IN THE
SUPREME COURT OF THE UNITED STATES

DURADE ZEBARI PHARM D

Petitioner,

v.

CVS CAREMARK CORPORATION and
WOODWARD DETROIT CVS, L.L.C.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In retaliations and discrimination claims, some employers aim to break the chain of causation by alleging that the manager engaged in adverse employment action had no direct knowledge of the protected activity. While Cat Paw Theory of Liability adapted by this Court in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) addressed one strategy to impute the required knowledge to the decision maker, there is still a circuit split and lack of guidance regarding other types of indirect evidence necessary to impute that knowledge. Question presented is:

Whether the Sixth Circuit erred when rejected all types of circumstantial evidence to impute the required knowledge to the decision maker when considered the decision maker's self serving and conclusory testimony, that he was not aware of the protected activity, sufficient enough to break the chain of causation.

PARTIES

The parties to this action are set forth in the caption.

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The unpublished opinion of the Sixth Circuit Court of Appeals is reproduced at Pet. App. 1a. The Court's order denying rehearing *en banc* is reproduced at Pet. App. 12a. The opinion of the District Court granting a summary judgment is reproduced at Pet. App. 13a. Plaintiff's opening brief in its relevant part is reproduced at Pet. App. 31a. Plaintiff's reply brief in its relevant part is reproduced at Pet. App. 39a.

JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on November 15, 2017. The court denied rehearing *en banc* on January 24, 2018. Plaintiff timely filed this petition. This Court has jurisdiction under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3, provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

A. Factual Background

Despite his denial, there are abundant circumstantial evidences to infer that the alleged decision maker was aware of the protected activity. There are circumstantial evidences to infer that the alleged decision maker was aware that the reasons for termination, gathered by his subordinates, were pretextual. There are circumstantial evidences that the alleged decision maker was not the sole decision taker. Furthermore, the defendants are still liable under Cat-Paw theory of liability for the subordinates' animus, regardless of decision maker knowledge of the protected activity.

Plaintiff was the Pharmacist in Charge/ Pharmacy Manager for CVS #8031 from March 2013 till his termination in May 2014. Plaintiff filed an Initial Notification of missing Controlled Substances (protected activity) on February 26, 2014 with the DEA and Board of Pharmacy and notified his immediate supervisor Ms. Iwick. On the same day of filing the second Initial Notification of missing control substance (protected activity) on March 21, 2014, Ms. Iwick went to the pharmacy and displayed displeasure with filing the Initial Notification. Ms. Iwick told plaintiff that a second reporting of control substances in a short period of time "going to bring lots of eyes to the store if we can't find it" (App. 2a).

That pharmacy was notorious for years as a problematic pharmacy that lost thousands of controlled substances (App. 27a). Ms Iwick was worried from repeated reporting of loses of control substances from that specific location. Few days before the second Initial Notification, the DEA started investigating other CVSs in California about control substances losses similar in scale to that of CVS #8031, and CVS was facing tens of millions of dollars in fines (App. 44a).

On that same day of the second protected activity March 21, 2014, Ms. Iwick sent CVS Regional Loss Prevention Manager Mr. McDonald to conduct an unannounced/ unscheduled audit. Mr. McDonald indicated on that day that all narcotic safes at CVS #8031 were functioning properly, in answering question #47 of his audit (App. 2a, 34a).

On March 26, 2017, Mr. McDonald started an investigation into a malfunctioned keypad on one of the narcotic safes, when he himself indicated five days earlier that all safes are functional. Mr. McDonald's interviewed employees including plaintiff, but he alleged that he did not examine the video footages of the cameras directed on the safes as per CVS policy and plaintiff's request to determine if plaintiff was accessing the safe without using the combination (App. 2a-3a, 34a-35a).

Plaintiff informed Mr. McDonald sometime in April, that an anonymous lady called the pharmacy accusing a technician, Mr. Thompson, of stealing control substances. Mr. McDonald allegedly obtained a written statement from Mr. Thompson on May 01, 2014, in which Mr. Thompson confessed to stealing control substances (App. 3a, 35a-36a).

On May 30, 2014 Ms. Iwick met with Plaintiff, and handed him counseling (termination) form, which states:

> As the Pharmacy manager, Durade Failed to take the appropriate action to ensure the CII safe was functional which could have prevented a significant loss incurred during a recent internal theft case" (App. 4a, 36a-37a).

CVS contradicted the stated reason for termination during oral argument at the district court:

> The court: And did he acknowledge that his taking was because – not because. But was made easier because the lock did not work on the safe?
> Ms. Raisty: He did not, your Honor. There were a number of different narcotics safes at this store and different drugs were stored in each one. And the drugs that he admitted to stealing were actually not stored in the safe that was not locking (App. 40a).

During his deposition, CVS regional Manager Mr. Cassin testified that he made the termination decision. CVS, however, failed to produce any termination documents or emails with Mr. Cassin name (App. 3a-4a).

During an internal investigation, a high ranked CVS Compliance Operation official sent the email below to CVS Human Recourse director Ms. Erika Anderson:

> Erika. This is an investigation update request for case 2014-6-43364. The termination in this case sounds off, I will need to know how the RLPM[1] knew about the safe not locking for a few years and why no other employees were disciplined prior to that time if he knew about the issue. Will the termination of the Reporter in this case stand? Additionally, please confirm that the safe has been repaired. Please provide me with your findings within the next 5 business days.

This email was not breaking news to Ms. Anderson, but was demanding answers during internal investigation; which means that the HR director was well aware that Mr. McDonald knew about the safe being malfunctioned for years before Plaintiff was transferred to that location at #8031, and he was just using it as a pretext. Mr. Cassin admitted during his deposition that he had a direct conversation with Ms. Anderson regarding the termination. Despite being requested by plaintiff during discovery, CVS never presented any other investigational materials especially related to Mr. Cassin (App 43a, 45a-46a).

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[1] RLPM: Regional Loss Prevention Manager (Mr. McDonald).

B. Proceedings Below

Plaintiff sued CVS Pharmacy for violation of the Whistleblower Act in the Michigan Circuit Court of Wayne County on or about August 15, 2014. CVS removed the case on September 18, 2014 to the United States District Court for the Eastern Michigan pursuant to 28 U.S.C. § 1441 (Diversity Jurisdiction). On April 21, 2016, CVS moved for a summary judgment.

In an order entered on October 27, 2016, the district court below granted summary judgment in favor of CVS. The district court determined that filing the two Initial Notifications are protected activities, and termination is an adverse action. However, the district court concluded that plaintiff did not satisfy the causal connection element since the alleged decision maker feigned ignorance of the protected activities.

> Even drawing the inference that Ms. Iwick's comment reflected her displeasure with Plaintiff for filing the Initial Notifications, he has still failed to link this displeasure to Mr. Cassin's decision to terminate his employment. It is undisputed that Mr. Cassin was responsible for making the decision to discharge Plaintiff. (Doc. 47, Ex. 9 ¶ 5 ("I made the decision to terminate his employment due to his failure to ensure that controlled substances were secured in compliance with federal and state law.")). Defendants have presented Mr. Cassin's sworn statement that at the time he made the decision to terminate

> Plaintiff's employment, he was unaware that Plaintiff had filed either of the Initial Notifications. (Id. at ¶ 7) (App. 26a).

The district court below applied an avowedly stringent standard when credited the decision maker statement that he was not aware of the protected activity and discredited all circumstantial evidence to impute the required knowledge.

The Sixth Circuit below did not acknowledge plaintiffs' arguments to impute the required knowledge of the protected activity to the alleged decision maker, and issued an order on November 15, 2017 that is very similar in content to that of the district court:

> According to Cassin, at the time he made the termination decision, he had no knowledge that Zebari had submitted or had had another pharmacist submit an Initial Notification. The information provided to Cassin, including the written statements from employees and McDonald's investigation report, did not mention the Initial Notifications. Zebari has identified no record evidence that contravenes these facts, and thus there is no genuine dispute that Cassin made the decision to terminate Zebari and had no knowledge of his protected activity (App 7a).

Plaintiff did identify, in both opening brief and reply brief, several circumstantial record evidence which were not credited by the Sixth Circuit. Such evidence as:

- Alongside Mr. Cassin's testimony, CVS failed to produces any other testimonies or documents referring to Mr. Cassin as the decision maker. Even Ms. Iwick, who delivered the termination document, did not identify Mr. Cassin as the decision maker, which implies that he was not the sole decision maker (App. 41a).
- Mr. Cassin had conversations regarding the termination with two supervisors who were aware of the protected activity; with Ms. Iwick, and CVS Human Resource director Ms. Anderson (App. 43a).
- Mr. Cassin was indirectly informed about plaintiffs' two protected activities in the two emails sent to him by Loss Prevention Regional Manager (App 42a-43a).
- Defendant had produced no evidence that the termination decision was warranted in compliance with any specific company policy.
- Mr. Cassin negligently or intentionally relied on false evidence and did not conduct his own investigation. Mr. Cassin did not follow the company standard procedures when did not review the footages of cameras directed on the safes as requested by plaintiff, and did not interview plaintiff's witnesses (App. 42a, 45a).
- CVS admitted during oral argument that the stated reason for termination, on the termination document, was not factual (App. 40a).

REASONS FOR GRANTING THE PETITION

I. The federal courts of appeals are deeply divided on the question presented.

The Second Circuit has adapted "General Corporate Knowledge" approach to impute the required knowledge of protected activity to the decision maker. D.C. Circuit has adapted a similar concept to that of the Second Circuit. First and Fifth Circuits have rejected Second Circuit's "General Corporate Knowledge" approach. The First Circuit indicated that the Sixth, Ninth and Eleventh Circuits had joined the camp rejecting "General Corporate Knowledge" approach. Fifth Circuit has applied a different set of indirect evidence to impute the required knowledge to the decision maker.

> ("Neither [the Second Circuit] nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity.")" *Zann Kwan v. Andalex Group LLC*, 737 F. 3d 834, 844 (2nd Cir. 2013)

> But first, a brief clarification of our standard is in order. Robinson suggests we need only find "general corporate knowledge," a standard adopted by the Second Circuit. *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 (2d Cir. 2013). Not so in this circuit, for we have consistently required proof of "actual" decisionmaker knowledge. *Robinson v.*

Jackson State University, No. 16-60760 (5th Cir. Dec. 4, 2017)

Other circuits echo this decisionmaker knowledge requirement. See Henderson v. Chrysler Grp., LLC, 610 Fed.Appx. 488, 496 (6th Cir. 2015); Brungart v. Bellsouth Telecomms., Inc., 231 F.3d 791, 800 (11th Cir. 2000); Cohen v. Fred Meyer, Inc., 686 F.2d 793, 797 n.5 (9th Cir. 1982).[3] Based on these cases, there is no precedent to support Chase's proposition that USPS's general knowledge can substitute for King's lack of knowledge for purposes of this FMLA retaliation analysis. *Chase v. US Postal Service,* 843 F. 3d 553, 560-61 (1st Cir. 2016)

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Circuit courts greatly differ in their required circumstantial evidence to impute the required knowledge of the protected activity to the decision maker.

The Second Circuit held that "general corporate knowledge" of protected activity is sufficient enough for the purpose of establishing a prima facie case. The court reasoned that imputing a manager's knowledge to the decision maker at the prima facie stage was necessary because otherwise an employer's simple denial of knowledge will render plaintiff's case dead on arrival. The Second Circuit indicated in the case below that the company's COO knowledge of protected activity is sufficient to impute the knowledge to the entire company's management.

> However, for purposes of a prima facie case, a plaintiff may rely on "general corporate knowledge" of her protected activity to establish the knowledge prong of the prima facie case. *Zann Kwan v. Andalex Group LLC*, 737 F. 3d 834, 844 (2nd Cir. 2013)

D.C. Circuit had adapted a similar concept to the general corporate knowledge when indicated that the knowledge could be imputed to the employer when the employer, although not the actual decision maker, was aware of the protected activity coupled with temporal proximity. *Jones v. Bernanke,* 557 F. 3d 670, 677-80 (Dist. of Columbia Cir. 2009)

In two 2017 opinions, the Fifth Circuit adapted the circumstances evidence approach to impute the required knowledge to the decision maker. "A decisionmaker's awareness may be established by circumstantial evidence." *EEOC v. EmCare, Inc.,* 857 F. 3d 678, 683 (5th Cir. 2017)

In the first case, the defendant alleged that the decision maker was not aware of the protected activity, and there was no evidence that any employee other than the alleged decision maker took the termination decision. The Fifth Circuit rejected defendant's arguments that any circumstantial evidence suggestive of decision maker knowledge amounts to speculations. The Fifth Circuit affirmed decision maker knowledge finding based on a supervisor criticized the employee following each complaint, the supervisor worked in the same division as the decision maker, the supervisor and decision maker discussed the employee's performance, and the decision maker fired the three complaining employees on the same day. *EEOC v. EmCare, Inc.,* 857 F. 3d 678, 683-84 (5th Cir. 2017)

In the second case, defendant alleged that the decision maker took the termination decision prior to the protected activity and that the decision maker was not aware of the protected activity. The Fifth circuit held that knowledge could be imputed to the decision maker based on "prototypical circumstantial indicators of decisionmaker knowledge" such as temporal proximity, specific conversations with knowledgeable colleagues, changed decision maker behavior following complaints, pretext, and parallel outcomes for similarly-situated employees. *Robinson v. Jackson State University,* No. 16-60760 (5th Cir. Dec. 4, 2017)

The Sixth Circuit below applied an avowedly stringent standard when credited the decision maker statement that he was not aware of the protected activity and overlooked the following circumstantial evidence:

The supervisor discouraged Plaintiff from reporting the second protected activity. The supervisor initiated an investigation on the same day of the second protected activity which led to Plaintiff's termination. Temporal proximity of about two months between the protected activity and termination. The decision maker discussed the termination with the supervisor and HR director who were aware of the protected activity. The decision maker, HR director and the supervisor share desks at the same regional business office. The decision maker negligently relied on false evidence and did not conduct his own investigation. Evidences of pretext. Defendant had produced no evidence that the termination decision was warranted in compliance with any specific company policy. Defendant admitted that the stated reason for termination was not factual.

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Employers must provide both evidence and documents to support their legitimate non-discriminatory ground for employment decision. Self-serving affidavits can be a legitimate method of introducing facts on summary judgment. However, parties should not be allowed to rest upon the mere allegations or denials of their pleading when documentation should have been readily available for back up.

> Even though the decision [to fire Ledbetter] was made a week prior, Anderson was unable to meet with Plaintiff to communicate his decision to terminate him until October 20, 2010, because of this work schedule." This is thoroughly self-serving testimony (treating it as incorporated by reference in Anderson's terse affidavit), and none too plausible. And though most testimony by a party to a lawsuit is self-serving and is not to be rejected on that account, *Widmar v. Sun Chemical Corp.*, 772 F.3d 457, 459-60, 460 n. 1 (7th Cir.2014), one would expect Good Samaritan to have backed

> up Anderson's affidavit with a record of some sort showing that he'd indeed worked 12-hour shifts between the 15th and the 19th and so mayn't have had time to speak to Ledbetter. *Ledbetter v. Good Samaritan Ministries,* 777 F. 3d 955, 958 (7th Cir. 2015)
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> In *Laxton,* we found a failure to produce "contemporaneous written documentation of any employee complaints, despite testimony that the corporation abides by rigorous record-keeping policies" created an inference that charges of employee complaints were false. *Burton v. Freescale Semiconductor, Inc.,* 798 F. 3d 222, 239 (5th Cir. 2015)

On contrary to the Seventh and Fifth circuits' above decisions; the Sixth Circuit below rejected plaintiff's argument that a big corporate like CVS should have been able to produce at least a document or an email stating that the Regional Manager was the decision maker as he alleged in his deposition. Plaintiff's direct manager (a Pharmacy Supervisor) was the person who initiated the investigation that led to the termination, delivered the termination letter and her name and signature was on it not the Regional Manager. The Sixth Circuit accepted the Regional Manager allegation that he was the decision maker solely based on his self serving and conclusory testimony, which was not supported by any documents.

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In a recent Fifth Circuit case from 2017, the COO who terminated plaintiff indicated that he discussed the decision with VP of HR who was aware of the protected activity. However, employer contended that any evidence suggesting the COO knew of the complaint was speculation. The Fifth Circuit considered both VP of HR and COO to be decision makers since the decision maker is an individual "who actually made the decision or caused the decision to be made." The VP of HR decided to audit the plaintiff shortly after the protected activity, and that audit was used to justify the firing. The COO discussed the termination with the VP of HR before it happened, the VP of HR was present when it happened and entered the termination into the company computer system. *EEOC v. EmCare, Inc.*, 857 F. 3d 678, 684-85 (5th Cir. 2017).

Despite the similarities, the Sixth Circuit below rejected Plaintiff's argument of Co- decision maker when Plaintiff indicated that his direct manager should be held liable as a decision maker. She sent the Regional Loss Prevention Manager to start an investigation on the same day of Plaintiff's second protected activity. That investigation led to the termination. Her name was on the computer generated termination letter as the issuer, and she delivered the letter herself to plaintiff and signed it.

II. The decision below conflicts with this court precedent.

The Sixth Circuit decision is directly conflicts with this Courts' precedents in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) adapting Cat Paw Theory of Liability, and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 12-484 (2013) adapting But-for Causation standard. Therefore, this Court could summarily reverse the Sixth Circuit decision.

The Sixth Circuit did not address any of the evidence submitted by plaintiff showing that the discriminating employee proximately caused the ultimate decision maker adverse action even when applying the But-for causation standard.

But- for: because of the supervisor's displeasure with plaintiff's protected activities, she instructed the initiation of an investigation, on the same day of the second protected activity, which led to plaintiff's termination. Furthermore and as discussed earlier, CVS admitted that their stated reason for termination was not factual.

The subordinates intent: was to retaliate against plaintiff for refusing to cover-up when the supervisor made her statement to dissuade plaintiff from reporting. Also, to use Plaintiff as a scapegoat if the DEA to investigate defendants into the missing controls, repeated similar major internal thefts, and a broken safe for many years.

Proximate Causation: This could be easily established since defendants claimed that the decision maker used the information provided to him by his subordinate as a ground for termination; and did not conduct his own investigation, nor interviewed Plaintiff's witnesses or examined video recording as requested by Plaintiff.

III. The question presented issue is of exceptional importance

This case presents an issue with significant practical consequences for both employers and employees. Litigations of employment-based retaliation claims are on the rise. During the 12 months period ending in June 30, 2017, employment retaliation cases filed in the United States courts was one of the largest categories of civil cases. Table C-2 U.S. District Courts- Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit, during the 12-Month Periods ending June 30, 2016 and 2017 available at http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_630.2017.pdf.

Retaliation claims now top the list as the most common type of claims filed with the EEOC. In 2017 alone, EEOC received 41,097 charges which is an overwhelming 48.8 % of total charges filed in 2017. Charge Statistics (Charges Filed with EEOC) FY 1997 through FY 2017 available at https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. In the light of the frequency employees allege misconduct; it is not surprising that the question presented here also arises often.

The 2016 EEOC Guidance on Retaliation and Related Issues suggested that retaliation cannot be shown without establishing that the decision maker was aware of the protected activity. However, it did not address using circumstantial evidence to impute that knowledge to the decision maker. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm

The number and variety of cases in which this issue has arisen amply attest to the significance of the question presented. One indispensable aspect of establishing causation is proofing that the employer was aware of the protected activity. While the general rule been "no causation without knowledge"; circuit courts have reached different conclusions depending on the set of facts of different cases, and each court's analysis of "who needs to know what".

While we've all heard that "Ignorance of the law is no excuse," ignorance of facts been providing many employers with a good defense strategy against retaliation and discrimination claims. Direct evidence of the decision maker knowledge of protected activity could be elusive because many individuals accused of retaliation are going to feign ignorance of anything that could have provided them with a motive. Circumstantial evidence has been accepted in some courts, but different courts have been applying different standards.

If allowed to stand, the decision below will have pernicious consequences. It deepens a widely recognized conflict among courts on the question presented.

IV. This case is an excellent vehicle to resolve this inter- circuit conflict.

This case presents an ideal vehicle for addressing this deeply entrenched conflict. It presents a well developed factual record, which allows the Court to assess and address the question presented in a specific, non-abstract setting. The evidence involves several of the most common ways knowledge of the protected activity could be imputed the decision maker.

The evidence adduced by plaintiff would readily meet the "general corporate knowledge" standard adapted by the Second Circuit, and the more rigid "prototypical circumstantial indicators of decision maker knowledge" standard adapted by the Fifth Circuit.

The Plaintiff's evidence would also support a finding of liability in the Fifth and Seventh Circuits that impose liability based on corporate negligence of keeping records and failure to produce essential documentations. Plaintiff's evidence challenges the identity of the decision maker by applying the Fifth Circuit adapted definition of the decision maker as an individual "who actually made the decision or caused the decision to be made."

Plaintiff's evidence meet Cat Paw Theory and But-For causation standards adapted by this court in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) and University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 12-484 (2013).

This issue is now rape for review. There would be no material benefits for additional percolation in the lower courts. The arguments for both sides have been profoundly developed in the courts of appeals. Even if it were otherwise, the imperative need for clarity and consistency in the law would outweigh any benefits from further percolation.

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for Writ of Certiorari.