No. 15-2543

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA VILLA,

Plaintiff-Appellant

v.

CAVAMEZZE GRILL, LLC, et al.,

Defendants-Appellees

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

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT PATRICIA VILLA AND REVERSAL

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STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission ("EEOC" or "Commission") is charged by Congress with administering, interpreting, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. This appeal raises issues pertaining to the scope of Title VII's anti-retaliation provision. Because these issues are important to the effective enforcement of Title VII, the Commission respectfully offers its views to the Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE[1]

Whether Patricia Villa's Title VII retaliation claim should go to a jury, given disputed issues of fact as to the evidence on which Villa's former employer relied in determining that Villa fabricated allegations of sexual harassment and the adequacy of the employer's investigation.

STATEMENT OF THE CASE

I. Statement of Facts

Patricia Villa began working at Cavamezze Grill, LLC ("Cava") as a cashier around March 2012, and she was later promoted to a supervisory position at Cava's Merrifield, Virginia, location. JA 199-200, 342-46; DE 55-2 at 7-8; DE 55-

[1] The Commission takes no position on any other issues in this appeal.

7 at 4-8. On October 28, 2013, Villa telephoned Cava's Director of Operations, Rob Gresham, and reported an alleged incident of sexual harassment involving Judy Bonilla, an employee whom Villa sometimes supervised. JA 230, 262, 300-01, 347, 359; DE 55-2 at 38; DE 55-4 at 3; DE 55-5 at 37-38; DE 55-7 at 9, 21. Villa reported to Gresham that Bonilla had told her that Marcelo Butron, General Manager of Cava's Merrifield location, had offered Bonilla a raise in exchange for sex. JA 201, 206, 346-47; DE 55-2 at 9; DE 55-4 at 3; DE 55-7 at 8-9. Villa explained that Bonilla made this statement at Villa's house, and that another Cava employee, Osmar Marinero, was also present at the time. JA 357; DE 55-7 at 19. According to Villa, she reported Bonilla's allegation to Gresham because she believed that the alleged conduct was "improper and probably illegal." JA 206; DE 55-4 at 3.

During this telephone call, Villa also told Gresham that she suspected that a similar incident led another employee, Jessica Arias, to resign. JA 206, 360-61; DE 55-4 at 3; DE 55-7 at 22-23. The parties dispute exactly what Villa told Gresham about Arias's resignation. Villa stated that she did not claim any personal knowledge surrounding the circumstances of Arias's resignation and that she did not tell Gresham that Arias had reported sexual harassment. JA 206; DE 55-4 at 3. Gresham, however, stated that Villa claimed that Arias explicitly told her that

Butron had offered Arias a raise in exchange for sex. JA 201-02; DE 55-2 at 9-10. Villa speaks limited English, while Gresham does not speak Spanish, and Villa testified that she "sometimes had difficulty communicating with Gresham" as a result of this language barrier. JA 206; DE 55-4 at 3.

According to Gresham, he told Villa, "I'll investigate, [and] if it's true, [Butron] will be terminated, but if this isn't true and you are making it up ... there's a good chance somebody is going to lose their job[.]" JA 202; DE 55-2 at 10. Gresham did not take any notes of this conversation and had no further discussions with Villa about the allegations. JA 202, 206; DE 55-2 at 10; DE 55-4 at 3.

Gresham initiated an investigation into the sexual harassment allegations. JA 211; DE 55-2 at 19. Because Gresham does not speak Spanish and Bonilla, the alleged victim, speaks limited English, Gresham directed Regional Manager Sergio Valdivia to contact Bonilla, who no longer worked at Cava. JA 86, 205-07, 282; DE 38-2 at 30; DE 55-2 at 13-15; DE 55-5 at 19. At the time, Valdivia supervised Butron, the alleged harasser. JA 86; DE 38-2 at 30. Valdivia and Butron were also close friends and had known each other since high school. JA 332-33; DE 55-6 at 27-28.

Valdivia spoke to Bonilla over the telephone and arranged a meeting with her. JA 206-07, 283; DE 55-2 at 14-15; DE 55-5 at 20. Gresham stated that

Valdivia told him that he, Valdivia, asked Bonilla about the sexual harassment allegations during this telephone conversation. JA 87; DE 38-2 at 31. Gresham, Valdivia, and Bonilla subsequently met in person and Gresham interviewed Bonilla, with Valdivia acting as interpreter. JA 207-08, 281-82; DE 55-2 at 15-16; DE 55-5 at 18-19. Gresham testified that Bonilla denied that Butron had sexually harassed her and denied that she told Villa that Butron had harassed her. JA 87, 208; DE 38-2 at 31; DE 55-2 at 16. Neither Gresham nor Valdivia took any notes during the in-person meeting with Bonilla, and Gresham never wrote an account of the in-person meeting. JA 209, 297; DE 55-2 at 17; DE 55-5 at 34.

However, Bonilla acknowledged at her deposition that she told Villa that Butron had requested sex in exchange for a raise. JA 273-81; DE 55-5 at 10-18. Bonilla further testified that her report to Villa had been false—Butron had never offered her a raise in exchange for sex—and that she had lied to Villa because of a serious alcohol problem. JA 277-80; DE 55-5 at 14-17.

Gresham also testified that he spoke to Arias over the phone, and that Arias denied that Butron had harassed her. JA 209-10; DE 55-2 at 17-18. Finally, Gresham spoke to Marinero, the other employee whom Villa stated had been present during Bonilla's statement to Villa. JA 211-12; DE 55-2 at 19-20. Gresham testified that he asked Marinero if he knew why Bonilla or Arias had resigned, and

that Marinero responded that he believed Bonilla left for financial reasons and Arias because of family issues. JA 211; DE 55-2 at 19. Gresham then asked Marinero if he had any knowledge about Bonilla or Arias resigning because of sexual harassment by Butron, and Marinero responded that he did not. *Id.*

According to Gresham, he determined that Villa's report was false based on his conversations with Bonilla, Arias, and Marinero. JA 212; DE 55-2 at 20. Based on Gresham's conclusion, Cava fired Villa on November 5, 2013, eight days after her report to Gresham. JA 212, 217, 345; DE 55-2 at 20, 25; DE 55-7 at 7. During the investigation, Gresham did not ask Butron, the alleged harasser, about the allegations. JA 213, 329-30; DE 55-2 at 21; DE 55-6 at 24-25. At the time of Villa's report and termination, Cava lacked a formal written sexual harassment policy, and lacked guidelines for conducting a harassment investigation. JA 219-22, 231; DE 55-2 at 27-30, 39. Cava did not have a human resources department or an in-house attorney, and Gresham did not consult with a human resources specialist or an attorney regarding his investigation. JA 215; DE 55-2 at 23. Gresham had never received training in investigating sexual harassment allegations, and he made no written notes or records during his investigation. JA 212, 214; DE 55-2 at 20, 22.

II. District Court Decision

In an oral ruling, the district court granted summary judgment to Cava on Villa's Title VII retaliation claim. The district court stated that Villa established the first two prongs of a retaliation claim: (1) protected activity (her report to Gresham) and (2) materially adverse action (her termination). JA 401; DE 64 at 17. As to the first prong, the district court explained that there is "no doubt that reporting allegations is protected activity." *Id.* However, the district court determined that Villa could not establish but-for causation, the third prong of a retaliation claim. JA 402-03; DE 64 at 18-19; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (articulating but-for causation standard for retaliation claims).

Villa asserted a strong causal link between her protected activity and her termination, arguing that Cava would not have conducted the investigation but for her report of harassment. JA 403; DE 64 at 19. And the district court acknowledged that "it's clear, and indeed undisputed, that plaintiff would not have been fired but for the investigation." JA 404; DE 64 at 20. But the district court nevertheless concluded that "the but-for cause of [Villa's] termination was the defendant's genuine conclusion, although later shown to be erroneous, long after the event, that she made a knowingly false harassment allegation." *Id.* The district

court stated that Villa "points to no evidence that [she] would have been fired but for retaliatory animus." *Id.*; *see also id.* ("[T]he plaintiff has conceded that her termination would have occurred regardless of the presence or absence of retaliatory animus."). Instead, in the district court's view, there was evidence that Cava lacked retaliatory animus: Gresham's statement that he would fire Butron if the allegations were true, or "somebody" else if they were not true. *Id.*

The district court asserted that its ruling would not discourage employees from making reports; instead it would "encourage defendants to engage in a reasonable investigation." JA 407; DE 64 at 23. And the district court concluded that "false accusations would be immunized" if it denied summary judgment. *Id.*

The district court also rejected Villa's argument that flaws in Cava's investigation precluded summary judgment, stating that evidence of shortcomings "doesn't play a role here." JA 405; DE 64 at 21. According to the district court, "There might be cases where the adequacy of an investigation might raise a triable issue of fact[,] [but] [t]his one, in my opinion, does not." JA 406; DE 64 at 22. The district court continued, "[T]hat doesn't mean that it was a great investigation because we now know that it didn't quite get to the truth." *Id.*

Despite acknowledging evidence of deficiencies in Cava's investigation, the district court stated that it would defer to Cava's determination that Villa fabricated

the report. JA 407-08; DE 64 at 23-24. In taking this approach, the district court explained that it agreed with the Eleventh Circuit's reasoning in *EEOC v. Total System Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000). JA 407; DE 64 at 23. *Total System* held that "when the circumstances give the employer good reason to believe that" an employee made "a knowingly false statement" in reporting unlawful activity, "the law will not protect the employee's job." 221 F.3d at 1176. Also, the district court cited with approval *McCullough v. University of Arkansas for Medical Sciences*, 559 F.3d 855, 863 (8th Cir. 2009). According to the district court, *McCullough* "noted that the appropriate scope of investigation is a business judgment, and shortcomings in an investigation do not, by themselves, support an inference of discrimination." JA 408; DE 64 at 24. The district court also observed, without identifying a specific decision, that this Court has commented that "courts don't sit as kinds of super personnel department[s]." *Id.*

Finally, the district court dismissed Villa's argument that granting summary judgment here would conflict with this Court's recent decision in *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc). The district court concluded that *Boyer-Liberto* was irrelevant because it pertained only to protected activity, not causation. JA 405; DE 64 at 21. According to the district court,

"*Boyer-Liberto* says nothing about [a situation where] [an employee] made [a report of unlawful activity] up." *Id.*

ARGUMENT

I. Standard of Review

This Court reviews a grant of summary judgment de novo, applying the same legal standards as the district court. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011). "Summary judgment is appropriate only if taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, no material facts are disputed and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). "While summary judgment is appropriate in cases where the facts are clearly insufficient to satisfy the standard, when there is a close question and reasonable minds could differ when weighing all the facts against the law, then summary judgment is inappropriate." *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 208 (4th Cir. 2014) (citation omitted).

II. The district court's deference to Cava's alleged conclusion that Villa fabricated harassment allegations is in tension with the Supreme Court's and this Court's precedents.

In granting summary judgment to Cava, the district court concluded that "the but-for cause of [Villa's] termination was the defendant's genuine conclusion ...

that she made a knowingly false harassment allegation."[2] JA 404; DE 64 at 20. To reach this holding, the district court deferred to Cava's allegedly "genuine" determination. *Id.* In doing so, the district court relied on the Eleventh Circuit's decision in *Total System*. The district court did not specify whether Villa's report constituted protected activity under the anti-retaliation provision's opposition clause, participation clause, or both. *See* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation because an employee or applicant "opposed any ... unlawful employment practice" or "made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing"). However, the district court's reliance on *Total System* indicates that the court likely viewed Villa's report as protected activity under the opposition clause, not the participation clause. JA 407;

[2] To the extent that the district court's opinion, which referred to "*the* but-for cause of [Villa's] termination," JA 404; DE 64 at 20 (emphasis added), could be read to apply a sole causation standard, that would be an incorrect interpretation of *Nassar*. *Nassar* directs that employees must show that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." 133 S. Ct. at 2533. Although this Court has not yet addressed whether *Nassar* requires sole causation, it has made clear in other contexts that but-for causation does not mean sole causation. *See Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235-36 & n.5 (4th Cir. 2016) (holding that the Americans with Disabilities Act incorporates a but-for causation standard for discrimination claims, and explaining that, under that standard, employees need not show that disability was the sole cause of a challenged action); *Arthur v. Pet Dairy*, 593 F. App'x 211, 220 (4th Cir. 2015) (explaining that, under the Age Discrimination in Employment Act's but-for causation standard, "an event ... need not be the sole cause of the adverse employment action" to constitute a "but-for cause").

DE 64 at 23; *see also Total Sys.*, 221 F.3d at 1175 (stating that, although Title VII may protect an employee who made false statements in the context of protected activity under the participation clause, "false statements made under the opposition clause" do not warrant protection).

This Court should not adopt the district court's reflexive deference approach or follow *Total System*. The district court's and *Total System*'s reasoning conflicts with Supreme Court decisions outlining the scope of Title VII's anti-retaliation provision, particularly *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006); *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011); and *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009). Moreover, *Total System* and the district court's approach are also in tension with two recent decisions of this Court, *Boyer-Liberto* and *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015).

A. The Supreme Court's decisions in *Burlington Northern*, *Thompson*, and *Crawford* cast doubt on the district court's standard of deference to the employer's asserted business judgment.

This Court should reject the district court's approach of reflexive deference to the employer's determination that an employee fabricated unlawful activity, and should also reject the Eleventh Circuit's reasoning in *Total System*, on which the district court relied. JA 407; DE 64 at 23. The district court's (and *Total System*'s)

approach prevents juries from resolving retaliation claims even where there is good reason to put the question to a jury. And *Total System*'s reasoning conflicts with Supreme Court decisions rendered after the Eleventh Circuit's ruling.

In *Total System*, the Commission asserted that an employer violated Title VII when it terminated an employee who opposed sexual harassment during an internal investigation. 221 F.3d at 1173, 1176. The employer claimed that it terminated the employee because it concluded that she lied about harassment allegations. *Id.* at 1173. The Eleventh Circuit rejected the EEOC's argument that summary judgment was inappropriate because there was a disputed issue of material fact as to the employee's truthfulness. *Id.* at 1175. Instead, the court stated that, for protected activity under Title VII's opposition clause, courts must defer to employers' business judgment: "[W]hether to fire an employee for lying to the employer in the course of the business's conduct of an important internal investigation is basically a business decision; this decision, as with most business decisions, is not for the courts to second-guess as a kind of super-personnel department." *Id.* at 1176.

But *Total System*, decided in 2000, relied on three rationales that the Supreme Court has subsequently rejected. First, *Total System* stated that the decision to fire an employee for lying to the employer is a business decision

beyond the scope of the court's review. *Id. Total System* was unclear on precisely why the employer should always prevail where the parties dispute the employer's conclusion that an employee lied. The Eleventh Circuit indicated both that the employee had not engaged in protected activity, *id.* at 1175-76, and that the Commission did not establish causation. *Id.* at 1176-77. The overarching rationale, though, was the court's concern about an employer's ability to make adverse personnel decisions without burdening the employer with the need to conduct "something like a trial for perjury." *Id.* at 1176.

But the Supreme Court's decisions in *Burlington Northern* and *Thompson* undercut *Total System*'s rationale that deference to an employer's internal decisions is always appropriate. *Burlington Northern* held that Title VII's anti-retaliation provision prohibits employer actions that "might [] dissuade[] a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (citation omitted). *Thompson* reaffirmed that standard, and interpreted *Burlington Northern* to include protections in some circumstances where an employer takes materially adverse action against an employee who did not himself engage in protected activity. 562 U.S. at 174. Therefore, instead of deferring to Cava's alleged determination that Villa falsified the report, the district court should have assessed whether Villa's termination "might have dissuaded a reasonable

worker" from reporting harassment. In general, terminating an employee because she made what she believed to be a truthful report of harassment might deter workers from reporting unlawful activity. Similarly, firing a supervisor who relayed an employee's harassment allegations might dissuade supervisors from reporting allegations up the chain of command, and therefore might also discourage employees from reporting harassment to supervisors.

Second, *Total System* suggested that the Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), are not relevant in construing Title VII's anti-retaliation provision.[3] 221 F.3d at 1174 n.3 (discussing participation clause of anti-retaliation provision). Instead, the Eleventh Circuit indicated that *Faragher* and *Ellerth* were limited to outlining the scope of employers' vicarious liability for supervisors' acts. *Id.* However, the Supreme Court's subsequent decision in *Crawford* looked to *Faragher* and *Ellerth* in interpreting the opposition clause to protect employees who answer an employer's questions during an internal investigation. 555 U.S. at 273, 276, 278-79. *Crawford* rejected a narrower reading

[3] *Faragher* and *Ellerth* held that, where an employee alleges supervisor harassment that did not result in a tangible employment action, the employer may establish an affirmative defense by showing that (1) the employer exercised reasonable care to prevent and promptly correct any harassment and (2) the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

of the anti-retaliation provision in part because it would undermine the reporting regime announced in *Faragher* and *Ellerth*. *Id.* at 279.

Similarly, *Total System*'s deference to employers—at the expense of a truthful employee reporting discrimination—also undermines the *Faragher/ Ellerth* reporting regime. Under *Faragher* and *Ellerth*, employers may avoid liability where an employee fails to follow the employer's corrective policies. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. As explained *supra* at 13-14, if courts reflexively defer to an employer's determination that an employee has fabricated unlawful activity, that will deter employees from reporting discrimination and harassment. That is, if "an employee who reported discrimination ... could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." *Crawford*, 555 U.S. at 179. But employees who do not take advantage of reporting channels will face challenges in holding employers accountable. *Faragher*, 524 U.S. at 807 (employer may assert affirmative defense where employee unreasonably failed to take advantage of corrective measures); *Ellerth*, 524 U.S. at 765 (same). Therefore, excusing employers from liability based on a business judgment that an employee made a false report—even where there is evidence that the employer's determination was flawed—will hinder the

operation of the *Faragher*/*Ellerth* reporting regime. Allowing the jury to decide such disputed questions is a more balanced approach that will encourage reporting by employees.

Third, the concurrence to the denial of rehearing en banc in *Total System* asserted that the narrow construction of the anti-retaliation provision would encourage employers to investigate and resolve discrimination complaints efficiently, in furtherance of Title VII's policy goals. *EEOC v. Total Sys. Servs., Inc.*, 240 F.3d 899, 904 (11th Cir. 2001) (denying rehearing en banc) (Edmondson, J., concurring). The district court echoed this reasoning, opining that deferring to employers would "encourage defendants to engage in a reasonable investigation." JA 407; DE 64 at 23. However, *Crawford* explains that *Faragher* and *Ellerth* sufficiently incentivize employers to "ferret out and put a stop to" unlawful activity in order to have recourse to the affirmative defense. 555 U.S. at 278-79. And *Crawford* makes clear that the goal of encouraging employers to investigate unlawful activity is insufficient justification for sacrificing anti-retaliation protections. *Id.* Here, a more balanced construction of the anti-retaliation provision—one that allows the jury to decide disputed issues of fact as to whether an employee fabricated a report of unlawful activity—would actually improve employers' ability to "ferret out" unlawful activity by spurring employees to make

reports. And the facts of this case indicate that *Total System*'s approach does nothing to disincentivize shoddy investigations by employers. *See infra* at 25-27.

B. The district court's deference to the employer's asserted business judgment is in tension with this Court's precedents.

This Court's recent decisions in *Boyer-Liberto* and *DeMasters* also call into question the district court's reflexive deference to the employer's determination that an employee fabricated allegations of unlawful activity. Moreover, allowing a jury to resolve Villa's retaliation claim would not conflict with this Court's precedents observing that courts should avoid operating as "super personnel departments." *See* JA 408; DE 64 at 24.

The district court concluded that *Boyer-Liberto* is irrelevant because that decision addressed whether an employee could establish protected activity because she opposed conduct that she reasonably believed violated Title VII. JA 405; DE 64 at 21. Here, by contrast, the district court determined that there is no question that Villa engaged in protected activity. JA 401; DE 64 at 17.

But *Boyer-Liberto* is pertinent because it sheds light on the scope of Title VII's anti-retaliation provision. And *Boyer-Liberto*'s broad conception of the anti-retaliation provision conflicts with the district court's—and *Total System*'s—approach of deferring to the employer's business judgment about whether an employee's report is truthful. In holding that an isolated incident could provide

grounds for a reasonable belief that a hostile environment was occurring, *Boyer-Liberto* cited *Crawford*, *Burlington Northern*, and *Thompson* for their directives to interpret the anti-retaliation provision broadly. 786 F.3d at 268, 283. This Court also determined that broad anti-retaliation protections encourage the prompt reporting of harassment that is "vital to achieving Title VII's goal of avoiding harm." *Id.* at 283. Also, this Court underscored that broad protections are consistent with the reporting requirements of *Ellerth* and *Faragher*. *Id.* at 282. That is, an employee may not delay reporting harassment to "investigate [and] gather evidence" and a "generalized fear of retaliation does not excuse a failure to report." *Id.* at 282-83 (quoting *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001)). *Boyer-Liberto*'s recognition that Title VII's anti-retaliation provision ensures broad protections conflicts with the district court's deference to Cava because such deference leaves Villa and others who are similarly situated entirely bereft of anti-retaliation protections.

This Court's recent decision in *DeMasters*, which the district court did not consider, is also relevant here. *DeMasters* held that the "manager rule" does not apply to Title VII. 796 F.3d at 423-24. Under the manager rule, which some courts apply in the Fair Labor Standards Act context, managerial employees' reports of

unlawful activity are not protected activity "if counseling and communicating complaints are part of a manager's regular duties." *Id.* at 421-22. In rejecting the idea that the manager rule should also apply to Title VII, this Court noted that Title VII's anti-retaliation provision protects a "broad range of conduct," and that Supreme Court precedent including *Burlington Northern* and *Crawford* supports an expansive construction of the provision. *Id.* at 422. In addition, this Court explained that the manager rule would discourage employees from complaining about discrimination and "put in motion a downward spiral of Title VII enforcement." *Id.* at 423.

Here, Villa was a supervisory employee who reported harassment allegations of an employee she supervised. In general, a manager is probably more likely than non-managerial employees to report other employees' complaints of discrimination. When reporting another employee's complaint, a manager will not necessarily have personal knowledge of the alleged conduct. That is, a manager who relays a complaint may not herself know whether the allegations are truthful. In those circumstances, deferring reflexively to the employer's judgment on whether the report was true is particularly problematic. Therefore, this Court's emphasis on protecting managerial employees in *DeMasters* is a further reason to

reject the district court's determination that the question of Cava's good faith should not go to a jury.

Moreover, allowing a jury to resolve disputed issues of fact as to the employer's determination that an employer lied does not conflict with circuit precedent stating that "courts [do not] sit as ... super personnel department[s]," as the district court asserted. JA 408; DE 64 at 24. The district court did not identify specific decisions. *Id.* But this Court has made that observation in the context of reviewing the employer's legitimate, non-discriminatory reason for an adverse action and the employee's evidence of pretext under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998) (invoking "super-personnel department" in context of assessing employer's asserted non-discriminatory reason for termination and employee's pretext evidence); *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Cir. 1997) (invoking "super-personnel department" in pretext assessment), *abrogation on other grounds recognized by Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 140 (4th Cir. 2006). These decisions indicate only that this Court will not second guess an employer's decision where the employee identifies insufficient evidence of pretext. *DeJarnette*, 133 F.3d at 299 (rejecting employee's argument that "her own opinion

and her coworkers' opinions that [she] was an average or good employee" showed that employer's claim of performance problems was pretextual); *Beall*, 130 F.3d at 620 ("Without evidence of pretext for retaliation, this Court will not act as a super-personnel department that reexamines an entity's business decisions."). Also, as explained *supra* at 13-14, *Burlington Northern* and *Thompson* authorize courts (and juries) to assess whether the employer's action "might have dissuaded a reasonable worker" from reporting unlawful activities. That inquiry will sometimes conflict with deference to an employer's business determination.

III. A jury should decide Villa's retaliation claim because there are disputed issues of fact as to the evidence on which Cava relied and the adequacy of Cava's investigation.

Because the district court's and *Total System*'s approach conflicts with Supreme Court and circuit precedent, this Court should recognize instead that reflexive deference to the employer may deprive juries of the fact-finding role. A jury should resolve retaliation claims where (1) an employee has engaged in protected activity under the opposition clause of Title VII's anti-retaliation clause, which prohibits retaliation against an employee who has "opposed any ... unlawful employment practice," 42 U.S.C. § 2000e-3(a);[4] (2) the employer claims that it

[4] It is clear that Villa is covered under the opposition clause. As the district court acknowledged, record evidence establishes that Villa truthfully reported Bonilla's allegations. JA 404; DE 64 at 20. And there is no question that the allegations Villa reported—a demand for sexual favors in exchange for a raise, which would amount

took adverse action because the employee fabricated allegations of unlawful activity; and (3) there are disputed issues of fact as to the evidence on which the employer relied or the adequacy of the employer's investigation.

In this case, a jury should resolve Villa's retaliation claim because Villa has raised issues of fact as to the evidence on which Cava relied and the adequacy of Cava's investigation. Cava relied on Bonilla's account to discredit Villa, choosing to believe Bonilla rather than Villa. And a jury could question Cava's determination based on record evidence showing significant flaws in Cava's investigation—including lack of a harassment policy, failure to interview the alleged harasser, and the alleged harasser's close friend's involvement in the investigation.

In the first place, a jury should resolve Villa's retaliation claim because the evidence on which Cava relied did not objectively establish that Villa fabricated harassment allegations. Instead, Cava made a credibility determination between Villa's account and Bonilla's account. Cava asserts that the company concluded that Villa lied because, at the time of the investigation, Bonilla told Gresham that she never complained to Villa. However, a jury could doubt Gresham's description

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to quid pro quo harassment—satisfies the opposition clause's "reasonable belief" requirement. *Boyer-Liberto*, 786 F.3d at 284; *see also, e.g.*, *Okoli v. City of Baltimore*, 648 F.3d 216, 222 (4th Cir. 2011) (discussing quid pro quo harassment).

of the meeting because Bonilla later confirmed that she did, in fact, tell Villa that Butron harassed her. Moreover, even if Bonilla really told Gresham she never complained to Villa, Cava was faced with conflicting accounts from two employees. That is, Villa claimed that Bonilla complained of harassment while Bonilla supposedly claimed the opposite. Yet Gresham never followed up with Villa after learning that Bonilla contested Villa's report.

In analogous circumstances, courts have explained 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 the jury." *Richey v. City of Indep.*, 540 F.3d 779, 785 (8th Cir. 2008); *see also Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 740-41 (8th Cir. 2005) (because the employer's "belief that [the employee] was lying was founded solely on the statements of other employees and witnesses" without "independently verifiable evidence that contradicted [the employee's] allegations," the district court erred in granting summary judgment on the employee's retaliation claim). Similarly, Villa's "claim of retaliation must go to the jury" because Cava "[chose] to disbelieve and discipline [Villa,] who had engaged in protected opposition to unlawful activity." *Richey*, 540 F.3d at 785. *Richey* and *Gilooly* both

involved allegedly false allegations of harassment, *Richey*, 540 F.3d at 782; *Gilooly*, 421 F.3d at 737, but the same principle applies where two employees offer differing accounts as to whether an allegation was ever made, because the "judgment of assessing witness credibility is normally the province of a fact-finder." *Gilooly*, 421 F.3d at 741.

Here, there was no "independently verifiable evidence that contradicted [Villa's]" account that Bonilla complained of sexual harassment. *Gilooly*, 421 F.3d at 740-41. According to Gresham, Marinero said that he believed that Bonilla left Cava for financial reasons. But although Villa stated that Marinero was also present when Bonilla complained to her of sexual harassment, Marinero's response to Gresham does not necessarily contradict Villa's account. He simply stated his understanding of why Bonilla resigned; he did not suggest that Villa fabricated Bonilla's report. *Compare Richey*, 540 F.3d at 785-86 (employer relied on independent corroboration, including documentary evidence and the employee's own admission, in determining that employee falsified harassment allegations).

Nor does Gresham's conversation with Arias provide "independently verifiable evidence" that Villa falsified allegations. Contrary to the district court's characterization, Villa never claimed that Arias voiced harassment allegations. Instead, Villa merely alerted Gresham to her suspicion that a harassment incident

might explain Arias's recent resignation. Therefore, Arias's denial that Butron harassed her did not show that Villa was lying.

In addition to "he said, she said" testimony, evidence that Cava's investigation was inadequate also justifies sending Villa's retaliation claim to a jury. The district court concluded that any defects in Cava's investigation were irrelevant (although it acknowledged that "there might be cases where the adequacy of an investigation might raise a triable issue of fact"). JA 406; DE 64 at 22. In doing so, the district court relied on the Eighth Circuit's decision in *McCullough* for the proposition that "shortcomings in an investigation do not, by themselves, support an inference of discrimination." JA 408; DE 64 at 24; *McCullough*, 559 F.3d at 863. But *McCullough* actually acknowledged that an employee may raise a trial issue as to whether the decisionmaker genuinely believed that the employee made false reports. 559 F.3d at 862.

Also, evidence of defects in Cava's investigation amount to more than mere "shortcomings." In fact, based on the record below, a jury could conclude that the investigation was biased and insufficient, and that Cava's human resources policies and procedures were inadequate to ensure a sufficient investigation.

First, a jury could find it noteworthy that Cava admittedly lacked a formal written sexual harassment policy, and that Gresham never received training in

conducting harassment investigations. *See EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, Part V.C.1.e ("*EEOC Guidance*") (June 18, 1999), 1999 WL 33305874, at *9, 11 (employers should adopt and distribute harassment policies and complaint procedures and investigators should be "well-trained"); *cf. Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (en banc) (jury could find employer's complaint procedure inadequate where it was "debatable whether the [employer] actually [had] a sexual harassment policy"). Gresham neglected basic investigatory steps during his inquiry into Villa's report. He never interviewed Butron, the alleged harasser. *See EEOC Guidance* Part V.C.1.e, 1999 WL 33305874, at *11-12 (indicating that investigators should determine whether an alleged harasser denies the allegations soon after receiving a complaint and explaining that investigators should interview an alleged harasser "when detailed fact-finding is necessary"). Also, although Villa speaks limited English and Gresham does not speak Spanish, Gresham did not enlist an interpreter for his conversation with Villa. Moreover, Gresham failed to take any notes of his interviews, and never wrote up a summary of his findings.

Second, a jury could question why, when faced with Villa's and Bonilla's allegedly conflicting accounts, Cava chose to believe the account that was more

advantageous to Cava—without even following up with Villa after hearing Bonilla's account. Similarly, a jury could find it suspicious that Gresham suggested to Villa that she would be fired if the report was untrue. A jury could infer that Gresham was referring to Villa when he stated that "somebody" would be fired, given that Bonilla no longer worked at Cava. And although the district court interpreted Gresham's comment as evidence that Cava lacked retaliatory animus, JA 404; DE 64 at 20, a jury could come to the opposite conclusion. At the time, Gresham had no evidence suggesting that Villa fabricated the report. Also, even though Gresham stated that either Butron or "somebody" else would be fired, he never questioned Butron about the allegations.

Third, a jury could question Gresham's decision to involve Valdivia, Butron's long-time friend, as an interpreter. Valdivia spoke to Bonilla alone before Gresham interviewed her, and he was present during the interview with Bonilla. Even if Valdivia did not influence Gresham's investigation, the appearance of bias could raise concerns with a jury. *See EEOC Guidance* Part V.C.1.e, 1999 WL 33305874, at *11 (effective investigation of alleged harassment should be "impartial").

Given record evidence of substantial flaws in Cava's internal policies and practices, and in this investigation in particular, the district court's deference to

Cava's determination makes little sense. Instead, a jury should decide whether Cava terminated Villa based on a retaliatory motive, or because it genuinely concluded that she falsified harassment allegations.

CONCLUSION

For the reasons above, we urge this Court to reverse the district court's grant of summary judgment and remand for trial.

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Dated: July 7, 2016

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