22-5915

NO. BC0437

In The
Supreme Court of the United States

CHARLESWORTH RAE,

Petitioner

v.

CHILDREN'S NATIONAL MEDICAL CENTER, ET AL.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented:

1. Whether the United States Court of Appeals incorrectly applied the *McDonnell Douglas* burden-shifting test to petitioner's retaliation or discrimination statutory claims in determining the evidentiary proof required by the parties with respect to their burden of production or burden of persuasion to hold the employer liability for the misconduct of petitioner's direct supervisor? Or, in the alternative, whether the employer is vicariously liable for the misconduct of the direct supervisor who participated in the process which ultimately culminated in petitioner's firing or the ultimate firing decision itself?

2. Whether the Court Appeals misapplied the standard of review dictated by the Federal Rule of Civil Procedure 15, 41, or 56?

3. Whether the Court of Appeals for District of Columbia Circuit applied a more onerous legal standard to petitioner's D.C. law based claims than governing legal precedent permit?

PARTEIS

The petitioner is Dr. Charlesworth Rae ("Rae"). The respondents are Children's National Medical Center ("CNMC"), Dr. Kurt Newman ("Newman"), Darryl Varnado ("Varnado"), Wilhemina DeShazo ("DeShazo"), Denise Cooper ("Cooper"), Zandra Russell ("Russell"), Dr. Ursula Tachie-Menson ("Tachie-Menson"), and Dr. Sarah Donegan ("Donegan"), (collectively, "respondents").

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dr. Charlesworth Rae (Rae), respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The importance of the questions presented in this writ is best conveyed by this Court's recognition in *Alexander* that a Title VII private litigant, as here, not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)(quotation marks and citations omitted). This Court has long recognized that employers may be liable, including strictly liable, for the conduct of direct supervisors, depending on the facts a given case.[1] The Court in *Thurston* recognized that the *McDonnell Douglas* burden-shifting test is inapplicable in cases where the plaintiff presents direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121(1985)(citations omitted). It also has recognized that the precise requirements of a prima facie case can vary depending on the context. *Id.*[2] In *White*, the Court made clear that context matters in determining employer liability for the retaliatory actions of immediate supervisors under Title VII. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57-59 (2006).[3] The Court has indicated that the *McDonnell Douglas* test was "never intended to be rigid, mechanized, or ritualist." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1992)(citing cases).[4] In S*uders*, the Court held that "it would be implausible to interpret agency principles to allow an employer to escape liability" for the misconduct of direct supervisors. *Pennsylvania State Police v.* S*uders*, 542 U.S., at 144 (citation omitted). The

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[1] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burlington Northern & Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 63-65 (2006)(citing cases); *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Pennsylvania State Police v. Suders*, 542 U.S.. 129, 143 (2004)(citing cases).

[2] *See Univ. of Tex. Southwesetern Med. v. Nassar*, 133 S.Ct. 2517, 2532 (2013).

[3] *See* footnote 92, *infra*; *Cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)(implying important considerations in deciding a case include ensuring the "coherency and consistency in the law" and "the realization of important objectives embodied in statutory law")(altered quotation marks).

[4] *Pompeo v. Figueroa*, 923 F.3d 1078, 1086-87 (D.C. Cir. 2019).

employer in *Suders* was held strictly liable for the misconduct of direct supervisors. *Id.* Here, the Court's review is warranted to determine whether the employer should be held strictly liable for the direct supervisor's misconduct. *Id.* Whether the lower courts abused their discretion by treating petitioner's discrimination claims waived for lack of argument under the Federal Rule of Civil Procedure 41(a)(2) presents a narrow but important issue in the Title VII context for this Court to resolve.[5] The lower courts failure to clearly delineate the status of petitioner's Second Amended Complaint raises an issue of abuse of discretion under Rule 15 for the Court to resolve.[6] Further, whether the courts below applied a more onerous legal standard to petitioner's District of Columbia law-based claims than governing law permits warrants the Court's review.[7] Thus, the questions presented provide the Court with an opportunity to clarify the proper procedural and legal standards to be applied by federal courts in determining employer liability in wrongful discharge cases in which the wrongdoer is a direct supervisor. Consequently, petitioner humbly prays for the Court's most favorable consideration.

OPINIONS AND ORDERS BELOW

The April 28, 2022 judgment of the U.S. Court of Appeals for the District of Columbia Circuit panel, which was not designated for publication, is set out at pages (pp.) 1a-2a of the Appendix (Pet. Ap.). The December 28, 2020 order and opinion of the district court, which was not reported, is set out at pp. 3a-52a. The March 28, 2018, Magistrate Judge Report and Recommendation, which was adopted in part by the district court, is set out at pp. 32a -51a. The

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[5] Pet. Ap. at 2a (Judgment); 15a & n. 7 (ECF 99 at 12 & n. 7); ECF No. 60 n. 1; ECF No. 58; Appellant's Brief (hereafter "Ap. Br.") at 10 & n. 58, 11 & n. 62, 12 & n. 67, 13; *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394 (1990); *Kokkoen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381 (1994); *cf. Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002).

[6] Pet. Ap. 3a-28a; *see id.* at 2a; Ap. Br. at 10 n. 58, 11, 12 & n. 67, 30; Fed. R. Civ. P. 15; *Foman v. Davis*, 371 U.S. 178, 182 (1962)(reiterating that "leave to amend shall be freely given when justice so requires")(altered quotation and quotation marks); *Mitchell v. Baldrige*, 759 F.2d 80, 82-83, 88-89 (D.C. Cir. 1985); *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972) (implying disposition of cases on "procedural technicality [ground is] particularly inappropriate in a Title VII statutory scheme"); *Haines v. Kerner*, 404 U.S. 519 (1972).

[7] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

district court's order granting motion for leave to proceed in *forma pauperis* is set out at p. 52a. The July 7, 2022 order of the Court of Appeals denying rehearing and rehearing en banc are set out at pp. 53a-54a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). Petitioner sued respondents under Title VII, § 1981, the District of Columbia Human Rights Act (DCHRA), and D.C. common law.[8] The U.S. District Court for the District of Columbia had original jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367.[9] On December 28, 2020, the district court entered summary judgment in favor of respondents, dispensing of all of the asserted claims.[10] Petitioner filed a timely Notice of Appeal with the U.S. Court of Appeals for the District of Columbia Circuit on January 19, 2021.[11] He also filed a motion to proceed on appeal in forma pauperis, which was granted.[12] The Court of Appeals for the D.C. Circuit had jurisdiction under 28 U.S.C. § 1291. Petitioner timely filed a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis* by hand delivery on October 5, 2022. *See, e.g.*, Sup. Ct. R. 13.1, 29.2, 33.2, 39.

RELEVANT STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are already part of the appellate record regarding Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended (hereafter, "Title VII"), 42 U.S.C. § 2000e *et seq.*, 42 U.S.C.A. § 1981, 105 Stat. 1071 (1991), and DCHRA, as amended, Title 2

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[8] Appellees' Appendix (hereafter "Appell. Apx") D.A. 21-72 (ECF 1, Compl.); *id.* D.A. 173-86 (ECF. No. 22-1, Am. Compl.); Appellant's Addendum in Lieu of Joint Appendix (hereafter "Appel. Add") at AA 292-316 (ECF 98 at 1-25, 2nd. Am. Compl.).
[9] *See* Pet. Ap. 18a (ECF 99 at 15); *see also* LCvR 72.2; 28 U.S.C. § 636 (b)(1).
[10] Pet. Ap. at 3a (ECF No. 100)(Order); *id.* at 4a-31a (ECF No. 99)(Opinion); *id.* at 32a-51a (Appendix A, ECF No. 71 at 1-21, R&R).
[11] Appell. Apx D.A. 813 (ECF No. 101).
[12] Pet. Ap. at 52a.

Chapter 14 § 2-1401-01 *et seq.*[13] Statutory provisions relating to the practice of pharmacy is set forth in Pet.'s Ap. at pp. 55a-63a.[14]

STATEMENT OF THE CASE

Petitioner filed a complaint *pro se* in the U.S. District Court for the District of Columbia to start this suit on May 15, 2015.[15] He is a member of a protected class on account of his race (black), sex (male), or national origin/ethnicity (Antiguan).[16] Between February 2010 and December 2014, he worked in CNMC's Investigational Drug Services (IDS) pharmacy as a research pharmacist.[17] He was qualified for the IDS pharmacist job and his work performance remained satisfactory up until the time of the firing decision on December 4, 2014.[18] During the time Donegan supervised him between September 2013 and termination, their relationship was contentious.[19] In 2013, she falsely accused him of "bullying" her after he complained of her

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[13] Appellees' Addendum of Pertinent Statutes at A.1 to A.26.

[14] *See* Appell. Apx D.A. 549 (ECF No. 60, Plaintiff's Mem. in Opp'n to Defs.' SJM, at 3); *id.* D.A. 554, 565 (ECF No. 60 at 8, 19); Pet. Ap. at 55a- 63a (D.C. Code §§ 3-1210.01, 3-1210.02, 3-1205.01, 3-1210.07, 12-301 *et seq.*).

[15] Appell. Apx D.A. 21-72 (ECF No. 1, Compl.); *see id.* at D.A. 173-86 (ECF 22-1, Am. Compl.); Appel. Add at AA 292-316 (ECF No. 98 at 1-25, 2nd Am. Compl.); *id.* at AA 317-374 (ECF No. 96 at 3-58, Rae decl. II); Ap. Br. at 29-31.

[16] Appell. Apx. D.A. 23(Compl. ¶¶ 10); Appel. Add at AA 145 (Donegan dep. at 82-83, ECF No. 87-1 at 45)(confessing that she asked Rae where he was from "out of curiosity); *id.* at AA 212-17 (Varnado dep. at 6-28, ECF 87-1 at 112-17)(testifying that Rae was "rude" and spoke in a "very aggressive tone"); *id.* at AA 275 (Tachie-Menson dep. at 151, ECF No. 88 at 61)(testifying that her interactions with Petitioner were "collegial and pleasant"); Ap. Br. at 21 & n. 111, 22-23.

[17] Appell. Apx D.A. 24, 53-54 (Compl. at ¶¶ 14, 160-62); *id.* D.A. 548 (ECF 60 at 2); *id.* D.A. 456-57 (Defs.' Ex. 37, ECF 59-39)(Termination Letter).

[18] ECF No. 79-4 at 1-6; Appell. Apx D.A. 23-24 (Compl. ¶¶ 11-13, 15); *id.* at D.A. 549, 558 (Pl.'s Mem. Opp'n to Defs.' SJM, ECF 60 at 3, 12); *id.* at D.A. 587-605 (Pl.'s Exs. 2-6, ECF Nos. 60-3 to 60-7); *id.* at D.A. 387-392 (Defendants' Exhibit to SJM, Defs.' Ex.18, ECF No. 59-20); Appel. Add at AA 86 (ECF No. 86-1 at 49); *id.* at AA 94 (ECF No. 86-1 at 57); *id.* at AA 101-102 (ECF No. 87-1 at 1-2); *see id.* at AA (Dr. Max Coppes noting "must have competent, qualified individual in IDS to assure accuracy of studies & documentation"); *id.* at AA 113 (ECF No. 87-1 at 13); *id.* at AA 107 (ECF No. 87-1 at 7)(On March 7, 2013, Compliance Manager, Molly Timko, updated petitioner on her efforts to follow up the "important concerns" he had "raised regarding the process of dispensing investigational drugs"); *id* at AA 108-109 (ECF 87-1 at 8-9)(On October 24, 2011, a member of the CEO/President, Dr. Kurt Newman, consulting team reached out to elicit petitioner's "insights about the Pharmacy Research area.").

[19] Appell. Apx D.A. 550-60(ECF 60 at 4-15, Pl.'s Mem. Opp'n to Defs.' SJM); *id.* at D.A. 44, 45, 52, 55 (Compl. at ¶¶ 121, 124, 152, 165-168)(EEOC discrimination charges); *id.*at DA 450 (Defs.' Ex. 33, ECF No. 59-35); *id.* at D.A. 393-394 (Defs.' Exs. 19 & 20); *id.* at 397-399 (Defs.' Exs. 23 & 24); *id.* at D.A. 400-402 (Defs.' Ex. 24); *id.* at D.A. 458 (Defs.' Ex. 38, ECF No. 59-40); *id* at D.A. 449 (Defs.' Ex. 32); *id.* at D.A. 703-705 (Pl.'s Exs. 13, 14 & 15); Appel. Add at AA 32-37 (ECF No. 85 at 32-37); *see also* Appell. Apx D.A. at 651 (Pl.'s Ex. 8); *id.* at D.A. 662-663 (Pl.'s Ex.10, ECF 60-11)(same as Pet. Ap. at, *supra*, at 64a-65a).

unlawful practice of pharmacy;[20] she reprimanded him for not following her instructions regarding the RAD001 study;[21] she refused his requests to have a witness present at one-on-one closed doors meetings with her;[22] and her negative input in his 2013 performance evaluation resulted in a significant lowering of his overall rating from "exceeds expectations" in 2011 and 2012 to a "meet expectations" rating in 2013.[23] In 2014, she falsely accused him of "raising his voice" at her during a meeting even though he was merely speaking in his native Antiguan tone of voice;[24] he experienced two episodes of precipitous life-threatening elevated blood pressure

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[20] Pet. Ap. at 8a (ECF 99 at 5)(noting that Donegan lacked a DC pharmacist license); *id.* at 9a, 24a-24a (ECF 99 at 6, 21-22); *id.* at 55a-63a (D.C. pharmacy laws); *id.* at 64a-65a (Pl.'s Ex. 10, ECF No. 60-11); *id.* at 66a (Defs. Ex. 15, ECF No. 59-17); Appell. Apx D.A. 379 (Defs.' Exs. 14, 16-17); *id.* D.A. 35 (Compl. ¶¶ 83-89); *id.* D.A.36 (Compl. ¶ 91); *id.* D.A. 577-578 (Pl.'s Ex. 1, ECF No. 60-2, Rae decl. at ¶¶ 8-12); Appel. Add at AA 336 (ECF. No. 96 at 22, Rae decl. II at ¶ 98); *id.* at AA 281(Tachie-Menson dep. at 174-76, ECF No. 88 at 67)(testifying petitioner complained to her that Donegan had falsely accused him of bullying her); *id.* at 336 & 338 (ECF No. 86 at 22 & 24, Rae decl. II at ¶¶ 98 & 105); *id.* at AA at 146 (Donegan dep. at 86-88, ECF No. 87-1 at 46)(conceding Tachie-Menson informed her of the anonymous complaint that was lodged with Corporate Compliance against her for engaging in the unlawful practice of pharmacy); *id.* at AA 130 & 203 (Donegan dep. at 21-23, 314-316, ECF No. 87-1 at 103)(confessing she was unlicensed to practice as a pharmacist in D.C. in 2013 and early 2014); *id.* at AA 255 (Tachie-Menson dep. at 69-71, ECF No. 88 at 41)(testifying Donegan was unlicensed to practice as pharmacist in D.C. in 2013 and early 2014); Ap. Br. at 5, 24-26; Appellees' Brief (hereafter "Appell. Br.") at 4-9, 26.

[21] Pet. Ap. at 7a-12a; Appell. Apx. D.A. 385-386 (Defs.' Ex. 17)(Dec. 13, 2013 reprimand); *id.* D.A. 36-37 (Compl. ¶¶ 92-94); Appel. Add. at AA 163-64 (Donegan dep. at 153-57, ECF No. 87-1 at 63-64); *id.* at AA 103 (ECF No. 87-1 at 3)(reflecting Donegan's handwritten note in 2013 asking Petitioner to provide copies of the law or policy which support the IDS pharmacy practice of requiring two pharmacists' signatures on dispensed prescriptions.); Appell. Apx D.A. 385-386 (Defs' Ex. 17, Dec. 13, 2013 reprimand); *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 147 (2000)(recognizing the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt.")(citation omitted).

[22] Appell. Apx. D.A. 385-386 (Defs.' Ex. 17, *supra*); *id.* D.A. 381 (Defs.' Ex. 16); *id.* D.A. 398-399 (Defs.'Ex. 23); *id.* D.A. 400 (Defs.' Ex. 24)(On August 25, 2014, Donegan threatened to reprimand petitioner for insubordination if he did not show up for a meeting with her and further indicated that she "will speak with HR about implementing some mandatory action" if petitioner "continued to exert [] concerns" about his "discomfort and anguish" in meeting with her for one-on-one closed door meetings).

[23] *See* Appell. Apx D.A. 560 (ECF 60 at 14 & n. 2); *id.* D.A. 595-600 (Pl.'s Ex. 5); *id.* D.A. 601-605 (Pl.'s Ex. 6, ECF No. 60-7)(Pl.'s personal copy of the unofficial 2012 performance evaluation in lieu of respondents' failure to produce a copy of the propounded official evaluation); *id.* D.A.387-392 (Defs.' Ex. 18)(2013 evaluation); *id.* D.A. 251(ECF. 59-1 at 37); Ap. Br. at 14, 16; *see* Appel. Add at 84 (ECF No. 86-1 at 47)(Tachie-Menson's email acknowledging that the 2012 evaluation was conducted by Jefferson Pickard on January 4, 2013); *id.* at AA 182 (Donegan's dep. at 229-32, ECF No. 87-1 at 82); ECF No. 79-2 at 3; Appell. Apx., *supra*, at D.A. 560 (Pl.'s Memo. in Opp'n to SJM, ECF No. 60 at 14 n. 2); Appell. Apx. D.A. 35-39 (Compl. at ¶¶ *e.g.*, 87, 88, 89, 90, 91).

[24] Pet. Ap. at. 8a; Appell. Apx D.A. (Defs.' Exs. 19 & 20); *id.* at D.A. 579-80 (Pl.'s Ex. 1, ECF No. 60-2, Rae decl. at ¶¶ 17-20); Appel. Add at AA 181-82 (Donegan dep. at 227-31, ECF No. 87-1 at 81-82); *id.* at 144-45 (Donegan dep. at 77-83, ECF No. 87-1 at 44-45); *id.* at AA 330 & 338 (ECF No. 96 at 16 & 24, Rae decl. II at ¶¶ 77 & 105); Appell. Apx. D.A. 393 (Defs.' Ex. 19, June 30, 2014, reprimand); Ap. Br. at 6 & n. 35, 7; *see* Appel. Add at AA 309 (ECF No. 98 at 18, 2nd. Am. Compl. ¶ 63)(citing Tachie-Menson dep. at 151); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

immediately after meetings with her on July 24 and October 28;[25] she arbitrarily and unreasonably refused to grant him permission to seek medical evaluation in the Occupational Health Department (OHD) on October 28;[26] she coerced him into signing off as a Sub-investigator (SI) for the Dysport (Ipsen) study even though his role in the study was that of an IDS pharmacist and not a SI;[27] she assaulted him, in her words, "as a point of reinforcement" on October 13;[28] she ordered him *alone* to refrain from copying his private email, a day after he lodged an internal complaint of continuing "harassment- discrimination" and "acts of retaliation" on July 8, which occurred nine days after he filed his June 30 Equal Employment Opportunity Commission (EEOC) discrimination charge.[29] Also, she and Russell accused him of

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[25] Appel. Add. at AA 32-37 (ECF 85 at 32-37); *id.* at AA 268 & 284 (Tachie-Menson dep. at 123-124, 187, ECF No. 88 at 54 & 70); Appell. Apx. D.A. 47, 51 (Compl. ¶¶ 131, 147-150); *id.* at D.A. 396 (Defs.' Ex. 21, showing that on July 7, 2014, Rebecca Cady, an attorney in Legal, sent Rae a responsive email instructing him to "follow the process"); *id.* at D.A. 448 (Defs.' Ex. 32)(On October 23, 2014, Director of Security, Keith McGlen, sent an email to Cooper, DeShazo, Tachie-Menson, Russell, and others, to inform them Rae had filed a police report against Donegan); *see* id. D.A. 290 - 291 (Defs.' Ex. 1, Employee Handbook, e.g., Harassment/Discrimination, Sexual Harassment, Violence Free policies/procedures); *id.* D.A. 278 (Medical Examinations Policy); Pet. Ap. at 7a – 12a (ECF No. 99 at 4 - 9).

[26] Appel. Add at AA 179-180, 183, 202, 206 (Donegan dep. at 217-224, 233-236, 310-311, 327-28, ECF No. 87-1 at 79-80, 83, 102, 106); Appell. Apx D.A. 398, 450 (Defs.' Exs. 23 & 33, ECF Nos. 59-25 at 1 & 59-35); Pet. Ap. At 10a & n. 4 (ECF No. 99 at 7 & n. 4)(citing Rae decl. ¶¶ 21, 28); Appel. Add at AA 268, 284-85 (Tachie-Menson dep. at 123-124, 186-189, ECF No. 88 at 54, 70-71); *id.* at AA 32-37 (ECF 85 at 32-37); Appell. Apx. D.A. 703 (Pl.'s Ex. 13)(On November 3, 2014, petitioner emailed Varnado, with copies to Deshazo, Cooper, Russell, Tachie-Menson, and his private email to inform them of his October 28, 2014, Occupational Health Department (OHD) visit, and to complain that Donegan's escalation of hostility was severely impacting his health and ability to perform his work - and mentioned she refused to grant his request to visit OHD to get evaluated); Appelll. Apx. D.A. 704 (Pl.'s Ex. 14)(On November 3, 2014, Rae sent email to Varnado, with copies to Keith McGlen, Mark Virachittevin, Denise Cooper, cerae@msn.com - expressing his outrage over the investigative findings of his complaint of assault against Donegan ... "Accordingly, I believe her touching me on October 2014, was a clear violation of the Harassment/Discrimination Policy); Appell. Apx. D.A. 289 (Corporate Compliance Policy); *see* Pet. Ap. at 9a-12a, 25a-26a, 30a (ECF No. 99 at 6-9, 22-23, 27).

[27] Pet. Ap. at 8a-10a (ECF No. 99 at 5-7); Appel. Add. at AA 12 (ECF No. 85 at 12)(Pl.'s signed COI form); *id.* at AA 273 (Tachie-Menson dep. 143-144, ECF No. 88 at 59)(conceding that employees can escalate their concerns up the chain of command); Appel. Apx D.A. 710 (Pl.'s Ex. 17, ECF No. 60-18 at 4)(On September 24, 2014, Donegan acknowledging that IDS pharmacists "are not considered [] sub-investigator[s]"); Ap. Br. at 20 & n. 107.

[28] Appell. Apx D.A. 443-44 (Defs.' Ex. 29); Appel. Add. at AA 187-188 (Donegan dep. at 249-254, ECF No. 87-1 at 87-88); *id.* at AA 145 (Donegan dep. at 82-83)(conceding she asked Petitioner where he was from "out of curiosity"); *id.* at AA 144 (Donegan dep. at 77-80, ECF No. 87-1 at 44 (conceding that she assigned Choi additional responsibilities because of his "aptitude and knowledge and skill set," which she did not offer to Petitioner, even though they had the same job); Appell. Apx D.A. 47-49 (Compl. ¶¶ 131-142); Pet. Ap. at 10a (ECF 99 at 7); Ap. Br. 3, 9, 22-23, 28-29; *see id.* at AA 32-37 (ECF 85 at 32-37).

[29] Appell. Apx D.A. 432 (Defs.' Ex. 27, ECF 59-29 at 5); *id.*, *generally,* at D.A. 400-39 (ECF 59-29 at 1-12); *id.* D.A. 458 (Defs.' Ex. 38, ECF No. 59-40)(Petitioner complained of discrimination on July 8, 2014); Appel. Add at

insubordination for "refusing" to attend meetings with them in HR on July 3 and December 3, respectively, even though he was the only one who did show up at the appointed time and place for both meetings.[30] He filed a second EEOC charge on November 25 due to the deliberate indifference of CNMC officials in addressing his concerns.[31] She publicly ridiculed him on December 2.[32] She and the other decisionmakers wantonly disregarded his email request to cancel the 3 p.m. mandatory meeting in HR for health reasons on December 3, despite the fact that he used the available internal mechanism to escalate his health concerns up the "chain of command" pursuant to CNMC's corporate compliance policy and pharmacy practice.[33] Varnado suspended him pending an investigation on December 3 and CNMC made the decision to fire

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AA 218-220 (Varnado dep. at 31-38, ECF No. 87-1 at 118-120); *see* Pet. Ap. at 8a-9a (ECF No. 99 at 5-6)(citing Defs.' Ex . 24)(quotation omitted); *id.* at 17a n. 9, 24a-25a (ECF 99 at 14 n. 9, 21-22); Ap. Br. at 7-8, 9 n. 45, 19-20; Appell. Apx D.A. 39-45 (Compl. ¶¶ 102-124); Appell. Apx. at D.A. 396 (Defs.' Ex. 21)(On July 7, 2014, Rebecca Cady in Legal emailed petitioner instructing him to "follow the process"); *see also* Appel. Add. at AA 87 (ECF No. 86-1 at 50)(On August 15, 2014, DeShazo emailed Tachie-Menson and Russell, with copy to Donegan, instructing them to bring all files on Rae to meeting, including emails); *id.* at AA 275 (ECF 88 at 61, Tachie-Menson dep. at 151)(testifying that her interactions with Petitioner were "collegial and pleasant.").

[30] Pet. Ap. at 8a-9a (ECF No. 99 at 6)(citing, e.g., Defs.' Ex. 20); *id.* at 10a & n. 4, 15a & n. 7, 25a, 27a, 29a & n. 11, 30a (Op., ECF 99)(citing Russell Aff. ¶16); Appell. Apx. D.A. 46-52(Compl. ¶¶ 126-152); *id.* at D.A. 394-395 (Defs.' Ex. 20); *id.* at 459 (Defs.' Ex. 39, ECF 59-41)(On July 3, 2014, Petitioner emailed Russell informing her of a posted note on HR's reception door stating HR was closed for the day.); Appell. Apx D.A. 451-54 (Defs.' Ex. 34 & 35); *id.* at D.A. 536-38 (Russell Aff. ¶¶ 5-9, 11-20); Appel. Add. at AA 581 (Pl.'s Ex. 1, ECF No. 60-2, Rae decl. ¶¶ 23-24); Ap. Br. at 7; *see also* Appel. Add. at AA 212-13, 217, 223 (Varnado dep. at 6-12, 25-28, 50-51, ECF No. 87-1 at 112-13, 117, 123); ECF No. 79-2 at 1-4.

[31] Ap. Br. at 7-9; Appel. Add at AA 32-37 (ECF No. 85 at 32-37); *see* Appel. Add. at 144-145, 149-150, 181-182, 187-188 (Donegan dep. at 77-83, 99-104, 227-231, 249-254, ECF No. 87-1 at 44-45, 49-50, 81-82, 87-88); *id.* at AA 212-217 (Varnado dep. at 6-26); *id.* at AA 273 (Tachie-Menson dep. at 143-144, ECF No. 88 at 59)(testifying that employees can escalate complaints up the "chain of command"); *id.* at AA 322-24, 330-31, 336, 338, 347, 369-70 (Rae decl. II, *supra*, at ¶¶ 16, 18-24, 26-37, 44-46, 77, 79, 98, 105, 138, 140, 221-32, 233-34, ECF No. 96 at 8-10, 16-17, 22, 24, 33, 55-56).

[32] Appell. Apx. D.A. 52 (Compl. ¶¶ 152-154); *id.* at DA705 (Pl.'s Ex. 15, ECF No. 60-16); *see id.* at D.A. 711 (Pl.'s Ex. 18)(December 2 mandatory meeting Outlook invitation); D.A. 53 (Compl. ¶¶ 155-159).

[33] Pet. Ap. at 23a-26a, 29a & n. 11, 30a-31a (ECF No. 99 at 20-23, 26, 27-28); Appell. Apx. D.A. 451-452 (Defs.' Ex. 34)(Varnado's Dec. 5, 2014 email); *id.* D.A. 453-454 (Defs.' Ex. 37)(Varnado's Dec. 8, 2014, email); Appel. Add. at AA 284-285 (Tachie-Menson dep. at 188-189, ECF No. 88 at 70-71)(testifying that she sought HR counsel on Petitioner's December 3, 2014, email); Appell. Apx D.A. 450 (Defs.' Ex. 33); *id.* at D.A. 289 (Corporate Compliance policy, *supra*); *id.* at AA 273 (Tachie-Menson dep. at 143-144, ECF No. 88 at 59)(stating that employees can escalate their concerns up the "chain of command"); *see Carter-Obayuwana v. Howard University*, 764 A.2d 779, 791 (D.C. 2001)(finding that "plaintiff's memorandum constituted protected 'opposition' on her part to alleged discriminatory practices.")(citation omitted); *see also* footnote 105, *infra*.

him the next day without adhering to its progressive discipline policy.[34] Varnado testified that he had huddle discussions with the decisionmakers about firing petitioner, but his testimony directly conflicts with Tachie-Menson's testimony, since she testified that she became aware of the firing decision *after* it was made.[35] Varnado also emailed petitioner on December 5 and 8 to inquire about the events of December 3, *after* CNMC made the firing decision.[36] He provided false testimony that petitioner was on a Performance Improvement Plan (PIP) for poor performance when he was fired too.[37] Although he conceded under oath that Russell or Cooper should have investigated petitioner's July 8 complaint of discrimination and that EEOC charges are handled only sometimes by HR, Russell conveniently failed to mention petitioner's July 8 complaint of discrimination, or the specific date CNMC first received notice of the EEOC charges, in her supporting affidavit, despite the fact that she participated in the investigation which culminated

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[34] Pet. Ap. at 8a-9a, 10a & n. 7, 11a-12a, 24a-31a (ECF 99 at 5-9, 21-28); Ap. Br. at 3 & n. 11, 7 & n. 39, 8 & nn. 43 & 44, 9 & n. 45, 14-15, 19-20; Appell. Apx D.A. 231-239 (Defs.' Mem. in Supp. SJM, ECF 59-1 a 17-25); *id.* at D.A. 555-57, 557, 560-64, 566-71 (Pl.'s Mem. Opp'n, ECF No. 60 at 9-11, 14-18, 20-25); Appell. Apx. D.A. 536-38 (Defs.' Ex. 46, Russell Aff. ¶¶ 8-11-15-20; *see also* Appel. Add AA at 308-309 (2nd Am. Compl. ¶¶ 60-64, ECF 98 at 17-18); Appell. Apx. D.A. 299 (Immediate Termination Policy); Appel. Add at AA 196, 208 (Donegan dep. at 286-87, 334, ECF 87-1 at 96 & 108); *id.* at AA 212-13, 218, 223 (Varnado dep. at 6-12, 29-32, 49-52, ECF 87-1 at 112-13, 118, 123); *see also* Pl.'s Ex 1, Rae decl. at ¶¶ 31, 34; footnote 31, *supra*.

[35] Appel. Add AA 212-16, 217-18, 222-23 (Varnado dep. at 6-16, 28-29, 47-52, ECF 87-1 at 112-14, 117-18, 122-23); Appel. Add. at AA 273-74, 283, 283-85 (Tachie-Menson dep. at 144-145, 181-189, ECF No. 59-60, 69-81)(testifying she learned of petitioner's firing after the decision was made.); *see also* Appel. Add AA at 308-309 (2nd Am. Compl. ¶¶ 60-64, ECF 98 at 17-18); Pet. Ap. at 13a, 15a, 17a & n. 8, 23a-29a, 31a (ECF 99 at 10, 12, 14 n. 8, 20-26, 28).

[36] Appell. Apx D.A. 451-54 (Defs.' Ex. 34 & 35); *see* footnote 35, *supra*.

[37] Appel. Add at AA 212-13, 223 (ECF 87-1 at 112-13, 123, Varnado dep. at 6-12, 49-52); *see* footnote 23, *supra*; Appell. Apx D.A. 277 (Performance Evaluation policy); ECF No. 79-3 at 3-4; *id.* at D.A. 560 (ECF 60 at 14 n. 2); Ap. Br. at 15, 16 & nn. 82-84; *EEOC v. Union Independiente de la Autoridad*, 279 F.3d 49, 56 (1st Cir. 2002); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

in the termination, and she also authored the termination letter.[38] The suit was filed pursuant to an EEOC right to sue letter.[39]

Respondents filed a 12(b)(6) motion to dismiss the complaint.[40] The District Court granted that motion in part and denied it in part.[41] The court also granted petitioner's oral motion for leave to amend complaint.[42] The parties engaged in discovery after petitioner filed the amended complaint.[43] During discovery, petitioner was briefly represented by counsel.[44] The court later randomly assigned the case to Magistrate Judge Deborah Robinson for management up to but excluding trial The court granted Newman's motion for a protective order against deposition;[45] and a motion for judgment on the pleadings with respect Newman and DeShazo.[46] It also dismissed Counts V, VII, and Denise Cooper as a defendant under Rule 41(a)(2).[47] It denied petitioner's oral motion to stay prosecution after granting his counsel's motion to voluntary withdraw her appearance.[48]

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[38] Appel. Add at AA 217-20 (Varnado dep. at 32-38, ECF No. 87-1 at 117-120); Appell. Apx D.A. 536-38 (Russell Aff.); Appel. Add. at AA 206 (Donegan dep. at 327-28, ECF No. 87-1 at 106); Appel. Add. at AA 273-74, 283, 284-285 (Tachie-Menson dep. at 144-145, 181, 188-189, ECF No. 59-60, 69, 70-71)(testifying she learned of petitioner's firing after the decision was made.); footnote 17, *supra*; *see also* Appel. Add AA at 308-309 (2nd Am. Compl. ¶¶ 60-64, ECF 98 at 17-18)]; Appell. Apx. D.A. 527-29 (Cooper Aff.); Pet. Ap. at 19a – 29a (ECF 99 at 16- 26); Ap. Br. at 15-17.

[39] Appell. Apx D.A. 21-70 (ECF 1, Compl.).

[40] Pet. Ap. at 12a- 17a (ECF No. 99 at 9-14); Ap. Br. at 9-11; *see* ECF No. 20 (Ct. Trans. of status conference for 03/24/2016); *see also* Appel. Add at AA (ECF No. 98, 2nd Am. Compl.); Appell. Apx D.A. 173-86 (ECF 22-1, Am. Compl.);

[41] ECF No. 18 (03/25/2016 Order); *see* footnote 41, *supra*; Pet. Ap. at 12a-13a (ECF 99 at 9-10).

[42] *See* footnote 41, *supra*.

[43] Appell. Apx D.A. 173-86 (ECF 22-1, Am. Compl.); *id.* at D.A. 187-96 (Defs.' Answer, ECF No. 25 at 1-10); *see* Ap. Br. at 9-11; footnote 41, *supra*.

[44] Pet. Ap. at 12a-13a. *See* Appell. Apx. D.A. 10 (ECF No. 34); 03/15/2017 Minute Order; 05/24/2017 Minute Order; 06/06/2017 Minute Order; 10/19/201 Minute Order; Fed. R. Civ. P. 72; 28 U.S.C. § 636 (b)(1).

[45] (05/24/2017 Minute Order; ECF No. 44.

[46] 08/01/2017 Minute Order; ECF No. 43.

[47] Pet. Ap. 2a (Panel's Judg. at 2); *id.* at 15a & n. 7 (ECF 99 at 12); *id.* at 38a & n. 5 (R&R); 03/08/2018 Minute Order (citing ECF No. 60 at 1, n.1); Ap. Br. 10 & n. 58, 13, 23, 31 (Rule 41(a)(2) [sic]); *see* Appell. Apx D.A. (ECF 60 at 1 n. 1); ECF Nos. 55 & 58; Fed. R. Civ. P. 41(a)(2) & 72; 28 U.S.C. § 636 (b)(1).

[48] 11/02/2017 Minute Order; 10/19/2017 Minute Order; *see* Pet. Ap. at 14a n. 6.

The magistrate judge issued a Report and Recommendation (R&R) proposing the dismissal of all of the asserted claims (Counts I-VII) on the merits.[49] Petitioner filed timely objections.[50] He objected on the ground that he had not been afforded a fair and full opportunity to adduce evidence to support his claims and defenses.[51] Of note, respondents deposed him on January 19, 2017, but suppressed critical propounded documentary evidence for the entire court-ordered discovery period.[52] He objected to the magistrate judge's: conclusion that his proffered evidence amounts to bare speculation;[53] application of a more onerous causation standard to the common law claims;[54] finding that he failed to articulate any "identifiable policy" which was violated to support the wrongful discharge in violation of public policy claims;[55] failure to credit his rebuttal or pretext evidence;[56] failure to consider respondents' bad faith in ending his employment without following the Employee Handbook;[57] and conclusion that no genuine issue of material fact exist for trial, since respondents' "undisputed facts" are amenable to more than one plausible interpretation.[58] Also, petitioner submitted the following for consideration: (1) motion for reconsideration to set aside the R&R; (2) supplemental discovery documentary evidence; (3) declaration (Rae Declaration II, Rae decl. II); and a motion for leave to file an amended

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[49] Pet. Ap. at 32a-51a

[50] Appel. Ap. D.A. 744-762 (ECF No. 78). *See also* ECF Nos. 85; 86; 87; 91; 93; 96; 98.

[51] Appell. Apx D.A. 759 (ECF 78 at 16, Pl.'s Obj.); Pet. Ap. at 30a & n. 12 (ECF 99 at 27 n. 12); Appel. Add at AA 3-4 (ECF No. 85 at 3-4).

[52] Appell Apx D.A. 652-661 (Pl.'s Ex. 9, Extract of Petitioner's deposition); *id.* at D.A. 318-354 (Defs.' Ex. 6, Extract of Petitioner's deposition); *id.* at D.A.547 (Pl.'s Mem. Opp'n to Defs.' SJM, ECF No. 60 at 1 n.1); ECF No. 54 (06/16/2017 Scheduling Order); ECF No. 55 (Joint Status Report); ECF No. 58 (Second Joint Status Report); Ap. Br. at 10 & n. 58, 13, 23, 31 (Rule 41(a)(2) [sic]). *See* ECF No. 79-2 at 1-4; Pet. Ap. at 15a & n. 7.

[53] Appell. Apx D.A. 755 (ECF 78 at 12); *id* at D.A. 747 (ECF 78 at 4).

[54] Appell. Apx D.A. 744-745 (ECF 78 at 1-2)(citing *Furline v. Morrison*, 953 A. 2d 344, 353 (D.C. 2008)(stating that "the burden of persuasion 'remains at all times' with the plaintiff employee to prove that the employer took adverse action for a discriminatory or retaliatory reason in whole or in part)"); *id.* at D.A. 759 & 760 (ECF 78 at 16); (citing, e.g., *Staub v. Proctor Hospital*, 131 S.Ct. 1186, 1194 (2011)(quotation omitted); *CBOCS West Inc. v. Humphries*, 532 U.S. 442 (2008)(quotation omitted)).

[55] Appell. Apx. D.A. 745-749 (ECF No. 78 at 2-6).

[56] Appell. Apx D.A. 749-758 (ECF No. 78 at 6-15); *see* Appel. Add at AA 6-8, 12, 32-37 (ECF No. 85 at 6-8, 12, 32-37)(Pl.'s Reply to Defs.' response to Pl.'s Objections to R&R).

[57] Appell. Apx D.A. 760 (ECF 78 at 17).

[58] Appell. Apx D.A. 760-61 (ECF 78 at 17-18; *see id.* at D.A. 746-47 (ECF 78 at 3-4).

complaint. *See* Fed. R. Civ. P. 15, 41, and 72; 28 U.S.C. § 636 (b)(1).[59] The 2nd Am. Compl. recites all of the claims asserted in the first amended complaint plus the claims of assault and discriminatory hostile or harassing work environment (as asserted in the original complaint).[60]

On December 28, 2020, the District Court entered an order and a memorandum opinion adopting the R&R in part.[61] The court held that respondents were entitled to summary judgment because petitioner provided insufficient evidence to support his claims; and that no reasonable jury could find that he satisfied each of the elements of any of the claims presented.[62] It held that the temporal proximity between petitioner's formal EEOC discrimination charges and his firing alone was insufficient to withstand summary judgment regarding the retaliation claims.[63] It also ruled that he provided no "positive" evidence to support any claim to defeat the presumptive validity of CNMC's legitimate, nondiscriminatory, reasons for firing him.[64] Petitioner appealed.[65]

After the parties completed the briefing period, the Court of Appeals' panel issued its judgment denying petitioner's request for oral hearing; affirming the district court order; and denying petitioner's motions for rehearing and rehearing en banc.[66] Petitioner argued that the summary judgment order was premature because it is plausible that the district court would have

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[59] Petitioner contends that the record is unclear on the disposition of the leave to amend complaint. *See* Order 11/30/2020 (ECF 97); 12/02/2020 (ECF 98); ECF Nos. 91, 93; 96; Appel. Add at AA 292-316 (2nd Am. Compl., ECF No. 98); *id.* at AA 317-374 (Rae decl. II); *see* Ap. Br. at 11, 23; Pet. Ap. at 2a.

[60] Order 12/02/2020 (ECF 98); Appell. Apx. D.A. 173-86 (Am. Compl.); *id.* D.A. 21-70 (Compl.); *id.* D.A. 292-316 (2nd Am. Compl., ECF 98 at 1-25)(Like the 1st Am. Compl., the 2nd Am. Compl. incorporates by reference ¶¶ 1-170 of the Compl.); *see* ECF Nos. 91, 93, 96; Appel. Add at AA 317-374 (Rae decl. II, ECF 96 at 3-58); Ap. Br. at 10 n. 58, 11, 12 & n. 67, 13 & nn. 68 and 69, 31; Pet. Ap. at 2a; footnote 53, *supra*.

[61] Pet. Ap. at 3a-31a (ECF Nos. 99 and 100); *id.* at 32a-51a (ECF 99 at 29- 49)(Appendix A, R&R).

[62] Pet. Ap. at, *e.g.*, 6a-7a, 31a (ECF 99 at 3-4, 28).

[63] Pet. Ap. at 1a-2a, 53a-54a; *id.* at 7a, 15a-16a, 27a-31a. (ECF No. 4, 12-13, 24-28); *id.* at 64a (Pl.'s Exhibit 10); *id.* at 55a-63a (D.C. Pharmacy Laws); Appell. Apx D.A. 577-78 (Pl.' Exhibit 1, ECF No. 60-2, Rae decl. ¶¶ 6-14); *see Hendelberg v. Goldstein*, 211 F.2d 428, 431 (D.C. Cir. 1954); *cf. Willliams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980).

[64] *See* footnote 146, *infra*.

[65] ECF No. 101.

[66] Pet. Ap. 1a-2a; *id.* at 53a-54a; Ap. Br. at 11, 12-13, 23, 31.

arrived at a different substantive outcome in his favor had it considered the totality of the evidence in the light most favorable to him.[67] He argued that the district court erroneously applied the *McDonnell Douglas* test to the statutory claims on account of respondents' reliance on subjective criteria in the termination process, which lacked the particularized, careful, systematic assessments of credibility one would reasonably expect in a termination action that is capable of adversely impacting an employee's reputation, health, safety, and the livelihood of himself and family members.[68] He also argued that: (1) the operative complaint for review is the Second Amended Complaint, (2) the district court erred in treating his discrimination claims waived under Rule 41(a)(2);[69] (3) CNMC's hiring of Donegan without license, instead of promoting him, to fill the vacant IDS pharmacy manager job evidenced an unlawful employment practice to materially support his wrongful discharge discrimination and retaliation claims;[70] (4) the district court improperly weighed the evidence ' or failed to draw all reasonable inferences in his favor;[71] and (5) the combination of CNMC's predatory discovery conduct, Varnado's false testimony that he was on a PIP at the time he was fired, CNMC's non-accidental destruction of the propounded 2012 and 2014 evaluations suffice to support an adverse inference of intentional discrimination or retaliation.[72] He even highlighted the fact that Tachie-Menson's email dated

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[67] Ap. Br. at 12-13 . S*ee also* Appell. Apx, at D.A. 761 (citing *Hamilton v. Geithner*, 666 F.3d 1344, 1351)(D.C. Cor. 2012)(noting that, to avoid summary judgment, a plaintiff need not submit evidence "over and above" that necessary to rebut the employer's stated reason.)(quotation and citation omitted).

[68] Ap. Br. at 13, 14 & n. 75, 15-21; *see* Appel. Add. at AA 366 (ECF No. 96 at 52, Rae decl. II ¶ 209); *id.* at AA 369 (Rae decl. II ¶¶ 221-232); *id.* at 370 (Rae decl. II ¶¶ 233-234).

[69] Ap. Br. at 10 & n. 58, 13, 23; Appel. Add AA at 292-316 (Second Amended Complaint); *Neal v. Kelly*, 963 F.2d 453, 458 (D.C. Cir. 1992)(concluding "that the district court erred first in granting summary judgment against a pro se [] litigant in a civil action without adequate notice and, second, in failing to treat the verified complaint as an affidavit.")(citing *Childers v. Slater*, 44 F.Supp.2d 8, 15 (D.D.C. 1999)(quotation and citation omitted)).

[70] Ap. Br. at 5, 6, 13, 15-16, 19 & n. 14; *see also* Appellant's Rehearing Br. at 1-4.

[71] Ap. Br. at 13, 16.

[72] Ap. Br. at 6, 13, 15-16, 20, 26, 27 & n. 135, 30 & n. 148, 31; ECF No. 79-2 at 1-4; ECF No. 60 at 14 n. 2, *supra*, footnote 23; *see* Appel. Add. at AA 213 & 225 (Varnado dep. at 10-12, 50-52, ECF No. 87-1 at 113 & 123); *Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2001)(ruling the district court erred in finding that the non-accidental destruction of personnel records constituted "weak adverse inference of spoliation")(altered quotation marks); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C. Cir. 1998)(en banc); *Barnett v. PA Consulting*

October 30, 2013, contradicts the panel's adopted version of the facts. Ap. Rehearing Br. at 1-4.[73] He now challenges the judgment of the lower court.

A. LEGAL BACKGROUND

The "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Except for the inquiry in determining whether there is any genuine factual issues that properly can be resolved only by a finder of fact, "[t]here is no requirement that the trial judge make findings of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)(altered quotation and quotation marks). The question then is "whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not." *Id.* at 254. The Court in *Anderson* explained that the substantive law provides the basis for identifying which facts are material (or capable of affecting the substantive outcome) in a given case even though "materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes." *Id.* at 248. Federal courts have applied different legal standards to determine employer liability in Title VII cases where the wrongdoer was a direct supervisor. However, "summary judgment will not lie if the dispute about a material fact is genuine" – i.e. "the evidence is such that a reasonable jury could return a verdict for the non-moving party." 477 U.S. at 248 (altered quotation and internal quotation marks). At the summary judgment stage, a judge should: (i) consider the totality of the record

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Group, Inc., 715 F.3d 354, 361 (D.C. Cir. 2013)(finding that the district court erred by resolving fact-bound questions in PA's favor); *Perdomo v. Browner*, 67 F. 3d 140, 145 (7th Cir. 1995)(explaining that "[b]ecause a fact-finder may infer intentional discrimination from an employer's untruthfulness, evidence that calls the truthfulness into question precludes a summary judgment"); *Lathram v. Snow*, 336 F.3d 1085, 1089 (D.C. Cir. 2003)(citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998)(en banc)(holding that "a plaintiff's discrediting of an employer's stated reason for its employment decision is entitled to considerable weight").

[73] Ap. Br. 5 & n. 29, 6, 25; Pet. Ap. at 1a-2a (Judg. at 1-2); *id.* at 7a-8a, 15a (ECF 99 at 4-5, 12); *see Scott v. Harris*, 127 S.Ct. 1769, 1776 (2007).

evidence in the light most favorable to the nonmovant; (ii) refrain from weighing the evidence or resolving credibility issues; and (iii) must draw all reasonable inferences in favor of the nonmovant. *See Anderson*, 477 U.S. 242, 248, 249-250, 255 (citations and quotation marks omitted). Also, the moving party has the initial burden of establishing the nonexistence of a genuine material factual issue. *Celotex Corporation v. Catrett*, 477 U.S. 317, 330 (1986)(quotation marks and citations omitted).

Courts have generally applied the *McDonnell Douglas* burden-shifting test to establish an allocation of the burden of production and order for the presentation of proof in private, non-class action involving discrimination or retaliation claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).[74] This test places the burden of persuasion on the employee. *Id.* at 802-05. Alternatively, courts have used other tools to determine employer liability in cases in involving direct evidence of discrimination or retaliation, and in other cases where the wrongdoer was an immediate supervisor.[75] Under *Suders*' strict liability test, the burden of persuasion lies with the employer, however. *See Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Here, the courts below applied the *McDonnell Douglas* test to all of petitioner's retaliation (and discrimination) claims without considering the other applicable legal standards to determine employer liability where a direct supervisor is the wrongdoer.[76]

B. FACTUAL BACKGROUND

In addition to the facts set forth above, petitioner was passed over repeatedly for

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[74] *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 518-519 (1992)(quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1991)(quotation omitted); *Holcomb v. Powell*, 433 F.3d 889 , 901-902 (D.C. Cir. 2006)(citing cases); *Burlington N. & Sfr Co. v. White*, 548 U.S. 53, 63, 126 S.Ct. 2405, 165 L.Ed. 2d 345 (2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801 (1973)); *Univ. of Tex. Southwestern Med. V. Nassar*, 570 U.S. 388, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013); *Pennsylvania State Police v. Suders*, 542 U.S.. 129, 143 (2004)(explaining holdings in *Ellerth* and *Faragher v. Boca Raton*, 524 U.S. 775 (1998))); *Staub v. Proctor Hosp.*. 562 U.S. 411, 422, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011)).]

[75] *See* footnote 74, *supra*.

[76] Pet. Ap. at 1a-2a, 3a-51a.; *see* footnotes 54 & 74, *supra*.

promotions involving vacancies in IDS pharmacy and CRI.[77] Tachie-Menson conceded that he expressed his interest in the vacant IDS pharmacy manager job to her in about July 2013.[78] She also conceded that Pharmacy had a practice of promoting employees to managerial jobs without requiring them to submit an job application as a criterion for promotion. *Id.* Petitioner also was qualified and eligible for a promotion based on his exemplary disciplinary and performance record in 2010, 2011, and 2012.[79] Tachie-Menson threatened to reprimand him for the collective failure of IDS pharmacy to meet expectations after he expressed his interest in this vacancy.[80] After he complained that the threatened reprimand was baseless and unfair she rescinded it. [81] The Interim Director of IDS pharmacy, Dr. Jason Corcoran, conducted a "sham" investigation of him (between July 25 through September 2013) for "shaking up" a white female external research monitor.[82] On September 16, 2013, Corcoran emailed Denise Cooper (in HR) to ask how to best "wrap up" the investigation; petitioner was never provided closure on this matter.[83] It is also odd that respondents have relied on hearsay evidence to support their narrative on the events of December 3, 2014, without providing an affidavit from the Director of Security, Keith

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[77] Appell. Apx. D.A. 362-363 (Defs.' Exhibit 8, ECF No. 59-10); Appel. Add. at AA (ECF No. 87-1 at 14) (On March 7, 2011, Simmons sent Rae an Outlook invitation for a meeting about the negative perception of the IDS pharmacy); Appel. Add. at 71 (ECF No. 87-1 at 34)(On May 24, 2011, Curran emailed Simmons petitioner's candidate report); *id.* at ; *i* at 369-372 (Defs.' Exhibit 11, ECF No. 59-13 at 1-4); *id.* at D.A. 364-365 (Defs.' Exhibit 9, ECF No. 59-11 at 1-2)(Curran Partners, Inc., Candidate Report on petitioner); *id.* at D.A. 651 (Pl.'s Exhibit 8, ECF No. 60-9)(On August 18, 2011, Simmons sent email to Vanessa Tyson in HR accusing petitioner of "obviously doing some 'retaliation' of his own."); Appel. Apx D.A. 34 (Compl.¶ 81). *See id.* D.A. 27, 30, 33 (Compl. ¶¶ 29, 62, 74); *id.* at . D.A. at 34-44 (Compl. ¶¶ 82- 121); Footnote, *supra*, at Compl. ¶ 81; *see* Appel. Apx. D.A. at 34-44 (Compl. ¶¶ 82- 121).

[78] Appel. Add AA at. 277-78 (Tachie-Menson dep. at 158-62, ECF 88 at 158-62); *see id.*. at AA 292, 295, 313 (2nd Am. Compl. ¶¶ 3, 6, 88-94).

[79] *See* footnote 23, *supra*; 116 & 117, *infra*.

[80] *See* footnotes 116 & 117, *infra*; *see also* Appel. Add. at AA 84 (ECF No. 86-1 at 47); *id.* at AA 275-76 (Tachie-Menson dep. at 151, 153-56, ECF 88 at 61, 62); *id.* at AA 96- 99 (ECF 86-1 at 59-62)(reflecting Pl.'s CRI job applications); *id.* at AA 100 (ECF No. 86-1 at 63)(reflecting Donegan's unlawful practice of pharmacy); *id.* at AA 92 (ECF 86-1 at 55)(showing Donegan became Pl.' s official manager on May 25, 2014); Appell. Apx. D.A. 34-35 (Compl. ¶¶ 81, 83); *id.* D.A. 277 (Licensure Policy); *id.* D.A. 293 (Promotion Policy); Pet. Ap. at 8a (ECF 99 at 5); *id.* at 55a-63a (D.C. pharmacy regulations); *id.* at 64a-65a (Pl.'s Ex. 10); *id.* at 66a (Defs.' Ex. 15).

[81] *See* footnote 80, *supra*.

[82] Appel. Add. at AA 72-76 (ECF No. 86-1 at 35-39); *id.* at AA 69 (ECF No. 86-1 at 32).

[83] Appel Add. AA at 104 (ECF No. 87-1 at 4); *see* footnote 23, *supra*; ECF No. 79-2 at 3.

McGlen, despite the fact that he was an eye witness to theses events, and he was aware of petitioner's pending police report of assault against Donegan at the time.[84] CNMC also failed to produce propounded security video footage of the HR reception and IDS Pharmacy areas for December 3. ECF No. 79-2 at 1-4. Varnado emailed petitioner to inquire about the events of December 3 on December 5 and 8, 2014, via the same private email upon which respondents' accusation of insubordination is premised.[85]

C. PROCEDURAL BACKGROUND

The Court of Appeals' panel ruled that (i) the district court correctly concluded that petitioner had submitted insufficient evidence "Raising a genuine issue of material fact with respect to whether his former employer "honestly believes in the reasons it offers" for firing him; (ii) petitioner forfeited any argument that his former employer failed to carry its burden of establishing those reasons in the first place; (iii) the district court correctly applied the *McDonnell Douglas* burden-shifting framework to the wrongful discharge statutory claims; (iv) the "operative complaint" is the first amended complaint contrary to petitioner's assertion; (v) the district court correctly applied the "close fit" test to the wrongful discharge claims in violation of public policy.[86] It explained that the district court denied leave to file the Second Amended Complaint; and therefore, petitioner forfeited any challenge to that ruling by failing to raise it on appeal.[87] Lastly, the Court declined to consider the procedural arguments petitioner

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[84] *See* Appell. Apx D.A. 535 (Defs.' Ex 45, ECF 59-47 at 9)(McGlen's email dated October 23, 2014); *id.* D.A. 448-454 (Defs.' Exs. 32 to 35, ECF Nos. 59-34 to 59-37); *id.* D.A. 536-38 (Russell Aff. ¶¶ 1- 20); *id.* D.A. 528 (Cooper Aff. ¶¶ 8-15); Appel. Add at AA 185, 187, 200-201 (Donegan dep. at 241-54, 301-06, ECF 87-1 at 85, 87, 100-101).
[85] Appell. Apx. D.A. 451-452 (Defs.' Ex. 34)(Varnado's Dec. 5, 2014 email); *id.* D.A. 453-454 (Defs.' Ex. 37) (Varnado's Dec. 8, 2014, email).
[86] Pet. Ap. at 1a-2a.
[87] Pet. Ap. at 2a.

made on appeal on the grounds that these arguments were "unanalyzed.[88] Petitioner disagrees, however, with the Court of Appeals' substantive and procedural rulings.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to continue providing federal courts with clarity and stewardship in Title VII employment cases to assure predictability in determining the legal standards required to evaluate employer liability for the misconduct of direct supervisors and the type and amount of material evidence parties need to satisfy their burden of production or persuasion at the summary judgment stage involving claims of unlawful discriminatory or retaliatory termination.

The following questions are presented:

1. Whether the United States Court of Appeals incorrectly applied the *McDonnell Douglas* burden-shifting test to petitioner's retaliation (or discrimination) statutory claims in determining the evidentiary proof required by the parties with respect to their burden of production or burden of persuasion to hold the employer liability for the misconduct of petitioner's direct supervisor? Or, in the alternative, whether the employer is vicariously liable for the misconduct of the direct supervisor who participated in the process which ultimately culminated in petitioner's firing or the ultimate firing decision itself?

There are subsidiary issues which must be resolved before fully answering the above question, including but not limited to: (I) whether the direct supervisor's unlicensed practice of pharmacy, which was aided and abetted by CNMC and its officials, provides sufficient basis to hold CNMC vicariously liable for the misconduct of the direct supervisor on the theory of "apparent authority" or "aided in the agency relation," *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 (1998); (II) whether the Executive Vice President of Human Resources

[88] Pet. Ap. at 2a.

(HR)/People Officer admitted participation in the termination process coupled with his impeachable deposition that petitioner was on a PIP for poor work performance is sufficient to impute liability on the employer on the "alter ego" theory;[89] (III) whether CNMC's proffered evidence to support its nondiscriminatory reason for firing petitioner for engaging in *harassing* behavior towards his direct supervisor by itself invokes an impermissible immutable trait (i.e. "tone of voice") as a but-for cause for the firing decision?

2. Whether the D.C. Circuit misapplied the standard of review dictated by the Federal Rule of Civil Procedure 15, 41, or 56?

3. Whether the Court of Appeals for District of Columbia Circuit applied a more onerous legal standard to petitioner's D.C. law based claims than governing legal precedent permit?

The above questions are of significant importance because "Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor." *Nassar*, 133 S.Ct. 2517, 2522 (2013)(quotation marks omitted). This Court made clear in *Alexander* that a Title VII "private litigant not only redresses his own injury but also vindicates the important Congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). So, in the absence of clear guardrails to delineate the contours of impermissible supervisor conduct under Title VII, it is plausible that some employees will be deterred from raising legitimate concerns internally with their employer about unlawful employment practices for fear that the employer would conveniently allow a direct supervisor to fabricate reasons to fire them merely to escape liability and to get off scot free. *Id.*; *see Nassar*, 133 S.Ct., *supra*, at 2534-2535 (Ginsburg, J., dissenting) (recognizing "fear of retaliation is the leading reason why people stay silent" about the

[89] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758-759 (1998)(reasoning that the employee's high rank in the company makes him or her the employer's alter ego).

discrimination they have encountered or observed) (citations omitted)(altered quotation marks).[90] In *Suders*, the Court made clear that an employer is strictly liable for supervisor harassment unaccompanied by an adverse official act and supervisor harassment that culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment. S*uders*, 542 U.S., *supra*, at 137-38, 140-41 (2004)(citations omitted). In the former situation, but not in the latter, the employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence, by showing: "(a) that the employer exercised reasonable carte to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 137-138 (citations omitted and altered quotation marks). Here, the direct supervisor's misconduct actually threatened the life of petitioner.[91] To prevail on a claim of retaliation, however, the plaintiff must provide "proof that the desire to retaliate was the but-for cause of the challenged employment action." *Univ. of Tex. Soutwestern Med. v. Nassar*, 133 S.Ct. 2517, 2521 (2013). But, In *White*, the Court made clear in *White* "that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." 548 U.S., *supra*, at 64 (citation omitted). The Court explained that "one cannot secure the [] objective [of the retaliation provision] by focusing only upon employer actions and harm that concern employment and the workplace." *Id.* 63 (altered quotation). Here, the lower courts ignored the *White* Court's guidance by crediting the actions of the decisionmakers to the detriment of the victimized subordinate

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[90] *Pennsylvania State Police v. Suders*, 542 U.S. 129, 152 (2004); *see also Univ. of Tex. Southwestern Med. v. Nassar*, 133 S.Ct. 2517, 2545 (2013)(Ginsburg, J., dissenting)(opining that a Title VII retaliation litigant should not have to play the game "heads the employer wins, tails the employee loses").

[91] *See* footnote 19, *supra*.

employee.[92] The Court in *Thurston* echoed the fact that a benefit that is part and parcel of the employment relationship may not be *doled out* in a discriminatory fashion, even if the employer would be free not to provide the benefit at all. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)(quotation and punctuation marks omitted). Here, Donegan ordered petitioner to refrain from copying his private email; denied him permission to visit OHD to seek medical evaluation; denied his requests to have a witness present at one-on-one closed door meetings; overtly or constructively denied his request to cancel the mandatory meeting on December 3 for health reasons; and testified that she made the recommendation to Russell to have him fired.[93] Clearly, she used her position to disadvantage him by scheduling the mandatory meeting to discuss a *phantom* 2014 annual performance evaluation with full knowledge of his health vulnerabilities, which triggered Varnado's decision to summarily suspend him a day after he filed a public ridicule complaint against her, and the ultimate firing decision. In doing so, she presented him with the unreasonable choice of asking Tachie-Menson to cancel the mandatory meeting for health reasons or show up for the mandatory meeting and risk another life-threatening elevation of his blood pressure (if not a stroke or heart attack). *See Suders*, 542 US, *supra*, at 144-48. A reasonable jury could find that IDS' working conditions were so intolerable that a reasonable person would have felt compelled to avoid the consequences of another precipitous elevated blood pressure episode on December 3. *Id.* at 146-48. A reasonable jury also could find that CNMC aided Donegan in her unlawful discriminatory scheme. *Id.* Similarly, the combination of Varnado's high rank in CNMC, participation in the termination process, and impeachable testimony regarding petitioner being placed on a PIP, which is intrinsically linked to petitioner's

[92] *See White*, 548 U.S. 53, 63 (2006).
[93] Appel. Add at AA 196, 202, 206 (Donegan dep. at 286-87, 309-11, 327-28, ECF No. 87-1 at 96, 102, 106); *see id.* at AA 183 (Donegan dep. at 233, ECF 87-1 at 83); footnote 33, *supra*; footnotes 95, 103, 105, *infra*.

job performance and firing, is sufficient to demonstrate that the termination process was opaque, unfair, and hold CNMC liable for Varnado's conduct as its "alter ego." *Ellerth*, 524 U.S., *supra*, at 758-759.[94] As discussed below, the record demonstrates the existence of multiple independent proximate causes which contributed to the termination. But, there is no credible record evidence to support a conclusion that Donegan quarantined her discriminatory animus towards petitioner during the time she supervised him.[95] A reasonable jury could conclude that CNMC's nondiscriminatory reasons are not only unsupported by admissible evidence, but are merely *ad hominem* attacks to besmirch petitioner's reputation for exercising his protected rights. *Id.*; *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 793 (D.C. 2001). Of note, intent is not an element of a civil assault or a claim of wrongful discharge in violation of public policy claim under D.C. law.[96] Petitioner believes that his arguments regarding the discrimination claims and amended complaints merit consideration as well. Thus, it is plausible that a reasonable jury could render a verdict in favor of petitioner on all his statutory and common law claims based on the record evidence.

1. The Court Below Incorrectly Dismissed the Statutory Retaliation Claims for Lack of Evidence Because This Decision was Based on the Wrong Legal Standard

Under *McDonnell Douglas*, the plaintiff bears the initial burden to establish a prima facie case of retaliation by a preponderance of the evidence. *See McDonnell Douglas Corp.*, 411 U.S., *supra*, at 802.[97] If this is met, it creates a presumption that the employer unlawfully retaliated against the employee. *Id.*; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)(citation omitted). This then shifts the burden to the employer to articulate some nondiscriminatory

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[94] *See* footnote 23, *supra*.
[95] *See DeJesus v. WP Co. LLC*, 841 F.3d 527, 535-36 (D.C. Cir. 2016); footnote 161.
[96] *See* footnotes 153, 155, 161, *infra*.
[97] *See also Holcomb v. Powell*, 433 F.3d 889, 901-902 (D.C. Cir. 2006); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

reason" for its adverse employment action at issue. *Id.* "[T]he employer must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination or retaliation was not the cause of the employment action." 509 U.S., *supra*, at 506-507 (altered quotation and citation and quotation marks omitted). In *Hicks*, the Court explained that the burden of production determination necessarily precedes the credibility-assessment stage. *Id.* at 509. If the employer fails to sustain its burden but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, this raises a question of fact for a trier of fact to answer. *Id.* at 509-510. If the employer meets it burden, the *McDonnell Douglas* test falls out. *Id.* at 510. The factual inquiry then proceeds to a new level of specificity, which means that the "inquiry [] turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals" of the retaliation or discrimination claims. *Id.* at 506-507. The plaintiff then must be afforded a fair opportunity to show that the employer's stated reason is pretext for retaliation. *Id.*at 515-517; *McDonnell Douglas Corp.*, 411 U.S., *supra*, at 804-805, 807; *see Hicks*, 509 U.S., *supra*, at 511-12. But, the plaintiff bears the burden of persuasion. *Id.*

Petitioner Can Establish a Prima Facie Case of Retaliation

To establish a prima facie case of retaliation under *McDonnell Douglas*, the plaintiff must present evidence that (1) he engaged in activity protected by Title VII [or ¶ 1981]; (2) the employer took an adverse employment action against him; and (3) the adverse action was causally related to the exercise of his rights." *Holcomb v. Powell*, 433 F.3d 889, 901-902 (D.C. Cir. 2006)(citation omitted)(altered quotation and quotation marks).[98] It is evident that the prima facie elements are satisfied here since the record shows that petitioner engaged in protected

[98] *Brown v. Brody*, 199 F.3d 446 , 452 (D.C. Cir.)(recognizing that "Title VII places the same restrictions on federal and District of Columbia agencies as it does on private employers)(quoting *Barnes v. Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977).

activity by filing two formal EEOC charges, that CNMC took an adverse action against him by firing him, and that the firing decision was triggered by his December 3 email to request the cancellation of the mandatory meeting with Donegan and Russell for health reasons.[99]

Petitioner Engaged in Other Statutory Protected Activity After March 2014

An employee engages in Title VII *protected activity* on account of having "opposed, complained of, or sought remedies for unlawful workplace discrimination." *Univ. of Tex. Soutwestern Med. v. Nassar*, 570 U.S. 388, 133 S.Ct. 2517, 2522 (2013)(citing § 20000e-3(a)); *see* Holcomb, 433 F.3d, *supra*, 901-03. Discriminatory "unlawful employment practice" may be met on the basis of any of seven prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. *Nassar*, 133 S.Ct., *supra*, at 2533 (quotation marks omitted). Of note, the district court has imposed an administrative tolling requirement on the Title VII and DCHRS claims, which limits these claims to protected activity that occurred essentially after March 21, 2014.[100] As such, petitioner's July 8 complaint of discrimination, copying of his private email to preserve information to support his EEOC charges, delayed signing of the Sub-investigator (SI) financial disclosure (COI) form, December 2 complaint of public ridicule, or December 3 email request to cancel the mandatory meeting with Donegan and Russell evinces discrete protected activity under Title VII. *Id.*[101] In *Thurston*, the Court explained that a benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free not to provide the benefit at all. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(quoting *Hishon v. King & Spalding*, 467

[99] *See* Pet. Ap. at 27a-29a.; Appell. Apx D.A. 450 (Defs.' Ex. 33, ECF 59-35); *id.* D.A. 44, 52 (Compl. ¶¶ 121, 152); Appel. Add at AA 32-37 (ECF No. 85 at 32-37); *Holcomb*, 433 F.3d, *supra*, at 902; footnote 33, *supra*; *Howard Univ.*, 764 A.2d 779, 791 (D.C. 2001).
[100] Appel. Apx. D.A. 101 (03/15/18 Order, ECF No. 18).
[101] *See* footnotes 33 & 95, *supra*; footnotes 103 & 105, *infra*.

U.S. 69, 75 (1984)(quotation and punctuation marks omitted). The Court of Appeals in *Howard University* also held that the False Claims Act (31 U.S.C. §§ 3729-3733) manifested Congress' intent to protect employees while they are collecting information about a possible fraud, *before* they have pull all the pieces of the puzzle together." *US ex rel. Yesudian v. Howard University* 153 F.3d 731, 740 (D.C. Cir. 1998)(citing *Neal v. Honneywell Inc.*, 33 F.3d 860, 864 (7th Cir. 1994); *id.* at 734. The district court here held that "[t]he record is [] replete with email communications between Donegan and Rae – with cc's to Rae's personal email account, Tachie-Menson, and various individuals in HR, including HR contact Zandra Russell – and these exchanges consistently demonstrate Rae's resistance to Donegan's requests to meet with him individually to discuss issues related to his work." Pet. Ap. at 9a.[102] It also held that "while Rae might well have complained to CNMC's Human Resources office about Donegan's treatment of him in late November of 2014 and early December of 2014, it is the binding precedent of this circuit that positive evidence beyond mere proximity between protected activity and adverse actions required to defeat the presumption that the employer's proffered explanations are genuine." *Snowden* [*v. Zinke*, 15-cv-1382], 2020 WL 7248349, at *14 [D.D.C. Dec. 9, 2020)](quoting *Talavera*, 638 F.3d at 313 (alterations omitted).")(internal quotation marks omitted).[103] Petitioner disagrees with the lower courts. Notably, the lower courts rulings provide a myopic view of the employer's adverse employment actions, particularly when the full context of the record evidence is considered as a whole in the light most favorable to petitioner. It also

[102] Appel. Apx. D.A. 768 (ECF No. 99 at 6). The court's version of the facts here discredits the record demonstrating that CNMC had a past practice of permitting petitioner and other employees to copy their private emails prior to June 30, 2014. *Id.* ; Appel. Apx. D.A. at 498-500 (Defs' Exhibit 43, ECF No. 59-45); *id.*, *supra*, at 428-429 (Defs.' Exhibit 27); *id.* at 378 (Defs.' Exhibit 13, ECF No. 59-15)("bullying email – 11/18/2013/ initial - Rae to Cooper); *id.* at 379 (Defs' Exhibit 14, ECF No. 59-16)(Rae to Cooper – bullying/shouting); *id.* at 380 (Defs.' Exhibit 15, ECF No. 59-17); *id.* at 381 (Defs.' Exhibit 16, ECF No. 59-18); *id.* at 383 (Defs.' Exhibit 17, ECF No. 59-19); *id.* at 394-395 (Defs.' Exhibit 20, ECF No. 59-22); see also *id.* at D.A. 381 (Defs.' Exhibit 16, ECF No. 59-18)(Rae's complaint about impromptu meeting on 12/17/2013- increased tone / hostility/ insubordination concerns); *id.* at D.A. 384-385 (Defs.' Exhibit 17, ECF No. 59-19)(Donegan's reprimand dated 12/17/2013).
[103] Pet. Ap. at 10a, 15a, 27a-29a; *see* footnote 146, *infra*.

runs counter to this Court's prior rulings. *See, e.g., White*, 548 U.S., *supra*, at 63-64; *Suders*, 542 US, *supra*, at 145. Based on ordinary human experience and common sense, it is evident that petitioner's December 3 email evinced passive resistance to the continuing discriminatory IDS pharmacy work environment, which is a well established way to oppose unlawful employment practices. *See McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996); *Parker v. Baltimore & OR Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981).[104] Also, Title VII's remedial purpose will be "ill-served" by the Court of Appeals judgment here, which would give employers a license to act unilaterally to interfere with an employee's unfettered access to internal mechanisms to oppose suspected discriminatory unlawful employment practices. *Id.*; *White*, 548 U.S., *supra*; *Suders*, 542 US, *supra*. Further, the courts below misperceived petitioner's copying of his private email, delayed signing of the COI form, and December 3 email to cancel the mandatory meeting for health reasons as evidence of insubordination. *Univ. of Tex. Soutwestern Med. v. Nassar*, 133 S.Ct. 2517, 2522)(citing § 20000e-3(a)); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 64-65 (2006).[105] This Court's recognition that an employer may be held liable for retaliating against an employee for conduct it condoned if it acts in a discriminatory manner undermines the lower courts' reasoning too. *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)); *see Howard University*, 153 F.3d, *supra*, at 740.[106] CNMC actually permitted petitioner

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[104] *See Wapner v. Somers*, 630 A.2d 885, 428 Pa. Superior Ct. 187, 193 n.1 (Pa. Superior 1993)(McEwen, J., concurring)(paraphrasing the words of Frederick Douglas that "the whole history of the progress of human liberty shows that all concessions yet made ... have been born of earnest struggle. ... and that if there is no struggle there is no progress')(altered quotation and quotation marks).

[105] Appel. Apx. D.A. 432 (Defs' Ex. 27, ECF No. 59-27 at 5); *id.*, *supra*, at 439 (ECF No. 59-27 at 12); *id* at 440-442 (Defs.' Ex. 28, ECF No. 30); *id.* at 428-439 (Defs.' Ex. 27, ECF No. 59-29); *id.* at 443-44 (Defs.' Ex. 29); *id.* at D.A. 450 (Defs.' Exhibit 33); *id.* at 394-395 (Defs.' Ex. 20); *id.* at 396 (Defs.' Ex. 21); *id.* 400 (Defs.' Ex. 24, ECF No. 59-26); *id.* at 403-407 (Defs.' Ex. 25); *id.* at 535 (Defs.' Ex. 45, ECF No. 59-46 at 9); *id.* at 448 (Defs.' Ex. 32); see *also id.* at D.A. 451-452 (Defs.' Exs. 34 & 35, ECF Nos. 59-36 & 59-37).

[106] Appel. Apx. D.A. at 498-500 (Defs' Exhibit 43, ECF No. 59-45); *id.*, *supra*, at 428-429 (Defs.' Exhibit 27); *id.* at 378 (Defs.' Exhibit 13, ECF No. 59-15)("bullying email – 11/18/2013/ initial - Rae to Cooper); *id.* at 379 (Defs' Exhibit 14, ECF No. 59-16)(Rae to Cooper – bullying/shouting); *id.* at 380 (Defs.' Exhibit 15, ECF No. 59-17); *id.* at 381 (Defs.' Exhibit 16, ECF No. 59-18); *id.* at 383 (Defs.' Exhibit 17, ECF No. 59-19); *id.* at 394-395 (Defs.' Exhibit 20, ECF No. 59-22); see also *id.* at D.A. 381 (Defs.' Exhibit 16, ECF No. 59-18)(Rae's complaint about

and other employees to copy their private emails for years as a benefit of employment. 467 U.S., *supra*, 75.[107] A reasonable jury therefore could infer a retaliatory motive on the part of Donegan for ordering petitioner to refrain from copying his private email a day after he filed the July 8 complaint of harassment-discrimination and retaliation (and nine days after he filed the June 30 EEOC charge).[108] A fair minded jury could conclude that a reasonable employee in petitioner's position who was threatened with disciplinary action for not signing off on the COI form as a SI could well be dissuaded from supporting or making a charge of discrimination. The COI form clearly states on its face that the signee declares under 21 CFR Parts 54.1 to 54.6 that the information provided is "true, correct, and complete." Appel Add at AA 12.[109] On September 24, 2014, Donegan also emailed the study sponsor to express that the specific role the IDS pharmacists were being asked to perform in that study was inconsistent with the role of a SI. Appel. Apx. D.A. 708-710 (Pl.'s Ex. 17).[110] And, there was no pharmacy process, policy, or procedure in place to "anoint" an IDS pharmacist to become a SI, which was the function of the Investigational Review Board (IRB). *Id.*; *see* Appel Add. AA at 86 (ECF No. 86-1 at 49).[111] The Corporate Compliance Officer, Sandra Walter, advised petitioner that he *must* signoff on the form in accordance with the Conflict of Interest Procedure (C:14P part B); and she was one of the officials who turned a blind eye to Donegan's unlicensed practice of pharmacy in 2013.

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impromptu meeting on 12/17/2013- increased tone / hostility/ insubordination concerns); *id.* at D.A. 384-385 (Defs.' Exhibit 17, ECF No. 59-19)(Donegan's reprimand dated 12/17/2013)

[107] Appell. Add at AA 122 (ECF No. 87-1 at 22)(showing Steve Jacobs copied his private email in 2010); *see id.* at AA 105 (ECF 87- at 5).

[108] *See* footnote 33, *supra*.

[109] *Cf. Abney v. Amgen, Inc.*, 443 F.3d 540, 550-51(6th Cir. 2006)(recognizing that *Grimes* stands for the preposition that researchers owe a duty to "vulnerable research subjects" independent of the subjects' consent)(citing *Grimes v. Kennedy Kreiger Institute, Inc.*, 366 Md. 29, 782 A.2d 807 (2001).

[110] Appellees' Apx. D.A. 710 (Pl.'s Exhibit 17, ECF No. 60-18 at 4); *see also* D.A. 289 (Employee Handbook, Section 14.2, Corporate Compliance); ECF No. 59-46 at 7 (Defs.' Exhibit 44, FDA's "Seizure Study" Establishment Inspection Report dated April 3, 2013); *id* at 4-6.

[111] *See also* footnotes 108 & 109, *supra*.

Appel. Apx. D.A. 404 (Defs.' Exhibit 25, ECF No. 59-27 at); Pet. Ap. at 64a-66a.[112] Neither did the Conflict Interest Procedure Walter provided petitioner address the issue about the IDS pharmacists' role as SIs. Also, the FDA's Seizure Study Establishment Inspection Report, which is of record, is instructive on this point. *See* Appell. Apx. D.A. 215-60 (ECF No. 59-1 at 1-46).[113] It can be easily discerned upon reviewing the FDA report that the inspector specifically reviewed the record to make sure that the PI and SIs (i.e. Drs. Brown, Chamberlain, and Teach) had submitted the proper COI forms.[114] The inspector did not concern herself with the two IDS pharmacists named in the report (i.e. Dr. Henry Choi and Felicia Carpenter). *See* ECF No. 59-46 at 4-7). Appel. Add., *surp*a, at 12.[115] In sum, this evidence raises a genuine material factual dispute as to whether petitioner's copying of his private email, delayed signing of the COI form by itself, December 2 complaint of public ridicule, or December 3 email request to cancel the mandatory meeting, separately or in combination with other record evidence, suffice to establish a causal link between petitioner's statutory protected activity and respondents' termination decision in order to support his wrongful discharge claims. *See McDonnell v. Cisneros*, 84 F.3d , *supra*, at 262.; *Parker*, 652 F.2d, *supra*, at 1012, 1019.

Employer Took An Adverse Action Against Petitioner After March 2014

Adverse employment actions are not confined to hirings, firings, promotions, or other discrete incidents." *Holcomb*, 433 F.3d at 902 (citation and quotation marks omitted). The *Holcomb* court expressed the view that "[s]o long as a plaintiff meets the statutory requirement of being "aggrieved" by an employer's action" that courts should "not categorically reject a particular personnel action as nonadverse simply because it does not fall into a cognizable type. *Id.* This

[112] Appel. Apx. D.A. 404 (Defs.' Exhibit 25); *id.* at D.A. 708-710 (Pl.'s Ex. 17); Pet. Ap. at 64a-66a.
[113] Footnote 33, *supra*.
[114] Appell. Apx D.A. 503- 526 (Defs.' Ex. 44, ECF 59-46, e.g., at 5-7)(FDA's Seizure Study Establishment Inspection Report).
[115] *See* Appel. Apx. D.A. 289 (Defs.' Ex. 1, Corporate Compliance Policy).

"threshold is met when an employee experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Id.* (citations omitted). In *Arlington Heights*, the Court recognized that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977)(citations omitted). *See Holcomb*, 433 F.3d at 902-903. In addition to the fact that CNMC's firing of petitioner constitutes an adverse employment action, his two visits to CNMC's OHD for a precipitous life-threatening elevation of his blood pressure immediately after meeting with Donegan on July 24 and October 28, respectively, also demonstrate that he suffered materially adverse tangible consequences affecting the terms, conditions, or privileges of employment, or future employment opportunities. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed. 2d 295 (1993)(citations and quotation marks omitted); *Holcomb, supra*, at 903. This conclusion is bolstered by the fact that his PMD had to place him on complete disability, and increase his blood pressure medication, both times to get his blood pressure back under control so that he could resume his usual work activities, and the post-termination destitute life he continues to experience today.[116] Third, CNMC officials, including Varnado, Russell, and Tachie-Menson, deliberate indifference to his repeated pleas to mitigate or correct the suspected discriminatory IDS pharmacy work environment, and denial of his request to cancel the mandatory meeting for health reasons on December 3, which he sought to avoid the consequence of suffering another episode of a precipitous life-threatening elevation of his blood pressure, evinces the very behavior Title VII was intended to eradicate from the workplace. Appell. Apx D.A. 230-239 (ECF No. 59-1 at 16- 25); see Pet. Ap. 23a-29a (ECF No. 99 at 20-26); S*uders*,

[116] Appell Add at AA 32-37 (ECF No. 85 at 32-37).

542 U.S., *supra*, at 146; *Ellerth*, 524 U.S., *supra*, at 753-754, 763-64[117] To the extent that the direct supervisor's conduct here is analogous to the conduct of the supervisors in *Suders*, or *Ellerth*, the Court of Appeals judgment here would result in a travesty on justice rather than promote a just end. *Id.*

Employer Took An Adverse Action Against Petitioner Before March 2014

With respect to petitioner's ¶ 1981 retaliation (or discrimination) claims, the window of actionable protected activity is four years. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951, 1959-1960, 170 L.Ed.2d 864 (2008); *Jones v. RR Donnelley & Sons Co.,* 541 U.S. 369, 381-382 (2004).[118] In *Nassar*, the Court reiterated "that 42 U.S.C. § 1981 – which declares that all persons shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens – prohibits not only racial discrimination but also retaliation against those who oppose it." *Nassar*, , 2529-2530.). In *Comcast Corp.*, the Court held that a § 1981 complainant must "initially plead and ultimately prove that, but for race, it would not have suffered the loss of legally protected right." , 1019 *Comcast Corp. v. Nat. Ass. Africa American-Owned*, 140 S.Ct. 1009, 1019, 589 U.S. __, 206 L.Ed.2d 356 (2020). In *Ellerth*, the Court recognized that an employer can be held strictly liable for the conduct of a high ranking official who acts as its "alter ego." *Ellerth*, 524 U.S., *supra*, at 758-759 (1998).[119] Of note, the courts below failed to set forth specifically when the statute of limitation began to run regarding the § 1981 claims.[120] Here, the Chief People Officer, Varnado, summarily suspended petitioner on December 3 pending an investigation, testified that he participated in the termination process,

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[117] Appell. Apx. D.A. 703 (Pl.'s Exhibit 13, ECF No. 60-14); *Id.* at 704 (Pl.'s Exhibit 14, ECF No. 60-15).
[118] *Graves v. District of Columbia*, 777 F. Supp. 2d 109, 115 (D.D.C. 2011) (noting that hostile work environment claims under section 1981 are subject to a four-year statute of limitation)(citing *R.R. Donnelley & Sons Co,*, 541 U.S. 369, 383, 124 S.Ct. 1836, 158 L..Ed.2d 645 (2004)).
[119] Appel. Add at AA 212-223 (Varnado dep. at 6-52, ECF 87-1 at 112-23).
[120] Pet. 1a-31a; *see Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998)(noting that the determination of when the statute of limitation began to run was a disputed issue of material fact); footnotes 116 & 117, *supra*; footnote 136, *infra*.

provided false testimony that petitioner was on a PIP for poor work performance when he was suspended, which were intended to cause, and did cause, petitioner to suffer tangible harm sufficient to materially alter the terms, conditions, or privileges of employment, or future employment opportunities, particularly since he granted petitioner permission to file a formal written grievance, and offered him a severance package that petitioner declined, on July 10, 2014. *Harris*, 510 U.S., *supra*, at 21.[121]

Further, petitioner suffered multiple adverse employment actions on account of CNMC's repeated failure to promote him to fill vacancies in IDS pharmacy and CRI. First, respondents have conceded that he challenged his non-promotion to fill the vacant Director of Research Pharmacy in 2011.[122] He was not only passed over for the vacant IDS manager job, which was offered to Donegan in September 2013, but Pharmacy officials threatened to reprimand him for the collective failure of the IDS pharmacy and subjected him to a "sham" investigation leading up to Donegan's hiring, after he expressed his interest in the vacant job to Tachie-Menson.[123] He was eligible for a promotion based on CNMC's promotion policy as evidenced by the "exceed expectations" job performance rating he received in 2011 and 2012.[124] On September 3, 2013, Tachie-Menson emailed petitioner stating "[y]our performance review was done by Jefferson Pickard on January 4, 2013," which clearly refers to petitioner's 2012 performance evaluation. Appel. Add. at AA 84 (ECF No. 86-1 at 47).[125] Yet, CNMC has *failed* to produce it. ECF No. 79-2 at 3.[126] On July 17, 2017, CNMC's counsel represented that "[w]e have not been able to

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[121] *See* Appel. Add at AA 321-24, 330, 338, 366-67, 369 (ECF 96, Rae decl. II at ¶¶ 15-43, 77, 105, 209-210, 221-32); *id.* at 339 (ECF 96, Rae decl. II at ¶¶ 105 [sic]); *Holcomb*, *supra*, at 902-03.
[122] *See* Appell. Apx D.A. 229, 230 & n. 2 (Defs.' Mem. in Supp. of SJM, ECF 59-1 at 15-16).
[123] *See* footnote 82 & 83, *supra*.
[124] Appell. Apx. D.A. 293 (Defs.' Exhibit 1, Section 12.2, Promotions and Transfers); *id* at D.A. 595-600 (Pl's Exs. 5, 6, 7); *see* footnote 23, *supra*.
[125] See footnote 23, *supra*.
[126] *See* Appell. Apx D.A. 560 (ECF No. 60 at 14 n. 2); *id.* at D.A. 601-05 (Pl.'s Ex. 6, ECF No. 60-7(Petitioner's personal copy of the unofficial 2012 evaluation); ECF No. 79-2 at 3.

locate a 2012 performance evaluation of Plaintiff." ECF No. 79-2, *supra*, at 3.[127] Tachie-Menson also testified that Pharmacy had a practice of promoting employees to managerial jobs without requiring them to submit a job application as a criterion for promotion.[128] However, this courtesy was not extended to petitioner. Although respondents' argument that petitioner's failure to submit a job application for the IDS pharmacy manager job undermines his claim of retaliatory (or discriminatory) nonpromotion might have some merit, this argument is *not* dispositive on whether his protective activity in challenging the 2011 nonpromotion decision was a but for cause of CNMC's decision to pass him over and hire Donegan for the IDS manager job in 2013. Since Donegan lacked the legal credentials for the IDS Manager job at the time she was hired (and during the time she supervised petitioner in 2013), no reasonable jury could conclude that CNMC's stated reason for hiring her instead of promoting petitioner is worthy of credence. *See Comcast Corp. v. Nat. Ass. Africa American-Owned*, 140 S.Ct. 1009, 1019, 589 U.S. __, 206 L.Ed.2d 356 (2020).[129] A reasonable jury could find that it would have been futile for petitioner to submit a job application for the vacant IDS pharmacy manager job, since the job was way out his reach from the get go. *See Teamsters v. United States*, 431 U.S. 324, 364 (1977).[130] A reasonable jury could conclude that CNMC would not have passed him over to hire an unqualified white female candidate for the IDS manager job but for his protected activity in challenging CNMC's decision to deny him an opportunity for promotion to fill the vacant Director of Research job on an impermissible basis. Thus, there is sufficient evidence to raise a genuine material factual dispute as to whether unlawful retaliation (or discrimination) was a but

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[127] ECF No. 79-2, *supra*, at 3; Appel. Add. at AA 84 (ECF No. 86-1 at 47)(Tachie-Menson's September 3, 2013, email acknowledging that Petitioner received a performance evaluation for 2012); *see* footnote 23, *supra*.
[128] Appel. Apx at AA 277-78 (Tachie-Menson dep. at 158-62, ECF No. 88 at 63-64).
[129] *See also CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951, 1954, 170 L.Ed.2d 864 (2008); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013)(per curiam).
[130]

for cause of CNMC's decision to deny petitioner a promotional opportunity to fill the vacant IDS manager job in 2013.

The Adverse Actions Were Causally Related to Petitioner's Exercise of His Protected Rights

Petitioner can establish that the adverse action complained of (i.e. discharge) was causally related to the exercise of his protected rights. *Holcomb*, 433 F.3d, *supra*, at 901-903. The Court of Appeals in *Dixon* explained that it is causation, and not temporal proximity itself, is an element of a plaintiff's retaliation prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn, since causation involves an inquiry into the motives of an employer and is highly context-specific. *Dixon v. Gonzales*, 481 F.3d 324, 336 (6th Cir. 2007)(quotation marks omitted); *see Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985). A plaintiff may satisfy this element by showing "the employer had knowledge of the employee's protected activity, and the adverse personnel action took place shortly after that activity." *Holcomb*, 433 F.3d, *supra*, at 903 (quoting *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985). Here, respondents' concede that Donegan and petitioner had a contentious relationship during the entire time she supervised him; she admitted her touching of him on October 13, 2014, was unwelcomed by him; he noticed all of the decisionmakers of his visit to OHD on October 28; and she participated in the termination process that culminated in his firing if not the firing decision itself. Therefore, this evidence is sufficient to satisfy the elements of a prima facie case to support an inference of retaliatory discharge. *Id.*

Respondents Failed to Meet Their Burden of Production

Once a plaintiff satisfies the prima facie case of retaliation, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason" for its adverse employment action at issue. *Hicks*, 509 U.S., *supra*, at 506-507. "[T]he employer must clearly set forth, through the

introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination or retaliation was not the cause of the employment action. *Id.*; *see McDonnell Douglas Corp.*, 411 U.S., *supra*, at 802.[131] CNMC fired petitioner for engaging in repeated harassing and insubordinate behavior towards Donegan, which eliminates one of the most common legitimate reasons employers successfully rely on to justify terminations. *See Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977).[132] Donegan testified that she hired a replacement to fill the vacancy created by petitioner's discharge in December 2014.[133] This eliminates a second one of the most common legitimate reasons employer's provide to successfully justify terminations. So, respondents here "must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination or retaliation was not the cause of the employment action. *Hicks*, 509 U.S. 502, 506-507 (altered quotation and citation and quotation marks omitted); *see Pompeo v. Figueroa*, 923 F.3d 1078, 1086-(D.C. Cir. 2019). As petitioner argued below, respondents' proffered evidence fail to satisfy the elements set forth in *Figueroa* to meet their initial burden of production in order to satisfy the second prong of the *McDonnell Douglas* test. *Id.* (citation omitted); Ap. Br. at 13-21. CNMC has failed to produce petitioner's 2014 annual performance evaluation which was the predicate for the mandatory meeting that triggered his firing, *id.* at 1089;[134] it relies on inadmissible "tainted" 2013 evidence to support the stated reason for firing petitioner; the firing decision was premised on subjective criteria and hearsay; and it has failed to articulate a clear, nondiscriminatory, and reasonably

[131] *See also Holcomb v. Powell*, 433 F.3d 889 , 901-902 (D.C. Cir. 2006); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).
[132] Appel. Add. at AA 189 (Donegan dep at 259, ECF No. 87-1 at 89).
[133] Appel. Add. at AA 189 (Donegan dep at 259, ECF No. 87-1 at 89).
[134] *See* Appell. Apx. D.A. 560 n. 2 (ECF No. 60 at 14 n.2); *id.* at D.A. 601-05 (Pl.'s Exhibit 6, ECF No. 60-7)(Petitioner's personal copy of his unofficial 2012 performance evaluation); ECF No. 79-2 at 3; Fed. R. Civ. P 56.

specific explanation as to how the disciplinary standards were applied to petitioner's particular circumstances. *Id.*[135] Assuming, *arguendo*, Donegan and Russell honestly believed that petitioner would not show up for the 3 p.m. mandatory meeting in HR on December 3, the fact that their honest belief was formed only hours before this scheduled meeting by itself raises suspicion of mendacity due to the missing propounded 2014 evaluation, since such a document would have taken days to prepare.[136] Because respondents have failed to proffer admissible evidence to meet their initial burden of production, they are not entitled to summary judgment.[137] Thus, petitioner's prima facie case of retaliation entitles him to the presumption that CNMC retaliated against him on an impermissible basis to withstand summary judgment.[138]

Petitioner's Proffered Evidence is Sufficient to Withstand Summary Judgment

Assuming, *arguendo*, that respondents did meet their burden of production, petitioner has proffered evidence in addition to the prima facie evidence which suffice to either rebut CNMC's stated reasons for its actions or to support an inference that these reasons are pretext to mask unlawful discrimination. In particular, Donegan's reprimand of petitioner for "raising his voice" at her raises a genuine material factual dispute, since petitioner was speaking in his native Antiguan tone of voice and mannerisms.[139] His "tone of voice" is a trait which is inextricably bound to his race, sex, national origin/ethnicity, or combination thereof too. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).[140] The lower courts crediting of this evidence in

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[135] *Pompeo v. Figueroa*, 923 F.3d 1078, 1087-89, 1092 (D.C. Cir. 2019).
[136] Appell. Apx D.A. 277 (Performance Evaluations); *see* footnote 126, supra.
[137] *Celotex Corporation v. Catrett*, 477 U.S. 317, 330 (1986); *see Laningham v. US Navy*, 813 F.2d 1236, 1239-42 (D.C. Cir. 1987) (noting that on ruling on a summary judgment the court must determine first whether the moving party has met its burden of production)(citation and quotation marks omitted); *see* Fed. R. Civ. P. 56 (a) & (c).
[138] *See Holcomb*, 433 F.3d at 901-903 (D.C. Cir. 2006); *Pompeo*, 923 F.3d, *supra*, at 1095; Footnote, 137, *infra*.
[139] Appell. Apx D.A. (Defs.' Exhibit 19); *id.* at D.A. (Pl.'s Exhibit 1, Rae's decl. ¶¶ 19-20).
[140] *See Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878 (D.C. 2008); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013); *Batson v. Kentucky*, 476 U.S. 79, 83 (1986)(Marshall, J., concurring)(recognizing decision maker's "own conscious or unconscious racism may lead them easily to the conclusion that a black person is sullen,

respondents favor essentially provides them with a "defense to [impermissible] discrimination." *Powers v. Ohio*, 499 U.S. 400, 410 (1991).[141] Similarly, the district court's treatment of petitioner's email complaint about Donegan's unfounded "bullying" accusation, during the time she was engaged in the illegal practice of pharmacy in 2013, as evidence of *his* harassing behavior is quite concerning. *Id.* [142] Thus, a reasonable jury could conclude that but for his race, national origin, or ethnicity that he would not have been fired. *Id.* [143]

In addition, respondents spoliation of propounded evidence, particularly regarding petitioner's 2012 and 2014 performance evaluations, coupled with Varnado's false deposition testimony, are sufficient to support an adverse inference of retaliation or discrimination.[144] A reasonable jury therefore could conclude that respondents proffered reasons are not worthy of credence and pretextual to cover up unlawful discrimination or retaliation. *See See EEOC v. Union Independiente de la Autoridad*, 279 F.3d 49, 56 (1st Cir. 2002), explained that "if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial. *Id.*; *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, the lower courts should have denied respondents' summary judgment motion. *Id.*

Under *Ellerth*, an employer may be held vicariously liable when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of

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a characterization that would not have come to mind if a white person had acted identically)(quotation marks omitted).

[141] *See* Footnotes 33, 72, 139, *supra*; *see* Appel. Add. at AA 92 (ECF No. 86-1 at 55)(HR "Position Action Form" showing that Donegan was assigned to be petitioner's *official* manager on May 25, 2014.); Pet. Ap. at 55a-66a; *Burrage v. U.S.* 134 S.Ct. 881, 888 (2014)(explaining "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died")(altered quotation and citation omitted).

[142] Pet. Ap. at 5a (ECF 99 at 8a); App. Br. at 5-6, 24-25; *See Ellerth*, 524 U.S. 129, 754, 759-63 (2004) .

[143] *See* footnote 3, *supra*; Appell. Apx. D.A. 455-56 (Defs.' Exs. 36 & 37, ECF Nos. 59-38 & 59-39); Appel. Add. at AA 206 (Donegan's dep. at 327-328); *id.* at AA 196 (Donegan dep. at 286-87).

[144] *See* footnotes 72 & 89, *supra*.

employment (even when those threats are not fulfilled) on the theory of either "apparent authority" or "aided in the agency relation." *Ellerth*, 524 U.S., *supra*, at 754, 759-63. A plaintiff can establish a case of "apparent authority" to hold an employer liable for the conduct of a direct supervisor by showing that the direct supervisor misused her authority. *Ellerth*, 524 U.S., *supra*, at 754, 759-63. Here, the district court credited respondents' 2013 asserted facts which accrued during the time CNMC aided and abetted Donegan in the unlicensed practice of pharmacy, including the supervision of petitioner. Since a pharmacist legal duty is nondelegable, Donegan's reprimand of petitioner in 2013 for alleged failure to follow her instructions regarding the RAD001 study, and respondents' accusation that he undermined her authority in 2013, suffice to establish the factual predicate to hold CNMC vicariously liable for Donegan's misuse of her authority on account of her illegal practice of pharmacy. *Id.* [145] Similarly, it is evident that CNMC, and its officials, willfully aided and abetted Donegan in the unlawful practice of pharmacy in 2013, including compensating her for the job of an IDS pharmacy manager. *Id.* The lower courts reliance on *Talavera* and *Woodruff* is misplaced as this evidence is sufficient to satisfy the factual predicate to hold CNMC liable for the misconduct of Donegan on the "aided in the agency relation" doctrine. *Id.*[146] Thus, the lower courts' conclusion that petitioner provided no "positive" evidence to support any claim to defeat the presumptive validity of CNMC's legitimate, non-discriminatory, reasons for firing him is clearly erroneous.[147]

2. Petitioner's Discrimination Claims Were Incorrectly Dismissed

Once a defendant files a motion for summary judgment motion or answer, the plaintiff

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[145] Pet. Ap. at 1a-2a, 8a-9a, 25a, 55a-66a; Appell. Apx. D.A. 277 (Defs.' Exhibit 1, CNMC's Licensure Policy).; *see Hendelberg v. Goldstein*, 211 F.2d 428, 431 (D.C. Cir. 1954); *cf. Willliams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980).

[146] Pet. Ap. 1a-31a; *Woodruff v. Peters*, 482 F.3d 521, 530-31 (D.C. Cir. 2007); *Talavera*, 638 F.3d, *supra*, at 313.

[147] *See* footnote 145, *supra*.

may dismiss the action only by stipulation under Rule 41(a)(1)(ii), or by order of the court, "upon such terms and conditions as the court deems proper," under Rule 41(a)(2)). *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394 (1990)(quotation marks omitted). Based on the case record, petitioner voluntarily dismissed claims V, VII, and Denise Cooper by stipulation. 03/08/2018 Minute Order.[148] The 03/08/2018 order was clearly issued without prejudice. *See* Fed. R. Civ. P. 41(a)(2); *Cooter & Gell*, 496 U.S., at 394. Respondents also produced critical propounded evidence after the parties entered a stipulation agreement.[149] So, petitioner's later filed motion for leave to amend complaint under Rule 15 should have been freely granted. *Id.*; Fed. R. Civ. P. 15.[150] The lower courts therefore abused their discretion by not considering the Second Amended Complaint. *Id.*; Pet. Ap. at 1a-31a; *see Laningham v. US Navy*, 813 F.2d 1236, 1239-42 (D.C. Cir. 1987)(citation omitted).[151] Also, there is no language in Rule 41(a)(2) that vests any discretion in the district court to waive petitioner's discrimination claims.[152] Thus, it would be an injustice to deprive a *pro se* petitioner of his day in court on the ground that the discrimination claims are "subsumed" into the retaliation claims as the lower courts ruled.[153]

Assuming, *arguendo*, that the the discrimination claims were proper subject matter for review by the lower courts, petitioner has proffered sufficient evidence to establish that impermissible discrimination on the basis of race, sex, or national origin/ethnicity, or a

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[148] Pet. Ap. 15a (ECF No. 99 at 12 n. 7); *id.* at 36a (ECF No. 71 at 5); ECF No. 58; ECF No. 60 at 1 n. 1.
[149] *See* Pet. Ap. at 64a-65a; ECF No. 58; ECF No. 79-2 at 1-5.
[150] ECF No. 91 (defective 2n. Am. Compl.); ECF Nos. 93 & 98 (2nd Am. Compl.); Appel. Add. at AA 317-372 (ECF No. 96 at 3-58, Rae decl. II, *e.g.*, ¶¶ 1-7, 43-46, 67, 77, 105, 136, 140-153); *see* footnote 6, *supra*.
[151] *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972)(recognizing that *pro se* complaints should be held "to less stringent standards than formal pleadings drafted by lawyers"); *cf. Swierkiewicz v. Sorema NA*, 534 U.S. 506, 511 (2002).
[152] *See* 03/08/2018 Order; Fed. R. Civ. P. 41; *Kokkoen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381 (1994); *Cooter & Gell*, 496 U.S., *supra*, at 394.
[153] Pet. Ap. at 15a n. 7; Ap. Br. at 12-13, 21-26; *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see Swierkiewicz v. Sorema NA*, 534 U.S. 506, 511 (2002); *Haines v. Kerner*, 404 U.S. 519, 520-521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)(citing cases); *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007)(recognizing that "[a] document filed *pro se* is to liberally construed")(quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251(1976)(internal quotation marks omitted)).

combination thereof was a motivating factor in his discharge to support, for example, a disparate treatment claim. For the reasons discussed above, a reasonable jury could conclude that respondents' stated reasons are not the actual reason for the discharge and that the real reason was unlawful intentional discrimination.

3. The Court of Appeals' Judgment Dismissing the D.C. Law Based Claims Conflicts With *Erie*

The *Erie* Court held that federal courts should apply state law as interpreted by the highest state court when exercising supplemental jurisdiction over state law claims. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).[154] Although the DCHRA mirrors Title VII in most respects, the burden of proof parties bear for claims brought under D.C. law differs substantively from that imposed under Title VII. *See Furline v. Morrison*, 953 A.2d 344 (D.C. 2008); *Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 888-889, 896 (D.C. 2008). In *Estenos*, the D.C. Court of Appeals recognized that practices that are merely questionable under Title VII may suffice to establish discrimination under the DCHRA. *Id.*, at 896, 888-899 (quotation marks omitted). The Court in *Furline* explained that under DCHRA "the burden of persuasion remains at all times with the plaintiff employee to prove that the employer took adverse action for a discriminatory or retaliatory reason in whole or part." *Furline*, 953 A.2d, *supra*, at 353 (D.C. 2008). The *Propp* Court made clear that the DCHRA "contains no safe harbor for otherwise lawful conduct done for an improper retaliatory purpose." *Propp v. Counterpart Int'l*, 394 A.3d 856, 866 (D.C. 2012)(citation omitted). Here, the lower courts applied a "one-size-fit-all" *McDonnell Douglas* analysis to the federal and D.C. law based claims, which is inconsistent with

[154] *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 843 (D.C. Cir. 1998)(citing *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 553 (D.C. Cir. 1993)(noting the extension of the *Erie* doctrine to the District of Columbia)); *see Washington v. Guest Servs, Inc.*, 718 A.2d 1071, 1074 (D.C. 1998); *id.* at 1075 ("Overuling our precedents can be effected only by this court en banc")(citing *M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971).

the D.C. governing precedent.[155] Nor did the court below cite any D.C. Court of Appeals precedent to support its judgment.[156] Assuming, *arguendo*, Donegan and Russell honestly believed that petitioner would not show up for the mandatory meeting on December 3, as the lower courts ruled, their honest belief is no defense for disciplining him for his equally honest (and reasonable) efforts in exercising his protected right to *avoid the consequences* of another life-threatening elevated blood pressure episode from Donegan's unrelenting discriminatory conduct. *Id.*[157] So, the lower courts failure to credit petitioner's honest and reasonable belief here is inconsistent with D.C.'s governing law. *Id.*[158] Thus, the lower court's judgment conflicts with *Erie*, since it improperly exercised its supplemental jurisdiction over the DC claims by not adhering to D.C.'s governing legal precedent. *Id; Erie.* 304 U.S. 64.

Contrary to the lower courts rulings, the record not only implicates cognizable public policies firmly tethered to the Constitution, federal drug safety laws, and D.C.'s pharmacy and criminal assault laws, but it suffice to establish a close-fit between petitioner's protected activity and his termination.[159] Similarly, the evidence suffice to demonstrate that one, or more, of the identifiable public policies implicated by his protected activity was violated by CNMC and was a predominant reason for the firing.[160] For example, petitioner's police report of assault implicates

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[155] Pet. Ap. at 1a-28a; Ap. Br. at 27 & n. 136; *see Furline*, 953 A.2d 344 (2008); *Propp*, 394 A.3d 856 (2012).
[156] Pet. Ap. 1a-2a.
[157] *Propp*, 394 A.3d, *supra*, at 866; *see* Suders, 542 U.S., *supra*, at 146.
[158] Pet. Ap. at 1a-2a; footnote 156, *supra*;
[159] Pet. Ap. at 1a-2a, 20a-27a; Ap. Br. at 27, 28 & nn. 139-142, 29; Reply Br. at 8-9, 11, 13 & nn. 43-44; Appell. Apx D.A. 549, 554, 565-66 (ECF 60 at 3, 8, 19-20); *see Carl v. Children's Hospital*, 702 A.2d 159, 168, n. 8 (D.C. 1997)(en banc); *Perkins v. WCS Constr., LLC*, No. 18-cv-751, 2018 WL5792828, at *8 (D.D.C. 2018); *Fingerhut v. Children's Nat. Med. Center*, 738 A. 2d 799, 801 (D.C. 1999); *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999); *Davis v. Cmty. Alternatives of Washington, D.C., Inc.*, 74 A.3d 707, 710 (D.C. 2013); *Bereston v. UHS of Delaware, Inc.*, 180 A.3d 95, 104 n. 25 (D.C. 2018); *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 886 n. 25 (D.C. 1998); *see also Adams v. George W. Cochran & Co.*, 595 A.2d 28 (D.C. 1991); 21 CFR Section 312 *et seq;* 21 CFR Parts 54.1 to 54.6; 21 CFR 361 et seq.; 42 CFR 93.100 *et seq*; Constitution, Art. I, § 8, cl. 8; District of Columbia Bar Professional Rule 8.4; *Safeshred, Inc. v. Martinez*, 365 S.W. 3d 655 (Tex. 2012); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-85, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989); footnote 161, *infra*.
[160] Footnote 154, *supra*.

a cognizable public policy in promoting the reporting of illegal activity to law enforcement.[161] Because Donegan committed the assault and participated in termination process, a reasonable employee in petitioner's position could be well dissuaded from making a police report for fear of being fired. Further, a cause need not work in isolation to be a but-for cause or a predominant cause.[162] Here, it is evident from the record that multiple independent proximate causes contributed to the firing decision such that one or more of these independent causes could plausibly be a predominate or but for cause for termination.[163] As a matter of public policy, Donegan's misconduct is the type that should be deterred rather than encouraged. The public policy interest is bolstered by Donegan's unlicensed practice of pharmacy which contravened D.C. law. Also, the district court's "close fit" analysis would transform the narrow-exception to the at-will doctrine into an empty shell. Moreover, a reasonable jury could infer that respondents retaliated against petitioner for making the police report, and further conclude that his protected activity was a predominant reason for his firing. Because the lower court applied a more onerous legal standard to these claims than DC governing law permits, its judgment conflicts with *Erie*.[164]

CONCLUSION

For the foregoing reasons the Court should grant this petition for a writ of certiorari.

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[161] ECF No. 60 at 19-21; ECF No. 99 at 19; Appell. Apx D.A 445-47; *see Davis v. Giles*, 769 F.2d 813, 815-16 (D.C. 1985); footnote 155, *infra*.
[162] Appell. Apx D.A. 571 (ECF No. 60 at 25); *see Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 217 (4th Cir. 2016).
[163] *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1191-92 (2011)(citation omitted).
[164] *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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