No. 20-172

IN THE

Supreme Court of the United States

UKPAI IGWEIKE UKPAI

Petitioner,

v.

CONTINENTAL AUTOMOTIVE SYSTEMS US, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

UKPAI I UKPAI
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INTRODUCTORY STATEMENT

The questions deal with whether the circuit court's analysis that concluded that two employees are not similarly situated, though both engaged in the same conduct under the supervision of the same person, violates the intent of the McDonnell/Green Scheme for proving a prima facie case for employment discrimination. The questions also deal with whether the circuit court's opinion is inconsistent with numerous of its and other circuits' opinions, as well as numerous holdings of this Court including Federal Rule 56 and the standard of drawing all inferences in favor of the non-moving party.

QUESTIONS PRESENTED FOR REVIEW

1. Can Courts find that two employees are not similarly situated though both employees performed the same conduct under the supervision of the same supervisor with the same set of rules and policies? And, would such a ruling be consistent with the intent and meaning of the "Similarly Situated" concept or be so onerous as to violate the intent established in McDonnel/Green scheme by this Court?
2. Should courts make presumptions in favor of the moving party in a summary judgment proceeding?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Petitioner Ukpai I Ukpai was the Plaintiff in the United States District Court for the Eastern District of Michigan, Southern Division and appellant in the United Court of Appeals for the Sixth Circuit. Respondent Continental Automotive Systems, US Inc., was the Defendant in the District Court and the Appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Ukpai I Ukpai, is an individual and brings this petition on his own behalf.

Respondent, Continental Automotive Systems US. Inc., is a subsidiary or affiliate of a publicly owned corporation with the relationship: Continental Automotive, Inc. owns 100% of Continental Automotive Systems, Inc. Continental Automotive, Inc, is owned 100% by Continental Automotive Holding Netherlands, B.V. which is owned 100% by CGH Holding B.V. which is owned 100% by CAS-One Holdinggesellschaft mbH which is owned 100% by Continental Caoutchouc-Export-G,bH which is owed 51% by Continental Automotive GmbH and 49% by Continental Aktiengessellschaft.

RELATED CASES

There are no related cases other than the opinions identified below in this matter:

Ukpai v. Continental Automotive Systems US Inc., No. 17-cv-12428, United States District Court for the Eastern District of Michigan, Southern Division. Judgment entered March 26, 2019.

Ukpai v. Continental Automotive Systems US Inc., No. 19-1463 United States Court of Appeals for the Sixth Circuit. Judgment entered February 18, 2020. En Banc hearing denied May 2, 2020.

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Petitioner Ukpai I Ukpai respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the order and opinion entered on February 18, 2020 and sustained by the order entered on May 4, 2020.

OPINIONS AND ORDERS BELOW

The May 4, 2020 order of the court of appeals denying Petitioners' Petition for rehearing *en banc* is reproduced at pp. 1a-2a of the Appendix. The February 18, 2020 order of the court of appeals is unpublished and viewable at *Ukpai v. Ukpai v. Cont'l Auto. Sys. US, Inc.*, 2020 U.S. App. LEXIS 14140 Cont'l Auto. Sys. US, Inc., 2020 U.S. App. LEXIS 14140 and reproduced at pp. 3a to 16a of the Appendix.

The March 26, 2019 opinion and order of the district court is reported at *Ukpai v. Cont'l Auto. Sys. US, Inc.,* 2020 U.S. App. LEXIS 14140 and reproduced at pp. 17a -35a of the Appendix.

JURISDICTION

The court of appeals entered judgment on February 18, 2020. The court of appeals denied a timely petition for rehearing *en banc* on May 4, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). Review of this case is appropriate under sub-divisions (a) and (c) of Supreme Court Rule 10.

STATUTES INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq* and is set forth in the Appendix at pp 36a-37a.

STATEMENT OF THE CASE

Petitioner Ukpai I Ukpai (Pro Se) commenced this action in the district court on July 25, 2017[1]. The district court had original subject matter jurisdiction of Petitioner's claims because the claims involve a Federal question under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

The district court granted Petitioner leave to amend the complaint on November 17, 2017[2]. Petitioner filed a First Amended complaint on December 1, 2017[3]. On February 15, 2018, the Court granted Petitioner's motion for leave to file a Second amended complaint[4] and the complaint filed with Petitioner's motion was deemed filed on February 15, 2018[5].

On October 15, 2018, Respondent filed a motion for summary judgment[6]. Petitioner filed his opposition on November 15, 2018 (Corrected

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[1] R1

[2] R17

[3] R24

[4] R35

[5] R45

[6] R104

December 29, 2018)[7]. Respondent filed a reply on November 27, 2018[8]. Petitioner retained counsel on February 4, 2019, 2019[9]. Petitioner's motion to amend Petitioner's response to Respondent's motion for summary judgment[10] was denied on March 18, 2019[11]. On March, 26, 2019, the District Court entered judgment granting Respondent's Motion for Summary judgment[12]. Petitioner timely appealed the judgment of the District Court to the Court of Appeals on March 26, 2019[13].

In its February 18, 2020 Order[14] the Circuit Court affirmed the order of the District Court. On March 2, 2020, Petitioner filed a petition for rehearing en banc to the Court of Appeals[15]. On May 4, 2020, the Court of Appeals denied the petition[16].

STATEMENT OF THE FACTS

In 2015, Ukpai I Ukpai, a black naturalized American citizen born in Nigeria, became the

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[7] R120

[8] R119

[9] R121

[10] R122

[11] R124

[12] R125.

[13] R127

[14] Pet. App. at 3a-16a

[15] Appellant's Petition for en banc hearing

[16] Pet. App. at 1a-2a]

target of discrimination and hostile treatment from Gilley, a Caucasian, who was Continental's representative and Ukpai's supervisor at the Kansas City Ford Assembly plant (KCAP). Ukpai, who speaks with an accent, was sent to KCAP, by his manager, Koua, in agreement with Aguayo[17] who coordinated all personnel for the inspections[18]. The work involved inspection of fuel pumps in the assembled vehicles.

Urban, a Caucasian, at KCAP for several weeks prior to Ukpai's arrival on October 29, 2015, planned to go back to the Czech Republic requiring Continental to replace him in order to meet Ford's needs[19].

After Ukpai's arrival, Urban decided to continue his stay at KCAP[20]. Consequently, Ukpai and Urban worked together under Gilley's supervision[21].

On arrival to KCAP, Ukpai called Gilley from the lobby [22]. Gilley immediately started to harass Ukpai and continued to do so in various forms until December 11, 2015[23].

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[17] [R116 at #4675-4679]

[18] R116 at #4768; R113 at #3225; R108-8 at #2780-2785; R108-9 at #2787 - 2796, R109-7 at #2895 – 2907

[19] R113 at #3190 – 3194, #3293-3294, R114 at #4437

[20] R113 at #3294

[21] *Id* at #3245-3269

[22] R113-4 at #4089-4095; R118 at #5358 – 5360; R115 at #4479 - 4524

[23] R113 at #3247 - 3292; R108-12 at #2832; R118 at #5379 -

Gilley, on the same day he first met Ukpai, demeaned and shouted at Ukpai for actions taken by Ukpai such as having parked his car at the visitors' lot, not bringing PPEs with him on arrival and not driving a Ford brand vehicle[24]. Ukpai reported the hostile interaction to Koua, who told Ukpai, as he would do several times during Ukpai's stay at KCAP, to '..lie low' and follow all of Gilley's instructions[25]. Gilley's hostile and discriminatory treatment of Ukpai continued the entire duration of Ukpai's stay at KCAP[26]. Gilley's actions towards Ukpai were in stark contrast to his treatment of Urban[27] and White[28]. Just like Ukpai, Urban was not driving a Ford vehicle on arrival and neither did he bring any PPE's with him, but, instead, was provided same by Gilley[29]. On one occasion as Urban and Ukpai carried out inspections, Gilley brought Urban's lunch exactly as Urban ordered it

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5429; R115 at #4557 - 4605,; #4488- 4507, #4607 – 4609; R108-16 at #2843

[24] R118 at #5358 – 5360; R113-4 at #4094 – 4095; R115 at #4481-#4526

[25] R120 at 8-16; R114 at #4445 – 4446; R115 at #4488 - 4507, #4557, #4589- 4609

[26] R118 at #5424 - 5427; R113 at #3247 - 3276; R115 at #4584 - 4605

[27] RE113 at #3278 - #3285; R118 at #5358- 5399; R115 at #4510,#4589 - #4594

[28] Appellant's Appeal Brief 18-26; R113 at #3273; R136 at #5916; RE118 at #5362 - #5365;

[29] R114 at #4439 – 4446; R113 at #3192 – 3240, #3278 -#3292; R113-4 at #4073- 4075;R108-12 at #2832;

but brought for Ukpai the one thing that Ukpai had specifically excluded, causing Ukpai to miss his lunch[30].

Gilley's adverse treatment of Ukpai continued in other forms. On November 5, 2015, Gilley falsely informed Koua and Aguayo, among others, that Ukpai did not follow his instruction. This was disputed by Ukpai to Koua at that time and Urban corroborated Ukpai's account, being an eye witness[31]. Gilley informed Backer, a Ford manager, that Ukpai was not a good person to replace Urban[32] though Ukpai did the job as well as Urban[33]. Gilley also blamed Ukpai for a grievance filed by the UAW with Ford though both Ukpai and Urban conducted the inspections together. Inspections were suspended after the grievance.

As Ukpai and Urban reported daily to Gilley's office, as he instructed[34], Gilley continued his harassment of Ukpai by constantly blaming him for the suspension of the inspections and never assigned blame to Urban[35]. Continental claimed[36]

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[30] R115 at #4584 - #4605, R113 at #3275 – 3276

[31] Appellant's Appeal Brief at 17-27

[32] R113-3 at #3947- #3970. To Aguayo's supervisor he wrote: "Dr. Ukpai is NOT a suitable replacement for Radim for many reasons" [R109-27 at #2848].

[33] RE113 at #3274 - #3275

[34] R109-27 at #2848; R109-1 at #2852

[35] Appellant's Appeal Brief at 23-25

[36] Appellee's Brief at 2-3; R104 at #2254-#2255;

that Gilley blamed Ukpai because of an issue that Gilley claimed Ukpai had with some hi-lo drivers. Continental also claimed the existence of a video of Ukpai taken by UAW drivers of Ukpai breaking plant rules[37]. These were disputed and contradicted by Ukpai[38] and Ukpai's account was corroborated by Urban[39], being an eye witness.

Later in November 2015, Urban went back to the Czech Republic. While in-plant inspections were suspended, Gilley asked Ukpai, on several occasions[40] to carry out pump inspections with him outside KCAP, as requested by Ford[41]. Gilley's hostile actions towards Ukpai continued in various fashions including a subtle accusation of theft by Gilley[42]. Though Aguayo constantly thanked Ukpai for his work[43], neither he nor Koua took any action to stop Gilley's hostile actions.

In December, 2015, another Caucasian, White, from Virginia, arrived to KCAP to carry out inspections and was introduced to Ukpai by

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[37] R74 at #1351 - #1352

[38] R114 at #4448; R118 at #5369 – 5371. Appellant's Brief at 46; Appellant's Reply Brief at 20-21

[39] R113 at #3248 - #3249

[40] Appellant's Appeal Brief at 25; R120 at #5589; R115 at #4619 - 4620, R113-4 at #4166-4168; R108-15 at #2841

[41] R109-5 at #2885 - #2890; R109-5 at #2880 – 2890;R109-1 at#2848 - #2852

[42] R120 at 12

[43] R116-1 at #4893; R114 at #4461

Gilley[44]. Gilley assigned White to conduct inspections on the day shift and Ukpai on the night shift. When Ukpai told Gilley that he should be on the day shift based on Gilley's earlier rule when he contemplated assigning Urban to conduct inspections on the day shift and Ukpai the night shift on account of Urban's seniority (which Gilley defined as arriving first to KCAP)[45], Gilley threatened to kick Ukpai out of the plant if he refused the night shift[46].

On December 9 and 10, 2015 Ukpai followed Gilley's instructions in conducting the inspections[47]. On December 11 Ukpai got approval from Aguayo to leave KCAP after Aguayo got two employees from the Czech Republic to conduct inspections. Aguayo told Ukpai he could take the rest of the year off to continue his vacation from which Aguayo had recalled him[48].

Also on` December 11, 2015, Gilley informed Ukpai's management that Ukpai was kicked out of KCAP by Ford because of grievances filed against him[49]. Gilley informed Bayer, a Ford manager, that

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[44] R114 at #4451 - #4452

[45] R118 at #5379-5388,#5429;R113 at #3290–3291;R113-4 at #4175

[46] R118 at #5379 – 5388, #5429

[47] R118 at #5387 – 5416, #5935-#5936

[48] R116-1 at #4889-4894 Accord R113 at #3277-#3278; R116-5 at #4908; R116-3 at #4897; R116-10 at #4922

[49] R116-5 at #4908-4909;R113-2 at #3456-3535, #3843, #3756; R136 at #5912-5916, #5844-5856; R116-5 at #4908-4909;

Ukpai was the Continental employee that broke UAW rules including being the only one that carried out inspections prior to the suspension of in-plant inspections in November, 2015[50]. Neither Backer[51], Bayer[52], nor any other Ford employee, banned Ukpai from KCAP. Gilley did not make any adverse remark about Urban to Urban's management regarding the alleged grievance and suspension of inspections[53].

On December 14, 2015, Ukpai was confronted by Bailey and Fisk and told he was banned from KCAP[54]. Ukpai explained the circumstances of his work at KCAP to Fisk, human resources department personnel, and reported to her the adverse treatment he got from Gilley while at KCAP[55]. Ukpai informed Fisk that he contemporaneously reported Gilley's actions to Koua. Fisk promised to investigate Ukpai's report of discrimination[56]. Koua claimed he was on vacation when Ukpai called him to inquire why Fisk would say he was banned. Also calling Aguayo, he told Ukpai to send him an email about

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[50] R110-10 at #3021, #3046 - #3063;R113-4 at #4182 - #4185

[51] R113-3 at #3940-#3944; Appellant's Appeal Brief at 33-46; Appellants Reply Brief at 8-10, 16-17

[52] R110 at #3003-#3100.

[53] R113 at #3278, #3285; R118 at #5358- #5399; R115 at #4510, #4589 - #4594; R109-2 at#2854

[54] R118 at #5413 - #5416; Appellant's Reply Brief at 10; Appellant's Appeal Brief at 17-18

[55] *Id;* Appellant's Reply Brief at 10

[56] *Id*

Fisk's accusation of him being banned from KCAP[57]. On or about December 15, 2015, Continental canceled Ukpai's pending internal job applications[58] .

On January 6, 2016, Continental terminated Ukpai's employment.[59]

REASONS FOR GRANTING THE PETITION

1. Petitioner Was Subjected to an Onerous Definition of a "Similarly Situated" Employee.

The Circuit Court's conclusion that Ukpai and Urban are not similarly situated is based on an onerous analysis.

The court's unjustifiably narrow definition of "similarly situated" employees frustrates the purposes of the prima facie case and contradicts this Court's case laws allowing plaintiffs to demonstrate a prima facie case in a variety of ways and, consequently, denies Ukpai the protection of the employment discrimination laws.

Though at KCAP from different units, all employees involved with pump inspections were under Gilley's supervision. The circuit court's analysis placed Ukpai in a 'unique' position where he

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[57] R116-4 at #4907, R116-2 at #4895; Appellant's Appeal Brief at 54

[58] R108-7 at #2778; Appellant's Appeal Brief at 26; Appellant's Reply Brief at 10

[59] R114 at #4463

could no longer be allowed to demonstrate discrimination inferentially because each employee had a different manager at his home department.

The Third Circuit in rejecting a similarly situated requirement stated that, "[a]ll employees can be characterized as unique in some ways and as sharing common ground with 'similarly situated employees' in some other ways ...."[60] The court stated that the requirement "would seriously undermine legal protections against discrimination ... [because] any employee whose employer [could] for some reason or other classify him or her as 'unique' would no longer be allowed to demonstrate discrimination inferentially....."[61] The court saw "no value in, and no mandate in our jurisprudence for, such a requirement."[62]

The circuit court's conclusion contradicts its own case laws. In *Ercegovich v. Goodyear Tire & Rubber Co.*,[63], the court said that the plaintiff only had to show that he was similar to the comparator in "all of the relevant aspects,"[64] and did not need

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[60] *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996.

[61] *Id.* at 510-11.

[62] *Id.* at 511; see also *Abdu-Brisson*, 239 F.3d at 467; *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344,353 (6th Cir. 1998).

[63] 154 F.3d 344 (6th Cir. 1998).

[64] *Id.* (quoting Pierce v. Commonwealth Life Ins., 40 F.3d 796, 802 (6th Cir. 1994))(emphasis omitted).

to show "an exact correlation."[65] The court noted that if courts applied the *Mitchell*[66] similarly situated standard too strictly, then any employee working in a unique position would be removed from the protection of the laws against discrimination unless he was able to present direct evidence of discrimination[67].

The employment discrimination statutes demand only that the employee prove that the employer discriminated against him in terms or conditions of employment because of his membership in a protected group.[68] The statutory language does not require a plaintiff to prove that the employer treated a similarly situated employee differently and this Court's cases bear this out. The McDonnell Douglass court stated that, at the pretext state, the employee could show discrimination in a number of ways. One way was pointing to similarly situated employees whom the employer treated differently. The plaintiff could point to how the employer treated him in the past and how the employer treated minority employees in general[69].

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[65] *Id*

[66] *Mitchell v. Toledo Hospital*, 964 F. 2d 577 (6th Cir. 1992)

[67] *Id*. at 353

[68] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) and Title VII's anti-retaliation provision in Section 704(a), 42 U.S.C. § 2000e-3(a) (1982)

[69] See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 802, 804-05 (1973)

Several courts[70], especially true in light of this Court's decision in *Reeves*[71], recognize that the ultimate issue is whether discrimination motivated an employment decision.

There are splits (discussed *infra*) among the circuits on the requirement of similarly situated employees in discrimination cases.

In *Ortiz v. Norton*[72], the Tenth Circuit said that the district court's requirement that, for Ortiz' prima facie case, "a similarly situated employee would be an employee with significant management responsibilities who requested an extended leave on short notice without providing the reason for the leave."[73] "made the playing field unlevel" and violated the principle that the plaintiff's prima facie burden was "not onerous."[74] The appellate court noted that the district court had used the employer's rationale for the denial of leave and the discharge as the basis for defining who was similarly situated[75] and this unfairly short-circuited the analysis at the prima facie stage

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[70] *Barnes v. City of Cincinnati,* 401 F.3d 729, 739–40 (6th Cir. 2005); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994).

[71] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43 (2000).

[72] 254 F.3d 889 (10th Cir. 2001).

[73] *Id.* at 894 (emphasis omitted).

[74] *Id.* at 894; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248,253 (1980)

[75] *Ortiz,* 254 F.3d at 894.

and frustrated the plaintiff's opportunity to prove that the employer's rationale was pretextual[76]. The discharge of a qualified minority worker raised "an inference of discrimination because it [was] facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement."[77] The district court had "erred by making the prima facie burden not just onerous but virtually impossible for plaintiff to meet, defining 'similarly situated' employees so that there were no employees against whom comparison could be made."[78] The court found that the plaintiff had raised genuine issues of material fact and reversed the district court's grant of summary judgment[79].

In *Abdu-Brisson v. Delta Air Lines, Inc.*[80], the Second Circuit echoed this Court in stating that the requirement of establishing a prima facie case was not "intended to be rigid, mechanized or ritualistic"[81] or "onerous."[82] The court stated that

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[76] *Id.* at 895 (citing *MacDonald v. E. Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991)).

[77] *Id.* (quoting *Perry,* 199 F.3d at 1140).

[78] *Id.*

[79] *Id.* at 898, 900

[80] 239 F.3d 456 (2d Cir.), *cert. denied,* 122 S. Ct. 460 (2001).

[81] *Id. at 467* (quoting *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985)) (quoting *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978)) (internal

while pointing to similarly situated employees was a "common and especially effective method" of proving the fourth element of a prima facie case, it was not the only way for a plaintiff to establish that element[83]. The court listed a number of circumstances in which a plaintiff could raise an inference of discriminatory intent including "... the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge."[84]. In *Oncale v. Sundowner Offshore Services, Inc.*[85] and *County of Washington v. Gunther*[86] this Court recognized the possibility of plaintiffs proving discrimination without pointing to similarly situated employees. This court has recognized that in most cases alleging individual disparate treatment, the plaintiff does not possess direct evidence[87] and therefore the use of circumstantial evidence is employed.[88]

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quotation marks omitted). See also *Humphries*, 474 F.3d at 406, affirmed, *CBOCS West, Inc.*, 553 U.S. at 457

[82] *Id.* (quoting *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1335 (2d Cir. 1997) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)) (internal quotation marks omitted).

[83] *Id.*

[84] *Id.* (citing *Chambers*, 43 F.3d at 37).

[85] 523 U.S. 75 (1998)

[86] 452 U.S. 161 (1981)

[87] *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

[88] SULLIVAN ET AL., *supra* note 2, § 2.5, at 45

In line with the *McDonnell Douglas Corp. v. Green* framework, this court established that the plaintiff prove "by the preponderance of the evidence a prima facie case of discrimination"[89]. In explaining the requirements to prove a prima facie case, this court noted in *Burdine*[90] that the requirements were "not inflexible" and stated that the plaintiff's burden in proving the elements of a prima facie case is "not onerous." [91] This court's purpose of the *McDonnell Douglas* scheme allocating the burdens of proof is to progressively "sharpen the inquiry into the elusive factual question of intentional discrimination."[92]

This court holds that the prima facie case can be made by offering evidence that "give[s] rise to an inference of unlawful discrimination"[93] either through the framework set forth in *McDonnell Douglas Corp. v. Green*[94] or with direct or

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[89] *Texas Department of Community Affairs v. Burdine,* 450 U.S. at 252-53 (1981)

[90] *See id. (quoting McDonnell Douglas,* 411 U.S. at 802 n.13).

[91] *Id.* at 253

[92] *Id.* at 256 n.8.

[93] *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)

[94] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); see also *Mitchell v Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir. 1992). Significantly, under Michigan's Elliot –Larsen Act, a Plaintiff is not required to establish that race/national origin is the sole reason for his treatment. See *Hazle v Ford Motor Company,* 464 Mich 456, 466, 628 NW2d 515 (2001), citing M Civ JI 105.02

circumstantial evidence of discriminatory intent[95]. Ukpai, in addition to arguing he was similarly situated with Urban, also provided circumstantial evidence of Gilley's discriminatory intent[96] including his email to Backer that Ukpai was not the "right person" to replace Urban[97], informing Bayer that Ukpai alone performed inspections prior to suspension of inspections, his demeaning treatment of Ukpai, blaming Ukpai for actions attributable to Continental and generally treating Ukpai worse than Urban.

Furthermore, petitioner placed the veracity of Continental's explanations at issue, pointing both to substantial inconsistencies and weaknesses and/or outright falsity in Continental's proffered reasons, as well as circumstantial evidence of intentional discrimination[98].

Discriminatory intent from Continental also follows from the application of the cat's paw theory of liability as Gilley's actions set off the chain of events that led to Ukpai's termination[99]. The Sixth

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[95] *Cordova*, 124 F.3d at 1148 (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)

[96] R120 at #5593 - #5603; Appellant's Appeal Brief at 26 – 49; Appellant's Reply Brief at 22-33

[97] See also footnote #28.

[98] See *Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir. 2004) see also *Reeves*, 530 U.S. at 143;

[99] see Appellant's Reply Brief at 16-24, 28-29; Appellant's Appeal Brief at 33-46) R120 at #5590-#5591. As Fisk did not base her decision on an honest investigation, the causal link between Gilley's animus towards Ukpai and Ukpai's

Circuit has acknowledged the cat's paw theory of liability in similar cases (see, for instance *Marshall v. The Rawlings Company LLC*, No. 16-5614, slip op., (6th Cir. April 20, 2017) .

By showing Continental's proffered reasons for Gilley's actions against Ukpai and Ukpai's termination as "unworthy of credence"[100] and a pretext for discrimination, Ukpai met his burden of prove and genuine issues of material fact exist for trial[101].

Ukpai's argument[102] shows that racial/national origin discrimination was a motivating factor in the termination of Ukpai's employment. On a previous occasion, Koua had discriminated against Ukpai due to his accent[103] when he forced Ukpai to apologize to Wyeffels to what amounted to Wyeffels not being able to understand Ukpai's accent[104] and reflected, by Koua, in an earlier performance

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termination is not broken (see *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997)). The cat's paw theory (*Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990)) applies.

[100] *Id*

[101] *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

[102] R120 at 5598-5602; Appellant's Appeal Brief at 30 to 33; Appellant's Reply Brief at 22-28

[103] In *In re Rodriguez*, 487 F3d 1001 (6th Cir 2007), the Sixth Circuit recognized discrimination on the basis of accent ("linguistic discrimination") as national origin discrimination.

[104] Appellant's Brief at 47-48; 56-57; Appellant's Reply Brief at 6, 14; R118 at #5283 - #5342.

report, as communication skills.

2. The Circuits Are Split on the Definition of a "Similarly Situated" Comparator and the Ruling in the instant case is a Further Split from Other Sixth Circuit Rulings.

The circuits are split about whether employment discrimination plaintiffs must point to a similarly situated plaintiff as part of their prima facie case. A further split occurs on what constitutes similarity.

Some courts require that the plaintiff demonstrate that the comparator "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."[105] Others require that the plaintiff show that the comparator engaged in the "same" or "similar" conduct[106] or that the comparator's conduct was of "comparable seriousness."[107]. Some

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[105] *Fullman v. Henderson*, 146 F. Supp. 2d 688, 697 n.4 (E.D. Pa. 2001) see also *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000) *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21 (1st Cir. 1999)

[106] See *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 96 (2d Cir. 1999)

[107] See *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999); *Taylor v. Virginia Univ.*, 193 F.3d 219, 234 (4th Cir. 1999), cert. denied, 528 U.S. 1189 (2000)

courts demand that the conduct be "nearly identical";[108] some require the similarity to be "flexible" and inherently "factual"[109], some that comparator be "similarly situated in all material respects."[110] while other courts say that the conduct need not be identical.[111] Some courts acknowledge that employees need not show an exact match in positions or even supervisors[112].

The First Circuit apparently abandoned an earlier requirement that plaintiffs prove, as part of their prima facie case, that the employer treated similarly situated persons differently.[113] In *Conward v. Cambridge School Committee* [114], the circuit court found that the trial court had erred in requiring the plaintiff to show as part of his prima

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[108] *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995); quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994);

[109] *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012)

[110] *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997); *Wimbley v. Cashion*, 588 F.3d 959, 962 (8th Cir. 2009)

[111]See *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000); *Weeks v. Union Camp Corp.*, No. 98-2814,2000 WL 727771, at *6 (4th Cir. June 7,2000)

[112] *Radcliffe v. Darcy Hall Med. Inv'rs, LLC*, 09-81063-CIV, 2010 U.S. Dist. LEXIS 152792, at *7 (S.D. Fla. Mar. 22, 2010)

[113] *Molloy v. Blanchard* 115 F.3d 86 (lst Cir. 1997) contra *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999)

[114] 171 F.3d 12 (1st Cir. 1999).

facie case that the conduct for which he was terminated "was nearly identical" to that committed by another employee outside of the protected class.[115]

In *Abdu-Brisson v. Delta Air Lines, Inc.,*[116], the Second Circuit held that showing of disparate treatment of similarly situated employees "was not the only way" [117] of establishing a prima facie case.

The Third Circuit rejected a similarly situated requirement in *Marzano v. Computer Science Corp.*[118] stating that such a showing would strengthen the plaintiff's case but was not required.[119] However, the court purported to impose the similarly situated requirement in, *Miller v. Delaware*[120] . Nevertheless, some courts in the Third Circuit have taken the opposite approach such as in *Bray v. L.D. Caulk Dentsply International*[121], where the court stated that "[s]uch a requirement flies in the face of recent Third Circuit case law."[122] The plaintiff, instead, had to demonstrate "that she was subjected to an

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[115] *Id.* at 19

[116] 239 F.3d 456 (2d Cir. 2001).

[117] *Id.* at 468

[118] 91 F.3d 497 (3d Cir. 1996).

[119] *Id.* at 510. see also *Matczak v. Frankford Candy & Chocolate Co.,* 136 F.3d 933 (3d Cir. 1997

[120] 158 F. Supp. 2d 406 (D. Del. 2001).

[121] No. C.A. 98-441-SLR, 2000 WL 1800527 (D. Del. July 31, 2000).

[122] *Id.* at *5

adverse employment action under circumstances that give rise to an inference of unlawful discrimination."[123]

The majority of Fourth Circuit cases impose a similarly situated requirement as part of the plaintiff's prima facie case. In *Moore v. City of Charlotte*,[124] the Fourth Circuit noted that the test is in whether the other employee's acts were of "comparable seriousness." [125]

In the Fifth Circuit the requirement for plaintiff to point to a similarly situated employee as part of his prima facie case[126] is made absent the introduction of direct evidence though the court has implied that this is not a rigid requirement[127].

In the Sixth Circuit the signals have been mixed. In termination cases, the court has required that a plaintiff, as part of his prima facie case, show either that the employer replaced him with someone not in the protected group or treated him

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[123] *Id.; see also Maull v. Div. of State Police*, 141 F. Supp. 2d 463,478 (D. Del. 2001)

[124] 754 F.2d 1100 (4th Cir. 1985).

[125] Id. at 1107 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.ll (1976)). See also *Cook v. CSX Transportation Corp.* 988 F.2d 507 (4th Cir. 1993).

[126] See *Rutherford v. Harris County*, 197 F.3d 173, 183-84 (5th Cir. 1999); *Jackson v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 172 F. Supp. 2d 860, 872 (S.D. Tex. 2001) cf *Williams v. Trader Publ'g* Co., 218 F.3d 481,484 (5th Cir. 2000).

[127] See *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995)

less favorably than a similarly situated employee.[128] In *Ercegovich v. Goodyear Tire & Rubber Co.*, [129] however, the Sixth Circuit did not impose a similarly situated requirement[130].

Also, in *Bobo v. United Parcel Service, Inc.*[131], the Sixth Circuit reversed the district court's order granting summary judgment to the employer because the district court applied a narrow standard for determining whether the Plaintiff and his comparators were similarly situated[132].

The Seventh Circuit, in almost all cases where there is no direct evidence, requires a plaintiff to produce evidence of similarly situated non-protected employee in order to establish a prima facie case.[133]

Mixed signals from the Eight Circuit require plaintiff's to show the existence of a similarly situated employee[134] while others impose no such mandate.[135]

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[128] *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992)

[129] 154 F.3d 344 (6th Cir. 1998).

[130] *Id* at 351

[131] 665 F.3d 741 (6th Cir. 2012)

[132] Id at 751

[133] *See Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1087 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001); *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1379-80 (7th Cir. 1987); *cf Bellaver v. Quanex Corp.*, 200 F.3d 485,495 (7th Cir. 2000.

[134] *See, e.g., LaCroix v. Sears, Roebuck & Co.*, 240 F.3d 688,693 (8th Cir. 2001) ;

[135] *See, e.g., Taylor v. Southwestern Bell Tel. Co.*, 251 F.3d 735, 740 (8th Cir. 2001);

A similarly situated requirement is imposed in most Ninth Circuit cases in order to establish a prima facie case.[136]

The Tenth Circuit has emphatically rejected a similarly situated requirement.[137]. In *Ortiz* [138], the Tenth Circuit reversed the district court's grant of summary judgment, finding that the plaintiff could satisfy the fourth element of a prima facie case in a variety of ways.

Plaintiffs are required to point to a similarly situated employee to establish a prima facie case in the Eleventh Circuit.[139] Recently, in *Lewis v. City of Union City, Ga*[140] the en banc Eleventh Circuit adopted a "similarly situated in all material aspects" standard and provided a handy (non-exhaustive) checklist of possible material connections such as "engaged in the same basic conduct (or misconduct)"[141]

3. The Circuit Court Created a Presumption and Made an Inference in Favor of Respondent With no

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[136] *Chuang v. University of California Davis, Board of Trustees* 225 F.3d 1115 (9th Cir. 2000).

[137] *Ortiz v. Norton.* 254 F.3d 895, 900 (10th Cir. 2001); *see also EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000);

[138] *Ortiz* at 889

[139] *Holifield v. Reno* 115 F.3d *1555* (11th Cir. 1997).

[140] No. 15-11362, 2019 U.S. App. LEXIS 8450 (11th Cir. Mar. 21, 2019)

[141] *Id*

Evidence Presented by Respondent to Support such an Inference

The Circuit Court's conclusion that Urban and Ukpai are not similarly situated is premised on the presumption that their different management was the reason Ukpai got punished and Urban did not. This presumption violates this court's precedence and the principle of drawing inferences in the light most favorable to the non-moving party during summary judgment.[142]

Gilley singled out Ukpai for blame for conduct attributable to Continental because Urban and Ukpai carried out inspections under his supervision[143]. While Gilley blamed Ukpai for the grievance, and reported the same to Ukpai's management, he did not similarly accuse Urban who engaged, with Ukpai, in the same conduct and neither did he make any false report to Urban's management[144].

The Court presumed that: 1) Gilley similarly informed Urban's management of Urban's involvement in the conduct that allegedly led to the filing of a grievance and 2) with that information, Urban's management was not as strict as Ukpai's

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[142] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000) (standard mirrors those for summary judgment.).

[143] Appellant's Appeal Brief at 23-25

[144] *Id*

and therefore, 3) Urban and Ukpai are mot similarly situated because 4)the consequence suffered by Ukpai was due to his management which exercised its discretion differently from Urban's.

The circuit court did not follow the law because: 1) Continental did not produce any evidence that Gilley reported any information to Urban's management of Urban being the cause of the filing of the grievance as he did for Ukpai, 2) In fact, Gilley singled Ukpai out for blame and did not blame Urban at all and therefore, 3)the Circuit court drew an inference in favor of Continental in making that presumption and attributing Ukpai's punishment to the style of his management that was different from Urban's. There is no reason for the court to automatically draw such an inference, especially in light of the statutory scheme and the McDonnell Douglas framework. "Inferences are by their nature permissive, not mandatory: although the fact proved rationally supports the conclusion the offering party hopes will be inferred, the factfinder is free to accept or reject the inference."[145] In *Blackshear v. City of Wilmington*[146], the court recognized that the existence of different supervisors did not

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[145] CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 4.1, at 299-300 (7th ed. 1992). A court that automatically draws an inference has, in essence, created a presumption. See id. § 4.2, at 302.

[146] 15 F. Supp. 2d 417 (D. Del. 1998)

necessarily defeat the plaintiff's contention that he and another employee were similarly situated noting that, while it had some probative value, it was not a defense to a race discrimination claim[147]. The court found that there was little support in the record that the comparator's supervisor was more lenient than the plaintiff s supervisor.[148] If there is a fact question about whether a difference is relevant or not, that question should go to the jury.[149]

The circuit court's conclusion also goes against the language of the employment discrimination statutes and the McDonnell Douglas scheme for allocating the burdens of proof. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees.., and any agent of such person."[150] The Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA") also contain the "any agent of such a person" language.[151] This Court noted in *Burlington Industries, Inc. v. Ellerth,*[152] that, by using this

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[147] *Id.* at 424

[148] *Id*

[149] See also *Lathem v. Dep'tof Children &Youth Servs.,* 172 F.3d 786 (11th Cir. 1999).

[150] Title VII of the Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (2000) (emphasis added).

[151] Age Discrimination in Employment Act of 1967 § 1 (b), 29 U.S.C. § 630(b) (2000); Americans with Disabilities Act of 1990 § 101(5)(A), 42 U.S.C. § 1211 1(5)(A) (2000).

[152] 524 U.S. 742 (1998).

language, Congress wanted the courts to use agency principles in determining when employers should be liable for the acts of their employees.[153] This Court concluded that when a supervisor commits a "tangible employment action," including "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,"[154] the employer should be held strictly liable for the supervisor's actions.[155] Under these principles, the action of Ukpai's management is attributable to Continental.

In addition, the lower courts made factual determinations that are disputed by the parties and, thereby, drew inferences in favor of Respondent. The Circuit Court wrongly determined that Bailey was Ukpai's supervisor[156], pivoting and blurring its position by also calling Koua one of Ukpai's supervisors[157]. This is material because of Bayley's involvement in Fisk's investigation as Ukpai's supervisor.[158]

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[153] *Id.* at 754

[154] *Id.* at 761.

[155] *Id.* at 762-63.

[156] App xx Circuit Court Opinion at 2

[157] *Id* at 7

[158] RE136 at #5996 - #5998, #5848 - #5855; RE113-2 at # 3817 - #3823; #3552 - 3661

4. The lower courts applied the wrong standard to petitioner's retaliation claim

Ukpai's retaliation claim stands on its own[159].

The lower courts wrongly applied the law on petitioner's retaliation claim and ignored or misapprehended significant aspects of the allegations. The circuit court stated that:

> "First, sending him to KCAP could not have been done in retaliation for his later complaints about harassment that he experienced at KCAP. Second, Koua's instruction to avoid contacting a customer directly does not rise to the level of "severe or pervasive ...harassment."[160]

Similarly, the district court found that:

> "[t]he record does not establish that this treatment was severe or pervasive. Further, according to Plaintiff's own statement, he went without lunch on one occasion. Dkt. No. 120, pgs. 11–12, (Pg. ID 5586–87). This treatment also does not rise to the severe or pervasive level. For these reasons and for the reasons stated *infra*, this Court finds that the record does not establish that Defendant retaliated against Plaintiff.[161]"

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[159] see *Collymore v. City of New York*, No. 18-2099 (2nd Cir. Apr. 11, 2019; *Anderson v. Brennan*, No. 17-2162 (1st Cir. 2018))

[160] App B, Circuit Court Opinion at p7

[161] App C, District Court Opinion at p9

However, Ukpai never argued Gilley's discriminatory actions was retaliation. Rather, retaliation stems from the materially adverse actions that Ukpai was subjected to after reporting Gilley's actions[162].

This court holds that a plaintiff alleging retaliation "must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[163] To make out a prima facie case of retaliation, Ukpai must establish that he undertook a protected activity under Title VII, his employer subjected him to an adverse employment action, and there is a causal link between those two events.[164]

After Ukpai reported Gilley's actions[165], Koua was obligated to take action to stop the discrimination[166]. His silence qualifies as a retaliatory conduct. Retaliation by silence is akin to defamation by conduct[167]. Various courts have

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[162] R120 at #5604 - #5607

[163] *Burlington Northern*, 126 S. Ct. at 2415 (citing *Rochon v. Gonzales*, 438 F.3d 1222,1219 (D.C. Cir. 2006)).

[164] EEOC COMPLIANCE MANUAL § 614, at 8-9 (1991). See also *Garg v. Macomb County Mental Health Servs.*, 472 Mich. 263, 273 (2005). Note that the "but for" causation is not required under Michigan law

[165] R114 at #4445-#4464; R115 at #4488- #4557 - #4609;

[166] R113-1 at #3389. Koua denied responsibility for Ukpai but is contradicted at Appellants Reply Brief at 12.

[167] *Krolikowski v University of Massachusetts Memorial*

recognized silence as a form of adverse conduct[168]. Koua constrained Ukpai in the performance of his duties by asking that he not contact a client on an ongoing project but to channel all requests through someone else[169]. This demeaned Ukpai and significantly diminished his material responsibilities and position. Its pervasiveness rests on the project being active. The Sixth circuit, in *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999), citing the Seventh Circuit's holding in *Crady v. Liberty National Bank & Trust Co. of Indiana* 993 F.2d 132, 136 (7th Cir. 1993), noted that "a materially adverse change might be indicated by a termination of employment, ..., significantly diminished material responsibilities, or other indices...."

After petitioner, on December 14, 2015, reported Gilley's discrimination to Fisk, Petitioner's internal job applications were canceled.[170] under the pretext that "Ukpai was not performing satisfactorily in his current position"[171].

Firstly, there was no proof that Ukpai's performance was unsatisfactory in his current role

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Medical Center, 2002 WL 1000192 (D Mass 2002))

[168] A defamatory statement can be an act or conduct. *Clampitt v American University,* 957 A2d 23, 39-40 (DC 2008) (in some contexts), *Phelan v May Department Stores Co,* 443 Mass 52, 57-58; 819 NE2d 550 (2004).

[169] R120 at #5595

[170] R113-2 at #3827 - 3828

[171] *Id*

and Continental's assertion has no basis in fact[172]. Continental asserted that Ukpai's termination was due to the multiple grievances and being kicked out of KCAP by Ford and various, albeit, changing references that includes Ukpai being a "borderline performer"[173]. After Ukpai debunked Continental's claims of poor performance by Ukpai[174], Continental blurred its earlier assertion by saying that "...this was not ultimately a performance–based termination and any alleged "issues of fact" relating to Plaintiff's performance or involvement with other projects are not sufficient to overcome Continental's motion for summary judgment."[175].

Secondly, in the only case of poor performance at CES prior to Ukpai's termination, the employee was allowed transfer to another department when performance in a current role was an issue[176].

The Sixth Circuit established that "...a lateral job transfer and a thirty-seven-day suspension without pay, notwithstanding the employee's reinstatement with back pay, constituted adverse employment actions" *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 791 (6th Cir. 2004) (internal quotations omitted). This court has established (by affirming the en banc Sixth

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[172] Appellant's Reply Brief at 13-14; R120 at #5583

[173] R104 at #2261-#2263

[174] Appellant's Reply Brief at 13-14

[175] R119 at 5476-5477

[176] R120 at #5599 - #5600; R113-1 at #3347 - #3376

Circuit's conclusion) that the actions and harms forbidden by Title VII's anti-retaliation provision are not limited to those that are employment-related or those that occur at the workplace[177]. After Petitioner reported Gilley's actions, Fisk harassed Ukpai by requiring Ukpai to be at work or otherwise to obtain a doctor's report despite Ukpai being off for the rest of the year[178]. Fisk's action put an undue strain on Ukpai and severely limited the vacation he had planned with his family, a vacation from which he had been recalled by Aguayo on December 2, 2015[179]. This constitutes an adverse employment action following the reasoning of the Sixth Circuit in *White.*

Ukpai was harassed by Bailey through constant observation and monitoring of his activities[180].

Genuine issues of material fact exist and a jury could conclude that the canceling of Ukpai's job applications and the demeaning treatments from Koua and Fisk were retaliatory acts because of Ukpai's complaints of discrimination.

5. The lower courts applied the wrong standard to petitioner's claim on hostile work environment

The circuit court improperly ignored and

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[177] *Burlington Northern & Santa Fe Railway Co. v. White* 126 S. Ct. 2409 (2006)

[178] R113-2 at #3516 - #3531

[179] R116-3 at #4987 -#4905

[180] R136 at #5992 - #5998; see also R113-2 at #3821

trivialized the pervasiveness of the hostile environment that Ukpai was in and Continental's role in sanctioning it, through silence, in violation of Title VII.

At issue is whether a reasonable jury could find that the harassing "conduct was sufficiently severe or pervasive `to alter the conditions of [Ukpai's'] employment and create an abusive working environment."[181]. This court held that, under Title VII, an employee has a "right to work in an environment free from discriminatory intimidation, ridicule, and insult."[182]

This court established that:

> "...whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. ... whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive...."[183]

The circuit's finding that "Other employees who were of different races and national origins were required to rent Ford vehicles and bring vests and

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[181] *Meritor Sav. Bank, FSB. v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)

[182] *Id at 65*

[183] *Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993)

safety goggles to the plant"[184] reflects the lower courts' misapprehension of the facts. For instance, the issue was not that Ukpai was asked by Gilley to rent a Ford vehicle, but that Gilley used it as an avenue to harass Ukpai and threaten to kick Ukpai out of the plant. Gilley also presented false information to Fisk including that Ukpai "refused to drive a ford vehicle and made others pick him up. He left work to get a rental. Rental place offered him a Ford multiple times but [he] said he liked a Kia"[185] Though Urban did not similarly start off with a Ford vehicle, Gilley never harassed him about it and never threatened to kick him out of the plant even falsely testifying that he was "...pretty sure he [Urban] rented a car.... Initially I would say he would have rented a Ford....."[186] (contrary to what actually happened[187]). Gilley merely suggested to Urban that renting a Ford vehicle would be more of a convenience[188]. Similarly, the issue was not that Ukpai was asked to bring a PPE because nobody did so. The issue was that Gilley used it as an opportunity to harass, berate and demean Ukpai, shouting at him and telling him he was doing everything wrong at the

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[184]App B, Sixth Circuit Order at 6

[185] R113-2 at #3820 *contra R118 at #5425-5426;* Appellant's Reply Brief at 15

[186] R113-4 PageID #4072 - 4073

[187] Urban did not rent a Ford vehicle from the time he arrived to KCAP. R113 at #3192 - 3240

[188] R113 at #3192 - 3193, #3239 – 3240;

very first interaction both had. In stark contrast, Urban, just like Ukpai, arrived at KCAP without PPE, but Gilley never harassed him about it but provided those to him[189]. After Urban and Ukpai both made their lunch orders, Gilley brought for Urban exactly what he ordered but brought for Ukpai the one thing that he excluded. It is unmistakable that Gilley meant to abuse and humiliate Ukpai by specifically bringing the one thing that Ukpai said he did not want because he abstains from it[190]. This, in itself is a direct evidence of Gilley presenting Ukpai with a hostile environment. By trivializing this as Ukpai going "...without lunch on one occasion..."[191] and by ignoring Gilley's never-ending threats to kick Ukpai out of the plant for things that other people like Urban similarly did but were not threatened, the lower courts ignored the severity and pervasiveness of the hostile environment so created for Ukpai.

The Circuit court's conclusion that "...there is no evidence that Gilley provided false information to Ukpai's supervisors..." has no basis in fact as Ukpai presented undeniable evidence that Gilley provided false information to Continental when Gilley said Ukpai was kicked out of KCAP by Ford and upon which information Ukpai was

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[189] See footnotes #21 and #25

[190] See footnote #26

[191] App C, District Court Opinion at p9

terminated[192]. The conclusion by the circuit court also ignores the influence of Gilley when he presented false information to Bayer representing that Ukpai, alone and not with Urban, performed inspections before the first grievance was alleged to be filed[193]. In short, the circuit court, in reaching this conclusion, violated this court's holding that inferences have to be drawn in favor of the non-moving party at summary judgment.

This court, in *Reeves v. Sanderson Plumbing Products, Inc.*[194], has established that under the standard for summary judgment under Rule 56, "...the court must review all of the evidence in the record, cf., e.g., *Matsushita Elec. Industrial Co. v.*

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[192] The false and malicious information from Gilley to Ukpai's management were contradicted by Ukpai. See R113-2 at #3820 which included false information that "Ukpai was kicked out of plant ...."; "Ukpai very argumentative and had issues w/ [with] almost everyone he came into contact with"; "[Ukpai] refused to drive a ford vehicle and made others pick him up. He left work to get a rental. Rental place offered him a Ford multiple times but [he] said he liked a Kia"; "Ford person removed Ukpai from plant Mike Bayer IQ manager Ford"; "Ukpai ...[A]lso knew about grievances b/c [because] work was shut down"[No evidence that work "was temporarily stopped" on the 11th of December, 2015 as Continental claimed. On Dec 11, 2015 at 6:49 PM Brandon sends a report that transits "were inspected from 7:00 am to 3:00pm on December 11, 2015" [Email RE108-8, PageID #2785]]; Appellant's Reply Brief at 22-24, 28-29; Appellant's Appeal Brief at 33-46

[193] See Appellant's Reply Brief at 22-24, 28-29; Appellant's Appeal Brief at 33-46)

[194] 530 U.S. 133, 146–47 (2000)

Zenith Radio Corp., 475 U. S. 574, 587, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence, e.g., *Lytle v. Household Mfg.*, Inc., 494 U. S. 545, 554– 555. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 255.

One issue of material fact is how Bayer's unequivocal testimony that he did not ban Petitioner from KCAP is construed to mean that he did.

Furthermore, the analysis of Petitioner's Hostile Work Environment claim by the lower courts violates the case law established by this court in *Faragher v. City of Boca Raton.*[195]. The lower courts overlooked the actions of Ukpai's employer in analyzing this claim. However, the failure of his superiors to do anything to stop or to remedy the known harassment by Gilley is a violation of Title VII in and of itself. Various Courts, such as the Ninth Circuit, has held that "[b]y tolerating sexual harassment against its employees, the employer is deemed to have adversely changed the terms of their employment in violation of Title VII." *Swenson v. Potter,* 271 F.3d 1184, 1191 (9th Cir. 2001) (citation and footnote omitted). The Ninth Circuit further noted that:

"If the employer fails to take corrective action

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[195], 524 U.S. 775, 789, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)

> after learning of an employee's sexually [or racially] harassing conduct, or takes inadequate action that emboldens the harasser to continue [her] misconduct, the employer can be deemed to have "adopt[ed] the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." [196]

Various jurisdictions have also noted silence as an adverse conduct under similar circumstances. The adequacy of Continental's response, as well as Gilley's underlying behavior constitute Ukpai being placed in a hostile environment.

In *Ray v. Henderson* 217 F.3d 1234 (9th Cir. 2000), the Sixth Circuit reversed summary judgment when the employee's supervisors "regularly yelled at him during staff meetings; . . . called him a `liar,' a `troublemaker,' and a `rabble rouser,' and told him to `shut up'". Gilley constantly shouted at Ukpai, demeaned him, and in one instance, told him "...you don't fucking talk to anybody...you just do the fucking inspection..." [197] all of which Ukpai reported to Koua. Under these "circumstances, the non-action by the employer can fairly be characterized as acquiescence, i.e., having changed the terms and conditions of employment to include putting up with harassment from other

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[196] *Id.* at 1192 (third alteration in original) (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 789, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)).

[197] Vol 2, R115, PageID #4488, #4506 - 4507, #4557, #4589, #4594, #4607 - 4609

employees."[198] Whether the harassment was sufficiently severe or pervasive to constitute a hostile working environment under Title VII should be left to the jury to determine.

The district court's conclusion that "Plaintiff does not establish that any adverse treatment unreasonably interfered with his work [because]... Plaintiff asserts throughout his pleadings that he was an exemplary worker." derives from an application of the wrong standard for determining what constitutes a hostile work environment as established by this court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

Under the totality of the circumstances, a reasonable jury could conclude that Ukpai, by way of Gilley's actions, was subjected to "a pattern of ongoing and persistent harassment severe enough to alter the conditions of [his] employment." *Morgan v. Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2000), rev'd in part on other grounds, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (internal quotation marks and citations omitted) or "that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered" *Vance v. Ball State Univ.*, 570 U.S 421, 427 (2013). In the alternative, a reasonable jury could find that the failure of Ukpai's' employer to stop the harassment "changed the terms and conditions of [his]

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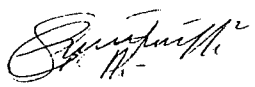
[198] *Brooks v. City of San Mateo*, 229 F.3d 917, 924 n. 4 (9th Cir. 2000)

employment to include putting up with harassment" from Gilley. *Brooks*, 229 F.3d at 924 n. 4.

CONCLUSION

Petitioner respectfully asks that this Court grant this Petition, so that his case may be examined on its merits and the law.

Respectfully submitted,



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