App. 1

United States Court of Appeals
for the Fifth Circuit

No. 20-40284

YVES WANTOU,

Plaintiff—Appellant/Cross-Appellee,

versus

WAL-MART STORES TEXAS, L.L.C.,

Defendant—Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas,
USDC No. 5:17-cv-00018

(Filed Jan. 10, 2022)

Before STEWART, HO, and ENGELHARDT, *Circuit Judges.*

KURT D. ENGELHARDT, *Circuit Judge*

Both parties appeal certain rulings by the district court relative to the claims asserted by Plaintiff-Appellant/Cross-Appellee Yves Wantou against Wal-Mart Stores Texas, L.L.C., under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981a, and Texas law. We AFFIRM.

I.

Wantou, a pharmacist and black man from Cameroon, West Africa, filed suit against his former employer, Wal-Mart, contending that Wal-Mart intentionally subjected and/or allowed him to be subjected to discrimination based on race, color, and national origin, illegal harassment, and a hostile work environment. Wantou additionally claims that Wal-Mart retaliated against him for complaining about discrimination and asserting his rights. Specifically, Wantou's suit challenges his termination from employment, three written "coachings" (formal workplace disciplinary actions) that he received while employed by Wal-Mart, a threat of demotion, and Wal-Mart's alleged failure to pay him for approximately 24 hours of work. Based on these assertions, Wantou has requested relief in the form of back pay, front pay, compensatory damages, punitive damages, attorney's fees, and restitution under quantum meruit for unpaid work.

In the district court, all of Wantou's claims were dismissed by summary judgment except for his Title VII retaliation claims and his quantum meruit claim. The remaining claims were presented to a jury in October 2019. The jury rejected all but one claim—regarding the third coaching—for which it awarded $75,000 in punitive damages. The jury also provided an advisory verdict recommending an award of $32,240 in back pay and $0 in front pay. Post-trial, the district court entered judgment in favor of Wantou as to the third coaching, awarding $75,000 in punitive damages but only $5,177.50 as back pay. Attorney's fees also

were awarded under 42 U.S.C. § 1988(b) to Wantou as a prevailing party.

On appeal, Wantou challenges the jury's rejection of his Title VII retaliation claims regarding his termination and first and second coachings, and the jury's failure to award compensatory damages or restitution for unpaid work and other benefits. Wantou also contests the district court's front and back pay awards, the summary judgment dismissal of his discrimination and hostile work environment claims, and a number of the district court's rulings regarding proposed jury instructions, the admission of evidence, and limitations on trial time. Wal-Mart appeals all aspects of the district court's judgment and post-judgment rulings that are favorable to Wantou, in addition to arguing that punitive damages, if awarded, should be remitted to no more than $10,355.

II.

In this appeal, we are tasked with reviewing the district court's final judgment and rulings on the parties' motions asserted pursuant to Rules 49, 50, 51, 56, and 59 of the Federal Rules of Civil Procedure. Summary judgments rendered pursuant to Rule 56(b) are reviewed de novo, "'applying the same standard that the district court applied.'" *Aggreko, L.L.C. v. Chartis Specialty Ins. Co.*, 942 F.3d 682, 687 (5th Cir. 2019) (quoting *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016)). "We may affirm the district court's grant of summary judgment on any ground supported

by the record and presented to the district court." *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 273 (5th Cir. 2015).

Summary judgment is appropriate where there is "no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Material facts are those that "might affect the outcome of the suit under the governing law." *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 456 (5th Cir. 2003) (internal quotation marks and citation omitted). "A genuine [dispute] of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017). All facts and reasonable inferences are construed in favor of the nonmovant, and the court should not weigh evidence or make credibility findings. *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009). The resolution of a genuine dispute of material fact "is the exclusive province of the trier of fact and may not be decided at the summary judgment stage." *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578 n.3 (5th Cir. 2002).

Although Wantou's claims were presented to a jury, the jury's determinations regarding back pay and front pay are, in this context, only advisory. That is, back pay and front pay are equitable remedies determined by the court. *See* 42 U.S.C. § 1981a(b)(2), (c). Thus, we review the district court's findings of fact for clear error and legal issues de novo. *Gebreyesus v. F.C. Schaffer & Assocs., Inc.*, 204 F.3d 639, 642 (5th Cir.

2000) (following a bench trial, we review the findings of fact for clear error and the legal issues de novo). "[F]actual findings made under an erroneous view of controlling legal principles are reviewed de novo." *Walker v. Braus*, 995 F.2d 77, 80 (5th Cir. 1993).

A finding of fact is clearly erroneous "when, although there is evidence to support it, the reviewing court, based on all the evidence, is left with the definitive and firm conviction that a mistake has been committed." *Gebreyesus*, 204 F.3d at 642; *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Importantly, "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

Regarding the jury's verdict, both parties moved for judgments as a matter of law or, in the alternative, a new trial. After a party has been fully heard on an issue during a jury trial, judgments as a matter of law are appropriately rendered by the court only when "a reasonable jury would not have a legally sufficient evidentiary basis to find for a party on [an] issue." Fed. R. Civ. P. 50(a). We review de novo the district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the trial court. *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). "[W]e consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party." *Id.* (quoting *Brown v. Bryan Cnty.*, 219 F.3d 450, 456 (5th Cir. 2000)). Although our review

is de novo, we recognize that "our standard of review with respect to a jury verdict is especially deferential." *Id.* Thus, a Rule 50 motion must be denied "unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Id.* (internal quotation omitted). We reverse the denial of a Rule 50 motion only if the jury's factual findings are unsupported by substantial evidence or "the legal conclusions implied from the jury's verdict cannot in law be supported by those findings." *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 614 (5th Cir. 2018) (citation omitted).

After a jury trial, Rule 59 of the Federal Rules of Civil Procedure authorizes courts to grant motions for new trial for any reason for which a new trial has heretofore been granted in an action at law in federal court. Fed. R. Civ. P. 59. After a nonjury trial, Rule 59 allows new trials for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. *Id.* The district court's exercise of discretion in denying a motion for new trial or remittitur "can be set aside only upon a clear showing of abuse." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *see also Abner v. Kansas City S.R.R. Co.*, 513 F.3d 154, 157 (5th Cir. 2008).

When reviewing a jury's conclusions, "we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination." *Rideau v. Parkem Indus. Servs., Inc.*, 917 F.2d 892, 897 (5th Cir. 1990). We defer to jury verdicts and

interpret them "most favorabl[y] to upholding the jury's decision by a finding of consistency." *Merritt Hawkins & Assocs., L.L.C. v. Gresham*, 861 F.3d 143, 154 (5th Cir. 2017). We will reverse the denial of a motion for new trial "only when there is an absolute absence of evidence to support the jury's verdict." *Williams*, 898 F.3d at 614 (citation omitted). "However, when this court is left with the perception that the verdict is clearly excessive, deference must be abandoned." *Eiland*, 58 F.3d at 183. When "defects in the award are readily identifiable and measurable," remittitur ordinarily is appropriate. *Matter of 3 Star Props., L.L.C.*, 6 F.4th 595, 613 (5th Cir. 2021) (quoting *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 179 (5th Cir. 1992)). Constitutional challenges to the size of the punitive damages award are reviewed de novo. *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001)).

Challenges to jury instructions are governed by Rule 51 of the Federal Rules of Civil Procedure. We "review challenges to jury instructions for abuse of discretion and afford the trial court great latitude in the framing and structure of jury instructions." *Young v. Bd. of Supervisors*, 927 F.3d 898, 904 (5th Cir. 2019) (citation omitted). "Verdict forms are considered part of the jury instruction," *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018), and we consider them "in light of the entire jury instruction." *Jones v. United States*, 527 U.S. 373, 393 (1999) (citation omitted). We ask not whether the court gave "every correct instruction offered by the parties," but rather whether it

"correctly and adequately instruct[ed] the jury as to the law to be followed in deciding the issues." *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1227 (5th Cir. 1984) (per curiam). "[T]he party challenging the instruction must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Young*, 927 F.3d at 904 (citation omitted). An error not preserved as required by Rule 51(d)(1) of the Federal Rules of Civil Procedure may be considered if the error is plain and affects substantial rights. *See* Fed. R. Civ. P. 51(d).

Finally, we review the district court's evidentiary rulings for abuse of discretion. *Wallace v. Andeavor Corp.*, 916 F.3d 423, 428 (5th Cir. 2019) (citations omitted). "A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.* "[T]o vacate a judgment based on an error in an evidentiary ruling, 'this court must find that the substantial rights of the parties were affected.'" *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 370 (5th Cir. 2000) (quoting *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344 (5th Cir. 1983)).

III.

The factual and procedural background of this matter, along with all contested issues, competing arguments, and substantive legal principles, is more than adequately set forth in the parties' extensive briefs and the district court's written rulings. Indeed,

the district court has generated three lengthy written rulings laboriously recounting the parties' motions, arguments, pertinent evidence, and applicable law. The September 30, 2019 order devotes 128 pages to discussion of the summary judgment issues and rulings, whereas the 36-page March 12, 2020 order and 20-page July 6, 2020 order address the parties' initial and second round of post-trial motions.

Given this detailed record, we need not parse each of the parties' many assertions made on appeal. Rather, having carefully reviewed the parties' briefs, the record, and applicable law, we agree in large part with the district court's assessment. Thus, we shall limit our additional comments herein to only those areas for which elaboration or modification is truly warranted.

A. Hostile Work Environment

Beginning with the district court's summary judgment dismissal of Wantou's hostile work environment claim, Wantou and the Equal Employment Opportunity Commission ("EEOC"), as *amicus curiae*, contend the district court misstated and misapplied the applicable legal standard for an actionable hostile work environment claim under Title VII. In addition to protecting employees from race, sex, and national origin discrimination in the workplace, Title VII also makes it unlawful for employers to require "people to work in a discriminatorily hostile or abusive environment." *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019) (quoting *Harris v. Forklift Sys.*,

Inc., 510 U.S. 17, 21 (1993)). "A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 106 (2002) (quoting 42 U.S.C. § 2000e-5(e)(1)).

To survive summary judgment on a hostile work environment claim, a plaintiff must show that (1) he is a member of a protected class; (2) he suffered unwelcomed harassment; (3) the harassment was based on his membership in a protected class; (4) the harassment "affected a term, condition, or privilege of employment"; and (5) "the employer knew or should have known" about the harassment and "failed to take prompt remedial action." *West v. City of Houston*, 960 F.3d 736, 741-42 (5th Cir. 2020) (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)). For harassment to affect a term, condition, or privilege of employment, it "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* The environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris*, 510 U.S. at 21-22)).

The totality of the employment circumstances determines whether an environment is objectively hostile. *Harris*, 510 U.S. at 23. Although no single factor is determinative, pertinent considerations are: (1) "the frequency of the discriminatory conduct"; (2) "its severity"; (3) "whether it is physically threatening or

humiliating, or a mere offensive utterance"; and (4) "whether it unreasonably interferes with an employee's work performance." *Id.* "Title VII, however, is not a 'general civility code.'" *Faragher*, 524 U.S. at 788 (internal quotation marks and citation omitted). Thus, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Id.*

Arguing that Wantou's deposition testimony identified pervasive comments related to his race and national origin that were both insulting and humiliating, Wantou and the EEOC contend that the district court erroneously required Wantou to establish conduct by his co-workers that was severe *and* pervasive rather than severe *or* pervasive. We have noted that "the test—whether the harassment is severe or pervasive—is stated in the disjunctive." *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163 (5th Cir. 2007). "An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment." *Id.* (citing *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 434-35 (5th Cir. 2005)). "The inverse is also true: Frequent incidents of harassment, though not severe, can reach the level of 'pervasive,' thereby altering the terms, conditions, or privileges of employment such that a hostile work environment exists." *Id.* Thus, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the

conduct." *Id.* (quoting *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)).

Wantou and the EEOC also maintain that the district court wrongly emphasized that "the incidents [asserted by Wantou] involved no physical threat," thus suggesting that factor is of special importance in determining whether conduct is "severe" and, in doing so, ignoring that "likening a black person to an animal is an especially heinous form of harassment." *Abner*, 513 F.3d at 168 & n.74; *see also Henry v. CorpCar Servs. Hous. Ltd.*, 625 F. App'x 607, 612 (5th Cir. 2015); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007). On this latter point, Wantou testified (at his deposition) that three Caucasian pharmacy technicians (Ann Samples, Rayla Edwards, and Wendy Willoughby) "continuously" called him "chimp" or "monkey." And, they made "a lot of comments" about Wantou's negative reaction to flies being in the pharmacy, telling him that Africa was "probably fly-infested" and "a dirty place," so he should just deal with it. They also "constantly" mimicked and mocked Wantou's accent, which was especially offensive because it occurred in front of customers. Wantou additionally contends that Shawn Shannon—another Wal-Mart pharmacist—emboldened and amplified the co-workers' harassment by calling Wantou an "African fart" and "you little African" on "multiple" occasions. Furthermore, Shannon eventually stopped speaking to Wantou altogether, making it harder for Wantou to do his job.

We agree that physical threats are not "indispensable elements" of a hostile work environment claim. As we have stated before, the test considers the totality of the circumstances. And the comments that Wantou attributes to his co-workers are unquestionably reprehensible. Were this the only evidence before us, we likely would vacate and remand the district court's summary judgment relative to Wantou's hostile work environment for further consideration in light of the principles discussed herein. On the instant record, however, we do not think that necessary here.

We reach this conclusion because of the fifth requirement for an actionable hostile work environment claim, i.e., that "the employer knew or should have known" about the harassment and "failed to take prompt remedial action." The EEOC's amicus brief does not focus on this requirement and Wantou's assessment regarding this question relative to the aforementioned offensive comments is scant. Our own review of the record reveals multiple references to co-workers' offensive comments in Wantou's deposition testimony. On the other hand, the same frequency and specificity is not true of Wal-Mart's documentation or the written statements that Wantou provided to Wal-Mart in connection with his various complaints to the company.

Among those documents is an October 1, 2015 email from Wantou to Wal-Mart Market Health and Welfare Director Steven Williams. Wantou references Shawn Shannon's not talking to him after September 23, 2015, except for "violent language or insults in [a] totally unprofessional manner and in front of techs,"

and accuses Shannon of "colluding with some of the techs to bully, mob, harass him and create a hostile work environment." In the same document, Wantou characterizes co-worker Rayla Edwards as "notorious in her harassment and constant bullying behavior towards me," and states that the climate negatively impacts work performance, morale, and customer service.

Interview documentation completed by Williams in the course of the investigation that he began in November 2015 references Samples' admitted remarks about flies and Africa, as well as the admonition that Samples received from then-Pharmacy Manager Pascal Onyema about such comments, and her own contention that she, a "world traveler," "didn't mean anything" by her comment. A reference to Ebola by a co-worker also is mentioned.

A statement prepared by Wantou, dated November 22, 2015, contends that Shawn Shannon is routinely treated more favorably by Caucasian pharmacy techs, who give Shannon "full support, while being hostile and uncooperative" to Wantou and "turning a blind eye to Shannon's shortcomings." Wantou also describes Shannon as "on occasion, verbally violent, unprofessional, [using] insulting language; [and] contributing to a divide along racial lines by colluding with most of the Caucasian technicians . . . , to bully, [], and harass me," whereas [pharmacy tech] Rayla Edwards "[is] notorious in her harassment and constant bullying behavior," "routinely yells at me," and "displays aggressive behavior towards me."

The record also includes an email that Wantou sent to himself on June 28, 2015, which references co-worker Ann Samples' comment about flies and Africa, and states that, another time, Samples said to Wantou: "You like to work like a dog, or a monkey rather." That comment likewise appears in a written statement that Wantou submitted to Williams on November 22, 2015, in connection with the investigation that Williams was conducting at the time. In that statement, Wantou adds that he experiences slurs regarding race, color, and national origin. *Id.* Finally, in his December 6, 2015 Global Ethics complaint, Wantou identifies co-worker Rayla Edwards as the most notorious harasser/bully, followed by Ann Samples, and references the impact that the hostile climate has on morale and work performance.

Based on this documentation, it is evident that workplace relations at the Wal-Mart pharmacy at which Wantou worked were hardly copacetic throughout his employment. Importantly, however, it is not apparent that offensive racist comments and conduct of the sort highlighted in the EEOC's brief and Wantou's deposition testimony continued after the investigation and instruction provided by Wal-Mart managerial personnel, in late 2015, in response to Wantou's complaint to management. Furthermore, on April 25, 2016, both Wantou and fellow pharmacist Shawn Shannon received a written coaching by Wal-Mart Interim Market Health and Welfare Director Damon Johnson for not maintaining communication as they had previously been instructed to do. And, according to Pharmacy

Manager Katie Leeves, she also met with Wantou, Shannon, and the pharmacy technicians, on April 26, 2016, to restate the requirement that all personnel act professionally in the pharmacy.

In all, based on this limited evidentiary showing, it is not evident that a triable dispute exists relative to whether Wal-Mart remained aware that Wantou suffered continued harassment and "failed to take prompt remedial action." Thus, given this additional determination regarding Wantou's hostile work environment claim, we find no reversible error in the district court's summary judgment ruling in Wal-Mart's favor.

B. Jury Instructions

Focusing next on jury instructions, Wantou maintains the district court erred in failing to include his proposed "Cat's Paw" instructions in the court's instructions to the jury. "[T]he district court's refusal to give a requested jury instruction constitutes reversible error only if the instruction (1) was a substantially correct statement of law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the party's ability to present a given claim." *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004). A court's refusal to give a jury instruction constitutes error "only if there [is] . . . sufficient evidence to support the instruction." *Jackson v. Taylor*, 912 F.2d 795, 798 (5th Cir. 1990).

Here, the district court concluded Wantou did not come forward with sufficient evidence to support a "Cat's Paw" causation instruction. If we were to consider the question in the first instance, we might find no harm in providing a Cat's Paw instruction. A plaintiff asserting a Title VII *discrimination* claim must show only that the employer's discriminatory motive "was a motivating factor" for an adverse employment action. *Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013), however, the Supreme Court clarified that a plaintiff asserting a Title VII *retaliation* claim must meet a higher standard of causation. Such a plaintiff "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* In *Zamora*, we confirmed that that the Cat's Paw analysis remains viable in the context of the but-for causation required for Title VII retaliation claims. 798 F.3d at 332-33; *see also Brown v. Wal-Mart Stores East*, L.P., 969 F.3d 571, 577 (5th Cir. 2020).

"Plaintiffs use a [C]at's [P]aw theory of liability when they cannot show that the decisionmaker—the person who took the adverse employment action—harbored any retaliatory animus." *Zamora*, 798 F.3d at 331. Thus, under the Cat's Paw theory, a plaintiff must establish that the person with a retaliatory motive caused the decisionmaker to take the retaliatory action. *Id.* "Put another way, a plaintiff must show that the person with retaliatory animus used the

decisionmaker to bring about the intended retaliatory action." *Id.*

Nevertheless, we find no abuse of discretion by the district court. To start, Wantou's proposed instructions, as written, are confusing if not, as the district court concluded, internally inconsistent. And one proposed instruction referred to "discriminatory bias" and "discriminatory animus" at various times, despite the district court's grant of summary judgment on all claims of discrimination. In any event, Wantou's ability to present and argue his retaliation claim to the jury was not seriously impaired by the district court's ruling.

Through the presentation of evidence, Wantou connected persons and evidence. And in closing argument, Wantou freely discussed the roles and alleged motives of the various actors, and was not limited in attributing those actions and motivations to Wal-Mart, who is the sole defendant. Consistent with Wal-Mart's disciplinary process and the complexity of Wantou's allegations, the instruction did not identify specific decisionmakers. "Defendant Wal-Mart" could capture each co-worker or supervisor covered in Wantou's requested instruction. Given this wording, Wantou was able to argue about the retaliatory animus of his co-workers, and assert that animus resulted in various adverse employment actions. Indeed, Wantou was able to provide his full story in closing and present all of his arguments to the jury without objection. Accordingly, we find no error in the district court's refusal to provide the specific Cat's Paw instructions that Wantou requested.

C. Jury Verdict—Sufficiency of the Evidence

To establish a claim of retaliation under Title VII or Section 1981, a plaintiff must prove by a preponderance of the evidence that: (i) he engaged in a protected activity; (ii) an adverse employment action occurred; and (iii) a causal link exists between the protected activity and the adverse employment action. *Washburn v. Harvey*, 504 F.3d 505, 510 (5th Cir. 2007). The burden of production then shifts to the defendant to articulate a legitimate, nonretaliatory reason for the alleged retaliatory action. *Id.* If the defendant satisfies this burden, the plaintiff must offer sufficient evidence that the proffered reason is a pretext for retaliation. *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005); *Gee v. Principi*, 289 F.3d 342, 345, 347 (5th Cir. 2002). Under this framework, the employee's ultimate burden is to prove that the adverse employment action would not have occurred but for the protected conduct. *Brown*, 969 F.3d at 577. Even if a plaintiff's protected conduct is a substantial element in a defendant's adverse employment action, no liability for unlawful retaliation arises if the employee would have faced that discipline even without the protected conduct. *See Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996).

As the district court reasoned, sufficient conflicting evidence exists to support the jury's verdict regarding the merits of Wantou's retaliation claims. Although we might reach a different result if we considered the claim in the first instance, that is not the role of the appellate court. Rather, the record reflects that the

jury was presented with all relevant evidence (including live witness testimony), heard arguments by counsel, and received the necessary instruction regarding applicable law by the district court. And, in the end, the jury's assessment, including its credibility determinations, favored Wantou regarding the third (June 28, 2016) coaching, and Wal-Mart regarding the first and second coachings, as well as Wantou's termination. In short, we cannot say the jury's verdict is against the great weight of the evidence or that a reasonable person could only have reached an opposite decision. Nor has reversible legal error been identified.

Particularly regarding the third coaching, enough evidence exists to allow the jury to conclude, despite Pharmacy Manager Katie Leeves' protests to the contrary, that Leeves was sufficiently aware of Wantou's various ethics complaints (submitted by means of Wal-Mart's Global Ethics Hotline), and complaints of race discrimination, when she issued the June 28, 2016 (third) coaching, and that the coaching would not have occurred but for those complaints.[1] Particularly pertinent here, we again emphasize the applicable standard of review and that the jury, as the trier of fact, is

[1] For instance, an addendum to Wantou's formal complaint (dated June 29, 2016) represents that, on June 27, 2016, the day before the third coaching, Wantou telephoned Pharmacy Manager Katy Leeves (who was away from the pharmacy) to "complain, once again, about the disparate treatment on the part of the technicians and the cashiers due to [his] race, [his] color, and [his] national origin." The same document accuses Leeves of "not affording [him] the right to complain, and retaliating against him whenever [he] complain[s]."

charged with making credibility determinations based on testimony and other evidence presented it. That is, a Rule 50 motion must be denied "unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Flowers*, 247 F.3d at 235. Thus, we find no reason to set aside the judgment of the district court and the jury's verdict relative to this claim.

D. Jury Verdict Form—Inconsistencies and Back Pay Award

Although we appreciate the logic of Wantou's assertions, we are not persuaded that the jury's responses to Questions 4 and 6, or the responses to Questions 4 and 7.3, of the verdict form are inconsistent. Both Questions 4 and 6 relate to whether Wantou was retaliated against, and the answer to Question 7 provides the jury's advisory verdict regarding back pay:

> **QUESTION 4**: Do you find that Plaintiff Wantou would not have been issued a written coaching on June 28, 2016 but for his good-faith, reasonable ethics complaints based on race, color or national origin discrimination by way of Defendant Wal-Mart's Global Ethics Hotline?
>
> Answer "Yes" or "No."
>
> YES
>
> **QUESTION 6**: Do you find that Plaintiff Wantou would not have been terminated but

for his good-faith, reasonable ethics complaints based on race, color or national origin discrimination by way of Defendant Wal-Mart's Global Ethics Hotline?

Answer "Yes" or "No."

NO

QUESTION 7: What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Wantou for the damages, if any, you have found Defendant Wal-Mart caused Plaintiff Wantou?

3. Wages and benefits from November 9, 2016 to November 5, 2019.

$32,240.00

Regarding Questions 4 and 6, Wantou argues that Wal-Mart conceded that he was fired for "Misconduct with Coachings," such that the third written coaching was a prerequisite to Wantou's termination. From this, Wantou maintains, because the jury found his third written (June 28, 2016) coaching retaliatory, and the third written coaching was a but for cause of his termination, his termination was retaliatory. Thus, Wantou argues, the jury could not have answered Question 6 in the negative. Relatedly, Wantou contends, if his termination was retaliatory, the jury should have awarded full back pay. As the district court reasoned, however, the jury's answers to Questions 4, 6, and 7 are reconcilable.

Wantou's argument rests on his assertion that his third written coaching was necessary for his termination. However, as the district court concluded, a reasonable jury could disagree. Record evidence suggests that that Wal-Mart's coaching levels are a guideline rather than a strict hierarchy. Indeed, Wantou's second written coaching informed him that the next level of action (if behavior continued) is "Third Written up to and including Termination." Additionally, Wal-Mart presented evidence that providing immunizations beyond the parameters established by the Standing Order is an immediately terminable offense. Notably, though Wal-Mart witnesses stated that Wantou was not terminated solely because he immunized persons outside of the age parameters established by the Standing Order, Wal-Mart also provided extensive evidence of its investigation into Wantou's immunization practices.

Furthermore, the cited evidence more than adequately supports the notion that Wal-Mart's termination decision turned on the fact that Wantou continued to immunize outside of the Standing Order's approved age groups, *even after having been specifically and expressly instructed not to do so*, rather than the mere fact that he already had received a third coaching, such that termination, rather than another coaching, was the indicated next level of discipline. Thus, considering Wantou's behavior—repeated defiance of Wal-Mart's corporate policy, the Standing Order, and management's express directives—a reasonable jury could find that his termination did *not* depend upon the third coaching for purposes of answering Questions 6 and 7.

Additionally, as the district court emphasized, Wantou did not object to the wording of the jury verdict form when it was provided to the jury or the jury's answers upon the return of the jury verdict. Nor, moreover, did Wantou, who bears the burden of proof, seek to include an additional jury question or elicit probative testimony (or other evidence) on this particular point. In other words, Wantou did not ask the persons who decided that he would be terminated whether his discipline would have been only an additional coaching, instead of termination, if he had not already received a third coaching.

Lastly, Question 7 does not dictate that "full back pay" had to be awarded. Rather, it simply asks the sum of money that would fairly and reasonably compensate Wantou for lost wages and benefits, if any, that Wal-Mart was determined to have caused. And, in any event, the parties have not disputed the district court's determination that it, not the jury, was charged with deciding the actual amount of back pay and front pay, if any, to be awarded. Thus, the final determination regarding the role that retaliation played vis-à-vis Wantou's termination and back pay award was the district court's to make, not the jury's.

Considering the amount of back pay ordered by the court, $5,177.50, and the other factors discussed herein, we find no clear error occurred relative to this finding. Indeed, given Wantou's statement (in closing argument) that he earned an annual salary of approximately $215,000 while employed by Wal-Mart, the jury's advisory verdict of only $32,240 seemingly fails

to suggest that the jury was convinced that, but for his third coaching, Wantou would have maintained his employment and annual salary during the three years identified in Question 7.3.

E. Punitive Damages

A Title VII plaintiff may recover punitive damages upon proof that the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). This is a higher standard than the showing necessary for compensatory damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 d discrimination is sufficient proof of malice or reckless indifference." *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 270 (5th Cir. 2000).

Ultimately, the terms "malice" and "reckless indifference" "focus on the actor's state of mind." *Kolstad*, 527 U.S. at 535. Both "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination [or retaliatory conduct]." *Id.* Thus, the defendant employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable for punitive damages." *Id.* at 536. "Moreover, even if particular agents acted with malice or reckless indifference, an employer may avoid vicarious punitive damages liability if it can show" that the agents' actions were contrary to the employer's good-faith efforts to comply with Title VII. *EEOC v. Boh*

Bros. Constr. Co., L.L.C., 731 F.3d 444, 467 (5th Cir. 2013) (citing *Kolstad*, 527 U.S. at 545-46).

The district court denied Wal-Mart's motion seeking judgment as a matter of law regarding punitive damages, concluding Wantou presented evidence that would allow a reasonable jury to conclude that Leeves acted with malice and that Wal-Mart did not exercise good faith. On malice, Leeves made several statements detailing a history of personal conflict with Wantou. Leeves admitted that, before Wantou's third written coaching, these disputes boiled over with raised voices and that she "did get a little defensive." Also, their interactions were "very confrontational." Because the malice inquiry "focus[es] on the actor's state of mind," Leeves "'must at least [have] [retaliated] in the face of a perceived risk that [her] actions w[ould] violate federal law to be liable for punitive damages.'" *Boh Bros. Constr. Co.*, 731 F.3d at 468 (quoting *Kolstad*, 527 U.S. at 535-36). Leeves was trained on Wal-Mart's statement of ethics policy, so she knew not to retaliate against Wantou because of his complaints of discrimination and harassment by his co-workers. Nonetheless, given the evidence of strong personal conflict between Leeves and Wantou, the jury could have reasonably found she did so, and with malice.

Regarding good-faith efforts, Wantou presented evidence from which the jury could conclude that at least certain of his ethics complaints were ignored by Wal-Mart. Even before his third written coaching, Wantou's ethics complaints were regularly demoted to nonethics. When "Wal-Mart failed to respond

effectively to [discrimination complaints]," the Fifth Circuit has found sufficient evidence to sustain an award of punitive damages, despite Wal-Mart encouraging employees to report grievances. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999). "For JMOL purposes, the evidence of Wal-Mart's antidiscrimination good faith was certainly not so overwhelming that reasonable jurors could not conclude otherwise." *Id.* A reasonable jury could credit Wantou's version of the facts and reject Wal-Mart's view; the jury, alone, weighs evidence and determines credibility. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

In addition to arguing that no punitive damages are warranted, Wal-Mart contends the district court's award of $5,177.50 in back pay cannot support an award of $75,000.00 in punitive damages. In support of this argument, Wal-Mart cites *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000), where the jury awarded $2,500 in compensatory damages plus $75,000 in punitive damages. There, we concluded the award was constitutionally excessive and remitted it to $25,000—10 times the amount of compensatory damages.

In *Abner*, however, we reasoned the statutory cap on punitive damages, coupled with the high threshold for culpability, "confine[d] the amount of the award to a level tolerated by due process." 513 F.3d at 157. And, because Congress "effectively set the tolerable proportion," we reasoned that "the three-factor [*BMW of North America v. Gore*, 517 U.S. 559 (1996)] analysis

is relevant only if the statutory cap itself offends due process." *Id.* at 164. Concluding that it did not, and that a ratio-based inquiry became irrelevant, we considered the "sufficiency of evidence [supporting] the statutory thresh-old [to be] a determinant of constitutional validity." *Id.* Applying that analysis here, we are not convinced, on the instant record, that any reduction of the $75,000 punitive damages award is legally necessary or appropriate.

F. Evidentiary Rulings

Lastly, Wantou protests a number of the district court's evidentiary rulings and limitation of trial time. Again, we emphasize that the applicable query is not whether another judge necessarily would have rendered the same ruling. Rather, it is whether the district court charged with this discretionary duty abused that discretion at the particular time that it was exercised. Considering the record at hand and the parties' submissions, we are not convinced that any of these rulings constitute an abuse of discretion. Nor is apparent that any of these rulings adversely affected any of the parties' substantial rights.

IV.

As stated herein, we find no reversible error in the district court rulings challenged on appeal. Accordingly, we AFFIRM.

JAMES C. HO, *Circuit Judge*, concurring in part and dissenting in part:

Yves Wantou is a pharmacist. But for five of his co-workers at Wal-Mart, all they saw was the color of his skin. According to the summary judgment evidence, his co-workers repeatedly called him a "monkey," a "chimp," "a little African," and an "African fart." They constantly mocked his accent in front of co-workers and customers. And they made numerous comments disparaging Cameroon, Wantou's country of origin, as "Ebola infested," "fly-infested," and a "dirty place." As one co-worker told Wantou: "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country."

This evidence establishes a troubling pattern of racial harassment—one that a jury could find sufficiently pervasive to alter the conditions of employment and thereby support a claim of hostile work environment under Title VII of the Civil Rights Act of 1964. *See, e.g.*, *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 771 (5th Cir. 2009) ("A workplace environment is hostile when it is 'permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'") (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Walker v. Thompson*, 214 F.3d 615, 619-22 (5th Cir. 2000) (plaintiff survives summary judgment where evidence demonstrated use of racial epithets including "little black monkey"); *see also, e.g.*,

Spriggs v. Diamond Auto Glass, 242 F.3d 179, 182 (4th Cir. 2001) (reversing summary judgment where plaintiff suffered "incessant racial slurs" including "dumb monkey").

But the district court concluded that these incidents, "although allegedly recurring, . . . involved no physical threat," and granted summary judgment to Wal-Mart accordingly.

I strongly disagree with the respected district judge on this point. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris*, 510 U.S. at 21 (cleaned up). And that is precisely what is presented here.

Physical threats or attacks are not required to establish a hostile work environment under Title VII. So the absence of physical threats to go along with the verbal abuse does not prevent this case from proceeding to trial. *See, e.g.*, *Walker*, 214 F.3d at 626 ("In the instant case, the district court granted summary judgment, concluding that '[n]one of these comments were physically threatening or humiliating, nor did they unreasonably interfere with Walker and Preston's work. Instead, they were simply truly offensive.' We disagree.").

Accordingly, I would vacate the judgment as to the hostile work environment claim and remand for further proceedings. I would not affirm on alternative

grounds not reached by the district court in the first instance, nor addressed by Wantou in his pro se brief on appeal—namely, whether Wal-Mart took prompt remedial action to redress the situation in a manner sufficient to avoid liability under Title VII.[1]

That is an issue that should be decided in the first instance by the district court, if not by a jury. As we've said before, we are a court of review, not first view. Accordingly, I concur in part and dissent in part.

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[1] According to Wantou, he first informed Wal-Mart in late October 2015 about his hostile work environment—an environment that, according to Wantou, continued to persist through the early summer of 2016, leading up to his termination.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU, Plaintiff, v. WAL-MART STORES TEXAS, LLC, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. 5:17-CV-00018-RWS-CMC

ORDER

(Filed Sep. 30, 2019)

Before the Court are the following: (1) Defendant's Motion for Summary Judgment and Brief in Support (Docket No. 209); (2) Plaintiff's Motion to Strike (Docket No. 210-1) Misty Perez's Declaration Submitted by Defendant in Support of Defendant's (Docket No. 209) Motion for Summary Judgment and All Pleadings Related Thereto, and to Strike Alleged Complaint by Pharmacy Technicians at Store #148 and All Pleadings Related Thereto (Docket No. 289); (3) Plaintiff's Motion to Strike (Docket No. 209-12) Jimmy Brimer's Declaration, Submitted by Defendant in Support of Defendant's (Docket No. 209) Motion for Summary Judgment, and All Pleadings Related Thereto; and to Strike Plaintiff's Interview of October 25, 2016 by James Jones and Damon Johnson and All Pleadings Related Thereto; and to Exclude Jimmy Brimer as Witness (Docket No. 299) and (4) Defendant's Objections to

Plaintiff's Summary Judgment Evidence and Response to Plaintiff's Objections (Docket No. 332-2).

The Court has carefully considered the relevant briefing and is of the opinion the motion

* * *

employer may be entitled to judgment in its favor. *Reeves*, 530 U.S. at 148. This is one such case where Plaintiff's evidence does not support an inference that intentional discrimination was the real reason for Defendant's decision.

Considering all of Plaintiff's evidence in the light most favorable to Plaintiff, the Court is not convinced that Defendant's legitimate, non-discriminatory reason for its action was pretextual – that the proffered reason was false and that discrimination was the real reason for the termination. *Rhodes*, 39 F.3d at 542. At most, Plaintiff has presented his own subjective beliefs along with a mere scintilla of evidence to show pretext. Based upon the record before the Court, no reasonable juror could find that Defendant's non-discriminatory reason for terminating Plaintiff was a pretext for race or national origin discrimination.

Similarly, Plaintiff has produced no evidence, either direct or circumstantial, supporting his claim that the termination occurred under circumstances that give rise to an inference that he suffered from discrimination motivated by racial animus or animus based on his national origin. Therefore, Plaintiff's Title VII and § 1981 discrimination claims must be **DISMISSED**.

See generally Byers v. Dallas Morning News, Inc., 209 F.3d 419, 422 n. 1 (5th Cir. 2000) (holding the Title VII and § 1981 analyses are identical at the summary judgment stage).

B. Hostile Work Environment Discrimination

1. Applicable law

To prevail on a Title VII hostile work environment claim, Plaintiff must show that: "(1) [he] belongs to a protected group; (2) [he] was subjected to unwelcome harassment; (3) the harassment complained of was based on race [or national origin]; (4) the harassment complained of affected a term, condition, or privilege of employment; [and] (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Hernandez v. Yello Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)). A work environment is hostile when it "is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). Plaintiff must show his workplace environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [he] in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

To make this determination, a court must look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 787-88 (quoting *Harris*, 510 U.S. at 23). The employer may avoid liability if it took "prompt remedial action" to protect the claimant. *Brooks v. Firestone Polymers*, LLC, 70 F. Supp. 3d 816, 857 (E.D. Tex. 2014), *aff'd sub nom. Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393 (5th Cir. 2016) (quoting *Harris*, 510 U.S. at 23) (citing *Hockman*, 407 F.3d at 329)). What constitutes prompt remedial action is a fact-specific inquiry and "not every response by an employer will be sufficient" to absolve the employer of liability. *Brooks*, 70 F. Supp. 3d at 857 (citations omitted).

2. Parties' assertions

According to Plaintiff, from the time he started working at Walmart, he was constantly harassed by his co-workers "who incessantly made insulting and humiliating comments related to Wantou's race and national origin." Docket No. 320 at 58. Among other things, Plaintiff argues as follows:

> Wantou, who has the trait of being easily annoyed by flies, was repeatedly told by pharmacy technician Ann Sample[s] that "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason

> for you to be annoyed by flies. You come from a dirty and fly-infested country," "Well, I'm sure where you come from, it's probably f[l]y-infested," "flies are attracted to dirt. You come from a dirty place, so just deal with it", Wantou was repeatedly called "chimp"and "monkey"by pharmacy technicians Ann Sample[s], Wendy Willoughby and Rayla Edwards, "African fart"by Shawn Shannon, "you little African" by Shawn Shannon.

Id. Plaintiff further contends the three pharmacy technicians and one pharmacist would constantly mimic his accent in a very humiliating manner in front of customers. *Id.*

According to Plaintiff, when pharmacy technicians would make errors and he would ask them to fix errors in the interest of patient safety, pharmacy technicians would use racial or national origin-based insults against Plaintiff, making it difficult for him to complete his tasks as a pharmacist. *Id.* at 59. Thus, Plaintiff asserts the harassment affected a term or privilege of employment. Plaintiff also testified the harassment was pervasive and continuous.

Defendant asserts Plaintiff cannot establish the fourth element of his *prima facie* case for a hostile work environment claim – that the alleged harassment affected a term, condition, or privilege of employment. Because Plaintiff's allegations of harassment are based on allegations against Plaintiff's co-workers and subordinates, Defendant asserts Plaintiff will be required to establish the fifth element of his *prima facie*

case as well – that Defendant knew or should have known of the harassment and failed to take prompt remedial action. According to Defendant, Plaintiff cannot establish either one. Defendant states it investigated each complaint and took prompt remedial action to remedy the issues, and the comments and actions alleged by Plaintiff are not severe and pervasive enough to create a hostile work environment.

3. Discussion

Racially "'discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment that violates Title VII.'" *Brooks*, 70 F. Supp. 3d at 857 (quoting *Mire v. Tex. Plumbing Supply Co., Inc.*, 286 F. App'x 138, 141 (5th Cir. 2008) (citing *Harris*, 510 U.S. at 21). "Hostile work environment" racial harassment occurs when an employer's conduct "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.'" *Brooks*, 70 F. Supp. 3d at 857 (quoting *Mentor Say. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a))). For harassment to be actionable under Title VII, it must be severe and pervasive enough to alter the terms, conditions, or privileges of the complainant's employment. "Title VII 'was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace,' and therefore conduct that only 'sporadically wounds or offends but

does not hinder' an employee's performance is not actionable." *Brooks*, 70 F. Supp. 3d at 857 (citations omitted).

Overall, the Court finds the conduct cited by Plaintiff, even when taken in its totality and viewed in the light most favorable to his case, falls short of the standard required for a finding of a hostile work environment in the Fifth Circuit. *See, e.g., Frazier v. Sabine River Auth. State of La.*, 509 F. App'x 370, 374 (5th Cir.), *cert. denied, 571* U.S. 857 (2013) (holding that a coworker's use of the words "nigger" and "Negreet," in plaintiff's presence, as well as a coworker's "noose gesture," were not severe or pervasive enough to establish a *prima facie* claim for hostile work environment); *Rudolph v. Huntington Ingalls, Inc.*, Civil No. 1:06CV820, 2011 WL 4350941, at *12 (S.D. Miss. Sept. 15, 2011) (holding that graffiti on bathroom stalls that read, "You don't have to use a rope to kill a nigger[,] there's a truck and a chain," "[k]ill all niggers," and "[n]iggers smell like dogs," were not physically threatening or humiliating, and, therefore, insufficient to support a hostile work environment claim).

Here, although allegedly recurring, the incidents involved no physical threat. Importantly, there is nothing in the record showing the alleged harassment was so severe as to affect the terms or conditions of Plaintiff's employment. Accordingly, Plaintiff fails to establish a *prima facie* case of race or national origin discrimination under a hostile work environment theory. Because the Court finds Plaintiff has failed to raise an issue of material fact concerning the fourth element

of his *prima facie* case, Defendant's motion for summary judgment is **GRANTED** as to Plaintiff's hostile work environment claim.

RETALIATION CLAIMS

Again, Plaintiff asserts retaliations claims in violation of both Title VII and § 1981. As the analysis is the same under either statute, the Court cites only to Title VII.

A. Applicable Law

"Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "This initial burden remains with the moving party even when the issue involved is one on which the nonmovant will bear the burden of proof at trial." *Russ v. Int'l Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991). "Simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of fact as to every element of its case." *Id.* at 591. "[I]t is never enough simply to state that the nonmoving party cannot meet its burden at trial." *Clark v.*

Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); *see also id.* (citing

* * *

United States Court of Appeals
for the Fifth Circuit

No. 20-40284

YVES WANTOU,

Plaintiff—Appellant/Cross-Appellee,

versus

WAL-MART STORES TEXAS, L.L.C.,

Defendant—Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:17-CV-18

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Apr. 19, 2022)*

Before STEWART, HO, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing

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* Judges Edith H. Jones, Jacques L. Wiener, Jr., and Don R. Willett, did not participate in the consideration of the rehearing en banc.

en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU	)	
VS.	)	5:17-CV-00018-RWS-CMC
WALMART STORES TEXAS, LLC)	)	TEXARKANA, TEXAS NOVEMBER 5, 2019

TRIAL ON THE MERITS

BEFORE THE HONORABLE
ROBERT WILLIAM SCHROEDER III
UNITED STATES DISTRICT JUDGE

Volume 5

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* * *

[670] THE COURT: Please be seated. Good morning everyone. I'm sorry to keep you waiting. At the end of the day yesterday we distributed copies of the final jury instructions or proposed final jury instructions. I asked the parties to review those and file any written objections on the docket and I will note no written objections were filed. Have the parties reviewed them and are there any objections that we need to take up?

MR. WANTOU: Yes, Your Honor. Yes, Your Honor. I object to the fact that the cat's paw instructions were not included in the jury instructions and I also object to the inclusion of the mitigation of

damages because the defendant has not shown that I failed to mitigate damages.

THE COURT: Let's take the first one first, the cat's paw instruction that was requested. What evidence have you adduced to support that instruction?

MR. WANTOU: Okay. The first coaching regardless of whether the individual who actually issued the coaching, regardless of whether they had retaliatory animus they collected statements from people that clearly knew that I had been involved in filing discrimination complaints and those people had retaliatory animus, those co-workers. The same thing for the second coaching and the third coaching.

THE COURT: Okay. Anything else about that?

[671] MR. WANTOU: As far as the evidence?

THE COURT: Yes, as far as the evidence.

MR. WANTOU: Okay. Basically whoever made the decisions it is unknown. Even for termination WalMart has not stated who made the decision. Specifically they have not really volunteered any, you know, conclusive information as to who made the decision; but regardless of who made the decision the people involved clearly had retaliatory animus.

THE COURT: All right. Would the defendant like to be heard on that, Ms. Waters or Mr. Zoys?

MS. WATERS: If Your Honor doesn't mind, just a quick response.

THE COURT: Yes, please.

MS. WATERS: Your Honor, I just believe the case of Zamora vs. City of Houston is directly on point on this issue with regard to the cat's paw. And I think the evidence that was presented during the course of the trial showed that Ms. Leeves specifically did not have any knowledge of Mr. Wantou's ethics complaints. There was no evidence presented with regard to that issue. Further, the third coaching actually was a coaching that didn't even have to be relied upon for Mr. Wantou's termination because of the fact that he could be – because of his violation it was subject to second level coaching or termination. And certainly there was no evidence that co-workers were provided any information with regard to [672] his ethics complaint. And so the lack of knowledge of Mr. Wantou's underlying ethics complaints basically demonstrates there was no retaliatory animus, Your Honor, that could be imputed to the company.

THE COURT: Can I ask you, Ms. Waters, for the cite for the case that you mentioned?

MS. WATERS: I have a copy of it here. And I don't have the cite in front of me and I can get that for you, Your Honor.

THE COURT: Any response, Mr. Wantou?

MR. WANTOU: Yes, Your Honor. The ethics complaints do not – I mean the ethics complaints are not the only way that I complained. I complained verbally. I complained directly to Ms. Katy Leeves. And in

fact Ms. Katy Leeves testified, yesterday she testified that I told her that I was not going to be discriminated against. She said that yesterday. So she admitted it herself, so she knew that I had grievances as far as discrimination. And so did the co-workers because they were interviewed back in November of 2015 so that they all knew. They were all aware.

* * *

[673] THE COURT: Ms. Waters?

MS. WATERS: Your Honor, I do have the case [674] cite.

THE COURT: Okay. Yes, please.

MS. WATERS: It is Christopher Zamora vs. the City of Houston, Cause Number 14-20125, Fifth Circuit, August 19, 2015, and it was an appeal from the Southern District of Texas.

* * *

[769] THE COURT: Okay. Be seated, please. Okay. Just to make sure we're all clear on this, we will proceed in the following manner: Let's resolve the instructions issue [770] with respect to the two matters that were previously discussed. On the cat's paw instruction, the request, I don't think there has been any evidence on that and I don't intend to give that instruction, Mr. Wantou. I'll let you make any additional record that you want to make for purposes of any appeal; but I think you have raised the issue and I have decided against you on you that point. But anything in

addition you want to say I'll be happy to hear it. Now would be the time to make that argument.

MR. WANTOU: Your Honor, I don't understand.

THE COURT: So you had asked for an instruction on the cat's paw and I don't think there has been any evidence to support that instruction, so I don't believe the Court should appropriately give that instruction. But I'll be happy to hear anything further you want to say in order to preserve your appeal.

MR. WANTOU: Yes, Your Honor. You are saying I haven't presented evidence that the cat's paw instruction –

THE COURT: Is appropriate.

MR. WANTOU: Okay. I did show that the coachings were made based on allegations made by co-workers. So for example, the first coaching Damon Johnson testified that he came to the pharmacy and he interviewed my co-workers and based on their statements he issued the coaching. So even if Damon Johnson were to allege that he didn't retaliate, he still [771] used statements from co-workers and that would support cat's paw instructions, co-worker's cat's paw.

THE COURT: So the elements of the instruction are that your supervisor was motivated by your complaints and that the decisionmaker relied on those by submitting, say, for example, a negative work evaluation or recommending termination. The second element is that the defendant or the supervisor

intended that the act would cause you to suffer some adverse employment action. And the third element, which is probably I think the element where you can't get there, is that the defendant or the decisionmaker would not have decided to terminate you but for this –

MR. WANTOU: Your Honor, may I?

THE COURT: Hold on just a second. I'm sorry. In other words, I think it is the causation that you have a problem getting to the jury on.

MR. WANTOU: So are you looking at just the terminations or the adverse actions?

THE COURT: I'm sorry. I don't understand your question.

MR. WANTOU: Are you looking at just the termination or the other adverse actions?

THE COURT: The termination.

MR. WANTOU: Okay. The termination, if we are talking about the termination, we have Katy Leeves. She's the [772] one who – the immunizations had been performed the same way, as I've argued throughout the trial. The immunizations had been performed in the same manner. So we have Katy Leeves who starts writing an e-mail to Damon Johnson – to James Jones. And she – Damon Johnson – I'm sorry. James Jones relies on what Katy Leeves says to make his decisions. So without Katy Leeves, if Katy Leeves weren't there, if he was another manager, for example,

if it was Pascal Onyema who had been there before, I would have not been terminated, Your Honor.

THE COURT: All right.

MR. WANTOU: So Katy Leeves had the animus, retaliatory animus against me and James Jones clearly relied on what she said. She said that I reviewed the guidelines, I reviewed the corporate policy and based on those statements James Jones made the decision that he made or maybe along with other people.

* * *

[776] THE COURT: Okay. Let's go on the record. It is a little bit after 1:00 o'clock. We have distributed the final jury instructions and the verdict form. As you'll note, Mr. Wantou, the cat's paw instruction you requested has not [777] been included for the reasons I have previously given. There is likewise not an instruction requested by WalMart on the duty to mitigate damages. Any further comments you want to make with respect to the instructions?

MR. WANTOU: Your Honor, are the objections going to be on record?

THE COURT: The objections you previously made are on the record, yes.

MR. WANTOU: Nothing further.

THE COURT: Okay. Very well. Ms. Waters, anything further?

MS. WATERS: Nothing for the defendant.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU	)	
VS.	)	5:17-CV-00018-RWS-CMC
WALMART STORES TEXAS, LLC)	)	TEXARKANA, TEXAS OCTOBER 28, 2019

TRIAL ON THE MERITS

BEFORE THE HONORABLE
ROBERT WILLIAM SCHROEDER III
UNITED STATES DISTRICT JUDGE

Volume 1

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* * *

[122] commit actions that prevented me from performing my duties as a pharmacist and eventually terminating me.

Who am I? My full name is Yves Gabriel Wantou Deugoue, short Yves Wantou. I was born and raised in the country of Cameroon in West Africa. I'm a naturalized U.S. citizen. I'm a pharmacist, as you all know by now. And besides English I speak several languages among which is French which I speak natively. I speak Bak which is a dialect from Cameroon and I Spanish fluently.

My problems with WalMart: On March 18th of 2015 I'm hired by WalMart to work as a pharmacist at

store Number 131 in Mount Pleasant, Texas. I joined a team of pharmacists compromising pharmacy manager Pascal Onyema, pharmacist Cecilia Elena Popescu. My working and personal relationship with both pharmacists are excellent. But just a few months into my employment I began to constantly receive insults on the part of Caucasian pharmacy technicians based on my race, my color, my national origin and my ethnicity. I started facing illegal harassment by Caucasian pharmacy technicians.

About late June of 2015 pharmacists Cecilia Popescu transfers to another pharmacy and Cecilia is replaced by another pharmacist by the name of Shawn Shannon, a Caucasian pharmacist in late July of 2015. At once pharmacist Shawn Shannon joins the pharmacy he joins the Caucasian pharmacy technicians in the harassment against me and the harassment [123] becomes worse. I repeatedly filed complaints of illegal discrimination and harassment. WalMart claims that it is investigating my complaints, but no action is taken. The illegal harassment based on my race, color, national origin and ethnicity is allowed to continue and after a sham investigation WalMart claims there is no illegal harassment or retaliation against me. The illegal harassment based on my race, color, national origin and ethnicity continues.

In January of 2016 pharmacy manager Pascal Onyema transfers to another pharmacy. He is replaced by another pharmacist by the name Alan Howard Pavia who is made acting pharmacist in charge and this was the first act of clear retaliation by WalMart

against me because WalMart made a clearly less qualified pharmacist active PIC. But I was in the store already. I could have assumed the position of pharmacist in charge especially since the pharmacist who WalMart made pharmacist in charge was clearly less qualified. And as a matter of fact, he didn't last long on the job because of his lack of qualifications.

The illegal discrimination and harassment continues. In February of 2016 acting pharmacist in chief Alan Howard Pavia is replaced by another pharmacist by the name of Katy Leeves as pharmacy manager. And from the time Katy Leeves become pharmacy manager the illegal harassment against me becomes exponentially worse. WalMart retaliated against me through [124] bogus coachings, encouraging Caucasian pharmacy technicians to be insubordinate to me, to make false complaints, to prevent me from completing my task and to prevent me from completing my duties as a pharmacist at the expense of patient safety.

On March 16 of 2016 WalMart alleged that I was coached, but it was never made known to me that I had been coached on March 16 of 2016. And I will prove to you, members of the jury, that this coaching was never issued to me, that there is clear evidence that this coaching could not have been issued to me. I will prove that this coaching was an entire fabrication of WalMart in retaliation for my repeated complaints of discrimination and illegal harassment. I will prove that WalMart through its agents had the intent to illegally retaliate against me by issuing this coaching unbeknownst to me.

On April 25th of 2016 I received a coaching by WalMart immediately after complaining of illegal harassment by Katy Leeves and Caucasian pharmacy technicians. I had also complained of disparate treatment, unequal treatment by Katy Leeves who treated me in a completely unequal manner with respect to Caucasian pharmacist Shawn Shannon. WalMart failed to address my complaint of illegal discrimination and harassment and unequal treatment, but WalMart only responds to my complaint with yet another coaching intended to punish me for complaining.

* * *

[206] Q. Do you personally know who wrote these notes?

A. I don't know who wrote these notes, but it says Jimmy Brimer wrote the notes.

Q. Did you ever make these statements that are recorded on page 67.3 through 67.7 which are the notes you are referring to which are supposed to be written by Mr. Jimmy Brimer?

A. I never ever made the statements that are recorded that are alleged here in Jimmy Brimer's notes.

Q. Now what –

A. Those notes are fraudulent. They're fraudulent. Fraudulent.

Q. Now from October 25th did you take a vacation on October 25th or shortly around there?

A. Yes, sir.

Q. How long were on you vacation?

A. I was on vacation about 10 days about, I think, yes.

Q. And what happened upon your return from vacation?

A. Upon my return I noticed, number one, that I had not been paid as I expected; and I called, contacted James Jones to claim and asked him, basically told him about the problem and he said that he would fix the problem.

Q. How did you contact Mr. Jones?

A. I texted him through text messages.

Q. Did you ever send an e-mail?

A. I also sent him an e-mail through WalMart e-mail

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU,	§	
Plaintiff,	§	
VS.	§	**CIVIL ACTION**
	§	**NO. 5:17-CV18**
WAL-MART STORES, INC.,	§	
Defendant	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S [Doc. 209] MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 20, 2019)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Yves Wantou, R,Ph., Plaintiff in the above-entitled and numbered cause and files this Response in Opposition to Defendant's [Doc. 209] Motion for Summary Judgment, filed by Defendant, Wal-Mart Stores Texas, LLC and would respectfully show the Court as follows:

❖ Introduction:

Defendant, Wal-Mart Stores Texas, LLC (thereafter "Walmart") has moved for summary judgment on Plaintiff's claims of race, color; and national origin discrimination under Title VII and §1981, hostile work environment under Title VII and §1981; retaliation claim under Title VII and §1981; wage under FLSA;

and of quantum meruit under Texas common law. Plaintiff, Yves Wantou (thereafter "Wantou" or "Plaintiff") would show the Court that there is evidence to support several genuine issues of material fact in dispute and that Walmart is not entitled to summary judgment based upon the record before the Court.

❖ Statement of Undisputed Facts

1. Wantou is Black
2. Wantou was born and raised in the country of Cameroon
3. Wantou has dark skin tone
4. Wantou's ethnicity/alienage is African, Cameroon.
5. Wantou has a thick foreign accent
6. Wantou is a non-native speaker of the English language
7. Wantou was at all times material herein qualified for the position of Staff Pharmacist, as attested by Walmart's own yearly evaluation of Wantou[1,2], praise received by Wantou from his Market Health

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[1] Ex Ψ Wantou's FY 16 Performance Evaluation.

[2] Note: Walmart overall Pharmacist Evaluation is an average of the individual performance of the pharmacist and the performance of the pharmacy performance which an individual pharmacist does not have direct control of).

& Wellness Director (MHWD) Steven Williams[3,4], Pharmacy Manger Pascal Onyema's ("Onyema) statements during Onyema's deposition [Onyema stated that he had never observed any deficiency in Wantou's performance[5], that Wantou was a hard worker[6].

❖ Summary of Plaintiff's Argument:

Wantou will show that he meets *prima facie* on all his claims under Title VII and §1981, and will also show that Defendant's proffered legitimate non-discriminatory reasons as to the claims raised by Wantou are fraught with falsity and are mere pretexts to cover illegal discrimination and illegal retaliation. Wantou will also show that outside of Wantou's claims under Title VII, Wantou is owed unpaid wages by Walmart.

❖ BRIEF HISTORY OF PLAINTIFF'S EMPLOYMENT WITH WALMART

Wantou began his employment at Walmart in March 2015, at Walmart Store #131 in Mt. Pleasant, TX. Plaintiff joined a team of pharmacists comprising Pharmacy Manager Pascal Onyema (Black, from

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[3] Ex. Q – E-mail Showing that MHWD Steven Williams Recognized Wantou for Wantou's Work

[4] Ex. R – Notes from MHWD Steven Williams in which Steven Williams Acknowledges Wantou is a Hard Worker

[5] Ex. S – Pascal Onyema's deposition, 32:23 to 33:6, and 38:12-22

[6] Ex. S – Pascal Onyema's deposition, 33:5-6 and 38:19-20

Nigeria) and Cecilia Elena Popescu (Caucasian, from Romania). Plaintiff had a very harmonious and peaceful relationship with both Pascal Onyema ("Onyema") and Cecilia Elena Popescu ("Popescu"). Never had there been any friction between Plaintiff and said pharmacists. At the time Wantou began his employment at Walmart, Store #131 was still reeling from a recent crisis that had seen former Pharmacy Manager Charles Uduma (Black, from Nigeria) be demoted and forced to transfer to another store. In a conversation Wantou had with Uduma, Uduma told Wantou that the reason he had been demoted and forced to transfer to another store was because Caucasian pharmacy technicians Ann Sample ("Sample"), Rayla Edwards ("Edwards"), and Caucasian Pharmacists Katie Leeves, Stony (last name unknown) and Lauren (last name unknown) had "ganged up against him and mobbed him."

At the time Wantou began his employment, Leeves and Edwards had just transferred to newly opened Walmart stores. Very soon after Wantou started working at Store #131, he began to experience the same racial mobbing that had been described to him by Uduma. Namely, Caucasian pharmacy technicians Ann Sample and Wendy Willoughby harassing and mobbing Wantou. In July 2015, Popescu transferred to another store while a new Caucasian pharmacist, Shawn Shannon, was hired at Store #131. From the time Shawn Shannon was hired, things went downhill for Wantou. Wantou began to be subject to a heightened level of harassment from both Caucasian pharmacy technicians and from Caucasian pharmacist

Shawn Shannon. In September 2015, Caucasian pharmacy technician Rayla Edwards transferred back to Store #131 and things spiraled downward. In January 2016, Onyema transferred to another store in a different geographic area Onyema was replaced by Causcasian pharmacist Allan Pavia as Pharmacy Manager. In February 2016, Leeves replaced Pavia as the Pharmacy Manager of Store #131. Upon Leeves taking over the position of Pharmacy Manager, Wantou was told by Uduma: **"Katy Leeves is a racist. She was one of my major problems at that store. I urge you to leave that store or else she will find a way to get you fired and terminated."**[7] Wantou, who had worked peacefully and harmoniously with Pharmacy Manager Pascal Onyema without any single issue and without any single coaching, did not heed Uduma's advice for Wantou to leave the store. Wantou's disciplinary woes at Walmart began virtually immediately upon Leeves arrival.

* * *

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). In the same manner, Defendant's statement, and Johnson's statement in support thereof in his declaration, that "it is not a requirement that associates sign to acknowledge a First Written Coaching" is hearsay for which no exception applies and conclusory (Johnson has provided no evidence whatsoever to support this allegation), uncorroborated, lacks foundation,

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[7] Ex. J – Plaintiff's deposition, 164:18 to 165:9, 165:19 to 166:5

and legally irrelevant (what is legally relevant is to know whether Plaintiff was presented the alleged First Coaching and not whether it is a requirement that associate sign to acknowledge a First Written Coaching).

Furthermore, the fact that Wantou only became aware of the alleged "First Written Coaching" of March 16, 2016 after Wantou"s termination is further corroborated by e-mail sent by Wantou to Buford after Wantou's termination, including an e-mail sent by Wantou to Buford on November 25, 2016[48] in which Wantou says: "Prior to my termination, I had been given coachings that were completely bogus and only stemmed from the animus of pharmacy manager Katy Leeves. On November 9, 2016, you also informed me that I had been given a coaching in March 2016 by an alleged Josh. I was never made aware of this coaching of March 2016 and absolutely do not know who Josh is."

- **The fact that the Alleged First Coaching Was Never Issued to Wantou Makes All Subsequent Coachings Null and Void:**

Defendant itself states that the decision to issue Wantou what Defendant alleges was Wantou's Second Written Coaching came from Johnson[49]. Johnson cannot show that he believed, in good faith, that Wantou should have received a Second Written Written

[48] Ex. C – Plaintiff's Termination Grievance to Health & Wellness Sr. HR Manager Kendra Buford

[49] Doc. 209 at 19, ¶35.

Coaching when he knew fully well that Wantou had never received what Johnson alleged was Wantou's First Written Coaching (which the evidence clearly confirms). In her deposition, Leeves testified that "[Leeves] proceeded with anything [Leeves] always checked with [Leeves'] managers to make sure that

* * *

cannot show that Johnson believed, in good faith, that Plaintiff deserved the coaching Johnson administered to Plaintiff on April 25, 2016.

Defendant's allegation that Leeves met with Techs, Shannon, and Wantou on April 26, 2016 to "address the requirement thay they all act professional in the pharmacy"[82] is completely false. No such meeting ever took place. Even if we assume, *arguendo*, that such a meeting ever took, it still would not address Plaintiff's complaint as Leeves herself, and it still would not address Plaintiff's specific complaint as to Pharmacy Technician Ann Sample, which was totally ignored by Market Health & Wellness Damon Johnson, of whom Plaintiff and Leeves were both direct reports[83].

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[82] Doc. 209 at 20, ¶36

[83] See Ex. P – Plaintiff's Offer Employment Letter from Walmart (showing Staff Pharmacists (just like Pharmacy Managers) are di ret reports of the Market Health & Wellness Director, and not of the Pharmacy Manager)

➢ **COACHING OF JUNE 28, 2016 ALLEGED BY DEFENDANT TO BE "THIRD WRITTEN COACHING"):**

The coaching issued to Wantou on June 28, 2016 (Exhibit O), just like the previous ones, was completely bogus and retaliatory. On June 28, 2018, Leeves issued Wantou a coaching in which she alleged myriad shortcomings, violations, and performance deficiencies on the part of Plaintiff with **no single objective evidence**. The coaching was entirely based on allegations (including allegations of complaints by customers with no single record of any such complaints) and was contradicted by Plaintiff's prior assessment by previous managers and by Katy Leeves herself[84]. Records are replete with praise of Plaintiff's performance from previous managers. Steve Williams, Plaintiff's former Health & Wellness Manager[85]. Exhibit Q shows record indicating that "Steve Williams recognized [Plaintiff] for the work he does." Exhibit R shows another record in which Steve Williams says: *"I agree that based on reports, [Plaintiff' is faster and [has] more experience [than Shawn Shannon] [. . .] There is no disputing that [Plaintiff] is a hard worker."* During Plaintiff's

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[84] Just two months prior to this coating, Katy Leeves had conducted a performance evaluation of Plaintiff in which Katy Leeves rated Plaintiff as a "solid performer."

[85] Staff Pharmacists do not report to the Pharmacy Manager at all: Both Plaintiff and Katy Leeves reported directly to the Health & Wellness Market Director (See Exhibit P: Plaintiff's Offer Letter signed by Plaintiff on March 18, 2015).

deposition, Walmart own counsel stated, regarding Plaintiff's work ethic[86]:

21 And, I mean, I think that – I mean,
22 clearly you have a strong work ethic, and I don't
23 think that was ever challenged while you worked for
24 Walmart, your work ethic.

Pascal Onyema, Store#131 Pharmacy Manager prior to Katy Leeves' arrival stated in his deposition that to his recollection, during the time Onyema worked with Wantou (about one year), Onyema had never observed any deficiency in Wantou's performance[87]. Onyema further testified that Wantouwas a hard worker[88]. Evidence of pretext exists when other supervisors approve the work for which the employee was fired[89]. *Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d 562 (5th Cir. 2011) (*"All of [Plaintiff]'s pilot schedules were approved by Frazer. Wachendorfer concedes that he never criticized Frazer for the schedules, only [Plaintiff]."*). *Id.* at 568. If an employer justifies an adverse action on poor performance, evidence of good performance or lack of evidence showing poor performance allows a jury to find pretext. *Rikabi v. Nicholson.* 262 Fed. Appx. 608 (5th Cir. 2008). "[T]here is nothing on the record, other that Dr. Parker's blanket

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[86] Ex. J – Wantou's deposition, 118:21-24

[87] Ex. S Onyema's deposition, 32:23 to 33:6, and 38:12-22

[88] Ex. S Onyema's deposition, 33:5-6 and to 38:19-20

[89] Leeves' coachings (and therefore Leeves' allegations therein regarding Plaintiff's work) clearly contributed to Plaintiff's termination.

assertion, indicating that [plaintiff] provided substandard patient *care*." *Id.* at 611.

In the coaching of June 28, 2018, Leeves makes allegations of doctor and customer complaints without providing any single record or proof of any such complaints. To support her allegations, Leeves provided nothing more than fabricated allegations **from the very same employees Wantou had repeatedly complained were discriminating against Wantou based on his race, his color and national origin**, with no single independently corroborating evidence. Complaints against an employee lack credibility when they all originate from the same coworker(s). *Vaughn v. Woodforest Bank*, 665 F.3d at 638 (5th Cir. 2011).

* * *

F. App'x 705, 708 (5th Cir. 2004) Terminating an employee at least partially based on his attitude toward the alleged discriminator raises a genuine issue of material fact regarding pretext. *Id.* Leeves' coaching of June 28, 2018 also departed from typical coachings issued to pharmacists[99] in the Walmart Markets subject to the [Doc. 92] Court Order of May 14, 2018, in that said coachings are typically specific and relate to specific misconduct or specific performance issues, as opposed to "all over the place" and erratic allegations of misconduct or performance issues.

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[99] Ex. W: Record of Coatings for pharmacists in Market 492 and Market 64

Just like for the coaching Wantou received on April 25, 2016, Wantou filed a grievance, with Kendra Buford, as to the coaching Wantou received on June 28, 2016, specifically complaining about Leeves' illegally discriminatory and retaliatory animus[100,101]. Once again, Buford told Wantou she would task Shannon Griggs with investigating the matter and that Buford would get back with Wantou after the investigation was completed. **Neither Buford nor Griggs ever got back with Plaintiff.**

➢ **DEFENDANT'S ALLEGATIONS THAT SHANNON GRIGGS RESPONDED TO PLAINTIFF'S COMPLAINTS AND GRIEVANCES:**

Defendant's allegations in ¶¶ 39-40 are absolutely false and are complete fabrications. Griggs e-mailed Wantou **in bad faith faith** on May 13, 2016 through Walmart e-mail system knowing that Wantou was on vacation and could not have access to the Walmart e-mail system outside of Walmart[102]. While outside out of Walmart, Wantou could not access the Walmart e-mail system, and Griggs knew that[103]. As a Regional Market Health & Wellness Director, Griggs had full access and visibility as to Wantou's schedule and had full panoramic view as to Wantou's activities

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[100] Ex. X – Plaintiff's Grievance for Coaching of April 25, 2016

[101] Ex. Y – Plaintiff's Grievance for Coaching of June 28, 2016

[102] Ex. J – Plaintiff's deposition, 203:2 to 205:13

[103] Ex. J – Plaintiff's deposition, 203:21-23.

within Walmart[104]. Furthermore, when Wantou came back from vacation and saw Griggs' e-mail, Wantou immediately responded but Griggs never responded again; which further

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whatsoever of an "update to Buford", further corroborating that Griggs' actions were merely a sham.

Furthermore, in her deposition, Griggs admitted[108] that," to [Griggs'] knowledge", there was no record (neither in front of her nor anywhere else) corroborating the allegation that she "looked into [Wantou's] concerns" as had been asked of her by Buford on April 27, 2016[109] after Wantou's complaint and made grievance to Buford on April 26, 2016[110]. Also completely false is Defendant's allegation[111] that Griggs addressed Plaintiff's concerned on July 12, 2016. There is no record whatsoever corroborating this allegation. In her deposition, Griggs when asked if she had any documentation corroborating that she addressed Wantou's concerns in July 2016, Griggs responded that she did not have said documentation in front of her[112]. Then, when asked if she had said documentation somewhere

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[104] Ex. J. – Plaintiff's deposition, 203:15-23; 204:9-17, 205:9-13

[108] Ex. A – Griggs' deposition, 73:7 to 74:8

[109] Ex. Φ – Complaints by Plaintiff's During Plaintiff's Tenure at Walmart.

[110] Ex. Φ – Complaints by Plaintiff's During Plaintiff's Tenure at Walmart.

[111] Doc. 209, page 23, ¶47.

[112] Ex. A – Griggs' deposition, 106:17-20

else, Griggs responded "I'm not sure. I can't answer that."[113], and then "Because I don't have them in front of me right now, I can't recall that."[114] Walmart has produced no evidence whatsoever corroborating its allegation (and Griggs' allegation) that Griggs ever addressed Wantou's complaint and grievance (for Wantou's coaching of June 28, 2016) submitted to her on June 29, 2016 and grievances in July 2016.

- **TERMINATION:**
  - **WANTOU DID NOT COMMIT VIOLATIONS ALLEGED BY DEFENDANT:**

A) Walmart's allegation that Wantou admitted to have violated the guidelines[115] is completely false. Wamart fails to point out where precisely Wantou admits to have violated the guidelines. The notes made by Jimmy Brimer **are completely fraudulent**[116]. Nowhere in the notes written by Wantou himself does Wantou admit to have violated the guidelines and to have performed vaccinations in contravention of previous instructions[117].

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[113] Ex. A – Griggs' deposition, 106:21-23

[114] Ex. A – Griggs' deposition, 106:25 to 107:1

[115] Doc. 209 at 28, ¶61

[116] Ex. J – Plaintiff's deposition, 250:9-17; Ex. QQ – Plaintiff's Declaration, ¶17

[117] Ex. J – Plaintiff's deposition, 249:7-13 and 249:19-20

B) Walmart alleges that[118]:

"It has now been determined that Plaintiff administered thirty-eight (38) immunizations outside the parameters of the standing order after the meeting on August 26, 2016."

First, assuming, *arguendo*, that Walmart's allegation is true, the Fifth Circuit has clearly stated that an employer cannot justify its employment action based on reasons uncovered after the decision was made or conduct that took place after the decision was made. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 239-40 (5th Cir. 2015). Second, what Walmart fails to state is that Wantou performed more immunizations than any other pharmacist in Wantou's Market, in Wantou's Region, and likely in Wantou's entire Division. While the goal of a pharmacist is to minimize errors, errors are an integral part of the pharmacist profession (most particularly ones that are of no consequence to the patient). Wantou contends that even if Defendant's allegation were true, 38 immunizations is a rather insignificant number with respect to the number of immunizations Wantou performed (nearly 2000 immunizations in the year 2016 alone). Furthermore, a good pharmacist focuses on the "big picture": preventing errors that can cause harm to the patient, instead of focusing on minute details at the expense of allowing grave errors to occur, to the detriment of the patient. In his own store (Store #131), Wantou performed more immunizations than all the other

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[118] Doc. 209 at 29, ¶64

pharmacists (Caucasian) combined. Because of Wantou's immunization efforts, Wantou's store alone accounted for nearly half of the immunizations performed in Wantou's entire Market, and Wantou's store ranked among the top five stores in the whole United States in terms of number of immunizations performed. Third, Walmart fails to state how many immunizations other pharmacists performed and how many they performed outside the Standing Order.

* * *

Plaintiff above. Lack of contemporaneous documentation regarding what was discussed during said meeting creates a genuine issue of material fact. *Burton*, supra; *Laxton*, 333 F.3d at 580; *Evans v. City of Houston*, 246 F.3d 344, 355-56 (5th Cir. 2001). In any event, the fact that Griggs testified in her deposition that she did not recall whether she told Wantou that she wanted Wantou out of Store #131 and demoted to a floater position because she was tired of Wantou's discrimination complaints, clearly creates a strong inference that Griggs indeed made that statement (due to the fact that Griggs herself admitted that the decision to demote a pharmacist is a serious decision which is not made frivolously, and that she also admitted that she was aware that it was illegal to discriminate against an employee for complaining about being discriminated against, which means she would have been aware of the seriousness of such a statement and could not plausibly "not recall"). The very fact that Wantou never received what Walmart alleges was Wantou's First Written Coaching creates a genuine issue of

material fact. The failure to promote Wantou **twice** in favor of two Caucasian American pharmacists who were not more qualified than Wantou is background evidence that also creates a genuine issue of material fact as to Wantou's claim of discrimination under Title VII and § 1981. Defendant's attempts at bolstering evidence after it had already made the decision to terminate Wantou is yet another circumstantial evidence creating a genuine issue of material fact. *Burton, supra.*

Throughout Wantou's employment, Wantou incessantly complained about the fact that Leeves (Caucasian) treated Shawn Shannon (Caucasian) more favorably than Wantou[220] and discriminated against Wantou because of Wantou's race, color, and national origin; about the fact that upper management treated Leeves more favorably than Wantou; and about Leeves racial animus against Wantou[221]. While, as the pharmacy manager, Leeves could not make decisions as to Wantou's termination, Leeves could influence the decision-makers by, e.g. fabricating or eliciting complaints against Wantou. Wantou also repeatedly complained about racial and xenophobic ("chimp", "monkey", "African fart", "little African", . . .)[222] insults (or "you come

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[220] Ex. Φ – Complaints by Plaintiff's During Plaintiff's Tenure at Walmart.

[221] Ex. Φ – Complaints by Plaintiff's During Plaintiff's Tenure at Walmart. (Wantou's Complaint to Buford on April 26, 2016 and to Wantou's Complaint Buford and Griggs on June 29, 2016, Complaint to Buford November 25, 2016)

[222] Ex. J – Plaintiff's deposition: 93:3 to 100:11

from an Ebola infested country") made towards Wantou to no avail. Wantou has demonstrated falsity in the explanation given by Defendant for Wantou's coachings and Wantou's termination. In doing so, Wantou has shown evidence of pretext as to Walmart articulated alleged legitimate non discriminatory reason for Wantou's termination. *Reeves, supra*; *Burdline*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804-805.

➢ CLAIM OF HOSTILE WORK ENVIRONMENT 42 U.S.C. § 2000e & 42 U.S.C. § 1981

To establish a *prima facie* claim of hostile work environment, Plaintiff must show that he: 1) belongs to a protected group; 2) was subjected to unwelcome harassment; 3) the harassment was based on race, national origin, and/or sex; 4) the harassment affected a term, condition or privilege of employment; and 5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *See e.g. Cain v. Blackwell*, 246 F.3d 758, 760 (5th Cir. 2001); *Flowers v. S. Reg'l Physicians Servs. Inc.*, F.3d 229, 235-236 (5th Cir. 2001); *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 353 (5th Cir. 2001); "Harassment affects a 'term, condition, or privilege of employment' if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th. Cir. 2002). In determining whether a hostile work environment exists, the Court must consider "the

frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). "For a hostile work environment to be deemed sufficiently hostile, all the circumstances must be taken into consideration. Discriminatory incidents outside the filing period may be relevant background information to current discriminatory acts: *Id.* at 268.

(1) It has been established, above, that Wantou is a member of a protected group, and for that matter, of more than one protected group. (2) Wantou was clearly subjected to unwelcome harassment. From the time Wantou started working at Walmart, Wantou was constantly harassed by his coworkers who incessantly made insulting and humiliating comments related to Wantou's race and national origin. Wantou, who has the trait of being easily annoyed by flies, was repeatedly told by pharmacy technician Ann Sample that "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country,"[223] "Well, I'm sure where you come from, it's probably fy-infested,"[224] "flies are attracted to dirt. You come from a dirty place, so just deal with it"[225], Wantou was

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[223] Ex. J – Plaintiff's deposition, 96:5-12, 98:14:18, 99:7-12

[224] *Id.*

[225] *Id.*

repeatedly called "chimp" and "monkey" by pharmacy technicians Ann Sample, Wendy Willoughby and Rayla Edwards[226], "African fartt" by Shawn Shannon[227], "you little African" by Shawn Shannon[228]. (3) Said pharmacy technicians and pharmacist would constantly mimic Wantou's accent in a very humiliating manner in front of customers (3) The harassment was clearly based on Plaintiff's race (being repeatedly called "chimp" or "monkey") and Plaintiff's national, origin (dirty children from Africa, Wantou "coming from a dirty place", mimicking of Wantou's accent)[229], 4) the harassment affected a term or privilege of employment: Wantou testified that the harassment was pervasive and continuous[230], that Caucasian pharmacy technicians and Caucasian pharmacist Shawn Shannon would call him racial epithets and mockingly mimic his accent **in front of customers**[231], that when pharmacy technicians would make errors and he would ask them to fix errors in the interest of patient safety, pharmacy technicians would use racial or national origin-based insults against Wantou, making it difficult for Wantou to complete his tasks as a pharmacists, given that the primary role of a pharmacist is to prevent medication

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[226] Ex. J – Plaintiff's deposition, 88:5-15, 99:7-12, 95:9-16, 95:21-25

[227] Ex. J – Plaintiff's deposition, 104:25 to 105:4, 105:9 to 106:8

[228] Ex. J – Plaintiff's deposition, 108:25 to 109:2

[229] Ex. J – Plaintiff's deposition, 97:8-11

[230] Ex. J – Plaintiff's deposition, 89:14-16, 105:20-25

[231] Ex. J – Plaintiff's deposition, 88:13-15

errors. When Wantou would, for example, ask pharmacist Shawn Shannon to add the DEA number to control substance prescriptions (a DEA requirement which Shawn Shannon constantly omitted to comply with), Shawn Shannon would call Wantou "African fart"[232]. Wantou felt very humiliated and dimished by the racial and national origin-based insults made by said Caucasian pharmacy technicians and Caucasian pharmacist Shawn Shannon and it came to the point where Wantou dreaded asking them to do things Wantou was expected, as a pharmacist, to ask them to do, for fear of being humiliated in front of customers, which prevented proper and required collaborative work. Wantou felt severely impeded in his ability to perform his job duties as a pharmacist under those circumstances. 5) Walmart knew and should have known of the harassment because Wantou continuously reported the harassment to then MHWD Steve Williams[233]. Walmart failed to take any remedial action whatsoever, let alone prompt remedial action. After complaining in June 2015 about harassment from pharmacy technicians, Wantou complained again to Steve Williams a month later because the behavior complained about was not being addresse[234]. Wantou testified that Steve Williams did nothing to stop the hostile work environment and was actually part of the "apparatus" whose primary mission was to exculpate the offending

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[232] Ex. J – Plaintiff's deposition, 105:9-13

[233] Ex. J – Plaintiff's deposition, 95:6-16, 102:4-12, 103:3-16, 115:3-11,

[234] Ex. J – Plaintiff's deposition, 102:8-12

Caucasian pharmacy technicians and Caucasian pharmacist Shawn Shannon and reach a bogus and sham conclusion after a sham investigation, that there was no discrimnation[235]. Wantou also testified that Steve Williams could have put an end to the offenders' behavior but he did not[236].

Walmart allegation that Wantou admitted that Wantou admitted that Steven Williams did not discriminate against Wantou[237] is totally false. Nowhere does Wantou make such an admission. In his deposition Wantou stated: "I can't say for sure whether he discriminated against me or not, because while he didn't – I didn't see any active gesture in that sense, I mean, I see that it's – it's evident from the – from what we received that, yes, that he was part of the – part of the – the apparatus that – that exculpated the people that committed discrimination and perpetuated that – that hostile working environment."[238]. Wantou further stated: "[Steve] was part of a – like what I call an 'apparatus' [. . .] whose primary mission was to reach the conclusion that there was no discrimination and they had to justify it in any way they could."[239]. And also: "number one, his investigation was not objective, and he participated in that – in that – in that apparatus, I mean of – to – to exculpate those people who I was

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[235] Ex. J – Plaintiff's deposition, 130:5-12

[236] Ex. J – Plaintiff's deposition, 135:18-24

[237] Doc. 209, at 16,1124; and Doc. 209 at 42

[238] Ex. J – Plaintiff's deposition, 129:17-25

[239] Ex. J – Plaintiff's deposition, 135:7-11

accusing of discrimination."[240] In his deposition, Wantou clarifies that Steve Williams did not discriminate against Wantou in the sense that Williams did not directly retaliate against Wantou[241] by for instance bogously writing up Wantou after Wantou complained but that Williams conclusorily espoused[242] the al legations made, during what was a sham investigation, by the very people Wantou was complaining about (in an attempt to justify their harassment and behavior toward Wantou), even though said allegations contradicted Williams' own statements regarding Wantou's work and performance[243].

Regarding Plaintiff's Ethics Line Complaint, first Defendant erroneously states that complaints made before March 2016 do not fall under the 300 days prior to Plaintiff filing a Charge of Discrimination and that Plaintiff failed to timely exhaust his administrative remedies. Walmart's statement is erroneous. Under the Continuing Violations Doctrine, all complaints made by Plaintiff are admissible as part of Plaintiff's Hostile Work Environment Claim.

The continuing violation theory provides that when a plaintiff alleges a hostile work environment claim, "as

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[240] Ex. J – Plaintiff's deposition, 129:3-8

[241] Wantou also states that the first time it became dear to Wantou that Williams might have in fact retaliated against Wantou was when Williams passed Wantou over for promotion (Ex. A – Plaintiff's deposition: 129:9-16)

[242] Wantou's Ethics Line Complaint of 12/06/15 was made after W

[243] Ex. J – Plaintiff's deposition, 130:12-23

long as an employee files her complaint while at least one act which comprises the hostile work environment claim is still timely, 'the entire time period of the hostile environment may be considered by a court for the purpose of determining liability.'" *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 736 (5th Cir. 2017).

Second, after a **sham investigation** of the very first complaint made by Plaintiff to his former MHWD Steve Williams, Defendant dismissed nearly all of Plaintiff's Ethics Line complaints without investigating them at all and conclusorily alleged that Wanton's allegations were unsubstantiated. Defendant does not explain why it then decided to allegedly "investigate" Plaintiff's complaint made on or about August 16, 2016 (by allegedly making Griggs, Johnson, and Jones come to Wantou's store to "address" said complaint), which was nearly identical to Wantou's complaint of January 11, 2016, which was never investigated. This clearly shows that Defendant's explanation as to why it failed to investigate Wantou's Ethics Line complaints is implausible. See e.g. *Young v. UPS*, 135 S. t. 1338, 1356 (2015) (Alto, J., concurring) ("Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder may infer that the employer's asserted reason for its action is a pretext for unlawful discrimination"). Whether or not Plaintiff detailed with specificity the racial and xenophobic slurs and insults used by the perpertrators in each one of Wantou's complaints, Wantou certainly mentioned that perpetrator continuously discriminated

against Wantou because of Wantou's race and national original. Also the record of Ethics Line complaints, contrary to what Defendant misportrays, does not encompass all complaints made by Wantou.

Third, Defendant violated its own policies by not investigating each one of Wantou's Ethics Line Complaints, purposefully **misconstruing** them and conclusorily assigning a false summary to each one of Wantou's complaints According to Walmart's own Discrimination & Harassment Prevention Field Management Guidelines[244]: "All reports of conduct that potentially violate the Discrimination and Harassment Prevention Policy must promptly and thoroughly be investigated and documented using the Ethics Investigation Process." There is no evidence whatsoever that Wantou's Ethics Line Complaints[245] were ever investigated at all. An employer's failure to follow its own policies or normal practices may be evidence of pretext. *Goudeau*, 793 F.3d at 477; *Russell, supra* (reversing grant of employer's motion for judgment as matter of law based in part on evidence that employer had not followed its own corrective action plan by its own internal procedures); *Pruitt, supra*, ("The failure to investigate this discrepancy, contrary to established policy, is evidence of pretext."). Fourth, the very fact that Plaintiff continuously filed Ethics Line complaints (as well

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[244] Ex. NN – Walmart Discrimination & Harassment Prevention Policy for Field Managers

[245] Excluding the initial sham investigation, which did not pertain to an Ethics Line Complaint anyway, but to a complaints made directly to MHWD Steve Williams

as direct complaints to members of management) and that said complaints were not being responded to, illustrates precisely the fact that Plaintiff was subject to oppressively hostile work environment. Plaintiff has established his *prima facie.*

➢ CLAIM OF RETALIATION
42 U.S.C. § 2000e-3(a) & 42 U.S.C. § 1981

To establish a *prima facie* case of retaliation under Title VII and § 1981, Wantou must demonstrate: (1) he engaged in protected activity, (2) he suffered an adverse employment decision, and (3) a causal link exists between the protected activity and the adverse employment decision. *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 684 (5th Cir. 2001). Title VII protects a

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU, Plaintiff, vs. WAL-MART STORES, TEXAS, LLC, Defendant.	)	Civil Action No. 5:17-CV-00018-RWS-CMC

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ORAL DEPOSITION

YVES WANTOU

May 23, 2018

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* * *

[87] Q. I'm going to hand you what's been marked as deposition Exhibit Number 8.

And this is – it appears to be an email that you sent to yourself regarding a complaint that you had about Ann Sample.

Is that – is this an email that you sent to yourself?

A. Yes.

Q. And did you send this email to anybody else?

A. No, ma'am.

Q. It does note in here that you notified Mr. Onyema about the situation that you address in this email; is that correct?

A. Yes, ma'am.

Q. Okay. And do you recall doing that?

A. Yes, ma'am.

Q. And did you provide Mr. Onyema any additional information other than what you covered in the email that's Bates number 8? Bates number – I'm sorry, Exhibit Number 8.

A. I did.

Q. Okay. You provided them with additional information?

[88] A. I did.

Q. What in addition – what additional information did you provide him in addition to what you noted on Exhibit Number 8?

A. I told him that she had called me "chimps" or "monkey" on a number of occasion.

Q. And that's not contained in this email?

A. I do not see it in this email.

Q. So is there anything else that you believe was discrimination by Ann Sample that you do not contain in this email or the comments about the "chimps" and "monkey"?

A. Yes, because she would mimic my accent in front of customers and mock my accent when I would speak, I mean, to customers, she and Rayla and Wendy.

Q. And this is as of the date June 28, 2015, correct?

A. Yes, ma'am.

Q. Prior to June 28, 2015, it's your testimony that Ann Sample made these comments that you've included in this email and then also called you a "chimp" and a "monkey"?

A. Yes, ma'am.

Q. Okay. And that she and Rayla Edwards –

A. Yes, ma'am.

* * *

[93] of management at Walmart?

A. I am sorry, between what date and what date?

Q. June 28, so the date you complained to Mr. Onyema, according to your email, and the date that you complained to Steve Williams. Was there any other formal complaints, or informal complaints that you made to any members of management?

A. Informal. There were informal complaints, 1 verbal – verbal complaints.

Q. So tell me when you made those complaints.

A. I know I made complaints starting June to Steve – Steven Williams about the – what I believe was discrimination from Ann, Rayla, and Wendy, in July, August, and September.

I wanted to keep things informal in the hope that they could be resolved in an informal way, I mean. But when I – when I decided, basically, that things had reached the point where they needed to be dealt with in a formal matter, that's' when I wrote the letter.

Q. To make sure I heard you correctly, did you say that you complained to Steve Williams in June?

A. Yes.

Q. Was that in addition to your complaint to Mr. Onyema?

[94] A. Yes.

Q. Okay. Was it at the same time?

A. Around the same time.

Q. And that was a verbal complaint?

A. Verbal, yes.

Q. Okay. And did you say July?

A. July, yes.

Q. Was that to Steve Williams?

A. To Steve Williams, yes.

Q. And was that a verbal complaint?

A. Verbal, yes.

Q. And then did you say August?

A. August, yes.

Q. Verbal?

A. Verbal.

Q. And to Steve Williams?

A. Yes, ma'am.

Q. Okay. And then September was verbal?

A. Yes, ma'am.

Q. And to Steve Williams.

And did – the content of the complaints, did they contain the same type of complaints that you have in your email to yourself of June 28th, 2015?

A. You said the same type?

[95] Q. Well, like, the same – because you said it was pervasive.

So did this type of comments continue through that time period?

A. Yes, ma'am.

Q. Okay. So tell me – tell me exactly what it was in June that you complained to Steve Williams about the work environment.

A. I told him that I felt I was being harassed, that I felt I was being treated differently because of my race, the way I speak, the way – where I come from.

And I told him that that's – those pharmacy techs, Rayla and – and Wendy, were using disparaging terms regarding my ethnicity, my race, my national origin, the way I talk, I mean, and that I felt that that needed to be put an end to.

Q. And that was in June?

A. In June. Starting June, yeah.

Q. And what disparaging remarks were they making to you based on your race?

A. We've already – for example, using terms like, "chimp," "monkey," talking about where I come from, Africa, in a – in a disparaging way. I mean, talking about me, I mean, in a disparaging way, in relation to where I come from.

[96] Q. And can you recall any specifics about the statements that they made other – I know you have the specific in the June email, but the ones you made to Mr. Williams, did you provide him any specific details?

A. For instance, there have been a lot of comments because of my – because of me being annoyed by flies. I mean, they said things like, okay, "Well, I'm sure where you come from, I mean, there's – I mean, your – it's probably fly-infested," something like – something of that nature, that where I come from is – is fly –

there's – there's – is fly-infested, so, therefore, I should just deal with it.

Or the comments as to, "Okay, well, flies – flies are attracted by dirt. You come from a dirty place and, therefore, just deal with it."

Q. That comment was made?

A. Yes.

Q. How many flies got into the pharmacy? That's kind of concerning.

A. There was not flies. There were no flies, but that was – that was – they were – I think, as it got hotter, I mean, in May/June, there were a lot of flies in the pharm – I don't know why, but maybe because we have the gardening department next to – next to the pharmacy. So I don't know if it had to do with it.

[97] Q. Any other comments that you can recall?

A. And most people in the pharmacy, they weren't annoyed, I mean, they – but for me, I was very annoyed, I will admit.

Q. Okay. And you're certain that those comments that they made were based – that you took them as being a racial –

A. It's not that I took them, but they made it clear that they were racial. They came to me. They didn't just make that. They came to me and made those comments to me specifically.

Q. And you're saying they made the comments about the flies on more than one occasion?

A. And in what – they would tell me that I came from a dirty place and I should be used to flies. I mean, why – why would that – I mean, in what way would that have – would that not have a racial or national origin connotation?

Q. What date was – did those comments take place?

A. I cannot give you an exact date, but I know it was between May 2015 and June 2015, I mean, when the pharmacy really, really had a lot of flies.

Q. Okay. So the time frame we're talking about with the information you just provided me is that one-month time period, the May to June?

[98] A. With regard to the flies.

Q. Okay. Just the flies.

And what was the specific comment that they made about "chimp"?

A. One – one – one time – usually, it happened – they did not like – unfortunately, we have a job as pharmacists, our job is to verify prescriptions.

If other pharmacists would not do their job, that doesn't mean that I should not do my job. They would expect me to do my job like other pharmacists, maybe not correct the errors that they were making.

And when I would correct the errors, they would insult me, and a lot of their insults would be "chimp," "monkey." I mean, and in what world would that not be a racial connotation? I mean, no. In what world would that not be a racist insult?

Q. And made those comments?

A. Ann and Rayla and Wendy, yeah.

Q. All three of them made those comments?

A. Yes. I know Ann definitely commented me and – and they would make comments of that nature. I mean, and all three of them would make those comments, yeah. And they would act in concert – in concert with each [99] other.

Q. You said they would make derogatory comments about your national origin?

A. Yes.

Q. Anything else other than what you've already testified to?

A. Other than being called a chimp, a monkey, being mocked – my accent being mocked by the three of them or being told that, because I come from a dirty place, I should be used to – I should not have a problem with flies, I mean, I think that's – I mean, they would say those in a pervasive way.

And to me, I mean, I think that's – I would also, when you're – when somebody makes these insults – insults of that nature to you, anything else, you just

kind of try to tune it out. I mean, you just – so, I mean, you don't even pay attention – try not to pay attention.

Q. Okay. So I think you answered my question, but I just needed to know that that's this – the total of the comments that were made during that time period?

A. That's the gist of the comments, yeah.

Q. Okay. And can you recall any other comments that were made by anybody else during that time period that you believe to be discriminatory based on your

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

YVES WANTOU,	§	
Plaintiff,	§	**CIVIL ACTION NO.**
	§	**5:17CV18**
VS.	§	
	§	
WAL-MART STORES	§	**DEMAND FOR**
TEXAS, LLC	§	**JURY TRIAL**
	§	
Defendant	§	

PLAINTIFF'S THIRD AMENDED COMPLAINT

(Filed Sep. 13, 2017)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff YVES WANTOU filing this Plaintiff's Third Amended Complaint and Jury Demand against Defendant, WAL-MART STORES TEXAS, LLC. ("Walmart"), for Race Discrimination, Color Discrimination, Ethnicity, Alienage Discrimination, National Origin Discrimination, Disparate Treatment Employment Discrimination, Hostile Work Environment, Harassment, Retaliation resulting in failure to promote and termination of employment; and an overtime claim under the Fair Labor Standards Act. In support thereof Plaintiff states the following:

I.
PARTIES

1. Plaintiff **YVES WANTOU** is a dark skin toned, Black, male, native of Cameroon, discharged employee

of Wal-Mart Stores, Inc. Plaintiff resides in Camp County, Texas. At all times relevant herein Plaintiff was an employee of Defendant.

2. Upon information and belief, Defendant Wal-Mart Stores Texas, LLC is the registered entity in Texas of Wal-Mart Stores, Inc., doing business as Walmart. Wal-Mart Stores, Inc. is a Delaware corporation with its principal place of business at 702 SW 8th Street, Bentonville,

* * *

of 42 U.S.C.§2000e(f) of **Walmart**.

19. Defendant **Walmart**, is a Delaware Corporation with its principal local place of business in Mt. Pleasant, Titus County, Texas

20. Defendant **Walmart**, was at all times material herein an employer as defined in 42 U.S.C.§2000e(f) for the reasons of: a) having engaged in an industry affecting commerce and b) who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

21. Defendant **Walmart**, is an employer with over 501 employees in 2015 and 2016.

IX.
STATEMENT OF FACTS

22. Plaintiff was hired in March 2015 as a "Staff Pharmacist" by Defendant at the Walmart, Mt. Pleasant, Texas location.

23. Just a few weeks into his employment with Defendant, Plaintiff began to suffer from harassment based on race, color and ethnicity on the pan of pharmacy technicians, most particularly Caucasian pharmacy technicians, who would utter derogatory racial comments, as well as derogatory comments regarding Plaintiff's national original and culture. Plaintiff was repeatedly called "monkey" and "chimp" by some Caucasian pharmacy technicians. Whenever he would ask said pharmacy technicians to perform tasks or point errors they had made in typing prescription directions, they would mimic, ridicule and mock his accent and utter racial slur or derogatory slur referring to his African ethnicity and national origin. As an example of the above illegal harassment referred to above, on or about June 26, 2015, the pharmacy was infested with flies. Plaintiff has the personal trait of getting very annoyed by the presence of flies. Upon noticing how annoyed Plaintiff was due to flies roaming around, Ann Sample, pharmacy technician, made the following comment: "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies." Ann Sample made the above comment in front of other associates. Plaintiff felt very humiliated, illegally harassed and discriminated based on

his national origin. Plaintiff reported the above incident (as well as another incident from the day before in which the same pharmacy technician, Ann Sample, had told him "You monkey like to work like a dog. Of course you're a monkey from Africa") to then pharmacy manager, Pascal Onyema, and specifically complained about feeling harassed and discriminated against based on his national origin. After complaining to the pharmacy manager about being constantly harassed, the harassment only got worse. The harassment by pharmacy technician Ann Sample and other Caucasian pharmacy technicians was so constant and pervasive that it severely interfered with Plaintiff's ability to concentrate on and perform his tasks as a staff pharmacist.

24. On or about July 2015, a new Staff Pharmacist, Shawn Shannon ("Shawn"), was hired at Plaintiff's pharmacy. Shawn was Caucasian and American-born. Upon being hired, Shawn had no or very little experience in retail pharmacy (he recognized this fact himself). He could not perform the basic functions of a staff pharmacist, such as making transfers, taking prescriptions over the phone, counseling patients, "4-pointing" and "visualizing" prescriptions, handling control substances, let alone the intricacies of the "Connexus" software, which is specific to Walmart. In addition, Shawn had very limited knowledge of pharmacy laws and regulations in the state of Texas. Even after 4 months into the job, Shawn was still incapable of independently performing basic pharmacist tasks without assistance. Despite Shawn's inability to perform basic pharmacist

tasks independently, he was treated by pharmacy technicians, most particularly Caucasian ones, as if he were superior to Plaintiff. On or about October 2015, Plaintiff

* * *

highly unfair as Plaintiff believed he had performed far more work both quantitatively and qualitatively than Shawn Shannon. Furthermore, Plaintiff believed that on an absolute basis (not just relative to Shawn Shannon), he had gone above and beyond in terms of performance and work ethics, and that as such it was very unfair for the pharmacy manager to ask both he and Shawn Shannon to rate themselves the same, and in particular to ask Plaintiff not to rate himself above "Strong Performer" (e.g. not to rate himself as "Exceed Expectation).

32. On or about early February 2016, Pharmacist-in-Charge/Pharmacy Manager Allan Pavia was replaced in his position, demoted and moved to another pharmacy due to the performance issues mentioned above. Plaintiff was once against retaliated against by being passed over for promotion within his own pharmacy despite being the senior-most staff pharmacist in his store, which was once again a departure from what was typically done in other stores. Allan Pavia was replaced by Katy Leeves (Caucasian, American-born). While Katy Leeves ("Katy") had worked at Walmart Store #131 in the past, she had transferred from the store to take up a promotion at another store prior to Plaintiff's arrival at the store. When former

Pharmacist-in-Charge Charles Uduma was demoted and forced to transfer to another store, Katy Leeves had benefited herself from being made the interim Pharmacist-in-Charge/Pharmacy Manager of the pharmacy at store #131, a benefit that was, once again, never afforded to Plaintiff.

33. Upon Katy's arrival to the pharmacy as the new Pharmacy Manager, Charles Uduma told Plaintiff: *"Katy is a racist. She was one of my major problems in that pharmacy (pharmacy at Walmart Store #131). She was constantly conspiring with other Caucasian pharmacists, Caucasian pharmacy technicians, especially Ann and Rayla, and Caucasian pharmacy cashiers to gang up against me, which caused my demotion and forced transfer to another pharmacy."* Charles Uduma further gave Plaintiff the following advice: *"You need to transfer to another pharmacy right away. If you stay in that pharmacy, I promise you she will do everything to get you fired if you do anything to oppose her racist nature."*

34. Charles Uduma's characterizations of Katy Leeves, as well as his predictions turned out to be "true to the T." As soon as Katy Leeves assumed the position of Pharmacy Manager in a pharmacy already divided along racial lines, she allied with Shawn Shannon, Caucasian pharmacy technician (chiefly Ann, Rayla and Wendy) and Caucasian cashiers in a quest to get rid of Plaintiff. Katy immediately started encouraging Caucasian pharmacy technicians (particularly Ann, Rayla and Wendy) and Caucasian staff to frivolously complain about and make false allegations about

Plaintiff, and to use any pretext she could find to discipline Plaintiff, while treating Shawn Shannon in a diametrically opposite way and making him her *protegé*. Whenever Plaintiff would oppose her discriminatory and disparate treatment towards him, she would retaliate all the more.

35. Shortly before Katy Leeves took over as the Pharmacy manager, Health and Wellness Market Director Steve Williams had stepped down from his position. Craig Mills (Caucasian, American-born) assumed de facto the interim for the vacant position left by Steve Williams. He did so in conjunction with Damon Johnson (light-skin Black, American-born), who was the Health and Wellness Market Director of another district.

36. Unlike Caucasian pharmacists, Plaintiff did not need a break during his shifts. Plaintiff typically worked long shifts of 10 hours or more without taking a break, as Plaintiff was used to working this way from previous jobs he had held as a pharmacist. Plaintiff had also worked this way under previous Pharmacy Managers at Store #131. Caucasian pharmacists such as Shawn Shannon would abuse the break policy, in addition to abusing the attendance policy. Shawn Shannon would often come late to work, take two 30-minute breaks and in addition take a lunch break of over an hour, while the break policy only allowed for a lunch break of 30 minutes, and would leave work an hour early. When Katy took over as pharmacy manager, she tried to force Plaintiff to start taking breaks. She said it was not fair to her and Shawn if Plaintiff

did not take breaks because it made her and Shawn "look bad." She also claimed that breaks were mandatory, to which Plaintiff responded that if breaks were mandatory and if the pharmacy were to adhere to policies, Shawn should not be allowed to take 1-hour or longer lunch breaks but should limit himself to no more than 30-minute lunch breaks, not to mention the two additional 30-minutes or more breaks, mentioned above, he frequently took. When Plaintiff reported the dispute over breaks to upper management, upper management ruled that breaks were not mandatory. However, Katy gave a completely different version to upper management and claimed that she wanted Plaintiff to take breaks for his own good whereas she had previously told him she wanted him to take breaks because him not taking breaks was not fair to her and Shawn because it "made her and Shawn look bad."

37. Up until Katy's arrival at the pharmacy as the Pharmacy Manager, Plaintiff had never received any coaching from any of the previous managers under which he had worked for nearly a year. Within 4 months of Katy's arrival at the pharmacy as the pharmacy manager, Plaintiff was at Level III of Walmart coaching system, the maximum level before termination. All the coachings received by Plaintiff were in retaliation for Plaintiff asserting his Title VII rights to non-discrimination and non-disparate treatment. The fraudulent, bogus nature, and absurdity of the first coaching (dated on or about March 16, 2016) is abundantly clear from the facts that Plaintiff was not even made aware of this coaching and that the coaching was

allegedly given by a person named Joshua Halcomb, whom defendant does not even know. Plaintiff only found out about this coaching after his termination. It appears that Katy Leeves made every effort to conceal this coaching from Plaintiff because she herself knew the coaching was not legitimate and was purely retaliatory (namely in retaliation for Plaintiff complaining about the events of February 29, 2016 in which blatant disparate treatment was exhibited by pharmacy technician Wendy regarding the manner in which she filled CII drugs with Plaintiff vs with Shawn Shannon). In addition, the fact that the coaching was done by a person who is unknown to the Plaintiff further speaks to the bogus and pretextual nature of the coaching, as it appears Katy Leeves did not have the courage to issue the coaching herself because she knew it was illegitimate and purely stemming from illegal retaliation. Furthermore, if the purpose of a coaching is to correct wrongdoing, not disclosing a coaching to the person allegedly involved in wrongdoing certainly defeats that purpose and is evidence of consciousness of guilt and pretext. Moreover, the coaching mentioned that "pharmacy technicians and pharmacists were interviewed regarding Yves." The pharmacy technicians and pharmacists in question were racially adversarial Caucasian pharmacy technicians Ann, Rayla and Wendy, and Caucasian pharmacist Shawn Shannon whose history of illegal harassment and disparate treatment based on race and national origin could not confer them any credence and credibility whatsoever. Furthermore, on the merits coaching was bogus because:

- Plaintiff was coached for doing exactly what pharmacy manager, Katy Leeves, had told him to do.
- Pharmacy manager Katy Leeves even had Plaintiff sign an acknowledgment in the presence of the Loss Prevention Manager requiring Plaintiff to do the very thing he was coached for.

38. On or about April 19, 2016, Plaintiff, within the normal course of his pharmacist duties, was addressing with pharmacy technician Ann her refusal to fix, upon request by Plaintiff, an error she had made while typing directions for a given prescription. Katy Leeves approached Plaintiff and yelled at Plaintiff "Stop badgering her, stop badgering her with that, stop badgering her, leave her alone. Stop right now. Stop right now **expletive*** Katy Leeves, very unprofessionally, yelled at Plaintiff as loud as she could, in front of Plaintiff's and Katy's mutual subordinates (the pharmacy technicians and the cashiers), and most importantly in front of customers. Not only was she totally unprofessional in displaying such abusive conduct in front of customers, but she also once again treated Plaintiff in a completely disparate manner with respect to Shawn Shannon (Staff Pharmacist, Caucasian, American-born) with whom Plaintiff was similarly situated (both Staff Pharmacists) and even with respect to the pharmacy technicians whom she treated as though they were above Plaintiff. Plaintiff complained about this incident and about Katy's disparate treatment with upper management, which led Damon Johnson and

Craig Mills to visit the store a few days later. Katy made the very false claim to Damon and Craig that she yelled at Plaintiff only to defuse the situation, which was completely false given the tone and manner in which she yelled. In retaliation for Plaintiff's complaint to upper management, instead of addressing the issue of Katy yelling at Plaintiff unprofessionally and in a discriminatory manner, as well as the issue of pharmacy technician Ann refusing to fix an error she had made on a prescription, Plaintiff was issued a coaching for a very unrelated issue: communication with Sean and other associates. This was absurd and pretextual because Plaintiff was the one who had sought to address the issue of communication with Shawn and other associates several times: In an e-mail to Steve Williamson or about October 2015, Plaintiff specifically mentioned that Sean had said "I'm done with Yves," and that whenever Plaintiff spoke with Shawn Shannon, Shawn responded by insulting Plaintiff. Again, on or about November 2015, Plaintiff sent another e-mail to Steve Williams in which Plaintiff said: *"the harassment and hostile work environment impact not only customer service but also effective communication among associates."* Basically, in retaliation for Plaintiff's complaint, he was now being coached about an issue he complained about multiple times, which management failed to address, and which Plaintiff had no control over in light of the ongoing harassment and hostile working environment.

39. On June 27, 2016, Plaintiff again complained about disparate treatment based on his race, color,

ethnicity, and national origin. Katy Leeves retaliated by issuing Plaintiff abroad sweeping coaching, of which if the facts alleged in this coaching were true, they would make Plaintiff the most ineffective and the worst pharmacist, which would totally contradict Plaintiff's annual evaluation given just a couple of months earlier. Katy issued said coaching based on frivolous allegations from adversarial Caucasian pharmacy technicians (notably Ann, Rayla and Wendy). In this coaching, Katy alleged that Plaintiff violated HIPAA in talking to a customer (by allegedly unwarrantedly divulging the name of another patient's medication to said customer) based on allegations by pharmacy technicians and cashiers. However, in the "SCRT report" she filled regarding the alleged event, she admits herself that the technicians and cashiers gave contradictory accounts as to the name of the medication in question. In the "SCRT report," Katy Leeves further makes the false statement that Plaintiff admitted to have divulged to the customer in question the name of another patient's medication in a manner contrary to HIPAA provisions. Furthermore, in the same "SCRT report," Katy submitted testimonies from cashiers and pharmacy technicians regarding the event in which HIPAA was allegedly violated. In her testimony, cashier Kitsha Cannon (Black, American) does not mention any HIPAA violation whatsoever. She does, however, mention the fact that the customer in question made xenophobic and racist remarks to Plaintiff and treated Plaintiff condescendingly due to his national origin by repeatedly saying: "This is not how we do things here in our country, . . I will show you how

we do things here in our country, . . . " in reference to the fact that Plaintiff did not want to sell him 2 boxes of insulin syringes (allegedly for a family member) without proof that the syringes were for legitimate use. Katy completely ignored and failed to address this testimony of racist and xenophobic abuse by a customer toward Plaintiff and conveniently chose to focus on an unfounded allegation of HIPAA violation as a pretext for retaliation.

40. The coaching mentioned in the above paragraph marked the pinnacle of Katy Leeves' abuse and disparate treatment towards plaintiff, and her encouragement of Caucasian pharmacy technicians, cashiers and pharmacist in their harassment of Plaintiff, and in their frivolous and false allegations, in a disparate manner (with respect to Shawn Shannon), regarding Plaintiff. Plaintiff was so severely distressed mentally and emotionally that he could not work for the next 10 days, and was forced to take a leave of absence and seek treatment. This coaching and the events surrounding it are materially adverse under Title VII because they affected Plaintiff's terms and conditions of employment and compensation, as Plaintiff lost income by taking a leave of absence due to the emotional distress he suffered as a result of the harassment and hostile work environment to which he was subjected.

41. At this time, Plaintiff complained to upper management [including Damon Johnson (Light-skin Black, American-born), interim Health Wellness Market Director; Shannon Griggs (Caucasian, American-born), Health and Wellness Regional Market Director; and

Kendra Buford (race unknown), Health and Wellness Divisional Market Director] about the fact that his working conditions were so hostile under Pharmacy Manager Katy Leeves, and the illegal harassment, disparate treatment and discrimination he was subjected to so severe that his working conditions had become intolerable.

42. On or about August 2016, due to persistent rumors that Wendy was on the verge of being made the Lead Pharmacy Technician, Plaintiff filed a complaint with Walmart Ethics in which

* * *

COUNT TWO – DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION 42 U.S.C. §2000e-2 & 42 U.S.C. § 1981 IN THE WORKPLACE AT WAL-MART STORES, INC.

64. Defendant Walmart Stores, Inc. has violated 42 U.S.C. §2000e-2, and 42 U.S.C. §1981.

65. Plaintiff repeats and re-alleges previous paragraphs.

66. Plaintiff is a dark skin toned, Black, native of Cameroon, male

67. Plaintiff has established his prima facia case of disparate treatment employment discrimination.

68. Defendant discriminated against Plaintiff because he is a dark skin toned, Black, native of Cameroon, male.

However, Defendant has not discriminated against similarly situated non-dark skin toned, and/or non-Black, and/or non-Cameroonian. Defendant treated Plaintiff differently than similarly situated non-dark skin toned, non-Black, and non-Cameroonian.

69. Defendant took adverse employment actions against Plaintiff as outlined above. However, Defendant has not taken the same adverse employment action against similarly situated non-dark skin toned and/or non Black and/or non-Cameroonian, employees. Defendant treated Plaintiff differently than similarly situated non-dark skin toned, non-Black, non-Cameroonian employees because of his race, color and national origin.

70. Defendant is a sophisticated employer that is fully aware of its duty to not discriminate against any individual on account of their race, color and national origin. Despite this knowledge, Defendant acted recklessly and without regard to Plaintiff's federally protected civil rights. Plaintiff demands judgment against Defendant for punitive damages.

71. The unlawful employment practices complained of herein were intentional.

72. Plaintiff suffered damages as alleged herein.

COUNT THREE – HOSTILE WORK ENVIRONMENT
42 U.S.C. §2000e & 42 U.S.C. §1981

73. Defendant, Walmart, has violated 42 U.S.C. §2000e, and 42 U.S.C. § 1981.

74. Plaintiff repeats and re-alleges previous paragraphs.

75. Plaintiff is a dark skin toned, Black, native of Cameroon, Africa male.

76. Plaintiff has established his prima facia case of hostile work environment.

77. Defendant, Walmart, knowingly allowed the ridicule, insults, rumors and innuendoes concerning Plaintiff, especially about his dark-skin tone, his race and national origin, false allegations about his work product and reputation, to continue unabated, which contributed to the exacerbation of the hostile work environment.

78. Defendant took no steps to reduce or eliminate the hostile work environment, especially when Plaintiff requested the adverse employment actions, ridicule, insults, rumor and innuendoes to stop. Defendant refused to honor said request; and

79. As a result of Defendant's failure to honor Plaintiff's request, the adverse employment actions, ridicule, insults, rumors, purposefully made false allegations, and innuendoes against Plaintiff and his work product were allowed to flourish at the workplace, to the point where Plaintiff was overwhelmed and exhausted, thereby aggravating Plaintiff's medical condition.

80. Although Defendant knew of the hostile work environment, Defendant took no remedial action to stop the hostile work activities and prevent those types of unlawful activities from occurring in the future.

81. In fact, not only did Defendant not take any remedial action to stop the hostile work environment, Defendant's managers and supervisors encouraged, actively participated in and contributed to the hostile work environment.

COUNT FOUR – RETALIATION
42 U.S.C. §2000e-3(a) & 42 U.S.C. §1981

82. Defendant, Wal-Mart Stores, Inc., has violated 42 U.S.C. §2000e-3(a), 42 U.S.C. §1981, by retaliating against Plaintiff with respect to compensation, terms, conditions, and privileges of employment, failure to promote, and above all by terminating Plaintiff's employment.

83. Plaintiff repeats and re-alleges all previous paragraphs.

84. Plaintiff participated in protected activity. 42 U.S.C. §2000e-3(a); *Byers v. Dall. Mrning News, Inc., 209 F.3d 419, 427-28 (5th Cir. 2000).*

85. In retaliation for Plaintiff's protected activity, on or about December 2015, Defendant passed over Plaintiff for promotion to the position of Pharmacy Manager

* * *

App. 108

No. 20-40284

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YVES WANTOU,

Plaintiff-Appellant Cross-Appellee,

v.

WAL-MART STORES TEXAS, L.L.C.,

Defendant-Appellee Cross-Appellant.

On Appeal from the United States District Court
for the Eastern District of Texas
Hon. Robert William Schroeder III, Judge
Case No. 5-17-CV-18

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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Statement of Interest

Congress charged the Equal Employment Opportunity Commission ("EEOC") with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Appellant Yves Wantou, a black man from Cameroon, alleges that he endured a hostile work environment because of his race and/or national origin. Title VII allows hostile work environment claims based on harassment that was either "severe or pervasive." Nonetheless, the district court required Wantou to demonstrate "severe *and* pervasive" harassment, and held that he could not satisfy this erroneous standard. This holding is reversible error.

Moreover, although Wantou need not prove both severe and pervasive harassment, a reasonable jury could find that he did. A jury could find that multiple coworkers continually called Wantou "chimp" or "monkey," humiliated him by mimicking and mocking his accent in front of customers, and repeatedly made derogatory comments relating to Africa and Africans. Title VII protects individuals from having to work in discriminatorily hostile work environments such as this, even in the absence of physical threats and regardless of whether or not the abuse completely destroyed the plaintiff's opportunity to succeed in the workplace.

The EEOC has a substantial interest in the proper interpretation of the laws it enforces. Accordingly, the EEOC files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

Statement of the Issues[1]

1. Did the district court err by requiring Wantou to show severe *and* pervasive harassment when binding precedent requires him to show only one or the other?

2. Could a reasonable jury find that Wantou endured severe and/or pervasive harassment, even in the absence of a physical threat, where multiple coworkers continually called him a "chimp" or "monkey," "constantly" mimicked and mocked his accent in front of customers, and "repeatedly" called him names and made derogatory comments about Africa and Africans?

Statement of the Case

A. Statement of Facts[2]

Wantou is a black man from Cameroon. ROA.52; ROA.54. In March 2015, Wal-Mart hired him as a staff pharmacist at a store in Mount Pleasant, Texas. ROA.54. The job description stated that Wantou would be responsible for providing pharmaceutical care to customers, ensuring compliance with company and regulatory requirements, and "modelling], enforc[ing], and provid[ing] direction and guidance" to pharmacy technicians. ROA.4204. Although the lab technicians

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[1] The EEOC takes no position on any other issue in this case.

[2] As required on summary judgment, the EEOC relates these facts in the light most favorable to Wantou, drawing all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Badgerow v. REJ Props., Inc.*, 974 F.3d 610, 616 (5th Cir. 2020).

were "theoretically" under Wantou's report, ROA.4155, Wantou testified that they "acted as if . . . I was actually under their report." ROA.4155. His job description did not describe any duties connected to hiring, firing, or discipline of personnel. ROA.4204.

From the outset of his employment, Wantou testified, three of the white technicians—Ann Samples, Rayla Edwards, and Wendy Willoughby—"repeated[ly]" and "continuous[ly]" subjected him to racist comments. ROA.4152; ROA.4602. When he corrected their lab errors, he testified, they would often insult him by calling him "chimp" or "monkey." ROA.4155. "All three of them would make those comments," he said, "[a]nd they would act in concert . . . with each other." ROA.4155. They also regularly "mimic[ked]" and "mock[ed]" his accent in front of customers. ROA.4152. He testified that they made "a lot of comments" about his negative reaction to flies, saying things like "Well, I'm sure where you come from . . . it's probably fly-infested . . . so, therefore, I should just deal with it," and "[F]ies are attracted by dirt. You come from a dirty place and, therefore, just deal with it." ROA.4154-55.

Samples, Edwards, and Willoughby made these comments "so pervasive[ly]," Wantou testified, "that it would be difficult for me to pinpoint a particular time because that happened on a continuous basis." ROA.4152; *see also* ROA.4153 (similar). If he had taken notes on each incident, he added, "I would have probably a pile of emails that could not even be contained . . . in any of the bags that I have." ROA.4153.

In July 2015, Wal-Mart hired Shawn Shannon as a new staff pharmacist. ROA.4156. Shannon, too, was white. ROA.4617. Wantou testified that until Shannon arrived, only Samples, Edwards, and Willoughby insulted him based on his race and national origin. ROA.4156; ROA.4610. However, he said, Shannon "aligned himself with those techs, and he would act in concert with them." ROA.4156. "Multiple times," he testified, Shannon would call him "[y]ou African fart" and "you little African." ROA.4156-57. Shannon's behavior, Wantou testified, "emboldened" Samples, Edwards, and Willoughby to "persevere in that behavior that they were displaying towards me." ROA.4156. Their behavior "wasn't . . . being addressed," he said, "and it was getting worse every day." ROA.4156. Wantou observed that Samples, Edwards, and Willoughby "routinely" treated Shannon with more deference, support, patience, and goodwill than they showed him. ROA.4224.

Wal-Mart's employee handbook directs employees who experience harassment "to report the incident to management through the Open Door process or contact Global Ethics." ROA.4254. In accordance with this policy, Wantou made multiple verbal complaints over the course of three months to pharmacy manager Pascal Onyema and to Market Health and Wellness Director Steven Williams. ROA.4153-54. "I wanted to keep things informal," he testified, "in the hope that they could be resolved in an informal way. . . ." ROA.4153.

In late September or early October, Shannon stopped speaking to Wantou altogether. ROA.4157.

This put an end to Shannon's insults, but it also meant that Wantou was unable to communicate with Shannon when a problem arose. ROA.4157. "I can't do my job," he testified, "in a context where I can't talk to another pharmacist." ROA.4157.

Feeling he no longer had a choice, Wantou decided that "things had reached a point where they needed to be dealt with in a formal manner." ROA.4153. He emailed Williams to protest his increasingly hostile work environment. ROA.4148. After a month had passed with no response, Wantou emailed Williams again in early November reiterating his complaints. ROA.4158-59. Williams investigated and concluded that he could not substantiate Wantou's allegations. ROA.4160-63.

Wantou then filed a formal Global Ethics Complaint. ROA.4161; ROA.4164. Once again, he alleged that "people . . . committed discrimination and perpetuated . . . that hostile work environment." An investigation of this new complaint also failed to substantiate Wantou's allegations. ROA.4162. Over the course of several months, Wantou filed a total of eight internal, formal complaints. ROA.4192.[3] None of these complaints caused Wal-Mart to re-investigate the hostile work environment claim.

An April 2016 internal complaint concerned Katy Leeves, who took over as pharmacy manager after

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[3] The parties dispute which, if any, of these complaints addressed his allegedly hostile work environment. *Compare* ROA.4120-21 (Mot. for S.J.) *with* ROA.6888-91 (Opp. to S.J.).

Onyema transferred to another store in January 2016. ROA.4172. Another employee who had previously worked with Leeves told Wantou that Leeves, who was white, was a "racist." ROA.4171-72. According to Wantou, "his prediction turned out to be true." ROA.4172.

In his April 2016 complaint, Wantou said that once when he was reprimanding Samples for having made a mistake with a prescription, Leeves yelled at him in front of customers, as loudly as she could, "Stop badgering her, stop badgering her with that, stop badgering her, leave her alone. Stop right now Stop right now." ROA.4621. Wantou never saw Leeves treat Shannon or any other pharmacist in that manner. ROA.4176. He explained that her behavior toward him in front of pharmacy staff "and, most importantly, customers" made him feel "highly humiliated and made to be inferior." ROA.4621.

"Such unprofessional conduct in front of customers," Wantou told Wal-Mart, "is highly detrimental to our operations as a business as it gives customers a very negative image of the pharmacy manager normally responsible for displaying the best possible image." ROA.4621. By not addressing Leeves's conduct, Wantou said, Wal-Mart "could have just emboldened her, just encouraged her to do that even further." ROA.4177.

In November 2016, Wal-Mart terminated Wantou for administering vaccines outside the minimum age requirement. ROA.10756. Wantou filed a charge of discrimination with the EEOC, alleging discrimination on

the basis of race, color, national origin, and retaliation. ROA.4229. He stated that he had been subjected to a hostile work environment and explained, "I reported to upper management several times that pharmacy techs made jokes about my accent, treated me differently than Caucasian Pharmacist, constantly harassed me, and made disparaging remarks about my culture and National Origin, to no avail." ROA.4229.

After receiving a notice of right to sue, Wantou filed this Title VII lawsuit. ROA.1. He alleged in relevant part that Wal-Mart was liable for allowing a discriminatory hostile work environment. ROA.677. Wal-Mart moved for summary judgment, arguing that Wantou did not complain of severe or pervasive harassment. ROA.4119. Additionally, Wal-Mart asserted that only one of Wantou's complaints mentioned a hostile work environment. ROA.4120-21. Acknowledging its responsibility "to take immediate and appropriate corrective action," ROA.4119, Wal-Mart maintained that it had responded appropriately by fully investigating all of Wantou's allegations. ROA.4119; ROA.4120-4121.

Wantou opposed summary judgment, arguing in relevant part that being "constantly harassed by his coworkers who incessantly made insulting and humiliating comments related to [his] race and national origin" did constitute severe or pervasive harassment. ROA.6887. Moreover, Wantou argued, Wal-Mart did not respond appropriately to his complaints because it "failed to take any remedial action whatsoever, let alone prompt remedial action." ROA.6888.

B. District Court's Decision

The district court granted summary judgment to Wal-Mart on Wantou's hostile work environment claim. ROA.10810. According to the court, "Title VII 'was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace.'" ROA.10809 (quoting *Brooks v. Firestone Polymers, L.L.C.*, 70 F. Supp. 3d 816, 857 (E.D. Tex. 2014), *aff'd*, 640 F. App'x 393 (5th Cir. 2016)). "[T]herefore[,] conduct that only 'sporadically wounds or offends but does not hinder' an employee's performance is not actionable." ROA.10809 (quoting *Brooks*, 70 F. Supp. 3d at 857).

The district court acknowledged that Wantou was "constantly" harassed on the basis of his race and national origin. ROA.10807. However, it said, "the incidents involved no physical threat [and] there is nothing in the record showing the alleged harassment was so severe as to affect the terms or conditions of Plaintiff's employment." ROA.10810. Thus, the court concluded, "the conduct cited by Plaintiff, even when taken in its totality and viewed in the light most favorable to his case, falls short of the standard required for finding a hostile work environment in the Fifth Circuit." ROA.10809 (citing *Frazier v. Sabine River Auth. La.*, 509 F. App'x 370, 374 (5th Cir. 2013), and *Rudolph v. Huntington Ingalls, Inc.*, No. 1:06CV820, 2011 WL 4350941, at *12 (S.D. Miss. Sept. 15, 2011)). The court noted, but did not address, Wal-Mart's argument that it should not be held liable because it investigated

each complaint and took prompt remedial action. ROA.10808.

Argument

The district court misstated and misapplied the standard for an actionable hostile work environment under Title VII.

Title VII prohibits discrimination in the "terms, conditions, or privileges of employment" based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). For coworker harassment to create a hostile work environment in violation of Title VII, an employee must show: "(1) [he] is a member of a protected class; (2) [he] suffered unwelcomed harassment; (3) the harassment was based on [his] membership in a protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment and failed to take prompt remedial action." *West v. City of Hous.*, 960 F.3d 736, 741 (5th Cir. 2020) (internal citation and quotation marks omitted); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (explaining different liability standards for supervisor versus coworker harassment); *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 321-22 (5th Cir. 2019) (same).[4]

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[4] It is unclear whether Samples, Edwards, and Willoughby were Wantou's coworkers or his subordinates for Title VII purposes, because the record lacks any indication that he had the authority to discipline them. Either way, courts generally apply the

Here, the parties dispute the fourth element of this test—whether the alleged harassment was sufficient to "affect[] a term, condition, or privilege of [Wantou's] employment." *West*, 960 F.3d at 741. For the following reasons, a reasonable jury could find that it was.

A. The district court wrongly required Wantou to show both severe and pervasive harassment.

Title VII does not prohibit all negative interactions among employees. "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). Only when a workplace "is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, [is] Title VII violated." *Harris v. Forklift Sys., Inc.*, 510 U.S.

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same "knew or should have known" standard governing coworker harassment to subordinate harassment. *See, e.g.*, *Franchina v. City of Providence*, 881 F.3d 32, 50 (1st Cir. 2018) (district court properly admitted evidence showing that management-level employees knew or should have known plaintiff's subordinates were sexually harassing her but failed to take prompt and appropriate corrective action); *Stewart v. Rise, Inc.*, 791 F.3d 849, 860 (8th Cir. 2015) (plaintiff who was harassed by subordinates must show that employer "knew or should have known of the harassment" and "failed to take proper action").

17, 21 (1993) (internal citations omitted). Whether conduct qualifies as sufficiently "severe or pervasive" to support liability is a fact-specific inquiry, turning on "all the circumstances." *Id.* at 23.

Contrary to law, the district court required Wantou to show both severe *and* pervasive harassment. ROA.10809. As this Court has noted repeatedly, the "severe or pervasive" standard "is stated in the disjunctive." *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163 (5th Cir. 2007); *see also Harris*, 510 U.S. at 21 ("severe or pervasive"); *Harvill v. Westward Comm'ns, L.L.C.*, 433 F.3d 428, 434 (5th Cir. 2005) ("In requiring Harvill to establish that the conduct was both severe *and* pervasive, the district court applied the wrong legal standard.").

This Court has explained the "severe or pervasive" standard as follows: "An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment. . . . Frequent incidents of harassment, though not severe, can reach the level of 'pervasive. . . .'" *Lauderdale*, 512 F.3d at 163. Severity and pervasiveness operate on a sliding scale. "Thus, 'the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.'" *Id.* (citation omitted).

To determine whether harassment is sufficiently "severe or pervasive" to violate Title VII, a court must consider the "totality of the circumstances." *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007); *see also Harris*, 510 U.S. at 23 ("[W]hether an

environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."). Relevant factors may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. The employee's psychological response may also be relevant. *Id.* at 22. Nonetheless, "no single factor is required." *Id.*

B. The district court erred in finding that Wantou endured neither severe nor pervasive harassment, when in fact a reasonable jury could find both.

The district court acknowledged that Wantou "was constantly harassed by his coworkers 'who incessantly made insulting and humiliating comments related to [his] race and national origin.'" ROA.10807; *see also* ROA.10808 (harassment was "pervasive and continuous"). Wantou testified that these incidents "were so pervasive that it would be difficult for me to pinpoint a particular time because that happened on a continuous basis." ROA.4152; *see also* ROA.4153 (similar). This evidence, standing alone, is sufficient to allow a reasonable jury to conclude that Wantou endured "pervasive" harassment on the basis of his race and/or national origin, warranting denial of summary judgment. *See Harvill*, 433 F.3d at 436 ("Harvill's assertions that she was touched 'numerous times' instead of providing exact dates or the exact number of instances do not

render her allegations so conclusory that they fail to create a genuine issue of material fact."); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (same principle).

Moreover, the district court failed to recognize that likening a black person to an animal is an especially heinous form of harassment. Samples, Edwards, and Willoughby "continuous[ly]" called Wantou "chimp" or "monkey." ROA.4152; ROA.4155; ROA.4602. This Court has repeatedly recognized that "monkey" is an "inflammatory racial epithet[]." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007); *see also Henry v. CorpCar Servs. Hous., Ltd.*, 625 F. App'x 607, 612 (5th Cir. 2015) ("[I]ntentionally comparing African-Americans to apes is highly offensive such that it contributes to a hostile work environment."); *Abner v. Kan. City S. R.R. Co.*, 513 F.3d 154, 168 & n.74 (5th Cir. 2008) (recognizing "racially derogatory" nature of monkey comparison); *Allen v. Potter*, 152 F. App'x 379, 382-83 (5th Cir. 2005) (jury could find severe or pervasive harassment from comments such as "[l]ook at the monkeys" and "[d]on't feed the monkeys"); *Walker v. Thompson*, 214 F.3d 615, 619-22 (5th Cir. 2000) (jury could find severe or pervasive harassment based in part on comparisons to monkeys), overruled in part on other grounds by *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Other courts concur. For example, the Sixth Circuit has noted the "prevalent" stereotype of African Americans as animals or monkeys, and has observed the "obvious" racial implications of such comparisons.

United States v. Jones, 159 F.3d 969, 977 (6th Cir. 1998). The Fourth Circuit has explained, "[t]o suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001); *see also Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303 (11th Cir. 2012) (African American "certainly could find racist and demeaning" the placement of banana peels on his delivery truck); *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) ("Primate rhetoric has been used to intimidate African-Americans and monkey imagery has been significant in racial harassment in other contexts as well.").

The district court wrongly relied on an unpublished opinion to diminish the impact of such severe and offensive language, and did so without fully understanding the facts of that case. *See* ROA.10809 (citing *Frazier*, 509 F. App'x at 374). Mistaking this Court's summary of the evidence as a complete picture of the facts, the district court interpreted *Frazier* as "holding that a co-worker's use of the words '[n****er]' and 'Negreet,' in plaintiff's presence, as well as a co-worker's 'noose gesture,' were not severe or pervasive enough to establish a *prima facie* case for hostile work environment." ROA.10809. But, as the *Frazier* Court was aware when it affirmed the award of summary judgment, the "total record" before the district court revealed a more complex factual picture. 509 F. App'x at 374.

According to the district court's decision in *Frazier*, the coworker who used the n-word in Frazier's presence immediately apologized to him, and the coworker who discussed the town of Negreet never used the n-word. Moreover, Frazier stated that he knew his coworkers were "joking with themselves" when one of them made a noose and acted as if he was going to put it around a white coworker's neck. *Frazier v. Sabine River Auth.*, No. 11-00778, 2012 WL 2120731, at *4-*5 (W.D. La. June 11, 2012). Thus, Frazier alleged only a few offensive incidents, all of which were tempered by circumstances specific to that case.[5]

Here, in addition to the egregious comparisons to chimps and monkeys, Samples, Edwards, and Willoughby made "a lot of comments" about Wantou's negative reaction to flies, telling him that Africa was "probably fly-infested" and "a dirty place," so he should just deal with it. ROA.4154-55. They also "constantly" mimicked and mocked Wantou's accent in front of customers. ROA.4152. *See Dimanche v. Mass. Bay Transp. Auth.*, 893 F.3d 1, 9 (1st Cir. 2018) (mimicking and mocking Haitian accent is evidence of racial harassment under 42 U.S.C. § 1981); *Galdamez v. Potter*, 415

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[5] We note that, depending on context, a jury could find even a handful of references to the n-word and/or a noose to be "severe." *See Vess v. MTD Consumer Grp., Inc.*, 755 F. App'x 404, 408 (5th Cir. 2019) (n-word is "perhaps the most offensive and inflammatory racial slur in English . . . a word expressive of racial hatred and bigotry") (quoting *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001)); *see also Lauderdale*, 512 F.3d at 163 (the more severe the harassment, the fewer instances are required).

F.3d 1015, 1023-24 (9th Cir. 2005) (offensive comments about Honduran accent is evidence of national-origin harassment); *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-801 (8th Cir. 2003) (mocking of Hispanic employee's accent is evidence of national-origin harassment); *cf. Mayorga v. Merdon*, 928 F.3d 84, 93-95 (D.C. Cir. 2019) (evidence that decisionmakers mocked plaintiff's accent could support finding that denial of promotion was discriminatory).

Here, the mimicking and mocking was especially offensive because it occurred in front of customers. As Wantou explained when he complained about Leeves's harassment, "unprofessional conduct in front of customers is highly detrimental to our operations as a business as it gives our customers a very negative image of the pharmacy manager normally responsible for displaying the best possible image." ROA.4621.

Moreover, Shannon—Wantou's fellow pharmacist—emboldened and amplified the coworkers' harassment. Shannon called Wantou an "African fart" and "you little African" on "multiple" occasions. ROA.4156-57. Eventually, he stopped speaking to Wantou altogether, making it harder for Wantou to do his job. ROA.4157; *cf. Harris*, 510 U.S. at 23 (court may consider frequency of challenged conduct and whether it "unreasonably interferes with an employee's work performance").

C. The district court erred by treating the most egregious harassment cases as if they establish a baseline for recovery under Title VII.

Notwithstanding the Supreme Court's instruction that "no single factor is required," *Harris*, 510 U.S. at 23, the district court wrongly emphasized that "the incidents involved no physical threat." ROA.10810. The court relied on a non-binding district court opinion for its apparent assumption that this factor is of special importance. ROA.10809 (citing *Rudolph*, No. 1:06CV820, 2011 WL 4350941). *Rudolph*, however, sheds no light on the proper interpretation of Title VII. There, the plaintiff produced evidence of graffiti saying, "Kill all [n****ers]" and "You don't have to use a rope to kill a [n****er]. There's a truck and a chain." *Rudolph*, 2011 WL 4350941, at *11-*12. Remarkably, the district court in *Rudolph* held that this graffiti did not constitute a physical threat. This Court dismissed the pro se appeal for lack of jurisdiction, Order, *Rudolph v. Huntington Ingalls, Inc.*, No. 12-60157 (Aug. 15, 2012), and never had the opportunity to correct the district court's errors.

Physical threats may certainly support the existence of a hostile work environment, but they are not indispensable elements of such a claim. What matters is only whether the offensive conduct is sufficiently severe or pervasive, viewed as a whole, to create an abusive work environment. *See Harris*, 510 U.S. at 23 ("no single factor is required"); *Hockman v. Westward*

Commc'ns, LLC, 407 F.3d 317, 325 (5th Cir. 2004) (same).

In ruling or implying that physical threats are required to establish a hostile work environment claim, the district court assumed, incorrectly, that the most egregious cases and conduct set the baseline for actionable harassment. To the contrary, prior cases involving "appalling conduct . . . merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Harris*, 510 U.S. at 22; *see also id.* at 19, 23 (remanding for further proceedings where allegations included sexual innuendos, jokes, and insults, but not physical threats); *Jones v. UPS Ground Freight*, 683 F.3d at 1303 n.49 ("Although the incidents of harassment in *Green* were greater in number than in the present case and were directed personally at the plaintiff, we are mindful that 'appalling conduct alleged in prior cases' does not 'mark the boundary of what is actionable.'") (quoting *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2d Cir. 2000)); *Wooten v. Fed. Express Corp.*, 325 F. App'x 297, 303 n.20 (5th Cir. 2009) (per curiam) (endorsing Second Circuit's observation that "[p]rior cases . . . do not 'establish a baseline' that subsequent plaintiffs must reach in order to prevail") (quoting *Schiano v. Quality Payroll Sys.*, 445 F.3d 597, 606 (2d Cir. 2006)).

We acknowledge that, in dicta, this Court has stated that "Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d

191, 194 (5th Cir. 1996). In *Weller*, however, the plaintiff complained only that her supervisor gave her an excerpt from a book that she found offensive: "an isolated incident in an otherwise satisfactory work relationship." *Id.* at 194 n.5. By any measure, the relatively mild conduct alleged in *Weller*, which only occurred once, was neither severe nor pervasive.

Because of this factual context, the *Weller* Court did not address the tension between its statement and the *Harris* Court's pronouncement that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris*, 510 U.S. at 21 (quoting *Mentor Say. Bank v. Vinson*, 477 U.S. 57, 64 (1986)); *see also Gardner*, 915 F.3d at 325 (same, citing and quoting *Harris*). As the Supreme Court has explained, "even without regard to . . . tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." *Harris*, 510 U.S. at 22.

Conclusion

The district court wrongly required Wantou to show both severe and pervasive harassment, although the law requires him to show only one or the other.

Nonetheless, the evidence in this case would allow a reasonable jury to find that he was subjected to both, and the district court erred in ruling otherwise.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,464 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

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Certificate of Service

I, Gail S. Coleman, hereby certify that I filed the foregoing brief electronically in PDF format with the Court via the ECF system on this 28th day of December. I further certify that I served the foregoing brief electronically in PDF format through the ECF system this 28th day of December to all counsel of record and to Yves Wantou, Plaintiff-Appellant Cross-Appellee.

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