No.

IN THE

Supreme Court of the United States

CIARA VESEY, PETITIONER

v.

ENVOY AIR INCORPORATED D/B/A AMERICAN EAGLE AIRLINES, INC.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Where the employer worked in close coordination with petitioner's biased supervisor to conduct a sham investigation which adopted the supervisor's false charge of wrongdoing, did the court of appeals impermissibly refuse to apply the "cat's paw" theory of liability in this retaliatory discharge case, putting it at odds with this Court's decisional law as well as other Circuit courts of appeals which apply this rationale?

2. Did the court of appeals irredeemably mishandle the summary judgment record by refusing to view the reasonable inferences drawn therefrom in the light most favorable to petitioner, the nonmoving party, when assessing her claim that after engaging in protected activity, she was discharged based on her biased supervisor's false charge of wrongdoing?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

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The published opinion of the United States Court of Appeals for the Seventh Circuit in *Ciara Vesey v. Envoy Air Incorporated*, C.A. No. 20-1606, decided and filed May 28, 2021, and reported at 999 Fed.3d 546 (7th Cir. 2021), affirming the District Court's Order granting summary judgment to respondent on petitioner's claims for workplace discrimination and retaliation, denying petitioner's Rule 59(e) motion and ordering that she pay respondent's costs, is set forth in the Appendix hereto (App. 1-12).

The unpublished Order of the United State District Court for the Central District of Illinois, Rock Island Division, in *Ciara Vesey v. Envoy Air Incorporated*, C.A. No. 4:18-cv-04124-SLD-JEH, decided and filed December 20, 2019, and reported at 2019 WL 12337658 (C.D. Ill. 2019), granting respondent's motion for summary judgment, is set forth in the Appendix hereto (App. 13-28).

The unpublished Order of the United State District Court for the Central District of Illinois, Rock Island Division, in *Ciara Vesey v. Envoy Air Incorporated*, C.A. No. 4:18-cv-04124-SLD-JEH, decided and filed March 12, 2020, and reported at 2020 WL 9812840 (C.D. Ill. 2020), denying petitioner's motion to alter and amend the district court's earlier order of December 20, 2019, granting respondent's motion for summary judgment, is set forth in the Appendix hereto (App. 29-36).

The unpublished order of the United States Court of Appeals for the Seventh Circuit in *Ciara Vesey*

v. Envoy Air Incorporated, C.A. No. 20-1606, filed June 30, 2021, denying petitioner's timely filed petition for rehearing and for rehearing *en banc* is set forth in the Appendix hereto (App. 37).

The unpublished Decision of the Administrative Law Judge of the Illinois Department of Employment Security, in *Ciara Vesey v. American Eagle Airlines, Inc.*, Docket No. 1641165, dated January 6, 2017, finding that there was insufficient evidence to show that respondent's discharge of petitioner on October 26, 2016, was based on "misconduct" so as to disqualify her from receiving unemployment benefits, is set forth in the Appendix hereto (App. 38-42).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's order granting summary judgment to respondent, denying petitioner's Rule 59(e) motion and ordering that she pay respondent's costs, was entered on May 28, 2021; and its order denying petitioner's timely filed petition for rehearing and for rehearing *en banc* was decided and filed on June 30, 2021 (App. 1-12;37).

This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of petitioner's timely filed petition for rehearing and for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the tight of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. §§ 2000e-2(a); (m) & 3 [Title VII of the Civil Rights Act of 1964, as amended]:

2. UNLAWFUL EMPLOYMENT PRACTICES

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

....

(m) An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

....

3. OTHER UNLAWFUL EMPLOYMENT PRACTICES.

(a) It shall be an unlawful practice for an employer to discriminate against of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

775 ILCS 5/1-102:

Sec. 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

775 ILCS 5/2-102:

Sec. 2-102. Civil rights violations - employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, to engage in harassment as defined in subsection (E-1) of Section 2-101, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status. An employer is responsible for harassment by the employer's nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

STATEMENT

The summary judgment record, read in the light most favorable to petitioner Ciara Vesey ("petitioner"), the non-moving party, established that she is an African-American woman employed as a ticket agent by respondent Envoy Air, Incorporated d/b/a American Eagle Airlines, Inc. ("respondent") at Quad Cities International Airport in Rock Island County, Illinois. During petitioner's four-year tenure which began in 2012, Teresa White ("White"), a Caucasian woman, was the general manager of respondent's Quad Cities' operation and petitioner's immediate supervisor.

Petitioner was one of the few minority employees respondent retained at Quad Cities and was not within White's trusted circle of employees and managers. While she performed her job as ticket agent well, petitioner fell out of favor with management by attempting to obtain equal treatment for herself and her fellow employees when she complained to respondent's Human Resources Department ("HR") in February and March of 2016, about favoritism in scheduling and racial discrimination in providing training opportunities. Respondent determined that her complaints were unsubstantiated (App. 14).

In August of 2016, Eric Masengarb, a Caucasian male who was petitioner's co-worker (and a friend of White), told petitioner during a break to "go back and pick cotton" (*Id.*). This racist remark was preceded by other racist statements and gestures towards petitioner by Masengarb, ones which she had not reported, e.g., he would grab her hair when worn "in two Afro puffs and...say, 'Oh, I like your balls'" while admitting that he

never acted in this manner with white female co-workers (*Id.*). Petitioner reported this latest episode of racism by Masengarb to respondent's Employee Relations Representative Danielle Griffin (*Id.*). After interviewing petitioner, Masengarb and two other employees who were in the vicinity when the incident occurred, Griffin found that petitioner's complaint was substantiated and Masengarb was terminated (App. 14-15). During this time, petitioner also reported a sexual affair between Masengarb and respondent's Station Lead Agent at Quad Cities, Carrie McMurray ("McMurray").

White was a friend of both Masengarb and McMurray. White even helped McMurray get her job back after respondent terminated her for a prescription drug-related offense. Both White and McMurray resented petitioner for having reported Masengarb's racist remarks which led to his termination. In addition, petitioner had reported White herself for her own racist behavior in the months prior to the Masengarb episode. Together with McMurray and Masengarb, White schemed to develop a reason for respondent to discharge petitioner. Their first effort was a complaint by McMurray that petitioner had posted a racist entry on Facebook, a charge which respondent eventually determined was not substantiated. During this time, McMurray also told co-workers that she did not want to work with petitioner anymore; and both White and McMurray made known to others they wanted petitioner fired.

Their second effort to have respondent terminate petitioner was begun by White claiming that petitioner had abused respondent's travel policy on September 10, 2016. But instead of making this claim herself, White used her position as general manager at Quad Cities to coerce Ashley Emerick ("Emerick"), another Station Agent at Quad Cities and White's subordinate, to file an anonymous complaint alleging that petitioner had committed travel abuse on September 10, 2016, a day when Emerick herself was not even working (but White was). As the summary judgment record showed, according to Emerick, White *sua sponte* "brought th[e issue] up" with Emerick as she (White) pressured Emerick to file this anonymous complaint against petitioner four days later on September 14, 2016 (App. 15-16;20).

As for the issue of travel abuse, all respondent's employees enjoy travel benefits which include the ability to fly standby ("non-revenue") on any Envoy or American Airlines flight with available seats; and employees also receive a discount on paid tickets (App. 15). An employee's use of these benefits is regulated by the policies contained in respondent's Travel Guide, available to all employees on respondent's intranet (*Id.*). According to its provisions, violations of company policy in connection with the Travel Guide may be grounds for termination "depending on the severity of the incident or offense and the employee's record;" and abuse of travel privileges "will be grounds for dismissal" (*Id.*). Yet respondent's policy for its employees' enjoyment of travel benefits consistent with its Travel Guide----or, stated negatively, its "travel abuse policy"-----was little, if ever, used; it was unfamiliar to any of the employees deposed in this

litigation; it contained no bright-line guideposts for termination; and it was never identified as a reason for termination, especially where the employee purchased her own ticket and respondent suffered no loss of revenue.

Like her co-workers, petitioner had no definite idea or prior knowledge that any of her actions in using her travel benefits would violate company policy (App. 16). While she signed an orientation form upon her hiring in August of 2012 that she agreed to review and abide by all information and rules related to employee travel privileges, she later testified that "no one sat down [with her] and said, Hey, this is how everything work[s];" and she never received any "formal training on how [sh]e w[as] supposed to use [he]r travel privileges" (*Id.*). But she did have some understanding "of how [she] was supposed to use [her] benefits" (*Id.*).

HR consultant Irma Stevens ("Stevens") received Emerick's anonymous complaint against petitioner which White had pressured her to file. White then invaded the process again when she piggy-backed onto Emerick's complaint by emailing Stevens twice on September 22, 2016, and on October 2, 2016, alleging *additional* incidents of travel abuse by petitioner. White thereby supplied to HR *the entire foundation of allegations* for which petitioner was ultimately terminated, including the "facts" supplied in Emerick's anonymous complaint. White thereafter contacted HR continually, asking for updates on the status of the investigation and whether she could move forward with petitioner's termination.

Armed with White's information which targeted petitioner for travel abuse, Stevens partnered with Valerie Durant, respondent's Corporate Security Investigator, to investigate the complaints. They reviewed petitioner's travel history, her activity on SABRE, respondent's system used to manage passenger flight reservations, as well as her activity on respondent's non-revenue travel planner, a system employees use to book non-revenue travel. Durant also interviewed petitioner and another station agent.

Respondent's investigation concluded petitioner had *intentionally* contravened respondent's travel policy in three ways: (1) by using her employee log-in to change her itinerary on respondent's SABRE system; (2) by asking a co-worker to change her itinerary instead of having her ticket reissued; and (3) by holding a non-revenue ticket at the same time she created a revenue reservation on the same flight (App. 16). These investigative "findings" were in lockstep with White's complaints against petitioner and all of the findings came directly from information supplied by White. *None* of respondent's investigation of petitioner involved anything other than the information White supplied. Conspicuously, *none* of petitioner's explanations for her conduct or her description of her intent in engaging in these events was reflected in respondent's report. In fact, respondent's corporate office asked White to review its termination letter *so that it was acceptable to White before it was even sent to petitioner*!

In each instance of travel abuse respondent relied upon , petitioner purchased her own ticket and respondent suffered no loss of revenue. Yet because

petitioner had a disciplinary action in her history (she had mistakenly driven a jet bridge into an aircraft in November of 2014), receiving an advisory for this mistake which was allegedly still active, Stevens recommended petitioner's termination (App. 17). Respondent approved petitioner's termination on October 26, 2016 (*Id.*).

On January 6, 2017, in an unpublished decision, an Administrative Law Judge of the Illinois Department of Employment Security, in *Ciara Vesey v. American Eagle Airlines, Inc.*, Docket No. 1641165, determined that there was insufficient evidence to show that petitioner had engaged in misconduct so as to disqualify her from receiving unemployment benefits when she twice made changes on her reservations for airline tickets which she herself had purchased, especially when she was unaware that respondent had a policy prohibiting such conduct (App. 38-42).

After receiving notice of her right to sue from the Illinois Department of Human Rights, petitioner began this civil action against respondent on February 12, 2018, in the federal district court for the Northern District of Illinois (App. 17). Invoking federal question (28 U.S.C. § 1331), civil rights (28 U.S.C. § 1343(a)(3) & (4)) and supplemental (28 U.S.C. § 1367) jurisdiction of the district court and demanding a jury trial, she claimed in six counts that respondent had unlawfully discriminated against her on account of her race or color in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e-2(a) & (m); and 3(a)), and the Illinois Human Rights Act, 775 ILCS 5/1-102 *et seq.* ("IHRA"). Specifically, petitioner claimed unlawful retaliation in the wake of her protected

activity of filing complaints for discriminatory treatment; harassment via a hostile work environment; and the negligent and intentional infliction of emotional distress (*Id.*)

Following transfer of the case to the federal district court for the Central District of Illinois, respondent moved for summary judgment on all of petitioner's claims (App. 13;17). On December 20, 2019, the district court, Darrow, J., granted the motion (App. 13-28). After dismissing as abandoned petitioner's claims for negligent and intentional infliction of emotional distress, the district judge addressed petitioner's retaliation claim under both Title VII and the IHRA (App. 18-23). Respondent conceded that petitioner had engaged in protected activity by filing three complaints in 2016 with respondent's HR Department and that she suffered an adverse employment action when she was terminated later that year (App. 19-20). However, it claimed there was no causal nexus between these events since petitioner was terminated *not* because of her complaints about workplace discrimination but rather because of her travel policy violations (App. 20).

To bolster the causation element of her claim of retaliation under the so-called "cat's paw" theory of liability and relying on the reasonable inferences due her from the record as the non-moving party, petitioner pointed to: (1) the biased conduct of White, petitioner's supervisor, who targeted petitioner for termination immediately after her complaints about Masengarb, White's friend, caused his termination; (2) White's pressuring Emerick, her subordinate, to file an anonymous complaint accusing petitioner of travel

abuse on a day when Emerick was not even working and of which Emerick therefore had no personal knowledge; (3) repeatedly communicating with respondent's HR Department during its investigation about additional instances of petitioner's travel abuse as well as inquiring about the progress of the investigation itself; (4) the absence of any actual policy in place which covered petitioner, an employee who purchased her own tickets and therefore was entitled to the same services and amenities as other revenue ticket holders; and (5) respondent's reliance upon a single source of information----White herself----whom the investigators consulted from start to finish in deciding to terminate petitioner (App. 16;20).

All of this evidence, petitioner asserted, invoked the "cat's paw" theory of causation and liability whereby the biased actions of a supervisor (White) who is not the ultimate decisionmaker, will still bind the employer if her conduct was the proximate cause of the adverse action suffered by the plaintiff-employee. As petitioner argued, the summary judgment record showed that White, resentful that petitioner had forced her friend Masengarb out of the company, pursued a scheme to feed Emerick and HR false information of petitioner's travel abuse in order to "set up" petitioner so that respondent would investigate and then discharge her for supposedly abusing her travel privileges (App. 20-21). In this way, White manipulated respondent into acting as a conduit for her retaliatory intent. But respondent, having already terminated Masengarb and knowing that White still wanted to rehire him, should have known that White retained retaliatory animus toward petitioner. Yet, as petitioner claimed, it failed to stop White's biased conduct, instead

enabling it, which rendered the ensuing sham investigation itself pretextual, i.e., a coverup for discriminatory animus.

The motion judge rejected this argument (App. 20-22). While the record did show that White brought petitioner's alleged travel violations to Emerick's attention, there was no proof "that Emerick...was encouraged to file the complaint by White" (App. 20). Nor did the district judge see any admissible evidence that White had any retaliatory animus toward petitioner in the wake of Masengarb's termination based on petitioner's complaint about his racist remarks (App. 20-21;28). Petitioner's testimony of what others had told her about White's statements to them about her disagreement with Masengarb's discharge was inadmissible hearsay (App. 21). Even Emerick's statement to petitioner that White had ongoing conversations about petitioner being fired and Masengarb getting his job back was not enough to draw an inference about her motivation to terminate petitioner (App. 21-22). Finally, the district court determined that respondent's had an actual policy contained in the Travel Guide which prohibits employees from changing their own reservations for full-fare tickets (App. 22).

The district judge therefore saw no triable fact issue on petitioner's claim of retaliatory termination; and after concluding that she had not established a genuine issue of material fact for trial on her claim of a racially hostile work environment, summary judgment entered dismissing all of petitioner's claims (App. 23-26). The district judge also granted costs to respondent (App. 2;5;11).

Having discovered that the court reporter omitted from the summary judgment record a portion of Emerick's deposition testimony describing how she was pressured by White to file the anonymous complaint about petitioner's alleged travel abuse, petitioner moved to alter or amend the judgment in order for the district court to reconsider its summary judgment ruling (App. 29-30). Judge Darrow refused to do so and denied the motion (App. 29-33). In doing so, the district judge found there was no evidence that McMurray took any action to influence the decision to terminate petitioner (App. 33-34).

Petitioner appealed, and on May 28, 2021, the court of appeals unanimously affirmed the district court's judgment in all respects (App. 1-12). The Panel noted that petitioner was not alleging retaliatory motives by respondent's investigators or committee members who ultimately brought about her formal termination (App. 6-7). Instead, she relied upon the "cat's paw" theory of liability, claiming that White, harboring retaliatory animus against petitioner, encouraged Emerick to file an anonymous complaint against petitioner for travel abuse, engineered the investigation itself to further target petitioner, and repeatedly invaded the process when, among other things, she piggy-backed onto Emerick's complaint by emailing Stevens twice on September 22, 2016, and on October 2, 2016, to allege *additional* instances of travel abuse by petitioner and then continually monitored the progress of the investigation itself (App. 7).

The Panel rejected this theory of liability because respondent's investigation resulted in an adverse employment action for reasons unrelated to

White's biased conduct (App. 7-8). That is, the biased supervisor's actions must have proximately caused petitioner's termination in the sense that the investigation took the complaint "into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified" or if the investigation "relies on facts provided by the biased supervisor" (App. 7 quoting *Staub v. Proctor Hospital, Inc.*, 562 U.S. 411, 421 (2011)). Since respondent's discharge of petitioner did not rely on White's credibility but rather rested on an investigation which contained independently sufficient reasons to discharge petitioner, there was no proximate causation (App. 8). According to the court of appeals, respondent only relied on White's veracity to begin the investigation (*Id.*).

Yet in describing petitioner's violations of respondent's travel policy, the Panel assumed that petitioner *intended* to commit them for personal profit and to thereby defraud respondent. For example, it described petitioner on two occasions as "[n]ever intending to take the trip" yet collecting a $500 travel voucher in exchange for postponing her reservation by one day; putting herself on the standby list for flights for which she already held non-standby reservations, then cancelling her non-standby ticket once on the plane as a standby passenger, thereby *intentionally* depriving respondent of the sale of her seat and improving her odds of flying standby for free; and *intentionally* avoiding change fees by having another employee check her in for a return flight via respondent's own booking system when she missed the departure flight on the same reservation (App. 3-4).

According to the Panel, this was "dishonest conduct" by petitioner which "defrauded her employer" and "[n]o evidence offered by petitioner creates a genuine dispute that would allow a reasonable jury to conclude that [she] was terminated for any reason other than her abuse of travel benefits" (App. 9). For these reasons, the district court properly granted respondent's summary judgment motion and denied petitioner's motion to alter or amend the judgment (App. 10-11).

On June 30, 2021, the court of appeals denied petitioner's timely filed petition for rehearing and for rehearing *en banc* (App. 37).

REASONS FOR GRANTING THE PETITION

1. The Summary Judgment Record Invoked The "Cat's Paw" Theory of Liability In This Retaliatory Discharge Case. The Court Of Appeals' Refusal To Apply It Conflicts With This Court's Decisional Law As Well As Other Courts of Appeals Which Would Have Applied This Rationale.

The "independent" investigation the court of appeals relied upon to break the causative link under the "cat's paw" theory of liability between White's blatant retaliatory animus and petitioner's ensuing termination was a sham. Read in the light most favorable to petitioner, the summary judgment record showed that White was intent on having petitioner fired because she caused Masengarb, White's friend, to be terminated for his racist behavior. White pressured Emerick to file an anonymous complaint with HR in order to "set up" petitioner so that respondent would

investigate and terminate her for supposedly abusing her travel privileges; and she repeatedly communicated with investigators, feeding them more false information about petitioner's alleged abuses and monitoring the progress of the investigation itself.

All of the investigative focus and results were in lockstep with White's complaints against petitioner and all of its findings came directly from information supplied by White herself. *None* of respondent's investigation or its findings involved anything other than the information White supplied. Conspicuously, *none* of petitioner's innocent explanations or her description of her lack of intent to engage in any prohibited conduct was reflected in respondent's report. In fact, respondent asked White herself to review and approve its termination letter before it was even sent to petitioner.

White was therefore the instigator, the author and the most persuasive "silent witness" behind the scenes of this investigation from start to finish, continually promoting her false contention that petitioner had somehow abused her travel benefits. Yet respondent's investigators made no attribution at all to White's pervasive participation and manipulation of this process in their report, a telling sign they acted as nothing more than rubber stamps for her retaliatory animus, a mere conduit for her invidious discrimination. White engineered this entire investigation; its results were exactly in line with her version of events; and respondent even sought her approval of the results.

All of these facts ----fairly inferred from the summary judgment record---- showed that White's

fingerprints were on every part this process, contrary to respondent's duty to conduct an *independent* investigation, one which would remove the taint of White's retaliatory animus and break the causative link under the "cat's paw" theory of liability between White's illegal behavior and petitioner's termination. It likewise undermines respondent's contention that it entertained an "honest belief" that petitioner had violated its travel policies. Having already terminated Masengarb and aware that White still wanted to rehire him, in addition to the fact that petitioner had filed two complaints against White just a few months prior, respondent should have known that White retained retaliatory animus toward petitioner. Yet it negligently failed to stop White in her biased fomenting of these false charges, enabling it instead by regurgitating her version of events in its investigation to justify petitioner's discharge and rendering this sham investigation itself pretextual, i.e., a cover-up for retaliatory animus.

Compounding the impropriety of the Panel's reliance on this sham investigation to break the causative chain are its unsubstantiated findings that petitioner violated its travel policies. Because *none* of these alleged violations contravened the Travel Guide, they too became a pretext for White's retaliatory animus. First, there was *no* actual policy in place which applied to petitioner, *an employee who purchased her own ticket,* and was therefore entitled to the same services and amenities as other revenue ticket holders. Second, the Travel Guide contained no bright-line guideposts for termination; it was seldom, if ever, used as a reason for discharge, especially when an employee purchased her own ticket; its provisions were

unfamiliar to any of the employees deposed in this litigation; and respondent suffered no loss of revenue.

Third, while petitioner had some understanding "of how [she] was supposed to use [her] benefits," she had no definite idea or prior knowledge that any of her actions in using those benefits would violate company policy (App. 16). Although she signed a form in August of 2012 agreeing to review and abide by all information and rules related to employee travel privileges, she testified that "no one sat down [with her] and said, Hey, this is how everything work[s];" and she never received any "formal training on how [sh]e w[as] supposed to use [he]r travel privileges" under the Travel Guide's sometimes opaque provisions (*Id.*).

Finally, respondent relied on violations which applied only to *non-revenue* ticket holders, those employees seeking to fly for free. Petitioner, a revenue ticket holder at all times, was *not* part of this class. During the January 2016 trip, *petitioner bought her own ticket* and sought to change her itinerary by seeking the assistance of another agent pursuant to the Guide. That she did so "out of sequence," as respondent found, is *not* defined in the Guide as an actionable event which could possibly amount to a travel policy violation. On September 13, 2016, *petitioner again bought her own ticket*, volunteered to be removed because the flight was weight-restricted, and cancelled her flight herself, using her employee sign-in to do so in SABRE. Like any revenue ticket holder, she was entitled to cancel the flight without violating travel policy.

On September 19, 2016, *petitioner again bought her own ticket*, again volunteered to get off a weight-

restricted flight, and received a $500 voucher accommodation. The Guide does *not* prohibit employees who purchase their own ticket from receiving this accommodation; and it further provides that employees who purchase their own tickets using their employee discounts are still eligible for all services and amenities. She rebooked her flight for the next day but later decided to cancel her flight, events which respondent found constituted a violation of the Guide as she received a "personal financial gain" by volunteering to get off this weight-restricted flight. But petitioner was a revenue ticket holder and was entitled to be reimbursed for her purchase and inconvenience. Nothing in the Guide prohibits this outcome if *petitioner buys her own ticket*, as she did here.

As for her October 2016 trip, petitioner did not want to miss her scheduled training session in Dallas. She opted to hold a revenue ticket for a confirmed seat and be placed on standby. When she was told she did not have enough Frequent Flyer miles to buy her seat, she canceled her revenue ticket confirmation the next day. Respondent called this a violation of travel policy because it prevented it from selling a seat. But an employee like petitioner under the Guide can hold a reservation for 24 hours before having to pay for it. Consistent with the Guide, petitioner timely canceled her reservation and was placed on standby for the next available flight to Dallas for her training. No violation of the Guide was shown. Instead, petitioner was punished for trying to ensure that she performed her work obligations.

In the final analysis, every "violation" the investigators found rested on their subjective opinion

about petitioner's "intent" when she acted. Fueled by White's overarching desire as a biased supervisor to have petitioner discharged for any reason, the investigators incorporated into their assessment of petitioner's conduct an intent to defraud respondent, the same fraudulent intent which White wanted them to attribute to petitioner when she reported her for "travel abuse." The Panel's opinion makes the same fundamental mistake. Petitioner was an employee *who purchased her own tickets*; she had no intent to defraud respondent; and nothing in the Travel Guide made any of her conduct a violation of respondent's travel policies.

Even the Administrative Law Judge on January 6, 2017, in petitioner's contested hearing over her receipt of unemployment benefits, determined that there was insufficient evidence to show that petitioner had engaged in misconduct so as to deny her benefits when she twice made changes on her reservations for airline tickets which she herself had purchased, especially when she was unaware that respondent had a policy prohibiting such conduct (App. 38-42).

Petitioner thus submits that (1) whether respondent's sham "independent" investigation, engineered by White, petitioner's biased supervisor, was a pretext for her retaliatory animus ; (2) whether the baseless violations of respondent's travel policy were pretextual; and (3) whether respondent's "honest belief" that petitioner had intentionally committed travel abuse is at all relevant on this record, are genuine issues of material fact fit for a jury's determination at trial. The court of appeals' decision otherwise is at odds with this Court's preeminent decisional law as well as the law of sister Circuit courts

of appeals which address the efficacy of employer investigations which by their independent nature break the causative link under the "cat's paw" theory between a supervisor's retaliatory animus and the employee's ensuing termination.

In this regard, certiorari should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c). Ultimately, "issues of proximate causation ...involve application of law to fact, which is left to the factfinder." *Exxon Co., U.S.A. v. Sofec, Inc.* , 517 U.S. 830, 840–841 (1996). The Panel's refusal to permit the factfinder to resolve these issues, instead deciding them for itself, is one of fundamental federal jurisprudence which deserves review by the Court.

42 U.S.C. §§ 2000e-3(a) makes it unlawful for an employer to retaliate against an employee "*because* he has opposed any practice made an unlawful employment practice by this subchapter...." (emphasis supplied). This "because of" causation standard obligates a plaintiff to prove that her Title VII complaints actually played a role in the employer's decisionmaking process to terminate her and had a determining influence on the outcome. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009) quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In *Burrage v. United States*, 571 U.S. 204, 211-213 (2014), Justice Scalia likened the phrase "because of" to "results from" with both invoking a "but for"

requirement which "is part of the common understanding of cause." *Id.* at 211. Thus when interpreting a statute that prohibits adverse employment action "because of" an employee's complaints of unlawful workplace discrimination, the ordinary meaning of the word "because" requires proof that the desire to retaliate was "a but-for cause of the challenged employment action." *Id.* at 212. That is, the employer would not have taken the adverse employment action *but for* a design to retaliate. *Id.* at 213-214.See *Bostock v. Clayton Cnty.*, ___U.S.___, ___; 140 S.Ct. 1731, 1739 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350; 360 (2013).

In *Bostock v. Clayton Cnty.*, *supra*, Justice Gorsuch observed that the "because of" standard of causation incorporates the "simple" and "traditional" standard of but-for causation, a type of causation established whenever "a particular outcome would not have happened 'but for' the purported cause." *Id.* citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. at 176. It directs a jury to change one thing at a time and then determine if the outcome changes; if it does, then a but-for cause has been identified. *Id.* So long as petitioner's complaints about workplace discrimination were one but-for cause of respondent's decision to terminate her, even if accompanied by other legitimate or illegitimate causes, that is enough to trigger Title VII's remedies. *Id.* citing *Nassar*, 570 U.S. at 350.

One application of this but-for causation standard to a Title VII plaintiff claiming a causal link between her protected activity and her retaliatory discharge is the "cat's paw" theory of causation and liability. Ordinarily, evidence of animus from an

employee or supervisor "who was not involved in making an employment decision ha[s] no bearing on the ultimate issue: whether the decision was the result of discrimination." *Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (7th Cir.2001)). However, under the "cat's paw" theory, the biased actions of someone who was not the decisionmaker can still bind the employer if the actions of the biased employee or supervisor were the proximate cause of the adverse action suffered by the plaintiff. *Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 435 F. App'x 545, 549 (7th Cir. 2011) citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011).

Discrimination can have "multiple proximate causes" and that one decisionmaker may be overridden by a higher decisionmaker does not "automatically render[ ] the link to the [subordinate's] bias 'remote' or 'purely contingent'" for proximate cause purposes, especially where the ultimate decisionmaker's judgment is neither "independent" nor unforeseeable. *Staub v. Proctor Hosp.* , 562 U.S. at 419-420. In *Staub*, Justice Scalia, writing for the majority, held that for the purposes of showing illegal antimilitary bias, a biased supervisor's unfavorable report could be a proximate cause for the plaintiff's ultimate termination, even though the supervisor did not make the ultimate decision. *Id.*

In so ruling, the *Staub* majority rejected a hard and fast rule that the mere exercise of independent judgment by the decisionmaker in the form of an independent investigation is always enough to remove the taint created by the supervisor's earlier retaliatory animus. *Id.* at 420. While an employer's investigation

resulting in an adverse action for reasons entirely unrelated to the supervisor's original biased action may result in the employer being held not liable, "the supervisor's biased report may remain a causal factor if the [decisionmaker's] independent investigation takes it into account without determining that the adverse action was, apart from the [biased] supervisor's recommendation, entirely justified." *Id.* at 421.

The Court further stated:

> We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect....[which] somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.....
>
> [Thus] *if the independent investigation relies on facts provided by the biased supervisor---as is necessary in any cat's-paw liability----then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor*....The biased supervisor and the ultimate decisionmaker...acted as agents of the entity that the plaintiff seeks to hold liable; each of them possessed supervisory authority delegated by their employer and exercised it in the interest of their employer.

Id. at 421(emphasis supplied).

Here the biased supervisor White performed *all* of the factual spadework for respondent's "independent" investigation. She assiduously tracked petitioner's travel activity both on SABRE and on respondent's non-revenue travel planner. Her ensuing complaint which she coerced Emerick to file, even providing information to Emerick in the complaint that Emerick could not have known since she was not working that day, and her later emails to the investigators themselves provided every fact investigators later used to conclude that petitioner had committed travel abuse. These investigative "findings" were in lockstep with White's complaints against petitioner and all of the findings came directly from information she supplied, bespeaking a "hand-in-glove" coordination between White and respondent to terminate petitioner on account of her protected activity. *See Acosta v. Brain*, 910 F.3rd 502,515-516 (9th Cir. 2018) (biased supervisors acted together to set in motion and influence decisionmaker to terminate plaintiff). Respondent even asked White after its investigation to review its termination letter so that it was acceptable to White before sending it to petitioner.

Moreover, none of respondent's investigation of petitioner involved anything other than the information which White supplied it. There was no showing by respondent that it relied on anything other than White's information to justify its recommendation to terminate petitioner. *See Zamora v. City of Houston*, 798 F.3d 326, 334-335 (5th Cir. 2015) (employer did not produce an example of employee's untruthfulness for which he would have been punished absent the biased supervisor's statements). In fact, *no* evidence was

adduced on summary judgment to show that respondent independently, i.e., without White's help and direction, determined that petitioner violated its supposed travel policies.

The *Staub* Court recognized that in this scenario an "independent" investigation is really not "independent" at all. *Id.* at 420-421. It is a sham investigation which simply regurgitates the version of events described by the biased supervisor and renders it insufficient to break the causative link under the "cat's paw" theory between White's blatant retaliatory animus and petitioner's ensuing termination. Because there is no light between the biased supervisor and the sham investigation she engineered, "[t]he employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Id.* at 421.

Other Circuit courts of appeals, including the Seventh Circuit, have recognized, consistent with *Staub*, that where an employer independently verifies the facts and does not rely on the biased source, there is no subordinate bias liability under the "cat's paw" theory. See, e.g., *Woods v. City of Berwyn*, 803 F.3d 865, 870-871 (7th Cir. 2015) (decisionmaker chose to rely solely on supervisor who did not harbor any discriminatory animus); *Lobato v. N.M. Env't Dept.*, 733 F.3d 1283, 1294 (10th Cir. 2013) (independent verification apart from unbiased source) ; *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 836-837(6th Cir. 2012) (only one of four violations, each of which would have supported termination, relied on the biased party).

However, and consistent with *Staub* as well, if the employer carries out an investigation where the biased subordinate influences or was involved in the decisionmaking process, or if the employer conducts no fact gathering at all, it will be liable for proximately causing the retaliatory termination sued upon by the employee. *See Acosta v. Brain*, 910 F.3d at 514-515; *Marshall v. Rawlings Co.*, 854 F.3d 368, 384-385 (6th Cir. 2017) (inadequate investigation); *Zamora v. City of Houston*, 798 F.3d at 334-335 (perfunctory investigation based solely on biased supervisor's statements); *Vazquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 275-276 (2nd Cir. 2016) (investigation consisted solely of biased co-employee's account).

Applying *Staub*, the record here raised triable issues of fact for a jury whether respondent's sham "independent" investigation, engineered by White, was pretext for her retaliatory animus; (2) whether the baseless violations of respondent's travel policy were pretextual, fueled as they were by the attribution by White and the investigators of an intent to defraud on the part of petitioner when there was none in the first place; and (3) whether respondent's "honest belief" that petitioner had committed travel abuse is relevant at all when it knew, or should have known, of White's retaliatory animus, allowing itself to be used as a conduit for her prejudice. *See Marshall v. Rawlings Co.*, 854 F.3d at 380; *Vasquez*, 835 F.3d at 275-276.

The court of appeals' decision otherwise is at odds with *Staub* and the law of sister Circuit courts of appeals which address the efficacy of employer investigations. The Panel's refusal to permit the factfinder to resolve these issues, instead deciding them

for itself, is one of fundamental federal jurisprudence which deserves review by the Court.

2. Contrary To This Court's Admonition In *Tolan v. Cotton*, 572 U.S. 650, 660(2014), The Court Of Appeals Refused To View The Reasonable Inferences Drawn From The Summary Judgment Record In The Light Most Favorable To Petitioner, The Non-Moving Party, When Assessing Her Claim That After Engaging In Protected Activity, She Was Terminated Because Of Her Biased Supervisor's False Charge of Wrongdoing.

In assessing the summary judgment record which raised the question of the causative nexus between White's retaliatory animus and petitioner's termination within the *McDonnell Douglas* framework for proving discrimination by indirect evidence, the Panel ignored the fact that petitioner's discharge was brought about immediately on the heels of her workplace complaints about the racist behavior of Masengarb, White's friend; and it failed to give credence to petitioner's proof that respondent's "investigation" was nothing more than a sham inquiry engineered by White as a pretext for her own retaliatory intent. Nor did the Panel include in its assessment of the record any of petitioner's innocent explanations for her alleged violations of respondent's travel policies or the fact that respondent had *no* travel policies in place for employees who pay for their own tickets, as petitioner did.

At the summary judgment stage in this workplace discrimination case alleging retaliation and a

hostile work environment, two core principles apply: (1) in construing the materials adduced by the parties, the Panel upon its *de novo* review was bound to draw all reasonable inferences from these materials *against* respondent as the moving party and *in favor* of petitioner as the non-moving party; and (2) it was also required to resolve all credibility questions *in favor* of petitioner, the non-moving party, because the role of the court is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, the Panel cannot make credibility determinations because this is a function of a jury, *not* a judge. 530 U.S. at 150-151 citing *Anderson*, 477 U.S. at 255.

In *Tolan v. Cotton*, 572 U.S. 650, 660(2014) (*per curiam*), the Court reinforced these summary judgment principles. In reversing the dismissal of a civil rights action brought against a police officer for using excessive force, it noted that where the parties disagreed about the facts surrounding the shooting, it was error for the court of appeals on summary judgment to weigh the evidence and then to credit the police officer's version of the facts rather than believing the plaintiff, thereby denying him the right to have his claim for injuries decided by a jury. *Id.* at 660. Because the court below credited the evidence of the party seeking summary judgment, while failing to acknowledge key evidence offered by the party opposing that motion, the *Tolan* Court ruled that it had "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences

should be drawn in favor of the nonmoving party," i.e., the plaintiff. *Id.*

A further proviso is that the Panel should be cautious about granting summary judgment to employers in a discrimination case, especially when intent and credibility are in issue. *See Pollar v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). "[A]dded rigor" is called for because direct evidence of discriminatory intent will rarely be available; "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 101 (2nd Cir. 2010). *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994). Put another way, "[i]f there is any evidence in the record that could reasonably support a jury's verdict for the nonmoving party, summary judgment must be denied." *Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH* , 446 F.3d 313, 315-16 (2d Cir. 2006) (internal citation and quotation omitted).

Contrary to these principles, the Panel believed and adopted respondent's asserted reasons for petitioner's termination, construing all reasonable inferences from the materials *in favor of* respondent as the moving party and *against* petitioner as the non-moving party, *the reverse* of its obligations under the decisions of the Court. It also resolved credibility questions *against* petitioner, the non-moving party, the *reverse* of the treatment required under summary judgment protocol. None of this appellate factfinding and weighing of evidence by the Panel comports with *Reeves*, *Anderson* or *Tolan*.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit and remand the case to the federal district court for the Central District of Illinois for a trial on the merits or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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999 F.3d 456

United States Court of Appeals, Seventh Circuit.

Ciara VESEY, Plaintiff-Appellant,

v.

ENVOY AIR, INCORPORATED, doing business as American Eagle Airlines, Inc., Defendant-Appellee.

No. 20-1606
Argued December 1, 2020 Decided May 28, 2021

Appeal from the United States District Court for the Central District of Illinois. No. 4:18-cv-04124-SLD-JEH — **Sara Darrow**, *Chief Judge*.

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Before Sykes, Chief Judge, and Brennan and Scudder, Circuit Judges.

Opinion

Brennan, Circuit Judge.

An airline agent was terminated after she abused her travel privileges. She sued, claiming she was harassed because of her race and fired in retaliation for reporting the harassment. The airline maintains it properly handled her complaints and that she was dismissed for just cause.

The district court granted the airline summary judgment, denied the agent's motion to alter or amend that judgment, and ordered the agent to pay the airline's costs. We affirm each of these decisions.

I

In reviewing a grant of summary judgment, we construe all facts and draw all inferences in the light most favorable to the non-moving party. *Pack v. Middlebury Cmty. Sch.*, 990 F.3d 1013, 1017 (7th Cir. 2021). Here, that is Ciara Vesey, an African American woman who began work in 2012 for Envoy Air, Inc. as a station agent at Quad Cities International Airport in Rock Island County, Illinois.

Several incidents occurred during Vesey's four years of employment with Envoy. For example, in November 2014 she drove a jet bridge into an aircraft. Vesey received a serious reprimand and signed a letter of commitment agreeing to comply with all company rules and regulations. This reprimand—the last step before termination—was to remain in effect for two years.

In 2016, Vesey and other Envoy employees also lodged workplace-related complaints against each other. Beginning in February and March, Vesey complained to the airline's human resources department of favoritism and bias. Envoy investigated and found her allegations unsubstantiated. But that August, Vesey reported that a coworker, Eric Masengarb, directed racist remarks and actions at her. Envoy found this complaint substantiated and fired Masengarb.

Vesey also said that in 2016, one of her lead agents, Carrie McMurray, and her general manager, Teresa White—who had defended Masengarb and sought to rehire him—undertook a campaign of retaliation and harassment against her. McMurray lodged a complaint, which was ultimately found unsubstantiated, that Vesey had posted racist content on Facebook. McMurray also told others she did not want to work with Vesey anymore. Both McMurray and White said they wanted Vesey fired. Vesey further claims that previously missing evidence—which she says is cause for reconsideration of the district court's decision on summary judgment—shows that White pressured Ashley Emerick, another employee, into filing an anonymous complaint alleging that Vesey abused her travel benefits.

Envoy's employment benefits included flying standby for free. As part of her employment, Vesey signed Envoy's rules and regulations that specified "[a]buse of travel privileges will be grounds for dismissal." In September 2016, Emerick complained that Vesey was abusing Envoy's travel benefits. Envoy investigated and concluded that, numerous times throughout 2016, Vesey had abused those benefits and her access to the airline's booking system.

The company discovered that on two occasions, Vesey—although not intending to travel—had used her employee access to volunteer to receive a travel voucher in exchange for taking a later flight, which she would then cancel. The first time, other customers volunteered for the travel voucher before her, hampering Vesey's plan, so she used her employee access to the booking system to cancel her reservation five minutes before the

flight was due to take off. The second time Vesey successfully collected a $500 voucher in exchange for postponing her reservation by one day. Never intending to take the trip, she then cancelled the new reservation.

On two other occasions, Envoy's investigators found that Vesey put herself on standby for flights for which she already held non-standby reservations. After successfully boarding the flight off the standby list, Vesey would cancel her non-standby reservation. This prevented the airline from selling a seat and improved her odds of flying standby for free. Envoy further discovered that Vesey had convinced another employee to check her in for a return flight via the airline's booking system when she had missed the departure flight on the same reservation. Passengers usually cannot fly only part of their reservation, so by having her co-worker manually check her in through the booking system, Vesey avoided the possibility of having to pay change fees. Envoy's investigators concluded that all of these actions by Vesey violated company policy.

Before the end of the investigation, Vesey again complained to human resources, claiming that McMurray was harassing and stalking her by looking at her travel history. Envoy found this complaint to be unsubstantiated, and that even if the allegations were true, they would not have amounted to improper conduct by McMurray.

Given the active reprimand for the jet bridge incident, and the finding that Vesey had abused her travel benefits, the investigator recommended the airline terminate her. A company committee agreed, and Vesey was terminated in October 2016.

II

Vesey sued Envoy, alleging among other things retaliation and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and the Illinois Human Rights Act. According to Vesey, Envoy's findings against her were pretextual, and the airline investigated and terminated her in retaliation for her reporting racist and retaliatory conduct by other Envoy employees. Vesey also alleged that she suffered a hostile work environment due to the conduct of Masengarb, McMurray, and White.

The district court granted Envoy summary judgment, ruling that Vesey was not terminated in retaliation for her conduct, and that the hostility Vesey claimed she was subjected to did not constitute a racially hostile work environment. After some dispute, and with some modification, the district court also granted costs to Envoy.

Following the district court's judgment, Vesey discovered that the transcript of Emerick's deposition she had received from the court reporter was incomplete. Specifically, the part of the transcript Vesey originally submitted to the court omitted Emerick's explanation that White had pressured her to file the complaint about Vesey's abuse of travel benefits. Vesey moved to alter or amend the judgment against her under Federal Rule of Civil Procedure 59(e). She argued that the previously missing portion of the deposition transcript was newly discovered evidence corroborating her allegation that her termination was retaliatory. The district court ruled against her again, holding that Vesey's lack of diligence in uncovering the mistake did

not make the evidence newly discovered for purposes of Rule 59.

Vesey now appeals the district court's grant of summary judgment to Envoy on the retaliation and hostile work environment claims, as well as the denial of her Rule 59(e) motion. She also asks us to set aside the order granting costs to Envoy.

III
A

We review a district court's grant of summary judgment de novo, construing all facts and drawing all inferences in the light most favorable to the non-moving party. *Pack*, 990 F.3d at 1017. Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a).

To sustain a retaliation claim, Vesey must show that (1) she engaged in an activity protected by the statute; (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse action. *Lewis v. Wilke*, 909 F.3d 858, 866 (7th Cir. 2018). For purposes of summary judgment, Envoy conceded that Vesey's filing of complaints was a protected activity and that her termination was an adverse employment action. The only dispute, then, is as to the causal link.

Vesey does not allege retaliatory motives by Envoy's investigators who recommended her termination, or by the committee members who approved it. Instead, she argues that Envoy is liable under a cat's paw theory of

liability. This theory applies when a biased supervisor "who lacks decisionmaking power uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Johnson v. Koppers, Inc.*, 726 F.3d 910, 914 (7th Cir. 2013) (internal quotation marks omitted). Vesey claims that White harbored retaliatory animus and encouraged Emerick to file the anonymous complaint against her.

But the mere fact that an employee's wrongdoing was reported by a biased supervisor with a retaliatory or discriminatory motive does not establish liability under a cat's paw theory. Where the "investigation results in an adverse action for reasons unrelated to the supervisor's original biased action ... then the employer will not be liable." *Staub v. Proctor Hospital, Inc.*, 562 U.S. 411, 421, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011). Rather, a plaintiff must show that the biased supervisor's actions were a proximate cause of the adverse employment action. *Id.* at 420, 131 S.Ct. 1186. Proximate cause exists only if the investigation took the complaint "into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified" or if the investigation "relies on facts provided by the biased supervisor." *Id.* at 421, 131 S.Ct. 1186.[1] So, if an employer's decision to take an adverse employment action did not rely on the credibility of a biased supervisor—that is, the employer believed it had independently sufficient reasons, such as corroboration of the allegations, to take the adverse action—then the employee's cat's paw theory will fail for lack of proximate cause. *See Woods v. City of Berwyn*, 803 F.3d 865, 870–71 (7th Cir. 2015) (when terminating employee, city board "did not rely" on the conclusions of an

allegedly biased supervisor, instead deciding based on facts presented by an unbiased party, so cat's paw theory of liability did not apply); *accord Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019) (explaining that proximate cause for a cat's paw theory exists when the decision to take adverse action is based on " 'uncritical reliance' on facts provided by a biased subordinate") (citation omitted).

Here, even if Vesey's general manager had a retaliatory motive, there is no evidence that Envoy's investigators relied on the veracity of the complaint for anything but initiating the investigation. Indeed, the investigators said they reached their conclusion by reviewing Vesey's travel history and activity on various airline systems and by interviewing her and the employee who had helped her modify one of her reservations. No evidence presented by Vesey creates a genuine dispute that would allow a reasonable jury to conclude that the result of the investigation was proximately caused by the complaint rather than by the independently sufficient findings of Envoy's investigation.

In addition to pressing her cat's paw theory, Vesey also argues on appeal that she did not violate any Envoy policies and that the alleged violations were therefore mere pretext for a retaliatory firing. But whether Vesey's conduct was in fact a violation of Envoy's company policy is beyond the scope of this case. An employer's explanation is not pretext if "the employer honestly believed in the nondiscriminatory reasons it offered." *Kellogg v. Ball State Univ.*, 984 F.3d 525, 528 (7th Cir. 2021) (internal quotation marks omitted). White and McMurray—the individuals whom Vesey claims had retaliatory animus—were not proximate causes of her

firing. She admits that the investigators themselves were not motivated by any discriminatory animus. And the uncontested facts about Vesey's use of travel benefits reveal her dishonest conduct. She alleges that others were not punished for similar actions, but she incorrectly equates her own conduct with the vastly different (and much more minor) violations of two other employees—accessing their own standby reservations through the reservation system—who were not fired. Vesey was not fired for merely accessing her own standby reservations through the wrong system; she was fired for defrauding her employer. No evidence offered by Vesey creates a genuine dispute that would allow a reasonable jury to conclude that Vesey was terminated for any reason other than her abuse of travel benefits.

Vesey also faults the district court for improperly rejecting her hostile work environment claim. She contends the racist actions of Masengarb, combined with the retaliatory actions of White and McMurray—being rude to her, and saying they did not want to work with her and wanted her fired—amounted to a hostile work environment. The district court was still correct to grant Envoy summary judgment on this claim. Envoy avoided any liability for Masengarb's remark by promptly investigating Vesey's complaint and terminating him. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 390 (7th Cir. 2010) (holding that employer liability for coworker harassment requires that the employer be "negligent in discovering or remedying harassment"). Vesey's claim that her general manager told other employees she ought to be fired rests only on hearsay. And as we have said, that a supervisor was "standoffish, unfriendly, and unapproachable [does not] establish[ ] an objectively

hostile work environment." *McKenzie v. Milwaukee Cnty.*, 381 F.3d 619, 624–25 (7th Cir. 2004).

B

Vesey also appeals the district court's denial of her Rule 59(e) motion to alter or amend the judgment given the previously missing portion of Emerick's deposition. According to Vesey, the newly discovered portion shows that Emerick filed the complaint against her at the urging of White—who Vesey alleges harbored retaliatory animus against her.

Relief under Rule 59(e) is an "extraordinary remed[y] reserved for the exceptional case." *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015). It is granted to correct a manifest error—factual or legal—or to consider newly discovered evidence. *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013). We review its denial for abuse of discretion. *Id.* at 953.

Vesey argues the missing part of the transcript is newly discovered evidence. But newly discovered evidence can be grounds for relief under Rule 59 only if the party exercised due diligence in discovering it and, nevertheless, only discovered it post-judgment. *Id.* at 955.

Vesey's lawyers attended Emerick's deposition, so they were present during the testimony memorialized in the portions of the transcript that became the subject of her Rule 59(e) motion. The evidence was therefore discovered on the day of the deposition. Additionally, while preparing her summary judgment filings, Vesey should have noticed that the transcript was incomplete,

especially if the missing portions, as she now argues, were important enough to change the outcome of the case. We agree with the district court that Vesey's "lack of diligence does not render this evidence newly discovered." *See Egonmwan v. Cook Cty. Sheriff's Dep't*, 602 F.3d 845, 852 (7th Cir. 2010) (denying a Rule 59(e) motion based on a deposition taken after summary judgment briefs were filed, but that could have been taken earlier, because "Rule 59(e) cannot be used to introduce evidence that could have been presented earlier"). Thus, the district court did not abuse its discretion in denying her Rule 59(e) motion.

Even considering Emerick's entire deposition, Envoy was still entitled to summary judgment. Vesey admits that Envoy's investigators were not motivated by any retaliatory or discriminatory animus, and instead she argues a cat's paw theory. But as explained above, a cat's paw theory does not apply because the investigators gathered sufficient justification, independent of the allegedly biased complaint, to fire Vesey.

C

Finally, the district court ordered Vesey to pay Envoy's costs, which she contests. Yet in her principal brief, Vesey offers only a conclusory remark on the topic: "The Bill of Costs had numerous entries of exorbitant charges and billing of which the Plaintiff-Appellant should not be held accountable." App. Br. 12, ECF No. 11. "Undeveloped arguments are waived on appeal." *United States v. Collins*, 604 F.3d 481, 487-88 n.2 (7th Cir. 2010). In her reply brief she elaborates slightly, but arguments not made in the principal brief are forfeited. *United States v. Foster*, 652 F.3d 776, 787 n.5 (7th Cir. 2011) ("The reply brief is not the appropriate vehicle for

presenting new arguments or legal theories to the court") (quoting *United States v. Feinberg*, 89 F.3d 333, 341 (7th Cir. 1996)). So we need not reach the merits of this argument.

For all these reasons, we AFFIRM the district court's grant of summary judgment to Envoy, denial of Vesey's Rule 59(e) motion, and order for costs.

Footnotes

1This court stated in *Staub v. Proctor Hosp.* that "[i]t is enough that the decisionmaker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision," 560 F.3d 647, 659 (7th Cir. 2009), but the Supreme Court rejected that standard, *rev'd and remanded*, 562 U.S. at 420–21, 131 S.Ct. 1186 (2011).

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Only the Westlaw citation is currently available.

United States District Court, C.D. Illinois,
Rock Island Division.

Ciara VESEY, Plaintiff,

v.

ENVOY AIR, INC. d/b/a American Eagle Airlines, Inc., Defendant.

Case No. 4:18-cv-04124-SLD-JEH
Signed 12/20/2019

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ORDER

SARA DARROW, CHIEF UNITED STATES DISTRICT JUDGE

Before the Court is Defendant Envoy Air, Inc.'s ("Envoy") Motion for Summary Judgment, ECF No. 52. For the reasons that follow, the motion is GRANTED.

BACKGROUND[1]

Plaintiff Ciara Vesey, an African American woman, began working for Envoy as a station agent at the Quad Cities International Airport ("MLI") in July 2012. She

was terminated from her employment on October 27, 2016 after an investigation into allegations that she abused her travel privileges. In this suit, she primarily alleges that she was terminated in retaliation for making complaints to human resources and that she was harassed because of her race and in retaliation for her complaints.

I. Vesey's Complaints

Vesey made at least three complaints to human resources while employed by Envoy. First, she complained to human resources in February and March 2016 about favoritism in scheduling and racial discrimination in training opportunities. A human resources officer investigated, but found Vesey's complaints unsubstantiated. Nevertheless, the officer reviewed Envoy's policies with management.

Second, Vesey complained in August 2016 about a racist remark made by a co-worker, Eric Masengarb. During a conversation in the break room, Masengarb told Vesey to "go back and pick cotton." Vesey Dep. 109:9–10, Resp. Mot. Summ. J. Ex. 1, ECF No. 59-1. He had previously made racist statements and gestures to Vesey, though she did not report them to management. For instance, when Vesey would "wear [her] hair in two afro puffs, he would grab them and say, Oh, I like your balls." *Id.* at 116:2–4. She asked him if he randomly grabbed white people's hair too, and "he just laughed and said, No." *Id.* at 116:6. Danielle Griffin, an Employee Relations Representative, investigated Vesey's complaint. She interviewed Vesey, Masengarb, and two other employees who were in the vicinity. She determined that

the complaint was substantiated and Masengarb was terminated.

Third, sometime in September or October 2016, Vesey complained to human resources that Carrie McMurray, a lead station agent, was harassing and stalking her by looking at her travel history. Griffin investigated. She determined that, even if true, McMurray's conduct would not constitute harassment or stalking. Vesey claims in this lawsuit that McMurray also harassed her by telling other employees that she did not want to work with Vesey and that she wanted Vesey to be fired.

II. Travel Abuse

Envoy employees enjoy travel benefits, including the ability to fly standby ("non-revenue") on any Envoy or American Airlines[2] flight with available seats and an employee discount on paid tickets. Employees' use of their travel benefits, however, is regulated by policies set forth in the Travel Guide. This is available to employees on Envoy's intranet. Violations of company policy can be grounds for termination "depending on the severity of the incident or offense and the employee's record." Rules & Regulations 2, Mot. Summ. J. Ex. 4, ECF No. 52-2 at 4–5. "Abuse of travel privileges will be grounds for dismissal." *Id.*

On September 14, 2016, Ashley Emerick, another station agent at MLI, filed a travel abuse complaint against Vesey with human resources. The complaint alleged that Vesey had violated company policy on September 10, 2016. Emerick testified that she filed a complaint after Teresa White, general manager of Envoy's MLI station,

"brought th[e issue] up" with her. Emerick Dep. 84:22–23, Mot. Summ. J. Ex. 11, ECF No. 52-2 at 76–84.

Human resources consultant Irma Stevens received the complaint. White emailed Stevens on September 22 and October 2, 2016, alleging additional incidents of travel abuse. Stevens partnered with Valerie Durant, Corporate Security Investigator, to investigate the allegations. Durant reviewed Vesey's travel history and her activity in Sabre (the system Envoy uses to manage passenger flight reservations) and the non-revenue travel planner (the system employees use to book non-revenue travel). She also interviewed Vesey and another station agent, Michael Watkins.

Durant's investigation revealed four incidents of Vesey violating company policy. Durant concluded that Vesey violated company policy in at least three ways: by changing her own reservations in Sabre, having a friend check her in for a flight instead of having her ticket reissued, and by putting a hold on a reservation and putting herself on the standby list for the same flight. Vesey made statements after her interview with Durant to the effect that she had no prior knowledge that her actions violated company policy. However, in August 2012, Vesey signed an orientation form in which she agreed to review all information and rules related to employee travel privileges and to abide by such rules. And she testified in her deposition that, though "no one sat down [with her] and said, Hey, this is how everything work[s]" and she did not get "formal training on how [sh]e w[as] supposed to use [he]r travel privileges," Vesey Dep. 23:13–16, she "had an understanding of how [she] was supposed to use [her] benefits," *id.* at 23:20–21.

Durant presented her findings to Stevens. Vesey had a serious disciplinary action in her history: on November 16, 2014, she received a Career Decision Day ("CDD") advisory after driving a jet bridge into an aircraft. She signed a letter of commitment, agreeing to comply with all company rules and regulations going forward. Stevens testified that a letter of commitment remains active for two years. Because Vesey had an active CDD at the time of the travel abuse investigation and the investigation revealed multiple policy violations, Stevens recommended termination. A committee consisting of Envoy's in-house attorney, a human resources vice president, and a finance vice president approved the termination.

III. Procedural History

Vesey filed charges with the Illinois Department of Human Rights, alleging that she was subjected to harassment, discrimination, and retaliation. After receiving notice of her right to bring suit, Vesey filed the instant lawsuit. Compl., ECF No. 1. Her complaint has six counts: I) retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17; II) retaliation in violation of the Illinois Human Rights Act ("IHRA"), 775 ILCS 5/1-101– 5/10-104; III) harassment on the basis of race or color in violation of Title VII; IV) harassment on the basis of race or color in violation of the IHRA;[3] V) negligent infliction of emotional distress; and VI) intentional infliction of emotional distress. Envoy moves for summary judgment on all claims.

DISCUSSION

I. Legal Standard

"Summary judgment is the 'put up or shut up' moment in a lawsuit." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003)). It is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It is also appropriate if the party opposing summary judgment fails to establish a genuine issue of fact on an element essential to its case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). At the summary judgment stage, the court's function is not "to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial"—that is, whether "there is sufficient evidence favoring the non[-]moving party for a jury to return a verdict" in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Patel v. Allstate Ins. Co.*, 105 F.3d 365, 370 (7th Cir. 1997). The court must view the evidence "in the light most favorable to the non-moving party[ ] and draw[ ] all reasonable inferences in that party's favor." *McCann v. Iroquois Mem'l Hosp.*, 622 F.3d 745, 752 (7th Cir. 2010) (citing *Anderson*, 477 U.S. at 255). "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." *Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir. 1999) (quoting *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 149 (7th Cir. 1994)).

II. Analysis

a. Tort Claims

Envoy argues that Vesey's tort claims—the negligent infliction of emotional distress and intentional infliction of emotional distress claims—are preempted. Mot. Summ. J. 24–25. Vesey makes no argument in response, so the Court deems these claims abandoned. *See Palmer v. Marion County*, 327 F.3d 588, 597–98 (7th Cir. 2003) (deeming the plaintiff's negligence claim abandoned because he failed to delineate it in his district court brief opposing summary judgment).

b. Employment Discrimination Claims

Vesey brings her retaliation and harassment claims under both Title VII and the IHRA. The same framework applies to Title VII and IHRA claims, *Volling v. Kurtz Paramedic Servs., Inc.*, 840 F.3d 378, 383 (7th Cir. 2016), so the Court analyzes the claims together.

1. Retaliation

Title VII and the IHRA prohibit an employer from discriminating against an employee for opposing an unlawful employment practice. *See* 42 U.S.C. § 2000e-3(a); 775 ILCS 5/6-101(A). "To prevail on a ... retaliation claim, the plaintiff must prove that (1) he engaged in an activity protected by the statute; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action." *Lewis v. Wilke*, 909 F.3d 858, 866 (7th Cir. 2018).[4] Envoy concedes, for purposes of summary judgment, that Vesey can prove that she engaged in protected activity by filing complaints with human resources in February, March, and August 2016. Mot. Summ. J. 13. Envoy also concedes that her termination qualifies as an adverse

action. *Id.* But it argues that Vesey cannot establish a genuine issue of fact as to causation. *Id.* It argues that she was terminated not in retaliation for filing complaints, but instead for her travel misconduct. *See id.* at 14.

Vesey points to "three pieces of evidence," which she argues are "sufficient ... to present a prima facie case of retaliation":

> (1) Teresa White communicated constantly with human resources regarding [Vesey] immediately after the incident happened with ... Masengarb; (2) there was no actual policy that covered ... [Vesey's] alleged[ ] violat[ions]; and (3) White encouraged ... Emerick to report [Vesey] for travel abuse on a day when Emerick was not even working.

Resp. Mot. Summ. J. 22, ECF No. 58. Envoy argues that none of these alleged pieces of evidence is supported by the evidence cited in Vesey's response.[5] Reply 6–7, ECF No. 63. The Court agrees. The evidence presented by Vesey in her response shows only that White emailed Stevens on two occasions regarding allegations of travel abuse. The evidence does show that White brought Vesey's alleged travel abuse to Emerick's attention. But no cited evidence shows that Emerick was not working on the day she filed the complaint or that she was encouraged to file the complaint by White.

Moreover, the Court has no admissible evidence that White had a retaliatory animus, so even if she had been involved in the termination, her involvement would not prove that Vesey was terminated in retaliation for filing

complaints.[6] *Cf.* Mot. Summ. J. 18 ("Plaintiff has offered nothing more than her assumption that the initial report about her suspicious travel activity report was motivated by retaliation."). Vesey argues that "[i]t is quite clear that White had discriminatory animus based upon the fact that she did not want to see ... Masengarb fired following [Vesey's] complaint." Resp. Mot. Summ. J. 23. But, as Envoy argues, *see* Reply 6, the only support Vesey cites—her testimony of what other people told her that White said, *see* Resp. Mot. Summ. J. 20 (citing Vesey Dep. 202, 272)—is hearsay. *See* Fed. R. Civ. P. 801(c) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted). "A party may not rely upon inadmissible hearsay to oppose a motion for summary judgment." *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009); *Aida Food & Liquor, Inc. v. City of Chicago*, 439 F.3d 397, 403 (7th Cir. 2006) ("Plaintiffs have produced no evidence of animus, save Fakhoury's deposition testimony that many people in the community have told him that Alderman Thomas has 'ill will' toward himself and his store. That testimony is inadmissible hearsay insufficient to create a genuine issue of fact.").

Even if it were admissible, the cited evidence does not necessarily show a retaliatory bias. The first part of Vesey's deposition cited is Envoy's attorney's recitation of a complaint that Vesey made that an Envoy employee told her "that his manager had told him that [White] had told the Champaign general manager that [Vesey] had reported her as being prejudice[d]." Vesey Dep. 202:19–22. All this shows is that White told someone that Vesey reported her. The second part of the deposition cited is Vesey's statement that Emerick told her that White "was involved in these conversations about that [sic]

[Vesey] should have been fired, that they were trying to get [Masengarb] his job back." *Id.* at 272:15–18. The Court has no evidence of White's part in these conversations and therefore can draw no inference as to her motivation.

The last argument Vesey makes is that there was no actual policy covering Vesey's conduct. Resp. Mot. Summ. J. 22. Presumably, she is attempting to argue that the reason offered for her termination is pretextual, which could be evidence of retaliation. "Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] lie, specifically a phony reason for some action." *Argyropoulos v. City of Alton*, 539 F.3d 724, 736 (7th Cir. 2008) (quotation marks omitted). The argument that there was no policy covering Vesey's conduct is undeveloped and, more importantly, belied by the record. The Travel Guide clearly prohibits employees from changing their own reservations for full-fare tickets, *see* Travel Guide 25, Durant Decl. Ex. A, Mot. Summ. J. Ex. 2, ECF No. 52-1 at 79–108, which Envoy found Vesey did. Vesey also argues that she "disputes all of the alleged instances" of her abusing her travel privileges and that her violations were serious enough to result in termination. Resp. Mot. Summ. J. 25. But she points to no evidence to dispute the underlying facts and makes no specific argument to counter Durant's conclusion that she violated company policy.[7] *See Siegel*, 612 F.3d at 937 ("The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts."). To the extent she attempts to make a comparison to McMurray, arguing that McMurray also violated the travel policies but was not fired or disciplined, it fails. McMurray said that she used Sabre to access her reservations when she

was flying standby or non-revenue. *See* McMurray Dep. 42:10–18, Resp. Mot. Summ. J. Ex. 6, ECF No. 59-5. Even if this is a violation of company policy, it is not a violation of the same policies Vesey violated. And the Court has no information about McMurray's background or whether Envoy was aware of these violations, so it can draw no inference from the comparison. *See* Reply 9. Vesey has not demonstrated that there is a genuine issue of fact on her retaliatory termination claims and Envoy is entitled to summary judgment.

2. Hostile Work Environment

To establish a hostile work environment claim, a plaintiff must show that: "(1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was severe or pervasive so as to alter the conditions of the employee's work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability." *Smith v. Ne. Ill. Univ.*, 388 F.3d 559, 566 (7th Cir. 2004) (quotation marks omitted). The Seventh Circuit also recognizes a retaliatory hostile work environment claim, which has the same elements except that the harassment must be in retaliation for engaging in protected activity. *See Flanagan v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 893 F.3d 372, 375 (7th Cir. 2018). Vesey points to seven incidents or pieces of evidence and argues that, considered together, she "has presented at least a question of fact of [sic] as to whether [her] work environment was hostile." Resp. Mot. Summ. J. 24–25. But she does not differentiate between incidents that are based on her race versus retaliation. *See id.* Race discrimination and retaliation are two different claims, *compare* 42 U.S.C. § 2000e-2(a) (prohibiting

discrimination on the basis of race), *with id.* § 2000e-3(a) (prohibiting retaliation), and she presents no support for the idea that she can combine incidents to establish one hostile work environment claim.

Regardless, she has not established a genuine issue of fact as to either claim. Some of her evidence is not of conduct or harassment she was subjected to, so it is not relevant to whether she was subjected to a hostile work environment. For instance, Vesey argues that she complained about White's poor treatment and her belief that African Americans were not given the same training opportunities. Resp. Mot. Summ. J. 24–25. An action that Vesey took—complaining— is not unwelcome harassment by others. To the extent Vesey is attempting to rely on the underlying poor and unequal treatment of which she complained, she has provided no evidence that it occurred. Similarly, she argues that she was uncomfortable speaking to management about issues she was experiencing. *Id.* at 25. But a feeling is not evidence of unwelcome harassment.

Other incidents she points to are unsupported by the record. *See* Reply 9. For instance, she argues that White talked about getting her fired. Resp. Mot. Summ. J. 24. The only evidence Vesey cites for this—that Emerick told Vesey that White was involved in conversations about Vesey getting fired, *see id.* at 20 (citing Vesey Dep. 272)—is hearsay and offers no detail about White's part in these conversations. *See supra* Section II(b)(1). Vesey also argues that White looked into her travel records and had others do the same. Resp. Mot. Summ. J. 24. But she points to no evidence to support this assertion.[8]

The remaining evidence is the racist comment and gesture made by Masengarb and McMurray's refusal to work with Vesey, *see id.* at 25, which she has suggested was motivated by retaliation for reporting Masengarb, *see* Compl. ¶ 13.[9] Envoy argues that Masengarb's conduct was not severe or pervasive. Mot. Summ. J. 19–20. The Court agrees that the comment and gesture alone are likely insufficiently serious to state a racially hostile work environment. *See Salvadori v. Franklin Sch. Dist.*, 293 F.3d 989, 997 (7th Cir. 2002) ("The mere utterance of a racial epithet that engenders offensive feelings does not sufficiently affect the conditions of employment to create a hostile work environment."). Regardless, Vesey reported Masengarb's conduct and Envoy terminated him. To demonstrate employer liability for co-worker harassment, a plaintiff must show that her employer "was negligent in discovering or remedying harassment." *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 390 (7th Cir. 2010). As Envoy argues, it remedied any harassment by Masengarb by terminating him, so it cannot be liable for this harassment. *See* Reply 9.

As for the fact that McMurray refused to work with her, the only evidence Vesey cites to is that McMurray told others she did not want to work with Vesey. Resp. Mot. Summ. J. 5 (citing Vesey Dep. 183–84); *see* Vesey Dep. 183:14–17 ("Q. What about the harassment? How was Carrie harassing you? A. Telling other people that she didn't want to work the same shift if I was going to be around."). This is inadmissible hearsay. *See* Mot. Summ. J. 22. Regardless, the Court agrees with Envoy that McMurray telling others she did not want to work with Vesey does not rise to the level of a hostile work environment. *See id.* at 22–23; *cf. McKenzie v.*

Milwaukee County, 381 F.3d 619, 624–25 (7th Cir. 2004) (holding that incidents where the supervisor was rude, standoffish, and unapproachable did not establish an objectively hostile work environment). Vesey has not established a triable issue on her hostile work environment claims, so Envoy is entitled to summary judgment.

CONCLUSION

Accordingly, the Motion for Summary Judgment, ECF No. 52, is GRANTED.

Footnotes

1At summary judgment, a court "construe[s] the record in the light most favorable to the nonmovant and avoid[s] the temptation to decide which party's version of the facts is more likely true." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). The facts related here are, unless otherwise noted, taken from Envoy's statement of undisputed material facts, Mot. Summ. J. 2–13; Plaintiff Ciara Vesey's disputed material facts and additional undisputed material facts, Resp. Mot. Summ. J. 2–21, ECF No. 58; Envoy's reply thereto, Reply 1–5, ECF No. 63; and the exhibits to the filings. In many instances, Vesey attempts to dispute Envoy's stated facts merely by stating that she "alleges" that they are "disputed, material fact[s]," *see, e.g.*, Resp. Mot. Summ. J. 10, or that her testimony was mischaracterized, *see, e.g.*, *id.* at 5. This is not sufficient. A party must dispute a fact by citing to materials in the record or by showing that the materials cited do not establish the fact. Fed. R. Civ. P. 56(c)(1); CDIL-LR 7.1(D)(2)(b)(2) ("Each claim of disputed fact must be supported by evidentiary

documentation referenced by specific page."). Where Vesey fails to properly dispute Envoy's facts, the Court considers them undisputed for purposes of the motion. *See* Fed. R. Civ. P. 56(e)(2). Vesey also indicates that some of her additional material facts are based "[u]pon information and belief." *See, e.g.*, Resp. Mot. Summ. J. 19. This is not sufficient to create a genuine issue of fact at summary judgment, so the Court does not rely on those facts.

2Envoy is a wholly owned subsidiary of American Airlines Group. *See* Our Company, Envoy, https://www.envoyair.com/our-company/ (last visited Dec. 20, 2019).

3This count is labeled retaliation, but alleges harassment. *See* Compl. ¶¶ 82–94. The Court believes the label is a typographical error.

4The parties make their arguments in terms of direct and indirect proof, but the Seventh Circuit has abolished this distinction. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) ("[W]e hold that district courts must stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards."). Envoy also makes an argument in terms of an "indirect method." Mot. Summ. J. 15–17. It appears to be referring to the *McDonnell Douglas* burden-shifting framework, which remains a viable method of organizing and assessing evidence. *Ortiz*, 834 F.3d at 766. But Vesey does not make an argument through that framework, so the Court will not address it. *Cf. Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866, 880 (7th Cir. 2016) (suggesting that when a plaintiff does not present his response to a summary judgment motion in

McDonnell Douglas terms, the court need not analyze the case through that framework).

5It is not the Court's responsibility to scour the record to find support for Vesey's arguments. *See Gross v. Town of Cicero*, 619 F.3d 697, 702 (7th Cir. 2010) ("Judges are not like pigs, hunting for truffles buried in the record." (quotation marks and brackets omitted)).

6Vesey also argues that she can prove retaliation via the cat's paw theory based on McMurray's animus. Resp. Mot. Summ. J. 22–24. But she provides no evidence that McMurray was involved in the travel abuse investigation which led to her termination, so her animus is irrelevant.

7To the extent Vesey argues that she was not able to obtain discovery on relevant issues, the time for such an argument has passed. Moreover, Rule 56 provides a mechanism for a party to request that a court defer considering the motion based on its inability to present relevant evidence, but Vesey did not use it. *See* Fed. R. Civ. P. 56(d)(1).

8Vesey cites to her own deposition to support that White looked into her travel history regularly. *See* Resp. Mot. Summ. J. 20 (citing Vesey Dep. 180–81). But the cited portion of the deposition does not support that fact.

9Vesey states that "McMurray refused to work with [Vesey], which caused her to hurt herself from trying to do the work of two people." Resp. Mot. Summ. J. 25. Although unclear, the Court interprets this to mean that Vesey hurt herself. But no evidence was cited to support this assertion.

United States District Court, C.D. Illinois,
Rock Island Division.

Ciara VESEY, Plaintiff,

v.

ENVOY AIR, INC. d/b/a AMERICAN EAGLE AIRLINES, INC., Defendant.

Case No. 4:18-cv-04124-SLD-JEH
Signed 03/12/2020

Attorneys and Law Firms

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ORDER

SARA DARROW, CHIEF UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiff Ciara Vesey's Motion to Alter or Amend the Court's December 20, 2019 Order Granting Defendant's Motion for Summary Judgment ("Motion to Alter"), ECF No. 68. For the reasons that follow, the motion is DENIED.

BACKGROUND[1]

Vesey filed suit against Defendant Envoy Air, Inc. ("Envoy") on February 12, 2018 in the Northern District of Illinois. Compl., ECF No. 1. Envoy answered the

complaint, Am. Answer, ECF No. 13, and the parties proceeded through discovery. Envoy then moved for summary judgment. Mot. Summ. J., ECF No. 52. Vesey responded to the motion, Resp. Mot. Summ. J., ECF No. 58, and Envoy filed a reply in support, Reply, ECF No. 63. The Court granted Envoy's motion in its entirety. Dec. 20, 2019 Order, ECF No. 66. Judgment was entered soon thereafter. Judgment, ECF No. 67.

The instant motion followed. Vesey moves for the Court to reconsider its December 20, 2019 Order pursuant to Federal Rule of Civil Procedure 59(e), which permits a court to "alter or amend a judgment." She makes three arguments for why the Court should alter or amend its order and deny Envoy's summary judgment motion: first, that she did not have the full deposition transcript for one of her witnesses at the time she filed her response; second, that the Court erred in finding that she could not establish a claim via the cat's paw theory; and third, that the Court made an improper factual determination in connection with her hostile work environment claim. Mot. Alter 4–10. Envoy opposes the motion, arguing that Vesey provides no reason for the Court to alter its order under Rule 59(e). Resp. Mot. Alter 1, ECF No. 70.

DISCUSSION

I. Legal Standard

Rule 59(e) "enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Miller v. Safeco Ins. Co. of Am.*, 683 F.3d 805, 813 (7th Cir. 2012) (quotation marks omitted). A court should alter or amend its judgment under Rule 59(e) "only if the

[moving party] can demonstrate a manifest error of law or present newly discovered evidence." *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008). "A manifest error occurs when the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (quotation marks omitted). It is not appropriate, on a motion for reconsideration, "to advance arguments or theories that could and should have been made before the district court rendered a judgment." *Miller*, 683 F.3d at 813 (quotation marks omitted).

II. Analysis

a. Missing Deposition Transcript

In her response to Envoy's summary judgment motion, Vesey argued that Teresa White, who allegedly had retaliatory animus against her, coerced or encouraged Ashley Emerick into filing a travel abuse complaint against her. *See* Resp. Mot. Summ. J. 22. But the Court held that "no cited evidence show[ed] that Emerick was ... encouraged to file the complaint by White." Dec. 20, 2019 Order 7–8.

Vesey now explains that after reviewing the Court's order, she "discovered that a needed portion of the transcript [of Emerick's deposition] was missing." Mot. Alter 5. Her counsel received only part of the transcript from the court reporter and the evidence supporting Vesey's argument that Emerick was coerced or encouraged to file a complaint was in the portion of the transcript that she did not receive. *Id.* at 4–5. Vesey argues that "[t]his was a highly prejudicial error that

occurred" and the Court should reconsider its order "in light of this crucial testimony from ... Emerick's full deposition transcript." *Id.* at 5.

The Court will not alter its order to consider this evidence. "[M]otions under Rule 59(e) cannot be used to introduce evidence that could have been presented earlier." *Egonmwan v. Cook Cty. Sheriff's Dep't*, 602 F.3d 845, 852 (7th Cir. 2010). Vesey should have known prior to filing her response that she did not have the evidence she wanted to use. As Envoy points out, Vesey's counsel participated in Emerick's deposition. Resp. Mot. Alter 2. When she received the deposition transcript, she should have reviewed it and realized that it did not reflect the entire deposition. Apparently, she did not do so. Her lack of diligence does not render this evidence newly discovered. *Cf. Egonmwan*, 602 F.3d at 849, 852 (upholding a district court's denial of a Rule 59(e) motion where the evidence the moving party sought to introduce—testimony from a deposition taken after summary judgment briefing concluded—could have been obtained prior to the close of discovery).

Moreover, Vesey states that the issue first came to her counsel's attention "when realizing that a footnote was missing that would have cited to testimony from ... Emerick's transcript that could not be found in the transcript [her] counsel had provided." Mot. Alter 3. Though confusingly worded, the Court reads this to mean that Vesey's counsel was aware of and attempted to cite to the portion of Emerick's deposition transcript that she did not have. She erred by not ensuring that she had the transcript to support the testimony she was citing. *See Ajose v. Gonzales*, 408 F.3d 393, 395 (7th Cir.

2005) ("Lawyers' errors in civil proceedings are imputed to their clients.").

Vesey offers no legal support for her argument that the Court can alter a final order to consider evidence that a party failed to offer by mistake. *See Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 (7th Cir. 2000) (holding that a motion for reconsideration "does not provide a vehicle for a party to undo its own procedural failures" (quotation marks omitted)). Moreover, evidence establishing that Emerick was coerced into filing a complaint by White would not change the outcome of the summary judgment motion. The Court noted that it had "no admissible evidence that White had a retaliatory animus," so even if she had coerced Emerick to file the complaint that ultimately led to Vesey's termination, "her involvement would not prove that Vesey was terminated in retaliation for filing complaints." Dec. 20, 2019 Order 8.

b. Cat's Paw

In her response to Envoy's summary judgment motion, Vesey argued that she could prove her retaliation claim under the cat's paw theory of liability based on White's and Carrie McMurray's animus. Resp. Mot. Summ. J. 22–23. The Court rejected this argument, explaining that there was no admissible evidence that White had influenced the decisionmakers to terminate Vesey or that White had a retaliatory animus, Dec. 20, 2019 Order 7–8, and that there was "no evidence that McMurray was involved in the travel abuse investigation which led to [Vesey's] termination," *id.* at 8 n.8.

Vesey argues that the latter finding was erroneous. Mot. Alter 8–9. But she points only to evidence showing that McMurray was motivated to retaliate against her, not that McMurray had any influence on the decision to terminate her. *See id.* at 9. To prove liability under the cat's paw theory, a plaintiff needs to show that an act motivated by retaliatory animus was "a proximate cause of the ultimate employment action." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011); *see Matthews v. Waukesha Cty.*, 759 F.3d 821, 829 (7th Cir. 2014) ("Liability under [the cat's paw] theory can be imposed where a non-decision-making employee with discriminatory animus provided factual information or input that may have affected the adverse employment action."). The Court found that Vesey failed to prove that McMurray took any action that influenced her termination. Nothing Vesey points to in her Motion to Alter demonstrates that the Court's finding was erroneous.

c. Hostile Work Environment

The Court granted summary judgment to Envoy on Vesey's hostile work environment claim. Dec. 20, 2019 Order 10–13. The Court found that the only evidence Vesey had that she was subjected to racial harassment was Masengarb's racist comment and gesture. *See id.* at 11–12. It "agree[d] [with Envoy] that the comment and gesture alone [we]re likely insufficiently serious to state a racially hostile work environment" and held that, regardless, Vesey could not establish employer liability for Masengarb's harassment. *Id.* at 12. Vesey argues that the Court improperly made a factual determination when it found "that what ... Massengarb [sic] said to

[Vesey] was similar to a case in which the 'n' word was said on one occasion." Mot. Alter 10.

True, a court may not make factual determinations at the summary judgment stage. *See Washington v. Haupert*, 481 F.3d 543, 550 (7th Cir. 2007) ("On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." (quotation marks omitted)). But the Court made no determination of the facts. Instead, it suggested that, as a matter of law, Masengarb's harassment could not rise to the level of a hostile work environment. This is permissible when considering a motion for summary judgment. *See, e.g.*, *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 601–03 (7th Cir. 2014) (determining at summary judgment that the harassment the plaintiff suffered did not rise to the level of an actionable hostile work environment claim). The Court cited to a case for the proposition that mere use of a racial epithet is not sufficiently severe or pervasive to rise to the level of an actionable hostile work environment. Dec. 20, 2019 Order 12 (citing *Salvadori v. Franklin Sch. Dist.*, 293 F.3d 989, 997 (7th Cir. 2002)). In her Motion to Alter, Vesey does not identify cases that the Court ignored. She has not shown, therefore, that the Court committed a manifest error of law. *See Burritt*, 807 F.3d at 253 ("A manifest error occurs when the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent." (quotation marks omitted)).

Moreover, the crux of the Court's holding was that, even if Masengarb's harassment were severe or pervasive, Envoy could not be liable because it took action to

remedy the harassment by terminating him. *See* Dec. 20, 2019 Order 12. Vesey offers no argument that the Court erred in that holding. The Court will not alter its order.[2]

CONCLUSION

Accordingly, the Motion to Alter or Amend the Court's December 20, 2019 Order Granting Defendant's Motion for Summary Judgment, ECF No. 68, is DENIED.

Footnotes

1This order presumes familiarity with the Court's order granting Defendant Envoy Air, Inc.'s summary judgment motion. *See* Dec. 20, 2019 Order, ECF No. 66.

2Vesey also now points to additional incidents for her hostile work environment claim, *see* Mot. Alter 10 (arguing that McMurray reported Vesey for being racist against white people and that White never spoke to Vesey about Masengarb's comment), but these were not identified in her response to the summary judgment motion, *see* Resp. Mot. Summ. J. 24–25 (identifying seven incidents and events underlying Vesey's hostile work environment claim). Vesey cannot use a Rule 59(e) motion to advance arguments that she should have made earlier. *See Miller*, 683 F.3d at 813.

United States Court of Appeals, Seventh Circuit.
Ciara VESEY, Plaintiff-Appellant,
v.
ENVOY AIR, INCORPORATED, doing business as American Eagle Airlines, Inc., Defendant-Appellee.

No. 20-1606

Argued December 1, 2020Decided May 28, 2021Rehearing and Rehearing En Banc Denied June 30, 2021

Before
DIANE S. SYKES, Chief Judge
MICHAEL B. BRENNAN, Circuit Judge
MICHAEL Y. SCUDDER, Circuit Judge

Appeal from the United States District Court for the Central District of Illinois.
No. 4:18-cv-04124-SLD-JEH
Sara Darrow,
Chief Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc filed by Plaintiff-Appellant on June 11, 2021, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

Illinois Department of Employment Security
Appeals-Chicago
33 S State St - 8th Floor
Chicago, IL 60603

Phone: (800) 244-5631
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Date Mailed:01/06/2017
Claimant ID: 4766186
Docket Number: 1641165
Appeal Filed Date: 12/01/2016
Date of Hearing: 01/05/2017
Type of Hearing: Telephone
Place of Hearing: Chicago

Administrative Law Judge's Decision

Claimant Appellant
CIARA L. VESEY
926 DEVILS GLEN RD
BETTENDORF, IA 52722-6442

Employer:
AMERICAN EAGLE AIRLINES, INC. AMERICAN EAGLE
AIRLINES, INC.
c/o EQUIFAX (TALX UCM SERVICES)

Employer's Agent
c/o EQUIFAX (TALX UCM SERVICES)
PO BOX 283
SAINT LOUIS, MO 63166-0283

Appearances/Issues/Employer Status: The claimant and employer appeared and testified. The claimant appeared without a representative. The employer appeared with that a representative. Whether the claimant was discharged from misconduct connected with the work? See 820 ILCS 405/602A. The employer is a party to the appeal .

Findings of fact: The claimant worked, until October of 2016, as a part-time station agent. The employer has a policy which prohibits employees from making changes on reservations on their own tickets. The claimant was unaware that such a policy existed. When the employer learned that she had twice made changes on her own reservations, the claimant was discharged .

Conclusion: 820 ILCS 405/602A provides that an individual shall be in eligible for benefits for the weeks in which he has been discharged from misconduct connected with his work and, thereafter, until he has become re-employed and has had earnings equal to or in excess of his current weekly benefit amount in each of the four calendar weeks. The term "misconduct" means the deliberate and willful violation of a reasonable rule or policy of the employees unit, governing the individual's behavior and performance of his work, provided such violation has harm the employee unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employee unit .

The main purpose of the Illinois Unemployment Insurance Act is to relieve the economic insecurity caused by involuntary unemployment. The Act recognizes that involuntary unemployment not only

burdens unemployed individuals and their families but also threatens the health, safety, morals and welfare of all Illinois citizens. In light of this purpose, the act must be liberally construed in favor of warning benefits to unemployed workers.

While an employer has the right to fire an at-will employee for any reason or no reason at all, the Act requires a different legal standard to be applied to the separate question of whether a terminated employee is eligible to; receive unemployment benefits. In order to show that an employee should be disqualified for misconduct, an employer must satisfy a higher burden than merely proving that an employee should have been discharged.

In this case, there is insufficient evidence to demonstrate that the claimant engaged in actions that would amount to the misconduct contemplated under the provisions of Section 602A of the Illinois Unemployment Insurance Act. Therefore, this separation from employment did not occur under disqualifying circumstances. Accordingly, this Administrative Law Judge concludes based upon a preponderance of the evidence, the claimant was discharged not for misconduct in, connection with the work and, is not disqualified from receiving benefits under Section 602A of the Illinois Unemployment Insurance Act.

Decision: The Local Office Determination is SET ASIDE. Pursuant to : 820 ILCS 405/602A, the claimant is eligible for benefits, as to this issue only, from 10/30/2016.

THOMAS L. PLOTKE, Administrative Law Judge

FURTHER APPEAL RIGHTS

A. LATE APPEAL: If this appeal was dismissed without a scheduled hearing on a finding the appeal was not filed in a timely manner under the provisions of 56 Ill Adm. Code 2720.207, this dismissal maybe appealed to the Board of Review:

B. FAILURE TO APPEAR IF YOU FAILED TO APPEAR AT THE HEARING, then you may request a rehearing of the appeal, but only if you failed to appear. Your request for a rehearing must state the reasons you did not attend the hearing and why you did not request a continuance (or why a continuance was erroneously denied) (See 56 Ill. Adm. Code 2720.255(e) (1)). A request for rehearing must be made within 10 days of the scheduled hearing or first receipt of notice of hearing, whichever is later. A request for rehearing must be made in writing, to the Appeals Division, 33 S. State St - 8th, Floor, Chicago, IL 60603, directed to the referee Administrative Law Judge whose name appears on this decision. A request for rehearing may also be made by fax at the referee Administrative Law Judge fax number (312) 793-1119.

You may also file an appeal to the Board of Review. It must be in writing and filed within 30 days from 01/06/ 2017. See paragraph C. below

C. If the decision is against you then you may file a further appeal to the Board of Review period and appeal to the Board of Review must be in writing and filed within 30 days from 01/06/ 2017period The appeal to the Board of Review must be mailed to the Board of Review

at 33 S. State St - 9th, Floor, Chicago, IL 60603 or by fax at (630) 645-3731.

TO: CIARA L. VESEY, Claimant
TO: C/O EQUIFAX (TALX UCM SERVICES), Employer Agent

CC: AMERICAN EAGLE AIRLINES, INC. c/o EQUIFAX (TALX UCM SERVICES), Employer