No. 15-1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KATHLEEN BURNS,
Plaintiff-Appellant,

v.

JEH JOHNSON, Secretary, U.S. Department of Homeland Security, Transportation Security Administration, DAVID JOHNSON, Supervisory Air Marshal, in his individual and official capacities,
Defendants-Appellees.

APPEAL FROM AN ORDER ENTERED FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON

BRIEF OF AMICUS CURIAE MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The Amicus, the Massachusetts Employment Lawyers Association, is a nonprofit organization that has no parent corporations and does not issue stock.

INTEREST OF AMICUS CURIAE[1]

The Massachusetts Employment Lawyers Association ("MELA") is a voluntary membership organization of more than 180 lawyers who regularly represent employees in labor, employment, and civil rights disputes in Massachusetts. MELA is an affiliate of the National Employment Lawyers Association (NELA), a membership organization with 69 circuit, state and local affiliates and more than 4,000 lawyers who regularly represent employees in such disputes. NELA is the largest organization in the United States whose members litigate and counsel individuals, employees, and applicants with claims arising out of the workplace. As part of its advocacy efforts, MELA has filed numerous Amicus Curiae briefs in employment matters involving state anti-discrimination law, singly or jointly with other Amici. The interest of MELA in this case is to protect the rights of its members' clients by ensuring that courts properly apply the summary judgment standard in employment cases, fully consider circumstantial

[1] This brief is conditionally submitted pursuant to Fed. R. App. P. 29, subject to leave of court. None of the parties' counsel has authored this brief in whole or in part. Neither the parties nor their counsel have contributed money that was intended to fund the preparation or submission of the brief. No persons other than the Amicus Curiae, its members, or its counsel have contributed money or services that were intended to fund the preparation or submission of the brief.

evidence of discrimination, and apply the correct standard for hostile work environment claims.

STATEMENT OF FACTS

MELA adopts the statement of facts presented by the Plaintiff.

SUMMARY OF ARGUMENT

MELA urges the Court to vacate and reverse the District Court's grant of summary judgment dismissing Plaintiff-Appellant Kathleen Burns' ("Plaintiff-Appellant" or "Ms. Burns") gender discrimination and hostile work environment claims.

Gender discrimination in the workplace is often subtle and based on unconscious biases arising from preconceived notions and stereotypes about the role of women in positions of authority. This case exemplifies the gendered roles and stereotypes faced by women in their jobs. It involves the rapid demotion of Ms. Burns, a woman with an excellent performance history in a male-dominated workplace and a mother of five small children who worked an alternative schedule (nights and weekends when her mostly male colleagues did not want to work). Notwithstanding her alternative schedule, Ms. Burns worked on her personal time to ensure that she was available for her (again, mostly male) colleagues. However, a new male supervisor, Supervisory Air Marshal in Charge ("SAC") Dave Johnson, demeaned and diminished her from the first day he met her, and singled

her out and questioned her about her work hours, including her work on personal time. Within weeks of meeting her, SAC Johnson stripped Ms. Burns of almost all substantive responsibility and reassigned her work to a group of male employees. His stated reasons: to ensure that "she" was not perceived as in control and to promote the men's "leadership" skills. SAC Johnson also asserted his power over Ms. Burns, his female subordinate, by wielding a baseball bat in every interaction with her, but failed to treat male subordinates similarly.

The District Court erred in serving as a gatekeeper to this substantial record of circumstantial evidence of discrimination. Direct evidence of discrimination is rarely available in employment cases. Under either the McDonnell Douglas burden-shifting framework or the Desert Palace mixed motive analysis, which are both at issue here, circumstantial evidence, including evidence of unconscious bias and stereotypes, is sufficient to demonstrate that a decisionmaker acted with discriminatory intent in making an adverse employment decision against an employee. Furthermore, on summary judgment, the court's role is not to resolve factual disputes as the factfinder, but rather it must view the record in the light most favorable to the plaintiff and draw all reasonable inferences in her favor to determine whether a jury could reasonably infer that an adverse employment action was motivated by gender bias. A jury could most certainly infer that gender bias motivated the reassignment of Ms. Burns' responsibilities.

Viewing the evidence in the light most favorable to Plaintiff-Appellant and drawing all reasonable inferences in her favor, there is ample evidence in the record for a jury to reasonably infer that SAC Johnson stripped Ms. Burns of her responsibilities at least in part because of gender discrimination, which satisfies both the McDonnell-Douglas burden-shifting framework and the mixed-motive standard. The District Court erred in concluding otherwise. Although the District Court paid lip service to the principle of reliance on circumstantial evidence, it improperly disregarded evidence that the stated rationale for stripping Ms. Burns of her responsibilities was based on discriminatory comments and stereotypes and "weaknesses, implausibilities, inconsistencies, or contradictions" and therefore pretextual, and discounted objective evidence of differential treatment and gender bias, including direct observations made by Ms. Burn's co-workers and supervisors. The District Court's erroneous reasoning ratcheted up the Plaintiff-Appellant's burden by effectively requiring her to present direct evidence of discrimination, which is not required, to survive summary judgment. Furthermore, the District Court impermissibly weighed the evidence and resolved factual disputes in favor of the Defendant.

The District Court also improperly articulated and applied the standard for a gender-based hostile work environment claim. The District Court misquoted the standard and repeatedly stated that the Plaintiff was required to show that her

supervisor's conduct was both "severe and pervasive," rather than "severe or pervasive." Compounding its error, the District Court also erroneously suggested that improper sexual remarks or innuendo were a necessary component of the proof required to sustain a hostile work environment claim. The District Court limited Ms. Burns' claim to one aspect of the record – SFAM Johnson's use of a baseball bat in Ms. Burns' presence – and failed to consider the totality of circumstances, as it must in a hostile work environment claim. A jury could reasonably infer from the totality of circumstances in this case – including evidence that Ms. Burns was the only woman working in operations in a male-dominated workplace, that SFAM Johnson wielded a baseball bat in a swinging position and an intimidating manner in every interaction he had with her (and generally did not do so when he was with male employees), that from the moment he met her he demeaned and diminished her, singled her out and questioned her about her childcare-oriented work schedule, and that he ultimately unjustifiably stripped her of her primary job responsibilities – that plaintiff was subjected to gender-based harassment constituting a hostile work environment.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment on Plaintiff's Gender Discrimination Claim

A. Under Both the McDonnell-Douglas Burden-Shifting Framework and the Desert Palace Framework, the Court Must Consider Circumstantial Evidence of Discrimination

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of sex. 42 U.S.C. § 2000e-2(a). This includes discriminatory employment decisions taken consciously or those that result from unconscious bias and stereotypes. Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1999) (discussing unconscious bias and stereotypes in race discrimination context).

Direct evidence of discrimination, such as explicit references to a plaintiff's gender as the basis for workplace decisions, is rarely available in employment cases and is not required to prove discrimination under Title VII. "A plaintiff is entitled to prove discrimination by circumstantial evidence alone." Chadwick v. Wellpoint, Inc., 561 F.3d 38, 46 (1st Cir. 2009) (citations omitted). As this Court has repeatedly recognized, proof of discrimination through circumstantial evidence "is all the more important now . . . since 'smoking gun' evidence is 'rarely found in today's sophisticated employment world.'" Thomas, 183 F.3d at 58 n.12 (quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 171 n.8 (1st Cir. 1998)); Chadwick, 561 F.3d at 46.

Circumstantial evidence is sufficient to demonstrate discrimination under either the McDonnell-Douglas burden-shifting framework or the Desert Palace mixed motive analysis. See McDonnell Douglas Corp. v. Green, 411 U.S.792, 793 (1973); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). While the analysis under

each standard is somewhat different, the sine qua non of both inquiries at summary judgment is that "'plaintiffs must present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias.'" Chadwick, 561 F.3d at 45 (quoting Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 31 (1st Cir. 2003)).

1. Circumstantial Evidence Under the McDonnell-Douglas Burden-Shifting Framework

Under the "familiar burden-shifting framework," Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Cir. 1996), initially set forth in McDonnell Douglas Corp., 411 U.S. at 793 , and further elucidated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), federal courts evaluate discrimination claims on summary judgment in three stages. While this burden-shifting framework may be "familiar" and is often recounted in various forms in court decisions, its underlying rationale is often lost in the thick of summary judgment facts and court reasoning. The rationale behind the McDonnell Douglas framework is that "discrimination, rarely explicit and thus rarely the subject of direct evidence, may be proven through the elimination of other plausible non-discriminatory reasons until the most plausible reason remaining is discrimination." Thomas, 183 F.3d at 58 (citing Burdine, 450 U.S. at 254 n.8) (emphasis added). Courts should be mindful, however, that "the question at

summary judgment is not which of the possible explanations is the most convincing; it is whether the plaintiff has produced enough evidence to raise a genuine issue of fact regarding her explanation." Id.

At the first stage, the plaintiff must establish a prima facie case of discrimination by showing that "(1) she belonged to a protected class; (2) she performed her job satisfactorily; (3) her employer took an adverse employment action against her; and (4) her employer continued to have her duties performed by a comparably qualified person. " Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (2000). "This task 'is not onerous,'" id. (quoting Burdine, 450 U.S. at 253), and has been repeatedly described by this Court as a "low standard" to meet, Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 139 (1st Cir. 2012) (collecting cases). Once a prima facie case is established, it results "in a rebuttable presumption 'that the employer unlawfully discriminated against the employee.'" Santiago-Ramos, 217 F.3d at 54.

At the second stage, the burden shifts to the employer to produce a "legitimate, nondiscriminatory reason for the adverse employment action." Santiago-Ramos, 217 F.3d at 54. "The employer's burden is merely a burden of production; the employee maintains the burden of proof throughout. If the employer meets its burden, the presumption of discrimination evaporates." Id.

In the third and final stage, the initial presumption of discrimination disappears and "it falls upon the employee to 'present sufficient evidence to show both that the employer's articulated reason . . . is a pretext and that the true reason is discriminatory.'" Santiago-Ramos, 217 F.3d at 54 (quoting Thomas, 183 F.3d at 56).

The First Circuit's articulation at the third stage has sometimes been referred to as the "pretext plus" standard. Thomas, 183 F.3d at 56. Importantly, however, "[p]laintiffs may use the same evidence to support both conclusions, 'provided that the evidence is adequate to enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action.'" Id. at 57 (citations omitted). "Because discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate 'plus' factor, such as a negative employer comment about the plaintiff's protected class, in order to provide discrimination. Otherwise, the McDonnell Douglas/Burdine framework would no longer serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence." Thomas, 183 F.3d at 58 (citing Smith v. F.W. Morse & Co., 76 F.3d 413, 420-21 (1st Cir. 1996)); see Chadwick, 561 F.3d at 46 (extending principle to gender-discrimination claim based on gender stereotypes related to employee's ability to balance work and

family obligations). The Court of Appeals has found error where, as here, the District Court has suggested that the plaintiff is required to present evidence to both disprove pretext and prove discrimination. See DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) ("To the extent the district court said it required DeCaire to present evidence beyond disproving the government's arguments as pretext, that was error").

Therefore, a plaintiff who has shown differential treatment and pretext need not "present direct 'smoking gun' evidence of [gender] biased decisionmaking in order to prevail. Where the disparity in treatment is striking enough, a jury may infer that [gender] was the cause, especially if no explanation is offered other than the reason rejected as pretextual." Thomas, 183 F.3d at 64.

2. Circumstantial Evidence Under a Mixed-Motive Theory

In a mixed-motive case, the plaintiff "must present evidence of discrimination on the basis of a forbidden bias, at which point defendants must then either 'deny the validity or the sufficiency of the employee's evidence, and have the jury . . . decide whether the employee has proved discrimination by a preponderance of the evidence, or prove that it would have made the same decision even if it had not taken the protected characteristic into account." Burton v. Town of Littleton, 426 F.3d 9, 19-20 (1st Cir. 2005) (internal citations, quotation marks, and alterations omitted).

In Desert Palace, the Supreme Court "rejected the requirement that there be direct evidence in mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive." Burton, 426 F.3d at 20 (citing Desert Palace, 539 U.S. at 101-02 and collecting cases). The Supreme Court specifically noted the "utility" of circumstantial evidence in discrimination cases, and explained that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Desert Palace, 539 U.S. at 100 (quoting Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 n.17 (1957)). The example of circumstantial evidence cited in Desert Palace is instructive. The Court pointed to Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147(2000), in which it had "recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of circumstantial evidence that is probative of intentional discrimination.'" Id. at 147.

The District Court erroneously relied on language set forth in case law predating Desert Palace, which held that direct evidence of discrimination was required to sustain a mixed-motive theory of discrimination. See Dist. Ct. Op. 7 (quoting Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999), abrogated in part by Desert Palace, 539 U.S. 90). While the District Court

appeared to recognize that Fernandes was negatively impacted by Desert Palace, it cited language in Fernandes stating that a mixed-motive analysis is only available in "those infrequent cases in which a plaintiff can demonstrate with a high degree of assurance that the employment decision of which [s]he complains 'was the product of a mixture of legitimate and illegitimate motives.'" 199 F.3d at 580. This language suggests a heightened evidentiary requirement and directly refers to the now-abrogated requirement of direct evidence in a mixed motive case, see id. ("What is required [to trigger mixed-motive analysis] is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring))). Relying on case law that was abrogated by Desert Palace, the District Court erroneously required direct evidence of discrimination in assessing Ms. Burns' claim of discrimination under a mixed motive theory.

B. There Is Sufficient Evidence of Discrimination Under Either the McDonnell-Douglas Framework or a Mixed-Motive Theory

Under either of the standards set forth above, a reasonable jury could find based on Ms. Burns' evidence that the Defendant discriminated against her based on her gender when SAC Johnson stripped her of her responsibilities within weeks of becoming her supervisor. Although the District Court recognized that "there is no direct evidence of a Title VII violation," Dist. Ct. Op. at 3, it erred by

disregarding circumstantial evidence of discrimination and impermissibly resolving genuine disputed issues of fact against the Plaintiff-Appellant.

Ms. Burns readily established a prima facie case of discrimination. She is a woman who had an excellent performance record over her decade-long career with the Department of Homeland Security. Appellant's Br. 2. Approximately three weeks after becoming her supervisor, SAC Johnson made the decision to remove approximately ninety-five percent of Ms. Burns' responsibilities from her and divide it up among nine male co-workers. Id. 8. Her work was immediately reduced to "clerical duties" and "menial tasks." Dist. Ct. Op. 4. "[R]eassignment with significantly different responsibilities" constitutes an adverse employment action. See Morales-Vallellanes v. Potter, 605 F.3d 27, 35 (1st Cir. 2010). There is no evidence in the record indicating that SAC Johnson or Ms. Burns' direct supervisor, Supervisory Federal Air Marshal James Ouellette ("SFAM Ouellette"), would be giving her new or different responsibilities after her primary responsibilities were reassigned. SFAM Ouellette merely told her that he would "reassess things" at some point, but given that SAC Johnson reassigned Ms. Burns' responsibilities over SFAM Ouellette's objections, a jury could reasonably infer that he had little if any authority to give Ms. Burns substantial work responsibilities. Appellant's Br. 10-11.

The District Court nonetheless questioned whether Ms. Burns had established an adverse employment action, citing an unpublished, nonprecedential out-of-circuit case, which is not binding on this Court and, in any event, is distinguishable because the plaintiff in that case was transferred to a new position with a new title and delineated responsibilities. Dist. Ct. Op. at 4 (citing Curry v. Nicholson, 277 Fed. Appx. 628, 632-33 (7th Cir. 2008). Given that there was no evidence of a set plan for Ms. Burns' to be assigned different responsibilities after her primary scheduling responsibilities were reassigned, the District Court should have viewed the record in the light most favorable to Ms. Burns and concluded that her duties had fundamentally changed, which is sufficient to meet the low bar of establishing a prima facie case of discrimination and establishing a rebuttable presumption of discrimination.

At the second stage, Defendant put forth two alleged nondiscriminatory reasons for the reassignment of Ms. Burns' duties, which were that SAC Johnson purportedly wanted the Boston Field Office to be consistent with the majority of other field offices and that he wanted to promote "leadership" and "accountability" among the male SFAMs who would now be performing Ms. Burns' duties. Dist. Ct. Op. 4.

The burden then shifted to Ms. Burns to demonstrate that these reasons were pretextual and that the true reason for the reassignment was discriminatory.

Plaintiffs in discrimination cases can establish pretext in any number of ways, including by showing that discriminatory comments were made by the decisionmaker, that the employer's nondiscriminatory reasons were after-the-fact justifications provided in anticipation of litigation, or that there were "'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons' such that a factfinder could 'infer that the employer did not act for the asserted non-discriminatory reasons.'" Santiago-Ramos, 217 F.3d at 46 (quoting Hodgens, 144 F.3d at 167). The record contains sufficient evidence establishing that SAC Johnson made discriminatory comments and that there were "weaknesses, implausibilities, and inconsistencies" in his proffered explanations supporting an inference of discrimination.

SAC Johnson made comments that could reasonably be inferred to be discriminatory when he discussed his reasons for reassigning Ms. Burns' responsibilities. In a June 2012 staff meeting, SAC Johnson stated that the system that Ms. Burns was intimately involved in creating and operating was "stupid" and that he was reassigning her responsibilities because he wanted "to eliminate the perception that 'she' was assigning international missions." J.A. 394 (Ouelette Dep.) "The entire meeting focused on Ms. Burns and the way 'she' was responsible for assigning international missions to FAMS," yet SAC Johnson did not refer to Ms. Burns by her name throughout the entire discussion. J.A. 93

(Ouelette Aff.) "During the meeting, [SAC Johnson] made frequent references to the way 'she' was doing things. He emphasized the word 'she.'" Id. The District Court disregarded the context of these statements and focused solely on the fact that SAC Johnson used the pronoun "she" when referring to Ms. Burns during the discussion to conclude that "[t]he use of the feminine pronoun when referring to a woman, however, hardly suffices to demonstrate gender bias." Dist. Ct. Op. 7.

The lower court's analysis misses the point. The stated reason for removing responsibilities from Ms. Burns is vastly different than the two reasons proffered by Defendant and undermines the validity of those reasons. SAC Johnson's focus on perception suggests he was more concerned about the outward appearance of who was in control of international scheduling, rather than actual programmatic consistency with other offices and development of "leadership" and "accountability" among SFAMs. Indeed, SAC Johnson's purported reason of promoting "leadership" among the male SFAMs (which as set forth below is disputed by at least several SFAMs) supports the discriminatory nature of his comments during this discussion. "Leadership" is a stereotype closely associated with male management skills in the workplace. See Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 Harv. Women's L.J. 77 (Spring 2003) (recognizing that "leadership" is a male-stereotype and that women, particularly

mothers, "may be seen as so feminine as to be incongruous in a job that is perceived as being highly masculine"). Given his emphasis on the outward perception that "she" should not be in control of assignments and his focus on the stereotypical-male quality of "leadership," a jury could reasonably infer from SAC Johnson's comments that he wanted to eliminate the perception of a woman in a position of authority.

A jury could also find evidence of weaknesses, implausibilities, and inconsistencies in SAC Johnson's stated reasons for removing Ms. Burns' responsibilities. The District Court summarily rejected much of this evidence by concluding, with no citation, that Ms. Burns could not "rel[y] upon the criticisms of others of the new procedures" to establish pretext. Dist. Ct. Op. 5. However, Ms. Burns has presented "more than simple disagreement with the correctness of [SAC Johnson's] decision, [she] has proffered evidence sufficient to raise an issue of fact as to whether [Johnson] himself truly believed [his stated reasons]." Acevedo-Parrilla, 696 F.3d at 140. As an initial matter, there is evidence in the record that SAC Johnson had been involved with or the subject of prior complaints to the Equal Employment Opportunity Commission ("EEOC"). When discussing the EEOC investigation underlying this action, SAC Johnson nonchalantly indicated that it was "not his first rodeo." J.A. 115 (Devine Aff.) A jury could reasonably infer from SAC Johnson's prior experience involving discrimination

complaints that he was well aware that he would need to provide a nondiscriminatory reason for his decision to reassign Ms. Burns' responsibilities to avoid a charge of discrimination.

Furthermore, SAC Johnson was aware that Ms. Burns was primarily responsible for international scheduling, yet initially indicated that he had no intention of making any immediate changes to the operations division and that he would normally evaluate an office for a period of time before making any changes. Appellant's Br. 4-5. He also never questioned Ms. Burns' work performance. Id. 9. Despite his original stated intentions, his past practice of taking time to evaluate an office's practices, and his belief that Ms. Burns' performed well, SAC Johnson abruptly upended the system within several weeks of his arrival. Id. 5. There is evidence, which viewed in the light most favorable to Ms. Burns, suggest that his reasons for changing the system are simply not believable. SFAM Ouellette testified that SAC Johnson did not indicate the reason for the change was to mirror other field offices, J.A. 393 (Ouellette Dep.), which creates a disputed issue of fact regarding whether SAC Johnson contemporaneously relied on this reason.[2]

[2] The District Court erred when it concluded that "one witness did not recall SAC Johnson stating that the reason for the change in scheduling protocol was to mirror other field offices." In fact, SFAM Ouellette answered "Not that I recall, no" in response the question, "Did David Johnson say anything about, this is how they do it in other field offices . . . ?" J.A. 393 (Ouellete Dep.) The "no" at the end of his answer is clear and, to the extent that there is any dispute, it is an issue of fact for the jury to resolve.

Santiago-Ramos, 217 F.3d at 56 (pretext may be established by showing that nondiscriminatory reasons were "after-the-fact justifications" provided in anticipation of litigation). Moreover, several witnesses disputed that the reassignment would promote leadership. Id. 8-9. As SFAM Ouellette testified, the reassignment of international scheduling responsibilities "had nothing . . . to do with leadership. It didn't teach anything. . . . [I]t's just putting [down] names of available people." J.A. 392 (Ouellette Dep.); see J.A. 791-92 (Devine Dep.).

Moreover, in the weeks immediately before the reassignment decision, SAC Johnson had several interactions with Ms. Burns, in which he demeaned her by speaking to her a condescending manner, questioned her about her alternative work schedule, which he knew was made for her childcare obligations, and intimidated her by wielding a baseball bat in all of his interactions with her. Id. 5-7. SAC Johnson reassigned Ms. Burns' primary responsibilities within a week of her voicing complaints about his use of the bat in their interactions. Id. 7-8. Although Ms. Burns' complaint was not officially reported to SAC Johnson until June, a jury could disbelieve Johnson's claimed ignorance about the complaint and reasonably infer that he became aware of it earlier from the fact that she complained about her fear of Johnson daily and everyone in operations knew about it. Id. A jury could reasonably conclude from the timing and context of SAC Johnson's abrupt change in the system that his purported nondiscriminatory reasons for the change were a

sham. See Santiago-Ramos, 217 F.3d at 55 ("The subject matter of Mayberry's comments (Santiago-Ramos' ability to work as a mother) coupled with Mayberry's previous impression of Santiago-Ramos (he was not inclined to fire her), together with the timing of Santiago-Ramos's dismissal (just two weeks of Mayberry made the comments), provides circumstantial evidence about the pretextual nature of Centennial's proffered nondiscriminatory reasons for Santiago-Ramos' dismissal).

The District Court erred in failing to find pretext based on these facts. Moreover, such evidence of pretext alone is sufficient for a reasonable jury to infer that SAC Johnson stripped Ms. Burns of her responsibilities due to discriminatory animus. See Reeves, 530 U.S. at 147.

In any event, there are sufficient objective facts in the record to demonstrate that gender discrimination was the actual motive here. Evidence in the record demonstrated Ms. Burns was a longtime employee of the Department of Homeland Security who had an excellent performance record. Appellant Br. 1. She worked in a male-dominated environment and was the only female employee in the operations division, and was a mother of five young children who worked a part-time schedule. Id. 3; J.A. 378 (Ouellette Dep.). From the moment that SAC Johnson met Ms. Burns (before he knew anything about her), he treated her differently than comparable male employees. On the first day he met her, he demeaned and diminished her by asking her, "who are you?" and "what do you do

for me?" Id. 5. He did not ask male employees the same question. Id. The next time he saw her, knowing full well that she had a part-time schedule due to her childcare obligations, SAC Johnson, wielding his baseball bat in a swinging position and with an unlit cigar in his mouth, questioned her by saying "so you do still work here." Id. 6. He carried his baseball bat in every interaction with her, which intimidated her. He did not do so with the male employees. In another conversation, again with the bat in hand, he singled her out and questioned her about her work schedule, telling her that he was not paying her to work from home. Id. Within one week of Ms. Burns' voicing her complaint about SAC Johnson's intimidating use of the baseball bet, SAC Johnson stripped Ms. Burns of her primary responsibilities despite previously stating that he would make no changes to the operations division and that he never makes changes without spending a substantial amount of time evaluating a program. Id. 7. No one explicitly told Ms. Burns that she was stripped of her substantive responsibilities because she was a woman or a based on stereotypes about her status as a mother. Nor is such evidence required to prove discrimination under Title VII. This evidence establishes "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination." Ahmed v. Johnson, 752 F.3d 490, 492 (1st Cir. 2014) (internal quotation marks omitted).

II. The District Court Incorrectly Articulated and Applied the Hostile Work Environment Standard

Title VII is also violated "[w]hen 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." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). In order to establish a hostile work environment claim, "[t]he plaintiff must establish that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based upon gender; (4) the harassment was sufficiently severe or pervasive that it altered the conditions of her employment and created an abusive working environment; (5) the offending conduct was both objectively and subjectively offensive; and (6) some basis for employer liability has been established." Aponte-Rivera v. DHL Solutions (USA), Inc., 650 F.3d 803, 808 (1st Cir. 2011).

The District Court improperly articulated and applied this standard to Ms. Burns' gender-based hostile work environment claim. The District Court misquoted the standard and repeatedly stated that the Plaintiff was required to show that her supervisor's conduct was both "severe and pervasive," rather than "severe or pervasive." See Dist. Ct. Op. 8. A plaintiff need not prove both severity and pervasiveness. "[A] single act of harassment may, if egregious enough, suffice to evince a hostile work environment." Noviello v. City of Boston,

398 F.3d 76, 84 (1st Cir. 2005); see Aponte-Riviera, 650 F.3d at 809 (finding sufficient evidence of hostile work environment claim based on evidence that supervisor "made several gender-based comments to her"); Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 55-56 (1st Cir. 2000) (denying summary judgment on hostile work environment claim based on two specific incidents over five years). The District Court mischaracterization of the standard impermissibly increased the Plaintiff's burden of proof on summary judgment.

Compounding its error, the District Court erroneously suggested that improper sexual remarks or innuendo were a necessary component of the proof required to sustain a hostile work environment claim. Dist. Ct. Op. 8. Conduct need not be overtly sex- or gender-specific in content in order to establish a gender-based hostile work environment. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998); O'Rourke v. City of Providence, 235 F.3d 713, 729-30 (2001).

The District Court also erred by "limit[ing]" the claim to "SAC Johnson's propensity to carry a baseball bat around the office," Dist. Ct. Op. 8, and failed to consider the totality of the circumstances, as it must in a hostile work environment claim. See Aponte-Rivera, 650 F.3d at 808 ("This is not a 'mathematically precise test' and whether an environment is 'hostile' or 'abusive' is determined by looking at all the circumstances."). The court may consider relevant factors, such as "the

frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating as opposed to a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." Id. "While psychological harm may be taken into account, no single factor is required." Id. "Subject to some policing at the outer bounds," it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt it affected the conditions of her employment." Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 20 (1st Cir. 2002) (citation omitted).

A jury could reasonably infer from the totality of circumstances in this case that plaintiff was subjected to gender-based harassment constituting a hostile work environment. Plaintiff-Appellant readily meets the first and second prongs of the test – she is a member of a protected class and there is substantial evidence in the record establishing that SAC Johnson's intimidating conduct toward her was unwelcome.

As set forth in further detail supra Part II, there is ample evidence demonstrating that the harassment was gender-based: Ms. Burns was the only woman working in operations in a male-dominated workplace. From the moment SAC Johnson met Ms. Burns, he demeaned and diminished her, singled her out and questioned her about her childcare-oriented work schedule. SAC Johnson

wielded a baseball bat in a swinging position and an intimidating manner in every interaction he had with Ms. Burns (and generally did not do so when he was with male employees). Within weeks of meeting her, he unjustifiably stripped her of her primary job responsibilities and divided them up among a group of male employees in order to promote their "leadership" skills. A jury could reasonably infer from this evidence that SAC Johnson's harassed Ms. Burns because of her gender. See E.E.O.C. v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 843-47 (2005) (finding that male supervisor's conduct toward female employees, including shouting, screaming, using foul language, and making threatening physical gestures was sufficient to establish gender-based harassment)

A jury could also find that the harassment was sufficiently severe or pervasive to satisfy the fourth prong of the standard. The District Court concluded that because Ms. Burns and SAC Johnson only had four interactions over the eight days in which they overlapped, she could not establish that the harassment was severe or pervasive. The District Court's reasoning is fundamentally flawed. In a workplace that either requires or fosters alternative work schedules, employers cannot be shielded from liability simply because the harasser and victim overlap less frequently than more traditional 9-to-5 offices. In any event, Ms. Burns was harassed by SAC Johnson, who was approximately 6'4" and 270 pounds, while he wielded a bat on four occasions over eight days of interactions. She found his

conduct on those four occasions intimidating and frightening and it clearly interfered with her work performance because she repeatedly reported it to her supervisors and ultimately felt like she had no choice by to leave her position as a result. A jury could reasonably conclude that such conduct was sufficiently severe to satisfy the fourth prong of the standard. See Aponte-Riviera, 650 F.3d at 809; Hernandez-Loring, 233 F.3d at 55-56.

This was much more than an "uncomfortable" or "tense" working relationship, as suggested by the District Court. Dist. Ct. Op. 8. There was substantial evidence in the record that SAC's conduct was both subjectively and objectively offensive. Ms. Burns' own testimony indicating how she felt fearful and intimidated when he brandished a baseball bat supports her subjective belief. Moreover, a jury could find that a reasonable person in Ms. Burns' position as a female subordinate would feel physically threatened if her male supervisor, who was much larger than she was, wielded a bat in a swinging position in her presence.

Ms. Burns also satisfies the final prong, establishing some basis for employer liability, because her supervisor engaged in the harassing conduct. See Gerald v. Univ. of Puerto Rico, 707 F.3d 7, 19-20 (1st Cir. 2013) ("When it is a supervisor that creates an actionable hostile work environment, the employer is vicariously liable.").

Taking the evidence in the light most favorably to Plaintiff-Appellant, as the Court must, a reasonably jury could conclude that Ms. Burns was subjected to a hostile work environment.

III. Conclusion

For the foregoing reasons, MELA urges this Court to find in favor of Plaintiff-Appellant and vacate and reverse the District Court's grant of summary judgment.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(7)(B)

Pursuant to Fed. R. App. P. 32 (a)(5), I hereby certify that this brief uses 14-Point Times New Roman, a proportionally-spaced font. Pursuant to Fed. R. App. P. 32 (a)(7)(B), I certify that the brief was prepared using Microsoft Word, and contains 6,091 words, including all citations but exclusive of all certificates of counsel, Table of Contents, Table of Authorities, and Corporate Disclosure Statement, according to that system's word count function.

Date: March 1, 2016

/s/ Monica R. Shah
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CERTIFICATE OF SERVICE

I hereby certify that this brief, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and that paper copies will be sent to those indicated as non-registered participants on March 1, 2016:

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