

APPENDIX A

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1295

TERRI L. SMYTH-RIDING,
Plaintiff-Appellant,

v.

SCIENCES AND ENGINEERING SERVICES, LLC;
HYO SANG LEE,

Defendants-Appellees,

and

SCIENCES AND ENGINEERING SERVICES, INC.,
Defendant.

Appeal from the United States District Court for the
District of Maryland, at Baltimore, J. Frederick Motz,
Senior District Judge. (1:11-cv-00558-JFM)

Argued: March 22, 2017 Decided: August 17, 2017

Before AGEE, WYNN, and FLOYD, Circuit Judges.

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Affirmed by unpublished opinion. Judge Agee wrote the opinion, in which Judge Wynn and Judge Floyd concurred.

ARGUED: Meghan Alexis Droste, LAW OFFICES OF GARY M. GILBERT & ASSOCIATES, P.C., Silver Spring, Maryland, for Appellant. Ziad Paul Haddad, TOBIN, O'CONNOR & EWING, Washington, D.C., for Appellees. **ON BRIEF:** Gary M. Gilbert, Katherine R. Atkinson, LAW OFFICES OF GARY M. GILBERT & ASSOCIATES, P.C., Silver Spring, Maryland, for Appellant. David C. Tobin, TOBIN, O'CONNOR & EWING, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit.

AGEE, Circuit Judge.

Terri L. Smyth-Riding appeals the district court's judgment in favor of her former employer, Sciences and Engineering Services, LLC ("SES"), and SES's founder, Dr. Hyo Sang Lee, on her claims of retaliation and sex discrimination. Following Smyth-Riding's presentation of evidence to a jury, SES and Dr. Lee moved for judgment as a matter of law, which the district court granted based on its conclusion that Smyth-Riding had failed to put forward evidence of causation. For the reasons set out below, we affirm.

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I.

A.

SES is a scientific research and development company with facilities in Columbia, Maryland, and Huntsville, Alabama.¹ During the relevant period, Dr. Lee served as the company's president and CEO.

In June 2007, SES hired Smyth-Riding as its Director of Human Resources to work in the Columbia office. As the HR Director, Smyth-Riding's responsibilities included facilitating the hiring of new employees, coordinating employee benefits and overseeing other related HR matters. At first, she reported directly to Dr. Lee, but after a year Dr. Robert Serino, the company's Director of Operations, took over that supervisory role.

Immediately after starting her employment at SES, Smyth-Riding began to point out corporate practices that she believed could be perceived as discriminatory. For example, at her own interview, she was asked about her age and family status, and specifically whether she had children and intended to have more children. She believed this question was improper and informed SES's senior management that they should not ask prospective employees these kinds of questions

¹ Because the case was resolved on a motion for judgment as a matter of law, the facts are recited in the light most favorable to Smyth-Riding, the non-moving party, and we draw all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility. *See Anderson v. G.D.C., Inc.*, 281 F.3d 452, 457 (4th Cir. 2002).

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because they could be construed as discriminatory. Almost two years later, when she learned that another female applicant had also been asked if she intended to have children, Smyth-Riding assured the woman that SES did not make employment decisions on that basis and admonished the interviewers not to ask questions of that type.

Early in 2008, Smyth-Riding and Daniel Joe, SES's financial controller, began clashing over employment decisions in the finance department. For example, in the first few months of 2008, SES began accepting applications for an accounts payable position. Joe asked to see the résumés directly rather than having Smyth-Riding review them first. Later, Smyth-Riding observed that only Asian candidates were being interviewed for the position. Based on her experience with the employment pool for similar positions, Smyth-Riding believed that the pool should have been predominantly African-American, so she took her concerns to Serino, who spoke to Joe and "inserted [Smyth-Riding] back into . . . the hiring process for that position." J.A. 372. A Caucasian woman from within SES was eventually hired for this vacancy.

Smyth-Riding and Joe were again in conflict when Joe fired Zakia Harris, an African-American payroll specialist. Immediately before he did so, Joe notified Smyth-Riding that he'd decided to terminate Harris' employment due to her poor performance. Smyth-Riding, however, did not accept Joe's explanation because she believed an Asian payroll employee with poor performance had not been disciplined. Although Joe

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further explained his rationale, Smyth-Riding did not believe the explanation was “legitimate.” J.A. 364. She asked Joe to wait in order to “think about” this decision, during which time she brought her concerns to Serino, Serino’s manager, and SES legal counsel. In particular, she was concerned that Harris may perceive that she was being terminated due to her race regardless of the truth. While Smyth-Riding was still talking to them, however, Joe informed Harris of his decision. Joe then told Smyth-Riding and the others that he’d already spoken with Harris.

Smyth-Riding also was unhappy with how Joe chose to hire a payroll administrator to replace Harris. Joe once again asked to see the résumés directly and when Smyth-Riding observed the list of individuals who received interviews, the names “weren’t representative of the Baltimore metropolitan area” and were not “the demographic you’d expect to see” for that type of position, by which Smyth-Riding meant “a predominantly black pool of candidates.”² J.A. 373.

Smyth-Riding was also distressed by conduct she testified occurred in the process of hiring an executive assistant for Dr. Lee in the spring and summer of 2008. One application was returned to her with the notation “too old” on it in Dr. Lee’s handwriting. J.A. 393. In addition, Serino informed her that Dr. Lee wanted to hire “someone very young” for the position and on another occasion returned a stack of applications to her saying

² As before, SES hired a Caucasian woman for the payroll administrator position.

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that all of the applicants were “too old.” J.A. 381, 384. Another time, one of Dr. Lee’s sons, Richard Lee, asked Smyth-Riding to bring in “chicks” to interview so that he could “hit on” them. J.A. 390. Believing she had a “big sister” relationship with Richard, Smyth-Riding chided him and said he “c[ould]n’t say things like that.” J.A. 390. Smyth-Riding also expressed concern with Serino and SES’s Senior Vice President Randal Castro that these events constituted inappropriate actions and potentially unlawful discrimination. However, Smyth-Riding never spoke to Dr. Lee or communicated to him in any way regarding her concerns.

In the fall of 2008, SES accepted applications for a second accounts payable position, and Smyth-Riding and Joe once again found themselves at odds over who should be hired. The final two candidates consisted of an Asian woman with no relevant professional experience, but who had recently graduated with a Bachelor’s Degree in the field, and a Hispanic woman with four years’ experience in accounts payable, but only an Associate Degree. Smyth-Riding felt the Hispanic woman was more qualified, and voiced her objections to Joe, Serino, and Castro when Joe decided to hire the Asian college graduate.

Smyth-Riding emailed Joe about this and other areas in which the two had ongoing disagreements, centering on the role that Smyth-Riding believed she should have in Joe’s decisions regarding employees within the finance division. Among other things, Smyth-Riding observed that she could provide expertise in employment-law compliance. Later, after Joe

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asked how SES was violating any labor laws, Smyth-Riding referenced Title VII and expressed her concern that Joe had hired someone she believed to be less-qualified, but who had been referred to Joe personally, rather than the more experienced candidate. Joe responded, explaining his hiring decision and challenging what he perceived to be Smyth-Riding's belief that she had oversight of his employment decisions. He further indicated that he did not want to violate any employment laws and that, if he was doing so, Smyth-Riding should let him know and copied Serino and Castro on the email exchanges.

Around the same time, Serino completed Smyth-Riding's annual performance evaluation, marking her as "consistently exceed[ing] expectations" in four of seven categories. She received the mid-range "met expectations" mark in two categories and "met and sometimes exceeded expectations" in one category. J.A. 639-40.

In 2008, Smyth-Riding volunteered to coordinate the SES holiday party. She knew from the outset, however, that she would not be able to attend the party because she was matron of honor for a friend's wedding that same day. Smyth-Riding coordinated with other employees and had her husband attend the party to oversee things in her absence. By most accounts, the party went well, although Dr. Lee expressed displeasure that Smyth-Riding did not attend.

In late December, Smyth-Riding discovered she could no longer access SES's salary and bonus

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database. She protested that she needed access to the database as part of her regular HR duties, but Castro assured her that it was likely a mistake and that he would look into it.

In early January 2009, Smyth-Riding learned that she would only receive a pay raise of 1.7% for 2009, which upset her because the average pay raise that year was 3-4%.³ On January 9, Smyth-Riding met with Castro to complain about her low pay raise, her continued inability to access SES's salary and bonus database, her ongoing conflict with Joe, and her discomfort with reporting to Serino given some of his views expressed in hiring Dr. Lee's assistant.

Three days later, Dr. Lee informed Castro that he had decided to terminate Smyth-Riding's employment. When Castro asked Dr. Lee why she was being terminated, Dr. Lee said it was because "she doesn't fit in" and because Huntsville was going to "becom[e] the nexus for much of the support operations." J.A. 149, 150.

Dr. Lee directed Castro to inform Smyth-Riding of his decision, which he and Serino did. Castro gave her a letter that he had signed and which explained that "[SES] no longer feels your personality fits with what

³ At trial, Dr. Lee described this raise as "terrible," indicating that it was the equivalent of a pay decrease. J.A. 302-03. The record does not contain any information concerning the circumstances surrounding the setting of pay raises, but Smyth-Riding testified that Dr. Lee was in charge of setting salaries, pay raises, and bonuses.

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is needed for this company and no longer feels it is in its best interests to continue your employment.” J.A. 646.

At trial, Dr. Lee was questioned extensively about the circumstances surrounding Smyth-Riding’s termination of employment. He could not initially recall whether anyone else – let alone who – first suggested that Smyth-Riding should be fired.⁴ But he consistently testified that he – and he alone – made the ultimate decision to terminate Smyth-Riding’s employment. He further testified that although Smyth-Riding had initially been a good employee, “she became very bad” “probably [after] about one year of work,” which would have been around June 2008. J.A. 265.

At trial, Dr. Lee pointed to several things that had informed his decision-making process. He said the “key reason” he decided to terminate Smyth-Riding’s employment was that a change in SES’s contract work resulted in a decreased need for and ability to pay HR employees, particularly in the Columbia office. J.A. 271. He then explained that Smyth-Riding “did not have any attribution which would justify for me to save her in [the shifting] business” structure. J.A. 273. He also testified Smyth-Riding had been “agitating” other employees about their salaries being wrong; created conflict with other employees rather than resolving conflict as an HR person should be doing; had been

⁴ Serino and Castro both denied having recommended terminating Smyth-Riding’s employment and testified they disagreed with the decision.

accused of “cheating [on her] time cards”; and had failed to attend the 2008 holiday party, but had sent her husband to do her job for her. J.A. 280-83, 287-88. In short, Dr. Lee stated his belief both that HR directors should “resolve the personal conflict, not create personal conflict” and that Smyth-Riding’s “[j]ob disappeared” as a result of SES’s decreased needs in Columbia and increased work in Huntsville. J.A. 288-89.

No one was hired to replace Smyth-Riding in Columbia. Instead, her responsibilities were re-routed to Huntsville’s human resources manager, Matt Boyett, an individual Smyth-Riding had hired to handle the increasing on-site demands at that facility. But Boyett’s title never changed and his salary was approximately half what Smyth-Riding’s had been. About a year after Smyth-Riding’s departure, SES hired a new Director of Human Resources, who worked out of the Huntsville office. When he left, Boyett again took over those duties. No person ever replaced Smyth-Riding in the SES Columbia office.

B.

Smyth-Riding filed discrimination charges with the Maryland Human Rights Commission, which transferred the matter to the EEOC. The EEOC issued Smyth-Riding a right to sue letter.

Smyth-Riding then filed a complaint in the U.S. District Court for the District of Maryland alleging numerous claims of discrimination and retaliation. Most of those claims were dismissed prior to trial and are

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not at issue on appeal. Five claims proceeded to trial: retaliatory discharge and retaliatory denial of a pay raise, in violation of 42 U.S.C. § 1981, against SES and Dr. Lee; retaliatory discharge and retaliatory denial of a pay raise, in violation of Title VII (42 U.S.C. § 2000e-3, as amended), against SES; and discriminatory discharge on account of sex, in violation of Title VII (42 U.S.C. § 2000e-2), against SES.

At trial, Smyth-Riding testified, as did Dr. Lee, Castro, Serino, and other SES employees. At the close of her case, SES and Dr. Lee moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The district court granted that motion, concluding Smyth-Riding failed to meet her burden as to the element of causation. Specifically, the court concluded there was no evidence Dr. Lee knew of Smyth-Riding's efforts to ensure compliance with federal nondiscrimination laws, or that he fired her because of that conduct.

Smyth-Riding noted a timely appeal, and the Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Smyth-Riding challenges the district court's decisions with respect to both her retaliation claims and her sex discrimination claim. The Court reviews de novo the district court's grant of a motion for judgment as a matter of law. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332 (4th Cir. 2004). The motion is "properly granted if the nonmoving party failed to make a

showing on an essential element of [her] case with respect to which [she] had the burden of proof.” *Id.*⁵ In other words, it is proper “if there can be but one reasonable conclusion as to the verdict.” *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (en banc); *see also* Fed. R. Civ. Pro. 50(a) (“If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may” “grant a motion for judgment as a matter of law against the party.”). The Supreme Court has instructed that this determination “depend[s] on a number of factors,” including “the strength of the plaintiff’s prima facie case” and “any other evidence that supports the employer’s case and that properly may be considered.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

III.

A.

Smyth-Riding first asserts the district court erred in granting judgment as a matter of law on her retaliation claims because she presented evidence from which a jury could have found causation. To establish a prima facie claim of retaliation under either Title VII or § 1981, “a plaintiff must prove three elements: (1) that she engaged in a protected activity; (2) that her

⁵ We have omitted internal quotation marks, alterations, footnotes, and citations throughout this opinion, unless otherwise noted.

employer took an adverse employment action against her; and (3) that there was a causal link between the two events.” *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405-06 (4th Cir. 2005). This case only concerns the third element.⁶

Retaliation claims can be proven by two avenues: one path looks to direct or circumstantial evidence of discriminatory motive while the other proceeds under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A plaintiff’s ultimate burden as to causation is the same under either avenue of proof: she must show that the “unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 249, 251-52 (4th Cir. 2015) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013)). In a direct evidence case, the plaintiff meets her ultimate burden as part of the prima facie case of providing “but-for” evidence of causation, by showing that she would not have been subjected to the adverse employment action “but for her employer’s retaliatory animus.” See *id.* at 252. In a burden-shifting case, she

⁶ The parties brief all three elements of a prima facie retaliation claim even though the district court only relied on a lack of proof as to causation. Because we agree with the district court’s rationale, we need not address the first two elements and assume, without deciding, that Smyth-Riding would be able to meet the other two requirements. To understand the causation analysis, we note that Smyth-Riding asserts that she engaged in protected activity by “express[ing] concerns to [SES] managers about discriminatory employment practices.” Opening Br. 27.

meets her ultimate burden at the third stage of the analysis by showing pretext. *See id.* at 250, 252. In other words, “[a] plaintiff who can show that retaliation was the real reason for the adverse employment action will necessarily be able to show that the harm would not have occurred in the absence of – that is, but for – the defendant’s conduct.” *Id.* at 252.⁷

⁷ Prior to the Supreme Court’s decision in *Nassar*, we applied the mixed-motive analysis applicable to retaliation claims arising under both Title VII and § 1981. *See Foster*, 787 F.3d at 249 (describing the mixed-motive analysis as requiring a plaintiff to show only that the “employer was motivated to take the adverse employment action by both permissible and forbidden reasons,” because “[s]o long as retaliatory animus was a motivating factor of the adverse employment action, the employee could recover – even if the employer would have taken the same adverse employment action in the absence of such animus”). *Nassar* rejected the mixed-motive analysis for Title VII retaliation claims, and reiterated that the statutory text for Title VII retaliation claims relies on a but-for causation standard. *Id.* (describing the but-for standard as requiring a plaintiff to prove “that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer”).

We have not yet decided whether *Nassar*’s analysis alters the causation standard for § 1981 claims. *See Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 n.5 (4th Cir. 2015) (en banc). But the parties did not brief the issue in this case and instead analyze the claims together. We need not resolve the § 1981 causation standard issue at this time because – as our analysis reflects – Smyth-Riding has failed to come forward with evidence that would suffice to show that retaliatory animus motivated the defendant’s decision under either a but-for or a mixed-motive analysis.

1.

Dr. Lee testified, and no evidence rebuts the point, that he was SES's ultimate decisionmaker. The record contains no evidence that anyone at SES except Dr. Lee had the authority to terminate Smyth-Riding's employment or set her salary.

Nonetheless, Smyth-Riding contends the jury could infer from the evidence that she was retaliated against due to her alleged protection activities. She first asserts that a jury could infer that Dr. Lee knew that Smyth-Riding had engaged in protected activities and gave her a low pay raise and later terminated her employment because of retaliatory animus. Specifically, she maintains that Dr. Lee's references to Smyth-Riding "agitating some of the employees" and his knowledge that Smyth-Riding and Joe disagreed about work structure provide evidence from which a jury could conclude Dr. Lee knew about Smyth-Riding's protected activities and retaliated against her because of them.

However, Smyth-Riding failed to put forth evidence at trial sufficient for a jury to conclude that she was retaliated against on the basis of her protected activities because there's no evidence that Dr. Lee was aware she was engaged in any such activities. Evidence of "the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish" the causation element of a retaliation claim because, "by definition, an employer cannot take action because of a factor of which it is unaware." *Dowe*

v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998); accord *Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006) (holding that a plaintiff failed to establish causation where the evidence did not demonstrate that the decisionmaker was aware of the allegedly protected activity at the time it acted).

Here, there is no evidence that Dr. Lee knew Smyth-Riding had objected to SES's alleged discriminatory practices. At trial, Smyth-Riding was questioned on multiple occasions with respect to the employment decisions and hiring practices with which she did not agree. She repeatedly and unequivocally stated that she never presented any of these concerns to Dr. Lee. The other SES witnesses confirmed that they never informed Dr. Lee of the specific practices Smyth-Riding complained about; nor were they aware of others doing so. Dr. Lee also testified that neither Smyth-Riding nor anyone at SES "ever came to [him] and [told him] that [she] was complaining about discrimination." J.A. 307. Accordingly, the record is devoid of any evidence that Dr. Lee knew about any of the actions Smyth-Riding points to as her protected conduct.⁸

Notwithstanding this absence of evidence, Smyth-Riding asserts the record could allow a jury to infer that Dr. Lee nonetheless harbored retaliatory animus

⁸ There is evidence that Dr. Lee knew that shortly after being hired, Smyth-Riding cautioned SES interviewers not to ask candidates about their age or familial status, but Smyth-Riding only briefly mentions that activity, and focuses on her later allegedly protected activities as the foundation for her claims.

because she received a low pay raise and was fired within two months of some of her complaints and because Dr. Lee offered shifting explanations for his decisionmaking, explanations that in her view “strain credulity.” Opening Br. 31.⁹ These arguments do not respond to what’s missing here: evidence that the decisionmaker was aware of plaintiff’s protected activity. Temporal proximity establishes nothing if Dr. Lee was unaware that his decisions came on the heels of any protected activities. *See, e.g., Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (observing that temporal proximity cannot provide proof of causation unless the “temporal proximity *between an employer’s knowledge of protected activity and an adverse employment action*” was “very close” (emphasis added)). Similarly, even if Dr. Lee gave conflicting or shifting explanations for his decision, those explanations demonstrate pretext only if the evidence also suggests that retaliation was a but-for cause of that decision. *See, e.g., Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000) (“Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury if there is evidence that precludes a finding of discrimination, that is if no rational

⁹ For example, Smyth-Riding relies on the temporal proximity between the decisions (both occurring in January 2009) and her fall 2008 altercations with Joe. She also notes that mere days before she was terminated, she “expressed her concerns about Serino’s direction to only consider young women” to Castro. In addition, she points to SES’s various explanations for its decision to terminate her employment, suggesting that they conflict and thus reflect post-hoc justifications that serve as a pretext for retaliation.

factfinder could conclude that the action was discriminatory.”). But again, the record does not show that Dr. Lee ever had the necessary information to retaliate against Smyth-Riding: there is simply no evidence he was aware of her alleged protected activities. Without that knowledge, he could not retaliate against her for having engaged in a protected activity, fatally undermining Smyth-Riding’s first theory of liability.

In addition, the testimony in the record about Dr. Lee’s knowledge of Smyth-Riding’s disagreement with Joe regarding access to the salary database is limited and thus does not allow the inferences Smyth-Riding urges that a jury could draw from it. Smyth-Riding contends that because Dr. Lee knew from Joe that she and Joe disagreed over access to SES’s data system that tracked employee salaries and bonuses, Dr. Lee retaliated against her because this particular “battle” was part of a larger war between herself and Joe over Joe’s alleged “discriminatory hiring and firing practices.” Opening Br. 34. But the evidence from trial only demonstrates that Dr. Lee knew Smyth-Riding and Joe disagreed over access to salary and bonus data and that Dr. Lee believed Smyth-Riding was “agitating” “some of the employees” by telling them that their salaries were wrong. J.A. 283-85; 308; 311-13. Nothing in the record connects that dispute to any alleged protected activity; there’s nothing in the record regarding which employees Smyth-Riding had “agitat[ed],” (and so no information about whether they fall into a protected category), nor is there any evidence about their salaries or upon what those were based.

Smyth-Riding testified only that she had a concern that salaries and bonuses were being decided based on “favoritism” as a result of a job satisfaction survey she circulated early in her employment with SES. *See* J.A. 489. That testimony has no connection to the separate concern that salaries were being set based on prohibited discriminatory motives. And while Dr. Lee testified to his awareness that Joe and Smyth-Riding disagreed about access to the database, he also testified that Joe never discussed anything to the effect of Smyth-Riding expressing any concerns about discrimination within SES or with Joe’s employment practices specifically, and that Smyth-Riding had never come to him with any such concerns either. Smyth-Riding offered no evidence to rebut Dr. Lee’s testimony.

In short, nothing in this record would allow a jury to connect Dr. Lee’s knowledge of the dispute over access to the salary database to knowledge of Smyth-Riding’s alleged protected activities. As such, it is speculative conjecture to infer that Dr. Lee could have acted in retaliation for those activities. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 241-42 (4th Cir. 1982) (reiterating that when causation is dispositive, a case should proceed to the jury only where circumstantial evidence supports a “probability,” both reasonable and substantial, of an impermissible motive rather than its “mere possibility” so as to insure that the jury will not rely on speculation or conjecture).

2.

As an alternative theory of liability, Smyth-Riding contends that even if evidence of Dr. Lee's knowledge was lacking, the record would allow a finding of causation based on a cat's paw theory of liability. Specifically, she asserts a "jury could reasonably conclude that Joe or Richard Lee's retaliatory animus was the proximate cause of [Dr.] Lee's decision to fire [her] and effectively decrease her salary." Opening Br. 37. In particular, she faults the district court for characterizing the conflicts between Joe and herself as a management conflict rather than hostility stemming from Smyth-Riding's attempts to prevent Joe from violating employment laws. Her argument as to Richard Lee is less developed, as she only notes that the district court allowed an inference that Richard told Dr. Lee that Smyth-Riding stood in his way between "hiring attractive, young women whom he could hit on," but then did not allow that inference to have the weight she attaches to it. Opening Br. 38.

In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the Supreme Court "consider[ed] the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." *Id.* at 413. *Staub* arose in the context of antimilitary animus and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), but its holding is nonetheless applicable because it relied on traditional agency principles to hold that the so-called cat's paw

theory of liability is a possible means of holding employers liable for discriminatory conduct.¹⁰ Under the cat’s paw theory, as articulated in *Staub*, “if a supervisor performs an act motivated by [unlawful] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable.” *Id.* at 422; *see also id.* at 420 (“[T]he requirement that the biased supervisor’s action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause.”).¹¹

The extent to which co-workers, as opposed to *supervisors*, can be the basis for invoking the cat’s paw theory of liability has not been resolved by the Supreme Court. Indeed, in *Staub*, the Supreme Court expressly declined to decide whether and to what extent

¹⁰ In addition, this Court has previously acknowledged the theory’s applicability in Title VII cases. *See, e.g., Hill*, 354 F.3d at 290-91.

¹¹ Because the USERRA uses a mixed-motive causation standard, while Title VII retaliation claims use a but-for causation standard, the Supreme Court’s articulation of when an employer can be held liable ordinarily would require some refinement in a Title VII retaliation case, like this one. *See supra* n.6. That is to say, while *Staub* permitted a plaintiff to prevail under a cat’s paw theory of liability where the supervisor’s action was only “a causal factor” in the analysis, 562 U.S. at 420-21 (emphasis added), a Title VII retaliation plaintiff would have to show that but for the supervisor’s conduct, the adverse employment action would not have occurred. *See Foster*, 787 F.3d at 252. The nuance of this distinction is of no moment in this case, however, because Smyth-Riding cannot prove that Richard Lee or Joe’s alleged retaliatory animus led them to do anything that was a factor in Dr. Lee’s decisionmaking.

an employer could be liable for retaliation in the event that a co-worker's animus influenced the ultimate employment action. *Id.* at 422 & n.4 ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."). And this Court has, in a decision issued prior to *Staub*, declined to impose cat's paw liability on the basis of a nonsupervisory, biased employee's influence on the ultimate employment decision. *Hill*, 354 F.3d at 290-91 ("[W]e decline to endorse a construction [of cat's paw liability] that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.").

In this case, there is no evidence in the record that either Joe or Richard Lee had supervisory authority over Smyth-Riding, only that they were co-workers whose responsibilities overlapped at times given the nature of an HR director's work.¹² To extend cat's paw

¹² At one point Richard Lee emailed Smyth-Riding asking that she report her leave and touch base with him periodically regarding HR's ongoing projects and goals, and there is evidence in the record that his role in SES was less defined given that he is Dr. Lee's son. But Smyth-Riding testified that her initial supervisor was Dr. Lee, and he later transferred that responsibility to Serino. Smyth-Riding did not testify that Richard Lee was her supervisor or had any authority over her employment status. On

liability to these circumstances would constitute an expansion of the theory to a context in which its application has not been recognized. *See Staub*, 562 U.S. at 421-22 (“Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a motivating factor in the employer’s action. . . . We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”); *Hill*, 354 F.3d at 290 (“When a formal decisionmaker acts merely as a cat’s paw for or rubber-stamps a decision, report, or recommendation actually made by a subordinate, it is not inconsistent to say that the subordinate is the actual decisionmaker or the one principally responsible for the contested employment decision, so long as he otherwise falls within the parameters of the discrimination statute’s definition of an employer or agent of the employer.”).

There is no evidence that either Richard Lee or Joe “perform[ed] an act motivated by [retaliatory] animus that [either individual] *intended* . . . to cause an adverse employment action” by Dr. Lee. *See Staub*, 462 U.S. at 422. Put another way, there’s no evidence from

this record, there’s insufficient evidence from which a jury could conclude that Richard Lee exercised the sort of supervisory or disciplinary authority over Smyth-Riding that *Staub* and our case law require.

which a jury could find that Richard Lee's or Joe's actions were "a causal factor," let alone that the adverse employment actions would not have occurred "but-for" something either of them did. The testimony at trial does not indicate that either Richard Lee or Joe spoke to Dr. Lee about Smyth-Riding's activities, performance, or employment apart from Joe mentioning their conflict about access to the salary database. Moreover, there's nothing from which a jury could conclude that either Richard Lee or Joe intended for Dr. Lee to take action against Smyth-Riding, or that Dr. Lee in fact took action as a proximate cause of his son's or Joe's conduct. Nor, for that matter, is there any evidence that either Richard Lee or Joe ever expressed a desire to retaliate against Smyth-Riding because of her protected activities. Richard Lee was unavailable to testify at trial and the portions of his deposition that were read into evidence did not cover any conversations with his father about Smyth-Riding in any capacity. Joe did not testify. What remains, then, is Dr. Lee's testimony that he did not recall speaking to Joe about Smyth-Riding other than about the issue regarding the salary database. J.A. 286, 292-93, 307. Dr. Lee was not questioned about any communications with Richard Lee about Smyth-Riding. Thus, Smyth-Riding did not come forward with evidence that would allow the jury to connect Dr. Lee's decisions to any alleged retaliatory-based act of Richard Lee or Joe.

For these reasons, the record does not contain evidence that would allow a jury to hold SES liable under a cat's paw theory of liability.

B.

Smyth-Riding next contends the district court erred in granting judgment as a matter of law on her sex discrimination claim. She notes the district court’s sparse explanation for its decision, asserts she made out a *prima facie* case of discriminatory discharge, and urges that the same actor inference does not apply to her situation.

Title VII makes it unlawful for an employer to discriminate against an employee on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). As with a retaliation claim, a sex discrimination claim can be proved through direct or circumstantial evidence, or through *McDonnell-Douglas*’ burden-shifting framework.

While the district court did not elaborate on the reasons for granting SES and Dr. Lee’s motion with respect to this claim, the record nonetheless shows that it engaged in extensive questioning of counsel about that claim while the motion was being argued. Moreover, causation – which the district court discussed at length – is part of both a retaliation and a sex discrimination claim. Specifically, no matter what method of proof Smyth-Riding relied on, she bore the ultimate burden of proving that she “was the victim of intentional discrimination.” *Reeves*, 530 U.S. at 153. This burden required her to “produce sufficient evidence upon which one could find that the protected trait actually motivated [SES’s] decision.” *Hill*, 354 F.3d at 286. Put another way, “[t]he protected trait must have actually played a role in [SES’s] decisionmaking

process and had a determinative influence on the outcome.” *Id.* Thus, many of the district court’s statements with respect to causation apply equally to the sex discrimination claim. *See, e.g., Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 216-17 (4th Cir. 2016) (discussing the different causation standards in discrimination and retaliation claims).

As for her failure of proof, the record contains no affirmative evidence that SES terminated Smyth-Riding’s employment because she was a woman. And while Smyth-Riding contends that a jury could nonetheless conclude that SES was motivated by discriminatory animus because her duties were transferred to Boyett, a male subordinate in the Huntsville office, the record she developed at trial did not show that this individual was given the title, salary, or full panoply of job responsibilities that Smyth-Riding possessed. In addition, SES did not hire anyone to replace Smyth-Riding as the HR director operating out of Columbia.

Additionally, that Dr. Lee both hired and fired Smyth-Riding gives rise to a strong inference that the termination of her employment was *not* discriminatory. When the same individual hires the plaintiff and then is accused later of taking an adverse employment action, “a powerful inference [arises] that the [action] was not motivated by discriminatory animus.” *Evans v. Techs. Applications & Serving Co.*, 80 F.3d 954, 959 (4th Cir. 1996); *see also Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (“When the hirer and firer are the same individual, there is a powerful inference relating to the ‘ultimate question’ that discrimination did not

motivate the employer, and the early resolution of this question need not be derailed by strict fealty to proof schemes.”). This is so because “employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.” *Proud*, 945 F.2d at 798.

Smyth-Riding asserts that this inference should not apply in her case given the length of time that lapsed between the decisions. But Dr. Lee hired Smyth-Riding in June 2007 and terminated her employment in January 2009, some 20 months later. Similarly, in *Evans*, the employer hired the plaintiff in June 1991 and the challenged employment decision was made in February 1993, some 21 months later. *See Evans*, 80 F.3d at 959. Smyth-Riding’s suggestion thus lacks a foundation, and we afford SES the strong inference of non-discriminatory conduct given Dr. Lee made both decisions.

In short, the lack of evidence to support Smyth-Riding’s position coupled with the legal inference of non-discrimination provide ample basis for affirming the district court’s grant of judgment as a matter of law to SES on Smyth-Riding’s sex discrimination claim.

IV.

For the aforementioned reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

App. 28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TERRI SMYTH-RIDING	*	
	*	
v.	*	Civil No. – JFM-II-558
SCIENCES AND	*	
ENGINEERING	*	
SERVICES, ET AL.	*	

ORDER

(Filed Feb. 25, 2016)

For the reasons stated on the record yesterday, it is, this 25th day of February 2016 ORDERED

1. Defendants' motion for judgment as a matter of law is granted; and

2. Judgment is entered in favor of defendants against plaintiff.

/s/ J. Frederick Motz

J. Frederick Motz
United States District Judge

APPENDIX C

App. 29

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

TERRI L. SMYTH-RIDING

v.

CIVIL CASE NO.
JFM-11-558

SCIENCE AND ENGINEER-
ING SERVICES, LLC, ET AL.,

Defendants

/

VOLUME III

Wednesday, February 24, 2016
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge
And a Jury

Appearances:

On Behalf of the Government:

Katherine A. Dave, Esquire
Meghan A. Droste, Esquire [sic]
Gary M. Gilbert, Esquire

On Behalf of the Defendants:

Ziad P. Haddad, Esquire
David C. Tobin, Esquire
Martin J. Amundson, Esquire
Stephen J. O'Connor, Esquire

Reported by:

Mary M. Zajac, RPR, FCRR
Fourth Floor, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

* * *

[123] CROSS EXAMINATION OF
AMY GRATZINGER BY MS. HADDAD

A I have never actually spoken to Dr. Lee.

Q No further questions.

MS. DROSTE: Nothing further, Your Honor.

THE COURT: Thank you very much, Ms. Gratzinger.

MS. DAVE: Your Honor, may we have a minute to confer before plaintiff rests?

THE COURT: Of course.

MS. DAVE: Thank you.

(Pause in proceedings.)

MS. DAVE: Plaintiff rests, Your Honor.

THE COURT: Okay. We now have to discuss some legal matters. It may take some time. I hope not. But if you all would go back to the jury room. If it was a nice day, I'd send you outside.

(Jury exits the courtroom at 2:30 p.m.)

THE COURT: Somebody want to make a motion?

MR. HADDAD: I certainly do, Your Honor. Plaintiff has essentially –

THE COURT: Are you moving for judgment?

MR. HADDAD: I'm moving for judgment.

THE COURT: As a matter of law.

MR. HADDAD: As a matter of law on all claims. I'll start, Your Honor, with the sex discrimination claim. There is no evidence –

THE COURT: Let me ask first, let me ask. I really [124] don't fully understand the case, Ms. Dave. Who, who was the decision maker? Who knew what?

MS. DAVE: That's an excellent question, Your Honor. And as the Court knows, when a company cannot identify the decision maker clearly –

THE COURT: But you've got the burden of proving.

MS. DAVE: – has to have evidence, pretext.

THE COURT: So this is not a matter of abstract. I have heard a case and I, I frankly don't know who you say the decision maker was.

MS. DAVE: Your Honor, we say that defense witnesses testify conflicting about who the decision maker is. But the evidence is clear –

THE COURT: No, no. There are no defense witnesses yet. These are your witnesses. Who made the decision to fire your client?

MS. DAVE: Dr. Lee made the final decision to fire our client.

THE COURT: And what did he know?

MS. DAVE: He knew that Terri had counseled him. He knew that Dr. Serino –

THE COURT: Terri had counseled him about what? About you shouldn't write "too old" on that one employment application?

MS. DAVE: I don't believe she counseled him on that.

THE COURT: I don't think she did, either.

[125] MS. DAVE: But as you'll recall, Dr. Serino told Dr. Lee, be sure not to ask these questions during the interview, like Terri tells us.

THE COURT: Excuse me. You just said that Terri – I prefer Ms. Smyth-Riding.

MS. DAVE: Yes, Your Honor.

THE COURT: Had counseled Dr. Lee about what?

MS. DAVE: During her interview about not asking her her age. In addition, Dr. Lee testified at his deposition, and was impeached on the stand, that Daniel Joe told him about Terri supposedly getting employees riled up about their salary differences and bonuses.

THE COURT: Yeah, but getting people riled up about salaries is not the role of the Human Resources Director. You know, you get people riled up about salaries on all kinds of grounds. It matters for discrimination only if somebody of one sex or age or gender is being paid more than the other.

I mean, it's not, we don't live in Bernie Sanders' world. We don't say that the person who owns the company ought to be paid the same as the person who is the Human Resources Director or an entry level person. I mean, getting people riled up about salaries is not saying anything about discrimination.

MS. DAVE: But, Your Honor, we know from the evidence of the e-mails between Terri Smyth-Riding and Daniel Joe, as well as her extensive testimony –

[126] THE COURT: No, no. But the problem I have in this case, frankly, is I, if Dr. Lee made the decision and what was being presented to him by his son and by Mr. Joe was that Ms. Smyth-Riding was riling people up and was a troublesome employee, that is quite different from knowing that there was discrimination occurring.

MS. DAVE: In addition, Your Honor, as you'll recall, we've made a cat's paw argument and have provided a cat's paw jury instruction in this case because Daniel Joe clearly was aware of Terri Smyth-Riding's counseling about numerous instances of him discriminating and improperly hiring.

THE COURT: Specifically what? I mean, they can hire, they can hire a college graduate from University of Maryland with potential. I mean, nobody's going to object to that. I mean, mean you just can't do it, not at all.

MS. DAVE: The issue here is not whether the company discriminated when it fired Zakia Harris or when it hired Mabel Ng over Carmen Medina. The issue is whether Terri Smyth-Riding had a good faith belief in making her protected –

THE COURT: And that that information was communicated to the decision maker. I mean, there is a gap. And the gap is, I will admit that in my mind I could be wrong. It is confused by the fact that you called the two immediate supervisors as your witnesses. I mean, that, that is causing some confusion in my mind. And I may not be thinking clearly.

[127] But they, as I understand it, they opposed the decision to discharge.

MS. DAVE: Correct.

THE COURT: They honestly didn't make it.

MS. DAVE: And as you'll recall, Dr. Lee testified that they recommended that he make the decision. There is no question that a jury could conclude from this disputed testimony from these managers that something was afoot, that this was pretext for discrimination and retaliation.

Why are they all telling different stories and pointing fingers at one another and giving shifting explanations? Those are clear reasons the court has held there can be pretext. Shifting explanations and pointing fingers at who made the decision.

THE COURT: Yeah, but you've got the burden to prove on causality. I mean, you've got to prove that the person who made the decision fired the person because of not conflicts with other people, specifically Mr. Joe, or with his son. There has to be evidence that he knew when he, I would think that he knew, if he was the decision maker, and I think the evidence was clear that he was the decision maker, about all of this, and your client says that she never told him.

MS. DAVE: Your Honor, Dr. Lee testified that he did not recall whether he knew whether Daniel Joe had told him about the discrimination allegations. He did not dispute. He said [128] that he does not remember.

THE COURT: So what discrimination allegations?

MS. DAVE: That Zakia Harris was fired, was, at least had the appearance of discrimination. That Mabel Ng was hired.

THE COURT: Yeah, but there's a difference between appearance and reality. I mean, I'm sorry.

MS. DAVE: Absolutely, Your Honor. And if we were representing Zakia Harris, we might not prevail. If we were representing Carmen Medina, we might not prevail. But we don't have to establish that the company did discriminate against those individuals. All we have to establish is that Terri Smyth-Riding complained about discrimination and that she had a good faith belief for her allegation.

THE COURT: Okay. So let's explore what those are.

MS. DAVE: Pardon?

THE COURT: What are they?

MS. DAVE: What are what, Your Honor?

THE COURT: What were her good faith reasons for believing the company was discriminating?

MS. DAVE: With regard to Zakia Harris, she testified that –

THE COURT: And what evidence is there that this was communicated specifically by Mr. Joe to Mr. Lee, or by anybody to Mr. Lee?

MS. DAVE: Dr. Lee testified that he knew everything [129] that was going on with his employees, that he was the President and the Chairman and the CEO, and he was aware of anything. And if there had been discrimination, he would have known about it, so there couldn't possibly be discrimination.

In his deposition, he testified that he and Daniel Joe –

THE COURT: Well, it's one thing to know that there's discrimination. It's another thing to know if there's not discrimination.

I am troubled by the fact that Dr. Lee clearly made the decision. I just think there's a gap about what he knew. And that goes – and you don't even get to

changing pretext – I mean, there’s a causation issue. Where is, where is the tie between the alleged discrimination and Dr. Lee?

MS. DAVE: Your Honor, again going to the cat’s paw argument. Daniel Joe obviously was angry, as defense counsel represented. He kept sending snarky e-mails to Ms. Smyth-Riding, raising the issue of potential discrimination.

THE COURT: Why? They weren’t snarky about that. I mean, they were snarky – they were confrontational. Clearly, Ms. Smyth-Riding and Mr. Joe didn’t get along. That’s obvious.

MS. DAVE: But Ms. Smyth –

THE COURT: I would assume that’s what Dr. Lee knew. I would assume that Dr. Lee – and I think you can infer that his son may have had, may over time have formed a bad impression of [130] Ms. Smyth-Riding and that Mr. Joe had done the same. But, and you have feuding executives.

I don’t know where the evidence is that he knew about Ms. Smyth-Riding’s complaint, or that there was a good faith basis for Ms. Smyth-Riding’s complaints. Clearly, on the one application, I think Ms. Smyth-Riding was totally off the reservation. I mean, I would hire somebody, if somebody is hired for 33, \$36,000 position who had, who had graduated from the University of Maryland and then done what she had done at College Park, as opposed to an Associate’s degree at Anne Arundel County, you know – I mean, this is no reflection

upon Anne Arundel County – that’s a perfectly legitimate business decision.

MS. DAVE: But that’s not the Court’s obligation, to determine whether or not this was discrimination based.

THE COURT: No. No. I have to determine whether it was a good faith basis for Ms. Smyth-Riding to – okay. So then we have Zakia – refresh my recollection on Zakia Smith. I thought she was a provisional employee.

MS. DAVE: There was, in her offer letter it referenced a probationary period. But the testimony was that Ms. Cruz made numerous mistakes that cost the company a great deal of money and she was never even disciplined. And Ms. Harris was immediately fired. Again, however, one of the most important issues here is the hiring of the administrative executive assistant position.

There’s no dispute that the company, that Dr. Lee wrote [131] “too old” on an application, that Richard Lee told Ms. Smyth-Riding to only hire hot young chicks he could date, that Ms. Smyth-Riding raised her concerns about that practice with Dr. Serino, with General Castro, and she was let go. She was fired. Supposedly because her personality didn’t fit? Although now the testimony is that the organization was changing.

It doesn’t add up, Your Honor. It doesn’t make sense. Why wouldn’t they have just laid her off?

THE COURT: You know, I'm concerned about the culture that existed, but I'm also concerned about your meeting your burden.

MR. HADDID [sic]: If I may address –

THE COURT: Go ahead. Maybe I'm not even focusing upon –

MR. HADDAD: We've heard a couple points. I think you've hit the nail on the head with the causation argument. Ultimately, it's their burden to connect the dots. And to establish that Dr. Lee had some knowledge, some knowledge, they have absolutely not done that. Absolutely not in any way, shape, or form.

Ms. Terri Smyth-Riding has testified she didn't bring any of these to his attention. Nobody has testified that they brought it to his attention. And he said on the stand, I had no knowledge of any of this.

Now, to rely on a cat's paw theory is a stretch beyond [132] belief. The cat's paw theory in the case, the Fourth Circuit case of *Hill v. Lockheed Martin* is the one that addressed the cat's paw theory. And in conclusion what the Court said there was an aggrieved employee who rested a discrimination claim upon discriminatory motivation of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision maker for the employer.

And there's no question, as you said, Your Honor, that the actual decisionmaker here was Dr. Lee. It's not

as though Dr. Serino yielded so much power and influence, and there's no evidence of this, over Dr. Lee. And certainly this is no evidence that Daniel Joe yielded so much power over Dr. Lee as to cause Terri Smyth-Riding's termination.

There's no evidence Dr. Lee did anything wrong. There's no evidence that she counseled Dr. Lee about anything with the exception of, with the exception of telling him that –

THE COURT: During the initial interview.

MR. HADDAD: – during the initial interview. He hired her.

THE COURT: And she laughed.

MR. HADDAD: What's that?

THE COURT: I think she laughed, but I'm not sure.

MR. HADDAD: She wasn't offended. That's what she [133] said.

THE COURT: She wasn't.

MR. HADDAD: And she, and she enthusiastically accepted the position.

I also want to add, Your Honor, that the other sort of area that you hit on exactly is the sole actor, the same actor rule, which is also –

THE COURT: He hired her.

MR. HADDAD: He's the same guy who hired her as the one who fired her. And when that's, when that happens, there is a powerful inference that the alleged action was not motivated by discriminatory animus.

And it's not sufficient to hang your hat on, oh, you know, the reason seemed to, seemed not to be entirely consistent. It's not enough to show that the reasons aren't even true. You still have to show that there was some sort of discriminatory intent or retaliatory intent. And without connecting the dots to Dr. Lee –

THE COURT: What is your understanding of what the plaintiff's claim is as far as –

MR. HADDAD: My understanding is that it's changed drastically. I mean, if you look at their summary judgment motion, it was loaded with allegations about pregnancy discrimination and how, and how they, they retaliated against pregnant women and how Asians were preferred.

[134] Now the case seems to have shifted to, well, the sex discrimination claim rests on some, some remarks made by subordinate employees, subordinate to Dr. Lee, and who did not have the authority to make the decision to terminate her.

Dr. Serino, Richard Lee, they made inappropriate comments. There's no evidence that Dr. Lee knew about those comments. There's no evidence that he condoned them. There's no evidence linking those

comments to her termination. They are stray remarks. And she laughed.

I mean, her testimony on the stand was that with respect to Dr. Serino, her and General Castro would have a good laugh about them.

THE COURT: Sometimes.

MR. HADDAD: Sometimes. Well, the one with the resumes, throwing them up in the air, they're too old, that's not a sex discrimination thing. That's an age discrimination thing, if anything. And yesterday she said, well, he, I think she characterized it as he was, it was jovial. What was the word? It was, it was sort of light-hearted. It wasn't a big issue. Today, all of a sudden her testimony was it was a big issue and I reported it.

Now, putting aside that issue, it doesn't matter because the fact of the matter is Dr. Lee had no knowledge of any, of any of these alleged complaints of discrimination which, frankly, her subjective belief must be objectively reasonable. [135] And I think Your Honor has heard how questionable her objective belief is.

THE COURT: Well, let's hear about the incidents involving Mr. Joe. There was Zakia Smith, who was a probationary employee.

MR. HADDAD: She was a probationary employee, Zakia Harris. Right? So he let her go.

THE COURT: There was somebody else. Ms., I think you pronounce it Ng.

MR. HADDAD: There was the hiring of Mabel Ng.

THE COURT: But she was clearly qualified and had potential to do –

MR. HADDAD: Correct.

THE COURT: What else? How about the administrative assistant?

MR. HADDAD: I don't think Marjorie Taylor – Marjorie Taylor wasn't a Daniel Joe thing. But Marjorie Taylor, there were –

THE COURT: Somewhat related. Weren't the people in the front desk, weren't they associated with the Accounting Department somehow?

MR. HADDAD: Yes. So the front desk is. And it requires, it requires computer skills. And she didn't have them. I mean, that's what that's about. But again, where's the evidence that Dr. Lee knew anything about concerns about Marjorie [136] Taylor? In fact, I don't think there's even any testimony that she expressed concerns that the non-hiring of Marjorie Taylor was discriminatory in nature. She has to have engaged in protected activity with respect to that issue – Okay – and establish that there's an objectively sound basis for her having a subjective belief that Marjorie Taylor was discriminated against. There's absolutely no evidence of that.

But even if there was evidence of that, again, you get into causation. And they have to establish under the but/for, the but/for test for retaliation, that but for her complaints to somebody about Marjorie Taylor, Dr. Lee wouldn't have terminated her. And there's absolutely no evidence of that.

To suggest that that even factored into Dr. Lee's consideration is – there's no evidence. There's just zero of that and of any of the other stuff. There just isn't.

THE COURT: Well, let me hear from the plaintiff, because this is what concerns me. Where is the evidence that –

MR. GILBERT: Your Honor, can I speak?

THE COURT: No, no. One lawyer. And Ms. Dave is doing a fine job.

MS. DAVE: Thank you, Your Honor. As you'll recall, Dr. Lee testified that the termination came up through his management. There's no dispute.

THE COURT: But your witnesses testified that we disagree with the decision. I don't care whether they're defense [137] witnesses, who they are, they are your witnesses.

MS. DAVE: As you'll recall, Dr. Lee questioned their credibility on the stand. This is a credibility issue that needs to go to the jury as to who knew what and who made the decision. There is sufficient evidence that Dr. Lee –

THE COURT: Are you now saying that Dr. Lee didn't make the decision?

MS. DAVE: I'm saying that Dr. Lee testified that his managers, who we all know knew –

THE COURT: No, it came up – there's a process by which it reaches your desk.

MS. DAVE: He testified that they made the recommendation to fire her, not just the process. He was impeached on that issue. He attempted to back-track and say it was just the process here. But at his deposition –

THE COURT: So your theory now is that Dr. Lee didn't make the decision?

MS. DAVE: Our theory, Your Honor, is that the defense can't get their story straight and that that is evidence of discrimination. There is no dispute here that many managers –

THE COURT: So what, what was the discrimination – what was the retaliatory or – what is your theory?

MS. DAVE: Dr. Lee also knew –

THE COURT: No. What is your theory of the case? What, what violated Title VII?

[138] MS. DAVE: Okay. So first with regard to the sex discrimination on the termination issue. There's no question that Ms. Smyth-Riding establishes a prima facie case. She's a woman. She was fired. She

was replaced by a man, Mr. Boyett, who had been her subordinate, and then Mr. Dwyer was brought in.

THE COURT: That's the only claim here. But so she was – so, so the theory is that she was fired because she was a woman?

MS. DAVE: A woman who complained about the unlawful hiring practices at SES. The retaliation claim with regard to the pay raise, which Dr. Lee testified was essentially a decrease, and the termination. The temporal proximity, Your Honor, is sufficient –

THE COURT: I'm sorry. Can't you decrease somebody's salary in this world any more?

MS. DAVE: I'm sorry?

THE COURT: Is it against the law to decrease somebody's salary? I mean, I don't get that.

MS. DAVE: Well, that merely goes to the fact that it was sufficiently adverse to have a prima facie case, that the salary decrease was another action. It's one of the counts, Your Honor. Three counts remain: The salary decrease that was retaliatory, the retaliatory termination, and the sex discrimination claim.

THE COURT: So there's direct sex discrimination [139] because of the salary decrease and because of the –

MS. DAVE: No, Your Honor.

THE COURT: – firing.

MS. DAVE: There's no sex discrimination claim with regard to the salary decrease. The only sex discrimination claim remaining is with regard to the termination. Again, the Court heard the testimony. She was fired. She's a woman. She was replaced by a man. There's sufficient evidence that the culture –

THE COURT: Isn't causation part of –

MS. DAVE: Yeah. That's what I'm going to next, Your Honor. There's sufficient evidence that the culture at SES was hostile to women. We haven't yet been able to introduce the evidence with regard to Richard Lee, but we've heard the comments about Dr. Serino and any number of other sexist situations.

Counsel for the defense represented that the too old comment is an age discrimination allegation. But it's not, Your Honor. This is about hiring young, attractive women. This is a sex discrimination issue. The age is merely coupled with it.

In addition, Dr. Lee testified that Terri, that Ms. Smyth-Riding was performing well for the first –

THE COURT: Doesn't say too unattractive. I don't, I don't understand that. Old means too old means not a woman? Or not, not attractive enough?

MS. DAVE: As you'll recall, Richard Lee told Ms. [140] Smyth-Riding that she should only bring in attractive, young women for him to hit on.

MR. HADDAD: That's not the testimony, Your Honor. It's hot chicks.

THE COURT: Hot chicks he could hit on. On whom he could hit.

MS. DAVE: Plaintiff will stipulate that Mr. Lee asked Ms. Smyth-Riding, the Director of Human Resources, to bring in chicks that he could date. That demonstrates the reason why too old mattered. They wanted an attractive, young woman, a woman who Richard Lee found dateable, to be at the front desk. They wanted to bring in candidates.

In addition, Dr. Lee testified that Ms. Smyth-Riding was performing well for the first year of her employment. About one year in, about July of 2008, her performance suddenly plummeted. That's the exact same time that she's raising these allegations about the executive assistant position.

Dr. Lee has presented no evidence of what about her performance suddenly declined. As the Court knows, her performance evaluation from a few weeks before she was fired was exceptional. That's sufficient evidence, Your Honor, that the jury could conclude that this was pretext.

In addition, Mr. Joe, defense witnesses testified, plaintiff's witnesses, defense managers, testified that Mr. Joe and Ms. Smyth-Riding were equally responsible for the conflicts [141] between them. Yet Mr. Joe was never disciplined, and Ms. Smyth-Riding was fired. And at one point during his testimony, Dr. Lee testified that her conflicts –

THE COURT: Well, who hires – I don't understand that. Who hires people in – I mean, a Human Resources Director has input to make sure that you don't violate the anti-discrimination laws. A Human Relations Director, or Vice President, whoever, doesn't hire people in operational positions. That's just not the way the world works.

Mr. Joe was entitled to hire, you know, subject to, you know, if there was concern about, and there may have been, about the anti-discrimination laws, in which you certainly would listen to your Human Resources Director. You don't just have her make the decision. If you think that somebody's a better candidate for a job, you hire that person.

MS. DAVE: Again, Your Honor, that's not our claim.

THE COURT: So Mr. Joe had the authority to hire Ms. Ng?

MS. DAVE: Yes. He should have followed his HR Director's advice.

THE COURT: Why?

MS. DAVE: These are not issues in the case.

THE COURT: Why? You say that. And why is that a jury question?

MS. DAVE: I don't believe it is, Your Honor. The [142] question for the jury is if, after Ms. Smyth-Riding raised her concerns with Mr. Joe, he

immediately started treating her poorly and Dr. Lee suddenly decided that she was performing poorly.

You saw the e-mail. Ms. Smyth-Riding professionally raised her concerns about the appearance of potential discrimination in hiring. And he was sarcastic and –

THE COURT: She didn't send that –

MS. DAVE: – nasty.

THE COURT: Did that go to Dr. Lee?

MS. DAVE: It went to Dr. Serino and General Castro.

THE COURT: She didn't want to send it to them.

MS. DAVE: No, Your Honor, but it doesn't matter.

THE COURT: Why didn't it go to Dr. Lee? Where's the evidence that – this is the problem. This is the problem I have. I just don't see, it's a gap. I mean, Dr. Lee may have been wrong and may have done things wrong at the company. It could be that young Mr. Lee was looking for wrong things in telephone receptionists. It could be that Mr. Joe and Ms. Smyth-Riding were confrontational with one another. But the evidence is pretty clear, it's absolutely clear that Ms. Smyth-Riding did not go to Dr. Lee.

Now, that could be because of concerns, well, Dr. Lee isn't going to listen to me. But as the President of

the company, you're, you are presented with your son telling you one thing, which I'm prepared to infer, that Ms. Smyth-Riding is a [143] pain; the Vice President, frankly forget what his job is, but Joe telling you that she is out there riling up people about pay, which is not discrimination. I mean, I say it can be discrimination, but it's not by itself.

This could have very well led Dr. Lee to the conclusion that Ms. Smyth-Riding is just not fitting in.

MS. DAVE: But, Your Honor, Dr. Lee has – the defense's argument is now that the primary motivation for firing Terri was the fact that the business was moving to Alabama.

THE COURT: Well, that – help me out with that. I thought – does that prove causation? Does that prove your case or simply pretext? Or that, I don't think – I think you've got the burden of proving things and then you get to the issue of whether or not a shifting explanation for what happened is pretext.

MS. DAVE: Well, there's no question that plaintiff can establish a prima facie case on all of these issues.

THE COURT: That's exactly what I'm challenging. I need to know where the causation is.

MS. DAVE: All right. As I mentioned earlier, she establishes a prima facie case of sex discrimination because she was replaced by a man. She establishes a prima facie case of retaliation –

THE COURT: Well, that's not enough. You can't, just because you are replaced by somebody of the opposite gender [144] doesn't prove gender discrimination.

MS. DAVE: Your Honor, that's sufficient to establish the prima facie case. Then we move on to pretext. But regardless –

THE COURT: I thought causation was part of the prima facie case.

MS. DAVE: The third prong in the pretext argument we can blend –

THE COURT: No, I thought causation. I mean, I thought there had to be –

MS. DAVE: Right, causation.

THE COURT: That you're discharged because you're a woman.

MS. DAVE: Right. So the fact that we've established that she had a positive performance evaluation the month before, and yet Dr. Lee, the decisionmaker, testified that her performance had been "very low level", quote –

THE COURT: Because he was listening to his son and Mr. Joe.

MS. DAVE: Your Honor, that's a cat's paw.

MR. GILBERT: Exactly.

THE COURT: It's one or two. Why don't you sit down? That will probably help keep you from being held in contempt.

MS. DAVE: Your Honor, the Court has inferred –

THE COURT: Okay. So tell me about cat's paw.

[145] MS. DAVE: If the Court, if the jury could conclude that someone who held the retaliatory, or the discriminatory, animus was conveying that animus to the decisionmaker and the decisionmaker adopted –

THE COURT: Does there have to be evidence of that or you just infer it?

MS. DAVE: It can certainly be inferred from circumstantial evidence, Your Honor. There's no direct evidence –

THE COURT: Where's the circumstantial evidence that anybody communicated to Dr. Lee other than Mr. Joe, and I think you can infer that, and maybe his son.

MS. DAVE: That's sufficient, Your Honor. There's no dispute –

THE COURT: But they clearly don't make the decision.

MS. DAVE: Right. They influenced the decisionmaker. As you heard testimony on, they both had

close relationships with Dr. Lee. That's sufficient. They had his ear. He relied on them to make his decision. They held discriminatory and retaliatory animus. That's a cat's paw argument. It's sufficient to go to the jury.

MR. HADDAD: Your Honor, again, I need to address that because that is –

THE COURT: Well, please do.

MR. HADDID [sic]: Okay. Cat's paw theory. Again, *Hill v. [146] Lockheed Martin*. I have the case right here with me, Your Honor, Fourth Circuit case. The Court says an aggrieved employee who rests a discrimination claim upon the discriminatory motivation of a subordinate employee – what they mean is subordinate to the ultimate decisionmaker – must come forward with sufficient evidence that the subordinate employee – in this case maybe Daniel Joe or maybe Richard Lee or maybe – must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

And the cat's paw theory is that, is to essentially, is to essentially avoid the situation where you have a decisionmaker who, in order to avoid liability, goes to somebody. Let's say I go to my associate over here, Marty, and say, here, sign off on this, stamp the letter. He doesn't know anything. But I'm really, I'm really in control here. I'm the partner. So he's just telling me what I'm doing (sic). He's just telling, you know, he's

just doing what I tell him to do. So that's what it is. It's about rubber-stamping.

There's no evidence here whatsoever that Daniel Joe or Dr. Serino, or anyone else for that matter, made this decision and that Dr. Lee simply rubber-stamped it. There's no evidence of that whatsoever.

It's not only that. But the person who made the decision must have had such authority and wielded such authority [147] that they were the decisionmaker. And there's just no evidence of that.

So in order to rely on the cat's paw theory, which they have to rely on, as opposing counsel has conceded, you need those elements. And it's their burden to prove that and they never proved that. There's no evidence on the record of that.

THE COURT: Okay.

MS. DAVE: Your Honor –

THE COURT: Ms. Dave.

MS. DAVE: The primary Supreme Court case, *Staub v. Proctor Hospital*, on the cat's paw theory, came out many years after *Hill v. Lockheed Martin*.

THE COURT: So how's does cat's paw work?

MS. DAVE: Okay. So according to the Supreme Court, the plaintiff must present evidence that the manager who held animus sought, quote, "sought to influence a decisionmaker." The jury here could conclude that Mr. Joe's and Mr. Lee's retaliatory and

discriminatory animus was the proximate cause. That's the standard. The proximate cause of Dr. Lee's decision.

THE COURT: Wait. Where is the evidence that Mr. Joe's confrontations stem from concerns about discrimination?

MS. DAVE: Mr. Joe?

THE COURT: I mean, the only reasonable inference is that he was ticked off because ms. [sic] Smyth-Riding was trying to run his department.

[148] MS. DAVE: Your Honor, the e-mail evidence uses the words "Title VII."

MR. HADDAD: It also says she's not accusing him of anything, by the way.

MS. DAVE: Your Honor, in addition, Ms. Smyth-Riding just testified that she consulted with counsel and discussed the concerns about the potential discriminatory appearance of firing Zakia Harris. There's no dispute that Ms. Smyth-Riding had concerns about the discriminatory appearance of only looking to hire an attractive, young woman for the executive assistant position.

THE COURT: So explain that all to me again. The executive –

MS. DAVE: The Supreme Court requires –

THE COURT: Go ahead.

MS. DAVE: – with regard to the proximate cause element, they describe it as not demanding. It requires only that some direct relation between the injury asserted and the injurious conduct alleged is established.

Again, Your Honor, the record is abundantly clear that Ms. Smyth-Riding engaged in protected activity over and over and over again.

THE COURT: What did she engage in?

MS. DAVE: She told Dr. Serino that it was inappropriate to only interview applicants for a receptionist [149] position that were attractive, young women. She told General Castro on January 9th, can you please take me out of Dr. Serino's line of supervision because I am uncomfortable with his hiring practices. And the next business day she was fired.

THE COURT: Go ahead.

MR. HADDAD: Thank you, Your Honor. The retaliation claim, but/for causation test Fourth Circuit *Dow* case, to satisfy the third element – this is of the prima facie case of a retaliation claim – the employer must have taken the adverse employment action because the plaintiff engaged in a protected activity. Since, by definition, the employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in protected activity is absolutely necessary to establish the third element.

They have, they have not done that. A plaintiff must establish that when taking the adverse action, an employer had knowledge that the plaintiff had engaged in protected activity.

Ms. Dave came up here and the first question you asked her was who made the decision? And Ms. Dave said to the Court we contend Dr. Lee made the decision to hire and to fire. Okay.

So now the question – in fact, under their retaliation claim, they’ve sued Dr. Lee directly because he was the one, they claim, made the decision. So they have the burden of establishing, putting forth evidence to go to a jury, putting forth evidence that Dr. Lee had some knowledge, had some inkling [150] of that. And there is none of that.

We discussed the – the only thing, the only thing that was out there were this reports of salary and whatnot. As Your Honor said, that doesn’t mean it’s discrimination. And I asked –

THE COURT: Well, that clearly is – I mean, that’s a philosophical and sociological point. I’m not sure in this world people realize that. It can relate to discrimination. If you’re paid less than somebody else because of your gender or because your race or because of your age, that is a factor. But we do not live in a Bernie Sanders’ world where riling people up about salaries in any way relates to Title VII or any other anti-discrimination law.

MR. HADDAD: And we asked Dr. Lee right on the stand. We said, Dr. Lee, did anyone ever bring any concerns of discrimination to you? His answer was no.

So, and the plaintiff certainly didn't put any evidence that she did, that she brought it to his attention. She just rested on, well, Dr. Lee didn't want to know, which there was no evidence of that, either, other than her testimony that Dr. Lee wanted nothing to do with HR.

Even so, even so, he's the ultimate decisionmaker. So if you're going to charge him for having retaliated against you, then you have to provide evidence that he had knowledge. And there is none. Zero.

[151] So there's no need to go forward in this case. There's no way to connect the dots. She hasn't put on her case of connecting the dots. That's a requirement, as you said. Causation is a huge issue.

MS. DAVE: Your Honor, the jury could conclude that Dr. Lee was not credible given the numerous inconsistencies between his testimony here and his testimony at deposition.

THE COURT: So suppose they find him not credible? What do you want to infer? That he was not the decisionmaker?

MS. DAVE: No. That he was aware of the allegations of the discrimination. Dr. Serino testified –

THE COURT: But there has to be evidence. You can't – there has to be some evidence that he was aware. And the only thing that really ties him is writing "too old."

MS. DAVE: That's a fairly significant fact, Your Honor. But in addition –

THE COURT: It doesn't relate to whether he was told by anybody else of that alleged – it could show that he was stupid.

MS. DAVE: In addition, Your Honor, Doctor, there's sufficient evidence from which the jury could infer that Dr. Lee –

THE COURT: They could infer that he wanted a telephone receptionist that his son could hit on.

MS. DAVE: Exactly, Your Honor. And that –

THE COURT: So what?

[152] MS. DAVE: – his son and Dr. Serino and Mr. Joe came to him and told him that Terri was causing trouble because she was advising the company to abide by anti-discrimination laws. Dr. Serino testified that he may have told Dr. Lee –

THE COURT: Well, she wasn't so keen on abiding by discrimination laws. She's an HR director and she laughs at sexist jokes.

MS. DAVE: Your Honor, as Ms. Smyth-Riding testified, this company had a tremendous emphasis

on being flexible, as Dr. Lee said in her interview. As Dr. Serino told her repeatedly, play team sports, Terri, be a team player. She was walking a tightrope at this company.

THE COURT: That's what makes me the Catholic. I just don't accept that. The fact of the matter is you are the Human Resources Director. You stand up for Title VII.

MS. DAVE: Your Honor, when Ms. Smyth-Riding did, she was fired. She sent –

THE COURT: By whom? Who knew what? You know, if I'm Dr. Lee, what I know is inferentially my son's telling me she's not working out, and Mr. Joe, in whom I have confidence, is telling me that she's sticking her nose into things and trying to make decisions on things that aren't her bailiwick, aren't within her bailiwick.

MS. DAVE: Your Honor, inferential is sufficient to get to the jury. There's no requirement –

[153] THE COURT: Okay. I'm going to grant the motion. Let's get the jury.

MS. DAVE: – for direct evidence.

THE COURT: I'm going to grant the motion. Let's get the jury.

MR. HADDAD: Thank you, Your Honor.

MS. DAVE: Your Honor, on all counts?

THE COURT: Yes.

(Jury enters the courtroom at 3:11 p.m.)

THE COURT: Please be seated. We are at the stage of the case where the defendants make a motion for judgment as a matter of law. And I could be making a mistake, but I'm going to grant that motion, which brings the case to an end.

You all are entitled to some explanation. I don't know what happened out there. You all can be seated. I mean, he shouldn't be writing "too old" on applications that are made by people who apply for a position. You shouldn't have a son who tells somebody hire somebody at the receptionist desk that I can hit on, a young, attractive woman. You shouldn't do that.

The problem that I have in this case is that it's perfectly clear from the evidence, and there's no way to get around it, that the plaintiff's theory is that Dr. Lee was the decisionmaker who determined to fire Ms. Smyth-Riding. I mean, one could make arguments otherwise. But that is really, that is the fact of this case.

[154] And if you really analyze the evidence, where is the evidence that Dr. Lee knew of any alleged actions being taken by the plaintiff to uphold Title VII and the discrimination, and the anti-discrimination laws? There isn't any.

We infer that Dr. Lee, at least I do, was the decisionmaker by virtue of the fact the witnesses called by plaintiff, the first two witnesses, who were more direct

supervisors, said, we didn't agree with this decision. Dr. Lee made the decision.

I certainly am willing to infer that Dr. Lee was told by his son, who didn't like the fact that we know, but there's no evidence that Dr. Lee knew, that Ms. Smyth-Riding was helping prevent or was standing in the way between hiring attractive, young women whom he could hit on. The situation with Mr. Joe, Mr. Joe was clearly not the supervisor of the plaintiff. And that was a, that was a management conflict, which upper management's got to decide.

And the fact of the matter is, based upon the e-mails, which there's no evidence that Dr. Lee got them, that Mr. Joe wasn't perfectly entitled to hire within his operations department whom he wanted to hire. It's not the job of the Human Relations Director to hire people. It's the job of the manager of that department.

And the same thing, the same thing with the employee who, compared to another employee doing a similar job, she was a [155] probationary employee. It's perfectly clear that her year was up and they let her go.

There isn't any evidence than Dr. Lee discriminated against the plaintiff because of concerns about the fact that she was upholding Title VII, and retaliated against her because she was acting as a good Human Resources Director should do.

I mean, I know I got angry when – and I did. I told you why. I don't think that – you're not, I think I may

have phrased it wrong, I don't think you're protecting any company if you're in a position where you're supposed to say, look, what you're doing is wrong. But, certainly, your job is not to protect the company, as opposed to the company in the context of the laws.

And somebody, whether it's General Electric, whether it's the defendant here or whoever, you know, if I'm their general counsel or if I'm their Human Resources Department, I think the law is being violated, my job is to protect the company by telling them that. And if – and that wasn't done here. We know that wasn't done here.

So this is a very troublesome case. You know, one could infer that things weren't right there, at the company.

I also, and I'm sorry, I was explaining why I got mad. But I told you why I got mad. I don't think that you can have a conversation with the Human Resources Director that you wouldn't have with somebody on the line. Indeed, I would think, to the [156] contrary, any sensible person wouldn't have that conversation with the Human Resources Director.

I just don't accept a world in which status makes a difference. I mean, the Human Resources Director hears you doing something wrong, there shouldn't be any light-heartedness about it. There ought to be, you know, I mean, at the best what you ought to say, I understand you think that's funny, and maybe other people would, too, maybe I did. But you can't say that. And

that's what you ought to do. But in any event, there's no evidence that Dr. Lee was told about this.

The decision to fire her came through, I guess, General Castro, up through Dr. Serino. But that's all we know. And the plaintiff has the burden of proving causation, that the decision was made to terminate her employment because of activities in which she was engaged.

I'm not saying that things weren't wrong there. I don't know whether they were or not. But I do have an obligation to analyze the evidence against the applicable rules of law. And there is a tremendous gap between what the plaintiff says she was involved in and trying to do and Dr. Lee. And Dr. Lee, if he perceived a management conflict between Mr. Joe, who had been with him a long time, and I guess his son, and let's just leave it with Mr. Joe, and the head of Human Resources, it was within his bailiwick. He was the decisionmaker. He could say things are just getting out of control. And I'm siding with Mr. Joe, [157] and it's not because she's engaged in Title VII activities. But I can't accept this.

This is a hard case. And I could be wrong on a lot. I could be wrong in the way I've analyzed it. And I've done the best I can. I could be wrong in not leaving it up, frankly, to you, and then have all of this argued to you and you make decision. And if the decision was for the defendant, all of this is academic.

This is an old case. I inherited it from another judge. And I regret it's as old as it is.

But I do have a job at the time of the motion for judgment as a matter of law to make my best decision, and that's what I've done.

So don't, don't think ill of the plaintiff. Don't think well of the defendant. That's not what I'm, the basis for my decision. But the plaintiff has a burden of coming in and proving that she, her employment was terminated because of activities in which she was engaged, to require that the company comply with federal anti-discrimination laws, which are serious. And I don't, and I can't find that that burden was met here.

So that's my decision and the reasons for it.

MS. DAVE: Your Honor, may we have permission to meet with the jury for feedback?

THE COURT: No.

(Conclusion of Proceedings at 3:20 p.m.)

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[159] REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of Terri Smyth-Riding v. SES, LLC, Case Number(s) JFM-11-558, on February 24, 2016.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this ____ day of ____, 2016.

Mary M. Zajac,
Official Court Reporter
