No. _____

IN THE

Supreme Court of the United States

JACINTA DOWNING,

Petitioner,

v.

ABBOTT LABORATORIES and ABBOTT MOLECULAR, INC.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Desert Palace, Inc. v. Costa*, this Court rejected a lower court's rule that required "direct evidence" to support a discrimination claim, and held that "treating circumstantial and direct evidence alike is both clear and deep-rooted: Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." 539 U.S. 90, 100 (2003) (internal quotation marks omitted). The question presented is:

Whether the Seventh Circuit defeated the fundamental holding of this Court's decision in *Costa* when it affirmed the district court's refusal to allow plaintiff to use circumstantial evidence to establish the lie in defendant's explanation for taking adverse actions against plaintiff.

LIST OF PARTIES

Jacinta Downing, petitioner on review, was the Plaintiff-Appellant below.

Abbott Laboratories and Abbott Molecular, Inc., respondents on review, were the Defendants-Appellees below.

RELATED CASES STATEMENT

- *Downing v. Abbott Labs*, No. 15-cv-5921, U.S. District Court for the Northern District of Illinois. Judgment entered Aug. 25, 2021.

- *Downing v. Abbott Labs.*, No. 21-2724, U.S. Court of Appeals for the Seventh Circuit, Judgment entered September 12, 2022. Rehearing and Rehearing En Banc Denied Oct. 12, 2022.

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The Opinion of the United States Court of Appeals for the Seventh Circuit is reprinted at 48 F.4th 793 and was issued on September 12, 2022. (App. 1a-41a) The Seventh Circuit affirmed a judgment entered by the United States District Court for the Northern District of Illinois, on August 25, 2021. (CA7 Dkt. 17, A1.) On August 11, 2021, the District Court orally granted a motion in limine excluding circumstantial pretext evidence. (App. 42a-47a.) On September 5, 2019, the District Court issued an unreported opinion denying in large part a motion for summary judgment. (App. 48a-89a.)

JURISDICTION

The Seventh Circuit issued its opinion and entered judgment on September 12, 2022. (App. 1a.) Petitioner filed a timely petition for rehearing and rehearing en banc, which the Seventh Circuit denied on October 12, 2022. (App. 90a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The Seventh Circuit erroneously affirmed the District Court's ruling prohibiting Petitioner Jacinta Downing from introducing testimony she offered to prove that her former employer was lying about the reasons it disciplined her, cut her pay, fired her, and

refused to re-hire her. The District Court prohibited Downing from introducing pretext evidence because it was circumstantial, instead of direct; the court was unwilling to allow the jury to consider the evidence and make an inference that the employer was lying about its reasons for taking adverse actions against Petitioner.

The District Court's ruling, and the Seventh Circuit's decision affirming it, conflict with this Court's well-settled and well-reasoned precedent regarding circumstantial evidence of pretext in employment discrimination cases. Again and again, this Court has emphasized the importance of pretext evidence in proving employment discrimination and retaliation claims, while rejecting any categorical distinction between "direct" and "circumstantial" evidence in such cases. This Court has "often acknowledged the utility of circumstantial evidence in discrimination cases." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000).

Circumstantial evidence of pretext is particularly important in discrimination cases, because such evidence—along with evidence satisfying the plaintiff's *prima facie* case under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)—can, on its own, support a verdict for the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-12

(1993). "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . ." *Id.* (internal quotation marks omitted, emphasis in original).

This case demonstrates how, over the last twenty years since this Court has addressed the issue, lower courts have strayed from this Court's guidance and imposed, additional, unnecessary, and unjustified barriers before plaintiffs pursuing employment discrimination and retaliation claims. This Court should grant certiorari to guide lower courts and reaffirm this Court's settled precedent allowing plaintiffs to rely on circumstantial evidence of pretext.

STATEMENT OF THE CASE

Petitioner Jacinta Downing ("Downing") sued her former employer, Respondent Abbott Laboratories and Abbott Molecular, Inc. (collectively, "Abbott"), for race discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 and the court of appeals had jurisdiction under 28 U.S.C. § 1291.

Downing, a Black woman, was a long-tenured and highly successful Regional Sales Manager

("RSM") at Abbott. Her role was to lead a team of salespeople to sell Abbott Molecular's products to medical professionals. For her outstanding work in 2011, she earned an "exceeds expectations" performance review, Abbott's highest rating. (CA7 Dkt. 18, SA198.) As of April 2012, Abbott rated Downing as effective and ready for promotion in its succession-planning review. (Tr. 600:1-611:9, PX720 at 9.)

During 2012, Abbott began transferring white male executives from Abbott Diagnostics ("Diagnostics") to run Molecular, (Tr. 612:5-613:1, 1915:2-1916:4). Abbott replaced Downing's manager with Mark Bridgman, who decided after one meeting with Downing—a Black sales veteran with braided hair, coming off the most recent of her three "exceeds expectations" performance reviews—that she lacked something called "executive presence." (Tr. 2283:14-22; PX575-81, 979.) In October 2012, Abbott imported Peter Farmakis, another white man from Diagnostics, as a new layer of management between Bridgman and Downing's role. (Tr. 614:2-4, 1086:9-14.) Almost immediately upon arriving in the role, Farmakis learned of Bridgman's assessment that Downing lacked "executive presence" and began building a case against Downing, his highly experienced, highly rated, and objectively successful new subordinate. Within weeks, Farmakis drew up a memorandum detailing what he asserted were Downing's many deficiencies. (Tr. 621:8-623:17; CA7 Dkt. 18, SA199.) Farmakis accused 2011's highest-reviewed manager of, among other things, "gross negligence,"

"honesty/transparency" concerns, and "defensive behavior." (CA7 Dkt. 18, SA199.)

Despite the shock of a new boss who despised her, Downing persevered, and by mid-year, she was the top-selling RSM. (PX228 at 2.) In July 2013, Farmakis held a meeting with his four RSMs—three women, including two Black women, and one white man—and demanded that the women increase their sales goals to make up for the white man's loss of a $5 million account. When the female RSMs resisted, Farmakis screamed at them and accused them of throwing in the towel. (Tr. 1161:23-1162:2.) Downing went to human resources ("HR") to accuse Farmakis of racially discriminating against her. (Tr. 1162:8-12, 1164:21-23.) Abbott HR subsequently conducted a "climate survey" of the four managers, and the three female managers all accused Farmakis of discrimination. (CA7 Dkt. 18, SA238-45.)

Immediately after the climate survey results were discussed with Farmakis, Downing and another female manager were formally disciplined. Farmakis also sought to discipline all three female sales managers for "insubordination." The white female sales manager resigned. Downing—who was the top-selling RSM in 2013—was disciplined because, according to Farmakis, Downing failed to provide sufficient or proper "coaching" to her team, and because her "team" had "expressed concern regarding [her] credibility" and "executive presence" in front of customers. (CA7 Dkt. 18, SA200-215.)

Ultimately, Downing and the other RSMs were laid off, and Abbott required them to interview for a new position with a new title—"RCD." Abbott prepared a spreadsheet rating the 10 candidates for the position, rated four white candidates the highest and the two Black candidates the lowest. In rating Downing, Abbott wrote that her reps had "consistently given feedback that she doesn't provide valuable coaching/support to them." (CA7 Dkt. 18, SA247.) The process resulted in offers being extended to four white candidates.

Downing sued Abbott in the United States District Court Northern District of Illinois for race discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. Abbott moved for summary judgment, and the District Court denied that motion nearly in its entirety. (App. 48a.) Denying Abbott's request for summary judgment, the court relied extensively on various kinds of circumstantial evidence Downing offered in support of her claims. (App. 48a.) In particular, Downing offered the testimony of her former subordinates Michael Cerney and Anecia Thedford, who declared that Farmakis's purported bases for disciplining Downing were false. They swore that Downing had always provided them valuable coaching, that they had personally observed her interact with customers, and that Downing handled these interactions well. (App. 67a-68a; CA7 Dkt. 17, SA 25-40.)) In denying summary judgment based in part on Thedford and Cerney's declarations, the District Court explained that "Abbott maintains that numerous employees expressed concern with

Downing's management style, demeanor in front of customers, and general understanding of Abbott products, but Downing has produced evidence to the contrary." (*Id.*)

The case proceeded to trial. Immediately before trial, Abbott filed fourteen motions in limine, primarily seeking to bar Downing from introducing circumstantial evidence of discrimination and retaliation. The District Court granted these motions, nearly across the board. With respect to the testimony of Cerney and Thedford, the District Court prohibited Downing from introducing evidence contradicting Abbott's assertions about her purportedly poor "coaching" of her team, or purported lack of credibility or "executive presence" with customers, unless Downing could prove that Cerney or Thedford had communicated the information to Farmakis. Downing argued that—whether or not the information had been communicated to Farmakis—the testimony was still highly probative circumstantial evidence of pretext. (D. Ct. Dkt. 496, 242:13-249:13; Dkt.424.) If the jury believed Cerney and Thedford, it could conclude that Abbott and Farmakis were lying when they asserted that Downing's "team" had "consistently given feedback" that she failed to adequately coach them, or lacked "credibility" or "executive presence" in front of customers. But the court rejected Downing's arguments that her direct reports' testimony—contradicting Abbott's allegations that her team had "consistently given" horrible feedback about her "executive presence" and leadership—would support an inference that Abbott's

assertions against Downing were untrue. (App. 43a-47a; D.Ct. Dkt. 496, 242:13-249:13; D.Ct. Dkt.424.) Because that conclusion would require the jury to make an inference, the District Court ruled that the evidence would be too "confusing," and refused to allow the jury to consider it. (App. 43a-47a.)

After she tried her case without the circumstantial evidence she had relied on to defeat summary judgment, the jury asked "Can we award punitives without finding 'yes' on any of the claims?" (Tr. 2885:2-3.) Ultimately, with her circumstantial evidence excluded, the jury ruled against Downing. At trial, Abbott did not offer any testimony or documentary evidence from Downing's direct reports supporting its assertions that Downing failed to provide adequate coaching to them, or lacked "executive presence" in front of customers. But, absent testimony from Cerney and Thedford on the matter, the jury had little choice but to take Farmakis's word for it.

Downing appealed to the Seventh Circuit, primarily arguing that the District Court erred in prohibiting Downing from introducing circumstantial evidence. With respect to the pretext evidence, Downing relied on, among other precedents, this Court's decisions in *Costa*, 539 U.S. 90, and *Hicks*, 509 U.S. 502. The Seventh Circuit ignored those decisions and held that the District Court correctly prohibited Downing from introducing pretext evidence that was not directly shared with a decision-maker. (App. 14a-16a.)

REASONS FOR GRANTING THE PETITION

I. The Refusal to Allow Circumstantial Pretext Evidence Conflicts With This Court's Governing Decisions

In an authoritative series of cases, this Court set forth the principles governing the use of circumstantial pretext evidence in employment discrimination cases. The bottom line is that such evidence is important, admissible, and highly probative of intentional discrimination. The District Court and Seventh Circuit's decisions—which impose unnecessary, unjustified, and unprincipled limitations on circumstantial pretext evidence—conflict with this Court's important and unchallenged precedent.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court addressed whether the finder of fact's rejection of an employer's proffered justifications itself compelled judgment for Plaintiff. In answering "no," this Court expounded at length on the importance of pretext evidence in employment discrimination cases. This Court explained that, after plaintiff satisfied the elements of a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and after defendant sets forth a legitimate, non-discriminatory reason for taking adverse action against plaintiff, the burden shifts back to plaintiff to demonstrate "that the proffered reason was not the true reason for the employment decision, and that race was." *Hicks*, 509 U.S. at 508 (internal quotation marks and citations omitted). If a

plaintiff puts forth a *prima facie* case of discrimination, and adduces sufficient evidence to rebut defendant's purported reasons for taking action, that can (but does not have to) result in a judgment for plaintiff: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is *required*." *Hicks*, 509 U.S. at 511 (internal citations and quotation marks omitted) (emphasis in original).

This Court further expounded on these principles in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000). *Reeves* turned on whether the plaintiff's substantial pretext evidence was sufficient—in the absence of other kinds of evidence—to support a jury's verdict for plaintiff. This Court held that the answer was "yes," and explained that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 147–48. This Court set forth exactly what kind of inferences the jury may draw from pretext evidence, establishing that the jury can be trusted to "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a

discriminatory purpose. Such an inference is consistent with 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." *Id.* (internal quotation marks and citations omitted). Discrimination may, in fact, be the "most likely alternative explanation" when the fact-finder rejects the employer's proffered explanation. *Id.*

Finally, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court affirmatively rejected an employer's argument that relied on the distinction between "direct" and "circumstantial" evidence. In that case, this Court unanimously held that "direct evidence is not required" to obtain a mixed-motive instruction under Title VII. *Id.* at 92. This Court determined that there was no reason—textual or otherwise—to depart in employment discrimination cases from the "conventional rule of civil litigation" that a plaintiff may prove her case by a preponderance of the evidence, via "direct or circumstantial evidence." *Id.* at 99. Echoing its decisions in *Hicks* and *Reeves*, this Court wrote that we "have often acknowledged the utility of circumstantial evidence in discrimination cases." *Id.* at 99-100. "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Id.* at 100 (quoting *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 (1957)).

The District Court's ruling and Seventh Circuit's holding—that pretext evidence can be introduced only if plaintiff can prove it was communicated to the decision-maker, *i.e.*, that it is *direct evidence* of pretext—simply cannot be squared with this Court's well-reasoned decisions in *Hicks*, *Reeves*, and *Costa*. The courts below ran afoul of this Court's guidance in refusing to permit introduction of pretext evidence because it would require the jury to make an inference before concluding that Abbott was lying.

Abbott asserted that it took various actions against Downing because her "team" had "expressed concern[s] regarding [her] credibility, executive presence and [her] being in front of our customers' executive team members" and "her reps have consistently given feedback that she doesn't provide valuable coaching/support to them." (CA7 Dkt. 18, SA199-214, 247.) No firsthand testimony or documentary evidence supported these assertions, and none of Downing's subordinates testified for Abbott. But Downing's team members were eager to rebut these spurious assertions and testify that they were inconsistent with what they had personally observed in years of working with and for Downing. Cerney and Thedford were prepared to testify that, based on years of experience and observation, Downing excelled in front of clients, including their executives, and that they had not "consistently given feedback" criticizing Downing for failing to motivate or inspire but rather found her and inspirational and effective leader. (CA7 Dkt. 18, SA25–28, 37–39.)

Downing intended to offer this testimony as evidence of pretext by showing Abbott's claims about feedback from her "team" were fabrications. (D.Ct. Dkt. 496, Tr. 238:15-240:2.) Yet the court barred Downing from offering any such evidence, unless it was volunteered to a decisionmaker.

The District Court's ruling, and the Seventh Circuit's affirmance of it, that pretext evidence is inadmissible unless it was communicated to a decision-maker, directly contradicts this Court's guidance. This Court firmly rejected imposing artificial distinctions between "direct" and "circumstantial" evidence in *Costa*, 539 U.S. at 99–100; *accord USPS Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (also rejecting a "direct evidence only" rule in employment cases). Admitting only the evidence conveyed to a decisionmaker effectively means that only direct evidence of pretext is admissible: the jury is prohibited from making an inference that an employer's accusation is a lie from evidence, based on personal knowledge, squarely contradicting the employer's assertions.

The Seventh Circuit's rule also defies common sense. Downing's subordinates could not have predicted that Abbott would put false words in their mouths to justify discriminating and retaliating against Downing, so they had no reason to refute those falsehoods in conversations with (future) decisionmakers. Downing's direct reports' testimony about her leadership would have cast substantial doubt on Abbott's assertions that her subordinates had "consistently given feedback" that she failed to

coach them or lacked "executive presence." The fact that such evidence could be labeled "circumstantial" or "indirect" is irrelevant to its admissibility. *Costa*, 539 U.S. at 99–100.

The lower courts' exclusion of the evidence Downing sought to introduce to prove pretext was particularly harmful because of the importance of such evidence in employment discrimination claims. As this Court has repeatedly held, a plaintiff can prove employment discrimination *solely* by setting forth a *prima facie* case and showing that an employer is lying about the reasons for taking action against a member of a protected class. *Hicks*, 509 U.S. at 511; *Reeves*, 530 U.S. at 147-48.

A jury may "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose," and, in these circumstances, the "most likely alternative explanation" is discrimination. *Reeves*, 530 U.S. at 147-48. That was one of the inferences Downing wanted the jury to draw, but the courts below did not allow it—based on the belief that the jury would be hopelessly "confused" by pretext evidence that required the jury to make an inference.

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. Downing had evidence at hand designed to demonstrate Abbott's mendacity: that would show

Abbott's accusations about her purported lack of "executive presence" and poor leadership of her team were not only untrue, but malicious lies. Cerney and Thedford's testimony, if introduced, would have supported a reasonable jury's conclusion that Farmakis and Abbott's decision-makers were simply making up the criticisms about "executive presence" and her purported failure to adequately "coach" her team. That inference would have been especially strong given that Abbott, at trial, offered not one shred of testimonial or documentary evidence from Downing's direct reports to support the accusations against Downing.

And the lower courts' rulings were especially damaging to Downing because they effectively prohibited her from introducing evidence that would have demonstrated *both* that Abbott was lying *and* that that the "most likely alternative explanation" was racial discrimination, given the nature of the lie. *Reeves*, 530 U.S. at 147–48. In particular, both Bridgman and Farmakis concluded within moments of meeting Downing that she, a Black woman with braided hair and decades of successful experience in sales, coming off an "exceeds expectations" performance review, lacked the *je ne sais quoi* called "executive presence" with her team and high-level customers. Downing sought to introduce evidence supporting an argument that Bridgman and Farmakis saw Downing and decided based on stereotypes—rather than based on facts or any actual feedback from her team—that she lacked "executive presence." The testimony from Downing's

subordinates would have directly contradicted the accusations that she lacked "executive presence" with high-level customers and her team, provided the jury a basis for concluding that Bridgman and Farmakis were lying, *and* supported a conclusion that the loaded term "executive presence" was simply a mask for discrimination.

A jury easily could have understood, without being confused, that if the people who reported to Downing observed her excel in front of customers and inspire her team, that the decision-makers' unsupported determination that she lacked "executive presence" was a mask for racial stereotyping and discrimination. Indeed, these are exactly the kinds of inferences this Court has held, repeatedly, that a jury may draw in employment discrimination cases. *See, e.g.*, *Costa*, 539 U.S. at 99–100; *Reeves*, 530 U.S. at 147–48; *Hicks*, 509 U.S. at 511.

But, by arbitrarily limiting Downing solely to testimony that was communicated with the decision-makers, the courts below demonstrated an evident lack of trust in juries to weigh the evidence and make appropriate inferences. That lack of trust contradicts this Court's rulings. This Court should grant certiorari, reverse, and remand for a new trial where the jury is allowed to consider competent pretext evidence.

II. This Court Should Grant Certiorari to Reiterate that Lower Courts Should Not Impose Artificial Barriers to Introduction of Evidence in Employment Claims

Six decades ago, this Court decided *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), devising the familiar burden-shifting method designed "to sharpen the inquiry into the elusive factual question of intentional discrimination" in employment cases. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.8 (1981). The *McDonnell Douglas* decision has stood the test of time, because the ultimate question of determining whether intentional discrimination occurred is a fraught and challenging one.

In rejecting a rule that required a plaintiff to submit "direct evidence" in support of a discrimination claim, this Court explained:

> the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic

> allocation of burdens and order of presentation of proof," *Burdine*, 450 U.S., at 252, in deciding this ultimate question. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:
>
> > "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

USPS Bd. of Governors v. Aikens, 460 U.S. 711, 716–17, 1983); *accord Hicks*, 509 U.S. at 524.

The reality of the modern workplace is that employment discrimination and retaliation exist. Black employees—and employees who accuse their managers of discrimination or unlawful activity—face adverse employment consequences that their white or non-complaining colleagues do not. But employers rarely admit their racially discriminatory and retaliatory animus. Thus, individuals like Downing, who have suffered grievous harm to their careers, must use circumstantial evidence to convince the fact-finder on the crucial question of discriminatory intent.

The Court's decisions over the decades have wisely, and repeatedly, reiterated the basic principle

that it is the finder of fact's responsibility to answer the sensitive and difficult question of whether an employer has engaged in intentional discrimination against its employee. *See Costa*, 539 U.S. at 98–101; *Reeves*, 530 U.S. 147–48, 153-54; *Hicks*, 509 U.S. at 524; *Aikens*, 460 U.S. at 716.

Over the years, however, lower courts have repeatedly attempted to impose additional restrictions designed to hamstring or limit how a plaintiff can prove a discrimination claim, or what the finder of fact can consider, in discrimination claims. This Court has repeatedly rebuffed such efforts. In *Costa* and *Aikens*, this Court rejected "direct evidence only" rules. *Costa*, 539 U.S. at 99–101; *Aikens*, 460 U.S. at 716-17. In *Reeves*, this Court rejected a "pretext isn't enough" rule. *Reeves*, 530 U.S. at 147–48.

This case represents a similar, unjustifiable, effort to limit how employees may prove discrimination cases. There is no legitimate basis for restricting pretext evidence to information shared with the employer's decisionmakers. Nor is there any justification for restricting the finder of fact from concluding, based on competent evidence contradicting the employer's stated explanations and supporting an inference of racial discrimination, that the employer was lying.

This Court—having addressed and clearly held that plaintiffs may rely on circumstantial evidence of lies to prove discriminatory intent—should take the opportunity to clarify that whether the

defendant's explanation is fabricated is a question of fact that may be resolved with circumstantial evidence and remind lower courts not to impose artificial evidentiary barriers on plaintiffs pursuing employment discrimination or retaliation claims.

CONCLUSION

Petitioner Jacinta Downing respectfully requests that this Court grant this petition, issue a writ of certiorari and either set the case for briefing and argument on the merits, or summarily vacate the Seventh Circuit's decision for reconsideration in light of *Hicks*, *Reeves*, and *Costa*.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED SEPTEMBER 12, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2746

JACINTA DOWNING,

Plaintiff-Appellant,

v.

ABBOTT LABORATORIES and
ABBOTT MOLECULAR, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-05921 — John J. Tharp, Jr., *Judge.*

Argued June 3, 2022 — Decided September 12, 2022

Before SYKES, *Chief Judge*, and FLAUM and BRENNAN, CIRCUIT JUDGES.

BRENNAN, *Circuit Judge*. Jacinta Downing worked for many years as a sales manager and then a sales executive at Abbott Molecular, Inc. Over time, that company faced financial difficulties. The company said that because of reductions in its sales force and Downing's work

performance, it ended her employment. Downing claims the company racially discriminated and retaliated against her, so she sued.

Many of her claims survived summary judgment, but after trial a jury found for Abbott Molecular. On appeal Downing challenges several of the district court's decisions, including evidentiary rulings, the exclusion of her expert witness, the jury instructions, and the testimony of her former manager, on which she moved for a mistrial. Downing argues that these errors, individually and cumulatively, denied her a fair trial. She also appeals the grant of summary judgment to the company on her disparate-impact claim, for which she contends she had sufficient evidence. We conclude that as to each decision, the district court ruled correctly or did not abuse its discretion, so we affirm.

I. BACKGROUND

Our description of the relevant facts comes from the jury trial transcript and other district court records.

A. Factual

Jacinta (or Jay) Downing, an African-American woman, had many years of sales experience when she was hired in 2002 by Abbott Molecular, Inc., a subsidiary of Abbott Laboratories. Downing's first job was Area Sales Manager. Her supervisor was Chris Jowett, a white man, who in 2009 arranged for her to be promoted to be one of four Regional Sales Managers. Each supervised a team

of sales representatives who sold millions of dollars of healthcare products to hospitals, commercial laboratories, and clinics, and who negotiated service contracts.

According to Downing, she "really liked working for" Jowett, who was "very inspirational" and mentored her. She considered him a man of great integrity and honesty. In March 2011 Jowett reviewed Downing and gave her an overall performance rating of "achieved expectations." According to that review, one of her main challenges was forecasting future business. Downing also fell somewhat short in developing relationships with decisionmakers at key accounts, and she was not comfortable with some of Abbott Molecular's product categories.

In 2012, Jowett gave Downing a performance rating of "exceeded expectations," the highest rating available. He wrote, "Jay is a strong leader for the Abbott Molecular sales organization and can be counted on to deliver results in spite of challenges. I look forward to Jay's continued success at Abbott Molecular." Jowett was pleased with Downing's improvement over the previous year, and by giving her the "exceeded expectations" rating Jowett said he was encouraging Downing. Shortly after completing that performance review, Jowett accepted a new role at Abbott.

Abbott Molecular came under financial pressure in early 2012. Medicare cut its reimbursement rates for a key Abbott product, which significantly impacted the company's margins. Multiple competitors also entered the market with updated versions of products Abbott

sold. In response, Abbott changed personnel in the Abbott Molecular division and reduced its work force. Mark Bridgman, a white man, was transferred from another Abbott division to fill Jowett's former role in Abbott Molecular.

Abbott also created the position of National Sales Director for the U.S. to "coach and guide the sales managers and reps on a day-to-day basis a bit more beyond what [Bridgman] was able to do." In October 2012, Peter Farmakis, a white man, was hired to fill the role. Farmakis oversaw one man, Mike Kohler (who is white), and three women: Jean Gray (who is white), Charlotte Jones (who is African-American), and Downing.

Almost immediately, Farmakis had issues with Downing, as well as with some of the other managers who reported to him. Downing had a conflict with a customer, in which she withheld a software key that could have possibly disrupted patient care, in October 2012. Farmakis was displeased, and he instructed Downing not to disrupt patient care going forward. Two months later, Farmakis was upset after he learned Downing had unilaterally informed another customer that Abbott would forgive a termination fee of $177,000. By January 2013, Farmakis had a list of concerns about Downing's performance, including oversights in end-of-year sales forecasting, which impacted other parts of Abbott's business.

Farmakis discussed his concerns about Downing's performance with Sarah Longoria, Abbott Molecular's human resources director in February 2013. The next

month, Farmakis gave Downing her performance review. Although Downing's overall rating was "achieved expectations," Farmakis included some detailed criticisms of her performance and identified areas for improvement.

In July 2013, Farmakis had a conference call with his four direct reports: Kohler, Gray, Jones, and Downing. According to Downing, Farmakis was "shouting and screaming" at the three women, whom he accused of "throwing in the towel." Downing reported the incident to Abbott's Employee Relations Department. She relayed her belief that Farmakis was discriminating against her because of her race and gender. About the same time, Gray also complained to Employee Relations about Farmakis's behavior. Gray, Jones, and Downing discussed their opposition to Farmakis's management in emails with each other.

Abbott investigated these complaints against Farmakis. An Employee Relations specialist sent a climate survey to the four managers who reported to him. In August 2013, Gray, Jones, and Downing gave very negative responses, which focused primarily on Farmakis's management style. Gray wrote that "[Farmakis is] especially hard on Jay. He embarrasses her and calls her out in calls or emails, part of the unfairness. Her numbers are good so don't understand why he calls her out, makes her feel stupid, don't know why he's doing that to her."

The Employee Relations specialist removed the identifying information from the survey responses,

deleted some of the comments, and sent them to Longoria. The anonymized feedback was shared with Farmakis, who Bridgman then coached to improve his management style.

Throughout 2013, Abbott Molecular's business continued to falter, resulting in layoffs. In January 2014, Abbott realigned its sales teams. Sales representatives who had previously reported to Downing were assigned to new teams. During the same month, Abbott also placed Downing on a performance improvement plan, the last step before termination. Downing then retained legal counsel and gave notice that she intended to file discrimination claims against the company. Abbott later cut Downing's stock award in March 2014, which left her unhappy.

That fall Downing filed a discrimination charge with the EEOC, which she later amended. Throughout 2014 Abbott's business had not improved, so the company instituted another reduction in force in January 2015. All four Regional Sales Managers, including Downing, lost their jobs when that position was eliminated. Farmakis, the National Sales Director, was also terminated.

At the same time Abbott terminated Downing's employment as part of the reduction in force, the company invited her to apply for the position of Regional Commercial Director. Downing understood this position to be essentially identical to her previous job. Keith Chaitoff, who replaced Bridgman in Abbott Molecular's leadership, testified his expectations for directors were "[d]ramatically" different. To him, the director role "needed people that understood business more holistically

and understood the financial drivers because we had to focus more on profit."

Abbott selected ten candidates, including Downing, to interview for the director position. A process was used to rate the candidates and to extend offers. Under that process, two African-American candidates (Downing and Jones), received the lowest ratings of the candidates for the position. Abbott did not select Downing, Jones, Kohler, or Farmakis, and ultimately extended offers for the position to four white candidates. One of those candidates declined, and an African-American man, Eron Butler, was hired.

B. Procedural

In June 2015 Downing filed suit claiming discrimination under Title VII and 42 U.S.C. § 1981. She later amended her complaint to allege: (1) racial discrimination under § 1981; (2) retaliation under § 1981; (3) racial discrimination under Title VII; (4) sexual discrimination under Title VII; and (5) retaliation under Title VII. The parties proceeded through discovery, at the close of which Abbott moved for summary judgment.

Abbott's summary judgment motion was "largely denied" because, the district court concluded, "the record in this case is replete with material factual disputes." For example, the facts did not establish whether Downing had a history of significant performance problems. To the court, Downing had "adduced enough evidence to support a jury verdict in her favor on her claim that Farmakis retaliated against her for complaining about

discrimination by giving her negative performance evaluations and placing her on performance management plans." Likewise, the court considered "evidence of more subtle differential treatment" and an allegedly racially charged remark made by Farmakis. There was also statistical evidence that "Farmakis's tenure coincided with a dramatic decrease in black representation at Abbott Molecular." The court reasoned, therefore, that a jury could find racial considerations motivated the coaching plan and performance improvement plan. Further, a reasonable jury could find "Farmakis's animus was the proximate cause of Downing's termination." So, the district court decided that the discrimination and retaliation claims predicated on Abbott's failure to hire Downing as a director should proceed to trial.

The district court did grant Abbott's motion for summary judgment in two respects. First, the court ruled that "Downing's performance management claim can be based only on race discrimination, not gender discrimination, as only race based discrimination was mentioned in the initial EEOC charge." Second, Downing could not proceed on her claim of disparate impact in the hiring process for the director position, as "a sample size of 10 individuals is simply too small to be statistically meaningful."[1]

At the same time, the district court granted Abbott's motion to exclude the proposed expert testimony of Dr.

1. Downing does not appeal the district court's grant of summary judgment to Abbott on her hostile work environment or sex discrimination claims.

Destiny Peery, a legal academic with a background in social psychology. Dr. Peery intended "to opine that there is evidence in the record that is consistent with how stereotyping and biases (either implicit or explicit) manifest and affect people in employment settings." But the court concluded that Dr. Peery's testimony would not help the jury because she disavowed any conclusion about what role, if any, stereotypes and biases played in Abbott's treatment of Downing. The court also decided that Dr. Peery employed an unreliable methodology.

Before and during trial, the district court granted Abbott's motions to exclude certain evidence Downing proffered. The court excluded:

- Proposed testimony from two of Downing's former subordinates, who would have testified they held high opinions of her management ability and character ("pretext evidence");

- Evidence of internal complaints made about two other Abbott employees ("comparator evidence");

- Portions of the climate survey responses that Jones and Gray submitted; and

- Statistical evidence of a decline in the number of African-American employees at Abbott Molecular between 2012 and 2015.

Appendix A

A two-week jury trial took place in August 2021. From the beginning the trial was hard fought. Downing's counsel raised numerous objections, including "a general concern to the entire way that the opening statement is being presented." At the close of Abbott's opening statement, its counsel told the jury: "[T]here are real people with real families being accused of race discrimination in this case ... I'm going to ask you to deliver a verdict for Abbott and, in the process, vindicate these people and restore their reputations."

During trial Downing presented evidence that she had been a high performer at Abbott, and that Farmakis had antipathy towards her and others. Abbott, on the other hand, offered evidence about Downing's performance problems, the business downturn that led to the reductions in force and Downing's termination, and the considerations that drove its hiring decisions for the director position.

Toward the end of trial, Abbott called Jowett as a witness. He discussed Downing's performance in detail, including some of her issues. Jowett also testified Downing was "not really open to feedback." He explained that while he had recruited other former Abbott employees to join another company he worked at between 2018 and 2021, he did not recruit Downing because he did not believe she could "take on the complexity of the sales position." According to Jowett, he was "flabbergasted" upon learning that Downing had identified him in an interrogatory response as someone who discriminated against African-Americans. Downing's counsel then moved for a mistrial, contending that Abbott's counsel had unduly influenced Jowett by telling him Downing

had called him a racist. The court denied the motion, explaining that Downing's interrogatory response could fairly be read to imply Jowett was a racist.

The disputes at trial extended to the jury-instruction conference. Downing's counsel proposed a series of instructions beyond those in the Seventh Circuit's pattern instructions, but the district court rejected most of them, including:

- A description of and quotations from the civil-rights statutes under which Downing sued;
- A list of the various types of circumstantial evidence that a plaintiff in a workplace discrimination case may use;
- A statement that making an adverse employment decision because of racial stereotypes is a form of race discrimination; and
- An instruction on spoliation for Abbott's failure to preserve a survey that Farmakis had referenced in his testimony.

The district court largely used the Seventh Circuit's pattern jury instructions.

During deliberations the jury posed written questions, two of which are relevant on appeal. The first question was:

"Can we award punitives without finding 'yes' on any of the claims?" The parties' counsel agreed to respond "no," and the district court gave that response. The second question read: "To be considered a 'protected activity,' does it need both opposing *and* reporting, or are one out of two sufficient." To the court, this second question asked whether one action or both was required. After discussion with the parties' lawyers, the court responded by submitting to the jury the written definition of an unlawful employment practice at 42 U.S.C. § 2000e-3.

Following deliberations the jury returned a verdict for the defense. The jury found that Downing did not prove she was subject to any adverse employment action because of her race. It also found that Downing did not prove any of her retaliation claims.

After the district court entered judgment, Downing appealed, raising a litany of issues. She challenges many of the court's evidentiary rulings; the exclusion of her expert witness; the instructions to the jury; and the testimony of Jowett, as well as the court's denial of the attendant mistrial motion. Our appellate review of these decisions is deferential, so Downing faces a demanding task. She also objects to the district court's grant of summary judgment to Abbott on her disparate-impact claim, which we review de novo.

II. EVIDENTIARY RULINGS

Downing first contends that the district court excluded evidence at trial about her discrimination and retaliation claims on which the court had previously relied to deny Abbott summary judgment. That court ultimately granted 10 of Abbott's 14 motions in limine, which to Downing resulted in a "fundamentally unfair trial."

Because "decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court," *Pittman ex rel. Hamilton v. County of Madison*, 970 F.3d 823, 829 (7th Cir. 2020), they are reviewed for abuse of discretion. Under that standard, "the district court's decision is to be overturned only if no reasonable person would agree with the trial court's ruling." *Aldridge v. Forest River, Inc.*, 635 F.3d 870, 875 (7th Cir. 2011); *accord Antrim Pharms. LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 430 (7th Cir. 2020) (same). In addition, for reversal to be warranted, the error must have "likely affected the outcome of the trial." *Wilson v. Wexford Health Sources, Inc.*, 932 F.3d 513, 522 (7th Cir. 2019) (citation omitted).

Title VII of the Civil Rights Act prohibits an employer from taking an adverse employment action against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). A plaintiff may use circumstantial evidence to prove discrimination through a chain of inferences. *Diaz v. Kraft Foods Glob., Inc.*, 653 F.3d 582, 587 (7th Cir. 2011). Our court has recognized three categories of

circumstantial evidence in Title VII cases: "(1) ambiguous statements or behavior towards other employees in the protected group; (2) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive better treatment; and (3) evidence that the employer offered a pretextual reason for an adverse employment action." *Id.*

Downing contends that the district court improperly excluded evidence about pretext, comparators, the climate survey responses, and demographic statistics.

A. Pretext Evidence

Testimony was excluded which Downing argues would have shown that Abbott acted adversely to her based on pretext. She submits that two of her subordinates, Michael Cerney and Anecia Thedford, would have testified—contrary to Abbott's assertions—that Downing was an exemplary manager. According to Downing, Cerney and Thedford found her to be inspirational and highly knowledgeable about products and pricing. Abbott responds that Downing was allowed to present those witnesses' assessments of her management, although they were properly limited to those opinions conveyed to decisionmakers.

To prevail on a Title VII racial-discrimination claim, a plaintiff must provide evidence that the decisionmaker acted because of her race. *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 378-79 (7th Cir. 2011). Pretext does not exist "if the decisionmaker honestly

believed the nondiscriminatory reason" given by an employer for an adverse employment action. *Stockwell v. City of Harvey*, 597 F.3d 895, 902 (7th Cir. 2010) (citation omitted). So, in evaluating pretext, the focus is on what the decisionmakers knew, and their perceptions are "controlling." *Id.* at 903.

Downing asserts this principle does not apply here. To Downing, pretext exists in two ways: Abbott's assertion that Farmakis believed she was not knowledgeable about the company's products or skilled in front of customers, and in Farmakis's statements that members of Downing's team relayed that message to him. Even assuming her proposed exception exists to the rule limiting the inquiry to what was shared with decisionmakers, this argument does not succeed. Contrary to Downing's portrayal, neither Farmakis nor Abbott maintained or suggested that Cerney or Thedford leveled these criticisms against Downing. Rather, per Farmakis and Abbott, other employees under Downing's supervision made the statements in question, which were consistent with Farmakis's firsthand observations. Because several employees other than Cerney and Thedford reported to Downing, those two individuals could not have rebutted the testimony that certain subordinates shared the criticisms with Farmakis.

Cerney was permitted to offer substantial testimony about Downing as a "motivational," supportive, and kind manager. More to the point, the district court ruled narrowly that Downing's counsel could elicit testimony from Downing's subordinates that Farmakis did not

seek out their opinions about her management style. But counsel could not ask what the subordinates would have told Farmakis about Downing's character or expertise. The district court emphasized that the relevant opinions were those held by Farmakis or another decisionmaker.

The district court properly concentrated this inquiry by limiting the testimony of Downing's subordinates to what they had communicated to Farmakis. Whether Cerney and Thedford agreed with Farmarkis's poor opinion of Downing's capabilities is not relevant to her Title VII claims, and such testimony would have prejudiced Abbott. To evaluate pretext, the evidence is what the decisionmakers knew and believed. *Stockwell*, 597 F.3d at 903. Downing's contention about what these two subordinates thought of her therefore does not engage with the district court's reasoning or the relevant case law. The court was within its discretion to exclude Downing's additional evidence purporting to show pretext.

B. Comparator Evidence

Downing argues next that the district court abused its discretion by not admitting evidence relating to two purported comparators: her co-manager Mike Kohler, and Kirk Mason, an employee in another department. To Downing, the "complaints about, investigation of, and suit against Kohler were paradigmatic comparator evidence." She asserts Kohler had the same job as she did, they were subject to the same standards, and he engaged in similar but more serious conduct than she did. Abbott responds that Kohler's situation involved different decisionmakers, job responsibilities, allegations, and time periods.

To prevail by showing a similarly situated employee was treated differently, a plaintiff must show the purported comparator was "directly comparable to her in all material respects" so as to "eliminate other possible explanatory variables." *Williams v. Off. of Chief Judge of Cook Cnty.*, 839 F.3d 617, 626 (7th Cir. 2016) (citation omitted); *see also Barbera v. Pearson Educ., Inc.*, 906 F.3d 621, 629 (7th Cir. 2018). The two employees who are purportedly similarly situated must deal with the same supervisor, be subject to the same standards, and "have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their employer's treatment of them." *Barbera*, 906 F.3d at 629 (citations omitted).

The differences between Kohler's conduct and Downing's conduct overwhelm the similarities. Kohler was accused of creating a hostile work environment by intimidating his direct reports. Those allegations were unlike the performance problems Abbott cited when Downing's employment was terminated. Further, Kohler was a National Molecular Physician Specialist, a different position than Downing. Kohler also reported to a different supervisor—Bridgman, not Farmakis. So, as a matter of law, Kohler was not a comparator relative to Downing. *See id.* The district court thus did not abuse its discretion in excluding the evidence about Kohler's alleged workplace misconduct.

Downing also claims the district court abused its discretion by not admitting evidence about Mason, even though Abbott opened the door to such evidence by implying a complaint Downing made against him was

baseless. Abbott responds that Downing effectively forfeited this argument because she failed to address the two reasons the district court gave to not permit Downing to testify about Mason: She lacked personal knowledge of the investigation into the allegations against him, and such testimony would confuse the jury.

Mason, a manager in the Contracts and Pricing Department, was referenced in Abbott's opening statement because he did not authorize Downing to forgive the $177,000 debt to a customer. Though Downing is correct that Abbott implied she had fabricated charges of racism against Mason, the allegations against Mason that Downing was precluded from introducing at trial were largely unrelated. The Employee Relations Department found Mason had engaged in yelling, speaking in a condescending manner, using inappropriate language, and referring to colleagues as his "work wife." None of that was relevant to Downing's job performance or her charge of racial discrimination. Setting aside Downing's lack of personal knowledge about the outcome of the investigation into Mason's wrongdoing, the district court was within its discretion to conclude that such evidence would have confused the jury and fallen short under Federal Rule of Evidence 403.

C. Climate Survey Responses

Downing asserts that because the climate survey responses showed that Farmakis treated other members of her protected class poorly, the district court should not have excluded them. According to Downing, "Jones's

and Gray's contemporaneous, written complaints about Farmakis's discriminatory behavior, memorialized in their climate survey responses, were extremely relevant" and were "inextricably part of Downing's circumstances and theory of the case." Abbott points out that the district court admitted into evidence, over Abbott's objections, the PowerPoint summary of the climate survey that Employee Relations received and reviewed. To Abbott, the district court was correct not to "allow Downing to submit portions of other people's responses that had nothing to do with race discrimination or her interactions with Farmakis."

Jones and Gray offered responses in the climate survey that they believed Farmakis was hostile to them because they were women. But those survey responses did not discuss race, so they had limited relevance to the jury's consideration of Downing's racial discrimination claim. The district court had previously granted Abbott summary judgment on Downing's sex discrimination claim, and she fails to acknowledge that was not an issue at trial. And, as the district court reasoned, there was a substantial risk of prejudice inherent in "having a bunch of complaints made by other people ... offered for their truth."

The district court did permit Downing to introduce one statement from Gray's climate survey response: "[Farmakis is] especially hard on Jay [Downing]. He embarrasses her and calls her out in calls or emails, part of the unfairness. Her numbers are good so don't understand why he calls her out, makes her feel stupid, don't know why he's doing that to her." This response was important to Downing's case, and her counsel referenced it during her

closing argument. Considering the district court allowed Downing to introduce this statement, despite its prejudice to Abbott, Downing fails to show the court abused its discretion by excluding other, less probative excerpts of the survey responses. Even more, Downing overlooks that the district court admitted and the jury heard the most important survey-response evidence. Longoria—the decisionmaker in Employee Relations—testified she saw the PowerPoint presentation that summarized the climate survey responses.

We cannot say that "no reasonable person would agree with the trial court's ruling." *Aldridge*, 635 F.3d at 875. The exclusion of the individual survey responses thus was not an abuse of discretion. And any error on this topic likely did not affect the trial's outcome, as would be necessary for a reversal on this ground. *Cf. Wilson*, 932 F.3d at 522.

D. Statistical Evidence

Between 2012 and 2015, the number of African-American employees at Abbott Molecular decreased from 32 (4.7% of the company's work force) to 16 (3%). After consideration, the district court excluded these statistics because they did not account for employees who, rather than being forced out or terminated, left for other reasons, retired, or transferred to other positions in Abbott.

Downing argues these statistics are probative of racial discrimination and that their exclusion was an abuse of discretion. To Downing, Longoria was a decisionmaker

responsible for the disproportionate attrition of African-American employees at Abbott Molecular. Downing also contends the statistical evidence should have been permitted to rebut assertions by Abbott's witnesses that they sought to increase diversity at the company.

Abbott responds that these data were not probative. Not only do they not identify which employees left for reasons other than termination, but they do not reveal which departures, if any, were connected to the decisionmakers in this case—Farmakis and Longoria. For Abbott, that means the statistics are insufficiently probative and unfairly prejudicial, and the district court properly excluded them.

Statistical evidence may help an individual employee with a Title VII claim show that racial discrimination was an employer's standard operating procedure, but those statistical comparisons must involve a proper group. *Matthews v. Waukesha Cnty.*, 759 F.3d 821, 829-30 (7th Cir. 2014). To support her position, Downing relies primarily on two cases: *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012), and *Vega v. Chicago Park Dist.*, 954 F.3d 996 (7th Cir. 2020). But each discusses statistical evidence in a Title VII setting only briefly.

In *Coleman*, this court noted that a Title VII plaintiff may use "evidence, but not necessarily rigorous statistical evidence, that similarly situated employees were treated differently." 667 F.3d at 860 (citation omitted). Nothing in that statement suggests statistical evidence must be admitted when it does not show whether employees were,

in fact, treated differently. Similarly, in *Vega* we concluded that a jury's verdict for a plaintiff had evidentiary support because the plaintiff showed that "no Caucasian park supervisors were fired [during the relevant period], while 17.6% of the Park District's Hispanic park supervisors were fired during that same period." 954 F.3d at 1005. So, statistical comparisons must involve a proper group.

At issue here is how many of the African-American employees who left Abbott Molecular between 2012 and 2015 did so involuntarily. Downing failed to show how many of the employees were fired or otherwise forced out of Abbott. And the record established that at least some of them left to pursue careers elsewhere. On appeal, Downing admits she cannot identify how many African-American employees left the company to pursue other positions, including positions within Abbott. This concession persuades us that the district court did not abuse its discretion in excluding the statistical evidence.

E. Harmless Error

To Downing, these various alleged evidentiary errors had the individual and collective effect of denying her a fair trial. In support, Downing cites the jury's first question: "Can we award punitive [damages] without finding 'yes' on any of the claims?" But the inference Downing advances—that the jury wanted to find for her but could not because of the evidentiary rulings—is conjecture. Speculation as to the evidence the jury did or did not rely on in reaching its verdict is just that, considering the jury never saw or heard the excluded evidence. By rule, with exceptions

not relevant here, inquiry into a jury's mental processes concerning a verdict is precluded. *See* FED. R. EVID. 606(b).

Indeed, Downing prevailed in the discussion among the district court and counsel on how to respond to this first question. After the court read it to the parties' counsel, Downing's attorney spoke first, and her proposed answer—"No"—was adopted and relayed to the deliberating jury.

The excluded evidence that Downing contends should have been admitted is also cumulative of other evidence the jury heard. "[E]rrors in admitting evidence that is merely cumulative of properly admitted evidence are harmless." *Jordan v. Binns*, 712 F.3d 1123, 1138 (7th Cir. 2013) (citations omitted); *see also Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1047-48 (7th Cir. 2000) (same). The excluded pretext evidence was cumulative of Cerney's extensive testimony, and the excluded portions of the climate survey responses were cumulative of the more probative portions that were admitted at trial. The proposed comparator evidence was weak, as neither Kohler nor Mason was even plausibly a comparator, so no harmless-error analysis is necessary on that point. And the statistical evidence had limited probative value because it did not account for the circumstances of any individual employee's departure from Abbott Molecular. Even if we were to determine that the statistical evidence should have been admitted, there is no reason to believe any error likely affected the outcome of the trial, so reversal is not warranted. *See Wilson*, 932 F.3d at 522.

Appendix A

III. EXPERT TESTIMONY

We consider next whether the district court erred by excluding the proposed opinion testimony of Dr. Destiny Peery about stereotyping and racial bias.

Expert testimony is admissible when: (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702. Under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the district court acts as the gatekeeper for expert evidence, *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 834 (7th Cir. 2015), evaluating the proffered expert's qualifications, the reliability of the expert's methodology, and the relevance of the expert's testimony. *Kirk v. Clark Equip. Co.*, 991 F.3d 865, 872 (7th Cir. 2021).

The party seeking to introduce expert witness testimony has the burden to show, by a preponderance of the evidence, that the testimony meets the *Daubert* standard. *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 782 (7th Cir. 2017). We review de novo whether the district court properly applied the *Daubert* framework. The district court here did so: In ruling on Abbott's motion to exclude Dr. Peery's opinions, it expressly relied on Rule 702 and *Daubert*. It then considered whether Dr. Peery's proposed testimony was consistent with those authorities.

The ultimate decision "to exclude or admit the expert witness testimony" is reviewed "for an abuse of discretion only." *Id.* (citation omitted); *see also Textron*, 807 F.3d at 835. A district court abuses its discretion when no reasonable person can agree with its decision. *Antrim Pharms. LLC*, 950 F.3d at 430. The district court considered two aspects of Dr. Peery's testimony—the reliability of her methodology, and its helpfulness to the jury.

Reliability. Downing has not offered an argument on appeal as to reliability. Even if she has not waived this point, the district court correctly determined that Dr. Peery's methodology was not reliable.

In assessing reliability, a district court may consider several factors, including the known or potential rate of error and the "existence and maintenance of standards controlling the technique's operation." *Kirk*, 991 F.3d at 873 (citation omitted). A court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (citation omitted). As this court has noted, a proposed expert must "bridge the analytical gap" by showing a "rational connection" between the data and the expert's contested conclusion. *Gopalratnam*, 877 F.3d at 786 (citing *Manpower*, 732 F.3d at 809).

Dr. Peery's report begins by reviewing literature concerning stereotyping and discrimination. It then pivots, opining that negative assessments of Downing's performance at Abbott are consistent with the possibility

of stereotyping or bias. Dr. Peery does not substantively discuss the methodology she used. The connection between the data in the report and Dr. Peery's opinions exists "only by the *ipse dixit*" of her as the witness. *Id.* at 781. The district court reasonably concluded that Dr. Peery's methodology was unreliable, so her opinions were properly excluded. *See id.* at 786-87 (affirming the exclusion of expert opinion evidence on reliability grounds); *Kirk*, 991 F.3d at 877 (same); *Textron*, 807 F.3d at 837-38 (same).

Helpfulness to the Jury. Dr. Peery's proposed testimony was also excluded because it would not help the jury determine any fact at issue. Downing suggests this was not only erroneous but an abuse of discretion that warrants reversal. Abbott responds that the district court correctly excluded Dr. Peery's opinions because she could not assess the probability of bias in any way.

In a *Daubert* inquiry, the district court must evaluate the relevance of the expert's testimony to a particular case. *Kirk*, 991 F.3d at 872; *Gopalratnam*, 877 F.3d at 779. For expert testimony to be admissible, the expert must have something "useful to say" about the particular circumstances at issue. *Kunz v. DeFelice*, 538 F.3d 667, 676 (7th Cir. 2008).

To the district court, Dr. Peery opined "only that stereotypes 'may,' 'might,' or 'could have' played a role in Abbott's decision making." She did not offer a definite opinion as to whether Abbott discriminated against Downing. The court's conclusion precisely tracks Dr. Peery's putative testimony. For her opinions to help

the jury, she needed to speak to whether Abbott's decisionmakers racially discriminated against Downing. That requirement was not satisfied, the court correctly concluded, when Dr. Peery could not opine—with even five percent certainty—that anyone at Abbott made a decision about Downing's employment on the basis of racial bias. *See id.* (affirming exclusion of expert witness's testimony because his generalized testimony did not have anything useful to say about the particular facts in dispute). Dr. Peery's testimony also would be unfairly prejudicial, as the court ruled, because jurors might incorrectly conclude she was offering an opinion on the ultimate liability question. For these reasons, the district court did not abuse its discretion by excluding Dr. Peery's opinion testimony.

IV. JURY INSTRUCTIONS

The district court also denied Downing's requests for certain jury instructions. We review those decisions for abuse of discretion. *E.E.O.C. v. AutoZone, Inc.*, 809 F.3d 916, 921-22 (7th Cir. 2016); *Aldridge*, 635 F.3d at 876. To the extent "the case turns on a question of law," our review is de novo. *Kuberski v. Rev Recreation Grp., Inc.*, 5 F.4th 775, 779 (7th Cir. 2021) (citation omitted). We will reverse "only if the instructions in their entirety so thoroughly misled the jury that they caused prejudice." *Farnik v. City of Chicago*, 1 F.4th 535, 544 (7th Cir. 2021) (internal quotation marks and citations omitted); *accord Auto-Zone*, 809 F.3d at 922.

Statutory Instruction. Downing claims the district court abused its discretion by denying her proposed

jury instruction 2, which quoted portions of Title VII and 42 U.S.C. § 1981. This denial, according to Downing, resulted in the jury lacking knowledge of "what the anti-discrimination laws prohibit." In declining to give this instruction, the district court stated, "I am inclined to agree with the defense view that we don't need to include this statement of the purpose of the civil rights laws." What was relevant, in the court's view, was "to tell the jury what they need to find in order to render a verdict on the claims that are submitted in this case."

On this point, the jury was instructed:

> Ms. Downing must prove by a preponderance of the evidence that Abbott terminated her employment because of her race. To determine that Abbott terminated her employment because of her race, you must decide that Abbott would not have terminated her employment had Ms. Downing not been African American but everything else had been the same.

We read this instruction to sufficiently convey what the anti-discrimination laws prohibit and what the jury was required to find to rule for Downing.

The verdict form also asked the jury to determine whether Downing was (1) placed on performance-management measures; (2) subjected to termination; or (3) not rehired into a different role "because of her race." Adverse employment actions, taken because of an employee's race, are exactly what Title VII prohibits. *See*

42 U.S.C. § 2000e-2(a)(1); *Barbera*, 906 F.3d at 628. Even more, in response to the second jury question, the district court adopted Downing's counsel's suggestion to give the jury a copy of the statutory definition of an unlawful employment practice. Rather than being misled, we conclude that the jury was sufficiently informed about the applicable law. *See AutoZone*, 809 F.3d at 921-23; *Aldridge*, 635 F.3d at 876. In view of the instruction that was given, the wording of the verdict form, and the response to the jury's second question, the refusal to give Downing's proposed jury instruction 2 was not an abuse of discretion.

Circumstantial evidence instruction. Next, Downing believes the district court should have given her proposed jury instruction 12. That provided a plaintiff "may prove discrimination or retaliation by offering different types of evidence," including ambiguous statements toward other African American employees or evidence that Downing failed to receive desired treatment for which she was qualified. In its denial the court told Downing's counsel: "You can tell [the jury], make your arguments about the probative value of the evidence and how it proves or does not prove discrimination or retaliation. We're not going to build that into the jury instructions." Abbott contends Downing failed to preserve this challenge and that the court's instruction as to how the jury should weigh evidence was sufficient.

The district court did not abuse its discretion here because it gave the circumstantial evidence instruction. After the close of evidence and argument, the court instructed the jury:

> You may have heard terms—the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact, that is, evidence that requires an inference ... You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weigh to give to any evidence, whether it is direct or circumstantial.

Downing does not acknowledge or account for this instruction, which the jury could have used to determine whether discrimination or retaliation had occurred.

Stereotyping Instruction. Per Downing, the district court also abused its discretion by refusing to give proposed jury instruction 17: "Making an adverse employment decision because of racial stereotypes is a form of race discrimination." This prejudiced her, Downing submits, because the court precluded her theory of stereotyping for lack of an adequate evidentiary foundation, even though there was "ample evidence."

Abbott responds that Downing forfeited this challenge, as on appeal she fails to contest the district court's ruling that the instruction was unnecessary. She was also permitted to argue that Abbott's actions were based on stereotyping, and Abbott sees no record support for this instruction.

Downing is incorrect that the record is replete with evidence of stereotyping. She claims that Abbott engaged in blatant racial stereotyping because it termed her "defensive," "negligent," and lacking in "executive presence." At oral argument, her attorney made the puzzling suggestion that a manager who does not communicate well in front of customers is a "horrible racial stereotype."[2] Yet such descriptors are legitimate criticisms of an employee's job performance. Downing provides no admissible evidence or authority that these labels are prevalent racial stereotypes. For this point she relies on Dr. Peery's testimony, but that was appropriately excluded under the *Daubert* standard. Given that Downing did not otherwise develop a factual record that would render such an instruction relevant, the district court did not abuse its discretion by denying it. *See AutoZone*, 809 F.3d at 922-23.

"[A] judge need not deliver instructions describing all valid legal principles." *Id.* at 923 (citation omitted). Instead, a trial court should generally allow a litigant to argue that a jury should draw a certain inference from the evidence. *Id.* The district court appropriately permitted Downing's counsel to argue to the jury that Abbott based its adverse employment actions on racial stereotypes. For these reasons, the denial of Downing's request for this jury instruction was not an abuse of discretion.

Spoliation Instruction. Downing's final challenge to the jury instructions involves spoliation. Farmakis

2. Oral Arg. at 10:45.

testified at trial that he sent a survey to everyone in Abbott Molecular's sales division to figure out what was going on within the business. Downing objected, arguing that the survey was not produced in discovery. Abbott responded that although the company could not locate the survey, Farmakis could still testify to his personal knowledge that he had conducted it and reviewed its results. So, the district court overruled the objection.

Near the end of the jury-instruction conference, Downing requested "something along the lines of a spoliation instruction" that would have told the jury that it could draw a negative inference from Abbott's failure to produce the document Farmakis had referenced during his testimony. The district court agreed with Abbott that there was an insufficient basis for a spoliation instruction. Downing contends that was an abuse of discretion.

To obtain an adverse inference related to spoliation, a plaintiff must demonstrate that a defendant intentionally destroyed documents in bad faith. *Perez v. Staples Cont. & Com. LLC*, 31 F.4th 560, 569 (7th Cir. 2022); *Norman-Nunnery v. Madison Area Tech. Coll.*, 625 F.3d 422, 428 (7th Cir. 2010). "The crucial element in a spoliation claim is not the fact that the documents were destroyed but that they were destroyed for the purpose of hiding adverse information." *Norman-Nunnery*, 625 F.3d at 428. Downing has not shown that anyone at Abbott destroyed the survey, which was taken in 2012—nine years before the trial—much less that any such destruction was for the purpose of hiding adverse information. Rather than an abuse of discretion, the district court's refusal to give the jury a spoliation instruction was correct.

The district court properly relied on this circuit's pattern jury instructions for Downing's claims, and it did not abuse its discretion by rejecting the four jury instructions discussed above.

V. JOWETT TESTIMONY AND MISTRIAL MOTION

Downing further argues that the district court should have limited the trial testimony of her former supervisor Chris Jowett, or declared a mistrial based on his testimony.

As noted above, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henderson v. Wilkie*, 966 F.3d 530, 534 (7th Cir. 2020). A party "seeking to overturn the district court's evidentiary ruling bears a heavy burden because a trial court's balancing of probative value and unfair prejudice is highly discretionary." *Id.* (cleaned up). An error in admitting evidence will not be a ground for a new trial unless justice requires otherwise, meaning the error must have prejudiced the aggrieved party's substantial rights. Fed. R. Civ. P. 61; *Stegall v. Saul*, 943 F.3d 1124, 1127-28 (7th Cir. 2019).

A district court's denial of a mistrial is likewise reviewed for an abuse of discretion. *Farnik*, 1 F.4th at 542. In this context, we consider whether the district court committed an error of law or made a clearly erroneous finding of fact. *Id.* (citing *Christmas v. City of Chicago*, 682 F.3d 632, 638 (7th Cir. 2012)). The ultimate question is whether the appellant was denied a fair trial. *Id.*

According to Downing, Abbott elicited testimony from Jowett as part of a strategy of "race baiting." Downing sees a recurring theme at trial of Abbott appealing "to the jury's emotions by asking it to vindicate the people Downing had accused of racism." Based on this claim, Downing sought to preclude Jowett from testifying about his experiences with her, except for what he shared with decisionmakers. The district court stated it would not make a "blanket ruling" limiting Jowett's testimony, although it would "judge the relevance in the context of the specific questions."

Abbott points out that after Downing's initial objection and the court's ruling, she did not renew her motion to exclude this testimony. Nor did she object to Jowett's testimony about her skills and capabilities, his perception that her claims of racial discrimination lacked merit, and his feelings about her accusation that he perpetrated racial bias while at Abbott. Abbott submits that Downing therefore waived or forfeited the argument she now advances. Downing does not respond to Abbott's contention that she failed to preserve this challenge.

"If the district court admits the contested evidence, the opponent must make a timely objection or motion to strike, stating the specific ground of objection, if the specific ground was not apparent from the context." *Jimenez v. City of Chicago*, 732 F.3d 710, 719 (7th Cir. 2013) (citations omitted); *see also Griffin v. Foley*, 542 F.3d 209, 218-19 (7th Cir. 2008). Downing's failure to object to specific portions of Jowett's testimony precludes her challenge on appeal. Further, arguments for excluding

testimony, when made on appeal, are not preserved by motions in limine that reference different arguments. *Jimenez*, 732 F.3d at 720. Downing argued to the district court that Jowett should be "limited to testify to what he shared with the decisionmakers." But on appeal, she claims Jowett should not have been permitted to testify, despite his extensive personal knowledge of Downing's performance, because he was part of Abbott's strategy of "race baiting" the jury. This gap between Downing's objection at trial and her argument on appeal means this challenge has not been preserved. *See Jimenez*, 732 F.3d at 720.

Even if Downing had preserved the challenge to Jowett's testimony, it would not form a basis to grant a new trial. A trial court's decision to admit evidence as more probative than prejudicial is highly discretionary. *Henderson*, 966 F.3d at 534. Downing relays how she perceives Jowett's testimony fit into the trial's narrative. She also offers a conclusory statement that "Abbott's conduct in baiting the jury" deprived her of a fair trial. But Downing cites no authority that a witness in Jowett's managerial position, with his knowledge of her performance and capabilities, should not have been allowed to testify.

As Abbott contends, Jowett's testimony was properly admitted in response to Downing's testimony that his 2012 "exceeded expectations" rating was evidence of her exemplary performance. That is the primary reason the district court gave for allowing Jowett to testify about his assessment of Downing's performance. Downing does not

respond to the basis for this ruling, so she has not shown it was an abuse of discretion.

Instead, Downing claims "race baiting," which she contends required a mistrial. Downing asserts that Jowett, when asked, testified that Abbott's counsel told him that Downing had accused him of racial bias in his former position at Abbott. After Downing's counsel moved for a mistrial on this basis, Abbott's counsel stated, "I literally read to him the interrogatory response, full stop. That's what I did." In the interrogatory at issue, Abbott asked Downing to "identify the following Abbott executives who discriminated against African Americans," to which Downing responded with a list that included Jowett. Downing's counsel argued that Abbott had tainted the jury by asking witnesses, including Jowett, whether they were aware that she accused them of racism. The district court denied the motion for a mistrial, although it permitted Downing's counsel to ask Jowett what Abbott's attorney had said to him.

The district court made no error of law or clearly erroneous finding of fact, so the denial of the motion for a mistrial must stand. *See Farnik*, 1 F.4th at 542. It was not unduly prejudicial for Abbott to ask witnesses in a trial about racial discrimination if they were aware that the plaintiff had accused them of racial discrimination. In addition, the district court accepted the representation that Abbott's counsel had only read the interrogatory response to Jowett. Downing offers no reason why doing so was not within the court's discretion. It is not surprising that Jowett interpreted the interrogatory

response as Downing accusing him of racism, because that is what it implies. Nothing about Jowett's testimony or the circumstances leading up to it deprived Downing of a fair trial.

Relatedly, Downing contends the "race baiting" was compounded by the district court's refusal to give proposed jury instruction 18. That instruction would have stated in part: "You have heard reference in opening statements that your role is to vindicate people and restore their reputations. You must disregard that statement, which is not evidence, nor is it an accurate statement of the law or your role or duty in this case."

The district court rejected this instruction for two reasons. First, it mischaracterized what counsel for Abbott said during his opening statement, which was that a verdict for Abbott would vindicate the former Abbott employees who had been accused of discriminating against Downing. Second, other jury instructions, including those that told the jury not to consider sympathy, were sufficient to cure any prejudice.

Both reasons are correct. Downing would not have been unfairly prejudiced by a comment that a defense verdict would vindicate Abbott employees whom Downing accused of racial bias. Juries are permitted to rely on their collective common sense. *See Stragapede v. City of Evanston, Ill.*, 865 F.3d 861, 866 (7th Cir. 2017). This would include that a verdict for the company would reflect well on its employees. The district court also gave instructions that were sufficient to eliminate any possible prejudice.

The jury was told: "Do not let sympathy, prejudice, fear, or public opinion influence you." The court also instructed, "[the jury's] concern is only whether Ms. Downing has proved that in taking the challenged employment action Abbott discriminated against Ms. Downing because of her race and/or retaliated against her for complaining about discrimination." So, contrary to Downing's contentions on appeal, the jury was instructed to disregard any effort to convince it to decide the case based on the feelings of the former Abbott employees whom she accused of racial bias. For these reasons, a new trial is not warranted.

Downing did not preserve her objections to Jowett's testimony, and in any event the district court was within its discretion not to exclude the testimony because it was relevant. Any error on the admission of Jowett's testimony did not warrant a mistrial.

VI. DISPARATE-IMPACT CLAIM

Last, Downing appeals the district court's grant of summary judgment to Abbott on her disparate-impact claim.

We review the district court's grant of summary judgment de novo, construing facts in the light most favorable to Downing and drawing all reasonable inferences in her favor. *Khungar v. Access Cmty. Health Network*, 985 F.3d 565, 572 (7th Cir. 2021) (citations omitted). "An inference is not reasonable if it is directly contradicted by direct evidence provided at the summary judgment stage, nor is a 'conceivable' inference necessarily

reasonable at summary judgment." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 876 (7th Cir. 2021) (citing *Cont'l Cas. Co. v. Nw. Nat. Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005)). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

An employment practice may be unlawful under Title VII based on its disparate impact. 42 U.S.C. § 2000e-2(k). "Under a disparate impact theory, an employer is held liable when a facially neutral employment practice disproportionately impacts members of a legally protected group." *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005). A plaintiff must first show that the employment practice had an adverse impact on employees with a protected characteristic, such as race. *Ernst v. City of Chicago*, 837 F.3d 788, 796 (7th Cir. 2016). If the employee makes such a showing, then the burden shifts to the employer to show its employment practice "is job-related for the employee's position and consistent with business necessity." *Id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

The district court concluded that the sample size of 10 applicants for the director position was too small to be statistically meaningful, so it granted Abbott summary judgment on Downing's disparate-impact claim. Downing challenges the process Abbott used to rate candidates and extend offers during the rehiring process for the director position. Under that process, two African-American candidates—Downing and Jones—received the

lowest ratings of ten candidates for the position. Downing argues she presented ample evidence that the subjective rating system Abbott used disparately impacted African-Americans. This included those white candidates without managerial experience all received higher ratings than Downing and Jones. Abbott defends the disparate-impact ruling because the sample size is so small that no inference of discriminatory impact would be proper.

A plaintiff cannot make a prima facie case of adverse impact where the affected group is "too small for any valid statistical comparisons," which "immunize[s] most single decisions from disparate impact challenges." *Council 31, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Ward*, 978 F.2d 373, 378 (7th Cir. 1992); *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 996-97, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) (noting that "small or incomplete data sets" prevent a plaintiff from making a prima facie case of adverse impact). *Accord Morgan v. Harris Tr. & Sav. Bank of Chicago*, 867 F.2d 1023, 1028 (7th Cir. 1989) ("Where the sample size or alleged effect is so statistically insignificant that no inference of discriminatory impact is proper, plaintiff fails to present a prima facie case."); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 514 n.3 (7th Cir. 1996) (stating an employer's hiring for four positions presented a "sample size" that was "too small for any meaningful statistical comparison"). Because only 10 individuals applied for the director position, the district court reached that conclusion here. Downing asserts the district court ruled, incorrectly, that disparate-impact liability was per se unavailable because the sample size was too small. But she cites no authority for her assertion, and the case law holds otherwise.

In response to this ruling, Downing points to her disparate-treatment evidence. She highlights what she sees as discrepancies between the interview results and the applicants' performance records. But Downing did not offer this argument in the district court, and a contention that an employer did not fairly assess an individual applicant for a position is not an allegation of disparate impact. *See Farrell*, 421 F.3d at 617. The district court correctly granted summary judgment to Abbott on Downing's disparate-impact claim.

VII. CONCLUSION

On each point Downing raises, the district court either ruled correctly or it did not abuse its discretion. Accordingly, we AFFIRM the district court's judgment in all respects.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED FEBRUARY 2, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACINTA DOWNING,

Plaintiff,

-vs-

ABBOTT LABORATORIES and ABBOTT MOLECULAR,

Defendants.

Case No. 15 C 5921

Chicago, Illinois
August 11, 2021
9:00 a.m.

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - VOLUME 1
BEFORE THE HONORABLE JOHN J. THARP, JR.,
and a jury

(Page 4) All right. We're going to get started in just a minute. We're sorting out the jurors.

Folks over in the benches, you understand you're not going to be there? Okay.

MS. GLINK: We do, Your Honor.

THE COURT: I just want to make sure everybody understands that.

All right. While we are waiting for the jurors to be sorted out, I've reviewed the supplemental memorandum in opposition to Abbott's motion *in limine* 5 and offer of proof and the defendant's response to that.

What can come in is the first -- testimony laid out in the first line that Mr. Cerney would testify that he's the FISH specialist in question and that Downing did not promise him a Grade 19 for a Grade 17 position. That is an example of a refutation of a fact that Mr. Farmakis relied on.

What can come in in part also is the penultimate line, the first line of the section that deals with Ms. Longoria's opinions, and Mr. Cerney can testify that he did not give such feedback to anyone. Ms. Longoria's statement there is that reps have consistently given feedback, which I think makes adequately relevant testimony that Mr. Cerney did not give such feedback to anyone.

Otherwise I'm hewing to my ruling on the motion *in limine* and the other opinion testimony of Mr. Cerney will not (Page 5) be permitted. It has minimal, if any, relevance that Mr. Cerney had a different opinion about

aspects of Ms. Downing's performance. And any minimal relevance that that -- that Mr. Cerney's opinion would have is greatly outweighed by the risk of jury confusion about what is relevant to the inquiry. What is relevant is not alternative opinions about Ms. Downing's competence and professionalism but the decision-maker's opinion. And the question is whether it was -- that opinion was pretext, that is, that it was not honestly held, not whether it was the correct decision. Information not known to the decision-maker could not have influenced the decision, and, therefore, the fact that it might be inconsistent with the decision-maker's opinion is not probative of animus. What could be probative is information that directly contradicts the decision-maker's statement of fact concerning an event involving that witness. That's the example in the first line.

What could also be relevant is evidence that the decision-maker did not ask or seek information from the witness because that goes to the integrity and quality of the decision-making process and ultimately to the question of whether that was illegitimate and the product of racial animus. So that would be fair game.

But the fact that the witness didn't observe conduct called out by the decision-maker just means that they did not (Page 6) witness that conduct. It does not mean that someone else on occasions when the witness was not present didn't observe it.

You know, how would you prove or impeach or contradict the decision-maker's -- the *bona fides* of the decision-maker's opinion? You would -- could, as I've

indicated, impeach the process. You could show that the decision-maker had contradictory evidence available to them that was disregarded. But you can't do it by just showing that someone else who didn't have the information that the decision-maker had had a difference of opinion.

The argument that Mr. Cerney's years of observing Downing meeting with executive-level customers makes it less likely that Farmakis heard and believed that Jim Meyer was not comfortable with bringing in Jay to meet with executive-level customers is not, in my view, probative that Mr. Farmakis' claim about what Mr. Meyer reported is false. And, again, any minimal relevance to that is, again, substantially outweighed by the risk of jury confusion as to what the appropriate inquiry here is.

The plaintiffs characterize Mr. Cerney's opinions as line-by-line refutations. They're not refutations. They're different opinions, and they're opinions that were never communicated to Mr. Farmakis.

With respect to the argument that Mr. Cerney's testimony is relevant to causation on the RCD selection, (Page 7) Mr. Cerney was long gone by the time that selection process took place, and there's no evidence that I'm aware of or that's been presented in any event to suggest that the decision-makers consulted former employees regarding any of the candidates. So the fact that we're not going to go back -- the process was not going to include solicitation of opinions from former reports of the candidates for that position.

Appendix B

With respect to the argument that Cerney's testimony is relevant to discriminatory intent, I don't agree that because someone had a good opinion of Ms. Downing that others -- that that -- that the fact that others disagreed standing alone is suggestive of bias or reliance on stereotypes. There's no logical connection to that. I don't think we're at the point where mere disagreement about an opinion about somebody reflects -- can be deemed to, standing alone, reflect bias or discriminatory animus.

So for those reasons and the reasons -- oh, the other point I wanted to simply make on the record is the plaintiffs start out by quoting from the summary judgment opinion. You know, this is the danger of taking things out of context both the procedural context and the context of the opinion. The opinion that is quoted there is expressly in the context that numerous employees had expressed concern with Downing's management style. It's addressing the specific allegations (Page 8) that were relied on by the decision-makers and did not address the general question of the admissibility of opinions by others. It does reflect Mr. Cerney's -- the substance of some of Mr. Cerney's testimony; but I think in the larger context it does not support the admission of the proffered evidence. And in any event as the plaintiffs have argued a number of times this was a summary judgment ruling where the Court did not have the benefit of the additional argument and points that both sides have made on this issue. And that's why summary judgment rulings -- why you still have motions *in limine* and evidentiary questions to address after summary judgment rulings.

Appendix B

Based on the full record of what the Court has considered I don't believe that this -- with the exceptions that I've noted that the proffered testimony is sufficiently relevant to warrant its admission. And, again, what relevance it has, if any, is greatly outweighed by the danger of undue prejudice and jury confusion and so would be excluded under Rule 403.

All right. That's my ruling.

MS. FRIEDMAN: Your Honor?

THE COURT: Yes.

MS. FRIEDMAN: Just for a point of clarification.

The defendant has a number of witnesses on their witness list for example, the flip side of the testimony that

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED SEPTEMBER 5, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 15 C 05921

John J. Tharp, Jr.

JACINTA DOWNING,

Plaintiff,

v.

ABBOTT LABORATORIES
AND ABBOTT MOLECULAR INC.,

Defendants.

September 5, 2019, Decided;
September 5, 2019, Filed

MEMORANDUM OPINION AND ORDER

Plaintiff Jacinta Downing filed this suit against her employer, Abbott Molecular, Inc., alleging that it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* by discriminating against her because of

her race and sex and retaliating against her for voicing her complaints about that conduct. Abbott has moved for summary judgment; for her part, Downing has moved to strike portions of declarations submitted by Abbott in support of its motion. For the reasons discussed below, Downing's motion to strike is denied in large part and granted in part. Abbott's motion for summary judgment, on the other hand, is granted in small part but largely denied because the record in this case is replete with material fact disputes.[1]

BACKGROUND

Jacinta Downing began working for Abbott Molecular, Inc., a subsidiary of Abbott Laboratories, in 2003.[2] Defendants' Statement of Facts ("DSOF") ¶ 3, ECF No. 212. After six years as a Molecular Area Sales Manager, Downing transitioned into the role of Regional Sales Manager in 2009, which reported directly to the Division

1. Abbott has also filed a motion to exclude Downing's proffered expert testimony on "implicit bias," which remains pending. Because the Court is denying, in large measure, Abbott's summary judgment motion, it is not necessary to resolve Abbott's motion to exclude Downing's expert testimony before issuing this opinion as to summary judgment. Even without the proffered expert testimony, Downing has adduced enough evidence to support a jury verdict in her favor as to her retaliation and race discrimination claims, and Downing's disparate impact claim, which does not survive Abbott's motion, does not rely on the proffered expert testimony.

2. Except where necessary to distinguish them, Abbott Molecular and Abbott Laboratories will be referred to collectively as "Abbott."

Vice President of Americas, Mark Bridgman. As one of five regional managers, Downing supervised a team of sales representatives who were charged with selling healthcare products to hospitals, commercial laboratories, and clinics. *Id.* ¶¶ 2, 6. Between 2004 and 2012, Downing received "Achieved Expectations" or "Exceeded Expectations" in her overall annual performance ratings. Plaintiffs' Corrected Statement of Facts ("PSOF") ¶ 2, ECF No. 237.

In 2011, the company began experiencing financial distress and decided to restructure its management hierarchy in response. DSOF ¶ 8. First, Bridgman terminated one of the regional managers, a white male ("M.M."), leaving Downing (an African-American woman), C.J. (an African-American woman), M.K. (a white man), and J.G. (a white woman).[3] Then, Abbott executives added a layer of management between the regional managers and Bridgman by hiring Peter Farmakis (a white man) into a new "National Sales Director" role in October 2012. *Id.* ¶ 13. As National Sales Director, Farmakis directly supervised the regional managers; the managers no longer reported directly to Bridgman.

It is Abbott's position that Farmakis immediately noticed problems with Downing's job performance, a fact which is hotly disputed and discussed in more detail below. It is Downing's position that Farmakis was unfairly

3. In an effort to preserve their privacy, this opinion refers to other employees whose performance and conduct is discussed herein by their initials. These individuals are not parties to this litigation and should not be burdened by publication of details of their performance evaluations.

targeting her. In July 2013, Downing complained to Employee Relations about Farmakis, alleging that he was discriminating against her because of her race. PSOF ¶ 8. According to Downing, she provided several examples of Farmakis favoring M.K., the white male regional sales manager, and complained of an incident in which she and C.J. (the only black managers) were required to "pick up the slack" for the other two poorer performing white managers. *Id.* In response, Employee Relations Specialist Colleen Plettinck conducted a "climate survey" in August 2013 regarding Peter Farmakis during which she interviewed the four regional managers. DSOF ¶ 72. The results of the survey were mixed. Downing, C.J., and J.G. (the three female managers) reported that they "strongly disagreed" with the statement that Farmakis treated people in the group equally. M.K., the only male manager, reported that he felt that Farmakis did treat people equally. Pl.'s Exs. 39-42, ECF No. 213. J.G. also reported that Farmakis was "especially hard on Jay [Jacinta]" despite the fact that "her numbers [were] good." Pl.'s Ex. 42. Downing reported that, earlier in the month, Farmakis had made a comment along the lines of "did you hear about the dress code, no hoodies," which Downing perceived as racist in light of the Trayvon Martin shooting incident. PSOF ¶ 9. Abbott maintains that the survey results led Sarah Longoria, Director of Business Human Relations, to believe that Farmakis needed coaching regarding his management style but that his behavior was not discriminatory.[4] DSOF ¶ 72. The results of the survey

4. Longoria testified in her deposition that she raised the issue of gender discrimination with Farmakis and also asked him about the "no hoodies" comment, but that she believed Farmakis when

were eventually summarized and shared with Farmakis in late September 2013.

In October 2013, Farmakis placed both Downing and J.G. on "coaching plans" because of their alleged performance issues. *Id.* ¶ 41. According to Downing, J.G. was the lowest sales performer but had not faced any disciplinary action until this time. Shortly thereafter, J.G. took early retirement and was replaced by P.R., a white woman, at the end of 2013. *Id.* ¶ 12. Then, in January 2014, after Downing had earned the sales manager of the year award based on her sales performance, PSOF ¶ 17, Farmakis escalated Downing's coaching plan to a formal 60-day Performance Improvement Plan ("PIP") which was written and reviewed by Employee Relations Specialist Sharon Larson and Sarah Longoria. DSOF ¶¶ 44, 45. The PIP laid out various areas for improvement and expectations and explained that failure to meet those expectations would result "in a review for termination." Defs.' Ex. 40, ECF No. 167-30. Abbott does not contend that Farmakis had cause to initiate a termination review based on the PIP. On September 9, 2014, Downing filed a complaint with the EEOC alleging that Farmakis had discriminated against her because of her race by subjecting her to a hostile work environment and retaliated against her by placing her on the coaching plan and PIP. Defs.' Ex. 66, ECF No. 167-50.

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he told her that he was not discriminating based on sex (but rather managing performances that were not meeting expectations) and that he did not intend for the hoodie comment to come across as racist. Pl.'s Ex. 9 at 129:8-17, 158:1-9.

At some point while this was happening, Abbott management began discussing the need for a company wide reduction in force ("RIF") to combat the ongoing sales slump. Downing maintains that discussions about a RIF began as early as October 2013; Abbott maintains they began in September 2014. DSOF ¶ 48. Regardless, Abbott executed the RIF in January 2015. Prior to doing so, Keith Chaitoff replaced Mark Bridgman as Division VP of the Americas. *Id.* ¶ 49. Although there is some dispute as to who had ultimate decision-making power with respect to the RIF, it is undisputed that Chaitoff and Sarah Longoria worked together to determine which U.S. commercial leadership positions would be eliminated. *Id.* Ultimately, Abbott terminated 42 employees around the globe, including all four regional sales managers (Downing, C.J., M.K., and P.R.) as well as Peter Farmakis. *Id.* ¶ 52.[5]

Following the RIF, Abbott created four new positions under the title of "Regional Commercial Director." *Id.* ¶ 53. Abbott maintains that this position differed from the previous regional manager position in several ways; Downing states that the positions were materially the same. *Id.* ¶ 54. The parties also advance different descriptions of the director hiring process. Abbott states that it started its search internally, and that candidates were interviewed by a three-member panel comprised of Keith Chaitoff, Sarah Longoria, and Dave Skul (former Senior Director of Enterprise Accounts) and graded on

5. The number of positions eliminated in the RIF net of new positions added is not clear from the record.

a set of objective criteria. According to Abbott, Chaitoff was the primary decision maker and Longoria and Skul acted in an advisory capacity. *Id.* ¶ 54. Downing contends that Chaitoff and Longoria had equal responsibility and the interview process was a sham; she maintains that Chaitoff and Longoria had pre-selected the candidates they intended to hire. PSOF ¶ 25. In any case, Downing interviewed for the director position but was not hired. Instead, Abbott extended offers to P.R. (a white woman and one of the regional managers whose position had been eliminated), Paul Kuznik (a white man formerly employed by Abbott), Jim Menges (a white man employed at Abbott in a different role), and Julee MacGibbon (a white woman whose position at Abbott had been eliminated during the RIF).[6] DSOF ¶ 62. Kuznik, however, declined the offer. In March 2015, Longoria learned that Downing would not sign a severance agreement and that Abbott was at risk of being sued for discrimination. PSOF ¶ 29. Shortly thereafter, Abbott filled the fourth director position with E.B., an external (black male) candidate. *Id.*

Downing filed an amended complaint with the EEOC in May 2015 alleging that Abbott had retaliated against her for filing her previous EEOC charge and discriminated against her on the basis of race and sex by terminating her and failing to re-hire her. In July 2015, Downing filed suit against Abbott in this district asserting her earlier claim that Abbott retaliated and discriminated against her on the basis of race by placing

6. M.K. and C.J., the other former regional managers, also interviewed for the position but were not hired.

her on performance improvement plans. Then, after exhausting her administrative remedies for the May 2015 EEOC charge, she amended her complaint in December 2015 to add the claim pertaining to her termination.[7] The parties subsequently engaged in more than two years of discovery, after which Abbott filed a motion for summary judgment and Downing filed a motion to strike several of the exhibits Abbott submitted in support of its motion. Even considering most of the evidence Downing seeks to strike, a jury could reasonably infer that Farmakis discriminated and retaliated against Downing by giving her negative reviews and placing her on a coaching plan and PIP, and that this proximately caused Downing's ultimate separation from the company. Accordingly, summary judgment on those claims is denied. Downing has failed to adequately establish, however, that the director hiring process had a disparate impact on African-Americans, so summary judgment as to that claim is granted.

DISCUSSION

I. Plaintiff's Motion to Strike

Before turning to the merits of the summary judgment motion, the Court considers Downing's motion

7. Downing also advanced in her amended complaint a Title VII hostile work environment theory of liability, Am. Compl. ¶ 7, and a 42 U.S.C. § 1981 race discrimination/retaliation theory of liability. *Id.* at Counts I and II. Because she does not defend (or even address) those theories in her response to Abbott's motion for summary judgment, however, the Court need not address them here. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (failure to respond to an argument results in waiver).

to strike as inadmissible portions of exhibits submitted by Abbott. *See Baines v. Walgreen Co.*, 863 F.3d 656, 662 (7th Cir. 2017) ("Evidence offered at summary judgment must be admissible to the same extent as at trial, at least if the opposing party objects, except that testimony can be presented in the form of affidavits or transcripts of sworn testimony rather than in person.").[8] For the reasons discussed below, that motion is granted in part and denied in part.

A. Hearsay

Downing argues that Peter Farmakis's declaration includes inadmissible hearsay. For example, Downing challenges:

- Farmakis's statement that he "received phone calls from a consultant . . . [who] lodged complaints regarding Downing's communication style, and

8. Motions to strike are disfavored. *See generally Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 727 (7th Cir. 2006) (Easterbrook, J., in chambers). Their purpose is circumscribed by Fed. R. Civ. P. 12(f) (striking insufficient defenses and redundant, immaterial, impertinent or scandalous matter), but more often serve as unauthorized vehicles for parties to expand the page limits for memoranda in support of their summary judgment motions and needlessly complicate the Court's docket. If a party believes that evidence on which a party relies is inadmissible, that argument should be set forth—along with all of the party's other arguments—in the response or reply brief, not in a separate motion to strike. Nevertheless, in the interest of preventing further delay and expense to the parties, the Court has considered the motion to strike as filed and briefed.

> requested that [Farmakis] instruct Downing not to call him anymore because she had an abrasive approach";
>
> - Farmakis's statement that Downing's colleagues "expressed concern about Downing's behavior in front of customers"; and
>
> - Farmakis's statement that one of Downing's direct reports said that "she believed Downing interfered with the strong relationships [the report] had established with customers."

Defs.' Ex. 31 Declaration of Peter Farmakis ¶ 6, ECF No. 177-1.

Federal Rule of Evidence 801(c) defines hearsay as an out of court statement offered into evidence "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). But the out of court statements that Downing challenges—that a colleague said this or a customer said that—are not offered for their truth. In other words, Abbott does not offer Farmakis's testimony to show that Downing did in fact have an abrasive approach or behave poorly in front of customers, but rather to show that Farmakis received complaints about Downing and that the complaints affected his belief about her abilities. *See Atkinson v. SG Americas Sec., LLC*, 14 CV 9923, 2016 U.S. Dist. LEXIS 171583, 2016 WL 7188163, at *7 n.2 (N.D. Ill. Dec. 12, 2016), *aff'd*, 693 Fed. Appx. 436 (7th Cir. 2017) (complaints about an employee are not hearsay when they are offered to show that an employer received

complaints rather than for their truth); *see also Luckie v. Ameritech Corp.*, 389 F.3d 708, 716 (7th Cir. 2004) (complaint made to supervisor not hearsay when offered to show supervisor's state of mind at the time she was evaluating employee's performance); *Alexander v. Cit Tech. Fin. Services, Inc.*, 217 F. Supp. 2d 867, 881 (N.D. Ill. 2002) (complaint about employee admissible to show a basis for employer's belief that employee was rude with customers).[9] These statements are therefore not hearsay and need not be stricken.[10]

B. Personal Knowledge

Downing fares better with her challenge to Farmakis's statements that he "learned" that Downing gave one customer free training and communicated unapproved pricing to another. Critically, Farmakis does not explain ***how*** he learned those things, and that violates Federal

9. The same goes for declarations of other Abbott decision-makers stating that they either received complaints about Downing directly, *see* Defs.' Ex. 39 Declaration of Dave Skul ¶¶ 4, 5, ECF No. 167-29, or that complaints were relayed to them. *See* Defs.' Ex. 41 Declaration of Keith Chaitoff ¶¶ 3, 4, ECF No. 167-31; Defs.' Ex. 33 Declaration of Sarah Longoria ¶ 5, ECF No. 167-26. That said, the Court will not consider these statements as proof of Downing's behavior.

10. Downing also challenges the admissibility of Farmakis's notes, which are attached to his declaration and outline the complaints he says he received, on hearsay grounds. The Court need not determine whether the notes may be admitted as evidence at this juncture, however, because its ruling on Abbott's motion for summary judgment would be the same regardless of whether the Court considered the notes themselves.

Rule of Civil Procedure 56(c)(4)'s instruction that a declaration used to support a motion "must be made on personal knowledge." *See Watson v. Lithonia Lighting*, 304 F.3d 749, 752 (7th Cir. 2002) (witness's affidavit stating that she "learned" something about two employees did not establish personal knowledge because it did not explain how she learned of the fact in question); *see also Rabin v. Provident Life & Acc. Ins. Co.*, 98 C 1577, 2000 U.S. Dist. LEXIS 11554, 2000 WL 1131944, at *7 (N.D. Ill. Aug. 9, 2000) ("In her affidavit, Rabin has not shown personal knowledge because there is no foundation for her general assertions that she 'learned' certain things.").[11]

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11. In contrast, paragraph 2 of Farmakis's declaration (which states that it was Farmakis's "understanding" that AMD had an exclusive license for a product that held significant market share, that alternative products were becoming available, and that the competition negatively impacted AMD) does not fail for lack of personal knowledge—Farmakis established personal knowledge by stating that he joined AMD as the National Sales Director. Farmakis Declaration at ¶ 1. *See, e.g.*, *U.S. E.E.O.C. v. Humiston-Keeling, Inc.*, 54 F. Supp. 2d 798, 804 (N.D. Ill. 1999), *aff'd sub nom. E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (witnesses had personal knowledge of company policy by virtue of their positions as managers). This reasoning also applies to statements about Abbott's financial health made by David Skul (former Senior Director of Global Marketing and Senior Director of Enterprise Accounts), Skul Declaration at ¶¶ 6,7 and Keith Chaitoff (Vice President of the Americas), Chaitoff Declaration at ¶ 5, as well as to statements about Abbott's restructuring plan made by Sarah Longoria (Director of Business Human Resources), Longoria Declaration at ¶¶ 3, 4. *See also* 1 McCormick On Evidence § 10 (7th ed.) ("[L]ay employees of a business are often held to have enough 'personalized knowledge' of the business' operation to testify about the amount of its profits.").

Downing's remaining objections, however, do not suffer from the same flaw. For example, Matthew Gaulden and Brian Witajewski (who state in their declarations that Downing was their direct supervisor) testify to observing Downing's interactions with customers and traveling with her on sales calls. *See* Defs.' Ex. 32 Gaulden Declaration, ECF No. 167-25; Defs.' Ex. 59 Witajewski Declaration, ECF No. 167-45. That these witnesses do not specify the exact products about which Downing lacked knowledge, the exact dates of various customer interactions, or the exact words used by Downing in these customer interactions may go to the weight of the evidence (which is not for this Court to consider), but it does not mean that they lack personal knowledge of the events described. Similarly, the fact that neither Keith Chaitoff nor David Skul state that they personally interviewed E.B. (the individual ultimately selected for a director position post-RIF) does not suggest that they lack personal knowledge about his qualifications; indeed, their representations that they participated in the hiring process suggests the opposite. *See* Defs.' Ex. 39 Declaration of Dave Skul ¶ 10, ECF No. 167-29; Defs.' Ex. 41 Declaration of Keith Chaitoff ¶ 11, ECF No. 167-31.

C. Contradictory Statement

Finally, Downing argues that Longoria's statement that Chaitoff was the primary decision maker in the director hiring process (and that she and Skul participated in the process solely in advisory roles) should be stricken because it contradicts her prior deposition testimony, where she stated that she and Chaitoff were "the decision-

makers responsible." Pl.'s Ex. 9 Longoria Deposition 443:18-19, ECF No. 213-9. This inconsistency is not egregious, and need not be stricken from the record. *See Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 572 (7th Cir. 2015) (explaining that an affidavit should be excluded as a "sham" to thwart summary judgment only where the witness has given clear answers to unambiguous questions in a previous deposition which negate the existence of any genuine issue of material fact). To the extent that it is relevant, however, the Court will credit Longoria's deposition testimony (which suggests that she shared equal responsibility in selecting the new directors) instead of her declaration (which downplays her role). *See Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 809 (7th Cir. 2015) (district court may decline to consider statements in a witness's affidavit that are inconsistent with the witness's deposition testimony). This is less of an argument for striking that portion of the declaration, however, than it is for complying with the standard that already applies: courts ruling on motions for summary judgment must construe all facts in favor of the nonmoving party and take care not to weigh any conflicting evidence. *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 705 (7th Cir. 2011).

Downing's motion to strike is therefore denied in large part; it is granted only with respect to Farmakis's statements that he "learned" that Downing gave one customer free training and communicated unapproved pricing to another.

II. Defendants' Motion for Summary Judgment

Moving on to Abbott's motion for summary judgment, the court reiterates that Downing appears to advance two primary claims: 1) that Farmakis retaliated against Downing for lodging a complaint against him and discriminated against Downing based on race by giving her negative reviews and placing her on a coaching plan/PIP and 2) that Abbott (*i.e.*, Longoria and Chaitoff) further retaliated against her and discriminated against her by terminating her and failing to re-hire her after the RIF.[12]

Summary judgment is warranted on these claims 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). A genuine dispute of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In this case, then, the relevant inquiry is whether the evidence, taken

12. Downing argues that it is improper to evaluate these employment actions separately after *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). *See* Pl.'s Resp. Br. 15, ECF No. 236. *Ortiz*, however, was concerned with the distinction (or rather, the lack thereof) between direct and indirect evidence as it is used to prove causation; it had nothing to do with lawsuits involving multiple employment actions. And because different decision makers are involved in the various adverse actions with which Downing takes issue, the Court addresses them separately. Further, Downing also advances a cursory argument in support of a disparate impact claim which the Court addresses below as well.

as a whole, would permit a reasonable jury to conclude that the challenged employment actions were motivated by Downing's race or were taken in retaliation for her complaints of discrimination. *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016); *see also Lauth v. Covance, Inc.*, 863 F.3d 708, 716 (7th Cir. 2017) (applying *Ortiz* to retaliation claims).[13]

To that point, a plaintiff may prove employment discrimination simply by setting forth sufficient evidence, either direct or circumstantial, that the employer's discriminatory or retaliatory animus caused the adverse employment action, but he or she may also use the burden-shifting method established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *McKinney v. Office of Sheriff of Whitley County*, 866 F.3d 803, 807 (7th Cir. 2017). Downing focuses primarily on the former method, so the Court proceeds accordingly.[14]

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13. For discrimination claims brought pursuant to Title VII, the plaintiff's protected characteristic need only be a "motivating factor" in the employer's decision to take the adverse employment action. 42 U.S.C. § 2000e-2(m). Retaliation claims, however, "must be proved according to traditional principles of but-for causation." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). *See also Mollet v. City of Greenfield*, 926 F.3d 894, 897 (7th Cir. 2019) (explaining that factors other than a protected activity can contribute to bringing an adverse action, but that a plaintiff must still show that the action would not have been taken had he or she not complained of unlawful discrimination).

14. Because the parties also address the burden-shifting method, however, it is worth mentioning that under *McDonnell Douglas*, a plaintiff has the initial burden of establishing a prima

Appendix C

A. Performance Management

1. Retaliation

Downing first claims that Farmakis placed her on a coaching plan and a PIP in retaliation for complaining about unlawful discrimination to Employee Relations. To succeed on a retaliation claim, a plaintiff must prove "(1) that she engaged in statutorily protected activity; (2) that her employer took an adverse employment action against her; and (3) that the protected activity and the adverse employment action are causally connected" *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1019 (7th Cir. 2016). There is no dispute that Downing engaged in a statutorily protected activity when she complained to Employee Relations that Farmakis was discriminating against her, nor is there a dispute that the measures

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facie case of discrimination (or retaliation) by showing that 1) he or she is a member of a protected class (or engaged in a statutorily protected activity), 2) he or she suffered an adverse employment action, 3) he or she met the employer's legitimate job expectations, and 4) similarly situated employees outside the protected class (or who did not engage in protected activity) were treated more favorably. The burden then shifts to the employer to articulate a non-discriminatory reason for the action, and once that showing is made, the plaintiff must show that the reason given was pretext. *McKinney v. Office of Sheriff of Whitley County*, 866 F.3d 803, 807 (7th Cir. 2017); *see also Rowlands v. United Parcel Serv. - Fort Wayne*, 901 F.3d 792, 801 n.3 (7th Cir. 2018) (describing framework in terms of retaliation). Only the third and fourth element of the prima facie case and the pretext analysis are at issue here, and would involve an analysis of the same evidence discussed under Downing's more holistic approach.

taken constituted adverse employment actions.[15] The only issue, then, is whether the evidence is sufficient to permit a reasonable jury to conclude that the actions complained of (here, institution of the coaching plan and escalation of that plan to a formal PIP) would not have been taken but for Downing's complaints about Farmakis. Evidence of causation may include factors like "(1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected group; (3) evidence, statistical or otherwise, that similarly situated employees outside of the protected group systematically receive[d] better treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action." *Rowlands v. United Parcel Serv. - Fort Wayne*, 901 F.3d 792, 802 (7th Cir. 2018).

As an initial matter, factual disputes abound with respect to whether, as Abbott maintains, Downing had a history of significant performance problems.[16] And

15. In contrast to discrimination claims, where an action is typically considered materially adverse only if it results in a change in the terms or conditions of the plaintiff's employment, *Madlock v. WEC Energy Group, Inc.*, 885 F.3d 465, 470 (7th Cir. 2018), an action is "materially adverse" for purposes of retaliation if it would dissuade a reasonable employee from engaging in the protected activity. *Koty v. DuPage County, Illinois*, 900 F.3d 515, 520 (7th Cir. 2018).

16. Under the *McDonnell Douglas* method, this analysis coincides with Downing's prima facie burden of establishing that she met Abbott's legitimate expectations. Further, because Abbott's purported reason for giving Downing negative employment reviews is, unsurprisingly, that Downing was not meeting expectations, the prima facie analysis merges with the pretext analysis and the question becomes simply whether the employer is lying. *See Peirick*

contrary to Abbott's assertions, the dispute goes beyond whether Downing was in fact performing poorly; Downing also adequately challenges whether Farmakis honestly believed that disciplinary action was warranted. *See McGowan v. Deere & Co.*, 581 F.3d 575, 579 (7th Cir. 2009) ("The pretext analysis focuses on whether the reason was honest and not whether it was accurate or wise.").

For example, Abbott states that customers called Farmakis directly to report problems with Downing's performance and to request that she no longer work on their accounts. *See* DSOF ¶¶ 18, 19. But Abbott's evidence of those calls consists largely of Farmakis's own declaration and notes, and Downing points to evidence that is inconsistent with Farmakis's statements, noting that not only did Farmakis not remove her from the accounts in question (Pl.'s Ex. 2 ¶ 46, ECF No. 213-2), he advised customers who were allegedly complaining about Downing that Downing would be working closely with them going forward (Pl.'s Ex. 177-C, ECF No. 237-13, Aug. 2013 email; "Jay will provide more details/introduction[s] in the weeks ahead") and praised her performance with respect to those customers. *See* Pl.'s Ex. 176-A, ECF No. 237-12 (January 2013 e-mail from Farmakis to Downing expressing that she did a "very nice job on the call today" and that Farmakis "was impressed.").

The only evidence in the record originating from a customer is an e-mail from ViraCor CFO Matt Urbanek

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v. Ind. University-Purdue Univ. Indianapolis Ath. Dep't, 510 F.3d 681, 687 (7th Cir. 2007).

dated January 2014 (*i.e.*, after Downing was given the formal coaching memo). *See* Defs.' Ex. 15, ECF No. 167-11. Downing does not dispute that this customer requested to work with someone else, but Downing maintains that it was Farmakis who made her look bad—apparently, Downing had (prior to Farmakis's arrival) forgiven a debt owed by ViraCor in light of mitigating circumstances and Farmakis had made her go back on her word after assessing finances at the end of the year. Defendants' Response to PSOF ¶ 38.5, ECF No. 240-2. And contrary to Abbott's position, there is evidence in the record apart from Downing's own declaration suggesting that forgiving this debt was within her discretion. *See, e.g.*, Pl.'s Corrected Ex. 175-A, ECF No. 237-11 (e-mail from Contracts & Pricing asking Downing "what she would like to do" with respect to ViraCor); Pl.'s Corrected Ex. 175-E (e-mail from Farmakis to Downing asking for specifics and "suggesting" that they bill the customer, but not stating that the debt forgiveness was unauthorized).

Similarly, Abbott maintains that numerous employees expressed concern with Downing's management style, demeanor in front of customers, and general understanding of Abbott products, but Downing has produced evidence to the contrary. *See, e.g.*, Pl.'s Ex. 5 ¶ 7, ECF No. 213-5 (declaration of Michael Cerney, who reported to Downing, stating that Downing was "professional, responsive and supportive of [him] generally and when [they] were in front of customers or prospective customers"); Defs.' Ex. 9 at 055507, ECF No. 167-8 (Farmakis's 2012 review of Downing, authored in February 2013, stating that she "knows the Molecular products and the laboratories" and

rating her as "Achieves Expectations" in the "Know the Business" section of the review).[17] And other evidence offered by Downing supports an inference that clients who were allegedly disgruntled with Downing were in fact unhappy with Abbott's pricing. *See, e.g.*, Pl.'s Ex. 177-A, ECF No. 237-13 ("Jay and I have had many discussions in the past regarding UroVysion [an Abbott product] and almost everything boils down to price."); Pl.'s Ex. 181, Aug. 23, 2012 email (email noting customer perception that "Abbott is a BULLY" with respect to pricing, among other contract terms). To be sure, the declaration of Downing's direct report Bryan Witajewski stating that he raised issues about Downing to Farmakis, Defs.' Ex. 59, and a March 2013 e-mail to Farmakis from the head of training describing Downing as providing feedback to employees who reported to her in "a condescending, demotivating manner," Defs.' Ex. 22, ECF No. 172-8, corroborate Abbott's position that Farmakis honestly believed that Downing was having problems. But Downing has produced competing evidence from which one could

17. Abbott cites to *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 752 n.6 (7th Cir. 2006) for the proposition that a co-worker's general compliments are insufficient to establish that a plaintiff was meeting the employer's legitimate expectations. But *Burks* also explained that there may be a triable issue where a co-worker corroborates that specific events which formed the basis for the employee's termination did not occur. *Id.* Cerney's declaration not only offers "general averments of adequate performance," it also disputes a specific fact cited by Abbott. *Compare* Defs.' Ex. 31, Farmakis Declaration ¶ 9(c) (Farmakis testifying that Downing improperly communicated to Cerney that she would try to get him into a higher pay grade) *with* Pl.'s Ex 5 (testimony from Cerney stating that the incident never happened).

question the truthfulness of Witajewski's declaration,[18] and the e-mail from the head of training also stated that the managers had not yet received training in "situational leadership"—in other words, accepting part of the blame for the problem as due to a lack of training by the company.

Further, while Abbott argues that Downing had difficulty hitting her sales forecasts, it is undisputed that Downing received the "regional sales manager of the year" sales bonus in 2013—a fact that Abbott seeks to dismiss as being based solely on sales numbers rather than on an overall assessment of the manager's performance—and routinely received positive performance reviews prior to Farmakis's arrival. Defendants' Response to PSOF ¶¶ 2.1, 17.5, ECF No. 240-2.

The parties devote substantial portions of their briefs and statements of facts to these and other examples of conduct characterized by Downing as discriminatory

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18. For example, Witajewkis's declaration suggests that a customer did not renew its contract because of aggressive tactics displayed by Downing in a meeting. Defs.' Ex. 59 ¶ 4(c). But an e-mail Witajewski sent recapping what had happened with that customer suggests that the customer had actually "had one foot out the door" for some time due to concerns regarding price and that Downing had "talked [the customer] off the ledge." Pl.'s Corrected Ex. 181-B, ECF No. 237-14. Further, when Witajewski was later reassigned to a different manager, he wrote to Downing stating that he was disappointed to no longer be on her team and thanking her for her guidance and direction. Pl.'s Corrected Ex. 181-I. *See Muhammed v. City of Chicago*, 316 F.3d 680, 683 (7th Cir. 2002) (explaining that a plaintiff can defeat summary judgment by providing specific evidence in support of an attack on a witness's credibility).

and by Abbott as evidence of poor performance. It is not necessary to catalog them all here; many, if not all, require a jury's evaluation and those set forth above are sufficient to demonstrate the point. It is difficult to reconcile this conflicting evidence, but looking at the evidence as a whole, there is enough grist for the factfinder's mill to support a conclusion that Downing was meeting Abbott's expectations.[19]

Even construing all the factual disputes in Downing's favor, however, evidence that Farmakis placed Downing on a coaching memo and performance improvement plan when he did not believe that there were problems with her performance does not by itself establish that he acted with retaliatory or discriminatory animus. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("It

19. For that reason, Abbott's reliance on this Court's decisions *in Jones v. J.B. Hunt Transp., Inc.*, 15-CV-07450, 2017 U.S. Dist. LEXIS 114515, 2017 WL 3130645, at *5 (N.D. Ill. July 24, 2017), where the plaintiff did not dispute her record of performance issues, *Hopkins v. Bd. of Educ. of City of Chicago*, 73 F. Supp. 3d 974, 980 (N.D. Ill. 2014), where a teacher did not dispute that her employer received parental complaints, and *Robinson v. Colvin*, 13 C 2006, 2016 U.S. Dist. LEXIS 38182, 2016 WL 1161272, at *2 (N.D. Ill. Mar. 24, 2016), where the plaintiff did not dispute that complaints about him were made, is misplaced. *See also Nehan v. Tootsie Roll Indus., Inc.*, 54 F. Supp. 3d 957, 970-72 (N.D. Ill. 2014) (employee admitted that he refused to work overtime, which was stated reason for his termination), *aff'd* 621 Fed. App'x 847 (7th Cir. 2015); *Sheppard v. Vill. of Glendale Heights*, 2014 U.S. Dist. LEXIS 38944, 2014 WL 1227025, at *5 (N.D. Ill. Mar. 25, 2014) (employee admitted to committing multiple infractions).

is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.") (internal citations omitted); *see also, e.g., Hobbs v. City of Chicago*, 573 F.3d 454, 461-62 (7th Cir. 2009) (district court did not err by requiring plaintiff to show both pretext and discriminatory animus; "a plaintiff demonstrates pretext by showing the employer's proffered nondiscriminatory reason is a lie and the real reason is based on discriminatory intent"). It is therefore necessary to address the other types of evidence presented by the parties.

First, Downing argues that the timing of the disciplinary actions was suspicious. It is undisputed that Downing complained to Employee Relations that Farmakis was discriminating against her because of her race on July 19, 2013. PSOF ¶ 8. It is also undisputed that in response to that complaint, Employee Relations conducted a "climate survey" in August 2013 during which Employee Relations specialist Colleen Plettinck interviewed the four regional managers to gather information about Farmakis and their work environment. *Id.* ¶ 9. On Thursday, September 26, 2013 Plettinck shared the results of the survey with Mark Bridgman and Sarah Longoria. *Id.* ¶ 10. Shortly thereafter, Bridgman and Longoria met with Farmakis to discuss the results of the survey and specifically the fact that people on his team believed that he treated them differently due to gender.[20] *See* Pl.'s Ex.

20. It is unclear from the record what specific information Bridgman and Longoria shared with Farmakis, but based on Longoria's statement that they discussed the issue of differential treatment based on gender it would not have been difficult for

9, Longoria Deposition at 158:3 (explaining that Longoria could not remember the exact date she met with Farmakis about the survey, but that she would have wanted to have the meeting "as soon as possible"). On October 3, 2013 Farmakis e-mailed Longoria expressing his intent to cite Downing, J.G., and C.J. for insubordination arising out of an event that had occurred more than two months prior where, according to Farmakis, he had asked all four managers to provide him with a document outlining a plan for how to achieve their respective sales goals but only M.K. had complied. Pl.'s Ex. 49, ECF No. 213-49.[21] A few days later, both Downing and J.G. were placed on formal coaching plans. PSOF ¶ 13.

Abbott argues that Farmakis's efforts to manage Downing's performance began well before the climate survey was conducted and therefore could not be retaliatory. Indeed, it is undisputed that Farmakis discussed with Employee Relations the possibility of placing Downing on a formal coaching memo as early as March of 2013. *See* Pl.'s Ex. 32 at 2320, ECF No. 213-32. On the other hand, Farmakis's Employee Relations service ticket regarding Downing was formally closed in early

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Farmakis to surmise that the negative reviews came from Downing, C.J., and J.G.

21. According to Downing (and corroborated by a July 2013 e-mail from C.J. to Farmakis), C.J. and Downing did not comply with Farmakis's directive because Farmakis had set their sales targets unreasonably high in order to make up for the other managers' shortcomings. C.J. and Downing felt this was unfair and refused to commit to numbers that they did not think would be possible to achieve. Defs.' Ex. 23, ECF No. 167-17.

June 2013 when Farmakis did not respond to an e-mail asking if he needed further guidance managing Downing's performance. *Id.* Farmakis, moreover, stated in May 2013 that Downing was "doing everything he [was] asking and making improvements" and that he had not received any recent complaints about her performance. Pl.'s Ex. 32, ECF No. 213-32. Further, the fact that Farmakis had previous issues with Downing does not explain why he would suddenly want to write up J.G. and C.J. for insubordination and place J.G. on a coaching plan; Abbott has offered no evidence to explain the timing of that conduct. The timeline of events could, therefore, provide reasonable cause for a jury to suspect Farmakis's motives.

Downing also points to the fact that M.K., the only regional sales manager who did ***not*** rate Farmakis negatively during the climate survey, received positive evaluations from Farmakis in his 2013 annual review, *see* Defs.' Ex. 74, ECF No. 167-56, despite the fact that he lagged in sales behind Downing and C.J., *see* Pl.'s Ex. 56, ECF No. 213-56, and had received complaints about his management style from his direct reports. *See* PSOF ¶ 30 (undisputed that a former employee had sued M.K. for gender discrimination);[22] *see also* Pl.'s Ex. 138, ECF No. 123-138 (Farmakis describing M.K. as "not high talent."). Abbott responds by arguing that M.K. is not "similarly

22. *See also* Pl.'s Ex. 120, ECF No. 213-120 (report from Employee Relations outlining that that M.K.'s direct reports described him as "managing with a strong thumb" and "very difficult" and explaining that that he "loses it and gets angry" when something isn't done and that his demands are "out of control," among other things).

situated" to Downing because he did not engage in similar conduct. First, as discussed above, there is a dispute as to whether and to what extent Downing engaged in problematic conduct. Regardless, though, "the similarly-situated inquiry is flexible, common-sense, and factual." *Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012). The fact that M.K. held the same job as Downing and reported to the same supervisor suggests that there are "enough common features between the individuals to allow a meaningful comparison." *Id.* That is particularly true in light of the fact that M.K. apparently performed worse than Downing on objective criteria and was the subject of employee complaints regarding his management style (one of the major problems Abbott maintains it had with Downing) yet unlike Downing was not given negative performance reviews or placed on a PIP.

While a jury could certainly resolve these fact disputes in Abbott's favor, in assessing this motion the Court is required to draw all reasonable inferences in Downing's. In doing so, the Court concludes that a reasonable jury could conclude that in putting Downing on performance management plans, Farmakis (and therefore Abbott) was retaliating against Downing for complaining that Farmakis was discriminating against her. The fact that the initial service ticket Farmakis opened with Employee Relations had been closed for almost three months before the climate survey occurred plus the fact that Farmakis ramped up his efforts to "manage" Downing's performance immediately after learning the results of that survey suggests that Farmakis escalated his discipline of Downing in retaliation for her

complaints. That inference is bolstered by the fact that M.K., the only non-complaining manager, did not receive similarly negative performance reviews and the fact that Farmakis expressed his desire to write up C.J. and J.G., who did complain, shortly thereafter. Accordingly, the Court concludes that Downing has adduced enough evidence to support a jury verdict in her favor on her claim that Farmakis retaliated against her for complaining about discrimination by giving her negative performance evaluations and placing her on performance management plans.

2. Discrimination

Downing also argues that Farmakis gave her negative reviews and placed her on performance management plans as a form of race-based discrimination.[23] In addition to the "pretext" evidence discussed above regarding Downing's

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23. Downing's performance management claim can be based only on race discrimination, not gender discrimination, as only race based discrimination was mentioned in the initial EEOC charge. Defs.' Ex. 66, ECF No. 167-50. *See Moore v. Vital Products, Inc.*, 641 F.3d 253, 256 (7th Cir. 2011) (claims not included in EEOC charge may not be brought in subsequent Title VII judicial proceeding unless they are reasonably related to the allegations in the EEOC charge); *see also Fairchild v. Forma Sci.*, Inc., 147 F.3d 567, 574 (7th Cir. 1998) (disability discrimination theory of liability not related to age discrimination theory of liability). *Cf. Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (sex discrimination claim allowed to proceed because while plaintiff checked only "race discrimination" in her EEOC charge, she included gender-based allegations). In contrast to the *Jenkins* plaintiff, Downing did not include any gender-based allegations in her initial EEOC charge.

job performance, Downing supports her discrimination claim by arguing that Farmakis 1) started recording false performance issues only after he met her in person and discovered her race; 2) targeted the two black managers while praising the white male manager; and 3) made a comment to her about a "no hoodie" dress code in the wake of the Trayvon Martin shooting incident.[24]

Downing's assertion that Farmakis started manufacturing performance issues only after he met her in person is without support in the record. According to Downing, Farmakis expressed his intent to give Downing an "Achieves Expectations" performance review on November 29, 2012, but, after discovering her race in early December 2012, began to compile a list of issues with her performance. Pl.'s Corrected Resp. Br. 3, ECF No. 236. Downing's only evidence of the timing of their first in person meeting comes from her declaration in which she states that, "to the best of [her] recollection," she did not meet Farmakis until December 3, 2012. Pl.'s Ex. 2 ¶ 16, ECF No. 213-2. But this is contradicted by an e-mail Farmakis sent on November 2, 2012 stating that he had his first face-to-face meeting with the regional sales managers the week before. Defs.' Ex. 99, ECF No. 240-29. As the Seventh Circuit has noted, "inconclusive" testimony cannot by itself create a genuine factual dispute. *Mucha v. Vill. of Oak Brook*, 650 F.3d 1053, 1056 (7th Cir.

24. Abbott does not dispute that the negative reviews, coaching plan, and PIP constituted adverse employment actions, perhaps because Downing has set forth evidence suggesting that these actions resulted in monetary loss in the form of reduced stock awards. *See* PSOF ¶ 20.

2011); *see also Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002) (plaintiff's statement that she did not recall receiving a brochure did not raise a genuine issue of material fact where uncontroverted affidavit of a different witness indicated that brochure was definitely sent).

The evidence regarding differential treatment is more ambiguous. On one hand, it is undisputed that Farmakis placed both Downing and J.G. (the white female manager) on PIPs. That might suggest that Farmakis was not motivated by race, particularly in light of the fact that C.J., the only other black manager, was not placed on any sort of coaching plan. While a defendant cannot succeed on summary judgment merely by identifying an employee within the protected class who was treated favorably, *see Diaz v. Kraft Foods Glob., Inc.*, 653 F.3d 582, 588 (7th Cir. 2011), these facts do tend to rebut Downing's position.

On the other hand, Downing has produced evidence of more subtle differential treatment. For example, as noted above, Farmakis set sales goals in July 2013 that arguably penalized C.J. and Downing for performing well by requiring them to reach unattainable targets while lowering the overall sales targets for the two white managers. *See* Pl.'s Ex. 36, ECF No. 213-36 (e-mail from Farmakis suggesting that all managers would be required to achieve $1.25MM above their Last Best Estimates regardless of net effect on original sales plan). Further, Downing points to evidence suggesting that when Farmakis realigned the sales regions in early 2014, Downing and C.J. were given the least profitable territories, Pl.'s Ex. 65 ECF No. 213-65, and it is undisputed that all of the

African-American sales representatives were assigned or reassigned to their teams.[25] What's more, evidence in the record suggests that Farmakis caused C.J. and Downing to receive reduced bonus amounts based on their "performance issues," *see* Pl.'s Exs. 81, 82, and 83, while making no reductions for the two white managers (at that point, M.K. and P.R.).[26] That is seemingly at odds with Abbott's repeated assertion that Farmakis referred to C.J. as "the best on the team," s*ee* Defs.' Reply Br. 12, ECF No. 240, and is therefore probative of discriminatory intent.

Further, a factfinder could reasonably infer that Farmakis's August 2013 comment about a "no hoodie" dress code (directed toward Downing and made while laughing) was racially charged considering the widely

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25. Abbott maintains that the sales territories were balanced in their potential for sales opportunities, but Plaintiff's Exhibit 65, which sets out the "indexes" for each territories, suggests that they were not. There is therefore a genuine dispute with respect to that fact which must be resolved in Downing's favor for purposes of this motion. The same goes for Abbott's contention that the realignment was designed by an independent consultant rather than Farmakis, *see* Defendants' Response to PSOF ¶ 15, given the fact that the spreadsheet outlining the plan stated that "Peter" was in charge of "Finaliz[ing] Alignments," Defs.' Ex. 18 at 057459, ECF No. 167-14, and Abbott's evidence suggests only that Farmakis "worked with" the consulting firm on the realignment, not that Farmakis was not ultimately responsible. *Id.* at 057452.

26. Abbott notes that C.J. received a higher bonus than any of the other managers. That may be so, but the point Downing is making is not about raw amounts, but about individual reductions from previous years.

publicized shooting of Trayvon Martin, an African American teenager who was wearing a hoodie at the time of his death. *See* Fed. R. Evid. 201(b) (A district court may take judicial notice of a fact that is not subject to reasonable dispute because it "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").[27] Abbott argues that this was merely a "stray remark" insufficient to establish discriminatory animus because it was not made in reference to an employment decision. Defs.' Opening Br. at 18. But the remark was made only a couple of months before Farmakis placed Downing on a coaching plan and need not be considered in isolation. *See Perez v. Thorntons, Inc.*, 731 F.3d 699, 709 (7th Cir. 2013) (isolated comment unrelated to employment decision insufficient to support inference of discriminatory animus ***when standing alone***).

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27. Abbott's suggestion that the "hoodie" comment could not be interpreted as race related because it was made 15 months after Trayvon Martin was killed is unpersuasive. Defs.' Resp. to PSOF ¶ 9. Indeed, according to Abbott's own source, a jury found the shooter not guilty on July 13, 2013, only a couple of weeks before the comment was made. *See* CNN, TRAYVON MARTIN SHOOTING FAST FACTS, https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html. And even absent any temporal connection to the Travon Martin shooting, it would be understandable for a factfinder to draw the inference that the comment reflected racial animus in view of the lack of any other credible explanations for announcing to an African-American coworker that the company dress policy does not permit the wearing of an article of clothing often associated with stereotypes of African-American males.

Finally, Downing notes in her brief that Farmakis's tenure coincided with a dramatic decrease in black representation at Abbott Molecular from 32 black employees in 2012 to 16 in 2015. *See* Pl.'s Ex. 126, ECF No. 213-126. Abbott's only response to this data is that it is unrepresentative of the company as a whole. *See* Defs.' Resp. to PSOF ¶ 36. But that Downing's data presumably reflects only the employees at the location in which Farmakis was employed would seem to make it more, not less, relevant. Correlation, of course, is not causation, *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988), but the decrease is nevertheless consistent with Downing's narrative and other evidence and, at a minimum, rules out any argument by Abbott that an inference of discrimination is unwarranted by reference to evidence that it was enhancing racial diversity within the division.

The individual pieces of evidence offered in support of Downing's claim that Farmakis targeted her with disciplinary action because of her race are by no means overwhelming, but a number of weak observations taken as a whole may support an inference of discrimination. *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006). Here, Downing has presented evidence that Farmakis treated the black managers less favorably than the white managers, made at least one racially charged comment, and relied on pretextual reasons for implementing performance management measures with respect to Downing. That combination of circumstances is sufficient to permit a jury to find that race was a motivating factor behind the coaching plan and PIP.

B. RIF & Director Hiring

Downing next challenges her termination and Abbott's failure to re-hire her on grounds of discrimination and retaliation. In support, Downing relies heavily on the evidence discussed above regarding Farmakis's motivations for managing her performance. But it is undisputed that Farmakis was not in charge of designing the RIF or hiring directors—to the contrary, Abbott terminated him in the RIF as well. Accordingly, the relevant question is whether the actual decision makers—Chaitoff and Longoria, according to Downing—harbored discriminatory or retaliatory animus toward her.[28] *See Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 379 (7th Cir. 2011) (Title VII plaintiff must show that ***decisionmaker*** acted for a prohibited reason). As to Chaitoff, Downing has not offered any evidence suggesting that he acted with a discriminatory or retaliatory motive. Indeed, Downing argues that "Abbott" decided to remove her from the company ***before*** Chaitoff took over for Bridgman in June 2014. Pl.'s Resp. Br. at 11.

As to Longoria, the evidence set forth by Downing is sparse.[29] Downing does argue, however, that "Longoria

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28. As previously noted, there is some dispute as to Longoria's level of involvement in these employment actions, but a jury could reasonably infer that she and Chaitoff had equal decision-making power. *See, e.g.*, Pl.'s Ex. 9 Longoria Deposition at 443:18 (Longoria stating that she and Chaitoff were the decision-makers responsible).

29. For example, Downing states that Longoria "accepted Farmakis's denial without investigating the accusations made in the climate survey," PSOF ¶ 10, "failed to express concern" about

believed all the accusations Farmakis had made against Downing" regarding her performance as a manager, Pl.'s Resp. Br. at 37-38, and, as Downing notes in her response brief (*id.* at 33), a plaintiff may succeed on an employment discrimination claim against an unbiased decision maker "when a biased subordinate who lacks decision-making power uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Woods v. City of Berwyn*, 803 F.3d 865, 867 (7th Cir. 2015); *see also Miller v. Polaris Laboratories*, LLC, 797 F.3d 486, 492 (7th Cir. 2015) (applying theory to retaliation claim). To survive summary judgment on such a theory, often referred to as "cat's paw" liability, a plaintiff must provide evidence that 1) the biased subordinate actually harbored discriminatory animus against the victim of the employment action and 2) the biased subordinate's scheme was the proximate cause of the adverse employment action. *Milligan-Grimstad v. Stanley*, 877 F.3d 705, 711 (7th Cir. 2017). Notably, the subordinate need not be the "singular influence" in the employment decision. *Woods*, 803 F.3d at 869.

In this case, as described above, a reasonable jury could find that Farmakis harbored retaliatory and discriminatory animus toward Downing and sought to have her removed from the company. Focusing on

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the nature and timing of Farmakis's zeal to discipline complaining employees, Pl.'s Resp. Br. 7, ECF No. 236, and "assisted" Farmakis in his efforts to discipline Downing by providing comments on Farmakis's coaching plan, PSOF ¶ 13. This may point to negligence in the form of misplaced trust in, and reliance on, Farmakis, but is not, without more, indicative of intentional discrimination.

the second inquiry, then, the Court concludes that a reasonable jury could also find that Farmakis's animus was the proximate cause of Downing's termination. Most significantly, Longoria testified that she believed everything that Farmakis told her about Downing.[30] Pl's Ex. 9 at 345:9.

There is also reason to doubt Abbott's argument that the elimination of manager positions and the director hiring process were unrelated to Downing. First, it is undisputed that Longoria created a document in December 2013 which included a slide labeled "next steps" and a bullet point stating, "complete management changes in US sales (Downing, [C.J.])," PSOF ¶ 16, notwithstanding that Downing had been first among the managers in sales that year. While not conclusive, one could reasonably infer, in light of the accusations about Downing's performance leveled by Farmakis and the fact that Longoria knew about and assisted Farmakis with Downing's coaching plan, that "management change" meant that Longoria planned to eliminate Downing (and C.J., the only other black regional sales manager[31]) from the company.

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30. Abbott notes that Longoria also testified that outside information about Downing "wasn't just coming from Farmakis." Defs.' Reply Br. at 15 n.10. This does not suggest, however, that Longoria conducted the sort of meaningful independent investigation into Downing's performance that would break the causal chain. *See Woods*, 803 F.3d at 870 (employer may not be subject to liability if ultimate decision-maker determines that adverse action is justified ***apart from biased subordinate's influence***).

31. Abbott offers a credible argument that the slide does not suggest an intent to terminate Downing and C.J., but that only

Second, Downing offers evidence suggesting that the stated reason for eliminating the manager positions—cost savings—is dishonest. Specifically, unlike any of the other eliminated positions, the four "manager" positions were replaced by four ***higher paid*** "director" positions with similar responsibilities, and P.R., one of the former managers, was given one of the spots. Pl.'s Resp. Br. at 32. Abbott responds by stating that the directors were required to 1) "absorb" the National Sales Director position and the Senior Director of Enterprise Accounts position (which were also eliminated in the RIF), 2) report directly to the division Vice President, and 3) take on profit and loss responsibility, which accounted for the higher salary. Defs.' Opening Br. at 22. But Downing has produced evidence showing that the division VP, not the directors, absorbed the National Sales Director position. *See* Pl.'s Ex. 172, ECF No. 213-172 (e-mail from Chaitoff stating that he would "play that role"). It seems doubtful, moreover, that the Senior Director of Enterprise Accounts position, held by Dave Skul, was truly eliminated; Skul was not included on the list of employees impacted by the RIF, Defs.' Ex. 45, ECF No. 167-35, and the post-RIF organizational charts show a position called "Sr. Director, Enterprise Solutions" held by Skul. Defs.' Ex. 47, ECF No. 172-14. Further, it is undisputed that before Farmakis was hired, there was no "National Sales Director" position and the regional managers reported directly to the division

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serves to underscore the point that it is the province of a jury to assess the credibility of the competing spins on the facts that have been developed and that at this stage, as the non-movant, it must be assumed that the jury would resolve such arguments in Downing's favor.

Vice President; the fact that the new directors would also report directly to the VP, then, does not persuade the Court that the director position can be reasonably viewed only as materially different from the manager position. And Downing testified that as a manager, she had always been responsible for profit and loss in her region. Pl.'s Ex. 2 ¶ 5.

Finally, Abbott argues that it would be "ridiculous" to infer that Abbott would terminate multiple other employees to cover up terminating Downing. But that misses the point—"[t]he relevant decision here relates not to the reduction-in-force itself, but to the alleged decision to eliminate [the manager] position." *Janiuk v. TCG/Trump Co.*, 157 F.3d 504, 509 n.5 (7th Cir. 1998). It's true that all four managers technically lost their jobs, but P.R. was hired as one of the directors, meaning that Abbott would only have had to fire C.J. and M.K. as "collateral damage." This is not so difficult to believe—M.K. was not "high talent" and had problems in the past, and there is evidence in the record suggesting that Farmakis had targeted C.J. as well as Downing.

As for Downing's failure to hire claim, the record indicates that Longoria relied on Farmakis's reports when evaluating Downing during her interview for the director position.[32] Pl's Ex. 9 at 345:9; *see also id.* at 401:6 ("Based

32. It bears noting that although Farmakis reported in February 2014, midway through the PIP, that Downing's performance still did not meet requirements (though acknowledging that it had improved), Abbott has adduced virtually no evidence of substandard performance by Downing over the balance of 2014. Farmakis did not

on the feedback that we received, we did not believe she was an inspirational leader."). And contrary to Abbott's argument (Opening Br. at 2-3), Downing is not ***required*** to show that her credentials were so superior to those of the successful candidates that "no reasonable person could have impartially chosen [them] over [her]," *Victor v. Vill. of Hoffman Estates*, 13 C 00921, 2016 U.S. Dist. LEXIS 6355, 2016 WL 232420, at *12 (N.D. Ill. Jan. 20, 2016), to succeed on a cat's paw theory of liability. That is the standard only where a plaintiff attempts to use disparate qualifications as evidence of pretext, *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002), which Downing does not do. In other words, Downing does not argue (at least for purposes of this theory) that Longoria did not honestly believe that the other applicants were more qualified; instead, she argues that she was not given a fair shot because the process was infected by Farmakis's discriminatory and retaliatory animus. *See Alexander v. City of Milwaukee*, 474 F.3d 437, 449 (7th Cir. 2007) (plaintiffs may receive damages where what they lost was a chance to compete on fair footing, not the promotion itself). Because a reasonable jury could conclude that Farmakis's impermissible motivations proximately caused the adverse employment actions, summary judgment must be denied.

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initiate a termination review and, whether the PIP was justified or not, the evidence does not provide a basis to conclude that Downing was not meeting expectations when, in September 2014, Abbott says it began consideration of the RIF or thereafter when it was assessing candidates for the new Director positions.

C. Disparate Impact

The third theory advanced by Downing is that the director hiring process (specifically a purported point system used to rate applicants on a set of criteria), had a disparate impact on African Americans. Abbott first argues that Downing failed to identify this policy in her EEOC charge. But Downing asserted a disparate impact claim with respect to her "termination and thereafter" and the reduction in force, Defs.' Ex. 67, and Abbott provides no legal support for its position that this is insufficient. Further, in response to Abbott's interrogatory requesting that Downing identify the practices forming the basis of her disparate impact claim, Downing pointed to "the creation and filling of vacant positions . . . after reductions in force." Defs.' Ex. 16 ¶ 15, ECF No. 167-12. This is therefore unlike the situation in *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002), where the plaintiff made no reference at all, prior to summary judgment, to the policies she challenged.

Downing's disparate impact claim nevertheless falls short. Under Title VII's disparate impact provision, a plaintiff establishes a prima facie violation by showing that an employer uses a particular employment practice that (needlessly, though not necessarily intentionally) causes a disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e—2(k)(1)(A)(i); *Richardson v. Rush Presbyterian St. Luke's Med. Ctr.*, 63 Fed. Appx. 886, 889 (7th Cir. 2003). To do so, plaintiffs must provide statistical evidence "of a kind and degree sufficient to show that the practice in question" caused the

exclusion of applicants for jobs or promotions because of their membership in a protected group. *Watson*, 487 U.S. 977 at 994, 108 S. Ct. 2777, 101 L. Ed. 2d 827. Downing does not meet this burden. While it is undisputed that out of the ten applicants who were initially interviewed for the position, C.J. and Downing (the only two African American applicants) received the lowest ratings, *see* Defs.' Ex. 50 ECF No. 167-37,[33] a sample size of 10 individuals is simply too small to be statistically meaningful. *See Parker v. Fed. Nat. Mortg. Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984) (sample size of 12 lacked "sufficient breadth to be trustworthy"); *Soria v. Ozinga Bros., Inc.*, 704 F.2d 990, 995 (7th Cir. 1983) (sample size of fifteen drivers too small); *White v. Office of Cook County Pub. Def.*, 14-CV-7215, 2017 U.S. Dist. LEXIS 129029, 2017 WL 3493803, at *8 (N.D. Ill. Aug. 14, 2017) (collecting cases). Abbott's

33. As an aside, Abbott quibbles with Downing's failure to include the scores of two African American candidates interviewed after one of the white candidates rejected an offer, but Longoria herself testified that they did not document those interviews or record any numerical ratings, *see* Pl.'s Ex. 9 Longoria Deposition 371:23-24, and there is sufficient evidence in the record from which a jury could infer that Abbott interviewed and ultimately hired an external African American candidate because it became aware that Downing was likely to sue for discrimination. *See, e.g, id.* at 359:9-23 (suggesting that after learning that Downing would not sign severance agreement, Longoria told talent management that candidates had to be diverse); *see also* Pl.'s Ex 117 (e-mail from Longoria to Chaitoff after hiring African American candidate stating that she felt "very good" about potential legal challenges and thanking him for "being so conscious of that aspect."). Even if Abbott hired E.B. in an effort to insulate itself from liability, however, the hiring decision does lessen the overall allegedly disparate impact Downing challenges and cannot be entirely discounted.

motion for summary judgment is therefore granted with respect to that claim.

* * *

For the reasons set forth above, Abbott's motion for summary judgment is denied in part and granted in part. Downing has produced sufficient evidence to support a jury verdict on her individual disparate treatment claims alleging that Farmakis discriminated and retaliated against her and that his animus caused her separation from the company. She has failed, however, to meet that burden for her disparate impact claim.

Date: September 5, 2019

/s/ John J. Tharp, Jr.
John J. Tharp, Jr.
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED OCTOBER 12, 2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 12, 2022

Before

DIANE S. SYKES, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-2746

JACINTA DOWNING,

Plaintiff-Appellant,

v.

ABBOTT LABORATORIES and
ABBOTT MOLECULAR, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 1:15-cv-05921

John J. Tharp, Jr.,
Judge.

Appendix D

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on September 23, 2022, no judge in active service has requested a vote on the petition for rehearing en banc,* and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

* Judge Rovner, Judge St. Eve and Judge Lee did not participate in the consideration of this petition for rehearing.