

**TITLE VII UPDATE (2012-13):
A PLAINTIFF LAWYER'S PERSPECTIVE**

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I. Sexual Harassment

A. Severe or pervasive conduct

In *Hall v. City of Chicago*, 713 F.3d 325 (7th Cir. 2013), the Seventh Circuit reversed the district court's summary dismissal of a female plumber's hostile environment claim. The plaintiff's supervisor had assigned her menial work while stopping her from taking on additional responsibilities, forbade co-workers from speaking with her, excluded her from meetings, tried to bump her while passing by, and made angry comments about her, some of which were gender-specific (e.g. "[I] ought to slap the woman sitting out there"). While questioning whether any of the supervisor's acts, considered individually, were "severe or pervasive," see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (a hostile work environment is so "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment"), the Circuit Court held that the evidence, taken together, "suggested that [the supervisor] made Hall the Division pariah, undeserving of human interaction," which created a triable issue of fact as to whether the work environment was hostile. 713 F.3d at 331.

In a same-sex harassment case, *Redd v. New York State Div. of Parole*, 678 F.3d 166 (2d Cir. 2012), the Second Circuit overturned the district court's grant of summary judgment where the plaintiff claimed that on three occasions a co-worker made unwelcome sexual advances to her, in particular, touching her breasts. The court took issue with the district court's characterization of the co-worker's conduct as "relatively minor, incidental physical contact ... [that] "may have been purely accidental." *Id.* at 172. The Second Circuit made clear that "[d]irect contact with an intimate body part constitutes one of the most severe forms of sexual harassment." *Id.* at 180.

The First Circuit, in *Gerald v. Univ. of Puerto Rico*, 707 F.3d 7 (1st Cir. 2013), overturned a grant of summary judgment, holding, that the plaintiff had established an issue of fact as to whether her supervisor's sexual harassment was severe or pervasive. Although only three incidents of harassing conduct occurred over a six-year period, the Court of Appeals determined that the incidents – the supervisor grabbed her breasts, sexually propositioned her, and crassly asked her in front of others why she would not have sex with him – were serious enough to create a hostile environment. The fact that the plaintiff had engaged in off-color banter of a sexual nature with the supervisor did not make his actions any less unwelcome: "We fail to see how an employee telling risqué jokes means that she is amenable to being groped at work." *Id.* at 17.

[Other language of note in *Gerald*, was the First Circuit description of the appellate court's role in reviewing a grant of summary judgment: "our function is one of screening, that is, to determine whether, on particular facts, a reasonable jury could reach such a conclusion.... In other words, we patrol the outer bounds." *Id.* at 20 (inner quotations and citations omitted).]

B. Motivated by sex

It is not enough, of course, that the offensive conduct be “severe or pervasive,” to be actionable the harassment must be motivated by gender. In *Hall v. City of Chicago* (see I(A), above), the Seventh Circuit found evidence of gender animus in the supervisor’s statements about “slap[ping] that woman” The Court observed,

This form of aggression is almost entirely limited to women – rarely does one say they are going to “slap” a male. To the extent any ambiguity remains, [the supervisor] attached “that women” to the end of the sentence, permitting a juror to conclude that an animus towards Hall’s gender was one factor leading to the outburst.

713 F.3d at 333-34.

The *Hall* court also explained that where the harassment is aimed exclusively at women, an inference can be drawn that the conduct was motivated by gender. The fact that the bigoted supervisor treated decently his secretary, the only other female in the workplace (male plumbers made up the rest of the unit), did not defeat the inference of gender bias. Citing social science literature, the court noted that men may reserve their discriminatory animus to those women who, like Hall, a female plumber, work in traditionally male roles. *Id.* at 332, citing Alice H. Eagly & Antonio Mladinic, *Are People Prejudiced Against Women? Some Answers from Research on Attitudes, Gender Stereotypes, and Judgments of Competence*, 5 Eur. Rev. Soc. Psychol. 1, 1 (1994).

In *Passananti v. Cook County*, 689 F.3d 655 (7th Cir. 2012), a jury found the County liable in a sexual harassment case, but the district court overturned the verdict as a matter of law. The Court of Appeals reversed, holding that the district court erred in finding that plaintiff’s mistreatment was not sex-based, despite the fact that her supervisor repeatedly called her “bitch.” The Seventh Circuit ruled that the word is gender-specific: “[W]e ... reject the idea that a female plaintiff who has been subjected to repeated and hostile use of the word “bitch” must produce evidence beyond the word itself to allow a jury to infer that its use was derogatory towards women.” *Id.* at 666.

C. Faragher/Ellerth Affirmative Defense

Under the *Faragher/Ellerth* affirmative defense, an employer is not vicariously liable for a sexually hostile environment created by a supervisor if it can show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1988).

In *EEOC v. Boh Bros. Constr. Co., L.L.C.*, ___ F.3d ___, 2013 WL 5420320 (5th Cir. Sept. 27, 2013) (*en banc*), the Fifth Circuit affirmed the trial court’s decision upholding a jury verdict for the plaintiff in a same sex sexual harassment case. The Court of Appeals held that an employer did not exercise reasonable care to prevent sexual harassment simply by having a

broad non-discrimination policy that lacked a complaint procedure and a definition of sexual harassment. Not only was the written policy deficient, the court noted that the employer provided only cursory sexual harassment training to its staff; supervisors failed to understand that conduct not motivated by sexual desire could be sexual harassment; the investigation of the plaintiff's sexual harassment complaint was grossly inadequate; and the harasser was not disciplined for the harassment. All of these factors showed the employer failed to exercise reasonable in both preventing and correcting harassment.

The Second Circuit held, in *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 42 (2d Cir. 2012), that the *Faragher/Ellerth* defense is unavailable to an employer when its harassing supervisor is the employer's proxy or alter ego. The Second Circuit's ruling is consistent with that of every Circuit Court which has considered the issue. See *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383–84 (5th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000). The Second Circuit determined that proxy or alter ego status exists if an executive has an extremely elevated position in the corporate hierarchy with significant control over the company's operations. The executive in *Townsend* was deemed a proxy because he was the only corporate Vice President, operating as second-in-command, immediately below the president (his wife); he was a corporate shareholder with a financial stake in the company, and indeed, all of the corporate shares were held by him, his wife, and their children; he exercised a significant degree of control over corporate affairs, collaborating with the president on corporate decisions including hiring, and the supervisors and managers in the field reported directly to him. The fact that he owned only 5% of the corporate did not defeat his alter ego status because "[s]tock ownership is not "a prerequisite for acting as a corporation's proxy," *Id.* at 55 (inner citation and quotation omitted).

D. Supervisors

In *Vance v. Ball State Univ.*, ___ U.S. ___, 133 S. Ct. 2434, 2439 (2013), the Supreme Court considered who is a "supervisor" for purposes of establishing vicarious liability in harassment cases. The question is important because an employer is strictly liable if the supervisor's harassment culminates in a tangible employment action. In cases of supervisory harassment where there is no tangible employment action, the employer will be liable for the supervisor's conduct unless it can satisfy the *Faragher/Ellerth* affirmative defense. (See I(C), above).

In a 5-4 decision, the Court defined "supervisor" narrowly, as one who can "effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 133 S. Ct. at 2443 (internal citation omitted). The Court rejected the more open-ended definition of supervisor, used by the EEOC and at least two Circuit Courts, as someone with the ability to exercise significant direction over another's daily work.

The impact of *Vance*, at least in hostile environment cases not involving a tangible employment action, may not be as significant as many originally had thought. Under *Vance*, an individual with control over an employee's daily work life but lacking hiring and firing authority is now treated as a co-worker rather than a supervisor. Negligence standards govern employer

liability in co-worker harassment cases, so that a plaintiff can impute liability to the employer if she can show that the employer knew or should have known about the co-worker harassment and failed to prevent or stop it. The evidence to establish the employer's negligence in a co-worker harassment case is virtually the same as that needed to avoid the *Faragher/Ellerth* affirmative defense where the harasser is a "supervisor." In both instances, the employer will be liable if it failed to exercise reasonable care in preventing and correcting sexual harassment. *See Faragher*, 524 U.S. at 807. In short, *Vance* should not change all that much the sexual harassment landscape.

E. Injunctive Relief

In *EEOC KarenKim, Inc.*, 698 F.3d 92 (2d Cir. 2012), the agency brought suit on behalf of 10 young female employees subjected to verbal and physical sexual harassment by a grocery store's manager. The EEOC prevailed at trial, but the district court denied its request for injunctive relief on the grounds that the requested relief was unnecessary and overly broad. The district court noted that neither the harassing manager nor the plaintiffs were still employed by the company, and the employer had instituted an anti-harassment policy.

Upon appeal, the Second Circuit reversed, holding that the district court abused its discretion in denying at least some of the requested injunctive relief. Under Title VII, a court in determining whether to order injunctive relief where the employer has stopped the unlawful conduct, should consider "the bona fides of the [defendant's] expressed intent to comply" with the law, "the effectiveness of the discontinuance," and "the character of the past violations." *Id.* at 100 (inner quotations and citations omitted). The manager, although no longer employed by KarenKim, was the store owner's fiancé, and, as the Court of Appeals noted, their relationship was the primary reason why the sexual harassment was allowed for years to go unchecked. The Court reasoned that absent an injunction, nothing prevented the harasser's re-hire or his physical presence at the store. The court concluded that the district court abused its discretion in not, at a minimum, ordering the defendant to refrain from re-hiring the harasser and to ban him from the store. The Court of Appeals also suggested that, on remand, the district court consider the adequacy of the defendant's newly-adopted sexual policies and whether the policies needed to be reformed. The Second Circuit, however, agreed with the district court that the EEOC's requested relief of an independent monitor was disproportionate to the scale of the sexual harassment.

F. Continuing Violation

Eleven years after the Supreme Court defined a continuing violation under Title VII in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Third Circuit had occasion to overturn its precedent on this issue in *Mandell v. M & Q Packaging Corp.*, 706 F.3d 157 (3d Cir. 2013). In *Morgan*, the Supreme Court held that the acts making up a hostile work environment are part of a single unlawful employment practice. Thus, a claim of hostile work environment is timely so long as one act contributing to the claim occurred within the statutory period. The Third Circuit's pre-*Morgan* precedents had held that if the pre-statutory harassment was such that the plaintiff should have been aware of the need to assert her rights before the limitations period ran out, her hostile environment claim is time-barred, even if some of the harassing conduct occurred post-statute. *Mandell* acknowledged that *Morgan* had expressly

rejected such a narrow interpretation of the continuing violations theory, and, on these grounds, reversed the district court's dismissal of the plaintiff's hostile environment claim.

II. Same Sex Harassment

In *EEOC v. Boh Bros. Constr. Co., L.L.C.* (see I(C), above), the Fifth Circuit upheld a jury verdict in favor of the plaintiff who suffered severe harassment because he was “not manly-enough in [his supervisor’s] eyes.” The Court of Appeals had little trouble finding the harassment “severe or pervasive.” The crew superintendent, among other things, repeatedly called the plaintiff “pu-y,” “princess,” and “fa-ot”; frequently approached him from behind and simulated intercourse; exposed his genitals while urinating in front of him; and taunted him that his using Wet Ones instead of toilet paper was “kind of gay.”

The Fifth Circuit also addressed whether a plaintiff could use gender-stereotyping to prove that the same sex harassment was “because of sex.” The defendant argued that the only permissible ways to prove “because of sex” in a same sex harassment case were those discussed by the Supreme Court in *Onacle v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), namely, 1) the harasser was homosexual and motivated by sexual desire; 2) the harassment was sufficiently sex-specific and derogatory to show that the harasser had a general hostility to the presence of a particular gender in the workplace; and 3) comparative evidence as to how the harasser treated both sexes in the workplace. The Court of Appeals rejected defendant’s argument, concluding that the three types of evidence outlined in *Onacle* were illustrative and not the exclusive ways of proving same-sex harassment, the same position taken by at least four other Circuit Courts. See also *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999).

See also *Redd v. New York State Div. of Parole* (I(A), above).

III. Sex Discrimination

The Pregnancy Discrimination Act provides that an employer may not discriminate on the basis of “pregnancy ... or related medical conditions.” The Fifth Circuit held, in *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013), that an employer violated Title VII, as amended by the PDA, when it fired a woman because she was lactating or expressing milk because lactation is a medical condition of pregnancy.

In *Young v. United Parcel Serv. Inc.*, 707 F.3d 437 (4th Cir. 2013), the Fourth Circuit held that an employer does not violate the PDA by refusing to provide the same accommodations accorded employees injured on the job or having a disability cognizable under the ADA. Young was a part-time driver for UPS. According to UPS, lifting packages weighing up to 70 pounds was an essential function of a driver. When Young became pregnant she was medically restricted from lifting more than 20 pounds. Notwithstanding the lifting restriction, Young sought to return to her job since, in her experience, she rarely lifted packages more than 20 pounds, and if needed, another driver could help her. UPS, however, terminated her because of her inability to perform an essential function of the job.

Young claimed that UPS's policy giving light duty assignments to a) employees injured on the job, b) employees disabled within the meaning of the ADA, or c) those losing their Department of Transportation certification, *but not* to pregnant women was discriminatory. The Fourth Circuit found UPS' policy lawful, stressing that it was pregnancy-neutral. The Court of Appeals held that, despite some ambiguity in the statutory language, the PDA merely included pregnancy within the definition of sex discrimination and did not create an independent cause of action for pregnant women. To interpret the PDA otherwise, the Court of Appeals held, would give pregnant women preferential treatment with the right to ADA-like accommodations not accorded male and female employees who incur injuries outside of the job.

IV. Race Discrimination

The Sixth Circuit, in reversing summary judgment in *Rachells v. Cingular Wireless Employees Servs., LLC*, ___ F.3d ___, 2013 WL 5645239 (6th Cir. Oct. 17, 2013), ferreted out discriminatory conduct from a record that a less searching court may have disregarded. Rachells, an African-American, worked as a salesman in Cingular's Cleveland region. He received many sales awards and between 2002 and 2004, exceeded company sales goals by the highest margin of any of his co-workers. In 2004, Cingular acquired AT&T and, as part of a reduction-in-force selected four of nine Cingular and AT&T salespeople to remain with the company. Cingular decided whom to layoff by rating the nine salespeople according to their performance reviews and a RIF interview. Plaintiff's rating left him ranked seventh among the nine candidates. Of the four candidates whose jobs were saved, three were other Cingular salespeople, and each was white.

The Sixth Circuit focused upon two items of evidence showing that the plaintiff was singled out for the RIF because of his race. First, a reasonable jury could find that based upon his sales record through 2004 and receipt of a performance review in 2003 that was the highest of any of his co-workers, Rachells had superior qualifications to the white candidates not laid off. Defendant argued, to the contrary that Rachells' performance markedly declined in 2004, as reflected by a poor performance review that year. The company also pointed to Rachells' low score on his RIF interview. The Court of Appeals, however, refused to take at face value the poor ratings in plaintiff's 2004 performance review and RIF interview: "[A] factfinder could infer that Rachells' poor scores in the RIF selection process did not reflect an actual decline in performance, but rather the reviewer's attempt to ensure that Rachells was among those discharged in the workplace reduction." *Id.* at *9.

The Court of Appeals also found evidence of a "discriminatory atmosphere." *Id.* at*10. There was evidence that the top manager in the Cleveland office, Fine, in 2003, discriminatorily denied a promotion to two black retail managers in favor of a less qualified Caucasian. Despite the fact that biased promotion occurred a year before and involved a different type of decision from the RIF, the court found it probative: "'[M]anagement's consideration of an impermissible factor in one context may support the inference that the impermissible factor entered the decisionmaking in another context.'" *Id.* at *11 (inner citation and quotation marks omitted). Further evidence of a discriminatory atmosphere was the newly promoted Caucasian district manager's conduct in giving out undeservedly poor evaluations to minority employees, the same kind of discrimination to which Rachells was subjected to as a lead up to his termination. Finally, the court found significant Fine's failure to respond to complaints of discrimination by the two

black store managers: “[T]his failure to investigate could be construed by a reasonable jury as willful inaction and condonation of discriminatory conduct.” *Id.*

The Eleventh Circuit reversed a grant of summary judgment in *Jones v UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012), finding that the placement of banana peels on the plaintiff’s truck at defendant’s garage was racially motivated. In reaching this conclusion, the court wrote:

Given the history of racial stereotypes against African–Americans and the prevalent one of African–Americans as animals or monkeys, it is a reasonable—perhaps even an obvious—conclusion that the use of monkey imagery is intended as a racial insult where no benign explanation for the imagery appears.... Moreover, it has become easier to coat various forms of discrimination with the appearance of propriety’ because the threat of liability takes that which was once overt and makes it subtle.... For instance, a discriminator may conjure up images of monkeys by using items associated with monkeys, such as their stereotypical food of choice, the banana.

683 F.3d at 1297 (inner citations and quotation omitted). The court also found that white co-workers’ wearing Confederate articles of clothing may support a finding of a racially hostile environment.

In *Evans v. Sibelius*, 716 F.3d 617 (D.C. Cir. 2013), two African-American GS-13 employees of the Department of Health and Human Services, one of whom was Evans, were selected for promotions to GS-14 positions by the outgoing Administration. After the in-coming Administration imposed a hiring freeze, and subsequently, hiring controls, Evans was told that she could not be promoted while the controls were in effect. Through a Freedom of Information Act request, Evans learned that, despite the hiring controls, three white employees had received promotions. The D.C. Circuit reversed the grant of summary judgment, finding pretext in the government’s shifting and inaccurate reasons for denying plaintiff the promotion and in the three white employees’ promotions during the hiring controls.

In *May v. Chrysler Group, LLC*, 716 F.3d 963 (7th Cir. 2013), the Court of Appeals affirmed the jury’s finding that the employer failed to promptly or adequately respond to co-workers’ years-long, racist, anti-Semitic harassment of the plaintiff, that included death threats. Noting that “a reasonable response to taunting or insults may be an unreasonable response to death threats and physical violence,” *Id.* at 971, the court found that Chrysler’s investigation of the harassment was inadequate because, among other things, the company neither interviewed the people the plaintiff suspected of harassing him nor installed surveillance cameras as the plaintiff requested. Instead, Chrysler undertook the “rather unsettling” campaign of proving that the plaintiff perpetrated the harassment against himself. *Id.* at 969.

See also Griffin v. Finkbeiner (Section VI, below).

V. Retaliation

In *Westendorf v. West Coast Contractors of Nevada, Inc.*, 712 F.3d 417 (9th Cir. 2013), the plaintiff brought suit claiming she was terminated in retaliation for complaining about sexual harassment. The employer denied firing the plaintiff and claimed she resigned. This put the employer in the position of not being able to give any reason, legitimate or otherwise, for the plaintiff's termination. The Ninth Circuit held that the plaintiff, by showing that the employer failed to give any reason for her termination, had established pretext for purposes of defeating summary judgment. The Court of Appeals noted that the employer *did* give a reason for not rehiring Westendorf – she wouldn't follow orders with which she disagreed. The court stated, however, that even if this reason was ascribed to plaintiff's termination, she would still have established pretext since there was no evidence in the record of insubordination.

The Eleventh Circuit, in *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012), joined every other circuit in recognizing a retaliatory hostile environment claim. Of note, the Court of Appeals held that that the “same decision” defense (i.e., because the defendant would have made the same decision even in the absence of retaliation, retaliation is not the but-for cause), while applicable to discrete acts of retaliation, does not preclude liability for a retaliatory hostile environment where discrete acts and non-discrete acts are considered collectively. “To allow the same-decision defense to eliminate but-for causation in a hostile environment claim would essentially do away with the claim.” *Id.* at 1313.

In *Townsend v. Benjamin Enterprises, Inc.* (see I(C), above), the Second Circuit held that an employee's participation in an employer's internal sexual harassment investigation not associated with a formal EEOC charge does not constitute protected activity under Title VII's participation clause. Townsend had complained to the employer's Human Resources director (who would become her co-plaintiff) that she was sexually harassed by the company's corporate vice president, the president's husband. The HR director, only on the job a short time, discussed Townsend's allegations of sexual harassment with a management consultant who was training her. The company president deemed the HR Director's disclosures to the management consultant inappropriate and fired her.

The HR director claimed she was terminated in retaliation for engaging in protected activity, that is, her participation in an internal investigation of a sexual harassment charge against a high-ranking corporate official. The Court held that the plain language of 42 U.S.C. § 2000e-3(a) (“participate in any manner in an investigation, proceeding or hearing under this subchapter”) requires that to be considered protected, an investigation must be connected with a formal EEOC proceeding, and, thus, the plaintiff's participation in a solely internal investigation of harassment was left exposed. The Second Circuit's holding is consistent with every Court of Appeals to have considered this issue *See Hatmaker v. Memorial Medical Ctr.*, 619 F.3d 741, 746–47 (7th Cir. 2010); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *see also Abbott*, 348 F.3d 537, 543 (5th Cir. 2003); *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000).

VI. Causation

In 1991, Congress amended Title VII of the Civil Rights Act of 1964 to codify the mixed-motive method of proving discrimination. The 1991 Act states:

[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice. (emphasis added)

In 2009, the Supreme Court, in *Gross v. FBL Financial Services*, 557 U.S. 167, 176 (2009), observed that, unlike Title VII, the Age Discrimination in Employment Act (“ADEA”) was never amended to incorporate the mixed-motives method. In the absence of explicit statutory language, the Court held that the mixed-motives method of proof was unavailable under the ADEA, and to establish age discrimination a plaintiff must prove that “age was the ‘but-for’ cause of the challenged action.”

In *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), the same five Justices who made up the majority in *Gross*, held that § 2000e-2(m)’s “motivating factor” test did not apply to retaliation claims. The Court used the same reasoning as it did in *Gross*: §2000e-2(m) did not expressly refer to retaliation claims. Thus, as a result of *Nassar*, plaintiffs may not avail themselves of the mixed-motive theory of liability in Title VII retaliation cases. However, on this score, *Nassar*’s impact is fairly limited since by the time the decision came down, only three Circuits sanctioned dual motivation liability in retaliation claims, the 9th, 10th and 11th.

Less clear is the implications of the Supreme Court’s mandate that Title VII retaliation claims be proven by but-for causation. Apart from explaining that it was a “more demanding” causation standard than the motivating factor test, *Nassar* did not give much guidance as to the meaning of but-for. The Court limited its efforts at definition to stating that “but-for” causation was the same as “because of,” or “based on,” or “by reason of” -- all formulations of the causation standard used in prior decisions. The *Nassar* court did not believe it was breaking new ground in applying but-for causation to retaliation claims. But-for, the Court stated, was the “default” causation standard for Title VII as it existed before the 1991 Act added the motivating factor test. 133 S.Ct. at 2525.

The Supreme Court’s prior decisions surely show that A but-for cause is not A sole cause. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10 (1976) (Title VII plaintiff need not show that he would have been rejected or discharged A solely on the basis of his race ... A no more is required to be shown than that race was a >but-for= cause); *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (but-for cause is a necessary but not sufficient event). Further, Justice Kennedy, the author of the majority opinion in *Nassar*, in his dissent in *Price Waterhouse*, wrote: A[S]ex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, i.e. but-for cause.” 490 U.S. 228, 284 (Kennedy, J., dissenting).

In prior opinions, two of the Justices forming the majority in *Nassar*, Chief Justice Roberts and Justice Thomas, went so far as to criticize but-for causation as an overly lax standard. In *CSX Transp., Inc. v. McBride*, the majority had approved the following jury instruction for the Federal Employees' Liability Act: "the defendant's negligence must "pla[y] a part—no matter how small—in bringing about the [plaintiff's] injury." In dissent, Chief Justice Roberts objected, stating that the majority's causation standard was "no limit at all. *It is simply 'but-for' causation*" (emphasis added). Justice Thomas wrote the majority opinion in *Pacific Operators Offshore, LLP v. Valladoli*, which construed the causation standard for the Outer Continental Shelf Lands Act. Justice Thomas rejected the "but-for" test as too easy to prove, and instead, endorsed what he considered a more stringent causation standard: "substantial-nexus," requiring an injured employee to establish a significant causal link between the injury that he suffered and his employer's off-shore operations. At least for Justice Thomas, but-for causation is something less than a substantial connection between the injury suffered and the tortious conduct.

The Court of Appeals, in *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012), a race discrimination case, reversed summary judgment, holding that the district court erred in requiring the plaintiff to show that the "real reason" for his termination was race discrimination. The Sixth Circuit pointed out that under *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), to survive summary judgment a plaintiff need only produce enough evidence to support a prima facie case and to rebut the defendant's explanation for the adverse action. The only exceptions are where "the record conclusively showed some other, nondiscriminatory reason for the employer's action," or the plaintiff created only a weak issue of fact as to pretext and there was "abundant and uncontroverted independent evidence that no discrimination occurred." The Sixth Circuit, following *Reeves*, held that the plaintiff produced enough evidence to defeat summary judgment. In particular, the plaintiff presented evidence of pretext by showing that the City of Toledo gave shifting reasons for her termination. The plaintiff also demonstrated the decision maker's racial animus, reflected in his use of racially derogatory language at meetings and his otherwise disrespecting black employees.

VII. Cat's Paw

In *Chattman v. Toho Tenax America Inc.*, 686 F.3d 339 (6th Cir. 2012), the plaintiff, a 20-year employee, alleged that a racially biased Director of Human Resources recommended his termination to management for engaging in horseplay, even though such conduct was commonplace at the plant. The proposed termination was reduced to a final written warning, but, nonetheless, the disciplinary action precluded his consideration for a promotion to a vacant position in his department.

An issue in the case was whether, under the cat's paw theory, the company could be held liable even though the biased HR Director was not a decisionmaker in meting out the warning. In *Staub v. Proctor Hospital*, ___U.S.___, 131 S.Ct. 1186 (2011), the Supreme Court endorsed the cat's paw theory, stating, "if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under the [Act]." *Id.* at 1194 (emphasis in original). *Staub* also held that the decisionmaker's independent investigation does necessarily immunize it from liability. Only if the investigation results in an

adverse action for reasons “unrelated” to the supervisor's original biased report or action, will the employer be free of liability. *Id.* at 1193. “[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, *apart from the supervisor's recommendation*, entirely justified.” *Chattman*, 686 F.3d at 351, *quoting Staub*, 131 S.Ct. at 1193 (emphasis added by Sixth Circuit).

Following *Staub*, the Sixth Circuit reversed the lower court’s grant of summary judgment. The Court of Appeals found easily satisfied the requirement that the HR Director intended *Chattman*’s discipline. A tougher question was proximate cause. The Sixth Circuit determined the HR director’s discriminatory animus was the proximate cause of the disciplinary action because he both had a “position [of] influence,” probative of his ability to influence the ultimate decisionmaker, and he “actively inserted himself in the decision making process.” *Id.* at 353 (internal citation and quotation omitted). Importantly, the fact that the employer had conducted an independent investigation, which appeared not to have relied upon the HR Director’s input, did not defeat the Sixth Circuit’s finding of proximate cause.

Haire v. Bd. of Sup’rs of Louisiana State Univ. Agricultural and Mechanical Col., 719 F.3d 356 (5th Cir. 2013), was even a stronger case than *Chattman* for finding liability under the cat’s paw theory. In *Haire*, a female major in LSU’s Police Department applied for a promotion to Chief of Police. Although plaintiff met all the qualifications for the job, a male major, named Rabalais, who lacked a college degree, was given the position. Because a degree was a qualification for Chief of Police, Rabalais initially was appointed on an interim basis, and did not receive the permanent position until he completed his undergraduate course work. The ostensible reason for denying *Haire* the promotion was she made an improper report on LSU’s police report posting system, even though she did so under direct orders from the then Chief.

Clear evidence existed showing Rabalais’ gender bias, including his statement that “if a woman was appointed to the position of Chief, [he] would quit.” *Id.* at **36. However, the Chancellor, not Rabalais, denied plaintiff the promotion. At issue was whether Rabalais’ discriminatory animus could be imputed to the Chancellor. The record showed that Rabalais played a role in the investigation of *Haire* about the second posting that resulted in her reprimand. Rabalais also informed the Chancellor that *Haire* had failed to follow normal procedure when she made the improper posting – the reason given by the Chancellor for promoting Rabalais over her. The Fifth Circuit concluded that because Rabalais had “influence over the ultimate decisionmaker,” his gender bias should have been attributed to the Chancellor. Interestingly, the decision makes no mention of *Straub*.

VIII. Disparate Impact

United States v. City of New York, 717 F.3d 72 (2d Cir. 2013), involves longstanding litigation challenging the New York City Fire Department’s dismal record of hiring blacks and Hispanics. In 2002, when the litigation began, blacks and Hispanics, respectively, made up 2.6% and 3.7% of the City’s firefighters, compared to 25% and 27% of general population. The government sued the City under Title VII, claiming, among other things, that the FDNY’s procedures for screening and selecting firefighters had a disparate impact on blacks and Hispanics. An organization representing black firefighters joined the suit as Intervenor, and made a claim of pattern-or-practice disparate treatment.

At the trial level, the City did not contest the government's disparate impact claim. The District Court granted the Intervenor's motion for summary judgment as to the pattern-or-practice disparate treatment claim. The district court held that the Intervenor made out a prima facie case of pattern-or-practice discrimination through the statistical evidence showing stark disparities in the employment of minority and non-minority firefighters. The court held that the City had not rebutted the Intervenor's prima facie case by failing to challenge this statistical evidence. The District Judge ordered widespread relief, including, enjoining the use of the challenged exams, appointing a monitor to oversee FDNY's progress toward ending discrimination, ordering the development of policies to assure compliance with anti-discrimination requirements, ordering steps to reduce minority attrition and requiring efforts to recruit minority applicants.

Upon appeal, the disparate impact decision was not at issue since the City had not contested the claim below. The City did, however, challenge the court's grant of plaintiff's motion for summary judgment on the pattern-or-practice disparate treatment claim. The issue on appeal centered on the sufficiency of the City's evidence rebutting the Intervenor's prima facie case. The Court of Appeals held that the district court, in requiring the City to disprove the statistical disparities, had applied too stringent a standard for rebutting a prima facie case of pattern-or-practice discrimination. The court held that to rebut a prima facie case, a defendant is not limited to controverting the plaintiff's statistical evidence, but rather, may produce any admissible evidence disproving discriminatory intent. Here, the City provided sufficient evidence of the lack of discriminatory intent to rebut the prima facie case by showing that the exams given the firefighters were facially neutral; the City had made efforts, even if unsuccessful, to prepare job-related exams; and the City acted to recruit minorities. Accordingly, the Second Circuit overturned that part of the lower court's order granting summary judgment on the disparate treatment claim.

However, the Court, in the main, rejected the City's appeal that the scope of the district judge's injunction (based upon disparate impact liability) was too wide. While modifying or eliminating some aspects of the injunction which it felt were too intrusive (e.g. requiring the City to hire an outside consultant for recruiting minority candidates), the Court upheld all the primary substantive elements of the injunction.

In *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012), the Court of Appeals considered what evidence is needed to prove a disparate impact claim under Title VII where there is a small sample size. Eleven Asian-American police officers claimed that the Port Authority passed them over for promotions. They asserted individual disparate treatment, pattern-or-practice disparate treatment and disparate impact theories of liability. The case went to trial and the jury found the Port Authority liable under each theory for discriminating against seven of the eleven plaintiffs. On appeal, the Second Circuit held that it was error for the trial court to charge the jury on pattern-or-practice liability, since that theory is limited to cases brought by the government or in a class action. As to the other claims, individual disparate impact and disparate treatment discrimination, the court upheld the jury's findings (although it cut the damages award because of the lower court's misapplication of the continuing violation doctrine).

In its discussion of the disparate impact claim, the Court of Appeals reiterated that to prove the employer used a particular employment practice that caused a disparate impact on the basis of a protected status, the plaintiff must 1) identify a specific employment practice or policy; 2) demonstrate that a disparity exists; and 3) establish a causal relationship between the two. The Port Authority argued that the promotion process consisted of three distinct steps and that the plaintiffs had failed to identify which of the steps caused a statistical disparity in the promotion rate between Asian-American and white officers. The court rejected this argument, pointing out that the steps were more discrete in theory than in reality, and that, in practice, “these ‘steps’ in the promotion process were not capable of separation for analysis.” *Id.* at 155.

The Court of Appeals also found that the statistical evidence presented by the plaintiffs was sufficient to make out a disparate impact claim. Plaintiff’s expert found that over a six-year period none of the 12 Asians on the eligibility lists were promoted, compared to 36 out of 259 whites, a difference that would occur due to chance about 13% of the time. The Port Authority argued that the results were not statistically significant since statistical significance requires a threshold of 5% or less. The Court of Appeals agreed that the 5% level is generally used to show statistical significance, but that there is “no minimal threshold” for establishing disparate impact. Rather, courts should use a “case-by-case” approach that considers not only statistics but all the surrounding facts and circumstances. In this case, in addition to the statistical evidence, plaintiffs showed that *no* Asian-Americans were promoted over a six-year period; there was substantial evidence presented at trial that the plaintiffs were more qualified than white officers who were promoted; and where there were so few Asian-American candidates, it would be mathematically impossible to show statistical significance.

Unlike *Chin*, the Sixth Circuit, in *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013), found that the multi-step hiring process -- challenged as causing a disparate impact in the hiring of men and women for entry-level sales positions – was capable of being unbundled and analyzed as separate employment practices. The plaintiff’s failure to identify a specific practice within the hiring process doomed her disparate impact claim according to the Court of Appeals. The plaintiff was allowed to proceed on her individual disparate treatment claim, but the putative class action was dismissed.

The Tenth Circuit, in *Tabor v. Hilti, Inc.*, 703 F.3d 1206 (10th Cir. 2013), held that a plaintiff may base a Title VII individual disparate impact claim on a discretionary employment practice, notwithstanding *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541 (2011). Hilti, a tool manufacturer, allegedly used a rating system, called Global Develop and Coach Process (“GDCP”), in making promotion decisions. The problem was that more often than not the company promoted employees without regard to the GDCP. Managers were given broad discretion in making promotion decisions, and the specific type of promotions challenged by plaintiffs, that is, from inside sales representatives to Account Manager, were done by way of a “tap on the shoulder.” 703 F.3d at 1212.

The GDCP’s discretionary nature was the employment practice identified by the plaintiffs as causing a disparate impact in promotions between males and females inside sales representatives. Hilti argued that after *Wal-Mart*, a disparate impact claim cannot be founded upon a discretionary employment policy. The Tenth Circuit disagreed, noting that *Wal-Mart* held that a discretionary policy cannot be the basis of a class action suit and did not address individual

disparate impact claims. The court pointed out that in *Watson v. Worth Bank & Trust*, 487 U.S. 990 (1988), the Supreme Court held that discretionary practices may form the basis for an individual disparate impact claim. The Court of Appeals also determined that more than sufficient evidence existed to show a statistical disparity in the promotion rates between male and female inside sales representatives. Depending on the period of time reviewed, males were 50 to 60% more likely to be promoted to Account Manager than females, a much higher statistical disparity than the 20% disparity in selection rates required by the EEOC's guidelines.

The Sixth Circuit, however, did hold that under *Wal-Mart*, the plaintiffs could not certify a class action based upon Hilti's discretionary GDCP.

IX. Class Actions

In *Scott v. Family Dollar Stores, Inc.*, ___ F.3d ___, 2013 WL 560636 (4th Cir. Oct. 16, 2013), 51 female former or current store managers of Family Dollar Stores brought a class action suit in 2008 alleging that they were paid less than male store managers, in violation of Title VII and the Equal Pay Act. After *Wal-Mart* was decided in 2011, the plaintiffs moved for leave to file an amended complaint. Whereas the original complaint made general allegations that subjectivity and gender stereotyping resulted in gender-based pay disparities, the amended complaint, in light of *Wal-Mart*, also challenged four distinct company-wide policies. The district court denied leave to amend, holding that plaintiffs' claims were barred by *Wal-Mart*.

The Fourth Circuit reversed, and remanded the matter to the lower court. The Court of Appeals derived two principles from *Wal-Mart* that allowed the suit to proceed. First, under *Wal-Mart*, even where company-wide subjective decision-making is alleged, a putative class may still satisfy Rule 23's commonality requirement if there is an additional allegation of a policy of company-wide discrimination. Second, *Wal-Mart* applied only to discretionary decisions made by lower-level, not upper-level, employees. The Fourth Circuit held that where high-level officials exercise discretionary authority, affecting a broad segment of the corporation's employees, there is a basis to find Rule 23 commonality. Thus, the Court of Appeals was able to distinguish *Wal-Mart*, first, because in their proposed amended complaint, plaintiffs were not relying solely on discretionary decisionmaking, but were challenging specific employment practices. Secondly, the discretionary authority targeted by the plaintiffs was carried out by high-level managers. Accordingly, the Court of Appeals held that the district court abused its discretion in denying leave to amend.

X. Evidentiary Issues

In *Kidd v. Mando American Corp.*, ___ F.3d ___, 2013 WL 5382138 (11th Cir. Sept. 27, 2013), an American-born plaintiff was denied a promotion to assistant accounting manager. When she tried to find out why, the company's human resources manager told her that the exclusively Korean management team would never consider an American for the position. A decisive issue in the case was the admissibility of the human resources manager's statement, for only if it were admissible would the plaintiff be able to make out a prima facie case of discrimination and show pretext.

The Eleventh Circuit identified two ways that the manager's statement could be introduced. First, under Fed.R.Evid. 801(d)(2)(D) (a statement is not hearsay if it "is offered against a party and is ... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"), the statement is admissible if the plaintiff could show that the manager was, to some extent, involved in the decision to hire a Korean-born applicant rather than her, and, therefore, was an agent. For an agency relationship to exist, the manager need not be the sole or even primary decisionmaker. As long as the human resources manager was "consulted" by the defendant's management, or otherwise "included in the decisionmaking process," that may be enough to make his statement admissible. *Id.* at *10. By contrast, if the manager's role was "largely ministerial," he could not be considered an agent for purposes of Rule 801(d)(2)(D).

Alternatively, if the HR manager's statement that the company would never hire an American for the position is interpreted as him simply repeating what the decisionmakers told him, than it may be considered an admission by a party opponent. However, if the statement is viewed as the manager's personal opinion or a conclusion based upon what he had heard or observed, it would be non-admissible hearsay. Because the factual record surrounding the HR manager's statement was not developed, the Court of Appeals remanded the matter to the district court to determine the statement's admissibility.

In *Griffin v. Finkbeiner*, while the race discrimination was dismissed on summary judgment (*see* Section VI, above), the retaliation claim was allowed to go to a jury. At trial, the court excluded non-party witnesses' testimony regarding other acts of retaliation, and then entered judgment as a matter of law to the defendant. The basis of the trial court's in limine decision was that the plaintiff had not proven that there was a common decisionmaker tying together all of the retaliatory acts. The Court of Appeals held that the lower court's analysis was erroneous under *Sprint/United Mgmt. Co. Mendelsohn*, 522 U.S. 379 (2008). *Sprint* held that the admissibility of "me-too" evidence depended upon many factors, only one of which was a common decisionmaker. Among the relevant factors not reviewed by the district court were temporal and geographic proximity, whether the various decisionmakers knew of the other decisions, whether the employees were similarly situated, and the nature of each employee's retaliation complaint. The Court of Appeals remanded the matter to the district court to consider the other factors. And, because the exclusion of the evidence was not harmless error, the appellate court reversed the judgment as a matter of law.

XI. Discovery

The Sixth Circuit, in *Serrano v. Cintas Corp.*, 699 F.3d 884, 901–02 (6th Cir.2012), rejected the "apex doctrine," which prohibits the depositions of high level executives absent a showing of their unique personal knowledge of relevant facts. The Court of Appeals held that Fed.R.Civ.P. 26(c)(1) governs protective orders. Rule 26(c)(1)(a) provides that a court may bar a deposition to "protect a part or person from annoyance, embarrassment, oppression, or undue burden or expense." The requirement that there be a showing of some harm to the deponent before s/he is excused from a deposition applies equally to high level executives. The lower court erred in assuming that "harassment and abuse" are "inherent" in depositions of high-level corporate officials. It is not enough to bar a high-level official's deposition on the basis of his lack of personal knowledge; a finding of harm is required.