A]n employer may offer a legitimate nondiscriminatory reason for taking an adverse action against an employee who has engaged in protected activity.... However, *the employer may not proffer a good faith reason for taking retaliatory action." Unlawful motive, not malicious motive, is all that Dr. Forman had to show*. Consequently, *even if Hoffman acted in good faith* in failing to forward Dr. Forman's complaint to the Secretary, he nonetheless *would violate the ADEA if his reason for doing so was retaliatory, i.e., in response to Dr. Forman's 1991 EEO complaint.*

Forman, 271 F.3d at 299-300 (emphasis added, citations omitted). As in *Forman*, Cava improperly seeks to "proffer a good faith reason for taking retaliatory action."

An employee who properly reports suspected EEO violations is entitled to protection from being fired for that conduct. The employer's mistake of fact cannot deprive her of that entitlement. More than 60 years ago, this Court came to a similar

conclusion in an analogous situation in *NLRB v. Industrial Cotton Mills*, 208 F. 2d 87 (4th Cir. 1953), where the law also provided an entitlement:

> [T]here is a right guaranteed by the Act -- the right of an employee to reinstatement after a strike. That right is forfeited by serious strike misconduct. What we hold is that *this right is not forfeited by the honest but mistaken belief of the employer* that the employee has been guilty of strike misconduct.

Id., 208 F.2d at 92 (emphasis added). This Court held that an honest but mistaken belief that the employer had a valid reason to fire the employee did not eviscerate the employee's statutory rights:

> [T]he statutory protection extended to a blameless employee is a firm and clear guarantee, not one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information. *Nor does the Act expose the innocent employee to the hazard of his employer's mistake where the consequence of this mistake is to divest the employee of a right guaranteed by the Act.*

Id. (emphasis added).

The court below erred by holding that an innocent employee could be fired based on her employer's mistake of fact.

III. THE TRIAL COURT ERRED BY FOCUSING ON THE ELEMENT OF "CAUSATION" RATHER THAN "PROTECTED ACTIVITY"

The real question here is not causation—as both Cava and the trial court mistakenly addressed—but whether Villa's actions were protected activity. The trial court held that her conduct was protected activity, *see* JA.389 (Tr., at 5:17-18),

but then held that Cava's mistaken belief that she lied broke the chain of causation between protected activity and her firing. This is illogical, and Cava's reliance below on *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) is inapt.

The issue resolved in *Nassar* has no bearing on this case. To understand *Nassar*, it is necessary to review a little history. Over 25 years ago, a plurality of the Supreme Court held that a plaintiff could prevail in a Title VII case without proving that discrimination was a "but for" cause of the challenged employment action. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Court held that Hopkins had proved that the promotion process was tainted by sexism to an unquantifiable degree:

> As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner." [¶] At this point Ann Hopkins had taken her proof as far as it could go.

Id., at 272 (O'Connor, J., concurring, citations omitted). But Hopkins was permitted to prevail in what became known as a "motivating factor" approach.

The legal issue in *Nassar* was whether the lower standard of proof—the motivating factor analysis—was applicable to retaliation claims. The *Nassar* Court resolved that issue in the negative, holding that retaliation still had to be proved by showing "but for" causation.

The Court later clarified that *Nassar's* explanation of but-for cause was not meant to impose a higher standard of "but for causation" in discrimination cases than

in other types of cases. As relevant to the case at bar, the Court explained:

> Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." . . . The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so — if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.

Burrage v. United States, 134 S. Ct. 881, 888 (2014) (citing, *inter alia*, *Nassar*).

The but-for causation analysis in this case is trivial. "But for" Villa's reporting of the harassment, she would not have been fired. Viewed from the reverse direction, if one removed Villa's original report from the facts, there would be no basis to fire her. That is the essence of a "but for" cause.

If the trial court wanted to wrestle with how a seemingly false EEO complaint should be analyzed, it falls analytically not under the third prong of "causation," but under the first prong of "protected activity."

In some situations, courts have held that the *manner* in which an employee engages in protected activity can be so disruptive to his employer's operations that he forfeits the protection to which he would otherwise be entitled. *See, e.g.*, *Armstrong v. Index Journal Co.*, 647 F. 2d 441, 448 (4th Cir. 1981). But to invoke such a rule, Cava would have to prove that Villa's conduct was in fact false and malicious, which on this record it cannot do. That may explain why Cava focused its argument on causation rather than on whether her conduct was so outrageous as

to forfeit statutory protection.

This Circuit has noted the issue, with regard to the "participation" portion of Title VII's antiretaliation provision:

> A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. Congress has determined that some irrelevant and even provocative testimony must be immunized so that Title VII proceedings will not be chilled.

Glover v. S. Carolina Law Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999).

The concern recognized in *Glover* applies with equal force to the case at bar. Villa is precisely the "innocent employee" who was discharged for engaging in protected activity. This Court should not immunize such behavior.[3]

[3] Because Cava did not argue below that Villa's conduct was unprotected, the issue is not preserved and need not be resolved here. The best way to provide sufficient protection and breathing room to avoid deterring legitimate claims is for all EEO reports to receive absolute protection, similar to *Glover*. Currently, "participation" claims receive such protection, but some courts differentiate "opposition" claims as having less broad protection. Whether an employee's use of an employer's internal complaint is better characterized as "opposition" or "participation" was argued in *Crawford*, but the Supreme Court did not resolve it. 129 S. Ct. at 853. The facts here amply demonstrate the chilling effect of permitting employers to penalize employees for use of the EEO process. See analysis of this issue in *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 977-79 (S.D.N.Y. 1987) (protecting false claims does less harm than empowering employers to deter truthful claims).

IV. WHETHER CONDUCT IS PROTECTED AGAINST RETALIATION MUST BE ASCERTAINABLE AT THE TIME OF PROTECTED ACTIVITY AND NOT SUBJECT TO RETROACTIVE DISQUALIFICATION

The anti-retaliation provisions are designed to encourage employees to engage in protected activity such as reporting potential civil rights violations to their employers. *Burlington Northern*, 548 U.S. at 63; *Boyer-Liberto*, 786 F.3d at 282-83. To meet this goal, an employee must be able to ascertain whether her actions in reporting harassment are protected *at the time* she reports them. On this record, there is no dispute that a knowledgeable employee in Villa's shoes would have concluded that she was protected at the time she reported her subordinate's harassment complaint.

Where the court below erred was in holding—as a matter of law—that actions which happened later in time, after Villa's protected report to her manager, could retroactively deprive her report of protection from retaliation. When Villa reported her subordinate's complaint, she could not know that her subordinate would later recant, or that the Operations Manager would conclude that she had made a false report. Indeed, any time the accused wrongdoer denies wrongdoing, there is some risk that the employer will believe the denial.

The holdings in both *Burlington Northern* and *Boyer-Liberto* preclude constructing a framework where actions that are both (a) later in time, and (b) outside the control of the employee, can *retroactively* divest protected activity

of its statutory protection. If Cava's rule is adopted, then an employee can never be secure when engaging in protected activity, and therefore, there will be less of the behavior that these opinions sought to encourage. Any rule of decision must focus on Villa's harassment report at the time she made it and what she knew at the time. Any other approach would create a minefield for employees deciding whether to report suspected discrimination or remain silent.

V. THE RULE ADOPTED HERE MUST BE APPROPRIATE FOR THE MORE COMMON "HE SAID, SHE SAID" CASES WHERE THE ACCUSED HARASSER DENIES MISCONDUCT

The rule urged by Cava and adopted by the Court below permits substantial mischief by letting the fox guard the henhouse. The employer gets to decide whether and how to investigate a claim, and whom to believe, notwithstanding that the employer has a vested interest in reaching a conclusion that precludes liability.

In this regard, the unusual facts of this case—where Villa was not the victim or witness but was relaying a report from a subordinate—may obscure the hazards of the legal standard at issue. The issue in this case should be considered against the backdrop of more common fact situations. *Amicus* MWELA, as an association of lawyers that litigates discrimination and retaliation cases, submits that many cases have the following characteristics:

1. The complainant is on the weak side of a power differential, where the harasser has actual or apparent authority to alter the terms or conditions of the accuser's employment;

2. The alleged harassment occurred in private, without witnesses or documentation to establish definitively what was said or done;

3. The accused harasser, if and when confronted, denies wrongdoing (note that cases where the harassing conduct is admitted or witnessed by third parties rarely end up in litigation); and

4. The accused harasser, being more senior, has stronger and deeper connections than the accuser with the managers who make decisions, and is therefore more likely to be believed than the junior employee.

In these cases, the issue for the Court is how to fashion a rule that does not permit an employer to short-circuit the process by choosing sides in a "he said, she said" dispute and then being granted immunity for choosing wrongly—in a way that directly benefits themselves.

Make no mistake about this—Cava urged below that the plaintiff and the court may not second-guess any aspect of the employer's investigation, no matter how superficial, shoddy, or one-sided it may appear. *See* JA.378-381 (Summ. J. Reply Br., at 5-8); JA.391 (Tr., at 7). This sets up a perverse incentive—under the Cava rule, an employer who "investigates" and concludes that the accuser is lying then has a green light to fire the accuser. This creates a "get out of jail free" exception to the anti-retaliation laws so big that the exception swallows the protection. By urging that the investigation and the company's conclusions are unreviewable business judgments, the Cava rule encourages sham investigations to

reduce liability. This regime—urged by Cava and accepted by the trial court—has nothing to do with the noble purposes of the civil rights laws emphasized in *Burlington Northern* and *Boyer-Liberto*.

Note that even a genuine effort to investigate easily could lead to the same result because it is quite plausible that any company official would have a reservoir of trust for the senior employee causing the accused harasser's denial to appear more credible than the story of a lesser-known accuser. This is a far cry from encouraging employees to come forward with information of potential violations of Title VII; in this regime, all the risk is on the complainant.

VI. THE CAVA RULE WOULD CHILL REPORTS OF POTENTIAL DISCRIMINATION VIOLATIONS BY FORCING EMPLOYEES TO PLAY "RUSSIAN ROULETTE," RISKING JOB LOSS WITH EVERY REPORT OF DISCRIMINATION

Cava urges a regime where every employee who reports a potential Title VII violation faces a statistical chance of being fired for making that report. This would chill such reports, as the risk of job loss would always be lower by remaining silent.

On this point, the record below provides a useful example. The Operations Manager testified that his reaction to hearing Villa's report was to decide that someone was going to lose their job—either the accused harasser or the one making the report. *See* JA.404 (Tr., at 20); JA.170 (Pl. Opp. to S.J., at 4). Under the Cava rule, it is entirely up to the employer to decide, based on its unreviewable

business judgment, whether to credit the accused harasser's denial. This means that an employee acting in good faith assumes some risk of termination merely for doing the right thing. The Cava rule forces an employee who wants to report suspected wrongdoing to play "Russian roulette" with their job by taking a calculated risk that the employer will not later deem their report to be false. Yet there is always the risk that a subordinate could be intimidated or frightened into recanting, or that the employer later credits the accused's denial.

If this Court adopts Cava's proffered rule, then employers in this Circuit could make this threat their official policy. Consider whether the noble purposes articulated in *Burlington Northern* and *Boyer-Liberto* would be served by the following statement in an employer's handbook under the harassment policy:

> WARNING: Any employee who reports discrimination or harassment is subject to immediate termination if the company, in its sole discretion, decides that the denial by the company official accused of discrimination or harassment is more credible than the original complainant.

This is not an exaggeration. Cava argued below that "the details of Defendants' investigation are not relevant" and that the plaintiff may not second-guess the quality or manner of the investigation. *See* JA.379 (Def. Reply Br., at 6). Note that Cava argued "relevance," meaning that the Court had no ability *at all* to consider how superficial or biased the investigation may have been.

This is a recipe for immunizing retaliation, which this Court should reject.

VII. CREDIBILITY DETERMINATIONS AS TO THE SINCERITY OF AN EMPLOYER'S CONCLUSION ARE IMPROPER ON A SUMMARY JUDGMENT RECORD

We anticipate Cava may argue that some deference is owed to its "honest belief" that Villa lied, even though it is now clear that Villa told the truth. Deciding whether an interested witness (the defendant) held an "honest" or "sincere" belief in an untruthful conclusion is simply a credibility determination.

While the plaintiff below said she was not relying on the *McDonnell Douglas* proof scheme, the trial court addressed it and so do we because the majority of cases rely at least partially on that analysis. Cava's alleged non-discriminatory reason for firing Villa was that she falsely reported a complaint of harassment. It is now clear that Villa accurately reported her subordinate's complaint. This means that Villa has evidence that Cava's stated reason for termination—a false EEO report—was pretextual. Evidence of pretext is generally sufficient to survive summary judgment.

The Supreme Court recognized that employers do not generally admit unlawful reasons for their employment decisions. Similarly, as Judge Posner explained, "Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible." *Riordan v. Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987); *see also Texas Dept. of Community Affairs v. Burdine*,

450 U.S. 248, 254 n.8 (1981) (the *McDonnell Douglas* analysis "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination").

Recognizing that proof of unlawful motivation is elusive, the Supreme Court held that indirect evidence is one available method that permits the factfinder to infer discrimination, which is now referred to as "pretext" evidence. The Court explained:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that *the proffered reason was not the true reason* for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence*. *See McDonnell Douglas*, 411 U.S. at 804-805.

Burdine, 450 U.S. at 257 (emphasis added).

Since these cases, the Court has twice squarely addressed the significance of pretext evidence, *i.e.*, evidence sufficient for the trier of fact to reject the employer's explanation proffered in the second stage of *McDonnell Douglas*. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court clarified that a finding of pretext *permits* but does not compel a finding of discrimination:

> Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "*[n]o additional proof of discrimination is required*."

Id. at 511 (emphasis added). The factfinder may choose to infer discrimination from the falsity of the employer's explanation, or it may infer that some other motivation caused the employer to proffer an untrue explanation, including simple mistake. Because these are both inferences, the choice of which inference to draw rests in the exclusive control of the jury. *Id.*

If there were any doubt about this point, the Court resolved it definitively in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), which rejected the "pretext-plus" standard.

In *Reeves*, the lower court found that the employee had adduced sufficient evidence of pretext for the jury to disbelieve the employer's proffered explanation. In setting aside the jury verdict for the employee, the lower court largely ignored the inferences that could be drawn from a finding of pretext, and held that there was insufficient evidence that age motivated the termination. The Supreme Court reversed, holding yet again that rejection of the employer's explanation as untrue was, by itself, sufficient for the jury to infer discrimination:

> [T]he Court of Appeals *misconceived the evidentiary burden* borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*. . . . [¶] In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."

Id., 530 U.S. at 146-47 (emphasis added) (quoting *Hicks*, 509 U.S. at 511). The Supreme Court held that the jury's disbelief of the employer's explanation is sufficient to find for the plaintiff *with or without* a suspicion of mendacity. That means that Villa's proof that Cava relied on a pretextual reason is sufficient to survive summary judgment, whether or not Cava was mendacious about its reason.

Under *McDonnell Douglas*, the employer is required to submit "admissible evidence" of its proffered explanation. *Burdine*, 450 U.S. at 255. This means that, in every case, one or more defense witnesses have testified under oath in support of the employer's proffered explanation. Not all of these defenses are meritorious, but determining which witnesses' testimony to believe is not the proper role for a trial court deciding summary judgment. Indeed, it is likely that almost every employer facing evidence of pretext would *claim* to have an "honest belief" in its original explanation, so adding the layer of "honest belief" does nothing but obscure the significance of pretext evidence.

There is no special deference to an interested witness testifying as to his own state of mind. As the Supreme Court has explained, even when all other material facts

are undisputed, the question of motivation is itself a fact which requires deciding which inference to draw from those facts. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) ("The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question."). A manager whose actions have been challenged as unlawful is an interested witness, and a jury need not believe his testimony as to what his state of mind was at the time of a decision, since testimony of interested witnesses is not entitled to deference:

> [T]he court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. 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 the evidence comes from *disinterested* witnesses."

Reeves, 530 U.S. at 151 (emphasis added) (citations omitted).

Implicit in the trial court's ruling was accepting without question that Cava's stated reason for its actions was the true reason. Giving greater weight to the defense's witnesses and ignoring the plaintiff's contradictory evidence is impermissible at summary judgment. *Tolan v. Cotton*, 134 S. Ct. 1861, 1867-68 (2014) (no deference owed to defense witnesses); *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015) (similar, applying *Tolan*).

This Circuit should not follow any sister circuit into error. Whether an

employer acted out of unlawful motive, simple mistake, or any other motivation is for the jury to decide. If a jury can reject the employer's proffered explanation as untrue, the jury is permitted to infer unlawful conduct. On this record, a jury could reject Cava's now abandoned claim that Villa made a false EEO report. That is pretext, and that is sufficient to deny summary judgment.

CONCLUSION

An employee does not lose protection for a good faith EEO report merely because the employer mistakenly believes it was false. Any rule that penalizes an innocent employee under the circumstances presented in this case is contrary to controlling precedent. Therefore, the summary judgment order should be reversed.

Respectfully submitted,

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Dated: 07/07/2016 /s/ Alan R. Kabat
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I hereby certify that on this 7th day of July 2016, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

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I further certify that on this 7th day of July 2016, I caused the required bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the clerk and depositing that into a U.S. Postal Service mailbox.

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I certify that on July 7, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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