DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 16-CV-1029

DEIDRE FRANCIS,

Appellant,

v.

SUTHERLAND ASBILL & BRENNAN LLP,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Stephen B. Pershing
D.C. Bar No. 482580
Pershing Law PLLC
1416 E Street, N.E.
Washington, D.C. 20002
(202) 642-1431
steve@pershinglaw.us

Alan R. Kabat
D.C. Bar No. 464258
Bernabei & Kabat, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7102
(202) 745-1942
kabat@bernabeipllc.com

Counsel to *Amicus Curiae*

July 21, 2017

Certificate as to Parties, Rulings, and Related Cases

(A) *Parties and Amici*. All parties appearing before the Superior Court and in this Court are listed in the Appellant's Brief.

(B) *Rulings Under Review.* References to the rulings at issue appear in the Appellant's Brief.

(C) *Related Cases.* There are no related cases.

Rule 29(c) Statement

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

Rule 29 (c)(3) Statement of *Amicus*

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

MWELA's members and their clients have an important interest in the proper interpretation of the anti-retaliation provision of the D.C. Human Rights Act, including whether employees can rely on circumstantial evidence of the decision-maker's knowledge of the employee's protected activity, and in the proper application of the summary judgment standards of Rule 56, D.C. Super. Ct. R. Civ. P., especially the requirements (a) that disputes of fact,

including reasonable inferences from the evidence, be left to the fact-finder, and (b) that the District's trial courts construe all facts, and consider all plausible inferences from those facts, in the light most favorable to the non-movant in determining whether a genuine dispute of material fact exists under Rule 56.

In line with those interests, this brief addresses the broader issues surrounding the trial court's grant of summary judgment in Sutherland's favor on the question whether Ms. Francis' termination was retaliatory, and the court's order *in limine* excluding all evidence of that termination from the jury's hearing.

Table of Contents

Table of Authorities

Statement of Facts

Amicus adopts the appellant's statement of facts. Brief of Appellant at 8-23. The following facts, stated here in condensed form, are relevant to *amicus*' understanding of the issues this brief addresses.

Deidre Francis was a capable, diligent and highly praised receptionist at the Sutherland law firm's D.C. conference facility. In September 2009, after almost a decade of employment, she complained to her supervisor that for many years she and her two fellow African American conference receptionists had been denied any chance for promotion.

Also in 2009, Ms. Francis' supervisor, Josephine ("Joy") Rodriguez, was promoted, and the firm created a new conference services supervisor position below her and over the receptionists. The posting for the new job listed a college degree as a requirement. Ms. Francis, who had no such degree, was permitted to apply but was never interviewed or considered a serious candidate. She asked about the qualifications of the white candidate who was eventually hired, and learned that neither he, nor the person who now supervised him, nor that person's supervisor—Ms. Francis' own second-line supervisor, Vickie Armstrong—had college degrees.

Ms. Francis complained of the unfairness of this situation to Ms. Rodriguez, who promised she would inform Sutherland's human resources chief, Lyn Dailey. Ms. Francis made the same complaint to Vickie Armstrong, Ms. Rodriguez' supervisor. Immediately after those complaints, Ms. Rodriguez and Ms. Armstrong began finding petty fault with Ms. Francis' performance, and within weeks they issued her a pre-termination "final written warning." After she received this warning, Ms. Francis went to the firm's long-

time chief executive officer, Clark Davis, explained her unfair-promotion concerns, and complained that the warning, and the management "bullying" that led to it, were retaliation for speaking out about discrimination at the firm. At Ms. Dailey's request, Ms. Rodriguez briefed Mr. Davis on the details of Ms. Francis' case before he met with her, and Mr. Davis promised Ms. Francis at their meeting that he would talk about the matter with Ms. Dailey, who was his immediate subordinate and reported directly to him.

Given the factual context just described, the lower court set down for trial the question whether Ms. Francis' "final written warning" was retaliatory. But it decided as a matter of law that her termination shortly thereafter could not have been retaliatory, in spite of that same surrounding evidence, apparently for the sole reason that Ms. Dailey testified that Mr. Davis did not tell her what Ms. Francis had told him.

Summary of Argument

In *amicus*' view this is a classic retaliation case, one that deserved to be placed before the jury in its entirety, not stripped of its major termination-related claim as the trial court ordered.

The trial court's determination was reversible error in two respects: the court injected itself between the facts and the fact-finder, indulging its own inferences rather than protecting the jury's prerogatives; and it made a fatally mistaken inference concerning "cat's paw" liability for retaliation when it decided, as a matter of law at the summary judgment stage, that where Sutherland's personnel director made the decision to terminate Ms. Francis, and the firm's chief administrative officer and the terminated employee's supervisors undisputedly knew of her complaints of discrimination, the decision-maker could not be inferred to know what the others knew, or to have relied on

a colleague's possibly ill-motivated opinion, even though the surrounding circumstances strongly suggested the opposite.

This case raises the same causation issues as did *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), in which the Supreme Court recognized the "cat's paw" theory of retaliation claims, *i.e.,* that an employee with knowledge of a worker's complaints of discrimination (or other protected civil rights activity), and a motive to retaliate against the worker for that activity, can influence an unwitting fellow employee to take action against the worker that the retaliator desired but lacked authority to take, in just the way the monkey in Aesop's fable induced the cat to burn its paws retrieving hot chestnuts that the monkey then took for itself. *Staub*, 562 U.S. at 415 n.1 (explaining Judge Posner's use of the fable).

The present case is a factual mirror image of *Staub*: whereas in *Staub* it was a subordinate who knew of the protected civil rights activity, and a superior who decided on the adverse action, here it was the superior who had knowledge of the worker's protected activity, and his subordinate who harbored a motive to retaliate for it. The two situations are doctrinally the same, and *Staub* makes no distinction between them. If a claimant can produce enough evidence of "cat's paw" retaliation—regardless of the hierarchical relations among the employer's agents—that a reasonable jury could decide such a claim in her favor, *Staub* instructs that the jury should be given the chance to evaluate that claim.

To uphold the trial court's contrary disposition here would require this Court either to reject outright the theory recognized in *Staub*, even though it is now the law of the land, or to accept one *Staub* scenario (where the subordinate's motive influences the

superior and taints his otherwise innocent adverse action) and reject its mirror image (where the superior has knowledge of protected activity, and the subordinate decides the adverse action).

Such a rule would create an intolerable double standard in retaliation cases. Juries would be allowed to infer that superior knew their subordinates' illicit motivation, but would be forced to reward subordinates' willful blindness or coerced deference to their bosses' biased intentions. The rule would vex juries and hobble their deliberations. It would confuse litigants, prolong disputes, and burden tribunals. Its real world effect would be to encourage employers to evade accountability by shifting decisions down the chain of supervision, thus worsening the isolation of employees who see or suffer unlawful discrimination and undermining the DCHRA and its cardinally important purposes.

Accordingly, the Court should see in Ms. Francis' termination a legitimate instance of potential "cat's paw" liability under *Staub*, and reverse the trial court's failure to commit the issue of such liability for jury decision.

Argument

A. This case illustrates the dangers inherent in trial courts' substitution of their own inferences for the jury's fact-finding

Summary judgment requires trial courts to observe the critical distinction between identifying a fact issue, which they must do, and deciding that fact in favor of one party over the other, which they must not do. *See, e.g.*, *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005) (citing *Holland v. Hannan*, 456 A.2d 807, 814-15 (D.C. 1983)) ("[t]he role of the court is not to try an issue as factfinder, but rather to decide whether there are genuine issue of material fact to be decided by the jury").

Our core concept of fact-finding includes making inferences from the facts. *Senator Cab Co. Inc. v. Rothberg*, 42 A.2d 245, 249 (D.C. 1945) ("inferences are matters of fact, not of law, and must be drawn by the jury or other fact finder").

The principle that factual inference belongs to the fact-finder applies in every subject area of civil litigation. This Court "will affirm an award of summary judgment 'only if there is no genuine issue of material fact remaining *after taking all inferences* in favor of the non-moving party.'" *Johnson v. Washington Gas Light Co.,* 109 A.3d 1118, 1120 (D.C. 2015) (negligence) (emphasis added); *Herbin v. Hoeffel*, 806 A.2d 186, 191 (D.C. 2002) (attorney misconduct) (same).

Two of the most important inferences a finder of fact can make—and only a finder of fact—are causation and intent, since either one may be dispositive and its proof will typically consist of circumstantial evidence alone. *See, e.g., Flax v. Schertler*, 935 A.2d 1091, 1102 (D.C. 2007) (circumstantial evidence alone sufficient to withstand summary judgment on fraudulent inducement claim). In *Johnson*, *supra*, the trial court at summary judgment made a causation-related inference favorable to the movant: it determined that the evidence "did not exclude the possibility" of causation by someone other than the defendant. This Court reversed the grant of summary judgment because the trial court had used exactly the wrong reasoning: the "possibility" that was not "exclude[d]" meant there *was* a fact issue, not that there was none.

This Court recently addressed the same inference question in the retaliation context in *Bryant v. District of Columbia*, 102 A.3d 264 (D.C. 2014), a DCHRA employment case strikingly similar to this one. Importantly, the posture in *Bryant* arguably called for more deference to the trial court than the present case does. After the case was tried to a

judge and jury, and after the judge granted the employer's motion for judgment as a matter of law before the jury retired, the employee asked to reopen the record for additional deposition testimony to bolster a causation inference. The trial judge denied the request and granted judgment to the employer as a matter of law. This Court reversed, holding that the trial court had abused its discretion by deciding on its own (and reaching an erroneous answer), rather than reserving to the jury, the question whether the extra evidence gave rise to an inference of causation. *Id*., 102 A.3d at 270 (holding that the additional deposition provided "crucial evidence that allows Mr. Bryant to make his *prima facie* claim" of causal nexus between one employee's knowledge and another's adverse action).

In the present case, the evidence obtained in discovery, construed in the light most favorable to Ms. Francis, would have allowed a jury to infer that Sutherland's termination of Ms. Francis, as well as the "final written warning" that preceded it, were retaliation against her for complaining of racial discrimination in the stated requirements for promotion to conference supervisor. But here, just as in *Bryant*, the trial court erred not only in what decisions to reserve to the jury, but in the conclusion it reached on the judgment it did make.

The trial court correctly said a jury could reasonably infer that the "final written warning" by Ms. Rodriguez, and by implication the selectively harsh glare on Ms. Francis that led up to it, were retaliation for her complaints of discrimination. *See* Trial Court Opinion at 7-8. In the next breath, however, the court said there was no support for a similar inference regarding termination, because the official who nominally decided to fire Ms. Francis, human resources chief Lyn Dailey, was acting on a final warning that

was "based exclusively on performance issues," *see* Trial Court Opinion at 9, and "nothing in the record suggests" that Ms. Dailey knew of Ms. Francis' post-warning complaint of discrimination to Mr. Davis.[1]

In fact, the trial court's conclusion about Ms. Dailey was demonstrably and seriously wrong, in the same way the lower courts' factual assessments in *Johnson* and *Bryant* were wrong. The trial record here contained plenty of suggestions that Ms. Dailey knew of Ms. Francis' post-warning complaints of discrimination and retaliation. The trial court's ruling even recited some of them—and then, unaccountably, ignored them.[2] The reasonable inference open to the jury on these facts was that Ms. Dailey's claimed ignorance of Ms. Francis' post-warning protected activity was unworthy of belief—as was any claim that in executing the firing Ms. Dailey did not know or rely on Ms. Rodriguez' opinion of Ms. Francis. *See, e.g.*, *Raphael v. Okyiri*, 740 A.2d 935, 955 (D.C. 1999) (whistleblower retaliation) ("it is common knowledge that [an office] grapevine can often travel directly to the boss").

---

[1] Whether the trial court's error is considered a factual or a legal one is immaterial. This Court "review[s] a motion for summary judgment *de novo*, applying the same standard utilized by the trial court." *Grant v. May Dep't Stores Co.,* 786 A. 2d 580, 583 (D.C. 2001) (citing *Colbert v. Georgetown Univ*., 641 A.2d 469, 472 (D.C. 1994) (*en banc*)). This *de novo* review standard applies to improper invasion of the jury's province whether based on misperception of fact, mistake of law or both.

[2] Specifically, the lower court's decision mentioned that Ms. Rodriguez, author of the final warning, was copied on a December 8, 2009, e-mail exchange in which Mr. Davis notified the eventual firing official, Ms. Dailey, that Ms. Francis had asked to meet with him about the warning. *See* Trial Court Opinion at 8-9. The court also mentioned that Ms. Dailey asked Ms. Rodriguez to "catch [Mr. Davis] up" on the details of Ms. Francis' case before he met with her. *Id.* at 9. The trial court also had before it, but failed to mention in its opinion, at least two other salient facts: Ms. Dailey was Mr. Davis' immediate subordinate and reported directly to him, and she and Mr. Davis had an e-mail exchange the day after Ms. Francis was fired that strongly suggested they had conversed on the subject before the firing. *See* Brief of Appellant at 22.

The most severe prejudicial effect of this ruling, a prejudice potentially dispositive in itself, was that it took away from the jury any evidence, as well as the right to decide, that the firing was the fruit of a poisonous tree. Evidence showed that the written warning played such a critical role in the firing—making it all but certain on the slightest further perceived infraction—that the trial court should not have confined its analysis of termination retaliation to post-warning events in general, much less to the particular question what Ms. Dailey knew about a single post-warning event, Ms. Francis' complaint to Mr. Davis. The Appellant's Brief at 49-50 addresses this important issue.

The trial court prejudiced the case as a whole when it kept the issue of retaliatory termination from ever reaching the jury, both by dismissing the claim at summary judgment and by issuing an *in limine* order that left the jury uninformed, *see* Appellant's Brief at 49, as to whether or under what circumstances Ms. Francis actually lost her job in this dispute. It is not surprising—and certainly puts to rest any suggestion that the error below was harmless—that the jury, faced only with the out-of-context question whether the final written warning was retaliatory, went against her. As the case was presented to them, the jurors could have deemed the warning by itself too trivial for redress, or inferred some non-actionable cause of whatever undisclosed further events led her to sue; but the same jury, deliberating on the termination as well as the warning, could well have come out in the plaintiff's favor on both.

This Court should have no hesitation in applying the same principles here that it did in *Bryant* and *Johnson*. Our courts should never require proof sufficient to exclude all contrary possibilities in order to survive summary judgment. Nor should they give effect to their own factual suppositions in lieu of the jury's if they personally favor one

permissible inference over another. *See, e.g., Johnson v. Perez*, 823 F.3d 701, 708 (D.C. Cir. 2016) (at summary judgment, "our focus is on whether a jury, looking at the record evidence and drawing all inferences in [the non-movant's] favor, *could* conclude" that the non-movant should prevail) (emphasis added); *id*. at 705 ("The court may not make credibility determinations or otherwise weigh the evidence. . . . The court may not, for example, believe one witness over another if both witnesses observed the same event in materially different ways.") (citations omitted).

A reversal and a new trial in Ms. Francis' case simply upholds this settled law, and should give no one heartburn. What should give the Court pause are the immediate shock waves and long-term distortions that a contrary ruling would create in our law of evidence, of summary judgment, and of retaliation under the DCHRA.

B. The trial court's mistakes of law regarding "cat's paw" retaliation call for correction.

1. "Some direct relation" between one worker's motive and another's decision is sufficient to establish liability.

The "cat's paw" theory of causation makes an employer liable for retaliation when the discriminatory intent of one of its employees had "some direct relation" to another employee's adverse action. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011). After *Staub*, "[i]f a supervisor performs an act motivated by an [unlawful] animus that is intended to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id*. at 419.

Staub thus announced and explained that one employee's discriminatory motive can so influence another's decision as to meet the proximate causation requirement for a retaliation claim against the employer. *Id.* at 420 ("the requirement that the biased

supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause") (citing *Anza v. Ideal Steel Supply Corp*., 547 U. S. 451, 457–458 (2006); *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("proximate cause . . . requires some direct relation between the injury asserted and the injurious conduct alleged")).

2. Circumstantial evidence is fully satisfactory as proof of retaliation.

Courts have accepted circumstantial proof of discriminatory motive at least as far back as *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977) (housing); *Rogers v. Lodge*, 458 U.S. 613 (1982) (voting); and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981), and *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147 (2000) (employment).

The Supreme Court has "often acknowledged the utility of circumstantial evidence in discrimination cases." *Desert Palace v. Costa,* 539 U.S. 90, 99-100 (2003). "The 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.'" *Id.* at 100 (quoting *Rogers v. Missouri Pacific R. Co*., 352 U. S. 500, 508, n.17 (1957)).

Indeed, even in criminal cases, the most severe test of evidence in our law, the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace*, 539 U.S. at 100 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954) (in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence")). This Court has long adhered to the same rule in cases

before it. *See, e.g.*, *Cannon v. United States*, 838 A.2d 293, 297 (D.C. 2004) (in reviewing evidence in criminal appeals, "we do not draw any distinction between direct and circumstantial evidence"); *Bernard v. United States*, 575 A.2d 1191, 1193 (D.C. 1990) (same).

Like any discriminatory behavior, "cat's paw" retaliation, meaning one official's adverse action caused by another's retaliatory motive, can be proven by circumstantial evidence if an open admission or other direct evidence is unavailable. *See, e.g., Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006) (recognizing temporal proximity as basis for inference of employer knowledge where employee "traded correspondence" with unidentified "senior [agency] personnel" around the time that her supervisors allegedly retaliated against her).

In keeping with these precepts, the cat's paw liability inquiry must not stop with whether an open admission or other direct evidence of collusion between two employees establishes retaliatory motive for an adverse action. A reviewing court must look to whether a reasonable inference of "ultimate" causation exists, *Staub*, 562 U.S. at 420, whatever the relation among the employer's agents—using "such circumstantial and direct evidence of intent as may be available" across the entire record. *Arlington Heights*, 429 U.S. at 266; *see also Bryant v. District of Columbia*, 102 A.3d 264 (D.C. 2014), Brief of the Metropolitan Washington Employment Lawyers' Association as *Amicus Curiae* at 13 (citing *Arlington Heights* on the importance of circumstantial evidence, given that open admissions of bias are rare or nonexistent).

3. Transfers of animus up and down a chain of supervision are doctrinally indistinguishable

Staub teaches that liability for retaliation is not precluded where an employer's supervisor passes an ill-motivated recommendation up the chain of command to a higher official who claims not to know that motivation. In this respect, the present case is *Staub*'s mirror image: the employer's chief administrative officer, Mr. Davis, knew of Ms. Francis' complaint, yet the trial court deemed *per se* unreasonable any inference that his immediate subordinate's decision to fire was the result of that knowledge. The trial court determined, in spite of the evidence, that Ms. Dailey could not possibly have known what her boss knew. Effectively, this was a judgment as a matter of law that the employer could not be held accountable for a knowing decision to fire a civil rights complainant even when the firm's top administrator, the decision-maker's first-line supervisor, knew of the complainant's protected activity.

Under *Staub*, we allow the jury to infer knowledge when information passes up the organizational chart to a higher-level decision-maker, even if that superior official claims not to have known that retaliatory animus led the subordinate to urge adverse action. It is even more reasonable to infer that information was passed *down* the chain, from a higher official with knowledge to a lower-level decision-maker who claimed to have none.

To allow the inference of cat's paw liability where the superior did not know, but foreclose it in the easier case where the superior did know, would forbid juries to draw the more immediate inference while permitting them to draw the more attenuated one. It would leave *Staub* and this Court's own cases in an irreconcilable tangle. Juries would be able to penalize the willful blindness of superiors to their subordinates' illicit motives, but would have to reward the willful blindness of subordinates to their superiors' knowledge,

or the negligent or intentional creation of deniability down, as well as up, the organizational hierarchy. The law of retaliation would become impossible for advocates and judges to discern, and disputes over cat's paw jury instructions would multiply at trial and on appeal with no hope of a clear answer.

The fairer and more sensible rule, and the correct allocation of incentives necessary to fulfill both the DCHRA's statutory purpose and the now-settled teaching of *Staub*, is the opposite: to permit the fact-finder to infer that an employer had notice of an employee's complaint if the official with that knowledge was the supervisor of the official who made the decision, the same as if the official with knowledge was subordinate to the decision-maker. This does not make new law, but simply follows it. *Staub*, 562 U.S. at 420 (imposing liability where one supervisor's animus was "ultimate" cause of adverse action without regard to supervisor's and decision-maker's places in hierarchy); *id*. at 420 ("if an employer isolates a personnel official from an employee's supervisors [and] vests the decision to take adverse employment actions in that official ... the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action").

4. The time has come to acknowledge that* McFarland *is no longer good law

This Court last engaged with the employer-knowledge requirement for DCHRA retaliation claims in *McFarland v. George Washington Univ*., 935 A.2d 337 (D.C. 2007), several years before *Staub* was decided. The *McFarland* panel relied on federal actual-knowledge precedents from long before *Staub* which have now been overruled. The decision in *Bryant* acknowledged *Staub,* but decided the case on other grounds. *Bryant*, 102 A.3d at 269 n.3. This Court has not yet squarely faced the "extent [to which] the

cat's paw theory has abrogated *McFarland*" for DCHRA retaliation cases. *Id*.

Amicus submits that the time has come to take this small but important step explicitly, and that this case presents an appropriate vehicle since the trial court based its ruling almost entirely on its assessment of actual knowledge by a single decision-maker. In expressly adopting *Staub* for the District of Columbia, this Court would be following federal appeals courts across the nation, which after *Staub* have consistently applied it to Title VII retaliation claims. *See Bryant*, 102 A.3d at 269 n.3 (collecting cases through 2011); *see also, e.g*., *Fisher v. Lufkin Industries, Inc*., 847 F.3d 752, 757 (5th Cir. 2017) (invoking *Staub* in reversing chain-of-causation inference not left to fact-finder); *Coleman v. District of Columbia*, 794 F.3d 49, 65 (D.C. Cir. 2015) (discussing *Staub*); *Zamora v. Houston*, 798 F.3d 326, 333-34 (5th Cir. 2015) (affirming *Staub* cat's-paw theory to Title VII retaliation notwithstanding enhanced proof requirements of *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013)).

Conclusion

The flaw in the lower court's reasoning here is obvious: it agreed to let the jury decide whether Sutherland's motive for the final warning against Ms. Francis was unlawful, yet it effectively ruled that the termination imposed in reliance on that warning was *per se* lawful. That error is dangerous to our law and must not be allowed to stand. Summary judgment should not have been granted as to any part of this case. This Court should unhesitatingly reverse that judgment, and the trial court's corollary order *in limine*, based on its own prior decisions in *Bryant*, *Johnson, Newman* and *Smith,* among others, and should order a new trial on the question whether Ms. Francis' termination, under the totality of circumstances that led to it, was retaliatory.

Respectfully submitted,

Stephen B. Pershing
D.C. Bar No. 482580
Pershing Law PLLC
1416 E Street, N.E.
Washington, D.C. 20002
(202) 642-1431
steve@pershinglaw.us

Alan R. Kabat
D.C. Bar No. 464258
Bernabei & Kabat, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7102
(202) 745-1942
kabat@bernabeipllc.com

Counsel to *Amicus Curiae*
Metropolitan Washington Employment Lawyers' Association

July 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that the forgoing amicus brief was transmitted by electronic and first-class mail on July 21, 2017, to counsel for the parties, as follows:

Gary T. Brown
Gary T. Brown & Associates
1717 K Street, NW
Washington, DC 20006

Joseph P. Harkins
Littler Mendelson, P.C.
815 Connecticut Avenue, NW
Washington, DC 20006

Alan R. Kabat