Case No. 14-1073

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IRIS FOSTER,
Plaintiff-Appellant,

v.

UNIVERSITY OF MARYLAND EASTERN SHORE,
Defendant-Appellee.

On appeal from the U.S. District Court for the District of Maryland,
USDC No. 1:10-cv-01933-TJS

BRIEF OF *AMICUS CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Metropolitan Washington Employment Lawyers Association
(name of party/amicus)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Richard R. Renner Date: May 16, 2014

Counsel for: Amicus

CERTIFICATE OF SERVICE

****

I certify that on May 16, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/Richard R. Renner
(signature)

May 16, 2014
(date)

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court (Magistrate Judge Sullivan) erred in concluding that *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013) requires a Title VII retaliation plaintiff to provide a quantum of inferential evidence of causality or pretext that exceeds what was previously required, without explicating the new standard or identifying authority for it?

II. Whether Foster presented sufficient evidence of causality and pretext to warrant trial on her retaliation claim?

III. Whether the District Court (Judge Grimm) erred in granting summary judgment to Appellee on Foster's sexual harassment claim, by failing to correctly apply either a ratification or negligence theory to impute liability to Appellee?

IV. Whether Foster presented sufficient evidence that Appellee ratified Jones' sexually harassing conduct, or that Appellee was negligent in failing to prevent the harassment of Foster based upon its knowledge of Jones' prior harassing conduct?

Statement of Interest

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association.[1] MWELA has over 300 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C., and Maryland. MWELA's purposes include promoting the efficiency of the legal system, elevating the practice of employment law, and promoting fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

MWELA has an interest in the disposition of this case because the standard of causation is central to every Title VII retaliation case. Further, correct application of the summary judgment standard to cases involving unlawful discrimination and retaliation is necessary for Title VII to accomplish its remedial purposes. The clients of MWELA members often depend on evidence of pretext to survive summary judgment. Finally, the dismissal of Foster's sexual harassment claim would be a serious deterrent

1 Counsel for all parties have consented to MWELA filing an *amicus* brief in this action.

to other employees subjected to workplace harassment if it were to stand.

MWELA declares that no party or party's counsel: (a) authored any portion of this Brief, or (b) contributed money that was intended to fund preparing or submitting this brief. MWELA further declares that (c) no person other than MWELA or its members or the undersigned counsel contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, viewing the facts and the reasonable inferences there from in the light most favorable to the nonmoving party. See *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Bonds v. Leavitt*, 629 F.3d 369, 380 (4th Cir. 2011). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed.R.Civ.P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

On May 5, 2014, the Supreme Court explained this standard in holding that it was improper to grant summary judgment by resolving disputed issues of fact in the movant's favor:

> courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau* v. *Haugen*, 543 U. S. 194, 195, n. 2 (2004) (*per curiam*); *Saucier*, *supra*, at 201 [*Saucier v. Katz*, 533 U. S. 194, 201 (2001)]; *Hope*, *supra*, at 733, n. 1 [*Hope v. Pelzer*, 536 U. S. 730, 733 (2002)]. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U. S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970); see also *Anderson*, *supra*, at 255.
>
> *Tolan v. Cotton*, 572 U.S. ___ (May 5, 2014), p. 7 of the slip opinion.

The movant is not entitled to a credibility finding at the summary

judgment level. Foster, as the non-moving party, is entitled to all inferences on credibility. *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285 (7th Cir. 1999); *Lust v. Sealy, Inc*., 383 F.3d 580, 582-83 (7th Cir. 2004) ("There is no presumption that witnesses are truthful."). See also, *Poller v. Columbia Broad. Sys., Inc*., 368 U.S. 464, 473 (1962) ("It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"); *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 512 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it.").

I. THE DISTRICT COURT ERRED IN DISMISSING THE RETALIATION CLAIM.

A. *Nassar* affects the standard of causation, not the methods of proof.

The nub of the Magistrate Judge's dismissal of Foster's retaliation claim is the Supreme Court's new pronouncement that retaliation victims prove that their protected activities are the "but for" cause of the adverse

action. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013). *Nassar* established the causation standard for private sector Title VII retaliation claims, but it does not change the long-established law on the burden or methods of proof.

In *Nassar*, the University appealed a jury verdict. The Fifth Circuit vacated the constructive discharge claim, but affirmed the verdict on the retaliation claim. The Fifth Circuit applied the causation standard created by the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m). This standard declares that an employment practice is unlawful when the victim establishes that the protected status "was a motivating factor … even though other factors also motivated the practice." The Supreme Court applied its analysis from *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), and held that retaliation must be a "but for" cause of the adverse action. It held that 42 U.S.C. § 2000e-2(m) applies to status discrimination claims, but not to private sector retaliation claims.

The Supreme Court recently expounded on the effect of *Nassar* in *Burrage v. United States*, 134 S.Ct. 881 (2014). In *Burrage*, the Court held that a statutory requirement that a death or injury "results from" use of a

controlled substance invokes the same "but for" standard of causation required in *Nassar*. (As *Burrage* is a criminal case, the government had to prove causation beyond a reasonable doubt.) The Court stated that this formulation represents "*the minimum* requirement for finding causation when a crime is defined in terms of conduct causing a particular result." 134 S.Ct. at 888 [emphasis in original; quoting Model Penal Code §2.03(1) (a).] Causation is established "if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so —if, so to speak, it was the straw that broke the camel's back." *Id*. The majority opinion noted that, "but-for causation is not nearly the insuperable barrier the Government makes it out to be." *Id*. at 891.

In *Taylor v. Rite Aid Corp.*, No. 1:12-cv-02858-WDQ, 2014 WL 320214 (D. Md. Jan. 27, 2014), Judge Quarles recently denied summary judgment in part on a Title VII and ADA discrimination and retaliation case, and explained that *Nassar* does *not* require that the protected conduct be the "only" factor for the termination:

> *Nassar* requires a plaintiff asserting a retaliation claim to show that her "protected activity was *a* but-for cause of the" employer's adverse action. *Nassar*, 133 S. Ct. at

> 2534 [emphasis added in *Taylor*]. *Nassar* does not require that protected activity be the only factor that resulted in an adverse action, just that the adverse action would not have occurred without the protected activity. *See Nassar*, 133 S. Ct. at 2533 ("Title VII requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."). Accordingly, Taylor's performance problems alone, even if they motivated the decision to terminate her in part, do not foreclose a retaliation claim under *Nassar*.

Taylor, 2014 WL 320214, at *10.

Nothing in *Nassar* or *Burrage* changes the methods plaintiffs can use to establish causation. Nothing in *Nassar* or *Burrage* changes the holding in *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 148 (2000) ("a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").

Title VII tolerates no racial discrimination, "subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1823 (1973). Still, *McDonnell Douglas* cannot be applied in a formulaic manner. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), the Court explains that the *McDonnell Douglas prima facie* method was

"never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." See also *U.S. Post. Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 715 (1983). In *Reeves*, 530 U.S. at 141, the Supreme Court recognized that determining motive is "sensitive and difficult," in that "there will seldom be 'eyewitness' testimony as to the employer's mental processes.'"

Since the Supreme Court's decision in *Nassar*, other circuit courts have confirmed that methods of proving discrimination remain untouched. *See Kwan v. Andelax Group*, PLLC, 737 F.3d 834, 845 (2nd Cir. 2013) ("[T]he but-for causation standard does not alter the plaintiff's ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity."). *See also*, *Wright v. St. Vincent Hospital*, 730 F.3d 732, 739 (8th Cir. 2013) (court considered circumstantial evidence of discriminatory motive before affirming decision from a bench trial); *Sayger v. Riceland Foods, Inc*., 735 F.3d 1025, 1032 (8th Cir. 2013) (affirming judgment after jury heard statements about "troublemakers" being gone and antagonists being involved in the adverse decisions); *Bishop v.*

Ohio Department of Rehabilitation and Correction Facilities, 529 Fed. Appx. 685, 693-696 (6th Cir. 2013) (discussing *Nassar*, then reversing summary judgment based on "cat's paw" theory and evidence of pretext).

The record Foster presents is more than sufficient to establish "but-for" causation using the long-established methods of proof.

B. Billie's admissions and Jones' threats are direct evidence of causation and prevent summary judgment.

Marie Billie, UMES' counsel and HR manager, testified that she supported Foster's termination because she thought that Foster was plotting to "set up" UMES. JA-387. Billie did not believe Foster about the retaliation, and she connected that disbelief to her support of Foster's termination. JA-319, 328-29. Billie testified that Foster's protesting put up "red flags" for her, JA-391, and, "that anything, you know, that ever happened to [Foster] forever would be related back to the sexual harassment case and she would always say you know this was done because of retaliation ... ." JA-326-27. Foster protested retaliation constantly and too much, and she (along with managers Wright and Holden) just wanted Foster to "move along" from the issue, but Foster would not let it go. JA-323-324.

This is direct evidence connecting Foster's termination to her complaints of harassment and then retaliation, and nothing in *Nasser* prevents this from being persuasive evidence to have a jury decide the motivation for Foster's firing.

There are more facts that satisfy a "but for" causation test. Foster testified that Jones threatened her by saying: "me, Chief and Wright and Dr. Holden are best friends . . . I'll tell you now, I have the ability to have police officers fired. I have fired people because I didn't like what they said or did." JA-634. This threat directly connects what Foster said to her termination. Foster did not stop her objection to Jones' harassment and she was fired shortly thereafter. Amicus submits that if the jury believes this testimony, which is direct evidence, then they can reasonably conclude that Jones did influence Wright and Holden to fire Foster because of her protected protests of Jones' harassment.[2]

Direct evidence shortcuts the proof of causation. "'[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail without

2 Foster's case is distinguishable from *Boyer-Limberto v. Fontainebleau Corp*., No. 13-1473, 2014 WL 1891209 (4th Cir. May 13, 2014), where the majority held that there was no protected activity.

proving all the elements of a *prima facie* case,' which is an indirect method of proof." *Craddock v. Lincoln Nat. Life Ins. Co.*, 533 F. App'x 333, 336 (4th Cir. 2013) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511(2002)). See also *Stone v. Landis Const. Corp*., 442 F. App'x 568, 569 (D.C. Cir. 2011) ("[A] statement that itself shows ... bias in the decision" constitutes direct evidence of discrimination). See also Appellant's brief, p. 54, fn 41.

The court below erred in dismissing the retaliation claim.

C. Evidence of pretext prevents summary judgment.

Amicus submits that this Court should recognize that where the employee has presented sufficient evidence of pretext, that the district court should not grant summary judgment. The Supreme Court held that, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated[.]" *Reeves*, 530 U.S. at 148.

As set forth in Foster's opening brief, the record presents adequate evidence of pretext. Foster's Brief, pp. 17-21, 25, 29-30. Based on that presentation of evidence, *amicus* submits that this Court should emphasize

that it is error to grant summary judgment in light of the holding of *Reeves*.

The two versions of events presented by Foster and UMES are inconsistent. A jury could conclude that someone is lying. That is the proper function of the jury. If the jury believes Foster, Waters and the admissions by Billie, they could conclude that Billie and Wright are lying to cover up their unlawful retaliation. They could reach this conclusion under any standard of causation.

Management's use of shifting explanations can also point to pretext. *Bechtel Const. Co. v. Secretary of Labor,* 50 F.3d 926, 934-35 (11th Cir. 1995). Foster's opening brief cited evidence that UMES senior management presented different explanations regarding an alleged handcuffing incident. Foster's Brief 22-23. In *Miller-El v. Dretke*, 545 U.S. 231, 243 (2005) ("*Miller-El II*"), the Supreme Court considered a *Batson* challenge. During *voir dire*, the government defended its strike against a black juror based on the juror's views about the death penalty and rehabilitation. After the defense showed that the juror's actual testimony did not support this reason, the prosecutor came up with a different reason for the strike. *Id*. at 237, 245-46. The Supreme Court noted the "pretextual timing" of the prosecutor's

second reason and said it "would be difficult to credit the State's new explanation, which reeks of afterthought." *Id*. at 246. A jury might reach the same conclusion about Wright's new-found amnesia, *i.e.*, the shifting explanation.

Amicus submits that this Court should hold that it is error for a district court to refuse to recognize that the evidence of pretext precludes summary judgment. *Cf.* JA-1166-67 (district court's decision refusing to recognize pretext). Such error is underscored by the court's prior holding that Foster "render[ed] the employer's reason so questionable as to raise an inference of deceit[.]" JA-1074-1075.

D. Jones' attempt to enforce a chain-of-command is evidence of animus against Foster's protected disclosures.

Amicus further submits that it is error to require an employee to report her concerns through a "chain of command" thereby leaving the employee unprotected when the employer retaliates against her for going outside the chain of command. As set forth in Foster's opening brief, she reported that Jones chided her for being unprofessional by protesting to Wright. *See* Foster's Brief, 16 (citing JA-633).

This chiding is an attempt to enforce a "chain-of-command." While a chain-of-command can be useful in a military organization for operational commands, the very nature of protected activity prohibits enforcement of such chains on protected disclosures. When the law protects an activity, an employer cannot punish the employee for engaging in that activity. Therefore, there is no chain-of-command when it comes to reporting violations of law, safety issues or other protected subjects.

The Title VII prohibition against retaliation, "is not confined to situations in which the parties are engaged in formal proceedings, but rather extends to forbid 'discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.'" *Hearn v. R.R. Donnelley & Sons Co*., 460 F. Supp. 546, 548 (N.D. Ill. 1978) quoting *McDonnell Douglas, supra*, 411 U.S. at 796 (1972).

By way of comparison, Congress has given the Department of Labor the responsibility to adjudicate whistleblower retaliation claims under more than 20 statutes.[3] The Department has concluded that once the law protects a disclosure, it does not permit the imposition of a chain of command reporting requirement. In raising safety concerns, employees are under no

3 A list is available at: http://www.whistleblowers.gov/statutes_page.html

obligation to report their concerns to their supervisors. *Fabricus v. Town of Braintree*, 97-CAA-14, D&O of ARB, at 4 (February 9, 1999)[4] (collecting cases); *Talbert v. Washington Public Power Supply System*, 93-ERA-35, D&O of ARB, at 8 (Sept. 27, 1996) ("chain of command" restrictions on reporting concerns would "seriously undermine the purpose of whistleblower law"). Hence, the Department has adopted the following rule: "an employer may not with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels, or circumventing a superior, when the employee raises an environmental health or safety issue." *Leveille v. New York Air National Guard*, 94-TSC-3/4, D&O of Remand by SOL, at 16-17 (Dec. 11, 1995). Consequently, taking adverse action against an employee merely because the employee "circumvented the chain of command" would constitute a violation of the whistleblower protection statutes. *Dutkiewicz v. Clean Harbors Environmental Services*, 95-STA-34, D&O of ARB, at 7 (Aug. 8, 1997), *aff'd*, *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998).

4 Available at http://www.oalj.dol.gov/Public/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/CAA/97CAA14C.HTM

In this vein, employees are protected even if they go "around established channels" in bringing forward a safety complaint, go "over" their "supervisor's head" in raising a concern, *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, D&O of SOL, at 17 (Oct. 26, 1992), violate or fail to follow the workforce "chain of command" or normal procedure, *McMahan v. California Water Quality Control Board*, 90-WPC-1, D&O of SOL, at 4 (July 16, 1993); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984), or refuse to disclose information they confidentially told the government. *Saporito v. Florida Power & Light Co.*, 89-ERA-7/17, SOL Remand Order, at 5, n. 4 (June 3, 1994).

On review of the *Nichols* case, cited above, the Eleventh Circuit explained:

> Even without *Chevron,* it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws. *See, e.g., Jones v. Metropolitan Atlanta Rapid Transit Auth.,* 681 F.2d 1376, 1380 (11th Cir.1982), *cert. denied,* 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984). The Secretary's interpretation promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they

> have a chance to bring them before an appropriate agency. *See, e.g., Macktal v. Secretary of Labor,* 923 F.2d 1150, 1152 (5th Cir.1991).
>
> *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 932-33 (11th Cir. 1995).

The ability of an employee to communicate directly with corporate, law enforcement or regulatory authorities is a critical component to employee whistleblowing.

In *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565 (8th Cir. 1980), the hospital disciplined a doctor for "fail(ing) to extend to the staff and administration of this hospital ... the professional courtesy to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the hospital." The Court of Appeals found substantial evidence supported the Department's finding of unlawful retaliation, even though "members of the hospital staff testified as to the absence of retaliatory motive behind the reorganization during which Dr. Richter was terminated." 629 F.2d at 566.

In a law enforcement agency, the chain-of-command could be improperly enforced to prohibit any disclosure at all of the illegal conduct.

In essence, a chain-of-command becomes a code of silence. A jury could conclude that Jones was attempting to enforce a code of silence when he told Foster that it was "unprofessional" of her to complain to Wright, and that he could get her fired because he does not like what she "said or did." JA-633-34. Hence, *amicus* respectfully submits that this Court should find that where the law protects employees in initiating proceedings or making disclosures, the law prohibits the code of silence, or otherwise requiring disclosures to be made only within the chain of command.

E. Circumstantial evidence is sufficient to prove causation and accordingly defeats summary judgment.

Amicus further submits that this Court should reiterate that an employee can use circumstantial evidence, and that such circumstantial evidence can be sufficient to prove causation, thereby defeating summary judgment. Foster's opening brief, pp. 17-18, 30, presented evidence leading to the reasonable inference that management had viewed her as a very good worker, that UMES management was worried about her sexual harassment report, that management was urgently concerned about controlling the records made relating to her report, and that management expressed animus

in response to her reports.

In *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1081-82 (3d Cir. 1996), the court articulates a fact of life:

> It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind.

That is why, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), the Court said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"

In assessing a dispute about intent, courts must consider the totality of circumstances. *U.S. v. Arzivu*, 534 U.S. 266 (2002) (admonishing the lower courts for examining the facts surrounding the investigatory stop in isolation, since only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the agent in deciding to conduct the stop.) The mental process of stereotyping is a

"reflexive reaction." *School Board of Nassau County v. Arline*, 480 U.S. 273, 285 (1987). Discriminators may be unaware of their own biases. In *Miller-El II*, Justice Breyer, concurring, noticed that, "unconscious internalization of racial stereotypes may lead litigants more easily to conclude that a prospective black juror is 'sullen' or 'distant', even though that characterization would not have sprung to mind had the prospective juror been white." 545 U.S. at 268. He continued,

> More powerful than those bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination ....

Id. at 241. Accordingly, a determination of the central issue of intent must include consideration of all the surrounding circumstances. Indeed, employee protection cases may be based entirely on circumstantial evidence of discriminatory intent. See *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall* , 629 F.2d 563, 566 (8th Cir. 1980)). "Normally, very little evidence of a causal connection is required to establish a *prima facie*

case." *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998).

Ultimately, *amicus* submits that this Court should recognize that the trier of fact will have to consider all of the evidence to determine if Foster's protected activities contributed to UMES' adverse actions. Accord, *Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 161 (3d Cir. 2013).

F. Foster's reports about sexual harassment and retaliation are protected as participation in proceedings.

1. Internal reports are protected proceedings.

Employees who "participate" in proceedings are entitled to "exceptionally broad protection." *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1006, n. 18 (5th Cir. 1969) (Title VII retaliation claim). Coverage under the "participation" clause (42 U.S.C. § 2000e-3) "does not turn on the substance of an employee's testimony," and retaliatory actions are prohibited "regardless of how unreasonable" an employer finds the testimony. *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 554 (4th Cir. 1999); *U.S. v. Glover*, 170 F.3d 411 (4th Cir. 1999).

Indeed, the United States Chamber of Commerce recognizes internal

reporting as its preferred method of whistleblowing, because of the need to prevent violations of the law in the workplace. It made these comments to the SEC on implementation of Section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant… Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[5]

The Chamber went on to state that when it comes to malfeasance, companies are "dependent on internal reporting of such instances," and that these companies are "best positioned to quickly and effectively investigate potential wrongdoing …. Thus, individuals with relevant information should be incentivized to utilize internal reporting mechanisms, rather than

5 Full text of the Chamber's comments can be found at http://www.sec.-gov/comments/s7-33-10/s73310-110.pdf

discouraged from doing so." *Id.,* at 5.

In *Villanueva*, the Fifth Circuit held that "[a]n employee need not cite a code section he believes was violated in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal." *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109-10 (5th Cir. 2014) (quoting, *Welch v. Chao,* 536 F.3d 269, 276 (4th Cir.2008)).

Amicus submits that when an employee, such as Foster makes disclosures to management about harassment and retaliation, that those are also protected as opposition to discrimination under Title VII, even though the employee made some of those disclosures in response to a management inquiry. *Accord*, *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271 (2009) (Title VII case which addressed only the opposition clause and not the participation clause).

In *Pettway*, the Fifth Circuit held that protections for participation in a proceeding (there, Title VII) apply regardless of the merits of the underlying proceeding. See also *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1138-39 (5th Cir. 1981); *Wyatt v. City of Boston*, 35 F.3d 13, 15

(1st Cir. 1994) (no requirement that underlying charge be reasonable). That internal communications can commence proceedings is not a new or novel idea. *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974); *Kasten v. Saint Gobain Performance Plastics Corp*., 131 S.Ct. 1325 (2011) (holding that oral report to supervisor is protected under 29 U.S.C. § 215(a)(3) which protects those who "filed any complaint."). Proceedings can be protected even when they do not involve the agency one might expect. *Douglas v. DynMcDermott Petroleum Operations Co*., 1996 WL 650899 (E.D. La. Nov. 11, 1996) (participation in Dept. of Energy audit of EEO practices is protected even though EEOC was not involved).

2. Foster's subsequent disclosures are just as protected as her first disclosures.

Amicus submits that Title VII protects all protected disclosures, not just the first disclosure. The district court took a contrary approach in treating only the first disclosure as protected. JA-1164. The Sixth Circuit addressed this issue in a comparable nuclear whistleblower case:

> Under this antidiscriminatory provision, as under the NLRA, the need for broad construction of the statutory purpose can be well characterized as "necessary 'to prevent the [investigating agency's] channels of

> information from being dried up by employer intimidation,' " *NLRB v. Schrivener*, 405 U.S. 117, 122, 92 S.Ct. 798, 801, 31 L.Ed.2d 79, 82-83 (1972), and the need to protect an employee who participates in agency investigations clearly exists even though "[h]is contribution might be merely cumulative," *id*. at 123, 92 S.Ct. at 802, 31 L.Ed.2d at 84.
>
> *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983)

This court has also recognized that when an employee engages in multiple acts of protected activity, they are all protected. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) ("Carter filed several EEO complaints, including one on September 26, 1988 and another on February 9, 1990, thus engaging in a protected activity.") Employees who are participating claimants, such as Foster, do not need to provide any "substantive information" to be protected under the retaliation statutes. *NLRB v. Retail Store Employees Union*, 570 F.2d 586 (6th Cir. 1978) (discrimination established under § 8(a)(4) of NLRA although employee provided no information at all during agency proceeding). Similarly, the False Claims Act protects employees who are collecting information about a possible violation, "before they have put all the pieces of the puzzle together." *Accord, U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40

(D.C. Cir. 1998).

In the September 27, 2013, Memorandum Opinion, page 8, the district court counted temporal proximity only from Foster's initial report in early May, 2007, and not her subsequent reports, including those of September 21 and 28, 2007. JA-655-57; JA-691-92 ¶78. *Amicus* submits that it was error for the district court below to count temporal proximity only from Foster's initial report, and not from her subsequent protests. Which protest was the straw that broke the camel's back is a question that the trier of fact must answer.

G. Employer discrimination against a subgroup is still unlawful discrimination.

Amicus further submits that when an employer discriminates against a subgroup of a protected class, such discrimination is just as unlawful as discrimination against the entire class. Here, the district court dismissed Foster's claim that she was fired on account of her gender. The court required Foster to show, "that the person who replaced her had 'comparable qualifications.'" JA-1064; 908 F. Supp. 2d 686, 704. This is an example of the "rigid, mechanized, or ritualistic" analysis rejected in *Furnco*

Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). There are other ways to prove unlawful discrimination.

Employers may well have policies that protect or even promote the employment of women and minorities but still have trouble when individual women or minorities act in unexpected ways, such as by reporting or protesting discrimination. Hence, discrimination against a subgroup of a protected minority is just as unlawful as discrimination against the entire class. In *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971), Phillips sued for violations of Title VII alleging that she had been denied employment because of her sex. The district court granted summary judgment for her employer even though the company was not accepting job applications from women with pre-school-age children (although it employed men with pre-school-age children), noting that 70-75% of the applicants for the position she sought were women and 75-80% of those hired for the position, assembly trainee, were women. In vacating the judgment, the Supreme Court made clear that unless a condition qualifies as a *bona fide* occupational qualification (BFOQ), such distinctions would qualify as discriminatory. In other words, being nice to most women does

not justify discrimination against others. *Accord*, *Connecticut v. Teal*, 457 U.S. 440 (1982).

In the age discrimination case of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the plaintiff was terminated at 62 years old and just a few weeks short of the years of service he needed for his pension to vest. The Court made the critical point that employer decisions "based in large part on ***stereotypes unsupported by objective fact***," are "***the essence of what Congress sought to prohibit*** in the ADEA," *id*. at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added)). This point applies equally to whistleblowers shunned as "trouble makers," unable to go along with illegality just to get along. In *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not "get along" with co-workers. This is an apt description of Foster after she complained about Jones' sexual harassment. A jury can lawfully conclude that UMES would not have fired Foster if she had been a man complaining about sexual harassment. That her replacement was a man would make no difference to that gender discrimination claim. That UMES did replace her with a man

makes the gender claim only stronger.

II. EMPLOYERS CAN BE HELD LIABLE FOR FAILING TO TAKE ACTION IN RESPONSE TO AN EMPLOYEE'S COMPLAINTS OF SEXUAL HARASSMENT.

A. Remedying sexual harassment is necessary to accomplish the goal of eradicating discrimination.

This Court should recognize that employers can be held liable for failing to take appropriate action when employees, such as Foster and Employee C before her, report and protest sexual harassment in the workplace. "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973)). To accomplish this end, courts have long recognized that sexual harassment is unlawful. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986).

"To establish a Title VII claim for sexual harassment in the workplace, a female plaintiff must prove that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or

pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer." *Ocheltree v. Scollon Productions*, Inc., 335 F.3d 325, 334 (4th Cir. 2003), *citing Spicer v. Va., Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir.1995) (en banc); *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 458 (4th Cir. 2002). "An employer cannot avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil' strategy." *Ocheltree*, 335 F.3d at 334.

Title VII prohibits employers and supervisors from making submission to sexual relations a condition of employment. EEOC's regulation, 29 C.F.R. §1604.11(a) provides:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Jones' unsolicited sexual comments, kiss, hug and propositions make clear that he wanted Foster to submit to sexual relations with him. Jones'

statement clearly conveyed that he intended to use his power over Foster's employment to satisfy his desires. JA-634. ("me, Chief and Wright and Dr. Holden are best friends . . . I'll tell you now, I have the ability to have police officers fired. I have fired people because I didn't like what they said or did.") This is *quid pro quo* harassment.

The district court held: "a reasonable jury could conclude that the conduct was objectively hostile or abusive. … Based on Plaintiff's response, a reasonable jury also could conclude that Jones's conduct was subjectively hostile or abusive to Plaintiff."[6] JA-1058; 908 F. Supp. 2d 686, 700-01. The court, however, dismissed this claim for failure to show that the Jones' harassment was imputable to her employer. JA-1058-62; 908 F. Supp. 2d at 701-03. However, as discussed below, the court erred in its conclusion.

B. The evidence permits a jury to find an employer liable for failing to act when an employee complains about a supervisor's harassment.

Appellant's brief, pp. 7-11, adequately sets out the evidence of UMES' failure to act after Employee C complained about sexual harassment

6 This distinguishes Foster's case from *Boyer-Limberto v. Fontainebleau Corp*., No. 13-1473, 2014 WL 1891209 (4th Cir. May 13, 2014) where this Court held that the harassment was not severe or pervasive.

by Jones. The court below exonerated UMES on grounds that Jones stopped his harassment of Foster after Foster complained to Wright and Billie. JA-1058-59; 908 F. Supp. 2d at 701. Here, if only UMES had taken the same action when Employee C had first complained, then Jones' behavior may have changed before Foster began work. That UMES claims it was proper to take no action because, "UMES['s] own investigation had found that the behavior had not occurred" [JA-1061; 908 F. Supp. 2d at 702, quoting Def. Reply, 8] is precisely the type of 'see no evil, hear no evil' strategy rejected in *Ocheltree.* In reaching its assessment of Employee C's allegations, UMES should be mindful of the risk that it was wrong and Jones would continue to harass other women officers. When an employer errs on the side of doing nothing, when doing something would prevent future sexual harassment, it is properly liable for the consequences. *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001) ("If an employer is on notice of a likelihood that a particular employee's proclivities place other employees at unreasonable risk of rape," an employer has a "responsibility to warn or protect likely future victims."). In this case, UMES' liability flows not from a failure to warn Foster about Jones' harassment, but rather from UMES'

superior knowledge of the risk that Jones would continue to engage in harassment and its failure to prevent that harassment. A reasonable jury can find that UMES had such a duty to prevent Jones' harassment and it was negligent in its failure. By deciding to exonerate Jones, UMES assumes the risk that Jones would re-engage in harassment.

In *Vance v. Ball State Univ*., 133 S. Ct. 2434, 2443 (2013), the Supreme Court stated:

> We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.,* to 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." *Ellerth, supra,* at 761, 118 S.Ct. 2257.

A jury could reasonably conclude that Wright had given Jones such power if it credits Foster's testimony about Jones' statement. JA-634 ("me, Chief and Wright and Dr. Holden are best friends . . . I'll tell you now, I have the ability to have police officers fired. I have fired people because I didn't like what they said or did."). This statement, combined with evidence that Wright and Billie took delayed and minimal action against Jones and did fire

Foster, could support a jury's inference that UMES empowered Jones to fire Foster. If this Court were to insist that Jones have official power to fire Foster, rather than actual power, then this Court would just paint a road map for retaliators on how to conceal their real power.

Even if UMES had taken action against Jones, a jury can still find that the action was inadequate to the point of negligence. *Paroline v. Unisys*, 879 F.2d 100, 106 (4th Cir. 1989), *vacated and remanded on other grounds*, 900 F.2d 27 (4th Cir. 1990) (holding that a reasonable jury could find that a warning and reprimand was inadequate given that previous reprimands for similar conduct failed to deter harasser); *Mikels v. City of Durham*, 183 F.3d 323, 329-30 (4th Cir. 1999) (whether harasser engaged in further harassing conduct is probative of adequacy of remedial measures).

> An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct.

Paroline, 879 F.2d at 107. Whether an employer should have known of and corrected harassing behavior prior to the harassment of the plaintiff "is generally an issue for the fact finder, not one for disposal on summary

judgment." *Id*.

The district court too easily separated the pre-complaint sexual harassment of Foster from the post-complaint retaliation. Unwelcomeness is a hallmark of both harassment and retaliation. As set forth in Foster's opening brief, pp. 20-31, Wright, Jones, Billie and Holden (senior management) effectuated UMES' official response to Foster's complaint: make Foster feel even more unwelcome. By punishing the messenger for reporting sexual harassment, UMES amplified the very hostility that Foster sought to end. A jury could reasonably find that UMES chose to end its sexual harassment problem not through effective remedial measures against the harasser, but rather by killing the messenger. A reasonable jury could infer that Wright and Billie knew that Jones could contain his harassing impulses for only so long. To show that a slap on the wrist was effective, they could prevail so long as Foster was removed before Jones harassed again. The law permits a jury to find UMES liable for the consequences of that choice.

CONCLUSION

MWELA urges this Court to vacate the trial court's dismissal and remand this matter for further proceedings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2014, I caused the foregoing Brief of *Amicus Curiae*, to be served through this Court's electronic filing system on all counsel of record.

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Dated: May 16, 2014