NO. 21-5886

IN THE
SUPREME COURT OF THE UNITED STATES

SASHA McGARITY

Petitioner,

v

BIRMINGHAM PUBLIC SCHOOLS

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO SASHA MCGARITY'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant properly serves its answer onto a plaintiff if it sent a copy of the answer by electronic means and by mail to the plaintiff's last known address under Federal Rule of Civil Procedure 5?

2. In applying the *McDonald Douglas* burden shifting framework to Petitioner's race discrimination claim brought under Title VII, whether the Sixth Circuit's decision that Petitioner failed to meet her burden of proof as to pretext because she relied only on unsupported conclusory allegations, comported with the relevant decisions of this Court?

3. Whether a plaintiff's failure to prove "but for" causation is fatal to her ability to prove a prima facie case of retaliation under Title VII?

4. Whether the Sixth Circuit followed the usual course of judicial proceedings in declining to review state law claims that were never raised before the district court?

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In addition to the opinions below identified in the Petition, the U.S. District Court for the Eastern District of Michigan Magistrate Judge's Report and Recommendation to Deny [Petitioner]'s Motion for Summary Judgment (Record 37, 156) and Grant Defendant's Motion for Summary Judgment (Record 55, 479-509) is unpublished, a slip copy can be found at *McGarity v. Birmingham Public Schools*, No. 19-11316, Slip Copy, 2020 WL 7268590 (E.D. Mich. Nov. 3, 2020). The U.S. District Court for the Eastern District of Michigan's Opinion and Order Accepting Magistrate Judge's Report and Recommendations, Denying [Petitioner]'s Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment, and Denying [Petitioner]'s Motion for Leave to Amend is unpublished, a slip copy can be found at *McGarity v. Birmingham Public Schools*, No. 19-11316, Slip Copy, 2020 WL 6793327 (E.D. Mich. Nov. 19, 2020). The United States Court of Appeals, Sixth Circuit's Order is not reported in Fed. Rptr., the unpublished Order is available at *McGarity v. Birmingham Public Schools*, No. 20-2176, __Fed. Rptr.___, 2021 WL 4568050 (6th Cir. Sept. 7, 2021).

RELEVANT AUTHORITY

The text of the following relevant Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e is contained in Respondent's Appendix. The text of Federal Rules of Civil Procedure 5 and 55 are contained in Respondent's Appendix.

COUNTER-STATEMENT OF THE CASE

The key facts of this case, supplemented by the judicially noticed facts, are as follows. Petitioner, Sasha McGarity, ("Petitioner"), filed suit against her former employer, Birmingham Public Schools (the "District"), alleging that she was terminated because of her race and in retaliation for requesting union representation.

On August 28, 2018, Petitioner was hired as a special education paraprofessional at West Maple Elementary to support the Learning Resource Center ("LRC") teachers, Claire Theys and Grace Weiss, with their special education students. Petitioner App. A 1-2.[1] As such, Claire Theys and Grace Weiss were Petitioner's direct supervisors. Petitioner was one of four paraprofessionals that worked directly under the LRC teachers at West Maple during the 2018-2019 school year. Record 55-8, 561. The other four paraprofessionals were long time employees and had worked for West Maple for at least ten years. One of these veterans was Julie Shimshock. The other four paraprofessionals are white, and Petitioner is African American. Petitioner App. A 2.

Petitioner was classified as a probationary employee from August 28, 2018, until January 22, 2019. Petitioner App. A 1-2. The District has a union for paraprofessionals called the Birmingham Association for Paraprofessionals, however, while probationary paraprofessionals could join the union, they were not treated the same as non-probationary paraprofessionals. *Id.* at 2. Under the Paraprofessional Collective Bargaining Agreement, the District had an "unconditional right to terminate" probationary paraprofessionals' employment at any time during the probationary period without going through the formal grievance process contained in the Agreement. *Id.*

[1] Special Education Director, Laura Mahler, recommended that the District hire Petitioner after the interview process. Record 55-5, 554. As such, Petitioner's allegation to the contrary is contradicted by the record evidence.

Special education paraprofessionals ("paras") are hired to assist disabled students in the Learning Resource Center ("LRC"), in the general education classroom, and in school activities. Paras work at the direction of the LRC teachers and the general education teachers. Record 55-7, 558. In short, LRC teachers provide paras with their schedule, their assigned special education students, and special instructions regarding their assigned students' needs. *See* Record 55-12, 574-575. To ensure that special education students are educated in the least restrictive environment (LRE), these students spend most of their school day in general education classrooms, not in the LRC. Petitioner App. A 2; Record 60-2, 849. Because of this, the paras, like Petitioner, spend most of their workday rotating between general education classrooms, where they work one-on-one with their assigned disabled students.

Regular and effective communication with the LRC teachers, the classroom teachers, and the other paras is an essential function of the para position. Petitioner App. A 2; Record 55-7, 557-59. In fact, communication is expressly listed as a duty on the paraprofessional job description. See *Id.* The LRC teachers are primarily responsible for assessing and accommodating each individual student's needs. Because of this, daily communication between the paras and the LRC teachers is imperative, to ensure that each disabled student's individual needs are met. Record 55-7, 558; Record 62, 902-903; Record 63-3, 931-932.

During the 2018-2019 school year, there were only two LRC teachers that served several disabled students that were spread across the 25 general education classrooms at West Maple. Petitioner App. A 2; Record 62, 902-903. As previously explained, the disabled students spend most of the school day in these general education classrooms. *Id.* The LRC teachers were unable to be physically present in each of the 25 classrooms to observe their students' progress with the general education curriculum. Instead, the LRC teachers relied on Petitioner and the other four

paras to share information regarding their assigned students' progress. Petitioner was the only probationary para during the 2018-2019 school year.

Petitioner began exhibiting performance issues shortly after her she began working at West Maple. Record 55-8, 561; Record 55-18, 591. By Mid-October Petitioner stopped attending morning meanings with the LRC teachers and stopped communication with the other paras. Record 55-18, 591. Petitioner admitted that she intentionally refrained from regular communication with the LRC and general education teachers because she believed she could work "independently" and without teacher supervision. Record 55-4, 534-35, 539-40. Instead of meeting with the LRC teachers throughout the day, Petitioner admits she spent her down time alone in a vacant classroom or in her car, watching "shows." By November, Petitioner ceased all communication with the LRC teachers, a fact which is not in dispute. *Id.* at 534-35, 539-40. However, this was contrary to the paraprofessional performance expectations and prevented the LRC teachers from giving and receiving necessary feedback regarding Petitioner's assigned students. Petitioner also refused to work with several of her assigned disabled students because they exhibited "difficult behaviors."

The LRC teachers made several unsuccessful attempts to work with Petitioner on her performance issues. Record 62, 903; 55-8, 562; Record 55-18, 592. However, Petitioner continued her pattern of not communicating with the LRC Teachers. Record 55-4, 534-35, 539. In early December the LRC teachers scheduled another meeting with Petitioner to address their continued concerns with her lack of communication. Petitioner App. A 3-4; Record 55-8, 562; Record 55-18, 593. However, Petitioner admitted that she skipped this meeting. Record 55-4, 538-39; Record 37, 156.

As a result, the LRC teachers brought their concerns to their direct supervisor, Principal Jason Pesamoska. Record 55-8, 562; Record 55-18, 593. Then on December 13, 2018, Principal

Pesamoska met with Petitioner to speak with her regarding her performance issues. Record 55-13, 77. During this meeting, Principal Pesamoska instructed Petitioner to meet with the LRC teachers, to make sure that the "lines of communication had been opened." Record 55-14, 580; Record 55-4, 540. Five days later Principal Pesamoska asked whether she had a chance with meet with the LRC teachers and whether she had opened the lines of communication with them. *Id.*; Record 62, 907-908. Petitioner admitted during her deposition that she had purposefully refrained from initiating any communication with the LRC teachers because she did not want to talk to them anymore. Record 55-4, 540-41. Principal Pesamoska then directed Petitioner to speak with them by the end of the day Friday.

On December 19, 2018, Petitioner finally met with the LRC teachers. During this meeting the LRC teachers discussed their concerns with Petitioner's communication and reviewed the job performance expectation. Record 55-8, 563; Record 55-18, Page ID #593. Following this meeting, Petitioner admitted during her deposition that she never spoke with the LRC teachers again. Record 55-4, 542.

Given that Principal Pesamoska received multiple complaints regarding Petitioner's job performance, he decided to conduct an independent investigation into her work performance. Record 62, 908; Record 55-11, 570-71. He interviewed seven objective West Maple employees about Petitioner's work performance. All seven employees corroborated the LRC teachers' complaints about Petitioner's communication issues and unwillingness to work with certain disabled students. Principal Pesamoska took notes during his investigation, briefly detailing each interviewed employee's account of Petitioner's work performance. Record 55-11, 570-71. Principal Pesamoska testified that based on these seven interviewed employees' statements, he honestly believed the LRC teachers' reports regarding Petitioner's inadequate work performance

were true. Thus, he had an "honest belief" that the complaints were true. Still, Principal Pesamoska gave Petitioner another chance and told her on December 21, 2018, that she needed to start communicating with the LRC teachers if she wanted to keep working at West Maple. On January 1, 2019, Petitioner informed Principal Pesamoska that she wanted to keep working at West Maple and indicated that she would work things out with the LRC Teachers. Record 37-2, 181.

Petitioner admitted during her deposition that she refused to correct her communication issues and intentionally disobeyed Principal Pesamoska's express directive. Petitioner admitted she refused to communicate with the classroom teachers, as Pesamoska ordered her to do:

> Q. And what happened when you returned to school?
> A. We were supposed to gather a meeting to, you know, discuss my issues with Grace and Claire. And did I talk to them? No. I did my job and I went home.... **Did I talk to them? No. I did not want to talk to them.** I was still very angry....
> Q. Until the point of that January 10th meeting, had you spoken with Claire and Grace?
> **A. No.**

Record 55-4, 542.

On or around January 7, 2019, Principal Pesamoska learned of Petitioner's continued unwillingness to correct her communication issues with the LRC teachers. *See* Petitioner App. A 4. Principal Pesamoska interpreted Petitioner's refusal to follow his direct instructions to communicate with the LRC teachers as insubordination, and grounds for termination. As a result, he recommended that Petitioner be terminated.

On January 8, 2019, Principal Pesamoska notified Petitioner that a disciplinary meeting was scheduled for January 10, 2019. Record 55-16, 584.[2] While Petitioner never joined the

[2] In this same email Principal Pesamoska notified Petitioner that "Dean Niforos, [the Deputy Superintendent of] Human Resources, along with Laura Mahler, [the Director of] Special Education will be in attendance." And informed Petitioner that he included a union representative in the email to inform her of the meeting in case Petitioner chose to have union representation. Record. 55-16, 584. Petitioner misrepresents in her Petition that Laura Mahler is Claire Theys' mother. This has no basis in fact and Petitioner has never provided any evidence to the contrary.

paraprofessional union, and on January 7, 2019, Petitioner stated she did not want representation, the District arranged for Petitioner to have a union representative at the disciplinary meeting. Record 55-16, 584; Record 55-17, 586-89. Based on the above, the District terminated Petitioner's employment on January 11, 2019, which was before the expiration of her probationary period. Petitioner App. A 3.

Petitioner filed suit, *pro se*, alleging that her termination was the result of discrimination and retaliation in violation of Title VII and the Fair Labor Standards Act (FLSA). Petitioner initially claimed that Grace Weiss told her that she should "put in her two weeks' notice" during the December 2018 meeting, and that this statement created a racially hostile environment under Title VII. However, Petitioner later admitted on appeal to the Sixth Circuit that this claim is not actionable under Title VII. *See* Pl. Appeal Br., Doc. 8-1, 21.

Petitioner served her complaint and summons on May 21, 2019. The District filed an answer on June 12, 2019 using the Court's electronic filing system. Record 12, 43-53. Petitioner filed multiple requests for a clerk's entry of default several weeks after the District filed its answer, which were denied. Record 16, 57; Record 20, 66. She then filed a motion for default judgment without first obtaining an entry of default from the Clerk. While the district court acknowledge that the District filed its answer one day later than required under Federal Rule of Civil Procedure 12(a)(1)(A)(i), the Court found that Petitioner failed to demonstrate how she was prejudiced by the one day delay. Because of this and because Petitioner's motion was procedurally deficient, the district court, upon the recommendation of the magistrate judge, denied Petitioner's motion. Petitioner App. C; Record 25, 89-90. The case then proceeded through discovery.

The Parties filed cross-motions for summary judgment. Record 37, 154-164; Record 55, 479-509; Record 63, 915-922. On October 27, 2020, the district court held a hearing on the

competing Motions. On November 11, 2020, the Magistrate issued his report and recommendation that the district court should grant the District's Motion for Summary Judgment and should deny Petitioner's competing Motion. Record 73, 1138-1164.

On November 16, 2020, Petitioner filed a motion for leave to amend her Complaint and filed an objection to the Magistrate's Report and Recommendation. Record 75, 1168-70; Record 76, 1177-1195. Petitioner then filed a second objection on November 17, 2020. Record 77, Page 1215-33.

On November 19, 2020, the district court issued its Opinion adopting the Magistrate's Report and Recommendation. Record 78, 1252-58. The district court concluded that, based on its independent review of the Parties' Motions, "the magistrate judge's R&R thoroughly, accurately, and fairly presents all of the relevant facts and analyzes them, as [P]laintiff acknowledges, 'based upon the law.' [The District] is entitled to summary judgment because no reasonable jury could find in [P]laintiff's favor on any of her claims." *Id.* at 1254-55. The district court reasoned that:

> [t]here is not a shred of record evidence to suggest that [P]laintiff's race or her engagement in any protected activity played a role whatsoever in [the District's] decision to discharge her. Nor is there a shred of evidence to suggest that [P]laintiff was subjected to a hostile work environment or that her rights under the FLSA were violated. ***In fact, the Court finds that [P]laintiff's case is so lacking in factual or legal support as to be frivolous and sanctionable under Fed. R. C. P. 11.***

Id. at 1255 (emphasis added). The district court entered its Judgment on November 19, 2020, granting the District's Motion for Summary Judgment and denying Petitioner's competing Motion. Record 79, 1259.

On December 3, 2020, Petitioner filed a notice of appeal to the Sixth Circuit. Record 80, 1260. She abandoned her hostile environment and FLSA claims and only appealed her racial discrimination and retaliation claims brought under Title VII. *See* Pl. Appeal Br., Doc. 8-1. She also challenged the district court's denial of her motion for default judgment. *See Id.*

On March 30, 2021, the District filed its brief on appeal. Def. Appeal Br., Doc. 17. On September 7, 2021, the Sixth Circuit issued an Order affirming the district court's judgment. Petitioner App. A. In reviewing the district court's denial of Petitioner's motion for default judgment, the Sixth Circuit determined that the district court did not abuse its discretion in denying Petitioner's motion. Petitioner App. A 6. The Sixth Circuit explained that that the Clerk had no obligation to enter a default against the District and she had no basis to pursue a default judgment since it filed an answer. *Id.* In reviewing the district court's grant of summary judgment, the Sixth Circuit determined that summary judgment was proper on Petitioner's discrimination, retaliation, and hostile environment claims.[3] First, the Sixth Circuit determined that Petitioner failed to meet her burden of proof for her race discrimination claim given that she failed to prove that her termination was actually a pretext for discrimination. *See* Petitioner App. A 8-10. The Sixth Circuit reasoned that Petitioner provided no evidence that her lack of communication did not actually motivate dismissal or that it was insufficient to warrant dismissal. *See Id.* Second, the Sixth Circuit determined that Petitioner's retaliation claim failed because Petitioner did not prove but for protected activity she would not have been terminated. In affirming the district court's conclusion, the Sixth Circuit explained that Petitioner provided no argument identifying a genuine issue of material fact as to the intervening event—i.e. Principal Pesamoska's discovery that Petitioner disobeyed his direct order and did not correct her communication issues—that was the legitimate reason for Petitioner's termination. *See Id.* at 10-11. Lastly, in reviewing Petitioner's hostile environment claim, the Sixth Circuit agreed that Petitioner abandoned the claim by conceding that Grace Weiss' alleged comment was not actionable under Title VII. *Id.* at 12. The Sixth Circuit expressly declined to review the state-law claim that was raised for the first time on appeal. *Id.*

[3] The Sixth Circuit agreed that Petitioner abandoned her FLSA claim on appeal. Petitioner App. A 7.

ARGUMENT

I. THIS COURT SHOULD DENY PETITIONER'S PETITION GIVEN THAT PETITIONER FAILS TO ARTICULATE ANY COMPELLING REASON WHY THIS COURT SHOULD REVIEW THIS CASE ON A WRIT OF CERTIORARI.

Petitioner's petition does not point to any authority indicating that the Sixth Circuit's decision is in conflict with a decision from another United State Court of Appeals. Moreover, it does not explain how the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. As explained in more detail below, this Court should deny the Petition as frivolous given that the Sixth Circuit's decision: (1) did not involve an important question of federal law that remains unsettled; (2) did not conflict with the relevant decisions from this Court; and (3) aligns with the accepted and usual course of judicial proceedings.

A. The Sixth Circuit Correctly Found that Petitioner Lacked a Procedural Basis to Pursue Default Judgment Under Federal Rule of Civil Procedure 55.

Federal Rule of Civil Procedure 55 governs requests for entry of default and motions for default judgment. *See* Fed. R. Civ. P. 55(a)-(b). Rule 55 states:

> (a) Entering A Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
> (b) Entering A Default Judgment.
> (1) *By the Clerk.* If the plaintiff's claim is for a sum certain . . . the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing . . . .
> (2) *By the Court.* In all other cases, the party must apply the court for a default judgment.

See Id.

Here, Petitioner provides no authority in support of her contention that the Sixth Circuit decision was incorrect. Instead, she claims that under the state court rules the Sixth Circuit misapplied the applicable procedural rules when concluding that the district court did not abuse its

discretion in denying her request for default judgment. While this Court does not review circuit court's procedural rules absent a compelling reason to do so, Petitioner failed to show such a compelling reason is present in this case.

First, neither of the federal statutes cited by Petitioner stand for her claimed proposition. 28 U.S.C.§ 3004(a) states that service is in accordance with the Federal Rules of Civil Procedure. Similarly, 28 U.S.C. § 1652 states that federal courts will recognize state court rules when there is no federal rule that applies. However, Federal Rule of Civil Procedure 5 governs service of pleadings. Because of this, federal courts are not permitted to apply the state court version of Rule 5 pursuant to 28 U.S.C. § 1652. Third, Petitioner misrepresents the facts in terms of whether she was properly served under Rule 5. Under Rule 5, service of a pleading is proper if it is made by filing it through the Court's electronic filing system. *See* Fed. R. Civ. P. 5(b)(2)(E). However, if the filer learns that it did not reach the person to be served, then service is considered incomplete and must be completed through one of the other modes of service listed in Fed. R. Civ. P. 5(b)(2).

Here, the District served its answer onto Petitioner through filing it in the district court's electronic filing system. However, once it learned that Petitioner did not receive it because she was not yet an authorized user, the District immediately mailed a copy to Petitioners last known address which amounts to proper service under Fed. R. Civ. P. 5(b)(2)(C). As such, Petitioner's service argument lacks merit.

Furthermore, Petitioner's argument completely confuses the issues and ignores the Sixth Circuit's basis for decision—i.e. that the district court did not abuse its discretion in denying her motion for default judgment because she failed to comply with the procedural requirements of Rule 55. There is no disagreement among the circuit courts that a district court does not abuse its discretion when it properly applies the procedure outlined in Rule 55 when deciding a motion for

default judgment. *See Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241,246 (2nd Cir. 2004)(discussing the basis procedure for obtaining a default judgment under Fed. R. Civ. P. 55)); *see generally First Bank Puerto Rico v Jaymo Properties, LLC*, 379 Fed. Appx. 166, 170 (3rd Cir. 2010); *Grant v. City of Blytheville, Arkansas*, 841 F.3d 767, 773 (8th Cir. 2016); *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1336 (11th Cir. 2014); *Fidrych v. Marriott International, Inc.*, 952 F.3d 124, 130 (4th Cir. 2020); *Harvey v. U.S.*, 685 F.3d 939, 946 (10th Cir. 2012); *Gilmore v. Palestinian Interim Self-Government Authority*, 843 F.3d 958, 965 (D.C. Cir. 2016)("The Federal Rules of Civil Procedure delineate the standards governing the entry and vacatur of defaults and default judgments.")); *VLM Food Trading Intern., Inc. v. Illinois Trading Co.*, 811 F.3d 247, 255 (7th Cir. 2016); *see also Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1192, n.3 (5th Cir. 1992); *see Heard v. Caruso*, 351 F. App'x 1, 15-16 (6th Cir. 2009); *United Coin Meter Co., Inc. v. Seaboard Coastline RR.*, 505 F.2d 839, 844 (6th Cir. 1983)(citing *Meehan v. Snow*, 652 F.2d 274, 276 (2nd Cir. 1981)); *see Burtscher v. Moore*, 611 Fed. Appx. 456 (9th Cir. 2015); *see Harry v. Countrywide Home Loans*, Inc., 902 F.3d 16, 19 (1st Cir. 2018)(citing Fed. R. Civ. P. 55 and holding that motions for default properly denied when the plaintiff failed to prove that the defendant "filed to plead or otherwise defend" against the complaint.)).

Petitioner only cites to one case, *EEOC v. Workplace Staffing Solutions, LLC*, Case No. 1:15cv360LG-RHW, 2016 WL 3676656 (S.D. Miss. July 7, 2016), in support of her contention that this Court should review the district court's denial of her motion for default judgment. However, this unreported case from the Southern District of Mississippi does not evidence that the Sixth Circuit's decision is in conflict with another federal circuit court on an important issue. Apart from the fact that this case is an unreported district court case, it applied the same default judgment procedure as the Sixth Circuit:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). The plaintiff may then seek a default judgment pursuant to Fed. R. Civ. P. 55(b).

EEOC v. Workplace Staffing Solutions, LLC, Case No. 1:15cv360LG-RHW, 2016 WL 3676656, *1 (S.D. Miss. July 7, 2016). As such, this case does not support review of this issue.

Furthermore, applying the proper federal rule of civil procedure, the Sixth Circuit properly determined that the district court did not abuse its discretion in denying Petitioner's motion. There is no dispute that the District filed its answer. Record 12, 43. Because of this, the Clerk had no obligation to enter a default against the District. *See* Fed. R. Civ. P. 55(a). Also, given that Petitioner did not first obtain a clerk's entry of default under Rule 55(a), Petitioner's request for a default judgment under Rule 55(b) was procedurally deficient. The district court then declined to award Petitioner's requested relief given that she failed to prove how she was prejudiced. Petitioner cites to no authority that would indicate that this amounts to a clear abuse of discretion. As such, this Court should deny the Petition as to this issue. *See Crites, Inc., v. Prudential Ins. Co. of America*, 322 U.S. 408, 418 (1944)(holding that matters within the sound discretion of the district court are ordinarily not reviewable except where a clear abuse of discretion is apparent)).

B. The Sixth Circuit Correctly Found that Petitioner Failed to Meet her Burden of Proof that her Termination was a Pretext for Discrimination as she Presented No Evidence of Pretext.

Petitioner misrepresents that she established inconsistencies and contradictions in the District's arguments. As the Sixth Circuit explained, Petitioner "d[id] not identify any blatant contradictions, only factual determinations made by the [D]istrict that she disagrees with."[4]

[4] Petitioner's claims that "[t]he circuit court apparently neglected to say whether the evidence was sufficient to prove or disprove pretext" and that she showed pretext "by pointing to inconsistencies and contradictions in BPS arguments" have no basis in fact. *See* Petition, p. 12. Petitioner pointed to zero contradictions in the District proffered reason for her termination. In fact, the Sixth Circuit expressly determined that Petitioner's chart did not evidence any blatant contradictions. Petitioner App. A 10.

Petitioner App. A 10. In addition to Petitioner's numerous misstatements regarding her proffered evidence of pretext, Petitioner grossly misstates her burden of proof. Petitioner assumes that her unsupported conclusory allegations can carry her burden of proof regarding pretext. However, this does not comport with the law.

The evidentiary burdening shifting framework for Title VII employment discrimination cases, is well settled precedent. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court explained the burdens of proof for employment discrimination cases brought under Title VII. This Court explained that the plaintiff has the initial burden of establishing a prima facie case of racial discrimination. *See Id.* at 802. Then "[t]he burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer meets its burden of production, then the burden shift back to the plaintiff to prove that the employer's reason was in fact pretext. *Id.* at 804-805. This Court explained that the plaintiff must "demonstrate by competent evidence that the presumptively valid reasons for [her] rejection were in fact a coverup for a racially discriminatory decision." *Id.* at 805. This Court has indicated that in order to show pretext, the plaintiff must "demonstrate that the proffered reason was not the true reason or the employment decision . . . [and] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is not worthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)

This Court clarified in *St. Mary's Honor Center v. Hicks*, "[i]t is important to note, however, that although the *McDonnel Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" 509 U.S. 502, 507.

Here, in the context of summary judgment, there is no disagreement among the federal circuit courts that the plaintiff cannot meet her burden of proof as to pretext if she relies only on unsupported and conclusory allegations. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)(holding that where the "nonmoving party rests merely on conclusory allegations, improbable inferences, and unsupported speculation," summary judgment is appropriate)); *see Smith v. American Express Co.*, 853 F.2d 151, 154-55 (2nd Cir. 1988)(holding that summary judgment was appropriate where the plaintiff provided only conclusory allegations of pretext that were unsupported by the weight of the evidence)); *see Solomon v. Society of Automotive Engineers*, 41 Fed. Appx. 585, 586 (3rd Cir. 2002)(holding that a plaintiff cannot rely on unsupported assertions, speculation, or conclusory allegations to avoid a motion for summary judgment)); *see Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006); *see Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 858 (4th Cir. 1988); *see Grimes v. Texas Dept. of Mental Health and Mental Retardation,* 102 F.3d 137, 139-140, 143 (5th Cir. 1996); *see Krim v. Banc Texas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993); *see Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.) *cert. denied*, 513 U.S. 871 (1994)(holding that unsubstantiated assertions are not competent summary judgment evidence)); *see Gunn v. Senior Services of Northern Kentucky*, 632 Fed. Appx. 839, 846 (6th Cir. 2015); *see Bell v. Ohio State Univ.*, 352 F.3d 240, 253 (6th Cir. 2006)(holding that "conclusory and unsupported allegations, rooted in speculation" are insufficient to create a genuine issue of material fact)); *see Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 985 (7th Cir. 1999)(holding that summary judgment was proper for the defendant because the plaintiff presented no evidence to show that his employer's reasons were a pretext for discrimination)); *see Davenport v. Riverview gardens Sch. Dist.*, 30 F.3d 940, 945 (8th Cir. 1994); *see Angel v. Seattle-First Nat. Bank*, 653 F.2d 1293,1299 (9th Cir. 1981); *see Shah v. Oklahoma,*

ex rel. Oklahoma Dept. of Mental Health and Substance Abuse, 485 Fed. Appx. 971, 974-975 (10th Cir. 2012); *see MacKenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1273 (10th Cir. 2005)("Unsupported conclusory allegations, however, do not create an issue of fact.")); *see Isenbergh v. Knight-Rider Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996)("Conclusory allegations of discrimination, without more, are insufficient to raise an inference of pretext.")); *see Oviedo v. Washington Metropolitan Area Transit Authority*, 948 F.3d 386, 399 (D.C. Cir. 2020).

Furthermore, based on the well-established evidentiary standards for pretext, Sixth Circuit correctly determined that Petitioner failed to meet her burden of proof given that Petitioner presented no evidence of pretext. The cases relied on by Petitioner from this Court do not alter this conclusion. Petitioner cites to *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006), in support of her contention that the Sixth Circuit wrongly decided the issue of pretext. However, *Ash* is factually and legally distinguishable from this case. In *Ash*, this Court determined when qualifications evidence is sufficient evidence of pretext in the failure to promote context. *See Ash*, 546 U.S. at 457. Petitioner does not claim that the District failed to promote her nor has she ever relied on evidence suggesting that she possessed superior qualifications to any other paraprofessional. Moreover, Petitioner does not explain how the Sixth Circuit's decision on the pretext issue conflicts with this Court's decision in *Ash*.

Petitioner also cites to *International Broth. of Teamsters v. U.S.*, 431 U.S. 324 (1977), in support of her argument the statistical proofs are probative of pretext. However, that case involved a class action pattern-or-practice case where this Court discussed statistical evidence as proof that the company operated under a general policy of discrimination. As such, that case lends no support in proving pretext in this single race discrimination case and does not evidence that the Sixth

Circuit's decision regarding pretext conflicts with this Court's decision in *International Broth of Teamsters*.

Petitioner claims that the Sixth Circuit wrongly decided that she failed to prove pretext by showing her communication issues were insufficient to warrant termination. However, Plaintiff is mistaken given that she presented zero evidence that Caucasian similarly situated employees were not terminated for substantially identical conduct.

Federal circuit courts have consistently held that non similar employees cannot be used as a comparable employee for the purpose of proving pretext. Indeed, when there are material distinctions between employees, such as differences in the conduct committed, differences in the employment status of the employees, or that involve such differentiating or mitigating circumstances that would distinguish the plaintiff's conduct from that of the other employee, the circuits uniformly find that the employees cannot be similarly situated to one another. *See Kindler v. Potter,* 197 F. App'x 515, 518 (7th Cir. 2006)("[plaintiff] is not similarly situated to either [employee], because the [employees] engaged in different conduct [that warranted discipline]."))(citations omitted); *see Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 592 (7th Cir. 2008)("A similarly situated employee need not be "identical," but the plaintiff must show that the other employee "dealt with the same supervisor, [was] subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish [his] conduct or the employer's treatment of [him]."")); *see Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010)(we have determined that "individuals are similarly situated when they have similar jobs and display similar conduct.")); *see Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)(holding that the employees were not similarly situated where the type and severity of an alleged offense was dissimilar)); *see MacKenzie v. City & Cnty. of Denver*, 414

F.3d 1266, 1277 (10th Cir. 2005)("Individuals are considered 'similarly-situated' when they (1) have dealt with the same supervisor; (2) were subjected to the same work standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.")), abrogated on other grounds by *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018); *see Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1229 (11th Cir. 2019)("she must demonstrate—as part of her prima facie case—that she and her comparators are "similarly situated in all material respects.")).

Following the above well-established principles, federal circuit courts have uniformly held that probationary employees cannot be similarly situated to non-probationary employees. *See Thomas v. Johnson*, 788 F.3d 177, 180 (5th Cir. 2015); *see George v. Leavitt*, 407 F.3d 405, 415 (D.C. Cir. 2005); *see Lewis v. Jefferson Parish Hosp. Serv. Dist. No. 2*, 562 Fed. Appx. 209, 212 (5th Cir. 2005)(holding that employees were not similarly situated where one was fired during her "probationary period" and the permanent employee had different job responsibilities)); *see Green v. New Mexico*, 420 F.3d 1189, 1195 (10th Cir. 2005)(finding employees were not similarly situated where, the comparing employees were not probationary employees)); *see Steinhauer v. DeGolier*, 359 F.3d 481, 484-85 (7th Cir. 2004)(holding that the proposed comparable employee was not similarly situated to the plaintiff because the proposed comparable was not on probation)); *see Bogren v. Minnesota*, 236 F.3d 399, 405 (8th Cir. 2000)(holding that troopers that were no longer in their probationary period could not be similarly situated to a probationary trooper)); *see Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1309-10 (3rd Cir. 1993); *see Holbrook v. Reno*, 196 F.3d 255, 262 (D.C. Cir. 1999)(holding that a probationary trainee cannot be similarly situated to 15 year veteran employee with supervisory responsibilities)); *see McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984)(holding that probationary employees are not similarly

situated to permanent employees)); *see Smelter v. Southern Home Care Services, Inc.*, 904 F.3d 1276, 1292 (11th Cir. 2018)(holding that the plaintiff, who was a probationary employee could not use an employee who worked for the employer for over two years as a comparable employee because they are not similarly situated)). Petitioner does not cite to any conflicting circuit decision that would suggest a circuit split on the issue.

The Eleventh Circuit decision, *Jackson v. State of Alabama State Tenure Com'n*, 405 F.3d 1276 (11th Cir. 2005), relied on by Petitioner, does not support Petitioner's contention that she provided sufficient evidence of pretext. In fact, it supports the opposite conclusion. In *Jackson*, the Eleventh Circuit found that the plaintiff's evidence, as a whole, did not support any reasonable inference of racist motivation. As such, this case illustrates the agreement among the circuits that a failure to provide sufficient evidence of pretext is fatal to a plaintiff's Title VII race discrimination claim.

Furthermore, based on the undisputed facts of this case, the Sixth Circuit correctly determined that Petitioner is not similarly situated to Claire Theys, Julie Shimshock or Amy Tomaselli. First, Claire Theys is a tenured teacher and was Petitioner's supervisor. Tenured teachers and probationary paras do not have the same job duties. Record 63-3, 930-931. Thus, a teacher cannot be a comparable employee to a para because they are not similar in all relevant respects. Moreover, Petitioner's does not allege that Claire Theys engaged in the same conduct. In fact, as the Sixth Circuit explained, there is no evidence on the record that Claire Theys refused to communicate with Petitioner.

Second, Julie Shimshock is not a similarly situated employee because they allegedly engaged in different conduct that was not of comparable seriousness. Petitioner was terminated for her continuous failure to adequately communicate with the LRC teachers and her failure to meet

her job performance expectations. This happened only after Petitioner's performance issues were confirmed by seven other employees during Principal Pesamoska's independent investigation, and Petitioner admitted to consciously disregarding Principal Pesamoska's direct order to communicate with the LRC teachers. In contrast, Ms. Shimshock has never engaged in similar communication or job performance issues or disregarded any orders from her supervisors. *See* Record 55-4, 549. Instead, on one occasion Ms. Shimshock's de-escalation response to a student's violent outburst was investigated. Record 63-3, 932-33. The allegations against Ms. Shimshock were thoroughly investigated by multiple, different administrators. But unlike Petitioner's situation, the investigations revealed no wrongdoing on Ms. Shimshock's part. *Id.* Finally, Ms. Shimshock dealt with a different decisionmaker. As such, Petitioner cannot be similarly situated to Ms. Shimshock.

Third, Petitioner argues that Amy Tomaselli is a comparable employee. Petitioner's absurd argument is premised on Ms. Tomaselli lack of in-person communication because she was required to carry out her job duties virtually due to the COVID-19 pandemic when the Governor ordered ALL schools to provide virtual instruction. These same unique circumstances did not exist during the 2018-2019 school year. Therefore, there were such differentiating and mitigating circumstances that would distinguish Petitioner's conduct from that of Ms. Tomaselli and the District's treatment of them for it.

Lastly, Petitioner does not explain how the Sixth Circuit's alleged failure to apply the "cat's paw" theory was in error. In fact, she provides no authority in support of her proposition that the theory applies to the facts of this case. Furthermore, Petitioner has never produced any evidence that Principal Pesamoska harbored any animus towards her or that he was not the one that made the decision to recommend her termination. Because of this, Petitioner has never proved that this

theory is applicable to the facts of this case. *See Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2350 (2021)(quoting *Staub v. Proctor Hospital*, 562 U.S. 411, 415 (2011)).

In sum, the evidence was undisputed that Petitioner's refusal to communicate with the LRC teachers during the probationary period, which was necessary part of the para job, provided a legitimate basis for her termination. Petitioner provided no evidence to refute this legitimate basis. Therefore, this Court should decline review of Petitioner's Title VII race discrimination claim.

C. There is No Circuit Split that the Heightened "But For" Causation Standard Applies to Petitioner's Retaliation Claims Brought Under Title VII and the Sixth Circuit Correctly Found that Petitioner Failed to Meet this Heightened Causation Standard.

In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 339 (2013), this Court clarified that a plaintiff must prove the heightened "but for" causation standard to succeed in a Title VII retaliation claim rather than the lesser causation standard used in Title VII discrimination claims. Since *Nassar*, it has been well settled law that but for causation is a necessary element to a Title VII retaliation claim. This is the exact causation standard that was applied by the Sixth Circuit when reviewing Petitioner's retaliation claim. Petitioner App. A, p. 10.

Here, the District provided undisputed evidence that Petitioner failed to comply with Principal Pesamoska express directive to open the lines of communication with the LRC teachers. It was only after Principal Pesamoska's discovery that Petitioner stilled refused to communicate with her direct supervisors that he decided to recommend her termination. As such, the Sixth Circuit then correctly determined that Petitioner's intervening act that occurred between the protected activity and the adverse action broke the causal chain necessary to establish but for causation. *See Kenney v. Aspen Technologies, Inc.*, 965 F.3d 443, 450 (6th Cir. 2020)(holding "that an intervening cause between protected activity and an adverse employment action dispels

any inference of causation." An intervening act or event is a "***legitimate reason*** to take an adverse employment action" and "dispels an inference of retaliation based on temporal proximity.")); *see Kuhn v. Washtenaw County*, 709 F.3d 612, 628 (6th Cir. 2013); *see e.g., Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 471-72 (6th Cir. 2012); *see Wingo v. Michigan Bell Telephone Company.*, 815 Fed. Appx. 43, 47 (6th Cir. 2020)(holding than an employee's refusal to follow her employer's express directives is legitimate cause to terminate the employee, it also constitutes an intervening act that dispels any potential negative inference from temporal proximity.)).

Multiple other federal circuit courts agree that under the heightened "but for" standard a material intervening event can dispel causation. *See Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001 (10th Cir. 2011)(stating that "we have recognized that evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protective conduct and the challenged employment action provide a legitimate basis for the employer's action.")(citing *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006))); *see Davis v. Time Warner Cable of Southeastern Wisconsin, L.P.*, 651 F.3d 664, 675 (7th Cir. 2011); *Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695, 698 (8th Cir. 2006)("presence of intervening events undermines any causal inference that a reasonable person might otherwise have drawn from temporal proximity"); *Nolley v. Swiss Reinsurance Am. Corp.*, 857 F. Supp. 2d 441, 461 (S.D. N.Y. 2012)(collecting cases)("'[a]n intervening event between the protected activity and the adverse employment action may defeat the inference of causation where temporal proximity might otherwise suffice to raise the inference.'") aff'd, 523 F. App'x 53 (2nd Cir. 2013); *Frazier v. Secretary, Department of Health and Human Services*, 710 Fed. Appx. 864, 874 (11th Cir. 2017)(holding that the defendant's evidence that the plaintiff was absent without leave and was not a team player negated any strong inference of causation that could be drawn from temporal

proximity alone)); *see Gogel v. Kia Motors Manufacturing of Georgia, Inc.*, 967 F.3d 1121, 1138 n. 15 (11th Cir. 2020)("An intervening event—Kia's discovery of information indicating that Gogel had solicited Ledbetter to sue and had provided her with the name of an attorney to use—undermined the significance of any temporal proximity.")). That is exactly what happened here: there was a material intervening event that justified Petitioner's termination. During the December 2018 meeting, Principal Pesamoska ordered Petitioner to "open the lines of communication" with her direct supervisors—the LRC teachers. Petitioner admittedly and defiantly refused to speak to the LRC teachers as ordered. When Principal Pesamoska learned of this act of insubordination, he determined that her probationary employment should be terminated.

Furthermore, Petitioner points to no split in the federal circuit courts regarding the Sixth Circuit's application of this but-for causation standard. While Petitioner relies on *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011), this case does not evidence a circuit split nor does it stand for the proposition that temporal proximity alone is sufficient to prove but-for causation. First, *Loudermilk* does not apply to this case. *Loudermilk* was issued two years before this Court's 2013 decision in *Nassar*, which established the heightened "but for" causation standard for Title VII retaliation claims. In fact, *Loudermilk* does not apply "but for" causation to its decision. Moreover, even if *Loudermilk* applied here, it does not stand for the proposition that temporal proximity alone is sufficient evidence of causation when the defendant produces evidence that the plaintiff's intervening acts, which amount to a legitimate reason to take an adverse employment action. As such, *Loudermilk* does not support Petitioner's contention that the Sixth Circuit incorrectly analyzed the causation element for her retaliation claim. Therefore, this Court should decline to review Petitioner's retaliation claim.

D. The Sixth Circuit's Decision to Decline to Review Petitioner's State Law Claims Directly Followed the Accepted and Usual Practice of All Federal Circuit Courts.

There is no dispute that Grace Weiss' alleged comment that Petitioner "should put in her two weeks" does not amount to actionable harassment under Title VII. In fact, Petitioner does not dispute this. Instead, she claims that the Sixth Circuit should have determined if the comment violated state law. This argument is contrary to the well-established precedent that federal circuit courts do not need to review new claims raised for the first time on appeal. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200 (1935); *Sanchez-Arroyo v. Eastern Airlines, Inc.*, 835 F.2d 407, 408-09 (1st Cir. 1987); *Cornhusker Cas. Ins. Co., v. Kachman*, 553 F.3d 1187, 1191 (9th Cir. 2009); *Local 377, RWDSU, UFCW v. 1864 Tenants Ass'n*, 533 F.3d 98, 99 (2nd Cir. 2008)(citing *Greene v. United States*, 13 F.3d 577, 586 (2nd Cir. 1994)); *Myers v. Alvey-Ferguson Co.*, 326 F.2d 590, 592 (6th Cir. 1964); *In re Diet Drugs Product Liability Litigation*, 706 F.3d 217, 227 (3rd Cir. 2013); *City of Waco, Tex. v. Bridges*, 710 F.2d 220, 227 (5th Cir. 1983); *Wever v. Lincoln County, Nebraska*, 388 F.3d 601, 608 (8th Cir. 2004); *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991); *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1258 (11th Cir. 2015)(citing *Etienne v. Inter-County Sec. Corp.*, 173 F.3d 1372, 1375 (11th Cir. 1999)).

Nevertheless, as Petitioner does not dispute, the single isolated non-race-based comment at issue is not severe enough to establish a hostile environment claim under Title VII. *See Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001).

EEOC v. American Glory Restaurant Corp., a case relied on by Petitioner, does not support Petitioner's position.[5] First, this case was filed in the Northern District of New York and does not

[5] Petitioner miscites this case. The correct case number is 1:20-cv-01184-DNH-DJS.

evidence a circuit split on the relevant issue. Second, it did not result in either a reported or unreported opinion because the case was settled and dismissed. Accordingly, this Court should decline to review Petitioner's hostile environment claim and state law claims.

CONCLUSION

For all the reasons stated above, this Court should deny Petitioner's petition for writ of certiorari.

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DATED: December 6, 2021

PROOF OF SERVICE

KENNETH B. CHAPIE states that on December 6, 2021, he did serve a copy of the **Brief in Opposition to Sasha McGarity's Petition for Writ of Certiorari** by placing same in a sealed envelope, properly addressed, with sufficient first class postage affixed thereon, in a United States Mail receptacle on the aforementioned date.

GIARMARCO, MULLINS & HORTON, P.C.

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NO. 21-5886

IN THE
SUPREME COURT OF THE UNITED STATES

SASHA McGARITY

Petitioner,

v

BIRMINGHAM PUBLIC SCHOOLS

Respondent.

RESPONDENT'S APPENDIX

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Appendix 1

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e:

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 *[originally, bankruptcy],* or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 *[United States Code]*), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 *[the Internal Revenue Code of 1986]*, except that during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

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Section 2000e-2:

(a) Employer practices

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.

Appendix 2

Fed. R. Civ. P. 5:

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. [Abrogated (Apr._, 2018, eff. Dec. 1, 2018)]

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers after the Complaint. Any paper after the complaint that is required to be served—must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) Nonelectronic Filing. A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an Unrepresented Person—When Allowed or Required. A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Appendix 3

Fed. R. Civ. P. 55:

a) ENTERING A DEFAULT. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) ENTERING A DEFAULT JUDGMENT.

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) JUDGMENT AGAINST THE UNITED STATES. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.