

20-7531

No. _____

Supreme Court, U.S.
FILED

NOV 02 2020

OFFICE OF THE CLERK

In The
Supreme Court of the United States

Dr. Baidehi L. Mukherjee,

Petitioner,

vs.

The Children's Mercy Hospital,

Respondent.

On Petition For Writ Of Certiorari

United States Court of Appeals

For the Eighth Circuit Court

PETITION FOR WRIT OF CERTIORARI

Dr. Baidehi L. Mukherjee, pro se
PO Box 200766,
Boston, MA 02120
(857)-301-9195

RECEIVED

JAN 22 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Should the violation of Standard of Review for Summary Judgment be allowed to stand uncorrected?
2. Should the violation of Federal Rules of Civil Procedures and Congress' mandate with inadmissible hearsay over objection be allowed to stand and not be corrected?
3. Should an Employer be allowed to discriminate and retaliate against a former employee with a false after-acquired affirmative defense for pursuing her complaint through a jury trial?
4. Should a published appellate opinion with falsity that there are no reversible errors indicating bias and prejudice be allowed to stand uncorrected?
5. Should a violation of Congress' mandate with confusing Jury instruction of "but for" means "in absence of" for discrimination and retaliation and false after-acquired affirmative defense be allowed to stand and not be corrected?

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting Writ of Certiorari	3
I. Violation of Standard of Review for Summary Judgment should be uniform and consistent.	
II. District court's admission of inadmissible hearsay over objections is a violation of Federal Rules of Civil Procedures and Congress' mandate. Plaintiff objected at least 10 times. This prejudicial reversible error defeats the purpose of the court and is in contrary to other court's decision.	
III. District court's allowance of a false, discriminatory and retaliatory "after-acquired affirmative defense" is highly prejudicial; it threatens pursuing complaints through the court system, it is contrary to Supreme Court's decisions.	
IV. District court's allowance of questioning and testimony over objection regarding an unrelated complaint brought by Plaintiff's sister against two	

individuals is retaliatory and threatens pursuing complaints through the court system.

V. District court's error in excluding evidence and questioning of Dudley's employment termination for insubordination and Plaintiff's disparate treatment is discriminatory and prejudicial.

VI. Jury's verdict was the produce of confusing and prejudicial instructions and in violation of Congress' mandate. It contradicts with Supreme Court's and other court's decisions.

Conclusion

12

TABLE OF APPENDICES

United States Court of Appeals for the Eighth Circuit, affirming District Court Judgment, filed April 9, 2020. A1

United States District Court for the Western District of Missouri Judgment in a Civil Case, filed July 9, 2018. A4

United States District Court for the Western District of Missouri, granting in part, denying in part, and deferring in part Defendant's Motion for Summary Judgment, filed March 3, 2018. A5

United States Court of Appeals for the Eighth Circuit, denying Petition for Panel Rehearing and Petition for Rehearing En Banc Entered June 5, 2020. A15

TABLE OF AUTHORITIES

CASES	Page
<i>Rhodes v. Guiberson Oil Tools</i> , 75 F.3d 959 (5 th Circuit 1996).	3
<i>Reeves v. Sanderson Plumbing Products, Inc</i> 120 S. Ct 2097, 68 USLW 4480 (2000)	3
<i>Burlington Northern & Santa Fe Ry. Co. v. White</i> 548 U.S. 53 (2006)	4
<i>Jute v. Hamilton Sundstrand Corp</i> 420 F.3d 166, 171 (2 nd Cir. 2005)	4
<i>Charlton v. Paramus Bd. Of Educ.</i> , 25 F.3d 194, 198-200 (3 rd Cir. 1994)	4
<i>Robinson v. Shell Oil Co.</i> 519 US 337 (1997)	5

<i>Wideman v. Wal-Mart Stores, Inc</i> 141 F. 3d 1453, 1456 (1998)	5
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57, 65, 91 L.Ed. 2d 49, 106 S. Ct. 2399 (1986)	5
<i>Haith v. Model Cities Health Corp. of Kansas City</i> , 704 S.W.2d 684, 686, 688, 689 (1986)	6
<i>Munden v. Harris</i> 153 Mo. App. 652, 134 (1911)	6
<i>Soto v. Costco Wholesale Corp.</i> 502 S.W.3d 38, 55 (Mo. App 2016)	6
<i>Ohio v. Roberts</i> , 448 U.S. 56, 66 (1980)	8
<i>United States v. Benson</i> , 961 F.2d 707, 709 (8 th Cir 1992)	8
<i>Batiste-Davis v. Lincare, Inc</i> , 526 F. 3d 377, 380	10
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)	11

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964's anti-discrimination and anti-retaliation provisions, 42 U.S.C. § 2000e-2, and §2000e-3

EIGHTH CIRCUIT MODEL INSTRUCTION

8th Circuit Model Instruction 5.22 (quoting Sheehan v. Donlen Corp., 173 F.3d 1039, 1048) (7th Cir. 1999)

TREATISE

EEOC Compliance Manual, Section 2: Threshold Issues § III-A4 (2000)

EEOC Compliance Manual § 8-II(C)(4) (Dec. 5, 2000)

EEOC Compliance Manual § 8-II(D)(2) (May 20, 1998)

EEOC Compliance Manual, Section 8, "Retaliation," Para. 8-II (D3) (1998).

EEOC Compliance Manual, Section 8. "Retaliation" 1998

EEOC Enforcement Guidance on Retaliation and Related Issues

FEDERAL RULES INVOLVED

Fed. R. Evid. 801(c)

Fed. R. Evid. 802

OPINIONS BELOW

The opinion whose review is sought is cited as *Mukherjee v Children's Mercy Hospital* and included in the Appendix at A-1. District Court opinion is included in the Appendix at A-5.

JURISDICTION

Jurisdiction is proper in the United States Supreme Court. The Eight Circuit Court of Appeals affirmed the district court judgment entered on April 9, 2020. A timely filed petition for Rehearing En Banc and Panel Rehearing was denied on June 5, 2020.

This petition for Writ of Certiorari is timely filed. The U.S. Supreme Court granted 60 days of extension due to the COVID-19 pandemic. This petition is filed within 150 (90 + 60) days after the entry of the denial of motion for rehearing and motion for en banc hearing on June 5, 2020, pursuant to 28 U.S.C §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964's anti-discrimination and anti-retaliation provisions, 42 U.S.C. § 2000e-2, and §2000e-3.

STATEMENT OF THE CASE

This case has wider implications. It merits the attention of the Supreme Court. Federal Rules of Civil Procedure and Congress' mandate should be applied uniformly without prejudice by different courts to maintain decisional uniformity and integrity.

Plaintiff-Appellant (Plaintiff) has been involved in application of scientific and medical inventions and innovations since 1998. She built on her expertise and reputation over the years through dedication, service and leadership. She has worked on the wider application of medical and scientific innovations in order to improve health, wellness and the economy. Her focus has been improving children's health and wellness.

Plaintiff is a non-Caucasian, woman of Indian origin. Experts have stated that she is one of the best and top 1% in her profession. She immigrated to the United States under the extraordinary ability category.

While employed at Cincinnati Children's Hospital Medical Center, a top third pediatric institution, Defendant approached Plaintiff to be the Director of Technology Development. She reported to Dudley. His experience is in Marketing and Sales. He did not have the knowledge or experience in scientific and medical innovations. Defendant's researchers and employees had many complaints against Dudley.

After joining Children's Mercy Hospital, the Defendant (CMH), Plaintiff found out that there were long standing frustrations and communication breakdowns. She worked hard and improved the situation vastly.

Plaintiff performed at a very high level. She worked diligently to advance CMH's innovations from an early stage to the final stage of licensing with industry. Her reputation and leadership in the profession laid the foundation for CMH's recognition in Intellectual Property matters.

Dudley subjected Plaintiff to discrimination and harassment. When she filed complaints against this and requested a change of manager, Dudley and others retaliated against her.

After Plaintiff came back from 2 days of paid time off to take care of a family medical situation, her employment was terminated. Dudley terminated her employment stating lack of performance. Yet for his own annual evaluation he wrongfully took the credit for Plaintiff's work. He wrote "....we currently have more potential licensing agreements in various stages of development, than the Hospital has had at any time in the past". This was the work that resulted from Plaintiff's stellar performance.

Dudley repeatedly threatened Plaintiff with employment termination for advising against his directives of sending information shared with company X under an agreement between CMH and company X to another company Y. It is proprietary product information and a trade secret. Dudley repeatedly instructed Plaintiff to send it to company Y. Plaintiff pointed out that it would be illegal and unethical to do so.

Plaintiff worked hard to protect CMH's rights and interests. Yet CMH violated her rights, interests and wrongfully terminated her employment. Retaliation continued in many ways including but not limited to obstructing her employment opportunities elsewhere.

CMH filed a position statement to Equal Employment Opportunity Commission (EEOC) with numerous false, discriminatory and retaliatory statements including but not limited to stating Plaintiff does not have work authorization. Plaintiff has always had work authorization all along.

Defendant's expert witness testified that Plaintiff is very smart, very qualified, has extensive areas of expertise and made efforts in finding a job.

Plaintiff's employment opportunities elsewhere were obstructed. Prospective employers showing excitement suddenly became silent. Two job offers were rescinded without any explanation.

As a last option, Plaintiff filed a complaint with the district court. CMH filed summary judgment to dismiss Plaintiff's complaint. District court granted summary judgment to CMH for violations of Missouri Human Rights Act, Privacy and Publicity, and Equal Pay Act. Remaining claims went to trial.

Plaintiff did not get a fair and unbiased trial. Prejudicial reversible errors had prejudicial influence on the jury's verdict against the Plaintiff and compromised the integrity of the

judicial proceedings. Through Counsel, she filed a motion for a new trial. District court denied it.

Plaintiff filed a notice of appeal. At the time attorneys were unable to take the case on a contingency basis. Plaintiff was unable to pay for attorney fees due to severe financial constraints and filed in forma pauperis. District court granted it. Plaintiff filed her Appellant brief in forma pauperis. Eighth Circuit affirmed district court's judgment.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. Standard of Review for Summary Judgment should be uniform and consistent.

For summary judgment, the court must review the evidence presented in light most favorable to the party opposing the motion. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 959 (5th Circuit 1996). The United States Supreme Court has held "that the court should give credence to the evidence favoring the non-movant as well as that evidence supporting the moving party that is un-contradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Products, Inc.* 2000 at 2110.

In this case, jury questions are present for Missouri Human Rights Act (MHRA), Privacy and Publicity, and Equal Pay Act. Plaintiff's testimony, supporting documents and other evidence show genuine dispute of material facts.

District court made prejudicial errors in granting summary judgment to CMH on these 3 claims, prejudicially and adversely affecting Plaintiffs' rights.

i) Violation of Missouri Human Rights Act (MHRA).

MHRA claims were timely filed because CMH's retaliation continued beyond December 2014 and Plaintiff filed the lawsuit on December 13, 2016. It is within the 2 years of Missouri statute of limitation. Plaintiff filed complaints about continuing retaliation and checked the "continuing action" box for her charge filed jointly with EEOC and MCHR.

Plaintiff testified about rescinding of job offers without any explanation, and prospective employers showing excitement about hiring Plaintiff, then suddenly becoming silent. There are supporting documents. CMH's expert witness testified that Plaintiff is very smart, very qualified, and has extensive areas of expertise and made efforts in finding a job.

Plaintiff presented CMH's position statement with numerous false, discriminatory and retaliatory statements including but not limited to, Plaintiff does not have work authorization. *EEOC Compliance Manual, Section 2: Threshold Issues § III-A4 (2000)*: "Individuals who are employed in the United States are protected by the EEO statutes regardless of their citizenship or immigration status."

CMH admitted submitting position statement to EEOC around March 2016. It stated false and detrimental statements about Plaintiff including lack of work authorization. This is discriminatory and retaliatory. It is continued retaliation against Plaintiff for filing her complaint with EEOC and MCHR.

EEOC is a federal organization. On behalf of EEOC and MCHR, a federal investigator was investigating Plaintiff's claims of discrimination, harassment and continued retaliation.

CMH had evidence of Plaintiff's work authorization, high performance, recommendations and numerous positive statements from CMH's employees about her. Yet CMH submitted false, discriminatory, and retaliatory information including lack of work authorization about Plaintiff to EEOC. CMH also tampered with Plaintiff's personnel file, removing documents that reflected positively on her performance before submitting to EEOC. These are serious matters and should be sufficient by itself in denying summary judgment.

Circumstantial evidences are critical for employment cases and should be considered. As noted in *Burlington Northern & Santa Fe Ry. Co. v. White* 548 U.S. 53 (2006) actionable acts of retaliation may occur after a plaintiff's employment ends. 548 U.S. 53, 68; see also *EEOC Compliance Manual § 8-II(D)(2) (May 20, 1998)* ("Adverse Actions Can Occur After the Employment Relationship Between the Charging Party and Respondent Has Ended").

For example, in *Jute v. Hamilton Sundstrand Corp.*, Jute claimed that her former supervisor advised her prospective new employer that he could not discuss matters pertaining to Jute because she "had a lawsuit pending" against the company, a statement which was false because she had not filed suit. 420 F.3d 166, 171 (2nd Cir. 2005). The offer she had received from that employer was thereafter withdrawn. The district court dismissed this claim, reasoning that Jute failed to submit an affidavit from a representative of her prospective employer asserting that her supervisor's statement caused or contributed to the withdrawn offer. *Id.* at 172.

The Second Circuit reversed, holding that the district court required Jute to prove too much. It observed that "[a]s a practical matter, it is unlikely that an employee could secure such evidence, as such an admission would subject a potential employer to Title VII claims of its own." *Id.* at 179 (internal citations omitted); see also *EEOC Compliance Manual § 8-II(C)(4) (Dec. 5, 2000)*.

The court concluded that "as is true of most Title VII allegations, to sustain her negative job reference claim Jute is 'constrained to rely on circumstantial evidence.'" *Id.* (internal citation omitted); see also *EEOC Compliance Manual § 8-II(D)(2) (May 20, 1998)* (citing as possible example of post-employment retaliation "actions that are designed to interfere with the individual's prospects for employment.").

The Third Circuit held the following in *Charlton v. Paramus Bd. Of Educ.*, 25 F.3d 194, 198-200 (3rd Cir. 1994):

"The need for protection against retaliation does not disappear when the employment relationship ends. Indeed, post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often

continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued."

In *Robinson v. Shell Oil Co.* 519 US 337 (1997), U.S. Supreme Court has held that a former employee does have the protection of Title VII's anti-retaliation provisions.

Third Circuit also held "that the retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship." *Charlton v. Paramus* 1994.

11th Circuit has held "adverse employment actions include soliciting other employees for negative statements about her" *Wideman v. Wal-Mart Stores, Inc* 141 F. 3d 1453, 1456 (1998).

The Equal Employment Opportunity Commission (EEOC) has interpreted "adverse employment action" to mean "any adverse treatment that is based on a retaliatory motive and is reasonable likely to deter the charging party or others from engaging in protective activity." *EEOC Compliance Manual, Section 8, "Retaliation," Para. 8-II (D3) (1998).*

EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 91 L.Ed. 2d 49, 106 S. Ct. 2399 (1986).

The Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006): a "materially adverse action" subject to challenge under the anti-retaliation provisions encompasses a broader range of actions than an "adverse action" subject to challenge under the non-discrimination provisions. "For the purpose of anti-retaliation protection, it expansively covers any employer action that "might well deter a reasonable employee from complaining about discrimination." An action need not be materially adverse standing alone, as long as the employer's retaliatory conduct, considered as a whole, would deter protected activity."

- ii) Misappropriation and violation of Plaintiff's name, associated Intellectual Property (IP), Privacy and Publicity.

CMH has continued to use Plaintiff's name and associated Intellectual Property (IP) for several years after employment termination, without her consent, pirating her identity. CMH stopped using previous Director's name and inactivated the CMH email account under his name promptly upon end of employment.

Plaintiff testified as to CMH's continuing use of her name. CMH failed to demonstrate any way that Plaintiff gave consent for continued use of her name after employment termination. CMH policies quoted does not create or discuss a right of CMH to continue to use a former employee's name or any part thereof after employment termination.

CMH failed to testify that it ceased using Plaintiff's name and CMH email account under her name. CMH failed and refused to cease using her name when Plaintiff contacted CMH.

As per 26(b) (3) (c) CMH is required to provide all emails sent, received and drafted at Plaintiff's CMH email account under her name. Yet CMH failed and refused to do so.

Missouri courts recognize actions for appropriation of privacy and the closely related action of appropriation of publicity, both species of the tort of invasion of privacy. See *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684, 687 (Mo. App. 1986) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.") (citing *Restatement (Second) of Torts*, § 652C (1977)).

Missouri first recognized the tort of invasion of privacy in *Munden v. Harris* (1911), in which the Missouri Court of Appeals stated with respect to the appropriate remedy: "If there are special damages, they may be stated and recovered; but such character of damage is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered." 134 S.W. 1076, 1079 (Mo. App. 1911).

In *Haith*, the Missouri Court of Appeals confirmed that "ordinary citizens have a cause of action in privacy for the appropriation of their names or likenesses." 704 S.W.2d at 688. *Haith* also confirmed that damages for humiliation and similar categories of emotional distress are recoverable in an invasion of privacy/appropriation of name case, and that this is a question of fact for the jury. 704 S.W.2d at 689 ("In any event, plaintiffs' recovery of damages (even nominal damages), should the jury find that they are entitled to recovery for appropriation of their names, is for that trier of the fact.").

Pursuant to Missouri law, "[d]amages for emotional distress and humiliation may be established by testimony or inferred from the circumstances. Intangible damages, such as pain, suffering, embarrassment, emotional distress, and humiliation do not lend themselves to precise calculation. Each case requires individualized contemplation and consideration by the trier of fact." *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 55 (Mo. App. 2016) (internal citations and quotation marks omitted).

Here Plaintiff has set forth facts, demonstrating Defendant's unauthorized use of her name on multiple occasions for several years after she was terminated. CMH's Dudley admitted under testimony monitoring the email account in Plaintiff's name. It effectively falsely represented to both its own employees and outside individuals who sent an email to Plaintiff's former address that Plaintiff remained affiliated with CMH. CMH has no right to keep Plaintiff's CMH email account under her name active for several years thereby giving the false impression that she is still employed there, when they don't have her on the payroll.

Plaintiff has testified about her resulting injuries to her professional standing and mental wellbeing. Plaintiff's name is her Intellectual Property (IP). It is her reputation. She has utilized her expertise, name and reputation for CMH's benefit. Through her leadership in the profession, as an invited speaker and other activities, Plaintiff represented CMH at the national and international level.

Plaintiff has an exclusive right to publicity and privacy of her name and associated IP. She has an exclusive right to the use of her name for any and all purpose, absent implied or express permission given to another. Plaintiff's exclusive right to use her name is her proprietary right. It is her property right of material value.

United States laws protects individual's name, Intellectual Property (IP), privacy, and publicity. CMH continues to violate Plaintiff's privacy, publicity and associated IP rights. Any dispute of material fact over CMH's use of Plaintiff's name is for determination by a jury.

iii) Violation of Equal Pay Act (EPA)

Plaintiff filed lawsuit for willful violation of EPA. Based on CMH's documents, she has established that she was willfully paid less than previous Director, a male Caucasian (Steve). At CMH, they both had the same job title (Director of Technology Development), and same job functions. Plaintiff is non Caucasian female of Indian origin.

CMH's records show that CMH was aware that Plaintiff is more qualified, accomplished and performed at a higher level. Steve did not meet the basic requirement for the job, which is a graduate degree in Biomedical Sciences. Unlike Plaintiff, he did not have experience working in a hospital or medical center on biomedical innovations or pediatric innovations.

For their defense, the best CMH could do, was to state that Steve was in his 3rd year and Plaintiff in her 2nd year of employment. That is irrelevant. EPA requires "equal pay for equal work".

CMH failed and refused to provide the complete compensation package and the personnel file of the previous Director. Without those documentation and evidence, the claim of statutory deadline does not hold.

Plaintiff has presented genuine disputes of material facts on these 3 claims. These are triable issues and should be heard by a jury.

II. District court's admission of inadmissible hearsay over objections is a violation of Federal Rules of Civil Procedures and Congress' mandate. Plaintiff objected at least 10 times. This prejudicial reversible error defeats the purpose of a court and is in contrary to other courts' decisions.

Court allowed CMH witnesses to testify trove of unreliable and fabricated out-of-court statements for truth, which often themselves included other unreliable and false out-of-court statements of supposed negative comments about Plaintiff, over timely objections. These are inadmissible hearsay and highly prejudicial. *Fed. R. Evid. 801(c), Fed. R. Evid 802.*

These statements are false and contradictory. CMH drummed up these false negative comments against Plaintiff in an attempt to justify the wrongful employment termination. These second and third hand comments solicited by CMH are discriminatory and retaliatory. *42 U.S.C. § 2000e-2, and §2000e-3.*

At the jury trial, CMH's Dudley, Stueve, Artman, Gage, Brown, and others, took the oath to tell the truth, and testified unreliable and fabricated out-of-court statements, as the truth, alleged to be made by Kearns, Kingsmore, Hoffman, and Hopkins, over repeated objections. These are inadmissible hearsay. *Fed. R. Evid. 801(c), Fed. R. Evid 802*.

In addition, CMH's Counsel stated those unreliable and fabricated out of court statements "is for the truth". The jury did not get to hear from the actual witnesses. Plaintiff did not get to examine Kearns, Kingsmore, Hoffman and Hopkins about what statements they made if any, about whom and so forth. This defeats the purpose of a jury trial. *Ohio v. Roberts (1980)* and *United States v. Benson (1992)* support exclusion of inadmissible hearsay.

However, for the appeal, in an attempt to cover up for the prejudicial inadmissible hearsay, CMH and their Counsel stated that these alleged unreliable negative out-of-court statements that were presented, were not for their truth. This is mockery and abuse of the system. They violated the sanctity of the court system.

Finally, CMH and their Counsel admitted wrongful employment termination of Plaintiff with false, discriminatory and retaliatory negative comments. 11th Circuit has held "adverse employment actions include soliciting other employees for negative statements about her" *Wideman v. Wal-Mart Stores, Inc 141 F. 3d 1453, 1456 (1998)*.

Congress mandated the Federal Rules of Civil Procedure promulgated by the U.S. Supreme Court to prevent bias and prejudice.

District court abused its discretion by allowing inadmissible hearsay over repeated objections. It prejudicially influenced trial outcome against Plaintiff. Affirmance is fundamental unfairness. It is a violation of Federal Rules of Civil Procedures and Congress' mandate. It is in contrary to other court's decision.

III. District court's allowance of a false, discriminatory and retaliatory "after-acquired affirmative defense" is highly prejudicial; it threatens pursuing complaints through the court system; it is contrary to Supreme Court's decisions.

At the jury trial, CMH presented a false after-acquired affirmative defense against Plaintiff for using her personal email to file complaints of discrimination, harassment, retaliation with CMH and forwarding documents in support of her complaints. CMH vaguely alluded it to violation of policy. Cited policy does not support it. In addition, violation of policy does not qualify for after-acquired affirmative defense. *8th Circuit Model Instruction 5.22 (quoting Sheehan v. Donlen Corp., 173 F.3d 1039, 1048) (7th Cir. 1999)*.

United States laws protect filing of complaint against discrimination, harassment, and retaliation, *42 U.S.C. § 2000e-2, and §2000e-3*. Policy of organizations has to follow the laws. Otherwise the policies would be unlawful.

CMH's so called after-acquired affirmative defense is not after acquired. While employed, Plaintiff communicated with CMH about her complaints of discrimination, harassment and retaliation, using her personal email. She forwarded supporting documents to CMH. CMH

knew it all along and confirmed it. Plaintiff testified that CMH had confirmed that she can use her personal email. She has provided supporting documents. CMH on one hand cannot agree to the use of personal email for complaints for confidentiality reasons and then turn around and say that is an after acquired affirmative defense. It is neither after acquired nor an affirmative defense.

At the trial, the only evidence that CMH presented for their so called after-acquired affirmative defense was 5 lines of false testimony from Robin Faulk, Human Resources. It has no merit for the following reasons:

i) While employed at CMH, Plaintiff communicated about her complaints with Faulk, Stueve, Wright, Anderson, and Harper using her personal email (Gmail). They had responded to Plaintiff at her Gmail.

ii) CMH allow use of personal emails for complaints. Managers have access to employee emails. So it is important for confidentiality reason to allow use of personal email for complaints.

iii) CMH submitted an irrelevant policy, personal health information policy as violation of policy by Plaintiff. Yet Plaintiff did not work with personal or protected health information.

iv) It is not even a terminable action. While employed at CMH, Kingsmore, Hopkins, O'Neil and others used their personal emails for CMH business matters. They forwarded confidential, sensitive and privileged information to their personal emails. This was common knowledge and practice. Their employment was not terminated for it.

CMH fabricated the false after-acquired affirmative defense against Plaintiff for pursuing her claims through the court system. It is discriminatory and retaliatory. It is unlawful, 42 U.S.C. § 2000e-2, and §2000e-3, EEOC Compliance Manual, Section 8. "Retaliation" 1998. Supreme Court has affirmed and reaffirmed against retaliation.

Admission of CMH's false, discriminatory and retaliatory after-acquired affirmative defense threatens pursuing complaints through the court system. It seriously affected the reputation of judicial proceedings. It is contrary to Supreme Court decisions.

IV. District court's allowance of questioning and testimony over objection regarding an unrelated complaint brought by Plaintiff's sister against two individuals is retaliatory and threatens pursuing complaints through the court system.

Plaintiff's sister testified about Plaintiff's emotional distress from wrongful employment termination. Plaintiff testified about her emotional distress. CMH's Dudley testified that he is sure that Plaintiff would have suffered from emotional distress. There is no credibility issue here about my sufferings.

Yet on the pretext of credibility, CMH brought up an unrelated complaint by a third sister against 2 individuals. District court allowed it over objections. It was prejudicial against

Plaintiff and her family, painting them as litigious. *Batiste-Davis v. Lincare, Inc*, 526 F. 3d 377, 380.

CMH attacked Plaintiff's sister because Plaintiff is pursuing her claims through the court system. It is continued retaliation. It is unlawful.

- V. District court's error in excluding evidence and questioning of Dudley's employment termination for insubordination and Plaintiff's disparate treatment is discriminatory and prejudicial.

Dudley and Stueve are the main players. This case revolves around their credibility. They had given conflicting testimony about Dudley's employment termination due to insubordination. There was credibility issue here.

Jurors were suspicious of Dudley's credibility, behavior and performance. They had questions. They were looking for evidence and information about why and how his employment ended.

Yet district court did not allow presentation of evidence or questioning of Dudley's involuntary employment termination and insubordination. District court applied unfair standard for Plaintiff and CMH.

At CMH, Plaintiff performed a highly specialized and complex function in Intellectual Property (IP) matters requiring multi-disciplinary expertise. It involves in-depth analyses, application of medical and scientific innovations through commercialization, collaboration and humanitarian efforts, when applicable. CMH General Counsel and others have referred her as the IP expert, guru.

Dudley's background and experience is in marketing and sales. He did not have qualifications and expertise comparable to Plaintiff. He did not have experience in IP or biomedical innovations. Prior to CMH, he never worked at hospitals or medical centers or academic centers.

CMH's offering severance pay to Dudley but not to Plaintiff is a disparate treatment, 42 U.S.C. § 2000e-2. District court's not allowing Plaintiff to present evidence of this disparate treatment to jury is prejudicial.

District court's prejudicial reversible error compromised integrity of the process. Affirmance is fundamental unfairness. It should be reversed.

- VI. Jury's verdict was the produce of confusing and prejudicial instructions and in violation of Congress' mandate. It contradicts with Supreme Court's and other court's decisions.

Plaintiff was able to speak with some of the jurors after the end of the trial. They were confused by the jury instructions. Jury instructions led the jury to give verdict against Plaintiff on all counts.

Plaintiff also did not get a fair and unbiased jury. Juror 5 is a security guard who works at a hospital that does business with CMH. CMH has an office in their building. He played a leading role for delivering verdict against Plaintiff on all counts.

Juror 3 was upset when a colleague filed discrimination complaint against their supervisor. Due to the filing of the complaint, she was transferred to another department, which upset her.

i) District court's instruction of "but for" means "in the absence of" for discrimination and retaliation to the jury, at the end of trial, after viewing the whole trial, is highly prejudicial.

During deliberation, juror 5 sent a note asking about statute and elements to determine how they should apply "but for". None of the jurors including juror 5 had back ground in law. Senior Judge said this is the first. Attorneys have said that jurors do not ask about statute and elements.

Court instructed "but for" means "in the absence of". It made retaliation claim dependent on discrimination. Discrimination and retaliation are separate claims, independent of each other, 42 U.S.C. § 2000e-2, and §2000e-3. District court's instruction "but for" means "in the absence of" does not support the law.

Counsel on both sides went along with it even though it is wrong and erroneous assessment and against EEO's laws. Plaintiff did not approve it.

All along Plaintiff has stated and testified that CMH subjected her to numerous forms of discrimination, harassment and retaliation for filing complaints of discrimination and harassment, followed by complaints for retaliation. Retaliation continued beyond employment termination. Plaintiff's complaints with EEOC included complaints about retaliation. She checked the continuing action box in the charge. She has provided supporting documents. Her filing of complaints are protected by the law.

Retaliation is unlawful. *Burlington Northern* 2006. U.S. Supreme Court has reaffirmed against retaliation. Jury instruction did not fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury in this case. It is highly prejudicial.

"An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test." Congress did not write the provision to imply such test of causation in any way. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

ii) During trial, jurors repeatedly heard the fabricated, discriminatory and retaliatory after-acquired affirmative defense. Jurors saw it repeated 18 times in the jury instruction. It was overemphasized and excessive. This was unfair prejudice, confusing issues, and misleading the jury.

District court has an important role to be fair and unbiased. Court's jury instructions compromised the integrity of the court. The district court made highly prejudicial errors in jury instructions. It should be reversed to restore the integrity of the judicial system and for the sake of justice.

Allowing such erroneous and prejudicial errors to remain uncorrected would undermine the EEO enforcement by discouraging plaintiffs from bringing EEO claims due to the fear of retaliation. It contradicts with Supreme Court's and other court's decisions.

CONCLUSION

This case has wider implications and merits the consideration of the Supreme Court. It is very concerning that the opinion of Appellate Court is contrary to the decisions of the Supreme Court and Circuit Courts. Cumulative effects of these prejudicial errors are even more detrimental. Decisional uniformity should be maintained for integrity of the Justice System.


CMH's defense has been inadmissible hearsay, false testimony and false after-acquired affirmative defense. Appellate court's opinion would condone unlawful activities and violation of Federal Rules of Civil Procedures and Congress' mandate thereby violating the sanctity of the court system.

When professionals like Plaintiff are wronged and obstructed from pursuing their profession, it adversely affects society. CMH's wrongful and unlawful actions harmed Plaintiff and obstructed her from contributing and leading development and commercialization of scientific and medical innovations for improving health, wellness and the advancement of the economy.

It would seriously affect the public reputation of judicial proceedings. It has affected Plaintiff's rights substantially and threatens the rights of others. It has harmed Plaintiff and also the society. This case has significant national importance.

Based on the foregoing, Plaintiff-Appellant respectfully urges that this *Petition for Writ of Certiorari* be granted. The Court may wish to consider reversal of the decision(s) by the District Court and Court of Appeals and the remand of this matter to that court for further proceedings. Petitioner also requests such other relief in law or equity to which she may be justly entitled.

Respectfully submitted,

B. L. Mukherjee 
PO Box 200766
Boston, MA 02120
(857)-301-9195

Petitioner-Pro Se