DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 16-CV-1135

DISTRICT OF COLUMBIA,

Appellant,

v.

TYRONE BRYANT,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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Dated: June 22, 2018

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 Appellee's Brief.

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

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

RULE 29(c) STATEMENT OF *AMICUS*

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 INTEREST 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 District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

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, D.C. Code § 2-1401 *et seq.*, including its "motivating reason" causation standard, the

permissible range of circumstantial evidence of the decision-maker's knowledge of an employee's protected activity, and "cat's paw" liability for retaliation where a decision-maker without such knowledge is influenced or manipulated by someone with both knowledge and discriminatory animus.

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STATEMENT OF FACTS

Amicus adopts the appellee's statement of the case, Brief of Appellee at 1-4, and statement of facts, Brief of Appellee at 4-11.

This brief addresses what *amicus* believes are the pending legal issues of greatest significance to the future understanding and enforcement of the DCHRA: the affirmation of the "motivating factor" standard for assessing causation in retaliation cases under the D.C. Human Rights Act ("DCHRA"), D.C. Code § 2-1401 *et seq*., and the recognition of two particular categories of evidence as valid bases for DCHRA retaliation liability: circumstantial evidence raising an inference of decision-maker knowledge of protected activity, and evidence of "cat's paw" influence or manipulation of a decision-maker, even one without knowledge, by someone else who has both knowledge and intent to discriminate.

SUMMARY OF ARGUMENT

This *amicus* brief focuses on two issues before the Court, both of great importance to the long-term protective function of the DCHRA, and urges that the Court take a strong position on each. First, retaliation claims under the Act are to be adjudicated under the "motivating factor" test for liability that applies to DCHRA discrimination claims across the board. The Act expressly requires that every "unlawful discriminatory practice" receive that treatment, and also states that retaliation is among those prohibited discriminatory practices. This Court has so recognized in *Furline v. Morrison,* 953 A.2d 344, 357 (D.C. 2008), by holding that DCHRA retaliation and status discrimination claims are to be tried under the same "motivating factor" standard. Nothing in the federal courts' interpretation of federal anti-

discrimination law, *see University of Southwest Texas Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013), negates the DCHRA's explicit statutory text to this effect, or permits or requires this Court to read into the Act a liability standard that employers have been unable to write into it through the political process.

Second is that proof of an employer's retaliation for a worker's civil rights activity must not be slavishly tied to evidence of the decision-maker's actual knowledge of that activity. This question was considered for Title VII retaliation in *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011), in which the Supreme Court recognized the reality that an unlawfully motivated manager or co-worker could so influence a decision-maker, for example by deception or manipulation, as to cause retaliatory action even where the decision-maker was never made demonstrably aware of the protected activity. A rule foreclosing "cat's paw" claims in the District, in the face of proof that a retaliator duped or deceived a decision-maker, would be analogous to a homicide statute that decriminalized the principal's role in murder for hire.

The posture of this case when it reached this Court in 2013, *Bryant v. District of Columbia,* 102 A. 3d 264 (D.C. 2014) ("*Bryant I*"), led this Court to remand for trial on the circumstantial evidence of the decision-maker's actual knowledge. However, if the Court holds (although it did not before, and should not now) that the evidence of the decision-maker's actual knowledge was insufficient to reach the jury, then *amicus* urges recognition of "cat's paw" influence on an unwitting decision-maker, as in *Staub,* as a viable ground for DCHRA retaliation liability, and reconciliation of *McFarland v. George Washington Univ.*, 935 A.2d 337 (D.C. 2007), to the extent necessary to acknowledge *Staub*'s alternative route to relief for the same bias-based harm.

ARGUMENT

A. "Motivating reason" or "motivating factor" causation under the DCHRA is alive and well after *Nassar*

The DCHRA explicitly bakes "motivating reason" liability into its overall structure. The central DCHRA anti-discrimination provision states that "it shall be an unlawful discriminatory practice" to take adverse employment action "*wholly or partially* for a discriminatory reason." D.C. Code § 2-1401.11(a) (emphasis added). The statute-wide definition section, D.C. Code § 2-1401.02(31), defines "unlawful discriminatory practices" to include all nine parts, A through I, of the DCHRA's list of prohibited discriminatory acts. D.C. Code, Title 2 (Government Administration), Chapter 14 (Human Rights), Unit A (Human Rights Law), Subchapter II (Prohibited Acts of Discrimination) (containing parts A through I), *available at* https://code.dccouncil.us/dc/council/code/titles/2/ chapters/14/units/A/subchapters/II/ (last visited June 21, 2018). Part G of the Subchapter II discriminatory practices list, captioned "Other Prohibited Practices," D.C. Code §§ 2-1402.61 through 2-1402.68, begins with "coercion or retaliation." D.C. Code § 2-1402.61. In other words, retaliation, along with every other discriminatory practice made unlawful by the DCHRA, is expressly covered by the "wholly or partially" standard for liability in § 2-1401.11(a).

"But for" causation, meanwhile, is defined in a single DCHRA provision—the one regarding "subterfuge"—using the admittedly awkward but readily comprehensible phrase "but for, wholly or partially." D.C. Code § 2-1401.11(b), cited in Brief of Appellee at 29-30, 39. Because of the unique logic of the subterfuge claim, that language is arguably non-redundant where it appears; but as Appellee points out, in

no other DCHRA provision is "but for" causation mentioned at all. Brief of Appellee at 29-30.

This Court recognized in *Furline v. Morrison,* 953 A.2d 344, 357 (D.C. 2008), that given this statutory structure and express language, DCHRA discrimination and retaliation claims should be treated under exactly the same "motivating factor" standard. *Furline* properly held that under the DCHRA as written, non-discriminatory and non-retaliatory reasons had to be the employer's *sole* basis for the adverse action in order to immunize that action from liability as a matter of law. *Id*. at 351. *See also Daka, Inc. v. McCrae*, 839 A.2d 682, 690 (D.C. 2003) (allowing a jury to determine whether professed reason for adverse action "masked, at least partly," a retaliatory purpose). Indeed, *Furline* went so far as to hold that an impermissible motive, either to discriminate or to retaliate, need not even have "played a *substantial* part in the [adverse employment] decision . . . the DCHRA does not impose a 'substantiality' requirement"). *Id*. at 351 n.9.

In *University of Southwest Texas Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013), the Supreme Court read a "but for" causation requirement for retaliation into Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), even though mixed motive continues to be a statutory basis for Title VII status discrimination liability. 42 U.S.C. § 2000e-2(m). At trial in the present case, each of these two conflicting standards was the basis for a jury instruction: a *Nassar*-based "but for" causation instruction on Mr. Bryant's Title VII retaliation claim, and a *Furline*-based "motivating reason" instruction on his DCHRA retaliation claim (in accordance with D.C. pattern jury instructions). Brief of Appellee at 15. The jury distinguished dispositively between the

two standards, finding no liability on Mr. Bryant's Title VII claim under the "but for" test, and finding liability on his DCHRA claim under the "motivating reason" test.

Thus the question here narrows to whether, after *Nassar*, this Court is obliged to overturn its own decision in *Furline* and construe the DCHRA anti-retaliation provision to exculpate any defendant who can adduce a motive in addition to the retaliatory one, even though the DCHRA's text explicitly allows claims of "wholly or partially" discriminatory motive under all its provisions, including retaliation. D.C. Code § 2-1401.02(31).

The District concedes that DCHRA legislative history documentation is scant, Brief of Appellant at 37 n.13, but then inappropriately ignores the statutory scheme described above. Instead, it contends that *Nassar* "but for" causation should be imported into the DCHRA for retaliation claims merely because the U.S. Supreme Court has given Title VII that narrow interpretation, regardless of the D.C. Council's acknowledged intent to exceed Title VII's level of employee protections. *See Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 886-87 (D.C. 2008) ("in enacting the DCHRA, the [D.C. Council] intended to go above and beyond the protections afforded to employees by Title VII").

In short, Title VII and the DCHRA are fundamentally different in language, structure and legislative purpose. This Court should so pronounce, definitively enough to put the District's twisted construction to rest once and for all. *See*, *e.g.*, *Railco Multi-Construction Co. v. Gardner*, 564 A.2d 1167, 1169 (D.C. 1989) (construction of statutory language proceeds "in light of the purposes of [the] statutory scheme"), citing *Thomas v. Dep't of Employment Servs.*, 547 A.2d 1034, 1037-38 (D.C. 1988).

B. "Cat's paw" influence, already recognized by implication, should be expressly made part of DCHRA law

1. *Circumstantial evidence is fully satisfactory as proof of retaliatory motive*

Courts have accepted circumstantial proof of discriminatory motive at least as far back as *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977) (housing); *Rogers v. Lodge*, 458 U.S. 613 (1982) (voting); and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981), and *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147 (2000) (employment). "'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace v. Costa,* 539 U.S. 90, 100 (2003), quoting *Rogers v. Missouri Pacific R. Co*., 352 U. S. 500, 508, n. 17 (1957). *See also, e.g*., *Cannon v. United States*, 838 A.2d 293, 297 (D.C. 2004) (even in criminal appeals, under the highest of evidentiary burdens, "we do not draw any distinction between direct and circumstantial evidence").

Like any discriminatory behavior, one official's retaliatory motive as the cause of another's adverse action can be proven by circumstantial evidence if an open admission or other direct evidence is unavailable. *See*, *e.g., Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006) (recognizing temporal proximity as basis for inference of employer knowledge of protected activity where employee "traded correspondence" with unidentified "senior [agency] personnel" around the time that her supervisors allegedly retaliated against her).

In the prior appeal in this case, *Bryant I*, the immediate evidentiary question was whether the evidence of direct or indirect communication between the biased individual and the decision-maker was sufficient to permit an inference of actual decision-maker knowledge. *Bryant*, 102 A.3d at 268 n.3 (leaving *Staub* cat's paw liability

question open). On this second appeal, after a full trial that had not yet taken place at the time of the first appeal, the District argues again that actual knowledge by the decision-maker is beyond the realm of permissible inference on the proofs presented. Brief of Appellant at 42-50. Mr. Bryant explains in detail the evidence that properly supported such an inference, Brief of Appellee at 40-45, and *amicus* concurs that there was ample evidence on which decision-maker knowledge could be inferred.

However, if the District's proposition to the contrary is accepted, the question necessarily arises whether a decision-maker's ignorance of an employee's protected activity insulates the employer from retaliation liability as a matter of law. The balance of the present brief shows why that question, if reached, should be answered in the negative.

2. *"Some direct relation" of animus to decision is sufficient to establish liability regardless of the decision-maker's actual knowledge of protected activity*

Staub v. Proctor Hosp., 562 U.S. 411, 419 (2011), stands for the proposition that an employer is liable for retaliation under Title VII when the discriminatory intent of one of its employees had "some direct relation" to another employee's adverse action. After *Staub*, "[i]f a supervisor performs an act motivated by an [unlawful] animus that is intended to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable [for retaliation under Title VII]." *Id.*, 562 U.S. at 419.

Staub thus announced and explained that one employee's discriminatory motive can so influence another's decision as to meet the proximate causation requirement for a retaliation claim against the employer. *Id.* at 420 ("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"), citing *Anza v. Ideal Steel Supply Corp*., 547 U. S. 451, 457–458 (2006); *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("proximate cause . . . requires some direct relation between the injury asserted and the injurious conduct alleged") (quotation marks and citations omitted).

Amicus believes that "some direct relation" under *Staub*, reflecting the settled tort doctrine affirmed in cases like *Anza* and *Hemi Group*, is present not just in situations that permit an inference of decision-maker knowledge, but wherever someone with knowledge and discriminatory animus manipulates or influences the employment decision, even if the influence does not include—or indeed, in cases of deceptive influence, deliberately avoids—apprising the decision-maker of the employee's protected activity.

This is precisely where the "cat's paw" theory of retaliation applies best and is needed most: where an employee with knowledge of a worker's protected activity, and a motive to retaliate against the worker for that activity, influences an *unwitting* fellow employee to take action against the worker that the retaliator desired but lacked authority to take, in just the way the monkey in Aesop's fable induced the unsuspecting cat to burn its paw retrieving hot chestnuts that the monkey then took for itself. *Staub*, 562 U.S. at 415 n.1 (explaining Judge Posner's use of the fable). *See Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (Posner, J.) (noting that decision-making committee's lack of knowledge or discriminatory motive did not shield the employer from liability for a co-worker's or manager's ill-motivated, deceptive influence on the committee); *cf*. W. Shakespeare, *Othello* II:iii:183-212 (1604) (in which Iago's layered deceptions of fact and self-presentation induce Othello to fire his lieutenant Cassio without suspecting Iago's malign intent).

Thus the "cat's paw" liability inquiry does not stop with whether evidence of decision-maker knowledge establishes retaliatory motive for an adverse action. A reviewing court must look to whether a reasonable inference of "ultimate" causation exists, *Staub*, 562 U.S. at 420, irrespective of the decision-maker's actual knowledge of the protected activity. That inquiry proceeds by examining "such circumstantial and direct evidence of intent as may be available" across the entire record, again regardless of whether that record permits an inference that the decision-maker actually knew of the employee's protected activity. *Staub,* 562 U.S. at 420, citing *Arlington Heights*, 429 U.S. at 266. *See Bryant I*, No. 13-0483, Brief of MWELA as *Amicus Curiae* (filed Sept. 23, 2013), at 13 (citing *Arlington Heights* on the importance of circumstantial evidence, given that open admissions of bias are rare or nonexistent); *Staub*, 562 U.S. at 420 (recognizing that "if an employer isolates a personnel official from an employee's supervisors [and] vests the decision to take adverse employment actions in that official, . . . the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action") (emphasis in original).

3. *The Court should clarify that a decision-maker's actual knowledge of protected activity is not invariably required in DCHRA retaliation cases*

In *Bryant I* and in another case now pending in this Court, *Francis v. Sutherland, Asbill & Brennan*, No. 16-1029 (argued May 17, 2018), the key question was whether the evidence would have allowed a jury to infer decision-maker knowledge of the employee's protected activity. The Court in *Bryant I,* relying on *Furline,* decided that actual knowledge could not be ruled out as a matter of law, and remanded for trial on that potentially dispositive fact question. *Bryant I*, 102 A.3d at 269 n.3. *Amicus* fully

concurs with Mr. Bryant on the validity of that decision, and urges the Court to reject the District's suggestions to the contrary.

Bryant I also specifically acknowledged the broader "ultimate causation" formulation of *Staub*, noting that "[s]everal federal courts of appeals have applied *Staub* to Title VII claims rather than requiring the plaintiff to show that the ultimate decisionmaker possessed discriminatory intent." *Bryant*, 102 A.3d at 269 n.3 (citations omitted). But the *Bryant I* opinion did not specifically address *McFarland v. George Washington Univ.*, 935 A.2d 337 (D.C. 2007), decided several years before *Furline* and *Staub*, which had held that the ultimate decision-maker's actual knowledge was generally required to prove retaliation. Neither in *Furline* nor in *Bryant I* did the Court squarely face "the extent [to which] the cat's paw theory has abrogated *McFarland*" for DCHRA retaliation cases. *Bryant*, 102 A.3d at 269 n.3.

On the underlying doctrinal question, one might consider the analogy to a criminal law regime that imposed full penalties on convicted murderers but foreclosed all charges against principals in murder-for-hire cases. It is difficult to imagine the District's first-degree murder statute, D.C. Code § 22–2104.01, without the provision (subsection (b)(2)) that punishes one who hires a murderer as if he himself had done the killing. Our law has long provided that those who induce others to commit crimes should have to answer for those crimes. On the same logic, retaliation claims under the District's principal civil rights statute should be open to the small class of employees who may have sufficiently powerful "cat's paw" evidence even if they do not have *McFarland* actual knowledge evidence.

If and assuming this Court reaches the questions of "ultimate causation," actual knowledge, and "cat's paw" liability, *amicus* submits that this case affords a suitable

opportunity to reconcile *McFarland* with more recent decisions, for two reasons. First, in *Bryant I* there was the real prospect that the case would return to this Court after trial with the issues narrowed, whereas this appeal is the last chance the Court will have to adjudicate Mr. Bryant's rights. Second, the pernicious "cat's paw" manipulation described in Aesop's fable, Judge Posner's opinion in *Shager*, and the Supreme Court's decision in *Staub* should be an especially strong basis for liability, not a weak one, under the language and policies of the DCHRA. The Act should not be read to foreclose a claim of so serious a wrong merely because the decision-maker was the retaliator's unwitting dupe as opposed to knowing co-conspirator.

The decision in *Furline* did not treat *McFarland* as a guarantee of immunity to employers absent proof of decision-maker knowledge. However, if in the present case the Court decides that the jury could not have imputed actual knowledge to the decision-maker after all, the "ultimate causation" principle should nevertheless require leaving the jury's verdict in place, even if that means limiting *McFarland* to cases without "cat's paw" proofs. Conversely, to use this case to create an absolute bar to "ultimate causation" liability in DCHRA retaliation cases would go squarely against the reasoning of *Furline*, and would set a dangerous new precedent at odds with this Court's DCHRA decisions and those of the federal courts under federal law.

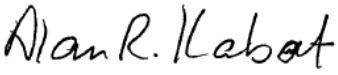
To affirm *Furline* on this issue, and to acknowledge the possibility of "cat's paw" retaliation under *Staub*, would be to follow federal appeals courts across the nation, which after *Staub* have consistently applied the "ultimate causation" principle to Title VII retaliation claims—a principle that is broad enough to encompass deceptions by Shakespeare's Iago or Aesop's monkey, as well as more conventional retaliatory collusion. *See Bryant*, 102 A.3d at 269 n.3 (collecting cases through 2011); *see also, e.g.*,

Fisher v. Lufkin Industries, Inc., 847 F.3d 752, 757 (5th Cir. 2017) (invoking *Staub* in reversing where chain-of-causation inference was not left to fact-finder); *Coleman v. District of Columbia*, 794 F.3d 49 (D.C. Cir. 2015) (applying *Staub* to whistleblower retaliation); *Zamora v. City of Houston*, 798 F.3d 326, 333-34 (5th Cir. 2015) (affirming *Staub* cat's-paw theory in Title VII retaliation case notwithstanding enhanced proof requirements of *Nassar*).

CONCLUSION

For the foregoing reasons, amicus MWELA respectfully urges this Court to affirm the judgment on the jury verdict in this case, and in the process to recognize two principles: (1) that with regard to proof of retaliation, the DCHRA's language, structure and legislative purpose do not fall to the narrow interpretation of Title VII in *Nassar*; and (2) that DCHRA retaliation liability does not invariably depend on proof of the decision-maker's actual knowledge of the aggrieved worker's protected activity, but can also flow, as the courts in *Furline* and *Staub* understood, from direct or circumstantial evidence of a chain of causation, and even from "cat's paw" manipulation of an unwitting decision-maker by another employee with both knowledge and retaliatory animus who hides the true purpose of the manipulation.

Respectfully submitted,



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