

DISTRICT OF COLUMBIA
COURT OF APPEALS

GAYE LIVELY,)	
)	
Plaintiff/Appellant)	
)	
v.)	No. 97-CV-128
)	
FLEXIBLE PACKAGING)	
ASSOCIATION, ET AL.,)	
)	
Defendants/Appellees)	
_____)	

I. Statement of the Issues Presented for Review

A. Whether the trial court erred in setting aside the jury’s finding of liability on Mrs. Lively’s D.C. Human Rights Act hostile work environment claim on statute of limitations grounds, notwithstanding evidence presented at trial that within the one-year limitations period, defendant Braswell gave plaintiff a negative performance review, placed her on probation, ordered her to submit to diagnostic testing at a facility devoted almost exclusively to learning disabled children, and in her presence referred to a female co-worker as “the dumbest girl” he had ever met?

B. Whether the trial court erred in setting aside the jury’s finding of liability on Mrs. Lively’s D.C. Human Rights Act retaliatory termination claim where there was sufficient evidence of retaliatory motive yet Plaintiff failed to prove false the facts underlying Defendants’ proffered reason for the termination decision?

II Statement of the Case

A. Procedural History

Plaintiff-Appellant Gaye Lively filed this action on December 8, 1993, against Defendant-Appellees, her former employer Flexible Packing Association (FPA), and her immediate supervisor at FPA, Glenn Braswell. She asserted multiple violations of the D.C. Human Rights Act, D.C. Code §§1-2501 *et seq.*, and a common law claim for intentional infliction of emotional

distress. Trial commenced on June 11, 1996. On June 21, 1996, the jury found defendants liable to Mrs. Lively for intentional infliction of emotional distress and, under the D.C. Human Rights Act, for: (1) discrimination due to a hostile work environment; (2) discrimination due to unequal pay; and (3) unlawful retaliation. The jury awarded Mrs. Lively \$458,158 in compensatory damages and \$535,658 in punitive damages.

Following the jury verdict, defendants filed a motion seeking judgment as a matter of law or, in the alternative, a new trial. The trial court granted the former on all four counts, and conditionally granted the latter on the retaliation and unequal pay counts.

Mrs. Lively filed a timely appeal, which went before a three-judge panel of this Court -- Senior Judge Belson, Judge Washington, and Judge Reid. Judges Belson and Washington upheld the judgment as a matter of law over Judge Reid's dissent. Lively v. Flexible Packaging Ass'n, 765 A.2d 954 (D.C. 2001) (vacated) (hereafter "Lively"). Plaintiff Lively then requested a rehearing *en banc* by the District of Columbia Court of Appeals, which this Court granted.

B. Statement of Facts: Evidence Presented at Trial¹

For thirteen years, Plaintiff Gaye Lively was an employee of Flexible Packaging Association, a trade association of flexible packaging material manufacturers. Mrs. Lively began her career with FPA as a secretary and, after several promotions and positive performance reviews, ended her career as Director of Membership. In that capacity, her primary function was to recruit new member companies and to maintain the membership of older ones. Lively, 765

¹ Because D.C. Superior Court Rule 50 requires this Court to view the evidence in the light most favorable to plaintiff Lively, *see infra* at Section III.A., that is how amici have presented the facts here.

A.2d at 957. While in that position, from the years 1990 to 1993, she successfully expanded the membership number from approximately 125 to over 170 member companies. S.R. 6, p. 236.² Defendant Glenn Braswell was hired as the president of FPA in 1986. Lively, 765 A.2d at 957. In 1987, Mr. Braswell fired Mary Bernhardt, Director of Government Relations, and replaced her with his friend, Mr. Thornburg. Id. at 972 (Reid, J., dissenting). The evidence at trial showed that, from 1987 onward, Mr. Thornburg and Mr. Braswell created a work environment characterized by demeaning and offensive treatment of women that lasted throughout the rest of Plaintiff's tenure at FPA. Both men made "regular, even daily, discriminatory and offensive comments to or about women, using such words as bimbos, broads, hookers, prostitutes, old maids, dykes and girls, and uttering language or gestures referring to female body parts, including breasts." Id. at 972 (Reid, J., dissenting). There was evidence that Mr. Braswell referred to women as "whores" and "hookers" at a staff meeting, id. at 958, and that on one occasion in 1987, while Mrs. Lively, Mr. Thornburg, and Mr. Braswell were on a business trip, "Mr. Thornburg 'pulled [Mrs. Lively] down on his lap [as she was getting into a limousine] and said, 'Sit here, Lively. I want to look down your cleavage.''" Id. at 972 (Reid, J., dissenting). In spite of complaints made by Mrs. Lively and several of the other women, the harassment did not abate. Id. at 958.

Upon learning of complaints to FPA's board of directors regarding his sexually harassing conduct, Mr. Braswell began a campaign of retaliation against the women who lodged those complaints. There was evidence presented at trial that Mr. Braswell illegally retaliated against

² The jury explicitly believed this and Judge Alprin and the majority decision on appeal all seemed to assume it before deciding that the claim was barred by the statute of limitations.

another female employee, Marlina Kaplan, when she complained of the harassment. This retaliation took the form, *inter alia*, of a negative performance review that contained an unprecedented criticism of Ms. Kaplan’s “communications skills.” Id. at 958.

Mr. Braswell openly attempted to close off channels of communication between FPA staff and anyone with supervisory authority over him, and made clear both that he suspected plaintiff of complaining and that the complaints angered him. At a staff meeting, Mr. Braswell “accused Mrs. Lively of reporting his conduct to the Board, said that if she did she was a liar, and instructed the directors that they were not to complain to the Board.” Id. at 959. Right around this time, Mrs. Lively received her first negative evaluation from Mr. Braswell, which for the first time negatively commented on her “communication” abilities. Id. at 959.

Plaintiff testified that Mr. Braswell’s treatment of her worsened after she engaged in further protected activity by authorizing her attorneys to send a letter to the board of directors in February 1989. Id. at 959. The evidence showed that FPA’s board of directors – which had already noted Mr. Braswell’s “chauvin[ism]” and his tendency to demean women– responded by prohibiting Braswell from criticizing or disciplining plaintiff in any way. Id. at 958-59. The contemporaneous letter the board sent to Mr. Braswell in August 1990 made clear the board’s concern that he might be discriminating and/or retaliating against Mrs. Lively. See id. at 959. (“... some senior members of the association were ‘unhappy’ about what they considered unfair treatment of Mrs. Lively.”)

Two years later, after a change in the composition of FPA’s board of directors, the restriction preventing Mr. Braswell from criticizing Mrs. Lively was removed in December 1992.

Id. at 959. Almost immediately thereafter, on December 11, Mr. Braswell gave plaintiff a severely negative evaluation that criticized her communication skills, placed her on six-month probation with an explicit threat of demotion if the alleged deficiencies were not remedied, and took the bizarre and unprecedented step of requiring her to undergo “diagnostic testing” at a facility specializing overwhelmingly (90 to 95% of its business) in learning disabilities or brain dysfunctions of children. Id. at 959, 973 (Reid, J., dissenting).

There was very little evidence in the record to justify the negative review and significant evidence presented of pretext. Notably, “the record shows no criticism, prior to December 11, 1992, of Mrs. Lively’s communications skills by anyone other than Mr. Braswell, who made a negative comment in 1988, the very same year in which he also criticized Ms. Kaplan’s communications skills.” Id. at 973 (Reid, J., dissenting). This Court’s vacated majority decision found the performance review “readily characterized as retaliation.” Id. at 967. On the same day, December 11, in Mrs. Lively’s presence, Mr. Braswell referred to another female FPA employee as “the dumbest girl I’ve ever seen.” Id. at 961.

Six months later, while Mrs. Lively was on temporary disability leave for a hip injury and about to undergo surgery,³ Mr. Braswell sent her a letter demanding that she return to work full time on July 15, 1993 – just seven days following her scheduled surgery. Id. at 959-60, 970. The letter also made clear that Mrs. Lively was still considered on probation and that when she did return, she would be required to undergo testing at the center for learning disabled children. Plt. Ex. 19.

³ Mrs. Lively was injured in an office-related accident on November 8, 1991. Lively, 765 A.2d at 959. The injury worsened in the months following the injury and forced Mrs. Lively into surgery in November of the following year and again in July of 1993. Id. at 960. Mrs. Lively testified that between the months of December 1992 and March 1993, she worked part-time from home for FPA. Id. at 959.

A letter from Mrs. Lively’s attorney put Mr. Braswell on notice of the date of the scheduled surgery and the fact that she would be incapable of returning on that date, although Mrs. Lively testified that she expected to be able to return to part-time work following recuperation from surgery. Id. at 970.

When plaintiff did not return on the date demanded, Mr. Braswell terminated her employment. Id. at 960. Mr. Braswell replaced Mrs. Lively with a male friend who worked part-time from home for the first year of his employment. Id. at 975 (Reid, J., dissenting). Mr. Braswell also denied plaintiff FPA’s standard severance package. Id. at 976 (Reid, J. dissenting).

III. Argument

A. Standard of Review

A judgment notwithstanding the verdict is proper only in “extreme cases,” where viewing the evidence in the light most favorable to the prevailing party, there is “no legally sufficient evidentiary basis for a reasonable jury to find” for the prevailing party. Super. Ct. Civ. R. 50; United Mine Workers of America v. Moore, 717 A.2d 332, 337 (D.C. 1998); Oxendine v. Merrell Dow Pharmaceuticals, Inc., 506 A.2d 1100, 1103 (D.C. 1986). “When there is *some evidence* from which jurors could find the requisite elements of [the plaintiff’s claim], *or* when the case turns on disputed facts and the credibility of witnesses, the case must be submitted to the jury for determination.” Lyons v. Barrazotto, 667 A.2d 314, 320 (D.C. 1995) (emphasis added). Thus, if reasonable minds might differ, a jury verdict must stand. Id. As explained by the Seventh Circuit Court of Appeals in interpreting Federal Rule of Civil Procedure 50:

In appealing a denial of a motion for judgment as a matter of law after the jury has decided against it, [a defendant] assumes a *herculean* burden. We reverse

if no rational jury could have found for the plaintiff, even when viewing the evidence in the light most favorable to the nonmovant. Careful to avoid substituting our judgment for that of the factfinder at trial, we ascertain whether there exists sufficient evidence upon which any rational jury could reach the trial verdict. Moreover, *we apply this standard stringently in discrimination cases, where witness credibility is typically crucial.*

Gile v. United Airlines, Inc., 213 F.3d 365, 372 (7th Cir. 2000) (internal citations omitted) (emphases added). This Court, in reviewing a trial court's grant of a judgment notwithstanding the verdict, applies the same standard as the trial court. Lyons, 667 A.2d at 320.

B. The Jury Correctly Concluded That The Hostile Work Environment Existing At FPA Continued Into The D.C. Human Rights Act Limitations Period

The jury awarded Mrs. Lively a verdict based on the discrimination she suffered in a patently hostile work environment over a period of years. In so doing, the jury necessarily found that her claims were not time-barred. Nevertheless, the trial court took the extraordinary step of overturning that verdict, and, in doing so, it erred.

At least two incidents that were manifestations of the hostile work environment unquestionably occurred within the one-year limitations period. On December 11, 1992, Mr. Braswell delivered the performance appraisal that criticized Mrs. Lively's "communication" skills, placed her on probation, and took the unprecedented step of ordering her to undergo testing at a facility for children with learning disabilities and brain dysfunction. On the same day, he was heard remarking that another female employee was "the dumbest girl I've ever seen." The trial court, in evaluating these two incidents, rejected the jury verdict and concluded instead that the incidents were not motivated by gender bias and therefore could not be a part of a continuing hostile work environment.

The vacated majority decision sided with the trial court, essentially determining that (1) the “dumb girl” comment was “an isolated incident which was unlike the other incidents” of the hostile work environment, and (2) the performance evaluation was of an entirely different nature from the incidents of sexual harassment. Lively, 765 A.2d at 964, 967. Like the trial court, the vacated majority decision of this Court erred. Judge Reid, in dissent, analyzed the issue correctly: a reasonable juror could find sufficient record evidence from which to conclude that the December events were motivated, wholly or partially, by gender bias and were a part of an ongoing hostile work environment that continued into the limitations period. See D.C. Code § 1-2512 (unlawful discriminatory practice to act "wholly or partially for a discriminatory reason" based on gender). As Judge Reid put it, “a jury could reasonably infer from this record that the December 1992 incidents . . . constituted a continuation of Mr. Braswell’s discriminatory behavior towards Mrs. Lively, and thus, were not isolated or unrelated events.” 765 A.2d at 973.

A hostile work environment is, by definition, continuing so long as acts in furtherance of that environment continue to take place. As the Eighth Circuit observed, this kind of discrimination is an “ongoing nightmare for the employee victim, in legal parlance, a ‘continuing violation.’” Gipson v., KAS Snacktime Co., 83 F.3d 225, 229 (8th Cir. 1996). “The first question in the analysis of a continuing violations claim is whether an actual violation of [employment discrimination law] occurred during the statutory period.” Palmer v. Kelly, 17 F.3d 1490, 1496 (D.C. Cir. 1994) (citations omitted).

In determining whether a continuing violation exists such that it is appropriate to extend the limitations period to cover earlier events, this Court, like the federal courts, requires a plaintiff to

show that the incidents both before and during the statutory period constitute a continuing course rather than discrete unrelated acts. See Lively, 765 A.2d at 962.

A continuing violation exists where there is a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the statutory period. To be considered continuing in nature, however, the discrimination may not be limited to isolated incidents, but must pervade a series or pattern of events which continue into the filing period.

Doe v. District of Columbia Comm'n on Human Rights, 624 A.2d 440, 444 n.5 (D.C. 1993) (citations omitted) (cited in Lively, 765 A.2d at 962); Milton v. Weinberger, 645 F.2d 1070, 1074-75 (D.C. Cir. 1981). Cf. Van Steenburgh v. Rival Co., 171 F.3d 1155, 1159 (8th Cir. 1999); Bell v. Chesapeake & Ohio Ry. Co., 929 F.2d 220, 223 (6th Cir. 1991) (employee must show “a series of allegedly discriminatory acts that are sufficiently related to constitute a pattern, at least one of which occurred within the limitation period.”); Green v. Los Angeles County Superintendent, 883 F.2d 1472, 1480-81 (9th Cir. 1989) (plaintiff must show that alleged discriminatory acts are related closely enough to constitute a continuing violation.”); Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983) (one factor in determining whether to apply continuing violation doctrine is whether the violations constitute the same type of discrimination).

This Court’s Doe test requires, in common with the tests used in other circuits, a “relationship” between acts occurring within and outside the limitations period. An incident within the limitations period need not satisfy the definition of sexual harassment when viewed in isolation. Van Steenburgh, 171 F.3d at 1159. Rather, the issue for the jury is whether the incident can be viewed as discriminatory in light of all the past incidents of harassment. Id. (citing Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1997) (reinstating jury verdict for plaintiff because humiliating

and intimidating effect of snickering noises could have been seen as stemming from prior rejection of sexual overtures); and Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (directing the trier of fact to focus on the cumulative effect of the harassment rather than “carv[ing] the work environment into a series of discrete incidents.”)).

The jury here unquestionably found that the actions that occurred within the limitations period were discriminatory and therefore related to the earlier discriminatory actions. Mr. Braswell had been guilty of every sort of sexual harassment: unwelcome touching (pulling Mrs. Lively onto his lap so that he could “look down [her] cleavage”); use of harassing and demeaning words such as bimbos, broads, hookers, prostitutes, old maids, dykes, and girls; and unequal treatment of men and women in the form of preferential treatment for his male friends and harsh and unequal treatment of women, particularly those who complained. See Lively, 765 A.2d at 972 (Reid, J., Dissenting).

The relationship between this pattern of pervasive and ongoing discrimination, on the one hand, and the discriminatory performance appraisal and demeaning reference to “girls,” on the other, is patent. The performance review was of a piece with his well-documented history of abusive and demeaning treatment of women. He had similarly applied the subjective “communication” criticism to another woman, Ms. Kaplan, who had complained of harassment. He imposed an outrageously unwarranted requirement that she submit to diagnosis and testing at a center for disabled children, a requirement deliberately designed to demean and trivialize Mrs. Lively and her work. And he did so almost immediately upon being freed by the board from its two-year restriction on his harassing activity. This performance review can only be seen as the culmination of his previous treatment and pretextual criticism of Mrs. Lively.

Likewise, when, on the same day, Mr. Braswell was heard remarking that another female employee was “the dumbest girl I’ve ever seen,” he demonstrated the same hostile attitude toward women that had characterized the previous several years. The jury so found.

Unaccountably, the trial court erred in failing to consider the entire environmental context in which Mr. Braswell conducted this performance review and made this discriminatory remark. The court viewed these actions in a vacuum when it ruled that “[t]here is virtually no evidence in the record” that the performance evaluation (as well as subsequent personnel actions) “were taken based on plaintiff’s gender.” Lively v. Flexible Packaging Association, Slip op. at 7 n.3 (Super. Court December 23, 1996). The court demonstrably refused to consider that this evaluation was made by a supervisor with a long and troubling history of harassment, that the type of probation and related requirements he imposed on her had never been imposed on male employees and were patently demeaning, and that the subjective “communication” criticism had similarly previously been used against another woman who had also had the temerity to complain of the discrimination. All of these factors established a hostile work environment, and to remove the last events from their discriminatory moorings was error.

Further, although the trial judge apparently did not regard it as important, even he seemed to acknowledge that the “dumbest girl” reference might have been taken by the jury as contributing to gender-biased harassment.⁴ Indeed, it is difficult to see how this comment would *not* constitute gender bias on Mr. Braswell’s part. It is entirely consistent with his history of using demeaning,

⁴ Judge Alprin was equivocal, ruling that the reference “*is not necessarily* an example of sexual harassment,” reflecting at least the possibility that a reasonable juror could find this reference discriminatory. Lively v. Flexible Packaging Association, Slip op. at 8 (Super. Court December 23, 1996).

trivializing descriptions of women. His habit of rudely insulting the intelligence of women was commonplace.

The panel majority's conclusion (labeled as "while not entirely conclusive") that offensive comments, because they were not sexual in nature, "detracted considerably from any tendency to create a hostile environment" 765 A.2d at 967, is flatly inconsistent with established law. Settled law holds that non-sexualized sexual harassment is actionable as a form of gender discrimination or hostile work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 25, 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring) (a hostile work environment may exist where "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."); Van Steenburgh, 171 F.3d 1155, 1159 (8th Cir. 1999) (defendant is "mistaken in asserting that there must be incidents within the limitations period that are explicitly sexual"); Smith v. St. Louis Univ., 109 F.3d 1261, 1265 (8th Cir. 1997) (hostile work environment created by supervisor's persistent derogatory comments to plaintiff and to at least one other female, none of which were sexualized); Kopp v. Samaritan Health System, 13 F.3d 264, 269-70 (8th Cir. 1993) (non-sexualized sexual harassment found where doctor yelled at, swore at, threatened and endangered females, including calling one a "stupid bitch"); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) ("the Supreme Court has in no way limited this concept [of a hostile work environment] to intimidation or ridicule of an explicitly sexual nature."); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) ("intimidation and hostility to women because they are women can obviously result from conduct other than explicit sexual advances."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); see also Vicki Schultz, "Reconceptualizing Sexual Harassment,"

107 Yale L.J. 1683 (1998) (arguing that non-sexual harassment is often a major part of a hostile work environment). As the D.C. Circuit stated:

We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of an employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or other unequal form of treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.

McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985). That the December events were not sexual, or sexually explicit, in no way lessens their import as components of a hostile work environment.

Similarly, for the trial court and the panel majority to discount the "dumbest girl" reference, whether because it was not sexual enough or because it was made about another employee, also was error. The essence of a hostile work environment claim is that it is *environmental*. The environment itself may become poisoned and the injury – altered workplace conditions – can continue even between and beyond discrete manifestations of harassment. It is beyond question that comments that demean women in the workplace are highly probative of hostile work environment. As Chief Judge Becker of the Third Circuit explained in Hurley v. Atlantic City Police Dept.:

Evidence that women other than the plaintiff were subjected to a hostile work environment clearly meets Rule 401's requirements in a number of situations. For example, a plaintiff may show that, while she was not personally subjected to harassing conduct, her working conditions were nevertheless altered as a result of witnessing a defendant's hostility towards other women in the workplace. See Lehmann, 626 A.2d at 457 (“A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other workers.”).

174 F.3d 95, 110 (3d Cir. 1999); See also Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) ("harassment of other women working alongside Vinson is directly relevant to the question whether [defendant] created an environment violative of Title VII"); Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981) (evidence of harassment of other women relevant).

In circumstances remarkably similar to this case, two circuits have reversed trial courts that overturned jury verdicts. The examples are instructive. In the Ninth Circuit's case of Draper v. Coeur Rochester, Inc., the plaintiff alleged a hostile work environment consisting mostly of unwelcome sexual banter and propositions, as well as unfavorable work assignments, from the plaintiff's supervisor. 147 F.3d 1104, 1105-06 (9th Cir. 1998). The only alleged incident of harassment that occurred within the limitations period did not involve sexual comments or work assignments: it was an incident where plaintiff complained to the alleged harassing supervisor about his behavior, and he responded by laughing at her. Id. at 1106. The district court granted summary judgment to the employer on statute of limitations grounds, determining that the laughing incident was not an act of discrimination. The Ninth Circuit reversed, however, holding that it was for the jury to determine whether the laughing incident was discriminatory and comprised part of a hostile work environment:

[The defendant] urges us to view the incident as an isolated event without reference to the circumstances in which it occurred. This narrow approach is inappropriate, particularly in the context of a continuing violation claim. As the Supreme Court recently acknowledged, determining what sorts of workplace behavior constitute discriminatory action that can create a hostile work environment requires “careful consideration of the social context in which particular behavior occurs and is experienced by its target . . . [and it] often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” Oncale v. Sundowner Offshore Servs., Inc., 140 L.Ed. 201, 118 S. Ct. 998, 1003 (1998). Discriminatory behavior comes in all shapes and sizes, and what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character, causing a worker to feel demeaned, humiliated, or intimidated on account of her gender. See Meritor Savings, 477 U.S. at 65 (noting that employees have the “right to work in an environment free from discriminatory intimidation, ridicule, and insult.”

Draper, 147 F.3d at 1109.

The Eighth Circuit’s decision in Van Steenburgh v. The Rival Co., is also strikingly similar to this case. 171 F.3d 1155 (8th Circuit 1999). There, the plaintiff alleged a hostile work environment consisting primarily of unwelcome sexual comments, propositions, and touching by her supervisor. Id. at 1157-58. After a jury returned a verdict for the plaintiff, the trial court granted the defendant’s motion for judgment as a matter of law on the grounds that there was insufficient evidence at trial for the jury to find that sexual harassment had occurred within the limitations period. Id. at 1158. Indeed, the only incident of alleged harassment that occurred within the limitations period was the plaintiff’s supervisor harshly informing her, in front of co-workers and supervisors, that he was placing another employee ahead of her on the production line. The Eighth Circuit reversed the trial court’s determination, finding that the jury “could have inferred a nexus between [the supervisor’s] hostile manner of addressing Van Steenburgh in front of her superiors and co-workers on June 8 and

her repeated rejections of his prior sexual overtures.” Id. at 1159. The Court further found that, “[a]lthough [the supervisor’s] conduct on June 8 was not as egregious as his earlier conduct, the jury could have found it to be discriminatory because [the supervisor] would not have treated a male employee the same way.” Id. at 1160.

Exactly the same considerations obtain here: the jury properly found that events occurring within the limitations period were discriminatory and a continuing part of the hostile work environment that had long existed at FPA. The panel and the trial court’s conclusion to the contrary is both error, and an improper arrogation of the role of the jury.

The majority panel supplied a second, alternate basis for its decision. Applying the Fifth Circuit’s “continuing violation” approach articulated in Berry,⁵ the majority held that by early 1989, Mrs. Lively knew, or should have known, that the earlier incidents of harassment were discriminatory. The majority based this conclusion on the facts that Mrs. Lively by 1989 had sought the advice of a lawyer, and had already been subjected to the cleavage comment, the hiring of the male stripper, and a negative performance review. 765 A.2d at 964.

Although much of the Fifth Circuit’s Berry analysis is consistent with that of other Circuits, it places an additional obligation on a plaintiff, beyond establishing that events within the limitations period are “related” to events outside. Under Berry, the court considers first whether the later events are of the same type as the earlier, time-barred, events. This is consistent with the tests applied by this Court and other Circuits. Second, under Berry, the court considers the frequency of the

⁵ The panel Majority did not explicitly adopt Berry. In fact, the majority analyzed the relationship between the “dumbest girl” reference and prior conduct under the Berry approach and under the Draper, 147 F.3d 1104, approach, and analyzed the performance evaluation under the Draper approach and the Van Steenburgh, 171 F.3d 1155, approach.

violations. This inquiry is superfluous in the context of a hostile work environment. The determination that a hostile environment exists is based in part on the very frequency of the conduct. Here, the hostile work environment has been found by the jury and acknowledged by all of the judges to have reviewed the matter.

The third Berry factor imposes a substantial new obligation on plaintiffs with respect to the timing of their complaint. It examines the “permanence” of the violation: whether the nature of the earlier violations should have triggered the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. Berry, 715 F.2d at 981. We urge this Court to reject this portion of the Fifth Circuit’s test. It creates very real obstacles to relief for victims of sexual harassment and is peculiarly inappropriate to the hostile work environment case. It is inconsistent with the broad remedial purpose of the D.C. Human Rights Act. Simpson v. District of Columbia Office of Human Rights, 597 A.2d 392, 398 (D.C. 1991) (civil rights statutes are remedial and must be construed generously). It imposes an obligation on the victim of sexual harassment to have perfect timing, filing her complaint not too early and not too late. Access to judicial relief should not be as elusive as the proverbial brass ring, requiring a rider's perfection of timing while maintaining balance on a fast moving carousel. It will foreclose judicial relief in too many otherwise meritorious cases.

A hostile work environment claim depends on the accumulation of multiple events, each of which may not be independently actionable. A victim may not be able to pick an exact date on which the accumulation is sufficient that her claim has “ripened,” so that she must proceed to the courthouse. If she files a claim too early without a sufficient accumulation of events, she will find her

complaint dismissed because she has made an insufficient showing of pervasiveness. If she files too late, she will be deemed to have sat on her rights, and her access to relief will be foreclosed even in cases where the sexual harassment is blatant and ongoing.

The instant case is an example of what can happen when only the last in a series of acts falls within the limitations period, and when a court requires that it be considered in isolation. Mr. Braswell's misconduct over a period of years was aptly described by defendant's own Chairman of the Board: Mr. Braswell demeans women and their abilities. The December events are of precisely the same nature. When the jury found them discriminatory and within the limitations period, that should have ended the matter.⁶

Further, it was impossible for Mrs. Lively to determine precisely when her claim for sexual harassment could properly be brought. Although Mr. Braswell's harassment was significant enough for Mrs. Lively in 1989 to hire an attorney, some forms of the harassment abated as a result of FPA's Board action. When the Board ordered Mr. Braswell to stop harassing her and specifically prohibited him from making critical comments about and disciplining her, Mrs. Lively no doubt reasonably believed that he would stop. Indeed, had that Board action been permanent, Mrs. Lively's rights would have terminated one year later. But in December 1992, the Board, under new leadership, lifted those restrictions, giving Mr. Braswell new license to discriminate and retaliate against Mrs. Lively. He immediately did so, committing further discriminatory acts that in effect reestablished the hostile environment. Consequently, and especially because the earlier Board held out the possibility of

⁶That the performance evaluation can be "readily characterized as retaliatory," as the panel majority said, 765 A.2d at 967, does not in any way lessen its impact as gender-biased harassment, since any singular act may have multiple motivations. *See* discussion of retaliation, *infra*.

correcting or restraining Mr. Braswell's conduct, there was insufficient cause for Mrs. Lively to believe that she must proceed to the courthouse to assert her rights at any date earlier than December 1992. Approximately one year later, Mrs. Lively did, in fact, file her claims.⁷

The Ninth Circuit has rejected the Berry test, finding it inappropriate in the context of hostile work environment claims. See Fielder v. UAL Corp., 218 F.3d 973, 987-88 & n. 10 (9th Cir. 2000).

The First, Third, Seventh and Tenth Circuits have utilized the Berry approach. See, e.g., Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481-82 (3d Cir. 1997); Purrington v. Univ. of Utah, 996 F.2d 1025, 1028-29 (10th Cir. 1993); Selan v. Kiley, 969 F.2d 560, 566-67 (7th Cir. 1992); Sabree v. United Bhd. Of Carpenters & Joiners Local No. 33, 921 F.2d 396, 401-02 (1st Cir. 1990). However, they have not uniformly interpreted or applied it. See, e.g., Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 n.4 (10th Cir. 1999) (holding that the three-factor Berry analysis is “not a bright line test”); Martin v. Nannie & The Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993) (where incidents occurring outside the limitations period included rape, plaintiff held not barred from including incident as part of continuing violation of sexual harassment); see generally Note, Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law, 79 Tex. L. Rev. 531, 541, 546 (Dec. 2000) (“circuit courts have not uniformly interpreted or applied the Berry test”; “the courts have yet to agree on exactly what types of events can be said to alert plaintiffs of their rights”).

⁷ Although, as we have said, the Berry test is particularly inappropriate in the hostile work environment setting, Mrs. Lively’s claim should survive even under that analysis. The December events are of the same type as earlier events, which occurred with frequency. Under the particular facts of this case, given the facts recited above even the third test, permanency, is met.

Indeed, in some instances these courts seem to ignore the permanence requirement altogether. For example, in Van Steenburgh, which involved extensive physical touching by the plaintiff's supervisor – all of which occurred outside the limitations period – the Court did not even address the issue of whether a reasonable person in the plaintiff's position would have realized she had an actual claim at some point in time outside the limitations period. Similarly, in Martin, the plaintiff alleged, as part of her harassment claim, a rape that occurred outside the limitations period. While the court purported to apply the Berry test, the court refused to hold that the rape should have alerted the plaintiff that she had a claim, and thereby reversed summary judgment granted to the defendant on limitations grounds. These cases make clear federal courts' reluctance to rigidly apply Berry's permanency factor when to do so would absolve severe harassers from liability.

This Court should similarly decline to rigidly apply the permanence prong of the Berry test, particularly in light of the near undisputed and severe harassment which occurred in this case.

**C. The Evidence Presented At Trial Supported
The Jury's Finding of Retaliatory Termination**

On the basis of the evidence presented at trial regarding Mr. Braswell's retaliation, coupled with the evidence of his tendency to harass and demean female employees, the jury returned a verdict for plaintiff on her claim of retaliatory termination. On motion of the defendants, the trial court entered judgment as a matter of law for defendants on plaintiff's retaliation claim, and in the alternative, granted them a new trial. The court based its decision on the facts that Mrs. Lively went part-time at FPA in October 1992, did not physically work in the FPA office after December 11, 1992, and was unable to return to work on the date demanded by defendants. Lively v. Flexible Packaging Association, No. 93CA13834, slip op. at 10 (Super. Court December 23, 1996). From

this, it concluded that no reasonable jury could find that Mr. Braswell was motivated, at least in substantial part, by an intent to retaliate against Mrs. Lively.

The court's decision is based on a significantly flawed understanding of the D.C. Human Rights Act and specifically, the law on proving pretext. Its decision violates the long-established rule of law that evidence of a retaliatory intent tends to prove pretext. It rests on the faulty legal premise that only a plaintiff who proves the facts underlying her employer's purported rationale to be false can demonstrate pretext, and if a plaintiff fails to do so, all evidence in the record tending to show retaliatory motive is rendered inconsequential. Based on these legal errors, the court was able to ignore the overwhelming evidence of Mr. Braswell's retaliatory intent to terminate Mrs. Lively – evidence which more than adequately demonstrated the reasonableness of the jury's verdict in this case.

The vacated majority decision of this Court upheld the trial court's decision on essentially the same grounds contained in the trial judge's order – that Mrs. Lively failed to dispute the fact that she was unable to work for the three and a half months prior to her termination. Lively, 765 A.2d at 970. Thus, like the trial court, the majority recognized only half of the well-established rule of law that a plaintiff can prove pretext *either* by showing that her employer's explanation is unworthy of credence *or* by showing that her employer was more likely motivated by a discriminatory reason. Indeed, the majority decision is quite remarkable in that it recognizes that there was substantial evidence of retaliatory intent, 765 A.2d at 970, but nonetheless upheld the trial court's decision because FPA proffered Mrs. Lively's absence as the basis for its decision. The majority thus compounded its error by not recognizing that, even where a legitimate reason underlies an employer's action, a finding of

liability is appropriate where a retaliatory motive also is a substantial factor on which the decision rests.

In her dissent, Judge Reid correctly “conclude[d] that the trial judge and [her] colleagues failed to review the evidence in the light most favorable to Mrs. Lively, and to recognize not only that she was entitled to every legitimate and reasonable inference, but also that it is the task of the jurors, rather than the judges, to weigh the evidence and determine the credibility of the witnesses.” Lively, 765 A.2d at 971 (Reid, J., dissenting). “Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.” Gallagher v. Delaney and Consolidated Edison Company of N.Y., Inc., 139 F.3d 338, 342 (2d Cir. 1998).

The District of Columbia Human Rights Act Section 1-2525 makes it unlawful to “retaliate against...any person...on account of having exercised or enjoyed...any right granted or protected under” the D.C. Human Rights Act. DC Code §1-2525(a)(2000). The requirements for proving a violation of the D.C. Human Rights Act mirror the requirements under Title VII. See Hunter v. Ark Restaurants Corp., 3 F. Supp. 2d 9, 14 (D.D.C. 1998). This Court has stated, “[t]he anti-discrimination provisions of both statutes are substantially similar,’ and when interpreting the DCHRA we have long referred to federal cases interpreting Title VII.” Knight v. Georgetown University, 725 A.2d 472, 478 n.5 (D.C. 1999) (quoting Young v. Sutherland, 631 A.2d 354, 361 n.17 (D.C. 1993)).

A *prima facie* case for retaliation under the D.C. Human Rights Act is made upon a showing that: (1) the plaintiff was engaged in a statutorily protected activity, or that she opposed practices made unlawful by the D.C. Human Rights Act; (2) the employer took an adverse action against her; and (3) there was a causal relationship between the protected activity and the adverse action. See Young, 631 A.2d at 368. With respect to the third prong, a plaintiff can show a causal connection in several different ways, no one of which is more probative than another. They include evidence showing “a pattern of antagonism following the protected conduct” and leading up to the adverse employment action, close temporal proximity of the adverse employment action to the protected activity, or any other evidence permitting an inference of causal connection. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3rd Cir. 1997) (“circumstantial evidence of a ‘pattern of antagonism’ following the protected conduct can also give rise to the inference. . .”) (interpreting Title VII) (citing Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 895 (3d Cir. 1993)).

After a *prima facie* case of retaliation is established, “a rebuttable presumption arises that the employer’s conduct amounted to unlawful discrimination.” Young, 631 A.2d at 361. The burden of production then shifts to the defendant to offer a legitimate non-discriminatory reason for its action. Id. If the defendant makes such an evidentiary proffer, the presumption of illegal retaliation drops out of the case, and the plaintiff then has the burden of demonstrating, by a preponderance of the evidence, that the reason given by the employer is pretextual. Knight, 725 A.2d at 478; see also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-143 (2000); St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

In this case, the trial court granted defendants judgment as a matter of law and a new trial on plaintiff's retaliation claim based on his conclusion that plaintiff failed to offer sufficient evidence of pretext. More precisely, the court based its holdings on the sole ground that the FPA's purported basis for terminating Mrs. Lively – her inability to return to work by July 15, 1993 – was in fact accurate. Lively v. Flexible Packaging Association, No. 93CA13834, slip op. at 10 (Super. Court December 23, 1996) (“[Mrs. Lively] was given specific advance notice to return to work by July 15, 1993, or face termination. She did not return.... The existence of a virtually undisputed legitimate, non-discriminatory reason for her termination defeats the retaliation claim.”). In so doing, the court ignored the substantial evidence plaintiff presented tending to show pretext and retaliatory termination, and implicitly construed the law as requiring plaintiff to prove untrue the facts on which the employer alleges it based its decision. This is not the law.

A plaintiff can prove pretext in one of two ways. A plaintiff can *either* show (1) that the proffered explanation is untrue or “unworthy of credence” *or* (2) that, even if the facts underlying the proffered reason are true, a discriminatory reason more likely motivated the employer. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). As the D.C. Circuit has explained, “an employment discrimination plaintiff *is not limited* to arguing that the employer's explanation is wrong on the merits, but he can also attempt to show *by other means* that the explanation was made up *to disguise illegitimate bias*.” Aka v. Washington Hospital Center, 156 F.3d 1284, 1299 (D.C. Cir. 1998) (emphases added), cert. denied, 531 U.S. 927 (2000); see also id. at 1295, n.11 (“the plaintiff is not limited to challenging the employer's explanation, but can also

avoid summary judgment (and prevail at trial) by presenting other evidence, either direct *or circumstantial*, that permits an inference of discrimination.”) (emphasis added); Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1108 (8th Cir. 1998) (plaintiff “may prove pretext either directly by showing that her employer was more likely motivated by a discriminatory reason or indirectly by showing that her employer’s explanation is unworthy of credence.”); Raniola v. Bratton, 243 F.3d 610, 625 (2d Cir. 2001) (“a plaintiff may establish a Title VII violation even when a retaliatory motive is not the sole cause of the adverse employment action, or when there were other objectively valid grounds for a discharge.”) (interpreting Title VII) (citations omitted); Wallace v. SMC Pneumatics, 103 F.3d 1394, 1397 (7th Cir. 1997) (there are “two ways in which a plaintiff can avert summary judgment for the defendant in an employment discrimination case”; one of those methods, “which is thoroughly conventional,” is “by putting in enough evidence, whether direct or, *more commonly* circumstantial, to create a triable issue of whether the adverse employment action of which he complains had a discriminatory motivation....”) (emphasis added).

Here, the panel and the trial court clearly erred by overlooking the second route to proving pretext; a route whereby a plaintiff can show that, though defendant’s proffered reason was plausible, it was not the actual reason the defendant took the adverse employment action. The evidence plaintiff marshaled at trial supporting the jury’s finding of retaliation was substantial. For example, there was overwhelming evidence in the record justifying the jury’s conclusion that Mr. Braswell created and maintained a work environment hostile to Mrs. Lively and the other female employees at FPA. See Hawkins v. Hennepin Technical Center, 900 F.2d 153, 156 (8th Cir. 1990) (“[A]n atmosphere of condoned sexual harassment in a workplace increases the likelihood of retaliation in

individual cases.”), cert. denied, 498 U.S. 854 (1990). Furthermore, there was ample evidence in the record for the jury to conclude that: (1) Mr. Braswell tried to censor employee complaints of discrimination through coercion, threats, expressions of hostility and attempts to close off their access to the board of directors; and (2) Mr. Braswell retaliated against another, similarly situated female employee when he found out about her complaint to the board of directors. See Lively, 765 A.2d at 958 (“There was also evidence of Mr. Braswell’s retaliatory conduct toward those who complained of his sexually harassing behavior.”); see also Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983) (circuit court held that evidence showing similar treatment to another employee was relevant to employer’s reason for terminating plaintiff and was properly admitted to prove employer’s motive, intent, or plan); see also Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 793 (D.C. Cir. 2001) (“[T]he record, viewed in the light most favorable to the plaintiff, could fairly be construed as supporting the claim in her brief that “[the Chairman]’s own words reflect a particularly thin skin towards plaintiff’s protected complaints, deriding them as ‘disruptive and accusatory behaviors’ and ‘libelous statements’ and ‘threats’”).

Further, it cannot be said that no reasonable jury could have concluded from the evidence that Mr. Braswell retaliated against Mrs. Lively in several ways prior to her termination. The record contained evidence that his reviews of her performance switched from good to bad upon learning of her complaints to the board. There was evidence that his day-to-day treatment of her in the office became more openly hostile after she engaged in protected activity. There was even evidence presented that the FPA board deemed Mr. Braswell’s treatment of Mrs. Lively retaliatory. Plt. Ex. 11 (“There is a perception that Gaye Lively is being painted unfairly into a corner....”). Plt. Ex. 14

(memorandum from Chairman Woolford to Braswell, lamenting the unfair treatment of Mrs. Lively and instructing Mr. Braswell not to “run wild” again). See Wall v. AT&T Technologies, Inc., 754 F. Supp. 1084, 1092-93 (M.D.N.C. 1990) (court held that the termination was just “part[] a continuing series of retaliatory acts committed in response to [the plaintiff]’s engagement in protected activities” and therefore, summary judgment on the issue of the retaliatory termination was erroneous).

There also was evidence presented at trial that would support the inference that Mr. Braswell’s December 1992 evaluation of Mrs. Lively was retaliatory, and was a precursor step in his ultimate decision to terminate her in July of 1993. The 1992 evaluation came close on the heels of the board of directors’ lifting the ban that prohibited Mr. Braswell from taking any disciplinary action against Mrs. Lively. The criticism of Mrs. Lively’s “communication skills” mirrored the negative review of other female co-workers who had complained of discrimination. There was evidence presented that would permit the inference that the criticism of Mrs. Lively’s “communication skills” was pure pretext. See Lively, 765 A.2d at 967 (the 1992 performance review could be “readily characterized as retaliation”). Mrs. Lively testified that in the more than sixteen years prior to her employment at FPA, she had never been criticized for any problems with her “communication skills”. S.R. 6, p. 187. Furthermore, in the six years before Mr. Braswell came to work at FPA, no supervisor had criticized Mrs. Lively in this manner. S.R. 1, p.77. Mr. Braswell, himself, had made no such criticism prior to her protected activity. S.R. 1, p.81. Nonetheless, the review placed Mrs. Lively on probation, contained the explicit threat of termination, and contained a near-unjustifiable requirement that she submit to testing at a center for learning disabled children. Both the probation

and the requirement that she submit to diagnostic training were reiterated in Mr. Braswell's July 15 letter threatening her with termination.

Furthermore, with respect to defendants' termination decision, although the purported non-discriminatory reason for terminating Mrs. Lively was her inability to return to work on July 15, 1993, defendants offered no explanation for the choice of July 15 as the drop-dead return date. In fact, Mr. Braswell selected the July 15th date after he learned of Mrs. Lively's impending surgery on July 8. These facts, combined with evidence that Mrs. Lively was denied FPA's standard severance package and was replaced by a male who worked part-time from home for the first year of his employment, further support an inference of retaliatory motive.

This Court has made clear on several occasions that it follows the dual method of proving pretext as articulated by the federal courts. In Hollins v. Federal National Mortgage Ass'n, 760 A.2d 563, 573 (D.C. 2000), this Court stated that, under the D.C. Human Rights Act, a plaintiff may prove pretext "either directly by [proving] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (quoting Burdine, 450 U.S. at 256); see also id. at 574 ("even without direct evidence of pretext, [a plaintiff] could still survive summary judgment if he could prove pretext indirectly by showing that discrimination was more likely to have been the motivation for [the adverse employment action], and thus that the [articulated reasons] were merely a pretext"). This Court similarly has held that "the fact that [an employer] ha[s] a legitimate business reason for its decision...[does] not necessarily insulate it from liability for retaliation under section 1-2525(a)." Young, 631 A.2d at 367-69 (fact that employer had legal right to foreclose on property that served as collateral for loan employee

defaulted on did not preclude finding that foreclosure constituted illegal retaliation) (citing Atlantic Richfield Co. v. District of Columbia Com. On Human Rights, 515 A.2d 1095, 1101 (D.C. 1986)).

Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 793 n.23 (D.C. 2001), highlights the law of this Court that a plaintiff can demonstrate pretext without proving an employer's explanation wrong on the merits. Carter-Obayuwana involved a claim of retaliation brought under the D.C. Human Rights Act. The plaintiff, an Associate Professor, claimed that Howard University reduced her salary (among other acts), in response to her complaints of sex discrimination by the Chairman of the University's psychology department. Howard responded that it was in fact the plaintiff's refusal to teach a particular course that resulted in her pay reduction. It was undisputed that the plaintiff in fact had disobeyed the university's instruction that she teach the extra course; that is, it was undisputed that the facts underlying the defendant's articulated rationale were true. However, this Court found summary judgment improper because, although the plaintiff had disobeyed the direct order, she also presented evidence that (1) she had repeatedly complained about the treatment she received, (2) the reduction in pay occurred shortly after her complaints of discrimination, and (3) that the university's requirement arose "suddenly and belatedly, at a time especially inconvenient to her." Id. at 793. These facts, this Court held, were a sufficient basis upon which a jury could find pretext.

In Carter-Obayuwana, the purported rationale was insubordination, rather than a failure to return to work on a date certain, as was the case here. But there is nothing particularly unique or exceptional about FPA's rationale here to except it from the standard methods of proof as to pretext. First, while it was undisputed that Mrs. Lively was unable to return to work on July 15, 1993, there

was evidence in the record that Mrs. Lively had been working part-time from home from December 1992 through March 1993, that she planned to return to work part-time after recuperating from surgery, and that FPA replaced her with someone who likewise worked part-time out of his home for the first year of his employment.

Second, the law draws no special exception for purported rationales involving absenteeism or presence in the workplace where there is sufficient evidence in the record of pretext. For example, in Gallagher v. Delaney, 139 F.3d 338, 350 (2nd Cir. 1998), the Second Circuit held that a Title VII plaintiff could survive a motion for summary judgment, in spite of the fact that the employer had alleged “excessive absenteeism” and “job abandonment” as its non-discriminatory reasons for firing her. The court based its ruling on the fact that the plaintiff had presented sufficient evidence to allow the inference of a discriminatory motive, i.e. demotions, lower performance evaluations, and continued harassment. The court held that “the intent of the employer is a *factually disputed matter* precluding summary judgment.” Id.

Similarly, in Koontz v. USX Corp., No. 99-3191, 2001 WL 752656 (E.D. Pa. July 2, 2001) (interpreting Title VII), the court denied the defendants’ motion for summary judgment on the plaintiffs’ retaliation claims. In Koontz, the plaintiffs had been involved in sexual harassment complaints to their union on behalf of two female employees. The plaintiffs alleged that because of those grievances, they began to suffer a series of adverse employment actions by their employers, including probations, reassignments and demotions, in response to which they filed repeated grievances with their union. Eventually, both of the plaintiffs were terminated due to “failure to

return to work” when they were both out for medical reasons substantiated by doctors’ notes. Id. at *3.

The court held that regardless of whether the defendants’ actions were “legitimate,” the plaintiffs still had presented sufficient evidence whereby “a reasonable jury could conclude that Plaintiffs were retaliatorily discharged.” Id. at *6. This evidence included: (1) temporal proximity between plaintiffs’ complaints about the adverse actions taken against them and their discharges; (2) alleged direct threats by defendants against plaintiffs and *ongoing antagonism* against plaintiffs; and (3) other evidence discrediting defendants’ assertion that its employment actions were legitimate. All of these factors were set forth in the plaintiffs’ *prima facie* case and the court found they were sufficient to show pretext. Id. at *5. See also Wall v. AT&T Technologies, Inc., 754 F. Supp. 1084, 1092 (M.D.N.C. 1990) (interpreting Title VII) (where plaintiff complained of sexual harassment, and there was evidence of a “continuing series of retaliatory acts committed in response to [the plaintiff]’s engagement in protected activities,” termination purportedly based on inability to return to work held to be illegal retaliation).

Thus, the law is clear that under the D.C. Human Rights Act and analogous federal law, a plaintiff may prove pretext -- even when she cannot disprove the facts underlying the employer’s rationale for its employment decision -- by presenting evidence from which a jury could infer that the stated reason of the employer, while technically true, was not the actual motivation. This method of proving pretext, like the first, relies on the jury’s power of inference. A finding of illegal retaliation is appropriate even when an employer is partially motivated by a legal purpose, if a desire to retaliate is also a “substantial contributing factor” in the employer’s decision to take the employment action

in question. See Young, 631 A.2d at 370; see also Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994) (a plaintiff only has to come forward with sufficient evidence whereby the jury could reasonably conclude that “an illegitimate factor more likely than not was a motivating or determinative cause of the adverse employment decision.”).

Here, the trial court erred in failing to recognize that the evidence at trial supported a finding that retaliation was at least one substantial motivation in defendants’ decision to terminate Mrs. Lively. The vacated majority decision from this Court entertained this possibility:

It is certainly true that the events preceding Mrs. Lively’s absence from the office – Mr. Braswell’s action toward, and in the presence of, of [sic] Mrs. Lively, the showing of prior acts of retaliation, Mr. Braswell’s attempts to squelch further complaints, and the performance evaluation in which Mrs. Lively was placed on probation and threatened with demotion – all shed light on Mr. Braswell’s state of mind, and suggest that her incapacitation may have been convenient for him.

Lively, 765 A.2d at 970. Yet, the panel failed to recognize its legal significance.

For the foregoing reasons, this Court should reverse the decision of the trial court and reinstate the jury’s finding of retaliatory termination.

IV. Conclusion

For the reasons here stated, *amici* respectfully request that the trial court’s order be reversed and vacated, and the jury verdict be reinstated.

Respectfully submitted,

Lois G. Williams, Esq., D.C. Bar No. 365894
Avis E. Buchanan, Esq., D.C. Bar No. 365208
Susan E. Huhta, Esq., D.C. Bar No. 453478

Attorneys of Record for the Washington Lawyers' Committee
for Civil Rights and Urban Affairs
11 Dupont Circle, NW, Suite 400
Washington, DC 20036
(202) 319-1000

Carl Messineo, Esq., D.C. Bar No. 450033
Partnership for Civil Justice, Inc.
1901 Pennsylvania Ave., N.W., Suite 607
Washington, D.C. 20006
(202) 530-5630

Linda M. Correia, Esq., D.C. Bar No. 435027
Attorney of Record for the Metropolitan Washington
Employment Lawyers' Association
Webster, Fredrickson & Brackshaw
1819 H Street, N.W., Suite 300
Washington, D.C. 20006
(202) 659-8510