No. 21-7770

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Crystal Jackson — PETITIONER
(Your Name)

vs.

Sheraton NY & Times Square Hotel et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Crystal Jackson
(Your Name)

319 Marcus Garvey Blvd Apt. 2
(Address)

Brooklyn, NY, 11221
(City, State, Zip Code)

347-678-7763
(Phone Number)

QUESTION(S) PRESENTED

1. Weather the United States Court of Appeals for the Second Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, by sanctioning a summary judgment that was granted without a trial, where there are facts material to the case that were in genuine dispute.

2. Weather the United States Court of Appeals for the Second Circuit violates petitioner's Seventh Amendment right to trial by jury.

3. Whether the United States Court of Appeals for the Second Circuit properly dismissed petitioner's employment discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., where petitioner has provided copious evidence of facts.

4. Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action).

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Patrick Athy, Director of Human Resources.

Diana Cimino, Manager of Human Resources.

RELATED CASES

- *Jackson v. Sheraton NY & Times Square Hotel, et al.* No.19-cv-04099, U.S. District Court for the Eastern District of New York. Judgment entered June 03, 2021.

- *Jackson v. Sheraton NY & Times Square Hotel, et al.* No. 21-1659, U.S. Court of Appeals for the Second Circuit. Judgment entered Dec. 29, 2021.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 29, 2021.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 4, 2022, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Rules of Civil Procedure Rule 56 (c) states in relevant part: The [summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

2. The Seventh Amendment to the United States Constitution states: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- et seq., Prohibits discrimination on the basis of race, color, religion, sex or national origin. Section 703(a) 42 U.S.C. §2000e-2 (a)1 states in relevant part: It shall be an unlawful employment practice for an employer 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. Section 704(a) 42 U.S.C. §2000e-3 (a) states in relevant part: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

4. Federal Rules of Civil Procedure: Rule 26, 26(a)(1)(B) states in relevant part: A party must, without awaiting a discovery request, provide to other parties: A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; Rule 34(a)(1)(A) states in relevant part: A party may serve on any other party a request within the scope of Rule 26(b): to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: any designated documents or electronically stored information including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

5. Respondeat Superior states in relevant part: An employer is responsible for the actions of its employees performed during the course of their employment.

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race with respect to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). An employer discriminates in the terms and conditions of employment when it subjects its employees to a racially "intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 65 (1986). Title VII of the Civil Rights Act of 1964 forbids an employer from retaliating against an employee because of the employee's opposition to "any practice made an unlawful practice" by Title VII, or the employee's participation in "an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). To state a viable claim for retaliation, a plaintiff must first establish that he or she opposed an unlawful employment practice or participated in an investigation, proceeding or hearing under Title VII. The other elements of a retaliation claim are employer knowledge of the protected activity; an adverse employment action; and a causal connection between the protected activity and the adverse employment action. A "protected activity" refers to action taken to protest or oppose discrimination and includes formal or informal complaints to management), *see Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 566 (2d Cir. 2000). An employee's opposition to an unlawful employment practice, or participation in an investigation, proceeding or hearing under Title VII, is referred to as "protected activity." A typical example of protected opposition activity is an employee making internal reports about discriminatory employment practices or harassment directed toward the employee or the employee's colleagues.

Title VII prohibits employers from subjecting employees to a hostile work environment based on their race, religion, national origin, or other protected characteristic. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986). To be actionable, a hostile work environment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Feingold v. New York,* 366 F.3d 138, 149 (2d Cir. 2004) (citations omitted). Whether harassment is sufficiently severe or pervasive to be actionable "can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993). Courts must not consider the evidence in "piecemeal fashion." *Redd v. N.Y. Div. of Parole,* 678 F.3d 166, 176 (2d Cir. 2012). Rather, "'the quantity, frequency, and severity of the incidents . . . must be considered cumulatively, so that we may obtain a realistic view of the work environment.'" *Raniola v. Bratton,* 243 F.3d 610, 617 (2d Cir. 2001) (citation omitted). An employee establishes a hostile-work- environment claim by showing that his employer subjected him to discriminatory harassment that was "sufficiently severe or pervasive." *Meritor,* 477 U.S. at 67. The severe-or-pervasive standard requires courts to consider the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993). This standard is intended to separate unlawful harassment from "ordinary tribulations of the workplace," such as "simple teasing" and "offhand comments." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998). Under it, a "mere offensive utterance" or an "offhand comment" cannot establish a hostile work environment, but an "extremely serious" incident may. *Id.* Title VII makes it an "unlawful employment practice" for an employer to "discriminate against" an employee "because" of an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e- 2(a)(1) (2006). In 1991, Congress re-affirmed that the term "because" in Title VII allows a plaintiff to prevail under a motivating factor standard. 42 U.S.C. § 2000e-2(m) provides: Except as otherwise provided in this sub-chapter, 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.

The United States Court of Appeals for the Second Circuit has long held that when the same individuals engage in some harassment that is explicitly discriminatory and other harassment that is not, the entire course of conduct may be relevant to a hostile work environment claim. *See Pucino v. Verizon Wireless Commc'ns inc.,* 618 F.3d 112, 118 (2d Cir. 2010) ("A plaintiff may rely on incidents of sex-based abuse to show that other ostensibly sex-neutral conduct was, in fact, sex-based."); *Kaytor v. Elec. Boat Corp.,* 609 F.3d 537, 547-48 (2d Cir. 2010) ("Circumstantial evidence that facially sex-neutral incidents were part of a pattern of discrimination on the basis of gender may consist of evidence that 'the same individual' engaged in 'multiple acts of harassment, some overtly sexual and some not.'") (quoting *Alfano v. Costello,* 294 F.3d 365, 375 (2d Cir. 2002)). The emphasis in hostile environment claims is on the hostility of the work environment as a whole, not on the motivation of a single decision maker. Liability "can be determined only by looking at all the circumstances." *Harris*, 510 U.S. at 23 (emphasis added). It is sufficient for liability purposes if "a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of [an employee's] working environment." *Alfano*, 294 F.3d at 374 (quoting *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 570 (2d Cir. 2000)); *see also Schiano v. Quality Payroll Sys., Inc.,* 445 F.3d 597, 600 (2d Cir. 2006) (question is whether "'reasonable employee would find the conditions of her employment *altered for the worse*'") (quoting *Whidbee v. Garzarelli Food Specialties, Inc.,* 223 F.3d 62, 70 (2d Cir. 2000)) (emphasis in *Whidbee*).

Petitioner was harassed in explicitly discriminatory ways, and the comments in question also involved race, and national origin. It was inappropriate as a matter of law for the district court to characterize these comments as "stray remarks," a legal doctrine with no applicability in the hostile work environment context. Moreover, a reasonable jury could

well find that the comments that were made with their express connection to protected characteristics, contributed to the discriminatory hostility of petitioners work environment. Physical threats and diminished work performance are relevant to Title VII liability, but being forced to work in a discriminatorily hostile environment is enough, on its own, to alter the conditions of employment, as long as the hostility is sufficiently severe or pervasive. Petitioner was harassed in ways that were explicitly discriminatory and also in ways that were not. The district court refused to consider the conduct that was not expressly based on race, religion or national origin, finding as a matter of law that calling petitioner a "fat bitch" or filing false complaints against petitioner had nothing to do with discrimination. Likewise, the court refused to consider other ostensibly non-discriminatory conduct, such as physical threats or false complaints about petitoner and management's failure to investigate or resolve petitoner's claims.

The court failed to acknowledge that a reasonable jury could infer discrimination from the fact that the same individual called petitioner "fat black bitch" multiple times.The same individual who was harrasing petitoner in discriminatory ways also harassed petitioner in other ways. Longstanding precedent allows juries to infer discriminatory intent in these circumstances. *See* Harris, 510 U.S. at 21 ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (internal citations omitted).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party if there is a "genuine" dispute as to those facts. "Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The following are the Material facts that are in genuine dispute:

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The Hotel is committed to principles of equal employment opportunity and strives to ensure that its employees, managers and supervisors comply with all applicable anti- discrimination laws. (Applicable Starwood policies and handbook provisions); The Hotel's equal employment opportunity policy specifically prohibits discrimination on the basis of race or any other protected characteristic, and provides that any breach of that policy will be grounds for

disciplinary action. Petitioner disputed. Respondent's reference to Applicable Starwood policies and handbook provisions that no longer applies to respondent. Respondent did not reference Applicable policies and handbook provisions from the Marriott Employee Handbook. As to the Hotel adherence to this policy and that the hotel is not equally committed to principles of anti-discrimination and equal opportunity when it comes to Black employees like petitioner. See Petitioner's Statement of Material Facts, Facts 1(Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The Hotel has a comprehensive anti-harassment policy and complaint procedure (Applicable Starwood policies and handbook provisions); The policy explains that the Hotel prohibits harassment based on any discriminatory reason, and provides associates with multiple options for reporting inappropriate behavior.(Applicable Starwood policies and handbook provisions); The policy also specifically prohibits retaliatory action against any associate who comes forward with a complaint. Petitioner disputed. Respondent's reference to Applicable Starwood policies and handbook provisions that no longer apply to respondent. Respondent did not reference Applicable policies and handbook provisions from the Marriott Employee Handbook, and as to the Hotel's adherence to this policy and the Hotel's practice of unequal application of its policies on the basis of race. See Petitioner's Statement of Material Facts, Facts 2, 4, 5 and 6 (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The Hotel also assures that an associate who reports allegations of harassment is not subject to retaliation. (Applicable Starwood policies and handbook provisions); The Hotel's policy prohibits retaliation against associates who report perceived harassment or who file, testify, assist or participate in any manner in any investigation, proceeding or hearing regarding potential harassment. (Applicable Starwood policies and handbook provisions); Petitioner disputed. Respondent's reference to Applicable Starwood policies and handbook provisions that no longer apply to respondent. Respondent did not reference Applicable policies and handbook provisions from the Marriott Employee Handbook, and as to the Hotel's adherence to this policy. See Petitioner's Statement of Material Facts, Facts 3, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. These disputes resulted in both Jackson and Acevedo filing competing complaints against each other (none of which related to their protected status). Petitioner disputed. Petitioner experienced every negative interaction with Acevedo through the lens of Acevedo's racial animus against petitioner because petitioner is Black. Petitioner reported and filed discrimination and harassment complaint to respondent in/or January 2018. See Petitioner's Statement of Material Facts, Facts 10, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Beginning on or around 2015, Jackson filed several complaints about Acevedo for reasons unrelated to racial discrimination, including but not limited to. Petitioner Disputed. Petitioner reported and filed her complaint of discrimination and harassment to respondent in/or about 2016 and 2018, which was ignored by respondent and never investigated. When petitioner complained about Acevedo's video conference, it was because Acevedo showed petitioner to the male caller so that he would be able to identify her outside of the workplace. Petitioner understood that Acevedo was threatening violence against petitioner by Acevedo's male acquaintance, which Acevedo later explicitly stated when she told petitioner that her "man" was waiting outside to "smack a fat Black bitch like [Petitioner]." See Petitioner's Statement of Material Facts, Facts 11, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The Hotel investigated each of the complaints made by both Jackson and Acevedo. Petitioner disputed. The Hotel's investigations into petitioner's complaints of race discrimination and threats by Ms. Acevedo was wholly inadequate, time and again. It was only when Ms. Acevedo threatened a non-Black coworker that the Hotel swiftly punished her for violating its anti-discrimination, unlawful harassment and retailiation policy then terminated Ms. Acevedo. See Petitioner's Statement of Material Facts, Facts 12, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Following each complaint, the Hotel could not conclude that the conduct complained about by either women could be corroborated, and/or that the conduct complained of rose to violations of the Hotel's policies. Petitioner Disputed. The Hotel did not conduct a thorough investigation into petitioner's complaints because it did not take them seriously on account of her race. In fact petitioner's complaint was corroborated by witnesses and Acevedo, but respondent continued to allow Acevedo to discriminate, harass, jeopardize plaintiffs safety and employment. Respondent anxiously and thoroughly investigated all of Acevedo's false complaints against petitioner and those complaints that Acevedo falsified against petitioner were found to be unsubstantiated. See Petitioner's Statement of Material Facts, Facts 13, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Jackson responded to Acevedo with several intimidating, harassing and threatening statements, including but not limited to. Petitioner disputed. Respondent did not include in discovery packet to petitioner, (Video/audio recording) or (Transcript). See Petitioner's Statement of Material Facts, Facts 17, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Acevedo said little in response to Jackson, most of which was not discernable from the recording. Petitioner disputed. Acevedo goaded petitioner and encouraged her to continue talking for the purpose of entrapping her. See Petitioner's Statement of Material Facts, Facts 18, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Acevedo recorded the interaction between Jackson and herself using her cell phone. Petitioner Disputed. Acevedo purposefully recorded only part of the interaction with petitioner because she did so with the purpose of editing the context of the interaction so that petitioner would appear the aggressor. Acevedo was emboldened to instigate an interaction with petitioner because the Hotel had repeatedly refused to take seriously petitioner's complaints about Acevedo's racial discrimination and animus when directed against her. See Petitioner's Statement of Material Facts, Facts 19, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Acevedo immediately complained to Security Manager Arnold Milliken that Jackson engaged in harassing and threatening conduct towards her. Petitioner disputed. Petitioner called up to security during the interaction to have security come to the office to defuse the interaction, by removing Acevedo from near petitioner. The Security Manager Mr. Milliken refused to come to the office, in fact Mr. Milliken called the office, spoke with Acevedo and told Acevedo to tell petitioner that he was not coming down to the office. When Acevedo hung up the phone with Mr. Milliken, Acevedo repeated to petitioner what Mr. Milliken told her to tell the petitioner "he said he not coming down". Mr. Milliken then called a second time to the office and spoke with petitioner and asked petitioner to go to another phone in a different part of the department, so that he could listen to what the petitioner had to say. Petitioner went to another telephone at the manager's desk and called Mr. Milliken to file her complaint. Mr. Milliken reluctantly took petitioner's complaint over the telephone. When Acevedo overheard petitioner's complaint to Mr. Milliken over the telephone, Acevedo left the office and went to Mr. Milliken's office. While petitioner was still on the phone with Mr. Milliken giving her complaint, Acevedo aggressively entered Mr. Milliken's office without knocking. Mr. Milliken with a very stern tone said to Acevedo "you have to wait outside". Acevedo did not leave, Mr. Milliken again in a very stern voice said to Acevedo, "you have to wait outside because I'm on the phone and can't speak with you right now". After Mr. Milliken was able to get Acevedo to leave, petitioner asked Mr. Milliken was that Acevedo? Mr. Milliken replied "yes that was her". See Petitioner's Statement of Material Facts, Facts 20, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Milliken referred the complaint to Director of Human Resources Patrick Athy ("Athy") who immediately launched an initial investigation on July 8, 2018. (Incident report, dated July 8, 2018). Petitioner disputed.

Petitioner filed an official security report first with Mr. Milliken security manager on July 7, 2018. According to respondent, Mr. Milliken referred Acevedo's complaint to Athy on July 8, 2018, after petitioner had filed an official security report on July 7, 2018. Mr. Milliken did not refer petitioner's complaint to Athy on July 8, 2018. According to respondent Mr. Athy immediately launched an initial investigation on July 8, 2018. According to Mr. Athy's own testimony at petitioners Arbitration, Mr. Athy was on vacation during that time and did not return to the Hotel until July 10, 2018. Mr. Athy also testified in petitioners Arbitration hearing, that Ms. Cimino called him on July 9, 2018 and during their brief conversation, Ms.Cimino just wanted to let Mr. Athy know that both Joannie Acevedo and petitioner were filing complaints against each other for harassment and petitioner was in the Human Resources office refusing to leave, demanding to speak with the General Manager. Mr. Athy also testified that Ms. Cimino wanted Mr. Athy to be aware in case he got a call from the General Manager. See Petitioner's Statement of Material Facts, Facts 21, (Docket 42).

In fact, petitioner's evidence of Athy's sworn testimony under oath at petitioner's Arbitration hearing proved respondent's false statements submitted to the court. Respondent recanted his statements that were submitted to the court, of respondent's return date to the Hotel after respondent's vacation to launch an investigation into the July 7, 2018, incident. Respondent recanted after petitioner brought the false statements to the district judge's attention in petitioner's sur-reply letter. *See* Athy Decl.,¶ 19; Douglas Decl. at Ex. L, at p. 1 (Summary of Investigation); *See* Douglas Decl. at Ex.M (Incident report, dated July 8, 2018). *See* (Docket 46).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. During the investigation, Athy reviewed the audio recording of Jackson making multiple demeaning, intimidating, threatening and harassing statements to Acevedo. Petitioner disputed. Mr. Athy never met petitioner or ever heard petitioner's voice to determine or verify that it was petitioner on the recording. Mr. Athy did not meet or speak to petitioner until July 11, 2018 shortly after he concluded the investigation and suspended petitioner, without interviewing or asking petitioner if it was indeed her on the recording. In fact Mr. Athy suspended then, terminated petitioner without explaining to petitioner the reason for her suspension. See Petitioner's Statement of Material Facts, Facts 22, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Following his review of the recording, Athy conducted initial interviews and reviewed additional documentation, including written statements by various individuals (including Jackson), Jackson's past record, and the Impartial Chairperson Opinion #2006-97. Jackson was interviewed on July 9, 2018, by Assistant Human Resources Manager, Diana Cimino. Petitioner disputed. Neither Mr. Athy or Ms. Cimino interviewed petitioner, nor did Mr. Athy or Ms.

Cimino take any statement from the petitioner, who was involved in the interaction with Acevedo. Respondent did not investigate petitioner's side of the story both because it did not take seriously petitioner's complaints about discrimination as a Black woman. Moreover, respondent purposefully created an incomplete investigatory record for the purpose of establishing a pretextual reason to suspend and then terminate petitioner. When petitioner requested that an investigation begin on July 9, 2018, to the Managers Ms. Diana Cimino, Mr. Eugene Mayer and Mr. Jake Lynch. Mr. Lynch stated to petitioner that it was too busy in the hotel to start an investigation. See Petitioner's Statement of Material Facts, Facts 23, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. On July 11, 2018, the Hotel suspended Jackson, pending an internal investigation of the events that occurred on July 7, 2018. Petitioner disputed. Respondent had completed the investigation and after the conclusion of the investigation on July 11, 2018, respondent called petitioner into the Human Resources office and suspended petitioner without any explanation. Respondent did not ask petitioner any questions about the incident and did not ask petitioner if it was her on the recording, after all the other witnesses were interviewed and gave their statements including Acevedo. Petitioner was unaware of respondents' plan to terminate petitioner until petitioner was informed in/or about August from petitioners Union Business Agent. The investigation was the Hotel's purported reason for suspending and later terminating petitioner. The Hotel's real reason for suspending and terminating petitoner was to retaliate against her for her complaints of race discrimination. See Petitioner's Statement of Material Facts, Facts 25, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The investigation, which concluded on September 27, 2018, revealed that Jackson's outburst, made in the presence of a number of employees and guests, was aggressive, abusive, threatening and included profanities and reprehensible insults. Petitioner disputed. The Hotel's investigation, which concluded on July 11, 2018, did not include taking a statement from petitioner. There weren't any guests present and witnesses stated that they did not hear any profanity, any threatening or arguing according to Mr. Athy's testimony during petitioner's Arbitration hearing. See Petitioner's Statement of Material Facts, Facts 26, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Jackson's remarks were made in a menacing tone, including repeated taunts, and overt and veiled threats of violence. Petitioner disputed. Petitioner did not threaten Acevedo. Acevedo edited the context of her audio recording so that her own role in instigating the interaction was not recorded. See Petitioner's Statement of Material Facts, Facts 27, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The Hotel concluded that Jackson violated the Hotel's Standards of Conduct as well as the policies prohibiting workplace violence and retaliation, which warranted immediate dismissal. Petitioner disputed.The Hotel selectively enforces its policies when determining which employees' actions warrant dismissal. Respondent selective enforcement of its own policies regarding dismissal favor non-Black employees over Black employees. The Hotel told petitioner that it was terminating her because of two infractions of Hotel policies: the July 7, 2018 incident with Acevedo and a 2006 incident. The Hotel relied upon the 2006 infraction in justifying petitioner's termination even though it was twelve years old at the time of her termination and petitioner did not have any infractions since 2006. The 2006 infraction should not have been considered in petitioner's termination according to the Union contract governing her employment and Marriott Employee Handbook. See Petitioner's Statement of Material Facts, Facts 28, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Petitioner appealed the termination. The Hotel's decision to terminate petitioner was sustained by an impartial arbitrator. In affirming petitioner's termination, the arbitrator noted that as a Union Delegate, petitioner thoroughly understood how to resolve disputes and her July 7, 2018, serious misconduct was a poor example, at best, for those she worked with and represented as a Union Delegate. Petitioner disputed. Petitioner's union did not give her an option to appeal the termination. The arbitrator could not have rendered an impartial decision because it was based on one-sided information from the Hotel, which purposefully did not interview petitioner or conduct a thorough or proper investigation. Petitioner conducted herself as a professional delegate and employee throughout her employment at the Hotel and is well respected. None of this information was brought before the Arbitrator. Petitioner endured Acevedo's abuse for many years without any remedy from respondent. Petitioner had followed all rules and regulations of filing her complaints to the chain of command and exhausted all of her options filing multiple complaints to the respondent about Acevedo's abuse. Including, but not limited to the Department Managers, Director of the department, Human Resource Managers, Director of Human Resource, Corporate Managers, General Managers and the police department about Acevedo's disturbing behavior toward her. See Petitioner's Statement of Material Facts, Facts 29, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. At around the same time that Acevedo lodged her complaint, petitioner filed a complaint against Acevedo alleging mistreatment by Acevedo. A separate investigation was conducted into petitioner's allegations and no evidence was found to substantiate her complaint. Petitioner disputed. Petitioner had filed many complaints about Acevedo's discriminatory mistreatment, harassment and threats of her prior to the July 7, 2018 incident as well as

following it. Petitioner filed her complaint before Acevedo, on July 7, 2018. The Hotel's investigations into petitioner's complaints either never occurred or were done so cursorily as to prove toothless. See Petitioner's Statement of Material Facts, Facts 31, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. The only remaining claim at issues in this matter is petitoner's allegation of race discrimination. The purported basis for her claim is a several years' old statement by Acevedo; that a man was allegedly "waiting to smack a fat black bitch like [Petitioner]." Petitioner disputed. Petitoner properly alleges claims of race discrimination and retaliation in violation of Title VII. Were the Court to allow her to amend her Complaint following summary judgment briefing, petitoner would amend to include a claim of race discrimination pursuant to 42 U.S.C. § 1981. See Petitioner's Statement of Material Facts, Facts 34, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Petitioner alleges in her Amended Complaint that Acevedo lodged a false complaint to the Hotel on or around May 2016 asserting that Jackson called Acevedo a "bitch" and alleged, in conclusory faction, "racial comments" without providing any specific words that were allegedly used. Petitioner alleges that it was actually Acevedo who made the "racial comments" to her.The Hotel investigated Jackson's allegations and found they were inconclusive. Petitioner disputed.The Hotel did not conduct an investigation into this or any other complaint of race discrimination and/or retaliation made by petitioner. See Petitioner's Statement of Material Facts, Facts 38, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Despite the foregoing allegations, petitioner admits in her Amended Complaint that she was terminated on October 18, 2018, as a result of the July 7, 2018 altercation. (Jackson specifically admits in her Amended Complaint that she was suspended and terminated as a result of the July 7, 2018. Petitioner disputed. Respondent's purported reason for terminating petitioner was the July 7, 2018 incident and a 2006 disciplinary infraction, but the Hotel's real reason for terminating petitioner was race discrimination and retaliation for having complained about race discrimination and retaliation. The Hotel inconsistently applied its own policies more harshly against petitioner because she is Black and less harshly against Acevedo because she is not Black. See Petitioner's Statement of Material Facts, Facts 40, (Docket 42).

MATERIAL FACT IN GENUINE DISPUTE. Disputed. Respondents (Audio/transcript) submitted into evidence. Respondent did not include (audio/transcript) in the discovery packet which is required under Fed. R. Civ. Proc. Rule 26, 26(a)(1)(B) and Rule

34(a)(1)(A). Petitioner did not receive in discovery packet pertinent information used against petitioner.

Petitioner received an incomplete discovery packet, without the discovery of the (audio/transcript) that respondent submitted to the court against petitioner, petitioner was not able to represent herself effectively. In fact, respondent admitted to the district court judge that the (audio/transcript) was not physically sent to petitioner in discovery. The Magistrate judge had previously chastised respondent, for long-standing failure to comply with discovery deadlines stating: "That failure to act in a timely manner to complete discovery is consistent with Sheraton's prior conduct in this case." *See* Magistrate Judge Orenstein's MEMORANDUM AND ORDER (Docket 30). Respondent also acknowledged on the telephone conference call with Magistrate Judge Orenstein that the parties' dispute turns on factual disagreements, and therefore could not likely be resolved on a motion for summary judgment. *See* (Docket 24).

Petitioner submitted a sur-reply letter to the District Court judge, in opposition to respondent's motion for summary judgment. In that sur-reply letter petitioner brought to the district court judge attention the false statements that were submitted to the court by respondent, the false accusations that respondent made against petitioner, and court rules that were not followed by respondent (*i.e.*) respondent did not give petitioner the (audio/transcript) in discovery. *See* (Docket 47).

In the sur-reply letter petitioner brought to the district court judge attention the following:

Cell phone usage at workstations goes against hotel policy and is prohibited. Acevedo was reprimanded and told not to use electronics at the workstations. Acevedo defied hotel policy and it's not the first time. Acevedo did not receive any discipline for her actions of violating hotel policy or her part in the altercation.

Petitioner was not given an opportunity to defend herself against an prohibited, insufficient, incomplete and unauthorized cell phone recording, before being suspended then terminated, because that was not the real reason for petitioner's suspension then termination, respondent used the recording as an purported excuse. Athy did not know if it was petitioner on the recording or not because Athy never met petitioner or heard petitioner's voice before July 11, 2018, after he listened to the recording, therefore respondents investigation was not fair or thorough the investigation was blatant discrimination and racially biased.

Petitioner also stated that petitioner did not receive the audio or transcript of the recording in the discovery package from respondent. Respondent states that it was

included on the list in discovery but it was not physically sent to petitioner. Respondent also states that respondent provided a link to the audio recording to petitioner prior to moving for summary judgment. Petitioner clarified that respondent submitted an incomplete statement. Petitioner stated in the sur-reply letter that respondent tried to email a link to petitioner after the Magistrate judge closed discovery, when petitioner tried to open the link petitioner could not get into it, petitioner did inform respondent through email that petitioner could not get into the link to retrieve the audio. Respondent then tried to get petitioner in a different way through email but it still did not work. Respondent then had his tech person add petitioner's email address to his law firm so that petitioner can try it that way. The tech person emailed another way to try to get into the system which still didn't work for petitioner. Petitioner never received the audio or transcript of the recording in discovery from respondent.

Respondent states that "in an Arbitration hearing petitioner had the opportunity to present all of the evidence to support her claims of wrongful termination", this is absolutely false. Petitioner did not have the evidence that she has now. Respondent did not bring any disciplinary charges against Acevedo for her actions on July 7, 2018, just petitioner. When the subject came up about Acevedo's disciplinary history in the Arbitration hearing, Respondent's Counsel objected to it stating that Acevedo is not being considered for termination just petitioner, therefore none of Acevedo's infractions were brought in front of the Arbitrator by respondent. The Arbitrator was not able to hear Acevedo's disturbing disciplinary history that also included infractions that petitioner filed against Acevedo that was substantiated. The majority of the evidence came after petitioner was terminated.

Athy's testimony at petitioners Arbitration hearing is evidence that respondent discriminated against petitioner, the false statements that respondent has submitted to the court is evidence that respondent is trying to conceal the fact that respondent discriminated against petitioner, the email from Mccleery to Human Resource Managers that respondent claim is a false statement and misleading the court is evidence that Acevedo discriminated against petitioner and respondent allowed it, respondent false statements that there was a separate investigation into petitioners complaint and that petitioner was interviewed by Cimino and Athy took petitioner's statement is evidence that respondent discriminated against petitioner, respondent false statement that Guests were present during the altercation is evidence that respondent discriminated against petitioner, respondents false statement that petitioner had a meeting with Managers for five hours is evidence that respondent discriminated against petitioner.

Respondent made false statements to mislead the court in hopes to conceal the fact that respondent discriminated and retaliated against petitioner for petitioners many

complaints about Acevedo's discriminatory and threatening behavior. Respondents' false statements that were submitted to the court are a prime example of respondent history of wrong doings and feeling that they will always be able to get away with it. With all of the evidence, respondents are still attempting to discredit petitioner right before the court.

Petitioner requested that respondents' Motion for Summary Judgment be denied and that petitioner be granted the opportunity to go to trial to be heard and receive justice. Respondent blatantly accused petitioner of making false statements and misleading the court while recanting their false statements and conflating statements in hopes of discrediting petitioner, all the while petitioner's evidence is clearly visible. It seems as though respondent is ignoring petitioners' evidence and creating their own. Petitioner's exhibits are actual and factual as well as petitioner's affidavit, Rule 56.1 counter statements and memorandum, unlike respondents. There are numerous material factual disputes regarding the discrimination that cannot be resolved on summary judgment, the above factual disputes are just some of many. Petitioner has the evidence and witnesses to expose respondents wrongdoing of discrimination and racially biased behavior against petitioner if allowed to proceed to trial.

As shown above there are numerous material facts in genuine dispute that a jury should have resolved.

The Seventh Amendment to the United States Constitution states: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

The District Court Judge disregarded petitioners' sur-reply letter of respondents' false material facts submitted to the court and opposition to respondents' summary judgment motion.There was cogent evidence to support the fact that respondent had submitted false statements to the court, then recanted those false statements. All of the facts that petitioner informed the district court judge of in the sur-reply letter were submitted into evidence to the court.

The District Court Judge's memorandum decision and order states: "As part of his investigation, Mr. Athy reviewed the recording from Ms. Acevedo's cellphone, and interviewed other guest services agents, who corroborated "the authenticity and veracity of the recording."(ECF No. 36-12 at 4.) *See* (Docket 52). This statement is false. The authenticity and veracity of the recording was not corroborated by other guest service agents or petitioner. Respondent once again submitted a false statement to the court

and the district court judge based her decision on the false statements of the respondent, not the evidence that petitioner submitted to the court. In petitioner's affidavit in opposition to summary judgment, *See* affidavit (Docket 41, Exhibit 20, Patrick Athy's sworn testimony). The evidence is very clear. Athy stated that he interviewed the Guest Service Agents and asked them if they had witnessed any arguments the night of July 7, 2018, if they heard anyone using profanity, and if they heard threatening anyone else and they said they did not. The evidence that petitioner submitted to the court of Athy's testimony at the Arbitration hearing was not thoroughly examined by the district court judge. If the evidence of Athy's sworn testimony under oath at the petitioner's Arbitration hearing were thoroughly examined it would have shown that the statement the district court judge referred to was false.

The District Court Judge ignored the evidence petitioner submitted to the court, stating: "In Fact, the plaintiff cites only one incident: that in 2016, two years before the altercation that led to the plaintiffs termination, Ms. Acevedo called her a "fat black bitch." That Statement, while certainly inappropriate and upsetting, does not raise a plausible inference that the defendant fired the plaintiff because of her membership in a protected class. Rather, that comment, far removed in time and made by a co-worker with no authority over the plaintiff, is the kind of "stray remark" that courts have found insufficient to constitute employee discrimination."

The District Court Judge analysis was factually wrong, as the record shows, petitioner specifically stated in her affidavit (Docket 41, No.14), "In or about January 2018, I filed a complaint about Ms. Acevedo's discriminatory, threatening and harassing remark, specifically that Ms. Acevedo's "man [was] waiting outside to smack a fat black bitch like [me]." The District Court Judge erred that the 2016 racial incident two years prior was the same incident. These were two separate incidents with January 25, 2018 being most recent not two years prior.

The District Court Judge erred in dismissing petitioners retaliation claim under Title VII stating: "The plaintiffs Title VII retaliation claim is dismissed because she has not shown a causal connection between her participation in a protected activity and her termination" "The plaintiff cites no recent protected activity before her suspension and subsequent termination."

Petitioner had submitted copious evidence that substantiates a causal connection between petitioners participation in a protected activity and termination including but not limited to, a police complaint, email complaints to Corporate including the Corporate CEO on July 10, 2018 the day before petitioner's suspension. The District Court Judge

did not even attempt to measure the total impact of petitioners' three years' worth of harassment.

The following facts can also establish a causal connection between petitioner's participation in a protected activity and termination:

Petitioner worked as a Guest Service Agent for respondent, for over 23 years. In 2015 petitioner testified against respondent in a discrimination case and with the help of petitioners testimony, respondent was not able to claim victory. In that same year of 2015, shortly after petitioner's testimony against respondent in the discrimination case, respondent transferred Joannie Acevedo from the housekeeping department into the department where petitioner worked for over twenty one years at the time. Petitioner worked in the same department without any major issues until respondent transferred Acevedo into the department.

Beginning in 2015, following petitioner's testimony against respondent for discrimination and on a near-daily basis continuously throughout the remainder of petitioner's employment, Acevedo discriminated, bullied, threatened, and harassed petitioner at work. Acevedo was an employee that always created a hostile work environment throughout the Hotel and respondent was well aware of Acevedo's disturbing behavior before her transfer to the department where petitioner worked. Specifically, Acevedo frequently made physical threats of violence towards petitioner that caused petitioner to fear for her safety such as, "[her] man is waiting outside to smack a fat black bitch like you," and repeatedly disrupting the workplace by making derogatory discriminatory comments and distracting noises to attempt to provoke petitioner. Acevedo's disturbing behavior led petitioner to file numerous complaints to all levels of management, who in turn refused to rectify the situation. Respondent terminated petitioner in 2018, for an alleged altercation with Acevedo.

Petitioner filed a charge with the EEOC, alleging that respondent violated Title VII by terminating her in retaliation for filing complaints of discimination, harassment, physical threats and testifying in a discrimination case against respondent. Petitioner was issued a right to sue letter from the EEOC. Petitioner filed a complaint in District Court on July 12, 2019 against respondent for racial discrimination "with respect to her compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1), Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112 to 12117 and retaliation 42 U.S.C. 2000e-3(a). On July 18, 2019 the District Court Judge dismissed petitioner's complaint for failure to state a claim, and on July 30, 2019 petitioner amended her complaint. The District Court Judge then dismissed petitioners disability discrimination claim on August 22, 2019, but allowed petitioner to proceed with her Title VII claim. The District Court

Judge concluded that petitioner has not established a *prima facie* case, and has not shown a causal connection between petitioner's participation in a protected activity and her termination. The District Court Judge dismissed petitioner's claim and granted summary judgment in favor of respondent. Petitioner requested reconsideration from the District Court Judge under Federal Rule of Civil Procedure, Rule 59 and Rule 60. The District Court Judge denied petitioner's request. The Court of Appeals affirmed the District Court's decision. The Second Circuit concluded that the appeal lacks an arguable basis either in law or in fact.

In May 2016, Acevedo continued harassing petitioner, by falsely reporting to Hotel management that petitioner called her a "bitch" and made racial comments to her over the phone. In response to Acevedo's treatment, petitioner lodged repeated complaints to the Director of Human Resources about Acevedo's false claims and disruptive behavior, stating that Acevedo, in fact, made racially charged comments towards her, in May 2016, not the other way around. Human Resources investigated petitioner's complaint and interviewed witnesses that corroborated what petitioner had reported, the Human Resources Director did not take any action against Acevedo and did not follow-up with petitioner regarding the results of their findings. Human Resources had first hand knowledge of Acevedo's conduct, and failed to take any action against Acevedo which effectively interfered with petitioners right to work in an environment free from hostility and discrimination.

Acevedo's behavior continued. In December 2016, Acevedo harassed petitioner and threatened petitioners safety by using a tablet to video-chat with a man that petitioner did not know. Acevedo positioned the tablet in the direction of where the petitioner was sitting, so that the man could see the petitioner and what petitioner was wearing, for the purpose of identification so that the man could attack petitioner after work. Petitioner filed a complaint to the Human Resources Director of the new incident, and requested that the Human Resources Director remove Acevedo from the department, because petitioner feared for her physical safety and was uncomfortable working with Acevedo any longer. The Human Resources Director investigated petitioner's complaint and substantiated the complaint by witnesses corroborating the incident and Acevedo admitting to the Human Resources Director that she did show that man the petitioner on her tablet and the man "described petitioner to the "Tee". Rather than investigating or acting against Acevedo for harassing and threatening petitioner's safety, Human Resources investigated Acevedo for use of a tablet during the shift, and concluded that Acevedo violated the hotel's policies regarding the use of personal devices at workstations. Human Resources again did not take any action to remove Acevedo from the department and ignored petitioner's request to remove Acevedo from the department to prevent future incidents with Acevedo. The Hotel failed to act on any of

the complaints that petitioner filed against Acevedo which interfered with petitioners rights as described above.

On December 22, 2016 the Human Resources Director sent an email to the Human Resources Manager, about petitioner's December 22, 2016 complaint against Acevedo, of FaceTiming and showing the petitioner to some man, so that the man can see the petitioner's face to cause physical harm to petitioner. The email stated that the complaint was thoroughly investigated and as a result of the investigation Human Resources was unable to conclude that any inappropriate conduct occurred as alleged by petitioner. This email was sent after Acevedo admitted to the Human Resources Director that she did in fact show petitioner to the man on the tablet and that man described petitioner. Petitioner expressed her many concerns about discrimination, safety and harassment to the Human Resources Director, Management and Security team often and adamantly following the FaceTime incident. Human Resources did not take petitioners complaints seriously because of petitioners race and in retaliation for petitioners testimony at the discrimination hearing against respondent.

In September 2017, Human Resources Manager investigated petitioner based on further false accusations made by Acevedo, that petitioner had made unspecific threats. Human Resources ultimately found these allegations unsubstantiated after they concluded their investigation the following month; once again, Human Resources did not take any action against Acevedo for making a false report against petitioner, jeopardizing petitioners employment and humiliating petitioner.

In November 2017, petitioner and six other Guest Service Agents, met with the Human Resources Director and Human Resources Manager to submit a signed petition requesting that Acevedo be removed from the shift due to her disruptive behavior, creating a hostile threatening environment, outbursts and interfering in job duties. While the Human Resources Director and Human Resources Manager met with petitioner and the six Guest Service Agents about a week later to discuss the concerns, Human Resources did not take any action to remove Acevedo from the shift or department. The Human Resources Director did not provide a response to petitioner's repeated emails regarding the status of her complaints or the petition that was submitted. Petitioner contacted the Corporate office in hopes of getting a resolution to the discriminatory hostile work environment that Acevedo was creating. The Corporate office directed petitioner to another Corporate Manager that did not remedy the discriminatory hostile work environment that Acevedo created for petitioner.

On January 25, 2018, Acevedo physically threatened and discriminated against petitioner by stating "[her] man is waiting outside to smack a fat black bitch like you," in

front of witnesses in the office. Petitioner believed Acevedo's threat to be real because Acevedo had shown petitioner to a man on FaceTime that Acevedo had called. The Director of Guest Services entered the office while Acevedo was in the process of making the discriminatory physical threat. The Guest Service Director began to ask petitioner and witnesses what happened. Petitioner and the witnesses that were present reported the discriminatory, derogatory and physical threat to the Guest Services Director, who in turn reported the incident to the Human Resources Director and Human Resources Manager for further investigation, via email, because Human Resources had closed for the evening. The Human Resources Director did not investigate the incident or reprimand Acevedo for her discriminatory physical threat to petitioner. The complaint that petitioner filed was ignored and never investigated or pursued by the Human Resources Management team.

On January 26, 2018 the following day, after petitoner's complaint to Human Resources about Acevedo's physical threat, discrimination, and harassment. The Human Resources Management team investigated another complaint that involved Acevedo's same disruptive behavior against a non-Black employee. The incident resulted in Acevedo's termination for violating hotel policy regarding anti-discrimination, unlawful harassment, retailiation and theft. The Hotel treated more seriously complaints about discrimination, harassment and retaliation made against Acevedo when those complaints came from a non-Black employee.

On January 26, The Human Resources Managers terminated Acevedo, not for the physical threat, discrimination or harassment toward petitioner the day before, but for harassing and threatening a non-Black employee. Human Resources never investigated petitioner's complaint. On February 9, 2018, the Human Resources Managers rehired Acevedo, and put her back into the same department with petitioner without any disciplinary action for her physical threat of harm, harassment or discriminatory actions toward petitioner. When respondent rehired Acevedo and put her back into the same department, respondent actions caused a great deal of emotional distress for petitioner, which petitioner still suffers from.

Although Human Resources Managers were well aware of Acevedo's documented discriminatory and harassing behavior in violation of its own anti-discrimination and unlawful harassment policy, Human Resources Managers rehired Acevedo shortly after terminating her intentionally creating a discriminatory, uncomfortable, stressful, unsafe, hostile enviornment for petitoner. The Hotel treated non-Black employees more leniently for infractions of its policies by, rehiring Acevedo after terminating her for violating the Hotel's anti-discrimination, unlawful harassment, retailiation and theft policy.

Petitioner became exasperated with having her complaints ignored, and filed a police complaint against Acevedo for harassment in February 2018. Petitioner gave a copy of the police complaint receipt to the Human Resources Manager. Still, the Hotel continued to have Acevedo work with petitioner, and continued interference with petitioners rights and causing petitioner even more emotional distress because Acevedo continued to harass, bully, and threaten petitioner in the manner described above without any repercussions.

On July 7, 2018, approximately six months following Acevedo's discriminatory physical threat, and harassment toward petitioner, once again Acevedo instigated an altercation. Petitioner began her shift in the Guest Services office approximately 3:00 p.m. Acevedo entered the office approximately 4:00 p.m. to begin her shift . Acevedo began to set up the workstation right next to petitioner, who was sitting at her workstation logged in and working, despite the fact that approximately five workstations were available where Acevedo could have chosen to sit and be separated from petitioner, Acevedo chose that particular workstation. Once petitioner realized that Acevedo was setting up the workstation, petitioner attempted to prevent any issues during the shift by immediately informing the Director of Guest Services of Acevedo's unusual seating choice, and requested that he change Acevedo's seat away from petitioner. Petitioner also reminded the Guest Service Director about the police complaint that petitioner had given to management prior against Acevedo and Acevedo's troublesome behavior toward petitioner. Petitioner also explained to him that petitioner did not want to have to call the police. The Guest Services Director understood and agreed to have Acevedo change her seat away from petitioner. The Director of Guest Services left and went home for the evening leaving petitioner unaware of his departure and without directing Acevedo to change to a different workstation away from petitioner.

When the evening Manager arrived, he had given Acevedo a direct order to change her seat, multiple times throughout the evening. The workstation where Acevedo usually sits became available at 9:45 p.m. Approximately six stations were now available, before Acevedo initiated an altercation and refused the Manager on duty direct order to change her seat. Acevedo chose to stay in the seat next to petitioner. Acevedo refrained from initiating the premeditated altercation, until the Manager on duty left to go home for the evening, at 10:30 p.m. Once the Manager on duty left for the evening, Acevedo began directing derogatory and insulting comments to petitioner, stating "I'm going to get her fat ass fired when I go back in the office" and "stop banging on the desk fat bitch." In fact petitioner was not at any time banging on the desk, that comment was Acevedo's way of instigating an altercation with petitioner in an attempt to provoke the petitioner. Acevedo attempted to physically harm petitioner, by pushing a large office chair in the direction of petitioner twice, almost hitting petitioner with the chair, then

Acevedo began to bend over several times so that her rear end could be close to petitioner's face. Acevedo's actions and comments were solely to provoke and instigate an altercation with petitioner.

Petitioner called security so that the Security Manager could come down to the office to defuse the situation by removing Acevedo from the office. Once the Security Manager called back to the office he stated that he was not going to come down to the office and that petitioner needed to go to another telephone out of the office to speak with him. Petitioner went to another office and spoke with the Security Manager on the telephone to explain what was happening with a witness present. Petitioner proceeded to file yet another harassment complaint against Acevedo to the Security Manager. Once Acevedo heard petitioner explaining to the Security Manager what had taken place, Acevedo left the office. While petitioner was on the telephone with the Security Manager filing the complaint, Acevedo aggressively entered the Security manager's office without knocking. The Security Manager with a very stern tone said to Acevedo "you have to wait outside", Acevedo did not leave, The Security Manager again in a very stern voice said to Acevedo, "you have to wait outside because I'm on the phone and can't speak with you right now". After the Security Manager was able to get Acevedo to leave, petitioner asked him if it was Acevedo, the Security Manager replied "yes that was her". The Security Manager then continued the conversation with petitioner. Petitioner continued to explain to the Security manager what had taken place and informed him that petitioner was going to call the police. Approximately forty five minutes later the Security Manager came down to the office with Acevedo to get her belongings because her shift was now over.

Acevedo's actions and comments on July 7, 2018 were premeditated and provocative which caused petitioner emotional distress that evening. As a result of this incident, the Human Resources Director and Human Resources Manager suspended petitioner on July 11, 2018, without interviewing or asking petitioner any questions about the incident. Petitioner asked the Human Resources Director what was the reason for the suspension and he replied " I can't tell you that". The Director of Human Resources and Human Resources Manager suspended petitioner pending an arbitration hearing but did not suspend Acevedo for her abusive conduct. The Human Resources Director and Human Resources Manager did not ask or give petitioner a chance to explain in an interview what had initiated the alleged altercation or what had taken place, but interviewed Acevedo and gave her the chance to give her fabricated version.

Later that evening of July 11, 2018, petitioner was made aware that the Human Resources Director and Human Resources Manager allowed Acevedo to submit a recording from her cell phone of the alleged altercation, although cell phones are

against Hotel policy and prohibited at employee workstations, and the Human Resources Director reprimanded Acevedo for using electronics at her workstation prior and gave Acevedo a direct order not to use any electronic devices at the workstations. The Human Resources Director listened to the cell phone recording on July 10, 2018, the Human Resources Director never heard petitioner's voice prior to his listening to the recording. The first time the Human Resources Director heard petitioner's voice was when he suspended petitioner on July 11, 2018, after he listened to the recording. The Human Resources Director did not know if the person on the recording was petitioner. In fact, the Human Resources Director testified under oath at petitioner's Arbitration hearing, that he was not aware who was on the recording, when asked was he aware of whose voices are on the recording and was he familiar with the recording. *See* petitioner's affidavit (Docket 41, Exhibit 20). The Human Resources Director called petitioner into the office and suspended petitioner because of the cell phone recording. The Human Resources Director did not ask petitioner if it was petitioner on the recording, or let petitioner listen to the recording to authenticate the recording. The Director of Human Resources suspended petitioner pending an Arbitration hearing, and once again did not suspend or reprimand Acevedo for her abusive conduct toward petitioner, or for not following Hotel policy of no use of cell phones at workstations.

Petitoner was ultimately terminated on October 18, 2018, the issue of Acevedo's discriminatory, derogatory remarks, physically threatening and attempting physical harm, toward petitioner repeatedly over the past several years without the Hotel taking any action against Acevedo was not brought before the arbitrator, nor was Acevedo ever reprimanded for her role in the altercation. The respondent colluded with Acevedo to terminate petitioner by using an incomplete, altered cell phone recording that Acevedo recorded on her cell phone, despite the fact that use of cellphones are prohibited at work stations according to Hotel's policy. The respondent also retaliated against petitoner because of petitoner's testimony in a discrimination case against respondent and the many complaints of harassment and discrimination against Acevedo.

The disparate discipline of petitoner for an alleged altercation between two individuals of different races raises a clear inference of discrimination. Petitioner reported multiple incidents to respondent during a three-year period in which her coworker Acevedo discriminated, physically threatened, attempted physical harm, harassed, called petitioner horrible derogatory names and directed insults to petitioner that were degrading and objectively offensive, which are in violation of petitioners rights mentioned above.

REASONS FOR GRANTING THE PETITION

This case raises an important and recurring question that urgently warrants review for Writ of Certiorari.

The Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, by sanctioning a summary judgment that was granted without a trial, where there are facts material to the case that were in genuine dispute.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party if there is a "genuine" dispute as to those facts. "Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Petitioner and Respondent tell two different stories regarding the material facts. The Respondents' version of the facts is so blatantly contradicted by the record that no reasonable jury could believe it. The District Court abused its discretion by adopting Respondents' version of facts for purposes of granting Respondents' motion for summary judgment.

Petitioner provided sufficient evidence to be entitled to a trial. Only a trial could possibly get to the truth. "It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties differing versions of the truth at trial." *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 288-289.

Petitioner has done more than simply show that there is some "metaphysical" doubt as to the material facts. The record of this case, taken as a whole, could lead a rational trier of fact to find for Petitioner. Therefore, there are genuine issues for trial. *See Scott v. Harris,*127 S. Ct. 1769, 1776 (2007).

Reasonable minds could differ as to the import of the evidence here. Therefore, summary judgment in this case, like that of a verdict, should not have been "directed." *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986).

From reading of the Decision and Order, and a review of the proceedings of the case, it is clear the District Court judge abused her discretion by, in effect, deciding that there were no genuine issues for trial and granted Respondents' summary judgment. Denying Petitioner the benefit of a full adversarial proceeding with discovery, witnesses and a hearing, despite the fact, Respondent agreed with the Magistrate Judge, that the parties' dispute turns on factual disagreements, and therefore could not likely be resolved on a motion for summary judgment. The Magistrate Judge stated in his ruling, denying Respondent's' reconsideration that "Sheraton predicates the request on a disavowal of the concession its counsel made on the record; namely, that this case presents genuine issues of material fact that preclude summary disposition. There is no reason to grant Sheraton reconsideration simply because it has contradicted its own previously stated position." *See* (Docket 30).

The District Court judge weighed the evidence determining, herself, the "truth", notwithstanding the presence of numerous facts material to the case that were in genuine dispute requiring a trial. The District Court Judge based her decision on false statements and an edited audio/transcript that Respondent purposely did not turn over to Petitioner in discovery. The District Court Judge disregarded clear evidence that Respondent submitted false statements to the court, then recanted those false statements, also Respondents' own admittance of not physically sending discovery of the audio/transcript to Petitioner in the discovery packet, which is required under Fed. R. Civ. Proc. Rule 26, 26(a)(1)(B) and Rule 34(a)(1)(A).

The Magistrate Judge exposed Respondents' for the false statements and contradictions on record. Although the Magistrate Judge chastised Respondent for the actions Respondent continued illicit tactics, by submitting false statements to the court in order to achieve a summary judgment decision from the District Court Judge. The District Court Judge ignored Respondents' false statements unlike the Magistrate Judge, although Petitioner brought the false statements that Respondent submitted to the court then recanted, to the District Judge attention in a sur-reply letter. The District Court Judge erred, by granting the Respondents' summary judgment based on false, contradictory statements and an edited recording that Respondent submitted to the court.

This was a violation of 56(c) and a violation of Due Process. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.*

"There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

As shown under Statement of the Facts, there are numerous facts material to this case in genuine dispute. All that was required for Petitioner to be entitled to a full adversarial proceeding and trial was a genuine dispute over any one of the material facts. "Under Rule 56, district court litigants opposing summary judgment have a right to a trial whenever there exists a 'genuine issue as to any material fact.'" *Agosto v. Immigration & Naturalization Serv.,* 436 U.S. 748, 754 (1978).

The Court of Appeals stated petitioner's claim "lacks an arguable basis either in law or in fact." The Court of Appeals wrongly usurped the jury's fact-finding role, determining as a matter of law that certain incidents of harassment were either irrelevant or were not motivated by discrimination. The Court of Appeals also erroneously determined that even pervasive and highly offensive harassment was insufficient to alter the conditions of Petitioners' employment.

"The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases." *Adickes,* 398 U.S. at 176 (Black J., concurring).

The Court of Appeals affirmed the District Court's summary judgment "for substantially the same reasons." If the District Court erred in granting summary judgment based on its assessment of the credibility of the evidence before it, the Court of Appeals erred in affirming, without a de novo review, based on its assessment of the credibility of the evidence. "[J]ust as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, *See Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467-468 (1962); 6 J. Moore, Federal Practice para. 56.02 [10], p. 56-45 (2d ed.1976), so too a court of appeals is not at liberty to deny an individual a de novo hearing on his claim ... because of the court's assessment of the credibility of the evidence" *Agosto v. Immigration & Naturalization Serv.,* 436 U.S. 748, 756-757 (1978).

The District Court Judge, states: " to establish an inference of discrimination the plaintiff needed to show that someone in a supervisory position disparaged her because of her race or made racially charged statements about her in her presence. (ECF No. 52 at 8.)" *See* (Docket 57).

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race with respect to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). An employer discriminates in the terms and conditions of employment when it subjects its employees to a racially "intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 65 (1986).

Under the doctrine of Respondeat Superior: An employer is vicariously liable for its employee's negligent or intentional acts if those acts are committed within the scope of the employee's employment, and the conduct is generally foreseeable and a natural consequence of the employment. Under the doctrine of respondeat superior, an employer may be negligent if the employer hired or retained an employee with knowledge of the employee's propensity for the sort of behavior which resulted in the injury. The employer's negligence consists of placing the employee in a position to cause foreseeable harm, which most probably would not have occurred had the employer taken reasonable care in the hiring of employees. In New York, an employer may be liable for an employee's conduct if the employee was not properly trained or supervised. "In instances where vicarious liability for an employee's torts cannot be imposed upon an employer, a direct cause of action against the employer for its own conduct, be it negligent hiring, supervision, or other negligence, may still be maintained" *Ciccone v. City of New York,* 138 AD 3d 910, 910-911, (2nd Dept 2016) citing, *Selmani v. City of New York,* 116 AD 3d 943 at 944, (2nd Dept 2014). To establish a cause of action based on negligent hiring and supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury *Hoffman v Verizon Wireless, Inc.,* 125 AD3d 806 (2nd Dept 2015) citing, *Jackson v New York Univ. Downtown Hosp.,* 69 AD3d 801, 801 (2nd Dept 2010).

As shown under Statement of the Facts and evidence submitted to the court, the following pertains to Respondeat Superior:

On January 25, 2018, Acevedo physically threatened and discriminated against petitioner by stating "[her] man is waiting outside to smack a fat black bitch like you," in front of witnesses in the office. Petitioner believed Acevedo's threat to be real because Acevedo had shown petitioner to a man on FaceTime that Acevedo had called. The Director of Guest Services entered the office while Acevedo was in the process of making the discriminatory physical threat. The Guest Service Director began to ask

petitioner and witnesses what happened. Petitioner and the witnesses that were present reported the discriminatory, derogatory and physical threat to the Guest Services Director, who in turn reported the incident to the Human Resources Director and Human Resources Manager for further investigation, via email, because Human Resources had closed for the evening. The Human Resources Director did not investigate the incident or reprimand Acevedo for her discriminatory physical threat to petitioner. The complaint that petitioner filed was ignored and never investigated or pursued by the Human Resources Management team. On January 26, 2018 the following day, after petitoner's complaint to Human Resources about Acevedo's physical threat, discrimination, and harassment. The Human Resources Management team investigated another complaint that involved Acevedo's same disruptive behavior against a non-Black employee. The incident resulted in Acevedo's termination for violating hotel policy regarding anti-discrimination, unlawful harassment, retailiation and theft. The Hotel treated more seriously complaints about discrimination, harassment and retaliation made against Acevedo when those complaints came from a non-Black employee. On January 26, The Human Resources Managers terminated Acevedo, not for the physical threat, discrimination or harassment toward petitioner the day before, but for harassing and threatening a non-Black employee. Human Resources never investigated petitioner's complaint. On February 9, 2018, the Human Resources Managers rehired Acevedo, and put her back into the same department with petitioner without any disciplinary action for her physical threat of harm, harassment or discriminatory actions toward petitioner. When respondent rehired Acevedo and put her back into the same department, respondent actions caused a great deal of emotional distress for petitioner, which petitioner still suffers from.

An employer is vicariously liable for the torts or wrongful acts of its employees committed within the scope of employment. *See Lisa M. v. Henry Mayo Newhall Memorial Hosp.,* (1995) (12 Cal. 4th 291, 296-97.) Respondeat superior may be enough to hold an employer liable for the torts of its employee committed within the scope of employment. When the supervisory authority is acting negligently in the hiring and/or appointment of an employee. *See Baisley v. Henry* (1921) 55 Cal. App. 760, 763-764. This negligence would subject a supervisor to personal liability for their actions. Agents may be found liable for their own wrongful actions, even if taken within the scope of their agency relationship. This situation commonly arises when a supervisor has some connection, involvement, or knowledge of the wrongful acts of the employee. The authority of a supervisor may be so expansive, that their actions align more similarly with that of a principal, thus subjecting them to liability. The agency immunity rule generally immunizes supervisors for actions of their sub-agents, if lawfully appointed. However, a supervisor may be held liable for the misfeasance of a subagent employed by him in the service of his principal if they are "guilty of negligence in the appointment

of such sub-agent." *Hilton v. Oliver,* 204 Cal. 535, 539 (1928). Such negligence could certainly include a decision to hire a prospective employee despite knowledge of tortious conduct by an employee.

In such a scenario, respondeat superior and the agency immunity rule do not govern the actions of the hiring supervisor. Rather, the negligent hiring done by the supervisor goes beyond the scope of the agency relationship, and, as such, beyond the scope of any immunity that they would have as an agent of the employer. With such immunity no longer applicable, petitioner can establish a negligence claim showing a supervisor's knowledge of an employee's propensity for committing the torts at issue, failure to follow established procedures, failure to perform background checks, and more. This scenario may be a viable exception especially when evidence exists showing specific instances of negligence on the part of the supervisor, such as when a hiring supervisor has specific knowledge of the propensities of the employee to commit tortious conduct. A supervisor acting within the scope of authority delegated them by the employer may still be liable for their own wrongful actions. A supervisor may be liable for the torts of an employee within their scope of authority, rather than in an individual capacity. *Hilton, supra,* 204 Cal. at 539. If a supervisor directs or authorizes the particular wrongful act of the subagent, or improperly cooperates in the subagent's acts or omissions, then he may be liable for his wrongful conduct. (*Id.*) If a tortious act has been committed by an agent acting under the authority of his principal, the fact that the principal is liable "does not of course exonerate the agent from liability." *Perkins v. Blauth* 163 Cal. 782, 787, (1912). Thus, a supervisor that has prior knowledge of certain propensities of an employee who authorizes, ratifies, or cooperates in such conduct may be personally liable for his own wrongful actions, *Stevens v. Roman Catholic Bishop of Fresno*, 49 Cal. App.3d 877, (1975) distinguished such immunity. A supervisor with expansive authority over the hiring, firing and management of its employee could be held liable for the tortious conduct of its employees if the supervisor had prior knowledge of the propensities of its employees to commit such conduct. If a supervisor had prior knowledge of the propensities of an employee, they may be subject to personal liability if they (1) negligently hire the individual, (2) authorize or cooperate in the wrongful conduct, or (3) have such expansive authority that their actions are analogized best to that of a principal.

As shown in Petitioners' Statement of the Facts and evidence submitted to the court, the following pertains to Respondeat Superior:

Later that evening of July 11, 2018, petitioner was made aware that the Human Resources Director and Human Resources Manager allowed Acevedo to submit a recording from her cell phone of the alleged altercation, although cell phones are

against Hotel policy and prohibited at employee workstations, despite the fact, the Human Resources Director reprimanded Acevedo for using electronics at her workstation prior and gave Acevedo a direct order not to use any electronic devices at the workstations. The Human Resources Director listened to the cell phone recording on July 10, 2018, the Human Resources Director never heard petitioner's voice prior to his listening to the recording. The first time the Human Resources Director heard petitioner's voice was when he suspended petitioner on July 11, 2018, after he listened to the recording. The Human Resources Director did not know if the person on the recording was petitioner. In fact, the Human Resources Director testified under oath at petitioner's Arbitration hearing, that he was not aware who was on the recording, when asked was he aware of whose voices are on the recording and was he familiar with the recording. *See* petitioner's affidavit (Docket 41, Exhibit 20). The Human Resources Director called petitioner into the office and suspended petitioner because of the cell phone recording. The Human Resources Director did not ask petitioner if it was petitioner on the recording, or let petitioner listen to the recording to authenticate the recording. The Director of Human Resources suspended petitioner pending an Arbitration hearing, and once again did not suspend or reprimand Acevedo for her abusive conduct toward petitioner, or for not following Hotel policy of no use of cell phones at workstations.

Pursuant to the doctrine of respondeat superior, an employer can be held vicariously liable for torts committed by an employee acting within the scope of employment." *Horvath v. L&B Gardens, Inc.,* 89 A.D.3d 803 (2nd Dep't 2011) (citations omitted). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment." *Holmes v. Gary Goldberg & Co., Inc.,* 40 A.D.3d 1033,1034 (2nd Dep't 2007) (citations and internal quotation marks omitted). "While ... vicarious liability does not arise from acts that are committed for the employee's personal motives unrelated to the furtherance of the employer's business, those acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to liability under the doctrine of respondeat superior, even where those acts constitute an intentional tort or a crime." *Id* (citations omitted). Liability may occur "when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment." *Judith M. v. Sisters of Hope Charity Hosp.,* 93 N.Y. 2d 932, 933 (1999) (citations omitted).

These legal errors warrant reversal. Petitioner respectfully asks this Court to reverse the award of summary judgment and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Crystal Jackson

Date: April 28, 2022