

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-50542
Summary Calendar

[Filed November 23, 2022]

MARIE PFAU,)
<i>Plaintiff—Appellant,</i>)
)
<i>versus</i>)
)
JANET YELLEN, IN HER OFFICIAL CAPACITY)
AS SECRETARY OF THE TREASURY,)
<i>Defendant—Appellee.</i>)
)

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-cv-422

Before DAVIS, DUNCAN, and ENGELHARDT, *Circuit
Judges.*

PER CURIAM:^{*}

^{*} Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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Plaintiff-Appellant, Marie Pfau, appeals the district court’s order to grant Defendant-Appellee’s Rule 50(a) motion for judgment as a matter of law which the court granted after plaintiff presented her case. We find no error and AFFIRM.

I. BACKGROUND

Pfau, formerly a seasonal clerk for the Internal Revenue Service (“IRS”), filed suit against the Secretary of the Treasury alleging that her employer engaged in sex and age discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act of 1967 (“ADEA”). Specifically, Pfau claimed that certain actions of her co-worker, Mario Drumgoole, constituted sex and age discrimination and created a hostile work environment.

The district court partially granted the Government’s Rule 12(b)(6) motion and dismissed Pfau’s age discrimination and retaliation claims under Title VII and the ADEA. Pfau’s only remaining claim, sex discrimination based on a hostile work environment, proceeded to trial on May 31, 2022. At trial, Pfau testified generally that a co-employee, Drumgoole, frequently spoke in an excessively loud manner to co-workers and to her which she found disruptive and disturbing. More specifically, she testified about the following six incidents involving Drumgoole that she believes constituted harassment:

(1) Drumgoole “announced” to the office he was going to let everybody go home because the department’s computer system was malfunctioning; (2) Drumgoole

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“interjected himself” into Pfau’s conversation with her co-worker, Margaret Rhoads; (3) Pfau overheard Drumgoole tell Rhoads that Rhoads “was going to get a complaint filed against her for not working;” (4) Pfau overheard Drumgoole and Rhoads reference “old people having sex;” (5) Drumgoole “yelled” at Pfau to “get back to work right now;” and (6) Pfau saw Drumgoole walking around the office “smack[ing] his fist into one hand and grunt[ing].”

At the close of Pfau’s case, the Government moved for judgment as a matter of law pursuant to Rule 50(a). The district court granted the Government’s motion, finding that Pfau had presented “simply no competent evidence” to support the essential elements of her hostile work environment claim. Pfau timely appealed.

II. DISCUSSION

On appeal, Pfau argues that the district court erred in granting the Government’s Rule 50(a) motion. We review the district court’s grant of a motion for judgment as a matter of law *de novo*, applying the same standard as the district court.¹ Under this standard, “we view the entire trial record in the light most favorable to the non-movant, drawing reasonable factual inferences in its favor.”² Judgment as a matter of law is appropriate after a party has been fully heard by the jury on a given issue, and “there is no legally

¹ *Ill. Cent. R.R. Co. v. Guy*, 682 F.3d 381, 392-93 (5th Cir. 2012).

² *Burch v. Coca-Cola Co.*, 119 F.3d 305, 313 (5th Cir. 1997) (citing *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir. 1994)).

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sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue.”³

As an initial matter, Defendant-Appellee notes that Pfau forfeited her challenge to the district court’s ruling on the sufficiency of the evidence by failing to cite to the trial record in her brief. We agree. A party forfeits an argument by failing to adequately brief it on appeal.⁴ Federal Rule of Appellate Procedure 28(a)(8)(A) requires an appellant’s brief to include the “appellant’s contentions and the reasons for them, with citations to the authorities *and parts of the record on which the appellant relies.*”⁵ In evaluating the appeal of a judgment as a matter of law, this Court has previously noted that it “cannot conduct meaningful appellate review of a district court’s decision to grant judgment as a matter of law without the testimony that would support or refute that determination.”⁶

Here, Pfau failed to adequately brief her sufficiency of the evidence argument because she does not cite to or analyze the evidence introduced at trial as required

³ *Id.*

⁴ *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

⁵ FED. R. APP. P. 28(a)(8)(A) (emphasis added).

⁶ *McNeil v. BMC Software Inc.*, 306 F. App’x 889, 892-93 (5th Cir. 2009) (per curiam) (unpublished) (noting that plaintiff provided “no citations whatsoever to any trial testimony in the appellate record”). Unpublished opinions issued in or after 1996 are “not controlling precedent” except in limited circumstances, but they “may be persuasive authority.” *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

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by Rule 28.⁷ Instead of citing to the trial record, Pfau’s appellate brief cites exclusively to her original complaint and defendant’s motion to dismiss.⁸ But in a Rule 50(a) appeal, like this one, this Court must evaluate the evidence adduced *at trial*, not assertions in the parties’ pleadings.⁹ Thus, because Pfau’s brief fails to provide citations to any trial testimony that would provide a legally sufficient evidentiary basis to support her claim for a hostile work environment, she has forfeited her challenge.¹⁰

⁷ See FED. R. APP. P. 28(a)(8)(A); see also *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 81 (1st Cir. 2001) (“Not surprisingly, the Federal Rules of Appellate Procedure require that appellants, rather than the courts of appeals, ferret out and articulate the record evidence considered material to each legal theory advanced on appeal.”).

⁸ For example, in support of the third element of her hostile work environment claim, plaintiff’s brief cites to defendant’s motion to dismiss for the assertions that “other members of the protected class reported harassment by Drumgoogle” and that Pfau “observed that women were treated differently and negatively by Drumgoole.” In turn, defendant’s motion cites to plaintiff’s original complaint for these assertions.

⁹ See *Burch*, 119 F.3d at 313 (noting that this Court reviews the “trial record” in reviewing a judgment as a matter of law under Rule 50(a)).

¹⁰ See *McNeil*, 306 F. App’x at 892-93 & n.5 (holding that plaintiff waived her challenge because she provided “no citations whatsoever to any trial testimony in the appellate record” and that even if the court “were to consider the pre-trial affidavits and depositions discussed in [plaintiff’s] appellate brief as if they were contained in a trial transcript, . . . [plaintiff’s] claim would still fail”).

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Moreover, even if plaintiff had adequately briefed her argument on appeal, we nevertheless find that the district court correctly concluded that there was no legally sufficient basis for a reasonable jury to find for Pfau on her hostile work environment claim. Title VII makes it unlawful for employers to require “people to work in a discriminatorily hostile or abusive environment.”¹¹ To establish a hostile work environment claim, the plaintiff must prove: “(1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.”¹²

After reviewing the evidence presented at trial in the light most favorable to plaintiff, we conclude that Pfau has not presented sufficient evidence to support the essential elements of her claim. Although Pfau testified that she believes the six incidents she identified at trial constitute harassment in violation of Title VII because “men were not insulted as [she] was,” Pfau failed to introduce any evidence that would suggest these incidents were motivated by her sex.¹³ To

¹¹ *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

¹² *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

¹³ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (noting that the “critical issue” in cases alleging harassment on the

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the contrary, as pointed out by the Government, Drumgoole's conduct was generally made in front of both male and female coworkers. Moreover, the identified incidents were "offhand comments" that were neither sufficiently severe nor pervasive to alter the conditions of Pfau's employment and create a hostile working environment.¹⁴ Finally, plaintiff cannot establish that her employer failed to take prompt remedial action because it is undisputed in the record that Pfau refused her employer's offer to relocate her workstation away from Drumgoole.¹⁵ Accordingly, because Pfau failed to present competent evidence at trial to meet the elements of her hostile work

basis of sex "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" (internal quotation marks omitted)).

¹⁴ See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." (citation omitted) (internal quotation marks omitted)); *Hockman v. Westward Commc'n, LLC*, 407 F.3d 317, 321, 329 (5th Cir. 2004) (noting that a co-worker's comments to plaintiff "about [a former employee's] body and requests to be alone with [plaintiff] are offhand comments that are boorish and offensive, but not severe" and that the co-worker's "newspaper slap" amounted to "simple teasing" (quoting *Faragher*, 524 U.S. at 788) (internal quotation marks omitted)).

¹⁵ See *Hockman*, 407 F.3d at 330 (noting that a plaintiff "cannot prove that [her employer] failed to take prompt remedial action where she unreasonably failed to take advantage of corrective opportunities provided by [her employer]").

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environment claim, the district court committed no error in granting a judgment as a matter of law.

III.

For the reasons above, the district court's judgment is AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**Docket No. A 18-CA-422 RP
Austin, Texas**

[Filed June 1, 2022]

MARIE PFAU)
)
vs.)
)
JANET YELLEN, IN HER)
OFFICIAL CAPACITY AS)
SECRETARY OF THE TREASURY)
)

**TRANSCRIPT OF TRIAL ON THE MERITS
BEFORE THE HONORABLE ROBERT L. PITMAN
Volume 2 of 2**

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Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

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I N D E X

Direct Cross Redirect Recross

Witnesses:

Josephine Eller 4 16 26

Page

Rule 50 Motion 30

E X H I B I T S

Offered Admitted

Plaintiff's

(None)

Defendant's

(None)

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THE COURT: Good morning.

I believe that the jury is here and ready to go. Anything we need to take up before we bring the jury in?

MR. COANE: No, your Honor.

MR. MUELLER: No, your Honor.

THE COURT: Okay. Very good.

(Jury present.)

THE COURT: And good morning, ladies and gentlemen of the jury. Thank you so much for being here and ready to go on time. We're going to go ahead and pick up where we left off yesterday and your next witness.

MR. COANE: Thank you, your Honor.

Plaintiff calls Josephine Jodi Eller.

THE COURT: All right. Good morning. Before you take a seat, could I ask you, please, to raise your right hand to be sworn.

THE CLERK: You do solemnly swear or affirm that the testimony which you may give in the case now before the Court shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: Please be seated.

JOSEPHINE ELLER, called by the Plaintiff, duly sworn.

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DIRECT EXAMINATION

BY MR. COANE:

Q. Good morning, ma'am.

A. Good morning.

Q. Could you state your full name for the record, please?

A. Josephine Eller.

Q. Okay. And you live here in Austin, correct?

A. Yes.

Q. And do you recognize the plaintiff in this lawsuit, Marie Pfau?

A. Yes.

Q. And she's here in the courtroom today?

A. Yes.

Q. Okay. And you know her from 2017 when she worked for you at the IRS?

A. Yes.

Q. And you used to be her supervisor; is that correct?

A. Yes.

Q. And where's that building located where y'all worked?

A. 3651 South IH-35 here, Austin, Texas.

Q. Okay. And, ma'am, what was your job title in 2017?

A. My job title was the supervisory clerk for a team of RAVES-IVES employees.

Q. And what were your job duties in that role?

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A. My job duties in that role were varied. I handled requests for tax returns, transcripts, had various employees doing different parts of this. I managed the quality review team, spoke with our IRM specialist in Kansas City almost daily, handled inquiries from TIGTA or special council concerning any of these returns for cases that they were looking into. Also handled calls from LEOS looking for information on 8821-A cases.

Q. Okay. Quite varied.

A. I'm sorry.

Q. Quite varied as you say. Okay. And you were supervising 50 to 70 employees at that time; is that correct?

A. Yes.

Q. Okay. And the majority of that group of 50 to 70 employees were women, correct?

A. Yes.

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Q. And one of those employees, not a woman, that you supervised was Mario Drumgoole, correct?

A. Mario, yeah.

Q. Would you agree that back in 2017, Mario was a high-energy person?

A. Yes.

Q. Okay. And as Mario's supervisor, one concern you had with him back in 2017 is that he gets a little loud in the

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work area, correct?

A. It was easy to do in that room. He has a voice that carries and it's an open area, kind of like this. So his voice would carry across the room.

Q. Okay. And it was your opinion at that time that he gets a little loud in that area, correct?

A. He would, having a conversation with other people when I would just ask him to tone it down.

Q. Okay. And did you work near him or how'd you?

A. I worked across the room from him.

Q. Okay. So you'd walk over to his cubicle and tell him to tone it down?

A. I would either walk over there or if he was standing, I would just do this (indicating).

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Q. And what are you doing with your hand? Oh, like close your mouth? And you also used the words "settle down" with him, as well; isn't that true?

A. Yes.

Q. Was Ms. Pfau under your supervision, as well?

A. Yes.

Q. And during that time, you personally did not assign any work to her; is that correct?

A. When Marie came on, they were in a training room for the first six weeks, and she did not come on the floor until later and then -- is when -- I met her briefly

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before that, but that's when I got to know her was on the floor.

Q. Okay. And did you give her work to do or she got it from the leads?

A. She was an IVES clerk and they had a specific area that they got their work from.

Q. But not directly from you.

A. No.

Q. Okay. And is Thomas Bustos the one who gave her work?

A. He was the lead and he would ensure the IVES people were working the correct cart. If I had people working the 4506s, they would be -- which are the photocopies of returns work, then he would make sure

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that they had their work. Or if they needed research or if they needed verification of a check, he would do that for them.

Q. Okay. Was it Mario's job to give Ms. Pfau or anyone else work to do in 2017?

A. No, it wasn't. If he did, it usually was work that had to go out immediately.

Q. Well, you've actually reminded him, isn't it true, that it's not his job?

A. It's not his job. He should bring it to the lead. Unfortunately, usually the lead was gone by that time, and so, I'd tell him, you know, you need to bring it to me and

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I'll make sure it gets to who needs to work it.

Q. As opposed to him giving it directly to people.

A. Right.

Q. Correct?

A. Yes.

Q. Okay. Thank you. Ms. Pfau was a seasonal employee at the IRS; is that correct?

A. Yes.

Q. And what does it mean to be a seasonal employee at the IRS back in 2017?

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A. Seasonal employee, even to this day, is an employee that is hired more or less on a permanent basis that is released and recalled yearly.

Q. Okay. Getting back to Mario assigning or giving work to some of the clerks there, you've also told him what are you doing when he gave work to clerks; isn't that true?

A. I'd ask him, what are you doing? And he would say, I need this out. I'm like, well, let me look at it, who's it for, how much is it so that we could figure out the correct way to get it out timely.

Q. You've received other complaints about Mario from other people other than Ms. Pfau; isn't that true?

A. I would receive complaints -- I don't know if I would call them complaints. They were like he's getting a little loud, you know, have him settle down or get quiet.

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That's about it.

Q. And the clerks would be telling you that?

A. Clerks, anyone in the work area could come and tell me if they felt he was a little loud and I would tell him to settle down. It's like I said, he has a lot -- a voice that carries. It's easy for him to get loud.

Q. Who is Margaret Rhoads?

A. Margaret Rhoads was the other IVES coordinator.

Q. Okay. And she worked in the same cubicle area as Mario and Ms. Pfau?

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A. Yes. They worked side-by-side.

Q. And she has reported to you in the past that Mario was acting up; is that correct?

A. She would say that -- I wouldn't really say acting up.

Q. Do you recall saying acting up when your deposition was taken in this case?

A. I'm trying to think, yeah, I probably would say that, but it really was like they were like siblings, like when sibling picking on the other.

Q. Okay. And when Margaret got picked on, she went to you and said he was acting up?

A. Yeah.

Q. Yeah. Okay.

A. And if Margaret was picking on him, he'd let me know

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that she was picking on him. But then, a few minutes later, everything was fine in their world.

Q. Right, because you told them to be quiet, right?

A. I'd tell them both.

Q. Okay. Now, Ms. Pfau complained in writing to you about Mario, correct?

A. She wrote me a note and slipped it under my door.

Q. Okay. Can you see that on the screen in front of you, ma'am? Do I need to make it a little larger?

A. No. It's fine.

Q. Okay. And is that the note that Ms. Pfau slipped under your door where she complained about Mario?

A. I have not seen the note since that day, so I'm assuming.

Q. I can't hear you, ma'am. Can you speak up, please?

A. This is the first time I've seen the note since. So.

Q. And that's Plaintiff's Exhibit No. 7 you're looking at. I'll show you the back side of it with your signature.

A. Okay.

Q. Does that help refresh your memory about it? Or you've seen a lot of documents since then.

A. Quite a few.

Q. But in any event, you said she slipped a note under your door?

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A. Uh-huh.

Q. Okay. And any idea when you received this complaint?

A. A couple of days after she slipped it under my door, I had left for the day. She slipped it under the door. I share an office with the nightshift manager who apparently picked up -- there were a couple of other

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documents, picked them up, put them in a stack and it was a couple of days before I got to that stack.

Q. Oh, okay. It was a couple of days later that you first saw the document.

A. Right.

Q. And then, did you speak to Ms. Pfau the same day or a couple of more days?

A. I spoke to her the day I found it.

Q. Okay. And you found it on your desk in a tray or a box?

A. Okay. I don't know how familiar you are with IRS and its work, but we have lots and lots of paper.

Q. Sure.

A. And I have lots and lots of paper on my desk in the area behind me. So if it's put in one of these stacks, as I clear a stack is how I find things.

Q. Sure. Okay. So it could take a little while. So did you call Ms. Pfau into your office to discuss this complaint that she submitted to you?

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A. Yes.

Q. Okay. And when you called her into your office and you were talking to her, did she tell you that Mario was telling her to get back to work while she was on a break and he was doing it aggressively?

A. That is what she told me.

Q. Okay. And she told you that prior to quitting, correct?

A. I'm sorry.

Q. She told you that prior to quitting couple of weeks later, correct?

A. Yeah.

Q. She also told you in that meeting that she felt physically threatened by Mario, correct?

A. Yes.

Q. Now, back in 2017, and you've alluded to this already somewhat, it was actually discouraged for coordinators like Mario to interact with the clerks like Ms. Pfau, correct?

A. We tried to discourage that so that they would focus on -- because the clerks have to pay attention to what they're ordering.

Q. Of course.

A. We lose revenue when they order the wrong product. The client does well because they get an extra product,

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but we lose revenue.

Q. Okay. And after you told Mario about Ms. Pfau's complaint -- let me back up. You told Mario about Ms. Pfau's complaint, correct?

A. I told him someone had made allegations against him.

Q. Okay. Did you eventually tell him who made those allegations?

A. Yes, when I had to ask him to stay away from her.

Q. Okay. And also at some point prior to Ms. Pfau resigning her position, Mario came back to you and told you that he felt that Ms. Pfau was discriminating against him, correct?

A. He told me that when I spoke to him about Ms. Pfau.

Q. So he was indicating that he was the real victim in all of this, correct --

A. Yes.

Q. -- ma'am?

A. Yes.

Q. Thank you. Let me show you what's been marked as Exhibit 16, page 11. Do you recognize this document, memorandum from Mario?

A. Yes.

Q. Is that the memorandum where you told him to stay away from Ms. Pfau?

A. That is a memorandum I issued to both him, Ms. Pfau

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and Margaret Rhoads.

Q. Okay. And in this memo, are you telling him to stay away from Ms. Pfau?

A. Yes.

Q. Okay. If you look at the bottom there for the employee's signature, did Mario refuse to sign that document?

A. Yes.

Q. Had you asked him to sign it?

A. I asked him to sign it and he refused because he felt he was the one being discriminated against.

Q. Right. And did you tell him that he's not admitting to discrimination by signing this, he's simply signing to indicate he received it. You told him that?

A. Yes.

Q. And he still refused to sign?

A. Yes.

Q. Okay. And whose writing is that where it says employee refused to sign?

A. Mine.

Q. You wrote that. Okay. Are you familiar with a -- the part of Ms. Pfau's complaint to you that talked about her having lunch in the atrium and how Mario was

aggressively telling her to get back to work? Do you recall that incident?

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A. Yes.

Q. Okay. And did you ask Mario about that incident, as well?

A. Yes.

Q. And what did -- did he tell you it never happened or what did he say?

A. He said that did not happen, that they joked and laughed on the way back when they walked in together.

Q. Okay. When you say on the way back, on the way back from where, the atrium?

A. I assume from lunch or break, wherever they were.

Q. So you were assuming he was having lunch with Ms. Pfau in the atrium.

A. No. I assumed that they met on the way back.

Q. Okay.

A. And happened to speak.

Q. Okay. So he admitted to you he was talking to Ms. Pfau on the way back from the atrium, correct?

A. He admitted that he spoke to Ms. Pfau coming back. He didn't specifically say the atrium.

Q. Okay. Did you understand him to mean the atrium?

A. I assumed it because that's where she said it happened. But.

Q. And you were talking to him about her atrium complaint, correct?

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A. I was talking to him about that and he said that he met her coming back.

Q. Got it. Thank you, ma'am.

You conducted your own investigation of what went on between Mario and Ms. Pfau, correct?

A. Yes.

Q. Okay. And the conclusion of your investigation was that it was difficult for you to determine who was actually in the wrong, correct?

A. Right.

Q. Because they both seemed to have a different story, right?

A. They both had different stories. No one corroborated either one. So.

Q. So you weren't sure who was in the wrong.

A. That's it.

Q. Okay. Pass the witness, your Honor.

CROSS-EXAMINATION

BY MR. MUELLER:

Q. Good morning, Ms. Eller.

A. Hi.

Q. We've met before, but just for the record, I'm Matthew Mueller. I represent the United States and Janet Yellen, Department of Treasury. You also go by Jodi; is that right?

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A. Yes.

Q. Jodi, where are you from?

A. Here, Austin Texas.

Q. And where did you go to high school?

A. I went to school here in Austin at Albert Sidney Johnston.

Q. And do you still work for IRS?

A. I do. It will be 38 years this December.

Q. And so, you started -- when did you start at the IRS?

A. December 17, 1984.

Q. Do you dream of being an IRS employee?

A. No.

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Q. How did you come to start working for the IRS then?

A. My sister -- I had just finished a job and I told her that I was going to take some time off. That went against her feelings because she was an IRS employee and she'd say, you need to come work for the IRS. I said no. Well, she took matters out of my hands, filled out my application with my information, drove me down to the main office and pulled into the circular drive and said get out. I'm like what? She says here's your app, get out, go take the test. I'm like I don't want to work here and she says just go take the test. What's it going to hurt? I'm like okay.

So I went in, took the civil service test, two

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weeks later, got a letter in the mail telling me to report on December 17th, and I've been there ever since.

Q. And what is your current title now, 38 years in?

A. I am a tax examining tech assistant supervisor.

Q. And how long have you had that position?

A. Since 2018.

Q. You talked about your work in 2017, your supervisory position, and I don't want to go back over that, but were the majority of the people that you were supervising, were they male or female?

A. Female.

Q. And what was the room like that they were sitting in?

A. It was a large open room with desks that have little partitions beside them like if you're sitting there, the partition comes about this high.

Q. And you were in that same room with people you supervised?

A. Yeah. I was in a corner of the room in a cubicle.

Q. And I think you answered this earlier, but Mario Drumgoole was one of the people that you supervised?

A. Yes.

Q. And how long had you been supervising him as of 2017?

A. Just a couple of years.

Q. Prior to Ms. Pfau's complaint, do you have any concerns about his interactions with his coworkers?

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A. None.

Q. And you testified about him being loud or boisterous, was that inappropriate in any way when he was doing that?

A. No. I never had any problems with him being inappropriate with anyone.

Q. And was he loud and boisterous more with women than he was with men?

A. No. There were a couple of gentlemen that worked near him and he would be talking to them, say, if I was talking to this lady second from the end, I would have to speak a little bit louder without the mic so my tone would carry. His voice did not have -- he didn't have to raise his voice. It would carry easily.

Q. So when you talk about him being loud or boisterous, he was having conversations across a couple of cubicles in the room?

A. Right.

Q. And was he yelling at people?

A. No.

Q. Was Mario the only person who had trouble with being loud or boisterous in that room?

A. No.

Q. And were you accused of being loud or boisterous on occasion, as well?

A. Yes.

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Q. Did Mario ever give you pushback or argue with you when you told him to tone it down or be quieter?

A. No. He'd always say yes, boss.

Q. All right. I want to talk about some of the specific -- oh, did you ever write up Mario for discipline while you were his supervisor?

A. No.

Q. And what was Mario's normal attire when he was in the office?

A. Normal attire would be polo shirts, baseball cap, because I believe he was losing his hair. But usually khakis or nice slacks.

Q. Did Mario wear football jerseys to the office?

A. Never. It just was not Mario.

Q. I want to shift to a few of the specific allegations that have been made. Did you ever receive a complaint from Dorothy Chambers about Mario having conversations about older people having sex or having kids?

A. No.

Q. Did you ever receive a complaint from anybody other than Ms. Pfau about Mario telling them to quit the IRS?

A. No.

Q. When you received the letter from Ms. Pfau, you said you discovered it a couple of days after the May 1st date on that letter. Did that surprise you, her allegations

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against Mario Drumgoole?

A. Yes. It did very much so.

Q. And why is that?

A. Because Mario was always very respectful with the older ladies in the group. They all treated him like a grandchild. They were -- they just got along very well with him.

Q. And after you called Ms. Pfau in to discuss the complaint that she had made in that letter, did you tell her that nothing could be done about Mario?

A. I told her we would investigate.

Q. And did you tell Ms. Pfau that nothing could be done to make the office safe for women?

A. I told her we were going to look into her allegations. I asked her if she wished to move, I could move her immediately and she refused. No one else had an issue with him, but have to be investigated.

Q. And when you were talking to Ms. Pfau and you received the letter, did he take that letter seriously?

A. Yes.

Q. And after you talked to Ms. Pfau, did you talk to Mario Drumgoole?

A. Yes.

Q. And what was his reaction when you told him that somebody had made a complaint against him?

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A. He was upset. He was hurt that it -- someone had said that about him.

Q. And did he ask to be moved?

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A. Yes.

Q. And were you able to move Mario immediately?

A. No, because the type of work he did and because of the need for the fax machines and telephone lines, I don't know how well everyone is familiar with the government. It moves slowly. We tried to get everything done that we're supposed to do, but we don't move quickly. Especially moving someone and moving their work, their phone lines, fax machines, these lines are set up in a certain area. We would have to reconstruct or lay new line for these kinds of things. We had to figure out how we could do this and let him continue the job he was doing.

And we tried to move him to another area, but the technology that he needed on this computer system was not able to load onto that computer. So that didn't work.

Q. But you moved him around a little bit into places that you could while you were setting up a longer-term solution?

A. Yes.

Q. Did you make your superiors aware of the complaint that Ms. Pfau made?

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A. Yes.

Q. And why did you get your superiors involved at the beginning?

A. We take everyone's allegations of any type of harassment, discrimination very seriously. It's all about the individual's perception, so we treat it as very real and we try to do everything we can to minimize any interaction and make everyone feel safe.

Q. On questions from Mr. Coane, he showed you a memo that he -- that you issued to Mario Drumgoole telling him not to have communication with Ms. Pfau. Do you remember seeing that?

A. Yeah.

Q. And did you issue the same memorandum to Ms. Pfau?

A. Yes.

Q. And did you issue the same memorandum to Margaret Rhoads?

A. Yes.

Q. And why did you issue that memorandum to Margaret Rhoads?

A. Because Ms. Pfau was complaining about Mario's interaction with Margaret, and just to make it easier, it was easier to issue it to all three and do it that way.

Q. And I believe you answered on examination from Mr. Coane that you conducted an investigation into Ms. Pfau's

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allegations?

A. Yes.

Q. And did you find anybody that could corroborate, that witnessed the things that Ms. Pfau alleged?

A. No.

Q. Did you walk around that room that you worked in and that Mario and Ms. Pfau worked in?

A. I always walked around the room. I usually tried to walk the room at least once a day to kind of greet everyone or see if there were any issues. If someone was having an off day, was it personal or just not feeling well, you know, what can I do to help, you know, let me know. But I would try to do that at least once a day. I would be on the floor at other times just to see how the work was moving, were there computer system issues.

Sometimes our systems did go down and we like okay, who's having -- who's still up, who's working, who's not, is everybody down. I would have to call our IT and make sure that they were aware we were having computer issues in order to get our system going again.

Q. Did you ever witness Mario Drumgoole having a verbal altercation with Ms. Pfau or anybody else?

A. No.

Q. Did you ever witness Mario Drumgoole threaten Ms. Pfau or anybody else?

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A. No.

Q. Did you ever witness Mario Drumgoole acting aggressively towards Ms. Pfau or anyone else?

A. No.

Q. What day, do you remember, did Ms. Pfau resign?

A. I believe it was a couple of days after I issued the memo to her.

Q. And that would have been May of 2017?

A. Yes. Mid-May.

Q. Since 2017, have you taken on a new role at the IRS?

A. Yeah.

Q. And what is your new role?

A. My new role is the tax examining supervisor in the I-10 operation.

Q. And when did you start that new role?

A. In 2018. February of 2018.

Q. And do you still work with Mario Drumgoole?

A. I have not seen Mario since I left RAVES-IVES, except for one time to direct him to a conference room and that was it. And I can't even tell you what day that was.

Q. At any point in working with Mario, did you see him treat women worse than he treated men?

A. No.

Q. Pass the witness.

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RE-DIRECT EXAMINATION

BY MR. COANE:

Q. Have just a couple more questions and I think we'll be done.

A. Okay.

Q. How many times did you talk to Mario about Ms. Pfau's allegations before she resigned? Was it just once or twice? Do you remember?

A. Two or three times, four.

Q. Okay. And the first time you talked to him, was it the same day you talked to Ms. Pfau or the next day?

A. I believe it was the next day. I'm trying to think. It may have been late in the day. Mario may have been gone already. If he was, then I spoke to him the next day.

Q. Okay. And after you spoke to him, he returned to his workstation?

A. Mario --

Q. Or he left? Or.

A. He probably left the work area for a little bit.

Q. Okay. And you didn't move him from his workstation the same day you talked to him, did you?

A. No, but he did express an interest in moving.

Q. Yes, ma'am. And you said now you work as a tax examining supervisor?

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A. Yes.

Q. Is that over audits?

A. No, sir. Tax examiner actually encompasses quite a few jobs. What we do is, we assign individual tax identification numbers for people that do not have Social Security numbers.

Q. Okay. And you were doing some of that work back in IVES, weren't you?

A. In IVES, no. We would -- we ordered transcripts. For instance, if you wanted just a transcript of your return that you filed last year, we would get you that for free for if an individual requested it, it's usually a 10-day transcript and it's free. If a business requests it, like a loan company or something, we charge them \$2 a transcript or we did at that time. If you wanted a full copy of your return, that would be a \$50 product, and we would send you a complete copy of your return.

Q. Okay. Another question I had, you mentioned just a couple minutes ago that you, yourself, have been loud and boisterous in the workplace.

A. I have.

Q. Okay. And has anybody ever complained to your supervisor about it?

A. No, because usually everyone was in a good mood. We were either having a buffet in the area or a quick snack.

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I had a tendency to bring something or another employee would bring in bagels or something, and we'd all get to share and talk and, you know, just a few minute break.

Q. And is that typically in the break room or in the atrium?

A. We would do it in the work area, which we usually tried not to get too loud because of the other work areas around us.

Q. And I think you said you offered to move Ms. Pfau; is that right?

A. Yes.

Q. And where were you going to move her to? Did you propose where you were going to move her to?

A. To another work area.

Q. On the same first floor there?

A. Yes.

Q. Okay. Pass the witness, your Honor.

MR. MUELLER: No further questions.

THE COURT: Thank you, ma'am. You may step down.

THE WITNESS: Thank you.

THE COURT: And may this witness be released?

MR. COANE: Yes, your Honor.

THE COURT: Okay. You're free to go then. Thank you. All right.

Could I have -- okay. Your next witness.

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MR. COANE: Plaintiff rest, your Honor.

THE COURT: Could I have counsel at the bench, please.

(At the bench, on the record.)

THE COURT: I just wanted to ask whether or not you were going to be making any motion at this time.

MS. NOBLE: Yes.

THE COURT: I'm going to excuse the jury.

Ladies and gentlemen of the jury, the plaintiff in the case has rested, which means that they have introduced all the evidence that they plan to introduce in support of their burden in the case. This is one of those times in the trial where we do need a little bit of time for housekeeping matters, and so, we're going to take an unscheduled break. It will likely be at least a 20-minute break.

So this will not -- we'll still take your two breaks later. We may adjust the timing of a later break. So if you want to take a snack now, we'll have a bit of a

longer break now. And again, purpose of this is just to be efficient with your time and rather than to have you sit there, you could be in the break room and taking a breath.

So with that, I'll give you at least a 20-minute break and we will -- if I could ask you to be ready --

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we'll try to limit it to 20 minutes, but I'd ask your patience as we get matters done. So you'll remember the instructions that I've given you: Don't talk with anyone, including each other, about this case. And don't engage in any independent investigation of any person, place, things, or law in the case. And we will be back with you just as soon as we can.

(Jury not present.)

THE COURT: Thank you. Please be seated.

MS. NOBLE: May I approach, Judge?

THE COURT: Yes.

MS. NOBLE: Judge, at this time, defendant makes a information under Rule 50 for judgment as a matter of law. Our argument is that plaintiff has failed to prove the essential elements of her claim based on the witness testimony and evidence to date. This is a copy of the jury charge with some deletions for space, but the jury charge is going to require Ms. Pfau to establish that Mario Drumgoole harassed her because of her sex, that the conduct was severe or pervasive; that Ms. Pfau has failed to meet her burden as to each of these requirements.

The incidents that are alleged are neither -- there's been no proof that those incidents were taken in the first place or that they were taken as a result of her sex. Nor is there proof that they are severe or pervasive

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enough to rise to the level to constitute a hostile work environment or harassment based on sex.

Ms. Pfau's also required to establish that the IRS managers knew or should have known of the harassment and failed to take prompt action to stop the harassment. And the testimony that we just heard from Ms. Eller directly contradicts that those elements -- Ms. Eller said she immediately offered to move Ms. Pfau and it was Ms. Pfau who refused. When Ms. Pfau refused, the government works to move Mr. Drumgoole, and then, they issued the directive, after which point, Ms. Pfau, herself, chose to resign. That's the basis of our Rule 50 motion.

THE COURT: Thank you very much.

Mr. Coane.

MR. COANE: Yes, your Honor.

We feel, your Honor, that we've submitted sufficient evidence for a verdict in favor of Ms. Pfau, that she has met all the elements, that the harasser himself has proven to be unworthy of telling the truth, and I think a number of the things he said have been disputed by Ms. Eller and she's admitted to it.

With regard to the severe and pervasive conduct, certainly the terms and conditions of Ms. Pfau's

employment were altered by the evidence, by her testimony of the physical threats, confrontations while Mario,

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himself, claims the atrium thing never even happened, truth of the matter as just described by Ms. Eller is, yeah, he was there and he walked down that hall that Ms. Pfau described as dark and was threatening to her. Contrary to what he has said, and that created, among other things, a hostile and abusive work environment.

And while they say that prompt remedial action was taken, you know, moving her to the same floor where -- and as Ms. Eller just testified, he just returned to that floor after she talked to him. So he was still there. And to move her to a different desk on the same floor, especially when he was angry after knowing about her complaint was not going to settle things. And Ms. Pfau testified that she would still feel unsafe because they offered no other protection than simply moving her to another desk on the same floor.

And so, we feel that we have met all the elements for hostile work environment and that the jury that's listened to this case should have the opportunity to decide by a preponderance of the evidence who's telling the truth. And that Ms. Pfau has met her burden to get the case to the jury, your Honor.

THE COURT: Thank you, Mr. Coane.

All right. Ms. Noble, I don't think I've ever granted a Ruled 50 motion in a case -- in a discrimination

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case like this and I want to check in with you to see whether or not this is a motion that is made in earnest and you are prepared to support such a finding on appeal.

MS. NOBLE: I think I am, your Honor.

THE COURT: You think are you. We can send this to the jury if you -- I mean, I'm prepared to grant the motion. But if at this point, you want to go ahead and put your case on and give it to the jury.

MS. NOBLE: May I confer a friend? We feel we can support it on appeal, Judge.

THE COURT: Okay. This is as thin a case as I've ever seen and I -- this case would not have gone to trial had this evidence been in front of me in a dispositive motion. There is simply no competent evidence, even if we were to believe the plaintiff's testimony, to meet virtually any of the elements of this cause of action. I find that no reasonable jury would have legally sufficient evidentiary basis to find that the plaintiff has met, really, any one of the requirements for this cause of action.

There is simply no evidence that even if taken true, the conduct of the -- of Mr. Drumgoole was -- even if it was to be considered to be anything more than loud or boisterous, which activity is not illegal, that it was persistent or serious enough to constitute a hostile work

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environment. Certainly there is no evidence that it was connected in any way to gender. That is the subjective belief, I suppose, of the plaintiff in this case, but it is not supported by any identifiable, credible evidence.

As a result, I'm going to grant the government's motion under Rule 50 and take this case from the jury and give a directed verdict for the defendant in the case.

Is there anything additional you need on the record?

MS. NOBLE: I don't think so, your Honor.

THE COURT: All right. Anything further?

MR. COANE: No, your Honor.

THE COURT: Okay. Thank you very much. We're in -- adjourned.

(Proceedings concluded.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 25th day of August, 2022.

Lily Iva Reznik

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