District of Columbia Court of Appeals

No. 13-CV-0483

TYRONE BRYANT,

Appellant

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellees

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT AND FOR REVERSAL

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Certificate as to Parties, Rulings, and Related Cases

(A) **Parties and Amici.** All parties appearing before the Superior Court and in this Court are listed in the Appellant's Brief.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Appellant's Brief.

(C) **Related Cases.** There are no related cases.

Rule 29 (c) Statement

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

Rule 29 (c)(3) Statement of Amicus

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the three jurisdictions in which its members primarily practice – the District of Columbia, Maryland, and Virginia.

MWELA's members and their clients have an important interest in the proper interpretation of the anti-retaliation provision of the D.C. Human Rights Act, including whether employees can rely upon circumstantial evidence of the decision maker's knowledge of the employee's protected activity.

An Unopposed Motion for Leave is filed contemporaneously with this Brief.

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INTRODUCTION

This case presents an important question of public policy: Shall the important goals of the District of Columbia Human Rights Act of 1977, D.C. Code §§ 2-1401.01 *et seq.* ("DCHRA"), be jeopardized by allowing employers to retaliate against potential witnesses in proceedings under the DCHRA, except in the rare instances where the witnesses are able to present direct evidence that the formal decisionmaker had personal knowledge that the witness was planning to testify truthfully that there was a violation?

In this case the Superior Court improperly disregarded several evidentiary sources from which a reasonable jury could have legitimately inferred that Mr. Bryant's concededly protected activity of planning to give truthful supporting testimony on behalf of a co-worker who had sexual harassment claims was the cause of his termination without explanation after eighteen years of discipline-free, exemplary, and frequently-commended performance, and held that none of this mattered unless Mr. Bryant could show such personal knowledge.

If this decision is affirmed, employers will be immune from claims of violations of the DCHRA whenever they are large enough to arrange for a formal decisionmaker who is far enough removed from witnesses that they can retaliate freely, chilling adverse testimony without accountability because the witnesses will be unable to prove their direct personal knowledge of the protected activity.

The large and important goals of the DCHRA are threatened at their core by the decision below.

SUMMARY OF ARGUMENT

Amicus respectfully submits that this Court should find that employees, in bringing retaliation claims under the DCHRA, can use circumstantial evidence to draw the reasonable inference that the decision maker knew of the employee's protected conduct when taking an adverse employment action against the employee.

ARGUMENT

A. The Goals of the DCHRA Should Guide Its Construction

The DCHRA begins with a statement of the Council's intent: "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit . . . ." D.C. Code § 2-1401.01. The *Report of the Council of the District of Columbia, Committee on Public Services and Consumer Affairs,* at 3 (July 5, 1977), stated that "the elimination of discrimination within the District of Columbia should have the 'highest priority.'" This Court relied on these statements of the importance of the policies of the DCHRA in *Howard University v. Best*, 484 A.2d 958, 978, 986 (D.C. 1984), as a guide to the proper construction of the statute.

B. An Effective Means of Challenging Retaliation Is Essential to Accomplishing the Goals of the DCHRA

This Court has long recognized that prohibitions of retaliation are important to safeguard the rights of employees. "The retaliatory discharge provision is an important protection against acts by employers intended to discourage valid workers' compensation claims . . . ." *Lyles v. D.C. Dept. of Employment Services*, 572 A.2d 81, 85 (D.C. 1990).

The U.S. Supreme Court takes the same view. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006), stated: "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial,

ethnic, religious, or gender-based status. . . . The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." (citation omitted). The Supreme Court then explained why the reach of the anti-retaliation provision had to be broader than the scope of the anti-discrimination provision to accomplish the goals of Title VII:

> To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments" . . . would be achieved were all employment-related discrimination miraculously eliminated.
>
> But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. . . . A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve **the antiretaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms.**" . . .

Id. at 63-64 (emphasis added) (citations omitted).

Similarly, the Supreme Court observed in *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), that decisions limiting the scope of anti-retaliation statutes jeopardize the goals of the statutes:

> If it were clear law that an employee who reported discrimination in answering an employer's questions 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. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005); see also *id.*, at 37, and n.58

(compiling studies). . . .

Id. at 279.

C. <u>Employers Will Not Admit Knowledge of Protected Activity, and Employees Are Often Not in a Position to Observe It</u>

This Court, in *Abramson Assoc., Inc. v. D.C. Dep't of Employment Services*, 596 A.2d 549 (D.C. 1991), stated: "Because an employer rarely declares that retaliation is the motive for the employee's discharge, the employee must ordinarily rely upon circumstantial evidence to prove retaliatory animus." *Id.* at 553.

Many federal courts have also emphasized the rareness of cases in which the employer admitted discrimination or retaliation, or admitted to facts on which a finding of liability could be based. These courts have emphasized the corresponding need to rely on circumstantial and inferential proof. *Hunt v. Cromartie*, 526 U.S. 541 (1999), a voting rights case, stated: "Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." The federal courts of appeal have reached consistent holdings. *See, e.g.*, *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("Because discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.2 (1st Cir. 1999) ("This method of proving a Title VII claim is all the more important now than it was when *McDonnell Douglas* was written, since 'smoking gun' evidence is 'rarely found in today's sophisticated employment world.'"); *Sanders v. New York City Human Resources Administration*, 361 F.3d 749, 755 (2d Cir. 2004) ("Courts recognize that most discrimination and retaliation is not carried out so openly as to provide direct proof of it."); *Carlton v. Mystic Transportation, Inc.*, 202 F.3d 129, 135 (2d Cir. 2000) ("Direct evidence of

discrimination is not necessary . . . because proof is seldom available with respect to an employer's mental processes. Instead, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence, since an employer who discriminates against its employee is unlikely to leave a well-marked trail, such as making a notation to that effect in the employee's personnel file.") (citations omitted.); *Bickerstaff v. Vassar College*, 196 F.3d 435, 448 (2d Cir. 1999) ("Moreover, as discrimination will seldom manifest itself overtly, courts must 'be alert to the fact that [e]mployers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.'") (citation omitted); *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999) ("The Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."); *Rutherford v. Harris County*, 197 F.3d 173, 180 n.4 (5th Cir. 1999) (direct evidence "'is rare in discrimination cases.'") (citation omitted); *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599 (7th Cir. 2003) ("For obvious reasons, we rarely encounter direct evidence.") (citation omitted); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) ("In pleading discrimination cases, litigants, usually as an alternative argument, will often contend that they have unearthed direct evidence of discriminatory intent, but such direct evidence—'eyewitness testimony as to the employer's mental processes'—is rarely found" since "most employers are careful not to openly discriminate and certainly not to publicly admit it.") (citation omitted); *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000) ("Because employers are usually careful not to offer smoking gun remarks indicating intentional discrimination, the Supreme Court established the burden

shifting approach as a means of evaluating indirect evidence of discrimination.") (citation omitted).

Just as employers are normally unwilling to admit, employees are normally unable to prove, that a higher-level manager acting as an "official decisionmaker" learned of a protected activity from subordinates or from other managers or from viewing company records. Employees engaging in protected activities have no right to be present when higher-level managers discuss these employees with subordinates, or with other managers, or when higher-level managers view company records about these employees.

It is extraordinarily easy for such higher-level managers to have a convenient loss of memory, or to lie outright, and deny knowledge. To allow an employer to escape liability simply because of a formulaic recitation that its higher-level decisionmakers did not know what their subordinates knew, or did not know what company documents showed, would make the goals and promises of the DCHRA illusory. Amicus respectfully submits that it is essential to the goals and promises of the DCHRA that all forms of circumstantial evidence be available to show the required causal relationship between the adverse action and the protected activity.

The trial court erred in this case by treating circumstantial evidence as relevant to show only the knowledge of the decisionmakers, as if this were a requirement of the *prima facie* case independent of the causation requirement. Opinion at 12.[1] With such a misplaced view of the function of the circumstantial evidence, it is easy to misunderstand

[1] Both under the DCHRA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), the third element of a retaliation claim is a causal relationship between the protected activity and the challenged adverse employment action. *Propp v. Counterpart Int'l*, 39 A.3d 856, 868 (D.C. 2012) (DCHRA); *Jones v. Bernanke*, 557 F.3d 670, 677, 384 U.S. App. D.C. 443, 450 (D.C. Cir. 2009) (Title VII).

the significance of that evidence, as the trial court did here. None of Mr. Bryant's circumstantial evidence pointed directly to knowledge; instead, the evidence pointed to causation. An inferential finding of causation based on circumstantial evidence necessarily results in the inference that decisionmakers—or those non-decisionmakers who affected their actions—knew about the protected activity. The lower court simply put the cart before the horse.

One example should make this clear. If a highly-commended employee of long standing and without disciplinary problems—like Mr. Bryant herein—files a complaint of discrimination with the D.C. Office of Human Rights ("OHR") and the employer fires the employee within minutes after Human Resources receives notice of the filing from OHR, the employee will not be able to offer evidence directly contradicting the decisionmaker's blithe denials of knowledge, backed up by a compliant Human Resources official. A rebuttable inference of causation is obvious from the timing, the employer's departure from its ordinary practice of continuing the employee's employment, and the absence of any disciplinary problems.[2] Since causation can be inferred, knowledge can also be inferred. Any other approach places the goals and promise of the DCHRA in great jeopardy.

D. This Court and Federal Courts Have Long Accepted Circumstantial Evidence of Causation in Retaliation Cases

As this Court stated, "Because an employer rarely declares that retaliation is the motive for the employee's discharge, the employee must ordinarily rely upon circumstantial evidence to prove retaliatory animus." *Abramson*, 596 A.2d at 553.

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[2] *Chang v. Inst. for Public-Private Partnerships, Inc.,* 846 A.2d 318, 329 (D.C. 2004), a case resting on temporal proximity alone, is similar to the hypothetical in text.

Therefore, this Court recognized in *Raphael v. Okyiri,* 740 A.2d 935 (D.C. 1999), where there is office chatter about an event, "it is common knowledge that such a grapevine can often travel directly to the boss." *Id* at 955. In *Okyiri*, the decisionmakers insisted that they had no knowledge of the employee's whistleblower activities. *Id.* at 954. This Court nevertheless held that the employee had demonstrated sufficient evidence at trial to prove a nexus between her whistleblowing activities and her termination. Noting that "[o]ne can often learn a great deal from the timing of events," and that the termination followed "close on the heels" of the employee's collaboration with the OIG," *id.* at 954,[3] this Court held that the trial court was not obligated to credit the decision maker's assertion that the decision maker "was unaware of what was going on, or that the disclosures and Ms. Okyiri's removal were unrelated." *Id.* at 955.

This Court has additionally accepted very close temporal proximity as evidence of causation. *Propp v. Counterpart Int'l*, 39 A.3d 856, 868 (D.C. 2012) ("Temporal proximity between the protected activity and the adverse action can establish the causal connection.") (collecting cases). This principle is generally accepted and extends broadly across the field of law. In *Bahura v. S.E.W. Investors*, 754 A.2d 928 (D.C. 2000), this Court drew from a variety of cases in different contexts, including tort and employment law, to hold that a trier of fact is justified in granting the inference of causation based on proximity in time between cause and effect:

> To be sure, a trier of fact may be well advised to exercise a measure of caution when assessing a contention that an antecedent event necessarily caused a later one. "[C]ontiguity of space or nearness of time do not, by themselves, afford a proper test for determining whether the negligence charged was the proximate

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[3] In *Okyiri*, the OIG began its investigation in earnest in January 1993, and the employee was terminated in May 1993. 740 A.2d at 936, 952.

> cause of the injury." 65 C.J.S. Negligence § 107, at 1152 (1966 & Supp.1999) (footnote omitted). Rain on the day the war ends does not prove that peace will not brook sunshine. In other words, if something happens after an occurrence (*post hoc*), it has not necessarily happened on account of that occurrence (*propter hoc*); hence the *post hoc ergo propter hoc* fallacy. But neither obeisance to Latin phrases nor our more general obligation to exercise caution before converting "after" into "because" requires us to be blind to common-sense inferences from the timing of the somatization plaintiffs' symptoms. On the contrary, "the lapse of time which may exist between the time of negligent construction and eventual injury is a factor for the jury to consider in determining the causal connection between the negligence and the injury." *American Reciprocal Insurers v. Bessonette*, 235 Or. 507, 384 P.2d 223, 224 (1963) (en banc). In the *Jones, Otis* and *Okyiri* cases, we held that causation could reasonably be inferred where a single plaintiff incurred injury or other detriment soon after the conduct or event that was alleged to have been responsible. In those cases, each of which involved but one complainant, **we held in effect that the trier of fact was not required to attribute to coincidence the proximity in time between conduct and its alleged consequences, but could fairly infer a causal relationship**.

Id. at 943 (emphasis added). The decision referred to *Jones v. Miller*, 290 A.2d 587, 591 (D.C. 1972) (tort); *Otis Elevator Co. v. Tuerr*, 616 A.2d 1254, 1260 (D.C. 1992) (tort) and *Raphael v. Okyiri*, 740 A.2d 935, 955 (D.C. 1999) (whistle-blower case) (*supra*)).

Chang v. Inst. for Public-Private Partnerships, Inc., 846 A.2d 318 (D.C. 2004), recognized the same principle: "In the instant case, Ms. Chang presented evidence that she took protected medical leave and was fired on the day she was to have returned to work. This evidence is sufficient to establish a prima facie case of retaliation." *Id.* at 329 (citation omitted).

The federal courts agree. *Jones v. Bernanke*, 557 F.3d 670, 384 U.S. App. D.C. 443 (D.C. Cir. 2009), stated:

> The Board first claims that the temporal proximity evidence is worthless absent additional evidence that Jones's supervisors knew of his September 2000 request—knowledge the Board insists they lacked. We agree that Jones's supervisors could not have retaliated against him unless they had knowledge of

> his protected activity. To survive summary judgment, however, Jones needn't provide direct evidence that his supervisors knew of his protected activity; he need only offer circumstantial evidence that could reasonably support an inference that they did. And we have repeatedly recognized that the precise kind of evidence Jones has offered—that "the *employer* had knowledge of the employee's protected activity, and the adverse personnel action took place shortly after that activity"—is "adequate to permit an inference of retaliatory motive," at least at the prima facie stage. . . . Of course, that such evidence would show intent at the prima facie stage does not resolve the question of retaliation *vel non.* Yet the reason we deem such evidence sufficient to support a prima facie case—that it tends to support a circumstantial inference of retaliation—applies to the ultimate inquiry as well. Moreover, if such evidence can support an inference of actual retaliatory motive, it necessarily can support an inference of mere knowledge.

Jones, 557 F.3d at 679, 384 U.S. App. D.C. at 452 (citations omitted); *see also Holcomb v. Powell*, 433 F.3d 889, 903, 369 U.S. App. D.C. 122, 136 (D.C. Cir. 2006) (recognizing temporal proximity when employee "traded correspondence" with unidentified "senior [agency] personnel" around the time that her supervisors allegedly retaliated against her); *Rochon v. Gonzales*, 438 F.3d 1211, 1220, 370 U.S. App. D.C. 74, 83 (D.C. Cir. 2006) (recognizing temporal proximity when agency had knowledge of employee's protected activity); *Singletary v. District of Columbia*, 351 F.3d 519, 525 n.6, 359 U.S. App. D.C. 1, 7 n.6 (D.C. Cir. 2003) (similar).

In *Hamilton v. Geithner*, 666 F.3d 1344, 399 U.S. App. D.C. 77 (D.C. Cir. 2012), the D.C. Circuit similarly held, notwithstanding the employer's evidence that the decisionmaker was not aware of the protected activity—"the Secretary claims that Hamilton failed to show that Burns knew of his complaint," *id.* at 1358, 359 U.S. App. D.C. at 91—that where the protected activity and adverse employment action were "very close in time," temporal proximity alone can support an inference of causation. *Id.* at 1357-58, 359 U.S. App. D.C. at 90-91.

Likewise, the district courts in the District of Columbia have recognized that an

employee may establish a retaliatory nexus by way of circumstantial evidence demonstrating that the knowledge should be imputed to the decisionmaker. *Shamey v. Administrator, General Services Admin.,* 732 F. Supp. 122, 132 (D.D.C. 1990) ("The plaintiff must establish that the employer had actual or imputed knowledge" of the plaintiff's complaint activity, "and that motivated by such knowledge, the employer acted with the intent to retaliate against or to punish the plaintiff.") (quoting *Downey v. Isaac,* 622 F. Supp. 1125, 1132 (D.D.C. 1985)); *Rogers v. McCall*, 488 F. Supp. 689 (D.D.C. 1980) (same).

E. **An Employer May Be Liable Even if the Decisionmaker is Personally Innocent**

The Supreme Court has provided guidance on this point that is very useful. In *Staub v. Proctor Hospital*, 562 U.S. __, 131 S. Ct. 1186 (2011), a case brought under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.*, the Court rejected the hospital's argument that an employee was required to show discriminatory animus by the decisionmaker. Just as the decisionmaker's subordinate managers here—Superintendent Dexter Dunbar and Deputy Superintendent David "DJ" Thomas—clearly possessed knowledge of Mr. Bryant's protected activities, the subordinate managers in that case clearly had animus against Mr. Staub because of his military obligations and tried to fire him. 131 S. Ct. at 1189 ("Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations."). Just as the formal decisionmaker here—Vincent Schiraldi, Director of the D.C. Department of Youth Rehabilitation Services—claimed to be unaware of Mr. Bryant's protected activities, the formal decisionmaker at Proctor Hospital—Linda Buck, Proctor's vice president of human resources—had no

animus against Mr. Staub. Just as the District of Columbia here argues that the ignorance of its formal decisionmaker bars Mr. Bryant's retaliation claim, Proctor Hospital argued that the innocence of its formal decisionmaker barred Mr. Staub's claim.

The Supreme Court's rejection of Proctor Hospital's argument recognized that the law is violated if supervisors with animus intended to cause an employee's termination for an unlawful reason by causing the official decisionmaker to take adverse action even if he or she was innocent of any animus. The Court explained:

> . . . An employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.
>
> Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule. As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause. . . . Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. **But the 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**. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." **The employer is at**

> **fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision**.

Id. at 1192-93 (emphases added; citations omitted).

The employer's arguments here should receive equally short shrift. The lower court mentioned no justification for the discharge of a long-time employee who admittedly performed his job extremely well and had had no disciplinary incidents, and stated there was no explanation. No other proximate cause of Mr. Bryant's termination has even been suggested, and no one in a position to know the internal communications between Superintendent Dunbar and DJ Thomas, on the one hand, and Director Schiraldi, on the other, admitted anything about these communications that explained why Mr. Bryant was so suddenly fired without cause. Such situations are not uncommon. This is why circumstantial evidence is so important.

F. <u>There Was Adequate Circumstantial Evidence in This Case for a Reasonable Inference of Causation</u>

The Supreme Court has also provided guidance on circumstantial evidence of unlawful discrimination. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a housing discrimination case, the Court stated: "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* at 267 (footnote omitted.)

In this case, there was sufficient circumstantial evidence for a reasonable jury to conclude that the ultimate decisionmaker was aware of Mr. Bryant's protected activity. First, there was evidence that Mr. Dunbar—who knew about Mr. Bryant's protected

activity[4]—had the authority to recommend the termination to the Director of Youth Rehabilitation Services. Mr. Bryant's brief, which *amicus* endorses, explains that, under *Staub*, 131 S. Ct. 1186, Mr. Dunbar's involvement in the termination decision is sufficient to establish liability. Second, only one month separated Mr. Bryant's protected activity and his termination. This very close temporal proximity was sufficient – standing alone – to support causation.

This Court should find that its prior decision in *McFarland* does not require direct evidence of retaliatory intent. Here, the trial court relied heavily on *McFarland v. George Washington University*, 935 A.2d 337 (D.C. 2007), in which this Court stated that "in order to establish the element of causation in a retaliation claim, an employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity." But not even *McFarland* requires direct evidence of the decisionmaker's knowledge. Moreover, the primary holding of *McFarland* – which is that corporate knowledge of the protected activity cannot be imputed to the decisionmaker – contradicts *Raphael v. Okyiri,* 740 A.2d 935 (D.C. 1999), discussed *supra*, and is largely premised on this Court's belief that imputing knowledge was not permitted by "the prevailing federal view."

McFarland relied on the earlier case of *Blackman v. Visiting Nurses Ass'n*, 694 A.2d 865 (D.C. 1997). *McFarland,* 935 A.2d at 346, 347, and 352. This is significant because *Blackman* established that an employer can prevail on summary judgment even where the employee establishes that the supervisor who initiated the adverse employment action did so as a result of retaliatory animus, so long as the employer can demonstrate

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[4] See Superior Court Decision at 1, n.1.

that the ultimate decision maker conducted an independent investigation that was insulated from the supervisor's animus prior to terminating the employee. *Id.* at 870 ("The discriminatory animus of an employee's supervisor, who is not involved in the decision to terminate, can not, as a matter of law, be imputed to the ultimate decision maker."). This aspect of *Blackman* was overturned by the Supreme Court. *Staub,* 131 S. Ct. at 1193 ("We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.").

Furthermore, the *McFarland* Court relied heavily on decisions of the U.S. Court of Appeals for the Seventh Circuit in its determination that an employee must show that the decision maker must have had actual knowledge of the protected activity. *McFarland*, 935 A.2d at 357 ("The United States Court of Appeals for the Seventh Circuit has explained that it is not sufficient that the defendant could or even should have known about the plaintiff's complaints; the decision-maker must have had actual knowledge of the complaints for her decisions to be retaliatory.") (citing *Luckie v. Ameritech Corp*., 389 F.3d 708 (7th Cir. 2004)). But in *Luckie*, the Seventh Circuit made it clear that establishing the decision maker's knowledge can be achieved by circumstantial evidences and inferences in the employee's favor: "[the employee] must offer evidence that would support a reasonable inference that [the decision maker] was aware of [the employee's] allegations of discrimination. *Luckie*, 389 F.3d at 715.

Another Seventh Circuit decision, *Dey v. Colt Constr. & Dev. Co*., 28 F.3d 1446 (7th Cir. 1994), gives valuable insight into how an employee would create such an inference. In *Dey,* even though the decision maker claimed not to know about the protected activity, the evidence showed that supervisors with knowledge of the protected activity attended meetings at which the termination was discussed, that one supervisor lied about knowing about the protected activity and that a jury could infer that the supervisor also lied when he said he had not told the decision maker about it, and that the termination came only four weeks after the complaint, all supported an inference that the decision maker was aware of the protected activity. *Id.* at 1458-59. *Dey* further reinforces the notion that *McFarland*'s strict approach to demonstrating the decisionmaker's knowledge is inconsistent with federal jurisprudence.

It would, moreover, be consistent with decisions of the D.C. courts to permit a reasonable inference that the decision maker knew about the protected activity under circumstances in which the knowledge of other supervisors or employees would be imputed to the decision maker. "Notice to the agent is notice to the principal not only as to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and still in his mind at the time of his acting as such agent, if the agent is at liberty to communicate such knowledge to the principal." *Bowen v. Mt. Vernon Sav. Bank*, 105 F.2d 796, 798, 70 App. D.C. 273, 275 (D.C. Cir. 1939).

"The so-called presumption that the principal knows what the agent knows is irrebuttable; it cannot be avoided by showing that the agent did not in fact communicate his knowledge." *Id.* at 799. The rule "is true whether the officer or agent has actually

disclosed the information to the corporation." *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468, 478 (D.D.C. 1997). "The reason for the rule is simple: it is the duty of the officer or agent to communicate his or her knowledge to the corporation, and the law presumes that the officer or agent has carried out this duty." *Id.*; *see also McHugh v. Duane,* 53 A.2d 282 (D.C. 1947) ("[t]he rule springs from the actual or presumed performance of the duty resting upon the agent to inform the principal of all matters coming to his notice or knowledge concerning the subject matter of the agency, which it is material for the principal to know for his protection or guidance.").

Applying these imputed knowledge cases to the retaliation setting would permit an inference that the decision maker knew about the protected activity if a supervisor or other employee of the employer knew about the protected activity and also held a position in which it could be expected that he or she would report such knowledge to the decision maker or where it is shown that the employee had previously disclosed facts concerning other employees' protected activity to the employer.

CONCLUSION

Based on the foregoing, *amicus* respectfully submits that in light of the decisions of this Court, and the prevailing Federal view, as illustrated by the U.S. Courts of Appeal for the D.C. and Seventh Circuits, *McFarland* cannot be read for the proposition that an employee must show some direct evidence that the decision maker knew about the employee's protected activity. Instead, that knowledge may be established by circumstantial evidence and other evidence from which a reasonable inference of that knowledge can be drawn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, this Amicus Brief was served by electronic mail, with a copy to follow by first class mail, postage prepaid, to counsel of record:

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