No. _____

In The

Supreme Court Of The United States

PATRICIA A. FLOWERS
Petitioner

v.

CONNECTICUT LIGHT AND POWER COMPANY, AKA NORTHEAST UTILITIES, AKA EVERSOURCE ENERGY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether Flowers proffered sufficient evidence in support of her prima facie case of racial discrimination and retaliation claims for a reasonable factfinder to reject Connecticut Light and Power Company's, aka Northeast Utilities', aka Eversource Energy's nondiscriminatory explanation for its decisions, adequate to sustain a finding of liability for intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq, and 42 U.S. Code § 1981.

2. Whether the Second Circuit Court of Appeals, as a matter of law, used the correct standard of review in its' review of the District Court's summary judgement decision.

3. Whether the Second Circuit Court of Appeals, as a matter of law, violated Rule 56(A) of the Federal Rules of Civil Procedure and sanctioned the District Court's violation of Rule 56(A) of the Federal Rules of Civil Procedure.

4. Whether the Second Circuit Court of Appeals (Second Circuit)should have allowed Flowers to amend her pleadings to add a retaliation claim that grew out of her racial discrimination complaint filed with the Equal Employment Opportunity Commission.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUES AND RULES

OTHER AUTHORITES

PETITION FOR A WRIT OF CERTIORARI

Patricia A. Flowers respectfully petition

for a writ of certiorari to review the decision

of the United States Court of Appeals for

the Second Circuit in the summary judgement procedure below.

OPINIONS BELOW

The Second Circuit Court of Appeal's decision reported at LI | No. 18-2415-cv. | 20190529117 is reproduced in the Appendix ("App.") at 1a-6a. The District Court's decision is reproduced at App. 7a-42a. The Second Circuit's denial for a panel rehearing and rehearing en banc is reproduced at App. 43a

JURISDICTION

The decision of the Second Circuit Court of Appeals was entered on May 29, 2019.

A petition for a panel rehearing and rehearing en banc was denied on July 23, 2019

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS

42 U.S.C.§2000e-2 et seq., provides in relevant part, It shall be an unlawful employment practice for an employer.(1)... to discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's race, color,.... to limit... deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect h[er[status as an employee, because of such individual's race, color...," [section 703]

42 U.S. Code § 2000e–3 provides in relevant part It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,..., because [s]he has opposed any practice made an [s]he has made a charge,..., or participated in any manner in an investigation, proceeding, or hearing under Sec. 2000e-3. [Section 704]

42 U.S. Code § 1981 provides in relevant part, [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,....

42 U.S. Code § 1981a provides in relevant part, [i]n an action brought by a complaining party... against a respondent who engaged in unlawful intentional discrimination ...(prohibited under section 703, 704,... of the Act [42 U.S.C. 2000e–2, 2000e–3,...], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

I) INTRODUCTION

Patricia Flowers (Flowers) is an African American woman who filed a Complaint with the District Court of Connecticut charging that 1) Eversource discriminated against her in failing to promote her from the position of Associate Analyst to that of Analyst in 2013; 2) Eversource retaliated against Flowers for filing an internal racial discrimination complaint.

The District Court awarded summary judgement to Eversource on all Flowers' Claims. Flowers appealed the District Court's decision to the Second Circuit Court of Appeals.

On May 29, 2019 the Second Circuit Court of Appeals (Second Circuit) issued a panel decision affirming the District Courts decision to grant summary judgement to Connecticut Light and Power Company, aka Northeast Utilities, aka Eversource Energy [hereinafter Eversource] on Flowers' failure to promote cause of action and ensuing retaliation claims all of which are addressed below.

The Court should grant Flowers' petition because the Second Circuit's decision is "manifestly" unjust.

II) PROCEDURAL FACTS

As an initial matter, to avoid confusion, there are two District Court Complaints and two oppositions to summary judgement in the record. The District Court appears to have confused the Complaints in its review of Eversource's summary judgement motion. Pet. App. 14a, 30a.

For example, on May 24, 2014 pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq, Flowers filed pro se with the Equal Employment Opportunity Commission (EEOC) a charge against Eversource for retaliating against her for filing an internal racial discrimination complaint. The internal complaint was predicated on Eversource's failure to promote Flowers' in 2013 to an Analyst position in its Transmission Reliability Compliance department (Reliability Compliance department) because of her race and color.

The three retaliation charges alleged in the EEOC complaint were 1) threatening while under protective activity; 2) lack of a thorough investigation of Flowers' internal complaint (inadequate investigation) and 3) an unfavorable job performance evaluation performed by Flowers' supervisor in 2013.

On February 5, 2015, the EEOC issued a right to sue letter and..." [Flowers] filed the Complaint in this action on April 10, 2015... [Flowers] submits a cause of action for failure to promote... (emp. added)

is in correct.

Flowers retained counsel in July of 2015. Flowers' counsel amended her complaint to add a failure to promote cause of action under Title 42 U.S.C. § 1981 and 42 U.S.C. §1981a and to add Flowers' retaliation claims under Title 42 U.S.C. § 1981 and 42 U.S.C. §1981a. Accordingly, the failure to promote cause of action is pleaded in the Amended Complaint which was filed with the District Court on August 11, 2015.

Since "[t]he general rule is that an amended pleading supersedes the original and remains in effect, unless again modified, from that point forward"(6 Wright, *Federal Practice & Procedure* § 1476, at 556-57 2nd ed. 1990 & Supp. 2001), the Amended Complaint is the active complaint in this instant case.

Flowers filed pro se with the District Court on December 27, 2016 and requested through several motions to be allowed to present evidence not presented by her former counsel in order to support allegations made in the Amended Complaint. At a hearing held on January 24, 2017 the District Court granted Flowers permission to file a substituted opposition to summary judgement.

On February 14, 2017 Flowers filed pro se a substituted opposition to summary judgement supported with a preponderance of evidence supporting all of the factual allegations made in the following case. The substituted opposition to summary judgement is the active opposition.

III) STATEMENT OF THE CASE

- **Background Facts and Issues**

From January 2008 through April 2009 Flowers successfully worked as a contractor in Eversource's Transmission Construction and Maintenance department. Flowers was initially contracted to work as an office assistant however in less than a years' time she was promoted to an analyst position in the Transmission Construction and Maintenance department.

On September 21, 2009, Eversource hired Flowers as a permanent employee to the position of Associate Analyst in its Reliability Compliance department. Karl Tammar (Tammar) was the hiring manager for the Reliability Compliance department at the time.

Under Tammar's supervision Flowers was immediately assigned senior-level work within two months of her hire and received excellent two and five-months performance evaluations. Flowers also received the 2009 annual raise under Tammar's supervision. Tammar left the company in October of 2010 and subsequently did not prepare Flower's 2010 job performance evaluation.

William Temple (Temple) replaced Tammar as acting manager in late October of 2010 and became the official manager of the Reliability Compliance department in December of 2010.

Record evidence shows immediately after coming under Temple's supervision, Temple initiated an ethnic conversation with Flowers about his Japanese heritage. During this conversation Temple informed Flowers that his mother told him and his siblings they should marry "white" people in order to get ahead. Pet. App. 9a.

In December of 2010 Temple called Flowers into his office to discuss her 2010 job performance evaluation. Temple informed Flowers during this discussion he had rated her a "2, one up from the bottom" and that he was not recommending her for the annual 2010 raise. Record evidence shows Flowers did not receive the 2010 annual raise.

In addition, in December of 2010, record evidence shows Temple reduced Flowers job responsibilities from the senior-level work she was performing under Tammar's supervision (e.g. compliance audit preparations, policy analysis, etc.) to primarily working with Eversource's Web-based Corrective Action Tracking System (CATSWeb), a company-wide system Eversource uses to track its compliance with regulatory entities' reliability standards.

Temple admits in his deposition testimony he did not review Flowers' performance evaluations prepared by Tammar before rating her a "2, one up from the bottom" and denying Flowers the 2010 annual raise. Temple also admits in his deposition testimony he had very little interaction with Flowers since Flowers' hiring date in September of 2009.

In March of 2011 record evidence shows Flowers complained about Temple's treatment of her to Deborah Ferringo, Human Resource Business Partner and Dwayne Basler (Basler), Temple's supervisor from October 2010 until 2014. Flowers requested of Basler to be removed from under Temple's supervision so "[Temple] would not have the power to discriminate against [her] again." Record evidence shows Basler refused to move Flowers from under Temple's supervision and refused to "chang[e] [Flowers'] overall job performance rating or merit pay adjustment for 2010."

- **Undue Scrutiny**

Record evidence shows beginning in October 2010 while Temple was acting manager through 2013 Temple covertly recorded notes on Flowers which focused on a host of accusations regarding, inter alia, Flowers work performance, interactions with coworkers and unfounded libelous allegations. Flowers gained access to the notes by way of Eversource's discovery materials. The notes show as early as January 21, 2011, the day after Temple signed-off on Flowers' 2010 job performance evaluation (January 20, 2011) Temple was premeditating a success plan (e.g. type of performance improvement plan) for Flowers.

- **Failure to Promote to Analyst Position In 2013**

In April of 2013 Eversource posted an opening for an Analyst position in the Reliability Compliance department. Flowers informed Temple she was going to apply for the position. Temple informed Flowers he would not be interviewing Flowers for the position because he was tired of managers complaining to him about Flowers' work performance. Temple's deposition testimony on this matter is dubious at best.

When Temple was being deposed by Flowers' former counsel he was asked in several instances about critical comments he made in Flowers job performance reviews from 2010 through 2013-what of Flowers work performance was he referring to. Temple admitted each time he was referring to Flowers' work performance with Eversource's CATSWeb tracking system.

- **Disparate Treatment**

Flowers alleged she was treated disparately in Eversource's 2013 promotional decision because two of her Caucasian co-workers in the Reliability Compliance department, Wyran Feil (Feil) and Mark Kenny (Kenny), made more similar and substantial alleged errors in the CATSWeb tracking system than Temple alleged Flowers had made, yet both Feil and Kenny were promoted to supervisor positions at Eversource. Pet. App. 26a-28a

- **New Hire**

After formerly applying for the Analyst position Flowers received from Eversource's human resource staff the response, ineligible for the posting.

Suzanne Black (Black) who is Caucasian was hired to the Analyst position in the Reliability Compliance department. Pet. App. 10a. Once hired, Black primarily worked within Eversource's Critical Infrastructure Program (CIP) where record evidence shows Flowers successfully worked for two years with CIP Manager, Michael Puscas. Black was qualified for the Analyst position and being hired to the position was a lateral move for Black from another department in Eversource. However, Black was hired after Temple refused to interview Flowers for the Analyst position before the interviewing process started and after Flowers formally applied for the position--a timeframe in which the Analyst position remained opened and candidates with Flowers' qualifications were still being sought.

Eversource's non-discriminatory reason for its 2013 promotional decision was that "[Flowers'] performance was "substandard and erratic," up until 2012 rendering her unqualified to serve as an analyst." Pet. App. 4a, 23a. However, Temple admitted in his deposition testimony "[he] does not believe he told [Flowers] she was unqualified for the position." Pet. App. 10a. He did not.

Retaliation Claims

- **Inadequate Investigation of Internal Complaint**

On August 15, 2013 Flowers filed a racial discrimination complaint through Eversource's internal discrimination and harassment complaint system known as the Beacon Line. Flowers' internal complaint alleged, inter alia, she was refused the promotion to the Analyst position in the Reliability Compliance department because of her race and color and that her email account had been "spoofed" (e.g. hacked) by Temple. Eversource's Information Technology policy defines "spoofing" as "u]sing another [u]ser's email account without authorization or without disclosing [their] identity or sending an email message under another person's name)." Denise Nadeau (Nadeau), Eversource's Program Manager for Employee Relations investigated Flowers' internal complaint.

On September 11, 2013 Nadeau met with Flowers to inform Flowers there was not sufficient evidence to prove Temple had racially discriminated against her. Record evidence shows Nadeau spent 20 hours (two and a half workdays) conducting the investigation, notwithstanding Nadeau admitted in an EEOC

affidavit Flowers' allegations were numerous which made the investigation complicated.

Nadeau interviewed six Eversource employees (favorable to Temple) who included Temple (the alleged offender), Basler, Temple's supervisor from 2010 through 2014, Boguslaw (aka Bob) Ciurylo,(Ciurylo) Information Technology (IT) Security manager and three other employees, two who blatantly lied during their interview. Nadeau did not provide Flowers an opportunity for rebuttal after interviewing these employees. Nadeau ended the internal investigation prematurely on October 29, 2013 after threatening Flowers with harassment charges for engaging in the internal investigation of Flowers email "spoofing" incident and while Flowers was under protective activity.

Eversource's non-retaliatory statement for Flowers' inadequate investigation assertion is that Eversource conducted a thorough investigation.

- **Threatening While Under Protective Activity**

Flowers alleged in close proximity to the rejection of her 2013 application for the Analyst position (April 16, 2013), on May 24, 2013 Temple accused Flowers of erroneously sending an email to a Duong Le at Northeast Power Coordinating Council (NPCC) that was meant to be sent to Temple only. Record evidence shows a discrepancy in time-stamp dates on the sent, reply and forwarded emails between Temple, Duong Le and Flowers. Because of this discrepancy coupled with the fact Flowers did not know of a Duong Le (Le) at NPCC, Flowers alleged Temple

manipulated the email so that it appeared the email sent to Le was sent by Flowers from her personal company email account. Flowers alleged Temple manipulated the email then blamed her for inter alia the email error to justify his rejecting her for the Analyst position and subsequently to fulfill his 2011 premeditated plan to place Flowers on a success plan.

On September 19, 2013 Nadeau met with Flowers and provided Flowers with a note from the IT Security department with instructions on who to contact regarding the email "spoofing" allegation. Ciurylo was the IT Security contact.

On September 20, 2013 Flowers met with Ciurylo. Ciurylo informed Flowers he would look into the email "spoofing" complaint.

Record evidence shows, on October 4, 2013, Nadeau wrote in follow-up notes she sent to Basler, Temple's supervisor, Deborah Ferringo, Human Resource Business Partner, Marianna Emanuelson (Emanuelson), Lead Human Resource Business Partner, and Anne Taveras, Manager for Employee Relations regarding Flowers' involvement in the email "spoofing" investigation,

"u]pon my return from vacation, I received a voicemail from Bob Ciurylo, Director-IT Security. Pat [Flowers] went to Bob about the email to Mr. Le again. Bob provided me with copies of his investigation, and we agreed he would close his investigation out with Pat." I notified Marianna of this event. Record evidence shows Nadeau's follow-up notes were an act of willful mendaciousness.

On October 21, 2013 record evidence shows Ciurylo sent an email to Flowers and provided Flowers with information he had obtained from his investigation of the alleged email "spoofing". In the email Ciurylo informed Flowers "[i]f you would like to discuss this topic further give me a call." (emp. added). Record evidence shows in a written report on the email spoofing investigation prepared by Ciurylo (CIS Report), Ciurylo documented the timeline of the investigation and the results of his findings. The report notes Ciurylo met with Flowers on September 20, 2013 and Ciurylo continued to follow-up with Flowers up until October 21, 2013.

The CIS report documents critical material facts that supports Flowers assertion she was threatened by Nadeau while engaging in and under protective activity and Flowers assertion Nadeau conducted an inadequate internal investigation:

> a) Based on the contents of Pat's e-mail, she believed someone added Duong Le to the distribution list because the sending date and time was 5/23/13 04:05 PM while Bill Temple's forward of that same e-mail on 5/25/13 had the sending time as 04:06 PM.
>
> b) The printout of the e-mail showed in the forwarded header detail from Bill on 5/24/13 that it was sent on 04:05:36 PM. (emp. added) (there are other emails Ciurylo does not mention in his report that shows a clearer picture of the discrepancy in the emails).
>
> c) It is possible that the Duong Le reply was fabricated by Bill Temple, until we receive positive external confirmation. (emp. added)
>
> d) Since original e-mails could not be produced, I did inform Pat [Flowers] that the contents of forwarded e-mails can be easily modified, e-mail headers as well as content, with no technical proficiency required. (emp. added)
>
> e) Reviewed above conclusion and supporting evidence with Denise Nadeau and she recommended I close this investigation. She will be reviewing these results with Marianna C. Emanuelson, HR Business Partner for Transmission. (emp. added)

The last date on the CIS report is October 21, 2013.

On October 29, 2013 Nadeau and Emanuelson met with Flowers to discuss Flowers' communications with Ciurylo. Flowers alleged at the October 29, 2013 meeting Nadeau threatened Flowers with harassment charges if she continued to contact Ciurylo regarding the alleged email "spoofing". Flowers did not contact Ciurylo again out of fear of being charged with harassment which could have resulted in the termination of her job.

Eversource's non-retaliatory reason for the October 29, 2013 meeting was to inform Flowers Ciurylo had investigated Flowers' email "spoofing

assertion twice and "Mr. Ciurylo's team would not continue to investigate the same issue again and again..." Pet. App. 5a, 33a

- **Illegal Cover-Up and Concealment of Material Facts**

Record evidence shows on November 5, 2014 in violation of 18 U.S.C. § 1519 under Title 18 of the Crimes and Criminal Procedures Act, Nadeau, Emanuelson and Ciurylo engaged in a cover-up of its adverse actions perpetrated on Flowers (e.g. threatening, inadequate internal investigation) by concealing material facts in affidavits submitted to the EEOC regarding the implied probability in the CIS report of Temple's culpability in the email "spoofing" incident. The affiants also made misleading statements in their affidavits that are inconsistent with facts in the CIS report. Notwithstanding the CIS report or the affiant's EEOC affidavits, Eversource listed the email "spoofing" investigation in its Local Rule 56(a)1

statement as a material fact not in dispute, citing Ciurylo's EEOC affidavit without any citation to the CIS report. (Ciurylo omitted the critical material facts aforementioned in his EEOC affidavit). In Flowers' initial Local Rule 56(a)2 statement prepared by her former counsel, Flowers' former counsel admitted to Eversource's assertion that the email "spoofing" investigation was not in dispute without controverting by use of, inter alia the material facts in the CIS report. All parties and counsels were in possession of the CIS report and November 5, 2014 EEOC affidavits and other evidence in regard to this matter (e.g. Nadeau's October 4, 2013 follow-up notes, Flowers' Temple's and Le's emails).

Eversource did not dispute this assertion of an illegal cover up of its adverse actions by concealing material facts in its EEOC affidavits.

- **Second Failure to Promote In 2016**

In or around March of 2016 Eversource posted an opening for a Senior NERC Specialist (Senior Analyst) position in the Reliability Compliance department. While the Analyst position Flowers applied to in 2013 had become vacant in and around 2015 and remained vacant when Eversource posted the Senior Analyst position, Eversource did not post an Analyst position at this time.

Flowers applied to the Senior Analyst position in March of 2016. Flowers' 2014 and 2015 job performance evaluations were exceptionally positive. Flowers had performed senior level work under Tammar's supervision and was performing some senior level work when she applied for the Senior Analyst position. Record

evidence shows, on August 1, 2016, on the eve Flowers was to give deposition testimony regarding this instant case to Eversource's legal department (August 2, 2016), Flowers' then current supervisor Kenny met with her to inform her Eversource's human resource department would not be considering her application for the Senior Analyst position because "[Temple] gave her a bad 2013 job performance review."

Eversource argued that during this meeting Kenny offered to help Flowers get promoted to the Analyst position.

Flowers resigned from the Associate Analyst position on September 26, 2016. Eversource moved for summary judgment several hours later.

IV) DISTRICT COURT DECISION

On September 29, 2017 the District Court granted summary judgement favorable to Eversource on all Flowers claims. The District Court predicated its decision on the following grounds:

> [Flowers] offers no evidence which raises a question of fact as to whether [Eversource] reason for not promoting her was mere pretext for discrimination. Pet. App. 19a, 27a
>
> Flowers offered insufficient evidence and conclusory statements to show she was subjected to racial animus beginning in 2010. [Flowers] deposition testimony on this matter is "self-serving testimony," "speculative, and "subjective." Pet. App. 25a-26a
>
> Flowers] offers no evidence of her Caucasian co-workers' errors who were treated more favorable than her in Eversource's promotional decisions or evidence to show she was similarly situated to the co-workers to who she compared herself. [Flowers] deposition testimony on this matter is "is solely based on her speculative belief." Pet. App. 26a

[Flowers] offers incomprehensible evidence to show co-workers' errors. Pet. App. 27a at fn. 4

Retaliation Claim-Threatening

[Flowers] has not established a prima facie case that [Eversource] retaliated against her when Nadeau notified [Flowers] she was borderline harassing someone in the IT department over her email account. Pet. App. 31a -35a

[Flowers] offers no evidence that she was accused of harassment.... Pet. App. 31a-35a

[Flowers] has not offered evidence that the Nadeau's threat was causally connected to [Flowers' internal] complaint. Pet. App. 31a-35a

Flowers] cites no evidence [aside from her own "conclusory allegations in her deposition and EEOC complaint] to show the pretext of [Eversource's] non-retaliatory reason for the October 29, 2013 meeting. Pet. App.31a-35a

Flowers] has not made a showing that Nadeau's [threat] was a "materially adverse action Pet. App.31a-35a.

- **Retaliation: Inadequate Investigation/ Failure to Promote in 2016**

Flowers retaliation claims of an inadequate investigation and 2016 failure to promote claim will not be considered on the grounds they were not presented in her Complaint and may not be alleged for the first time in her Opposition to Summary Judgment. Pet. App. 31a at fn.5

V) SECOND CIRCUIT DECISION

On July 23, 2019 the Second Circuit affirmed the District Court's decision to grant summary judgement favorable to Eversource. The Second Circuit reasoned its decision on the following:

- **Failure to Promote Cause of Action**

Even assuming that Flowers has established a prima facie case of race-based discrimination, we agree with the district court that she has failed to produce

sufficient evidence that the failure to promote her was motivated by discriminatory animus rather than by Eversource's stated motivations.... Flowers, for her part, has failed to offer sufficient evidence of pretext. Pet. App. 4a

- **Retaliation Threatening**

...[E]ven assuming that Flowers has established a prima-facie showing of retaliation, Eversource has offered ample evidence of legitimate, non-retaliatory reasons for the allegedly adverse actions taken toward Flowers following her filing of the complaint. Yet Flowers has failed to provide sufficient evidence that these actions were instead motivated by discriminatory animus. Pet. App. 5a

- **Retaliation Claims: Inadequate Investigation/ Failure to promote in 2016**

Flowers argues that the district court erred in declining to consider her two additional allegations of retaliation: Eversource's alleged inadequate investigation of her internal discrimination complaint and its refusal to promote her for a second time in 2016. Flowers, however, asserted these claims for the first time in her opposition to summary judgment, and the district court therefore properly declined to consider them. Pet. App. 5a

The Second Circuit declined to consider Flowers assertions "her supervisor subjected her to disparate treatment based on her race beginning in 2010" and that "Eversource engaged in an illegal coverup of its wrongdoing by omitting information from affidavits submitted to the [EEOC]" on the grounds these claims were allegedly presented for the first-time on appeal. Pet. App. 6a at fn.1.

The Second Circuit also declined to grant Flowers permission to amend her complaint to add Eversource's 2016 retaliatory promotional decision infra. Pet. App. 6a at fn. 1.

VI) REASON FOR GRANTING THE PETITION

Pursuant to Supreme Court Rule 10(a), Flowers request the "exercise" of the Court's supervisory power on a decision entered by the Second Circuit that has so far departed from the accepted and usual course of judicial [summary judgement] proceedings, [and] sanctioned such a departure by [the District Court] as to call for an exercise of this Court's supervisory power." *Supreme Court Rule (10a).*

The Second Circuit, as a matter of law, erroneously assessed Flowers' evidence supporting her prima facie cases of racial discrimination and retaliation, by 1) viewing the facts of the case and evidentiary facts in light favorable to Eversource, 2); construing evidence in light favorable to Eversource; 3) disregarding critical evidence that undermines Eversource's stated reasons for its adverse actions taken against Flowers; 4) reviewing the evidence in piecemeal fashion; 5) neglecting to review the whole record on appeal.

A. The Second Circuit Erred as a Matter of Law, in Its Assessment of the Facts and Evidence in This Case

First, the Second Circuit erred in its assessment of Flowers' evidence and by its affirmance of the District Court's decision sanctioned the District Court's doing of the same, by viewing the facts in the record in light favorable to Eversource. Accordingly, the Second Circuit and the District Court drew inferences from these facts favorable to Eversource as well, notwithstanding the Court's holding in, *United States v. Diebold*, Inc, that "[i]n evaluating a motion for summary

judgment, a district court should consider the facts in the light most favorable to the non-moving party and draw all reasonable inferences from those facts in favor of that party.") *Diebold,* Inc., 369 US 654 (1962).

Second, the Second Circuit totally disregarded and sanctioned the District Court's disregarding of over 25 pieces of critical evidence Flowers proffered to show the pretext of Eversource's stated reasons for its adverse actions taken toward her infra. The disregarded evidence does not include CATSWeb documents, evidence that coexists within the fact (*Black's Law Dictionary* defines this type of evidence as "fact-in-evidence" or "evidentiary fact" which "constitutes as evidence.") or deposition testimony infra. Again, the Second Circuit departed from the Courts' holding in *Reeves v. Sanderson*, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record" *Reeves* 530 U.S. 133 (2000).

Third, the Second Circuit erred and sanctioned the District Court's erring in viewing the evidence in piecemeal fashion rather than as a whole. While the Second Circuit held in *Walsh v. New York City Housing Authority* "[a] plaintiff's evidence at the third step of the *McDonnell Douglas* analysis must be viewed as a whole rather than in a piecemeal fashion." *Walsh*, 828 F.3d 70 (2nd Cir. 2016)(citations omitted), the Second Circuit made an arbitrary decision to depart from its holding in this instant case. In *Matsushita v. Zenith Radio Corp*, the Court held, "[w]here the record, taken as a whole, could not lead a rational trier of fact to

find for the nonmoving party, there is no "genuine issue for trial." *Matsushita,* 475 U.S. 574 (1986). This is not the case here.

When all the facts, evidentiary facts and other evidence in the record are viewed and construed as a whole in a light favorable to Flowers, and all reasonable inferences are drawn in her favor, the record shows not only are there material issues of facts in dispute so to have precluded summary judgement, but that there is sufficient evidence, including Flowers' deposition testimony, supporting Flowers' prima facie case of racial discrimination and retaliation claims so to sustain a jury finding of liability for intentional discrimination perpetrated on Flowers by Eversource.

The Sufficiency of the' Evidence

- **Deposition Testimony**

As an initial matter, Flowers' rejects the District Court's characterization of her deposition testimony as self-serving testimony," "speculative, and "subjective" which is summarily concluding Flowers' deposition testimony is mere conclusory statements. Pet. App. 25a-28a, 37a

While the Second Circuit did not specifically state Flowers' deposition testimony is comprised of conclusory statements, nevertheless, the Second Circuit disregarded evidence in Flowers' deposition testimony relevant to her claims and in its affirmance of the District Court's decision sanctioned the District Court's characterization of Flowers' deposition as such.

Fed. R. Civ. P. 56(C)(1)(A) specifically permits a party to support its factual assertions by means of deposition testimony. *Black's Law Dictionary* defines deposition testimony as "testimony evidence." (*Black's Law Dictionary* 678 (9th ed. 2009). Charles Alan Wright, stated in *Federal Practice and Procedure*, "[b]ecause a deposition is taken under oath and the deponent's responses are relatively spontaneous, it is one of the best forms of evidence for supporting or opposing a summary-judgment motion" (emp. added). (10a Charles Alan Wright, et al., *Federal Practice and Procedure* §§ 2722, at 382-84 (3d Ed. 1998))

Hence, rather than conclusory statements, first, Flowers deposition testimony is evidence given in support of the pleadings in the Amended Complaint, including her disparate treatment claim Pet. App. 6a at fn.1 and assertion of Eversource's retaliatory inadequate internal investigation Pet. App. 5a, 6a at fn.1, 31a at fn.5. As a matter of fact, Eversource disputed these two claims in its November 5, 2014 EEOC rebuttal statement and in its response to the Amended Complaint via its Affirmative Defenses filed with the District Court on September 10, 2015. Eversource' continued to dispute these two claims up until March 6, 2017 in its reply to Flowers' substituted opposition.

Second, Flowers' deposition testimony attests to the adverse action she was subjected to by Eversource's 2016 promotional decision (second failure to promote) Pet App. 5a, 6a at fn.1, 31a at fn.5:

> **Q**. I'm just looking at your complaint, and I'm not seeing that you are alleging damage because of a performance review.

A. To answer this, I can allege damage as of yesterday.

Q. Okay. Well, there is nothing in your complaint about it.

A. It just happened yesterday.

Flowers goes on in her testimony to explain her 2016 application to the Senior Analyst position however the questioning deflected to other matters.

Consequently, the Second Circuit erred in its conclusion that Flowers' assertions of a retaliatory inadequate internal investigation and that Eversource's 2016 retaliatory promotional decision were presented for the first time in her substituted opposition to summary judgement. Pet. App. 5a Likewise, the Second Circuit erred in concluding Flowers' disparate treatment claim was presented for the first time on appeal. Pet. App. 6a at fn.1.

The Second Circuit also erred in its' conclusion that Flowers' assertion of Eversource's illegal cover-up of its adverse action taken towards Flowers was presented for the first time on appeal. Pet. App. 6a at fn.1. Flowers filed this assertion with the District Court on October 25, 2017 in response to Eversource's objection to Flowers' motion for reconsideration of the District Court's summary judgement decision.

Flowers' deposition testimony, which is extensive, has been undermined as sworn evidentiary testimony not only by the District Court and affirmed by the Second Circuit, but by Eversource as well.

In Eversource's December 6, 2016 reply to Flowers' opposition to summary judgement prepared by Flowers' former counsel, Eversource argued,

> [Flowers'] characterizations of Nadeau as "reprimanding" and even "threatening" are not backed up with identification of any offensive language or any other objective facts. [Flowers] identifies only her own deposition testimony as evidence, and no facts substantiate [Flowers'] hyperbole.

This was true in the opposition to summary judgement prepared by Flowers' former counsel. However, Eversource argued again in its March 6, 2017 reply to Flowers substituted opposition

> Flowers] argued to this Court on January 24, 2017 that she should be given a second opportunity to object to the Eversource Motion because she needed to provide evidence to back up statements in her deposition transcript that her attorney had not presented.
>
> It should be noted, that in the 2d Opposition, [Flowers] cites, again, to the transcript of her own deposition, with no support other than self-serving documents of her own creation (emp. added).

Eversource's March 6, 2017 argument is simply not true.

Flowers' substituted opposition cites to a preponderance of material evidence in the record that supports every factual allegation she attested to in her deposition testimony. Approximately seventy-five percent of this record evidence Flowers offered in support of her claims was adduced in Eversource's discovery materials labeled and paginated accordingly. Flowers received this evidence as early as April of 2016, if not earlier. In *Anderson* the Court held, "...the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession

of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. *Anderson,* 477 U.S. 257 (1986).

Other of Flowers relevant evidence was downloaded from electronically stored information systems belonging to Eversource of which the contents cannot be altered offline (e.g. CATSWeb documents, payroll stubs, etc.).

- **Temple's Deposition Testimony**

By allowing the District Court to characterize Flowers' deposition testimony as conclusory statements, the Second Circuit gives permission for the District Court to characterize Temple's deposition testimony (which the District Court and Eversource disregarded almost in its entirety) as conclusory statements as well.

The Second Circuit disregarded critical evidence in Temple's deposition testimony that 1) corroborates Flowers testimony that she was subjected to racial animas and discrimination as early as 2010; 2) mentions his scrutiny notes that contributes to the nexus of racial animus leading to his decision not to interview Flowers for the Analyst position in 2013; 3) gives support to Flowers disparate treatment claim that her Caucasian co-workers were treated more favorably in Eversource's promotional decisions; 4) corroborates Flowers' testimony she was qualified for the Analyst position and 5) shows inconsistencies in Eversource's non-discriminatory reason for its 2013 promotional decision. The Court held in *National Railroad Passenger Corporation v. Morgan,* "[Title VII does not] bar an employee

from using the prior acts as background evidence in support of a timely claim. *National Railroad Passenger Corporation*, 536 U.S. 101 (2002).

Temple's deposition testimony also attests to Eversource's human resource department's role as the decision maker in promotional decisions-- the department who made the ultimate decision to reject Flowers 2016 application for the Senior Analyst position. The application was rejected specifically based on Flowers' retaliatory job performance review Temple conducted in 2013, notwithstanding Flowers' 2014 and 2015 job performance evaluations were exceptionally positive. Moreover, Eversource's human resource department had approved Flowers' Caucasian coworkers' applications for promotion despite their errors. As the ultimate decision maker in Flowers' application for the Senior Analyst position in 2016, the motivating factor (e.g. racial animus) that motivated Temple to write an unfavorable job performance review and which caused an adverse action becomes the motivating factor in Eversource's human resource department's 2016 promotional decision as well. *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) (holding, "Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination [or racial animus] is a motivating factor in his doing so, it is a "motivating factor in the employer's action,..."). Hence, if Flowers were to concede her deposition testimony is mere conclusory statements, which she does not, together with Temple's deposition testimony, the attestations raise several "questions and/or issue of facts.

- **Other Evidence in The Record**

In its blanket affirmance of the District Court's summary judgement decision, the Second Circuit construed in light favorable to Eversource or did not construe at all other evidence in the record Flowers proffered to show the pretext of Eversource's non-discriminatory and non-retaliatory statements for its adverse actions taken against her.

For example, what should have been construed as clear and convincing evidence of a concealment of material facts in the EEOC affidavits and Eversource's illegal "cover-up of its wrongdoing" when viewed together with, inter alia, the CIS report, the Second Circuit instead construed false statements made in the EEOC affidavits to defend Eversource's non-retaliatory reason for the October 29, 2013 meeting and sanctioned the District Court's doing of the same. Pet. App. 4a-5a, 31a-35a.

The concealment of material facts and Eversource's cover-up of its wrongdoing is critical evidence to showing the pretext of Eversource's non-retaliatory reasons for the inadequate investigation and the "threat."

First, the cover-up shows a consciousness of guilt. Second, the cover-up establishes the "but-for-cause" the Court held in *University of Texas S.W. Med v. Nassar* that is necessary to prove the causation of the retaliatory threat and inadequate internal investigation. "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation

test stated in §2000e–2(m)"). *University of Texas S.W. Med.* 570 U.S. 338 (2013). To wit, "but-for" the CIS report's implied probability of Temple's culpability in the email "spoofing" allegation, Nadeau would not have threatened Flowers on October 29, 2013 with harassment charges if she continued communications with Ciurylo regarding the email "spoofing" incident. Nor would Nadeau prematurely have ended the internal investigation which included the email "spoofing" incident but for the CIS report.

In *Reeves* the Court stated,

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative.....it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Reeves, *supra* at 134

The EEOC affidavits also establishes the third and fourth prong of Flowers' prima facie case for the retaliatory threat. Pet. App. 65a-73a.

First, the fourth prong of the prima facie case (causal connection to the internal complaint) is shown in the following statements in Nadeau's EEOC affidavit:

> On August 15, 2013, Patricia Flowers filed a complaint through the Company's compliance hotline, the BEACON Line.... I...reached out to Bob Ciurylo, the Manager in the Company's IT Security Department, described Ms. Flowers ' claims of sabotaging her work and emails, and asked how this issue could be investigated. He indicated that she would need to contact his group with specifics....
>
> Ms. Flowers spent a significant amount of time talking about the email that had been sent to Duong Le on May 23, 2013.

Second, the third prong of Flowers' retaliation claim, the materially adverse action was established when the representative of Eversource's human resource department, the formal gateway for an employee to file complaints of discrimination, threatened Flowers with harassment charges while Flowers was engaged in and under protective activity. The Court held in *Burlington N. & Sfr Co. v. White*

> [a] 'materially' adverse action is one that 'well' might have dissuaded a reasonable worker from making or supporting a charge of discrimination."
>
> [t]he anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms.(citations omitted).... It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their *employers*") *Burlington,* 548 U.S. 53 (2006) (emp. added).

To be threatened with harassment charges by Eversource's employee relations department with no support from the Lead Human Resource Business partner, the liaison between employees and the company, well dissuaded Flowers from approaching Eversource's human resource department again in 2016 when it suspiciously rejected her application for a promotion to the Senior Analyst position on the eve Flowers was to be deposed.

As a further matter of an adverse action, Nadeau's threat led to the inadequate internal investigation. If Flowers' internal investigation had of been conducted as what Black's Law Dictionary defines "[as] an activity of trying to find out the truth [about something ... " [or as] "an authoritative inquiry into certain fact," [emp. added] the internal investigation would have uncovered disparate

treatment, excessive scrutiny and would have provided Flowers a fair opportunity to rebut the employees who were interviewed. Instead, Nadeau conducted an inadequate and bias investigation resulting in Flowers being denied the same privilege and benefits of promotion afforded her similarly situated co-workers. The Second Circuit held in *Sassaman v. Gamache*, "[t]he failure of an employer to conduct an adequate investigation.... can constitute evidence in support of a Title VII plaintiffs allegations."). *Sassaman*, 566 F. 3d 315,(2nd Circuit 2009).

Since the Second Circuit dismissed Flowers' disparate treatment claim for consideration in its review, it ignored evidence in affidavits submitted by Basler (Temple's supervisor from 2010-2014) that shows Flowers was similarly situated to her Caucasian co-workers to whom she compared herself in her disparate treatment claim. The Court held in *McDonnell Douglas v. Green*, evidence relevant to showing the pretext of an Employer's non-discriminatory explanation is how an employer' treated a "white" person in similarly situated conditions. *McDonnell Douglas Corp.* 411 US 804 (1973) (holding, "relevant to such a showing [of pretext] would be evidence that white employees involved in acts...of comparable seriousness ... were nevertheless retained or rehired [or promoted]").

In addition, while the District Court dismissed as incomprehensible Flowers' CATSWeb evidence showing the severity of her Caucasian co-workers' errors, Flowers summarized the evidence in the documents in her Appellant Brief to make it comprehensible on appeal. The Second Circuit disregarded this evidence as well in its review.

B. The Second Circuit, as a Matter of Law, Violates Rule 56 (A) of the Federal Rules of Civil Procedure

The Second Circuit's Decision as, a matter of law, violated the ultimate rule of summary judgement jurisprudence and sanctioned the District Court's violation of the same. Fed. R. Civ. P. 56(A) specifically states, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

In *Adickes v. S.H. Kress & Co.* the Court held, "[t]he party seeking summary judgement has the burden to demonstrate that no genuine issue of material fact exists." *Adickes* 398 U.S. 144, 157 (1970). In *Anderson* the Court reiterates, "[t]he movant has the burden of showing that there is no genuine issue of fact." Anderson, supra at 256.

Eversource has not met this burden.

In *Anderson*, the Court held, "Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving part." Anderson *supra,*. at 248. The Second Circuit's decision should not lie in this instant case.

C. The Second Circuit Declines Permission to Amend Complaint

The Second Circuit declined to grant Flowers' permission to amend her pleadings to add her assertion that Eversource retaliated against her in its 2016 promotional decision. Pet. App. 6a at fn.1. This adverse action grew out of Flowers'

complaint filed with the EEOC in May of 2014. The Second Circuit based its reasoning on Flowers made this request in her Appellant Reply Brief and as a rule requests not made in the Opening Brief are waived. Pet App. 13a at fn.1. Flowers' respects this circuit rule. However, the Court held in *Foman v. Davis*

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [s]he ought to be afforded an opportunity to test h[er] claim on the merits. *Foman v. Davis.* 371 U.S.

Justice so requires.

VII) Conclusion

It is Flowers' prayer that justice will prevail in this instant case. That is, that the Court will grant this petition and summarily reverse or vacate the Second Circuit's decision as the Court deems appropriate.

Respectfully Submitted,

s/s Patricia A. Flowers
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