RECORD NO. 15-2543

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

PATRICIA VILLA,

Plaintiff – Appellant,

v.

CAVAMEZZE GRILL, LLC, *et al.*,

Defendants – Appellees.

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

REPLY BRIEF OF APPELLANT PATRICIA VILLA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

I. INTRODUCTION

The key facts in this case, at least when viewed "in the light most favorable to the losing party" in the court below, as this Court must do on a challenge to summary judgment, *Pension Benefit Guaranty Corp. v. Beverley*, 404 F.3d 243, 246 (4th Cir. 2005), are as follows: Plaintiff-Appellant Villa truthfully reported to Rob Gresham, the Director of Operations of Defendant-Appellee Cava, that another Cava employee had told her that a top Cava manager had offered that employee a raise in exchange for sex. After a quick and shoddy investigation Gresham purportedly decided that Villa was a liar who had invented the harassment report and that the senior manager had done nothing wrong. Based on these conclusions, Gresham fired Villa. In fact, however, Villa was telling the truth.

In its Brief Cava does not dispute that Gresham's determination that Villa had lied was mistaken. It insists, however, that even though what Villa said was true, and regardless of the quality of Gresham's investigation and the reasonableness of his conclusions, Villa is not entitled to have a jury decide her claim that she was fired for reporting sexual harassment, a violation of Title VII of the Civil Rights Act of 1964. According to Cava, as a matter of law it did not violate Title VII's anti-retaliation provision because Villa cannot prove that

Gresham did not actually believe that Villa was lying when he fired her, meaning that Cava cannot be shown to have acted in bad faith. In Cava's view, Villa cannot survive summary judgment unless she can identify evidence that would allow a jury to conclude that Cava's asserted reason for firing Villa—the company's mistaken conclusion that she had been dishonest—was merely a pretext to obscure Cava's intentional violation of Title VII.

But Cava is wrong. An employer who dismisses an employee as a result of the employee's report of discrimination violates the law even if it does not subjectively intend to do anything improper. The empty head, pure heart rule advocated by Cava is inconsistent with Title VII's plain language and with this Court's precedent. It would also fly in the face of the Supreme Court's mandate that Title VII be interpreted so as to encourage individuals with information about conduct that violates Title VII to report it to their employers. An employee who knows that a manager has violated Title VII would think long and hard before disclosing that information if she knew that, even though her report was true, her employer was free to fire her if a company investigator—who would often be another manager—subjectively believed that she was lying, regardless of the reasonableness of the investigator's conclusion. To the extent that *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000), is to the contrary, it is wrongly decided.

II. THIS CASE IS NOT ABOUT CAUSATION

Essentially ignoring Villa's and Amici's arguments to the contrary, Cava continues to insist that Appellant's claim was properly dismissed because Villa's report of harassment was not the "but-for" cause of her firing. According to Cava, this is so because Villa was terminated because Cava concluded that her report of harassment was false, not for reporting harassment. Although Cava is correct that under *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), Villa must prove that "but-for" her report she would not have been fired, it fundamentally misunderstands the nature of "but-for" causation. Cava simply refuses to recognize that one "but-for" clause does not preclude another—there are always multiple causes of any particular event. The test for whether but-for causation exists is simple: one event is the but-for cause of a later event if "the latter would not have occurred 'but for' the former." *Paroline v. United States*, 134 S. Ct. 1710, 1722 (2014); *see also* Restatement (Third) of Torts § 26 cmt. b (an outcome is the "but-for" consequence of an event "if, in the absence of the act, the outcome would not have occurred."); *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 236 n.5 (4th Cir. 2016) (to satisfy "but-for" requirement plaintiff in employment discrimination need only show that discrimination was a cause of adverse action, not "'only or sole cause'"); *Arthur v. Pet Dairy*, 593 F. App'x 211, 220 (4th Cir. 2015) (in age discrimination case "an event ... need not

be the sole cause of the adverse employment action" to constitute a "but-for cause").

The Restatement (Third) of Torts' discussion of but-for causation is highly relevant:

> An actor's tortious conduct need only be a factual cause of the other's harm. ***The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur.*** Those other causes may be innocent or tortious, known or unknown, influenced by the tortious conduct or independent of it, but so long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause. Recognition of multiple causes does not require modifying or abandoning the but-for standard …. ***[T]here will always be multiple (some say, infinite) factual causes of a harm***….[1]

§ 26 cmt. c (paragraphs combined, emphasis added); *see also Nassar*, 133 S. Ct. at 2525 (relying on Restatement (Third) of Torts in determining causation standard in Title VII retaliation case).

Here but-for causation is clearly present because Villa would not have been fired if she had not reported the harassment.[2]

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[1] The Restatement uses the term "factual causation" for what is "familiarly referred to as the 'but-for' test." § 26 cmt (b).

[2] Cava asserts that Villa's work performance was "below expectations." Appellee Br. at 3. Not only is this not an undisputed fact—Villa's promotion to a supervisory position and her pay raise shortly before she was fired, JA 26, 257, indicate above average performance—but it is irrelevant to Cava's causation argument. Cava does not and could not argue that Villa would have been

III. CAVA'S INTENT IS NOT DETERMINATIVE

Although awkwardly presented as an argument about causation, Cava's central theme appears to be that it cannot be liable because it did not act with an improper motive. As Villa acknowledged in her opening brief, this view is supported by the Eleventh Circuit decision in *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000), and by language in some Eighth Circuit opinions.[3] But, as Appellee explained in her opening Brief, *Total System* is inconsistent with both precedent and the plain language of Title VII.

In support of its view that Cava's subjective intent is determinative, Cava repeatedly emphasizes Villa's supposed failure to prove what it sees as a pre-requisite for retaliatory liability: "retaliatory animus" by Cava against Villa. Cava does not cite to any authority defining "retaliatory animus," but its apparent view is that it is equivalent to an employer's specific intent to unlawfully retaliate.

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dismissed for performance reasons if she had not reported harassment. *See* JA 70 (Deposition of Rob Gresham: "Q Were [Villa's managers] going to dismiss her [for poor performance]? A No. Q Was she close to being dismissed? A No.")

[3] It is unclear whether, in the Eight Circuit, an employer who acts based on a factual mistake, without retaliatory, intent is liable on a Title VII retaliation claim. *Compare Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005) ((employer liable where employer acted in apparent good faith but evidence of work misconduct was ambiguous), *with McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855, 858-59 (8th Cir. 2008) (no liability under *McDonnell Douglas* framework because extensive investigation supported employer assertion that dismissal was for misconduct).

It is true that in adjudicating retaliation cases courts sometimes refer to "retaliatory animus," with little or no discussion of that term's meaning. In run of the mill retaliation disputes the phrase makes sense because normally in such cases the dipositive issue is whether there is a causal link between an adverse employment action taken against the plaintiff and the plaintiff's protected activity. For example, the parties may dispute whether the plaintiff was fired for reporting discrimination or for some other reason, such as poor job performance, unconnected to the protected activity. In such situations the question is whether the reasons for dismissal given by the employer are a true but-for cause of the employee's dismissal or a pretext to hide illegal retaliation. Since the employer's intent is the issue, it makes sense to say that it is necessary to determine whether or not "retaliatory animus" was the employer's real motivation.[4]

[4] Many of the cases relied on by Cava in its discussion of retaliatory animus, *see e.g.*, Appellee Br. 14, illustrate this typical fact pattern. In such cases, in contrast to the case at bar, the issue is whether the proffered reason for disciplining an employee is merely a pretext for intentional retaliation. *See, e.g.*, *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 246-47 (4th Cir. 2015) (dispute as to whether employee fired as retaliation for complaint or for unrelated misconduct); *Ripberger v. Corizon, Inc.*, 773 F.3d 871, 881 (7th Cir. 2014); (dispute as to whether defendants' refusal to hire plaintiff was retaliation for the plaintiff's support of another employee's discrimination complaint or because of an unrelated reduction in force); *Bennett v. Windstream Comm'cns, Inc.*, 792 F.3d 1261, 1264-69 (10th Cir. 2015) (dispute as to whether employee was fired for opposing discrimination or for unrelated "time and attendance issues"); *Shirrell v. St. Francis Med. Ctr.*, 793 F.3d 881, 883-86 (8th Cir. 2015) (dispute as to whether plaintiff was fired because of "her religion and her complaints about discriminatory

But in atypical retaliation cases, such as this one, where pretext is not an issue and the link between protected activity and adverse action is self-evident, the employer's intent is irrelevant. As pointed out in the briefs of both Villa and Amicus Metropolitan Washington Employment Lawyers Association ("MWELA"), the relevance of an employer's intent in such cases was addressed in *Forman v. Small*, 271 F.3d 285 (D.C. Cir. 2001). That decision rejected the defendant's argument that its conduct was not actionable because it had not acted with animus or any intent to violate the law when it deferred consideration of an employee's promotion because the employee's discrimination complaint was pending. *Id.* at 299. The court explained that "motive, in the sense of malice is not required for liability." *Id.* Cava does not say why *Forman* should be disregarded, or even mention the case.[5]

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conduct" or for unexcused absences and other unrelated performance issues); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1229-31 (10th Cir. 2000) (dispute as to whether plaintiff was dismissed because of his race or for "verbally abus[ing] and ha[ving] physical contact with a supervisor"); *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 295 (4th Cir. 1998) (dispute as to whether plaintiff dismissed for poor performance or for pregnancy); *Estate of Bassatt v. Sch. Dist. No. 1*, 775 F.3d 1233, 1235-36 (10th Cir. 2014) (dispute as to whether plaintiff was fired because of his race or for "masturbating in the parking lot of [a school]."

[5] Cava does quote an unpublished district court case, *Rowe v. Goldsboro Wayne Transp. Auth.*, No. 5:13-CV-754, 2015 U.S. Dist. Lexis 75839, at *31 (E.D.N.C. June 11, 2015) which asserts that "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."). Appellee Br. at 16 (alterations by Appellee). *Rowe* cites to *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000). But this is not what

Cava also ignores Villa's argument that an intent requirement is inconsistent with the plain language of the statute, which prohibits actions against an employee "because" the employee "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The factual issue of whether an employee actually opposed a particular practice is unaffected by the employer's subjective interpretation of the employee's conduct.[6]

Furthermore, as Villa and Amicus MWELA point out, when faced with retaliation claims under the National Labor Relations Act (NLRA) the Supreme Court and this Court have held that an employer is liable for an adverse action against an employee for engaging in NLRA-protected conduct even if the employer honestly believes, because of a good faith mistake of fact, that the employee's conduct was not protected. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *NLRB v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir. 1953); Appellant's Br. at 21-23; MWELA Amicus Br. at 14-15. Cava does not challenge the logic of these cases, and does not dispute that courts have often looked to

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Hawkins says. In that discrimination (not retaliation) case this Court merely held that, because the evidence indicated that the plaintiff was fired because a supervisor thought her a poor performer, and that race was not a factor, it would not delve into the factual issue of whether the plaintiff was actually a poor performer. *Id.* at 279-81.

[6] Although 42 U.S.C. § 2000e-3(a) is referred to as Title VII's "anti-retaliation" provision as a matter of legal shorthand, it is unnecessary to parse whether "retaliation" implies a particular state of mind as Congress did not use that term in this section.

NLRA cases to interpret Title VII. Nevertheless, it insists that these decisions are inapposite because, according to Cava, the NLRA does not have "a but-for causation requirement." Appellee Br. at 28. But even if that is true, it does not matter. Regardless of the applicable causation standard, the reasoning in these cases is sound and should be applied here: when both parties act in good faith it is the employer who makes a factual mistake which results in an adverse action against an employee for engaging in protected conduct, and not the employee, who should bear the consequences of that mistake.

IV. VILLA'S INTERPRETATION OF TITLE VII WOULD NOT IMPROPERLY BURDEN EMPLOYERS

Cava also does not take issue with Villa's view that this Court and the Supreme Court have mandated that Title VII be interpreted in a way that encourages reporting. It could hardly do otherwise given the clear pronouncements of these courts. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) ("[E]arly reporting" of discrimination by employees is "vital to achieving" Title VII's objectives); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 283 (4th Cir. 2015) (*en banc*) ("early reporting [is] vital to achieving Title VII's goal of avoiding harm").

Citing to these and other cases, Villa argued in her opening Brief that Cava's interpretation of Title VII, which would allow an employer to fire an employee

who reports discrimination if the employer thinks the employee is lying, was improper because it would discourage the reporting of Title VII violations. An employee who knows that a manager has violated Title VII would hesitate before disclosing that information if she knew that her employer was free to fire her if an internal investigation, which might well be conducted by another manager, subjectively but unreasonably determined that her report was false. This case illustrates the point—if another low level Cava supervisor learns that one of her subordinates has been harassed by a senior manager how likely would they be to report that information?

Cava seems to agree with Villa on the practical impact of its interpretation of Title VII retaliation law. It emphasizes that the adoption of its view would mean that employers would be less likely to be found to be liable. *See, e.g.,* Appellee Br. at 31 (Cava's interpretation of Title VII would mean fewer "retaliation claims … proceeding to trial."). But, while rules that target frivolous cases for early dismissal may make sense, Cava's interpretation would close the door to meritorious claims. Under Cava's reasoning an employee such as Villa who is wrongly disciplined for making the type of report that Title VII seeks to encourage has no remedy against an employer which honestly but mistakenly determines that a Title VII violation never occurred. Moreover, this is so, according to Cava, regardless of the reasonableness of the employer's belief.

Cava's suggestion that a ruling in Villa's favor would "immunize" employees who make false claims of retaliation, Appellee Br. at 9, is wrong. Villa does not argue that an employee who makes a malicious and intentional false report cannot be dismissed. But, in Villa's view, there must be a reasonable basis for the employer's determination that the report was false.

Such a reasonableness requirement can best be enforced by allowing an employee disciplined for filing a false report to establish retaliation by showing that she reported truthfully and in good faith. Under such a rule an employer who acts on the basis of strong evidence of employee misconduct after a thorough and objectively reasonable investigation would face little prospect of liability, especially since the employee, as the plaintiff, would have the burden of proof in any case she might bring against her employer. Moreover, in those rare cases were an employer acts mistakenly, but in good faith, it is entirely appropriate that the consequences of that mistake be shifted to the employer who made it rather than to the employee who did nothing wrong. *Industrial Cotton Mills*, 208 F.2d at 91.

Alternatively, employers' reasonable interests could be protected by a rule that exempts from liability an employer who, unlike Cava in this case, acts only after conducting a reasonable investigation. Under such a rule an employer who reaches a mistaken conclusion about the veracity of an employee's report after conducting an investigation that is objectively reasonable under the circumstances

would be fully protected. Moreover, in many such cases an employer could obtain summary judgment by showing that there is no material factual dispute about the reasonableness of the investigation.[7]

Admittedly the rule Cava seeks—essentially that employers are free to fire an employee who report discrimination if the employer's officers are willing to testify that they did not fire her for the report, but because they believed her to be lying—would reduce the burden faced by employers. But any enforcement of Title VII necessarily imposes some burdens. These must be weighed against Congress' determination in enacting Title VII that combatting workplace discrimination, and encouraging the reporting of such discrimination, is of fundamental importance to this nation and that those who discriminate or who suppress reports of discrimination should be held accountable.

Moreover, as a practical matter adopting Cava's view would *de facto* give employers the immunity that Cava wrongly claims Villa is seeking for retaliation plaintiffs. Any employer who dismisses an employee for reporting discrimination could escape liability by asserting that its action was not in response to the

[7] Reasonableness is, of course, a concept applied throughout the law, including in Title VII cases. *See, e.g. Crawford v. Metro. Govt. of Nashville & Davidson County*, 555 U.S. 271, 278 (2009) (under *Ellerth-Faragher* affirmative defense employer may avoid liability for a hostile work environment in certain circumstances, provided that it can show that "it exercised reasonable care to prevent and correct promptly any discriminatory conduct" by its employees) (quotations omitted).

employee's report, but to the employer's subjective belief that the employee was being untruthful. Such a justification, dependent on a defendant's state of mind, will usually be impossible to disprove.

V. A JURY COULD FIND THAT CAVA'S INVESTIGATION WAS UNREASONABLE

Even if this Court does not adopt Villa's view that an employer is necessarily liable to an employee who can prove that she was fired for a report of discrimination that was true and made in good faith, at a minimum it should hold that, in such a situation, the employer is only protected if its actions are based on a reasonable investigation. Although Cava's principle argument seems to be that the reasonableness of its investigation is irrelevant if it subjectively believed that Villa was a liar, it also suggests that there was nothing hurried or inappropriate about Gresham's investigation. But Cava is unconvincing. A jury could readily conclude that its investigation was not reasonable.

As an initial matter, in an apparent effort to support its argument, Cava ignores one critical fact and misstates another. Cava's discussion of the factual background contains a startling omission—although it emphasizes its supposed good faith in investigating Villa's report, it never acknowledges that it is now undisputed that the investigation's conclusion was wrong—Villa was telling the

truth. At a minimum, the fact that Gresham reached the wrong conclusion suggests that his investigation was flawed.

Cava also repeatedly asserts as a fact that Villa had reported that "two former employees, [Judy] Bonilla and [Jessica] Arias, had been harassed by their supervisor." Appellee Br. at 1. Cava relies on this supposed fact to support the reasonableness of its internal investigation: "[s]ince Arias and Bonilla, the … alleged victims of Butron's sexual harassment, denied the allegations … and denied that they had ever made the allegations to Villa, Gresham reasonably concluded that Villa made up the allegations." *Id.* at 6. The implication is clear—since it was not only Bonilla who contradicted Villa, but also a second individual, Arias, Gresham's conclusion that Villa was untruthful makes perfect sense. But this is factually wrong—Villa told Gresham not that she had personal knowledge that Arias had been sexually harassed, but that she "suspected" that this ***might*** have been the reason that she left Cava. JA 262. Indeed, Defendants themselves acknowledge that their repeated factual assertions on this issue are wrong, explaining that, during her conversation with Gresham, Villa was "just speculating" as to the possible reason for Arias' departure from the company, not reporting any personal knowledge. Appellee Br. At 4. Cava says that Gresham "understood" Villa to say something that she did not actually say because Villa supposedly "never informed Gresham that she was speculating" about Arias. App.

Br. at 4. But Villas' testimony is that this is exactly what she told Gresham. JA 262. Gresham's confusion is not surprising given the language barrier that hindered his communication with Villa and his decision not to interview her after their initial phone conversation.[8]

The fact that even now, some three years after Villa's complaint, and after extensive litigation of her retaliation claim, Cava is still unable to get right what it was that Villa actually reported strongly supports Villa's view that a reasonable jury could find that Cava's initial investigation was inadequate.

[8] Cava's incorrect assertion that Villa reported that she had personal knowledge that two employees had claimed to have been harassed by Butron is reiterated throughout its Brief. *See* Appellee Br. at 1-2 ("***two*** former employees complained to [Villa] that they had been sexually propositioned by Butron"); *id.* at 1 ("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."); *id.* at 6 ("Bonilla ***and Arias*** … both had denied that Butron had offered them a raise in exchange for sex."); *id.* at 7 ("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."); *id.* at 10 (Villa "was terminated for making up her allegations that ***two*** other employees had been harassed by a supervisor"); *id.* (conclusion that Villa was lying justified because "the ***two*** employees denied both that they had been harassed by the supervisor and that they had ever told Villa that they had been"); *id.* at 11 (Cava interviewed "the ***two*** alleged victims"); *id.* at 15 ("Villa reported to Cava that ***two*** former employees were allegedly sexually harassed"); *id.* at 21 (Cava interviewed "the ***two*** alleged victims"); *id.* at 22 (referring to "the ***two*** alleged victims"); *id.* at 23 ("the alleged ***victims*** denied being sexually harassed and denied telling Villa that they had been sexually harassed"); *id.* at 27 ("***both*** alleged victims denied being sexually harassed and … denied ever telling Villa that they had been sexually harassed") (all emphases added).

Cava complains that no weight should be given to Villa's "opinion" that Gresham's investigation was flawed, even though it is supported by ample facts including among other things, the absence of an anti-discrimination policy, Gresham's failure to interview complainant Villa or alleged harasser Butron, Gresham's lack of training in how to conduct a harassment investigation and the fact that Gresham was investigating one of his own senior subordinates. Appellee Br. at 21-22. But, assuming that the reasonableness of Cava's investigation is at issue, it is the jury's opinion that matters and each of these facts, and others citied in Villa's opening Brief, could support an inference by a reasonable jury that Cava's investigation was not reasonable. Similarly flawed is Cava's complaint that Villa has presented no affirmative evidence that the involvement of Area Manger Sergio Valdivia in the investigation—he participated in the interview of Bonilla and spoke to her on the phone about the situation prior to the interview—made Bonilla less willing to be forthcoming. *Id.* at 19. A jury could readily conclude that Cava's decision to involve Valdivia, who Bonilla testified she knew was a close personal friend of Butron, supports an inference that Cava's investigation was not reasonable.[9]

[9] Cava does not dispute that its investigation failed to comply with Equal Employment Opportunity Commission ("EEOC") guidance on conducting a fair and reasonable internal investigation. Appellee Br. at 22 n.16; EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by

Cava also misunderstands the significance of Gresham's determination, immediately upon hearing Villa's report, that either Butron would be fired for harassment or Villa would likely be fired for lying about it. Gresham's testimony indicates that he never gave serious consideration to the very real possibility of what Bonilla now claims actually happened—she told Villa that she had been harassed, meaning that Villa made a truthful report, but that Bonilla's statement to Villa was itself false. Cava's apparent failure to even consider this possibility is additional evidence that could support a jury finding that its investigation was not reasonable.

Supervisors at 11, 15 (available at https://www.eeoc.gov/policy/docs/harassment.pdf). Instead it asserts that these guidelines are not binding, pointing to the Supreme Court's determination in *Nassar* that separate EEOC guidance on another issue should not be afforded the deference to which an agency's interpretation is normally entitled because, for reasons the *Nassar* Court set out in detail, the guidance at issue in that case "lack the persuasive force that is a necessary precondition to deference under *Skidmore*." *Nassar*, 133 S. Ct. at 2533-34 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). But, although it complains that the EEOC guidelines at issue in this case should have cited more authorities, Cava does not explain why they are unpersuasive or contrary to precedent. Appellee Br. at 22 n.16. In fact, the guidelines are both persuasive and consistent with precedent and are consequently entitled to *Skidmore* deference. At a minimum they are persuasive authority.

CONCLUSION

For the foregoing reasons, and for the reasons set out in Villa's initial Brief, this Court should reverse the district court's grant of summary judgment and remand this case for trial.

Dated: August 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4608 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

/s/Matthew B. Kaplan
Matthew B. Kaplan

Date: August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system, including counsel for Appellees:

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