RECORD NO. 15-2543

In The
United States Court of Appeals
For The Fourth Circuit

PATRICIA VILLA,

Plaintiff – Appellant,

v.

CAVAMEZZE GRILL, LLC;
CAVAMEZZE GRILL MOSAIC, LLC,

Defendants – Appellees,

and

CAVA GROUP, INC.,

Defendant,

METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION;
U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amici Supporting Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-2543 Caption: Patricia Villa v. Cavamezze Grill, LLC and Cavamezze Grill Mosaic, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cavamezze Grill Mosaic, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Cavamezze Grill, LLC and Cava Group, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ David Barmak Date: December 29, 2015

Counsel for: Cavamezze Grill Mosaic, LLC

CERTIFICATE OF SERVICE

****

I certify that on December 29, 2015 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:

Matthew B. Kaplan
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/s/ David Barmak (signature) December 29, 2015 (date)

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Signature: /s/ David Barmak Date: December 29, 2015

Counsel for: Cavamezze Grill, LLC

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I. STATEMENT OF THE ISSUE

To survive summary judgment, an employee who has engaged in protected activity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") must present evidence that retaliatory animus was the but-for cause of the employer's decision to take an adverse action against her. Here, there is no evidence of retaliatory animus by the employer, Cava, against the employee, Villa. To the contrary, it is undisputed that, although Villa reported to Cava that two former employees, Bonilla and Arias, had been harassed by their supervisor, when Cava investigated that report Bonilla and Arias not only denied ever being harassed, but also denied that they had told Villa they had been harassed. Villa admits that Cava terminated her only after concluding, based on Bonilla's and Arias's statements and other evidence, that Villa had made up her report. Cava therefore lacked retaliatory animus. This case therefore presents the question: Can Villa prevail on her retaliation claim even though Cava's decision to terminate her was made without retaliatory animus?

II. STATEMENT OF THE CASE

On October 28, 2013, one day before she was scheduled to meet with her manager Marcelo Butron ("Butron") to discuss her performance issues, Plaintiff-Appellant Patricia Villa("Villa"), reported to Cava's Operations Director Rob Gresham ("Gresham") that two former employees complained to her that they had

been sexually propositioned by Butron. Cava[1] immediately investigated these allegations by going straight to the two former employees, Judith Bonilla ("Bonilla") and Jessica Arias ("Arias"), as well as another employee, Osmar Marinero ("Marinero"), who Villa said was present when Bonilla told her she had been harassed by Butron. Bonilla and Arias not only denied to Cava that they had been propositioned by Butron, but they also denied that they ever told Villa that they were. Likewise, Marinero did not corroborate Villa's allegations. Given the complete lack of evidence to support Villa's allegations and the outright denials by the alleged victims, Cava appropriately concluded that Villa made a false report of sexual harassment and terminated her employment on November 5, 2013 for making a false report.

A. Cava's Organizational Structure

Defendant-Appellee CavaMezze Grill, LLC ("CMG") is a Maryland limited liability company and the parent company of several fast casual restaurants, each of which is owned and operated by a wholly owned subsidiary of CMG. JA 15, 55, 85.[2] Defendant-Appellee CavaMezze Grill Mosaic, LLC ("Mosaic") is a Virginia limited liability company and wholly owned subsidiary of CMG that owns and operates the Cava Mezze Grill restaurant located in Merrifield, Virginia. JA 50,

[1] "Cava" will be used throughout to collectively refer to Defendant-Appellee CavaMezze Grill, LLC and Defendant-Appellee CavaMezze Grill Mosaic, LLC.
[2] Citations in the format "JA" and the corresponding page number refer to pages of the Joint Appendix (filed June 30, 2016).

56. Gresham was the Director of Operations for Cava, overseeing the operations of each fast casual restaurant, including Mosaic. JA 59. Sergio Valdivia ("Valdivia") was the Area Manager for Cava at that time, overseeing five restaurants including Mosaic. JA 24, 66.

B. Villa's Employment with Cava

Villa began her employment at Cava in the spring of 2012, initially working at another location before transferring to Mosaic. She was a Supervisor from approximately February 22, 2013 until November 5, 2013. JA 92-94. In this role, she reported to Butron, Mosaic's General Manager, whom she had known for several years. JA 95, 122, 125-126. Villa frequently performed below expectations, but Butron gave her some leeway and informally counseled her to improve her performance. JA 98, 132-139, 144-146. However, Villa's performance issues continued, prompting Butron to discipline Villa in September and October of 2013. JA 118, 144-146.

C. Cava's Investigation into Villa's Sexual Harassment Allegations

On October 28, 2013, Villa called Gresham to report that Bonilla, a former Mosaic employee, told Villa that Butron said he would give Bonilla a raise in exchange for sex. Villa informed Gresham that Bonilla told her this while she and Marinero, another Mosaic employee, were at Villa's house. JA 67, 70, 102-103, 105-108.

During her conversation with Gresham, Villa also reported that Arias, another former Mosaic employee, probably left Mosaic because Butron told Arias he would give her a raise in exchange for sex. JA 109-110. Even though Villa was just speculating as to whether Arias left Mosaic because Butron propositioned her, Villa never informed Gresham that she was speculating. JA 109-110. Gresham therefore understood Villa to be reporting the alleged reason for Arias's departure as fact. JA 67-68.

Gresham informed Villa that he would investigate the allegations regarding Butron. JA 68. Gresham stated that if the investigation found Villa's allegations to be true, Butron would be terminated, but if the investigation found that Villa's allegations were not true and that Villa was making up the allegations, it was possible she would be terminated. JA 68, 103. Villa asked Gresham if she still needed to meet with Butron the next day, October 29, to discuss her performance, to which Gresham replied that she did. JA 68-69.[3] Immediately thereafter, Gresham informed Brett Schulman, the Chief Executive Officer of Cava, of Villa's report and Schulman instructed Gresham to investigate the allegations by speaking

[3] The following afternoon, Villa attended a performance meeting with Butron and Valdivia and received a written warning. JA 100-101, 118, 130-132. Gresham purposely did not inform Butron or Valdivia of Villa's sexual harassment report until after their meeting with Villa. JA 72. Gresham informed Valdivia of Villa's report shortly after Valdivia and Butron met with Villa but neither of them informed Butron of the report until November 5, 2013 when Gresham terminated Villa. JA 72, 140-141.

with the people involved. JA 53-54, 70-71. Gresham conducted his investigation based on the allegations told to him by Villa: (a) that Butron offered Bonilla a raise in exchange for sex and (b) that Arias quit her job at Mosaic after Butron offered to give her a raise in exchange for sex.

Gresham met with Bonilla at a Panera Bread Restaurant, with Valdivia translating. JA 73-74.[4] Gresham asked her why she had left Mosaic. Bonilla responded that she left for a better paying job at Matchbox. JA 74. When asked whether she left Mosaic because Butron told her he would only give her a raise in exchange for sex, Bonilla said that was not true. She also denied that she had made the statements attributed to her by Villa. JA 74, 83-84, 87, 152-153.

Gresham spoke with Arias by phone. During his conversation with her, Arias explained that she left her employment at Mosaic because she lived far away. JA 75. When asked whether she left because Butron said he would give her a raise in exchange for sex, Arias laughed, said that never happened and whoever told Gresham that was lying. JA 75-76, 87.

Gresham also informally spoke with Marinero and did not receive any information from him that supported Villa's allegations about Butron. JA 77.

[4] Gresham initially contacted Bonilla by telephone and left a message for her. JA 71.Gresham did not expect Bonilla to return his call because she did not speak English well, so he told Valdivia about Villa's complaint, and asked Valdivia to try to get in touch with her and see if she would meet them in person, with Valdivia serving as translator, which he did. JA 71-72, 74, 154.

Although Villa stated that Marinero had been present when Bonilla allegedly told Villa of Butron's sexual proposition, Marinero denied ever hearing Bonilla say that Butron offered her a raise in exchange for sex. JA 107, 159-160.

D. Cava's Decision to Terminate Villa's Employment

Since Arias and Bonilla, the two former employees and alleged victims of Butron's sexual harassment, denied the allegations about Butron *and* denied that they had ever made the allegations to Villa, Gresham reasonably concluded that Villa made up the allegations. JA 78. Not only did he not find any evidence to corroborate Villa's allegations, both Bonilla and Arias denied that they ever told Villa they had been harassed. Gresham therefore concluded that Villa fabricated the report against Butron and decided to terminate her employment for that reason. *Id.* On November 5, 2013, Gresham met with Villa and Butron and explained to Villa that he spoke with Bonilla and Arias and they both had denied that Butron had offered them a raise in exchange for sex, and that as a result, he determined that Villa made a false report regarding Butron. JA 80-81, 113-114.[5] Gresham informed Villa that her employment was terminated and Villa responded that she was sorry. JA 81. At no point during the termination meeting did Villa take issue with Gresham's conclusion that she submitted a false report. JA 114.

[5] Butron did not participate in the decision to terminate Villa's employment and first learned of Villa's complaint and the allegations against him when Villa was terminated on November 5, 2013. JA 140-141.

E. The Summary Judgment Decision Below

Cava moved for summary judgment because it was undisputed that it acted without the requisite retaliatory animus. Specifically, the record revealed that:

> Since Ms. Arias and Ms. Bonilla denied the allegations about Mr. Butron, and denied that they have ever made the allegations to Ms. Villa, Mr. Gresham concluded that Ms. Villa made up the allegations. As a result, Mr. Gresham decided to terminate Ms. Villa's employment *for fabricating the report* against Mr. Butron.

See JA 32-33 (emphasis supplied). The quoted language is taken directly from paragraph 43 of Cava's Statement of Undisputed Facts, which contained citations to the supporting evidence in the record. Critically, Villa did "not dispute the assertions in [that] paragraph." JA 189.[6]

Villa's argument in opposition was twofold. First, she argued that because she acted in good faith when she made her complaint to Gresham, she was "protected" against being terminated by Cava, regardless of what Cava believed when it terminated her. JA 172-178.[7] Second, Villa argued that in Cava's investigation was not sufficiently thorough and, therefore, the case should be submitted to the jury to decide. JA 178-179. The district court dismissed Villa's

[6] See E.D. Va. Loc. Civ. R. 56(b) ("In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.").

[7] The district court did not address whether or not Villa acted in good faith and assumed that Villa engaged in protected activity and that her termination was an adverse employment action. JA 401.

first argument, stating "if you went this way, then it would immunize all protected activity even if it was blatantly false, and surely that isn't the law." JA 403, 405-407. It also dismissed Villa's second argument, noting that if "every time there is an investigation [there is] a triable issue of fact as to the adequacy of an investigation, there would never then be a summary judgment." JA 406.

Instead, the district court phrased the dispositive issue as "whether the facts show a triable issue of fact on whether a reasonable jury could find causation." JA 401. Relying on the but-for causation standard expressed by the Supreme Court in *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), for Title VII retaliation cases proceeding on direct evidence, the district court granted summary judgment in Cava's favor because Villa "points to no evidence that [she] would not have been fired but for retaliatory motive" and "the mere fact that [Cava's] investigation might not have been perfect does not prove that [Cava] acted with retaliatory animus." JA 402, 404, 408. The district court recognized that Villa conceded that Cava "in fact concluded that [Villa] made a knowingly false allegation . . . and that [Cava] terminated [her] as a result of that conclusion." JA 409. It therefore ruled that no reasonable jury could conclude that Cava fired Villa out of retaliatory animus, and entered summary judgment for Cava. JA 409-410.

III. SUMMARY OF THE ARGUMENT

Title VII states that it is unlawful for an employer to take an adverse employment action "because" an employee engaged in protected activity. 42 U.S.C. § 2000e-3(a). Therefore, a Title VII retaliation claim fails if the plaintiff cannot prove "but-for" causation. As the Supreme Court's decision in *Nassar* and this Court's decision in *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015) make abundantly clear, proof of "but-for" causation requires proof that the employer acted with retaliatory animus. That is, that the employer would not have taken adverse action against the plaintiff but for its intention to retaliate against her.

Villa asks this Court to ignore the explicit requirement that she prove causation, going so far as to say that the district court was incorrect in treating the lack of causation, here, as determinative. She admits that she was terminated because Cava concluded she fabricated her report of sexual harassment, but argues that her report should immunize her from termination, even one based, as is the case here, on the employer's determination that Villa made up the allegations included in her report. The law provides no such immunity.

Title VII does not protect Villa from an adverse employment decision resulting from Cava's good faith conclusion that she fabricated her report, because that conclusion is by its very nature non-retaliatory: Villa was not terminated for

reporting harassment. Villa admitted below that she was terminated for making up her allegations that two other employees had been harassed by a supervisor and that at least one of the supposed victims had told her as much. When the two employees denied both that they had been harassed by the supervisor and that they had ever told Villa that they had been, Cava reached the conclusion that she made up her allegations, and fired her for that. Thus, Cava did not act with retaliatory animus.

Villa elected to proceed with direct evidence of retaliation, rather than taking advantage of the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[8] Yet, there is no direct evidence in the record of retaliation since Villa admits that she was terminated because Cava concluded, based on its investigation, that she fabricated the report. By conceding this critical fact and failing to present direct evidence of some retaliatory motive, Villa effectively resolved the case on Cava's behalf.

Villa therefore attempts to get a do-over by arguing that Cava's investigation was not sufficiently rigorous and that Gresham believed from the beginning that he might have to fire the supervisor, Butron, if Villa's allegations against him were true, or Villa if he concluded she was making them up. But those arguments are unavailing. First, it is Cava's belief that Villa fabricated her report that is

[8] Villa claimed "*McDonnell Douglas* is irrelevant," and elected to proceed on direct evidence. JA 177.

important here, not the quality of Cava's investigation. Moreover, both Cava's investigation and the conclusion it reached were reasonable. It interviewed the two alleged victims and the person who allegedly heard one of the victims tell Villa she had been harassed. All three denied what Villa had reported. Cava's conclusion that Villa had lied was therefore reasonable and the law simply does not support second guessing its conclusion. Second, by opting not to proceed under the *McDonnell Douglas* framework and challenge Cava's stated reason as pretextual, and admitting that Cava's stated reason it's real reason, her efforts to suggest some other motive at work is too little, too late, and wholly unsupported by any evidence.

Since it is undisputed that Cava conducted an investigation which led it to conclude, based on its interviews of three witnesses, that Villa had made up her report of harassment and fired Villa for doing so, the district court correctly concluded that that there was no evidence from which a reasonable jury could conclude that Cava acted out of retaliatory animus. The district court's grant of summary judgment in favor of Cava should be affirmed.

IV. ARGUMENT

A. When the parties do not dispute the dispositive material facts, the Court should affirm the lower court's grant of summary judgment.

The district court's grant of summary judgment is reviewed de novo. A grant of summary judgment should be affirmed if there are no disputed material facts and the moving party is entitled to judgment as a matter of law. *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 460 (4th Cir. 2012). To defeat a motion for summary judgment, the opposing party "must identify an error of law or a genuine issue of material fact; the [non-movant] cannot create a material fact by reliance on conclusory allegations or bare denials." *Erwin v. United States*, 591 F.3d 313, 319 (4th Cir. 2010).

In a case such as this, where dispositive material facts were conceded by the non-movant, the court need not consider whether there are any genuine issues of material fact. Rather, the only relevant question is whether, based on the dispositive, undisputed material facts, the district court erred in granting summary judgment as a matter of law in favor of the moving party. *See Beard v. Banks*, 548 U.S. 521, 527-28, 536 (2006) (holding that in granting summary judgment, the district court properly relied upon the facts contained in the defendant's statement of undisputed facts because the plaintiff, by failing to specifically challenge the facts, admitted the validity of such facts) (citing Fed. R. Civ. P. 56(e)).

B. Since it was undisputed that Cava terminated Villa because it concluded that she fabricated the report, the district court correctly ruled that, as a matter of law, Cava lacked the retaliatory animus required to sustain Villa's retaliation claim.

i. Retaliatory animus against Villa for engaging in protected activity must be a but-for cause of Cava's decision to terminate her.

The Supreme Court highlighted the critical importance of proof of causation in Title VII retaliation cases in *Nassar*: "Title VII retaliation claims require proof that the desire to retaliate was the *but-for cause* of the challenged employment action." 133 S. Ct. at 2528. (emphasis supplied). In adopting this but-for causation standard, the Supreme Court noted that it would enable district courts to dismiss "dubious claims at the summary judgment stage," where the employer's "actions were not in fact the result of any discriminatory or retaliatory intent." *Id.* at 2532. Thus, it is clear that plaintiffs in Title VII retaliation cases must be able to prove that "retaliatory intent" was the but-for cause of the employer's adverse action; that is, the plaintiff must prove that the employer's retaliation was the "real reason" for the employer's termination decision. *Foster*, 787 F.3d at 252 (noting that these two statements are "functionally equivalent").

Before continuing, it is important to emphasize the proper but-for causation standard as applied to the instant appeal since it is misstated by Villa and amicus Metropolitan Washington Employment Lawyers Association ("MWELA"). *See*

Villa Brief at 16[9]; MWELA Brief at 17.[10] The proper standard is *not*: but-for Villa's report of sexual harassment to Cava, Villa would not have been fired. Were that the standard, an employee could fabricate a report, solicit witnesses to lie in support of her report, or engage in other misconduct with impunity. Rather, the proper standard is: but-for Cava's retaliatory animus, Villa would not have been fired. Consequently, to survive Cava's motion for summary judgment, Villa "must prove that retaliatory animus was a but-for cause of the challenged adverse employment action." *Foster*, 787 F.3d at 246 (interpreting *Nassar*).[11] *See also Ripberger v. Corizon, Inc.*, 773 F.3d 871, 881 (7th Cir. 2014) (affirming summary judgment for employer where employee could not meet her burden of showing but-for causation); *Bennett v. Windstream Communs., Inc.*, 792 F.3d 1261, 1269 (10th Cir. 2015) (same); *Shirrell v. St. Francis Med. Ctr.*, 793 F.3d 881, 888 (8th Cir. 2015) (same.)

[9] Citations in the format "Villa Brief at" and the corresponding page number refer to pages of the Corrected Opening Brief of Appellant Patricia Villa, *Villa v. CavaMezze Grill, LLC, et al.*, No. 15-2543 (4th Cir. July 22, 2016).

[10] Citations in the format "MWELA Brief at" and the corresponding page number refer to pages of the Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant, *Villa v. CavaMezze Grill, LLC, et al.*, No. 15-2543 (4th Cir. July 7, 2016).

[11] In *Foster*, this Court made clear that *Nassar's* holding applied equally to cases involving alleged pretext and burden shifting under the *McDonnell Douglas* framework. In either case, plaintiff bears the burden of showing that the employer acted with retaliatory animus. *Id.* at 252.

ii. Cava did not act with retaliatory animus. It terminated Villa only after concluding she fabricated her report of sexual harassment, not for making her report.

1. It is undisputed that Cava concluded Villa made up her report.

There is no dispute that Cava terminated Villa because it concluded, after interviewing several witnesses, that she made up the report about Butron. After Villa reported to Cava that two former employees were allegedly sexually harassed by Butron, Cava spoke with the former employees. JA 71-76. Both of them denied being sexually harassed by Butron and denied ever telling Villa that they were sexually harassed by him. *Id*. Cava therefore concluded that Villa fabricated the report, and it terminated her employment for that reason. JA 78. Villa does not dispute that this was the reason that Cava terminated her employment. JA 32-33, 189. She did not offer any evidence that Cava really terminated her for some other reason. There is no such evidence, and how could there be when Villa. expressly admitted that Cava terminated her because it concluded she fabricated the report about Butron, not for some other reason. *Id.*

Villa seeks to get around the absence of any evidence of Cava's retaliatory motive while giving lip service to that requirement by arguing, in effect, that terminating Villa for *fabricating* her report is the legal equivalent of terminating her for *making* her report. Villa Brief at 14-16. That argument is simply wrong. It flies in the face of the Supreme Court and Fourth Circuit rulings in *Nassar* and

Foster because it effectively reads out of the law the retaliatory animus requirement, which is the linchpin of those decisions.

Retaliatory animus has long been recognized to depend on an employer's beliefs and conclusions because "it is the perception of the decisionmaker that is relevant." *Rowe v. Goldsboro Wayne Transp. Auth.*, 2015 U.S. Dist. 75839, at *31 (E.D.N.C. June 11, 2015) ("it does not matter if [the employer] was correct in assessment of [the employee's] dishonesty, it needs only to be the sincere reason for her termination.") (citing *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000)). In *Gilooly v. Mo. Dep't of Health & Senior Servs.*, the Court explained: "[b]ut whether a judge or jury might later disagree with the employer's good faith conclusion about falsity is not dispositive, because whether the employer discriminated unlawfully depends on the employer's beliefs and motivations." 421 F.3d 734, 743 (8th Cir. 2005).[12] In *Kendrick v. Penske Transp. Servs.*, the Tenth Circuit noted that it must "look at the facts as they appear to the person making the decision to terminate [the employee]," not the employee's subjective evaluation of the facts. 220 F.3d 1220, 1231 (10th Cir. 2000).

So, where "the undisputed evidence shows that the [person making the decision] decided to terminate [the employee] based on his belief that [the

[12] (Colloton, concurring in part and dissenting in part) (citing *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002); *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000); *Scott v. County of Ramsey*, 180 F.3d 913, 917 (8th Cir. 1999)).

employee committed misconduct]", the employee's assertion that he did not commit the misconduct is insufficient to establish retaliatory intent. *Id.* at 1232. *See also McCullough v. Univ. of Ark. For Med. Scis.*, 559 F.3d 855, 862 (8th Cir. 2009) (granting summary judgment where the plaintiff provided "no evidence that the investigators purposely ignored relevant information or otherwise truncated the inquiry because of [discriminatory] bias[.]"). To establish retaliatory animus, Villa cannot rely on her assertion that she was not lying, nor can she simply point to minor discrepancies to "cast doubt on [Cava's] explanation's validity, or by raising points that are wholly irrelevant to it." *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202 (4th Cir. 2014) (quoting *Hux v. City of Newport News*, 451 F.3d 311, 315 (4th Cir. 2006)). Rather, she must present evidence that Cava lacked a good faith belief when concluding that she lied. *EEOC v. Total Sys. Servs.*, 221 F.3d 1171, 1177 (11th Cir. 2000). But, that ship has sailed. Villa admitted that she was terminated because Cava concluded she made up her allegations.

2. Villa did not argue or provide evidence that Cava's conclusion that she made up the report of harassment was pretextual.

Since Villa opted to prove retaliation using direct evidence[13], she "must produce direct evidence of a stated purpose to [retaliate] . . . What is required is evidence of conduct or statements that both reflect directly the [retaliatory] attitude

[13] *See* JA 117, 402; Villa Brief at 16, n.6.

and that bear directly on the contested employment decision." *Jacobs v. NC Admin. Office of the Courts*, 780 F.3d 562, 577-78 (4th Cir. 2015) (quoting *Rhoads v. FDIC*, 257 F.3d 373, 391 (4th Cir. 2001)).[14] "[P]ossibilities and other speculative scenarios" by Villa also will not "carry the day" and will not permit her claims to survive summary judgment. *Emmett v. Johnson*, 532 F.3d 291, 305 (4th Cir. 2008).

Because she opted to proceed by direct evidence and admitted she was terminated because Cava concluded she made up her report, Villa now hopes to avoid the dispositive effect of that decision and her admission. So, she argues that Gresham's initial statement to Villa that Butron may lose his job if Cava determines her allegations are true and that Villa may lose her job if Cava determines that her allegations are not true and that she fabricated the allegations constitutes evidence of retaliatory animus. Villa Brief at 28. First, this is not direct evidence of Gresham's intention to discipline Villa for reporting alleged sexual harassment. At most, it is evidence of Gresham's intention to discipline

[14] The Court in *Jacobs* analyzed the retaliation claim on both the basis of purported direct and indirect evidence and under the *McDonnell Douglas* framework. While it held that the "purported direct and indirect evidence [was] insufficient to survive summary judgment, it held that under *McDonnell Douglas*, the plaintiff set forth "sufficient evidence of pretext" to defeat summary judgment. *Id.* at 578-579. The latter holding is inapplicable here since Villa has elected not to proceed under that framework, and also because under either approach the lack of retaliatory animus is dispositive. *See Foster*, 787 F.3d at 252 (the requirement that a plaintiff must prove retaliatory animus is "functionally equivalent" in direct evidence or pretext cases).

Villa *if he determined that she was lying*. *See* JA 68 (Gresham testified that he told Villa: "I'll investigate, if it's true, [Butron] will be terminated, but if this isn't true and you are making it up . . . I said there's a good chance somebody is going to lose their job[.]"). It is undisputed that after Gresham could not corroborate any of Villa's allegations, he determined that she had fabricated the report and terminated her employment for that reason, not simply because she reported alleged sexual harassment. *See McCullough*, 559 F.3d at 865 (summary judgment is appropriate where an employer fired an employee for filing untruthful complaints, not for "filing a complaint in general").

She also now suggests that Gresham was biased because a finding of serious misconduct by a manager would reflect poorly on him without citing to anything in the record that suggests this. Villa Brief at 26. Villa speculates Bonilla could not have spoken freely about what happened because Gresham, in conducting his investigation, "relied heavily" on Valdivia, who allegedly had a conflict of interest in the matter. *Id.* at 26-27. But, nothing in the record suggests that during Cava's investigation Valdivia did anything more than serving as an interpreter for Gresham during his interview of Bonilla or that Bonilla felt like she could not speak freely to Gresham. *See* JA 206-209, 211, 281-283.

Villa now also claims that Gresham wanted "to ensure that his decision to exonerate Butron could not be effectively challenged," but she has offered no such

evidence. *See e.g.*, Villa Brief at 28. At best, Villa perhaps could have argued that Gresham's alleged motive was indirect evidence of pretext, except for the fact that it is not evidence at all. It is mere speculation. For Villa's speculation to matter here she "must present evidence reasonably calling into question the honesty of [her] employer's belief; [Villa's] mere demonstration that [her] employer's belief may be incorrect is not sufficient to prove discrimination." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997)). Villa has no such evidence. Furthermore, if such evidence existed, why would Villa have admitted that Gresham's decision was a "result" of his "conclu[sion] that Ms. Villa made up the allegations" against Butron? Certainly, she would have controverted that statement, and pointed to any evidence that she had to show that Gresham had actually concluded no such thing and was simply out to clear Butron of the allegations. But she did not do so. Instead, she admitted that Gresham *had* concluded she had fabricated her report, and she expressly opted not to argue that his conclusion was pretextual.

iii. Cava's investigation and resulting conclusion were reasonable and should not be second-guessed.

Despite conceding that she was terminated by Cava because Gresham believed she fabricated her report about Butron, Villa attempts to side step that

concession and the undisputed facts supporting it by attacking the investigation Cava conducted. Villa Brief at 26-29.

Villa's disagreement with the manner in which Cava conducted its investigation and the ultimate conclusion it reached is not enough to save her claims because "Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette*, 133 F.3d at 298-99 (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995)). As this court held in *DeJarnette*, "this Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." *Id.* (internal citations and quotations omitted). This is particularly true in a case such as this, where Villa has admitted that Cava decided to terminate her employment only after interviewing several witnesses, including the two alleged victims, both of whom not only denied that they were harassed, but also denied ever telling Villa that they had been.

Villa nonetheless asserts that Gresham's investigation was unreasonable because, in her opinion, Gresham should have interviewed her or asked her to submit something in writing after she made her report, consulted an antidiscrimination policy to guide his investigation[15], received previous training on

[15] *See also Walker*, 775 F.3d at 212 (the plaintiff "has not created a triable issue as to pretext based on [the employer's] failure to follow its written sexual harassment policies").

how to conduct an investigation, and consulted with an attorney. Villa Brief at 27-28.[16]

Villa's after-the-fact opinions as to how Cava should have conducted its investigation are irrelevant and do not change the facts that Cava terminated her only after concluding, based on several interviews including interviews of the two alleged victims, that she made up her report. "It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *DeJarnette*, 133 F.3d at 299 (internal quotation and citations omitted). *See also Walker*, 775 F.3d at 211("And while Walker asserts Mod-U-Kraf Homes' investigation into the altercation was insufficient and its conclusion . . . was incorrect, neither argument provides evidence of pretext."); *Estate of Bassatt v. Sch. Dist. No. 1*, 775 F.3d 1233, 1241 (10th Cir. 2014) ("The proper inquiry is not whether the inadequacy of the investigation foreclosed Sanchez from the possibility of believing Bassatt.

[16] Villa also suggests that Cava, in conducting its investigation, should have adhered to the EEOC's guidance to employers on how to conduct a prompt, thorough, and impartial investigation into alleged harassment to avoid vicarious liability. Villa Brief at 27, n.12. However, similar to the EEOC Compliance Manual relied upon by the employee in *Nassar*, the EEOC Enforcement Guidance relied upon by Villa here lacks "the persuasive force that is a necessary precondition to deference[.]" *Nassar*, 133 S. Ct. at 2533. Specifically, the section of the Guidance entitled "Effective Investigative Process" does not reference any specific provisions of Title VII and contains a generic explanation of steps the EEOC thinks employers should take to investigate sexual harassment. *See* EEOC, NOTICE 915.002, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999) (only providing a citation for its statement that "the amount of time that it will take to complete the investigation will depend on the particular circumstances").

Rather, the relevant inquiry is whether Sanchez subjectively, but honestly, believed that Bassatt had engaged in the misconduct.").

The undisputed facts are that after the alleged victims denied being sexually harassed *and* denied telling Villa that they had been sexually harassed, Gresham concluded that Villa fabricated the report and terminated her employment *for that reason*. JA 32-33, 189. That is, the undisputed facts indicate that Cava concluded Villa was "caught in a clear, unequivocal lie." *Cf. Gilooly*, 421 F.3d at 740. This is not a case where Cava was presented with a "he said, she said" set of facts where Cava chose to believe an alleged harasser over an alleged victim. *See* MWELA Brief at 6, 20-22; *Richey v. City of Independence*, 540 F.3d 779, 785 (8th Cir. 2008) (interpreting "*Gilooly* to mean that when an employer is presented with a 'he said, she said' set of facts involving two employees, and the employer chooses to disbelieve and discipline the employee who had engaged in protected opposition to unlawful activity, then the employee's claim of retaliation must go to a jury."). This is a case where it is undisputed that Cava had a good faith belief, supported by independent corroboration from the alleged victims, that Villa fabricated her report of sexual harassment. *Richey*, 540 F.3d at 785 (applying the *McDonnell Douglas* burden-shifting framework). Without evidence that Cava's retaliatory motive was a but-for cause of her termination, Villa cannot avoid summary judgment. Since Gresham's investigation uncovered evidence that justified his ultimate conclusion,

this Court should "not sit as a kind of super-personnel department weighing the prudence" of Cava's decision to terminate Villa. *DeJarnette*, 133 F.3d at 299.

C. The broad protection from retaliation created by Title VII was not meant to completely shield employees who engage in protected activity from non-retaliatory adverse employment actions.

i. Title VII's anti-retaliation provision only makes adverse employment actions unlawful if the employer takes them because of its retaliatory motive towards an employee who engaged in protected activity.

Title VII's anti-retaliation provision does not make it unlawful for an employer to take an adverse employment action against an employee who has opposed an unlawful employment practice. It makes it unlawful for an employer to take an adverse action against an employee *because* that employee opposed an unlawful employment practice. 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]."); *Nassar*, 133 S. Ct. at 2521. Villa ignores this very clear statutory language and argues that because she made an honest report of alleged sexual harassment, Cava could not lawfully terminate her for non-retaliatory reasons. Villa Brief at 19-23. In Villa's view, her honest report immunized her. Cava's honest conclusion that she fabricated her report does not matter, according to Villa: She is immune, Cava is liable, and summary judgment in favor of Cava is inappropriate. *Id.*

A very similar set of facts played out before the Eleventh Circuit in *Total Sys. Servs.* The Equal Employment Opportunity Commission ("EEOC") sued Total Systems Services, alleging that it retaliated against an employee who complained of sexual harassment. *Total Sys. Servs.*, 221 F.3d at 1173. Total Systems Services denied retaliating against the employee, stating that it terminated her employment because it determined she fabricated her report of sexual harassment. The EEOC put forth many of the same arguments put forth by Villa, MWELA, and the EEOC in the instant appeal. For example, the EEOC argued in *Total Sys. Servs.*: "an employer must bear the risk of Title VII liability if the employer fires an employee who did not actually lie even when the employer had good reason to believe the employee had lied" and that "to avoid liability under Title VII, [an employer] must prove that [the employee], in fact, lied." *Id.* at 1175-76. *See also* Villa Brief at 20-23; MWELA Brief at 14-15; EEOC Brief at 15.[17]

The *Total Sys. Servs.* Court rejected the EEOC's arguments, and so should this Court. Consistent with the Fourth Circuit's well-established view that courts "do not sit as a 'super-personnel department weighing the prudence of employment decisions'", the Eleventh Circuit in *Total Sys. Servs.* noted that 'whether to fire an employee for lying to the employer . . . is basically a business decision; this

[17] Citations in the format "EEOC Brief at" and the corresponding page number refer to pages of the Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant Patricia Villa and Reversal, *Villa v. CavaMezze Grill, LLC, et al.*, No. 15-2543 (4th Cir. July 7, 2016).

decision, as with most business decisions, is not for the courts to second guess as a kind of a super-personnel department." *Id.* at 1175-76 (noting that it is not possible for anyone to know for certain whether the employee lied or not); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 272 (4th Cir. 2005). Where an employer, such as Cava or Total Systems Services, receives a report of sexual harassment in the workplace, the Eleventh Circuit explained:

> the employer can lawfully ask: is the accusation true? When the resulting employer's investigation (not tied to the government) produces contradictory accounts of significant historical events, the employer can lawfully make a choice between the conflicting versions—that is to accept one as true and reject one as fictitious—at least, as long as the choice is an honest one. And, when the circumstances give the employer good reason to believe that the fictitious version was the result of a knowingly false statement by one of its employees, the law will not protect the employee's job . . . And, in carrying out its business and making business decisions (including personnel decisions), the employer can lawfully act on a level of certainty that might not be enough in a court of law.

Id. at 1176 (affirming the district court's grant of summary judgment in favor of the employer because the EEOC failed to show causation or pretext simply by arguing that the employer was mistaken) (citations omitted). *See also Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 417 (8th Cir. 2010) ("an employer who investigates allegations of workplace misconduct is entitled to latitude in evaluating the information gathered, so long as the employer acts in good faith.").

Here, as Villa acknowledged, Cava had good reason to believe that Villa fabricated her report to Gresham when both alleged victims denied being sexually harassed, and as importantly, denied ever telling Villa that they had been sexually harassed. In fact, it is undisputed that this honest belief led to Cava's decision to terminate Villa's employment.

In her effort to vitiate to the point of meaninglessness the retaliatory animus requirement set out in *Nassar* and *Foster*, Villa asks this Court to ignore the *Total Sys. Servs.* decision despite its factual similarities to this case and instead extend the policy of encouraging reports of a Title VII violation as immunizing reporting employees from adverse employment actions. Villa Brief at 20-21. The cases cited by Villa and the EEOC[18] discussing Title VII's "broad protection from retaliation" are distinguishable, however. *See Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (applying the broad protection to the determination of whether an employee engaged in protected activity); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (applying the broad protection to the determination of whether an employer's action was materially adverse); *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271 (2009) (applying the broad protection to whether employee complaints raised during an internal investigation is protected activity covered under the opposition

[18] Villa Brief at 20-21, EEOC Brief at 11-18.

clause); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (applying the broad protection to whether Title VII covers adverse employment actions taken against third party because an employee engaged in protected activity). The issue here, however, is not whether Villa engaged in protected activity, or whether the termination of her employment was materially adverse, or whether Villa's report was covered by Title VII's opposition clause, or whether Title VII covers retaliation against a third party because Villa engaged in protected activity. The issue here relates to the element of causation, *not* to whether there was protected activity or an adverse action. As to the element of causation, Villa has come forward with no evidence of retaliatory animus. Villa's effort to convert the policy in favor of encouraging reports of harassment and discrimination into immunization from adverse action where the employer acts without a retaliatory motive is a thinly disguised effort to vitiate the retaliatory animus requirement of *Nassar* and *Foster*.

Even more misplaced than her reliance on *Burlington Northern, Boyer-Liberto*¸and *Crawford* is Villa's reliance on case law interpreting the anti-retaliation provision of the National Labor Relations Act to support her argument that an employer is liable for retaliation even if it acted pursuant to a good faith mistake of fact. Villa Brief at 21-23. This argument might warrant consideration if the relevant NLRA provision had a but-for causation requirement. It does not.

To the contrary, as the Supreme Court held in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the employer's motive is irrelevant under Section 8(a)(1) of the NLRA.

Title VII's anti-retaliation provision is different precisely because it does have a but-for causation requirement that not only makes the employer's motive relevant, but renders proof of retaliatory animus a *sine qua non* of liability. *See Nassar*, 133 S. Ct. at 2528; *Foster*, 787 F.3d at 249. Indeed, the reliance of Villa (and amicus MWELA) on *Burnup & Sims* and other cases interpreting and applying the NLRA lays bare what is at the core of their argument, which is that proof of retaliatory animus ought not be required in Title VII cases.[19] But, as the Supreme Court and this Court have held, Title VII does require it. And, as the district court properly held, there is no evidence of retaliatory animus in this case.

[19] As a back-up argument, amicus MWELA also asks the Court to create a new rule that employers may only discipline employees who engaged in protected activity if the discipline is for "outrageous conduct." MWELA Brief at 9. MWELA does not point to any support for such a rule, which is nowhere to be found in the text of Title VII or in *Nassar* or *Foster*. *Id.* at 9, 17-18. Furthermore, MWELA does not offer a definition of "outrageous". *Id.* But it is hard to imagine any definition of "outrageous" that would not include fabricating a report of sexual harassment.

ii. Villa's request that this Court place limits on an employer's right to discipline an employee who engaged in protected activity for non-retaliatory reasons will place employers and the courts in untenable positions.

Citing First Amendment jurisprudence that is not relevant here, Villa appears to argue that for an employer to prevail on summary judgment it must prove that its decision to take an adverse employment action against the employee who engaged in protected activity was "reasonable." Villa Brief at 24-26. In Villa's opinion, if the employer cannot prove that its decision was "reasonable" or there is a dispute about the reasonableness of the decision, the case should go to a jury. *Id.*

Rather than focusing on whether the employee presented evidence that retaliatory animus was behind the employer's decision to take an adverse action, the Court's inquiry at summary judgment, according to Villa, should be on whether the employer acted reasonably. *Id.* By advocating for this focus, Villa overlooks the reasoning behind the Supreme Court's decision in *Nassar*, namely that:

> The proper interpretation and implementation of [Title VII's anti-retaliation provision] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency.

133 S. Ct. at 2531. Thus, the Supreme Court recognized that the requirement that a Title VII retaliation plaintiff come forward with proof of but-for causation to

defeat summary judgment, had the salutary effect of preventing an influx of retaliation claims from proceeding to trial that would "siphon resources from efforts by employer, administrative agencies and courts to combat workplace harassment." *Id.* at 2531-32.

Nonetheless, Villa would have this Court abandon its long-standing position that it does not sit as a super-personnel department reviewing any adverse employment action decision that an employee claims was retaliatory in violation of Title VII. *See Walker*, 775 F.3d at 211 ("[w]e have repeatedly observed that it is not a court's province to decide whether an employer's reason for terminating an employee was wise, fair, or even correct, ultimately, so long as it truly was the reason for the employee's termination.") (quoting *DeJarnette*, 133 F.3d at 299) (internal quotations omitted). If Villa's position were to prevail, every decision by an employer to take an adverse employment action against an employee who opposed unlawful discrimination would be subject to Monday morning quarterbacking by the plaintiff, who could always point to something more or different that the employer "could have" or "should have" done differently. Employers who have done their best to promptly and thoroughly investigate reports of discrimination and have reached conclusions based on what they learned would have their every action reviewed by a trier of fact. Even worse, the rationale behind an employer's "personnel decision involving a false statement [would] be

treated as something like a trial for perjury" before the jury. *See Total Sys. Servs.*, 221 F.3d at 1176.

The purpose of Title VII is to "combat workplace harassment." *Nassar*, 133 S. Ct. at 2531-32. An employer cannot do that with the constant fear of prolonged litigation and judicial scrutiny of every decision it makes relating to a report of unlawful conduct. This result "would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." *Id.* The time and resources of the courts, as well of employers and employees, are "combat[ing] workplace harassment." *Id.* Summary judgment is appropriate where, as is the case here, the undisputed material facts establish that Cava did not act with a retaliatory motive when it terminated Villa's employment. For that reason, the district court's granting of summary judgment in Cava's favor should be affirmed.

V. CONCLUSION

For the reasons stated in this brief, and in the district court's Order and reasons from the Bench, Defendant-Appellee CavaMezze Grill, LLC and Defendant-Appellee CavaMezze Grill Mosaic, LLC respectfully ask this Court to affirm the district court's grant of summary judgment in their favor.

Dated: August 8, 2016

Respectfully submitted,
CavaMezze Grill, LLC and
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By their attorneys,

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Dated: August 8, 2016

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of August, 2016, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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