No. 13-_____

In The
Supreme Court of the United States

SARA C. DEBORD,

Petitioner,

v.

MERCY HEALTH SYSTEM OF KANSAS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

MARK A. BUCHANAN
LAW OFFICE OF MARK A. BUCHANAN
712 Broadway, Suite 100
Kansas City, MO 64105
(816) 221-2288

Counsel for Petitioner
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Section 704(a) of Title VII of the Civil Rights Act of 1964 forbids an employer to retaliate against any employee because that worker "opposed" unlawful discrimination. The question presented is:

Does section 704(a) prohibit retaliation against a worker because of the worker's statements:

(1) only when the statements are made to the worker's own employer or to federal or state anti-discrimination agencies (the rule in the Tenth and Fourth Circuits), or

(2) also when the worker's statements are made to any other person (the rule in the First, Second, Third, Fifth, Sixth and Ninth Circuits)?

PARTIES

The petitioner is Sara C. Debord. The respondent is the Mercy Health System of Kansas, Inc.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Petitioner Sara C. Debord respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on November 26, 2013.

OPINIONS BELOW

The November 26, 2013 opinion of the court of appeals, which is reported at 737 F.3d 642 (10th Cir. 2013), is set out at pp. 1a-34a of the Appendix. The March 20, 2012 opinion of the district court, which is reported at 860 F.Supp.2d 1263 (D.Kan. 2012), is set out at pp. 35a-73a of the Appendix. The January 16, 2014 order of the court of appeals denying rehearing en banc, which is not reported, is set out at p. 74a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on November 26, 2013. On January 16, 2014, the court of appeals denied a timely petition for rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

This case presents an important issue regarding the scope of section 704(a) of Title VII, which protects workers from retaliation because they "opposed" unlawful discrimination. 42 U.S.C. § 2000e-3(a). In *Crawford v. Metropolitan Government of Nashville and Davidson County,* 555 U.S. 271 (2009), this Court adopted a broad view of when the *content* of an employee's statement would constitute "opposition" to discrimination, and thus be accorded protection from retaliation. The statements in *Crawford* had been made by the plaintiff to her employer. In a concurring opinion, Justice Alito noted that a distinct question regarding the scope of the anti-retaliation provision of Title VII would be raised by a statement about discrimination made by an employee to co-workers (or

others),[1] rather than to his or her employer. 555 U.S. at 282-83. This case presents that issue.

(1) From 2004 to 2009 Sara Debord worked in the radiology department of Mercy Hospital in Independence, Kansas ("Mercy"). Her supervisor throughout this period was Leonard Weaver, who was married to one of the hospital's chief surgeons.

> Weaver ... would often say to Plaintiff and her co-workers "feel my cold hands," then touch the employees' upper arms or the back of their necks. One employee told Weaver "don't touch me." ... [S]everal said, "your hands are cold, get them off me." Plaintiff's response was to pull away. Weaver would sometimes rub Plaintiff's back, and she would tell him "Stop, that hurts," although it didn't hurt. Weaver touched Plaintiff approximately three times a week.

(App. 37a; see App. 3a). Three other female Mercy employees in the radiology department described being touched in this manner by Weaver. (App. 14a). "Weaver ... admitted to occasionally touching [Debord] and other employees on the arm to show them how cold his hands were." (App. 7a). "Weaver claims he was just trying to show [Debord] how unusually

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[1] A statement made to the EEOC or a state or local anti-discrimination agency would at least ordinarily be protected by the provision of section 704(a) applying to participation in a proceeding under Title VII.

cold his hands were, but Debord says the touching was sexual harassment." (App. 3a). "Debord also says Weaver frequently made offensive sexual comments and advances, such as pulling down the neck of her shirt while she was leaning over a patient, asking her to show him her chest, and using sexually suggestive language when she wore certain clothing." (App. 3a).[2]

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[2] Memorandum in Support of Defendants' Motion for Summary Judgment, 13-14:

> In 2004, Weaver asked DeBord if he could see her breasts.... He asked her a half dozen times.... She said no.... In 2004, Weaver asked "If no one would ever find out would you ever consider sleeping with someone like me." ... DeBord said no.... In 2004, Weaver was assisting DeBord with laying down a patient and as DeBord was bent over toward Weaver, he pulled the neck of her shirt down to look down her shirt.... She said don't ever do that again.... In 2006, DeBord was wearing jeans and Weaver said "I didn't notice in scrubs but you have a really nice butt." ... DeBord responded by never wearing jeans again.... In April 2009, DeBord was shutting the door to change into her gym clothes and Weaver walked by and said "can I watch?".... In June, 2009, Debord was leaning over her computer and Weaver came up behind her and said "your butt looks good. I almost slapped it.".... DeBord said "don't ever do it".... This occurred one month before her termination.... Weaver would sometimes rub DeBord's back and she would tell him that hurts and to stop even though it did not hurt.

When a Mercy official asked Weaver whether he had remarked to a female employee that he "would like to slap" her on the bottom, Weaver "said he could not confirm saying that but he

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On July 6, following an incident during which Weaver hugged her, Debord posted on her Facebook page her objection to Weaver's actions, commenting that Weaver "needs to keep his creapy [sic] hands to himself" (App. 4a-38a; CA App. 284).[3] Debord's Facebook page was accessible to her Facebook "friends," who included several co-workers.[4] The parties disagree about whether such a communication to co-workers and friends is protected by section 704(a) a disagreement that tracks a well-defined split in the Courts of Appeals. Another posting that day stated that Weaver had improperly approved an overpayment to Debord.

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could not deny it either." (Court of Appeals Appendix ("CA App.") 599) (Brewster notes of interview with Leonard Weaver).

[3] Q. And in your Facebook posts, when you said "creepy hands," were you intending to describe something other than cold hands?

A. No. Just that it just gave me the creeps. I mean, it was such an everyday thing that it got to where I could be sitting somewhere and he would come into the area and I wouldn't even have to look, my skin would crawl.

App. 39a; CA App. 472.

[4] CA App. 599 (Brewster notes of interview with Leonard Weaver):

Leonard said [Debord] put inappropriate comments on FaceBook concerning him and was suspended for one day. Leonard said he had a copy. I asked him how he got a copy of her FaceBook page, didn't you have to be designated as a "friend" to access FaceBook. He then told me he received the copy from someone who had access to "FaceBook" as a designated "friend" to the co-worker FaceBook space.

At some point on July 6 Weaver learned that Debord had posted her complaint about his "creepy hands." Later that same day, when Debord was in a meeting with Mercy's Human Resources director, Eric Ammons, "Weaver interrupted the meeting to confront Debord about the posts." (App. 5a). Debord, unwilling to confront her supervisor, initially denied having posted the complaints. Weaver ultimately left the room, but only after explicitly warning Debord – in Ammons' presence – "Be careful what you say, it will always come back to bite you." (CA App. 473). Ammons ordered Debord to take down her Facebook post about Weaver's "creepy hands," and she subsequently did so. (CA App. 473).

On July 8, 2009, Ammons called Debord to his office and told her she was being suspended without pay for a day because of the disputed Facebook posts. The written reason for the suspension was as follows:

> Work related conduct needing improvement: Failure to conduct yourself in a manner consistent with a high degree of personal integrity and professionalism which is expected of Mercy co-workers. Engaged in behavior deemed harmful to a fellow co-worker. *Supporting details*: See attached Facebook Documents. – During counseling Sara admitted posting information on Facebook.

(App. 40a). The Facebook posts themselves were attached to the suspension notice. (CA App. 291-92). Also attached to the Corrective Action Form were two

pages from the Mercy printed "Standards of Conduct," on which Ammons had underlined the following passage:

> This [standard] not only involves sincere respect for the rights and feelings of others, but also encourages that both in your business and your personal life you refrain from any behavior that might be harmful to you, your co-workers, and/or Mercy.

(CA App. 289, 542). In Weaver's absence, Debord conceded to Ammons that she had posted the complaints on her Facebook page. (CA App. 466).

Prior to suspending Debord, Ammons did not ask her for any details about the "creepy hands" complaint or make any effort to ascertain whether Weaver had indeed been touching Debord.

> *After* Ammons informed Plaintiff of her suspension, he asked Plaintiff about the "creepy hands" comment, and Plaintiff replied that Weaver was a "perv." Ammons asked what she meant by that, and plaintiff replied that Weaver had made comments about her body and would run his hands up inside the arm of her scrubs and down the back neck of the scrubs.

(App. 40a) (Emphasis added).

Later that same day, following her meeting with Ammons, Debord sent a text message to one of her female co-workers stating that "[Ammons] was calling the techs ... asking about [Weaver's] conduct ... the lewd comments and touching." (CA App. 302-03). Debord sent the message to that particular co-worker

"[b]ecause she knew how Leonard [Weaver] was so I knew that she would understand."[5] That co-worker had at an earlier time resigned because of Weaver's harassment, returning only on a part-time schedule that would permit her to minimize any contact with Weaver.[6] That text message was one of the grounds later cited by Mercy to explain its decision to dismiss Debord. (CA App. 480). The parties disagree about whether the text message constituted protected activity. Mercy contends that after her meeting with Ammons, Debord also discussed the harassment with co-workers (CA App. 97),[7] and cited those discussions as a basis for her dismissal. The parties also disagree about whether such discussions would be protected by section 704(a). These disagreements mirror the circuit split described below.

On July 9 Debord was interviewed by a second Mercy official, and again described how she had been harassed by Weaver.[8] That official subsequently

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[5] CA App. 468.

[6] CA App. 619 (worker repeatedly touched by Weaver's "creepy" hands), 620 (Weaver assaulted worker when she dropped off her daughter to babysit for him), 621 (worker resigned and returned to work only part time to avoid Weaver) (Walsh dep.).

[7] Whether Debord had such discussions with her co-workers is disputed.

[8] CA App. 597 (Brewster notes of interview with Sara Debord):

> I told Sara I had called her in to talk about a sexual harassment compl[ai]nt. She said she did not file out a sexual harassment compl[ai]nt. I asked if she had

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interviewed only one other female employee in the radiology department.[9] The official also met with Weaver, and indicated in her notes that Weaver "[w]anted to know when he was proven innocent what would we do with Sara [Debold]. I told him all co-workers at Mercy have the freedom to report what they perceive as harassment without any type of punitive damage. I don't believe he was happy with that response." (CA App. 599) (Brewster notes of interview with Leonard Weaver).

Four days later, on July 13, 2013, Mercy dismissed Debord. The written Statement of Disciplinary Action provided only a short explanation of that

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> verbalized a compl[ai]nt to HR. She said yes. I asked who it was against and she said Leonard Weaver.
>
> I asked her about the environment in the department. She said she really didn't know it was sexual harassment until someone told her and then she read up on sexual harassment on the internet and thought maybe it was. Sara started crying. I gave her a Kleenex.

[9] CA App. 598 (Brewster notes of interview with Kim Harris):

> Did she feel the Radiology Department environment was hostile or any sexual tension in the department? Kim said she pretty much stayed to herself. The department was pretty laid back and she wasn't in the clique.
>
> In the Department were there any lewd comments, etc. She said the department was pretty open, joked around, like most clinical departments, probably to let off tension.
>
> Kim brought up Sara and a FaceBook comment. I told her I wasn't looking into the Facebook issue.

action: "Inappropriate and disruptive behavior. Dishonest." (App. 42a; CA App. 307). The dismissal notice also stated: "Dates of conduct needing improvement: Information Received (7/6-7/10)." (CA App. 307). July 6 was the date on which Debord had posted on Facebook her complaint about Weaver's "creepy hands." (The 11th and 12th of July were a weekend). Ammons, who signed the notice of dismissal, told Debord that she was being dismissed in part because she had been "dishonest ... about the sexual harassment." (CA App. 480). Ammons informed Debord that the dismissal was also based on her actions in sending text messages to a co-worker referring to the investigation of her complaints concerning Weaver. (CA App. 543, 548, 668).

(2) Debord filed suit in the district court, asserting that she had been dismissed in retaliation for actions protected by section 704(a) of Title VII of the 1964 Civil Rights Act.[10] After a period of discovery, Mercy moved for summary judgment.

Mercy argued, inter alia, that Debord's Facebook post was not protected activity under section 704(a), because Debord had intended to communicate only to her Facebook "friends" her objection to Weaver's

[10] Debord also asserted a claim that Weaver's actions had created a hostile work environment in violation of section 703(a) of Title VII. The lower courts rejected that claim on several grounds, and Debord does not seek review by this Court of the dismissal of her sexual harassment claim. (App. 10a-22a, 47a-58a).

"creepy hands," and had not acted with any purpose to notify her employer about the problems. "The Facebook posts are not protected opposition.... DeBord intended these posts only for her friends.... They are not protected activity. *Hine v. Extremity Imaging Partners,* ... 2011 WL ... 765853, at *9 (S.D.Ind. Feb. 25, 2011) (griping with friends and co-workers is not statutorily protected activity)." Memorandum in Support of Defendants' Motion for Summary Judgment, 23 (capitalization omitted). If, as Mercy contended, section 704(a) does not protect communications to "friends and co-workers," Debord's text message about Weaver would also be unprotected under section 704(a), because it was sent to a co-worker, not to management officials as would Debord's discussion with co-workers about the sexual harassment.

The district court granted summary judgment without resolving whether the Facebook post, text message or discussion were protected activity.

(3) On appeal the Tenth Circuit held that neither the Facebook post about alleged sexual harassment nor the text message or discussion about that harassment were protected activity.[11]

The court of appeals concluded that Mercy had offered six different "stated reasons" for terminating Debord: (1) "posting inflammatory material about her

[11] Mercy contended, as it had in the district court, that nothing Debord had said or done in connection with the harassment was protected by section 704(a). Appellee/Cross-Appellant's Principal and Response Brief, 33 n.4.

supervisor on the internet," which included the complaint about Weaver's "creepy hands," (2) "discussing the ... harassment investigation[ ] with others,"[12] (3) "discussing the overpay ... investigation[ ] with others," (4) "sending text-messages to co-workers bad mouthing her supervisor (unrelated to the alleged sexual harassment)," (5) "knowingly pocketing overpayment in 2007," and (6) "thrice lying about posting information on Facebook while at work." (App. 24a). Debord contended that the first and second of these "stated reasons" were facially unlawful; the court of appeals held that neither the Facebook post nor the text message to or discussions with a co-worker were protected by section 704(a).

The Tenth Circuit rejected "Debord's ... argument[ ] ... [that] Ammons could not lawfully terminate her for using Facebook to air her complaints." (App. 24a). In its initial decision to suspend Debord, Mercy had explained that her Facebook complaint about Weaver – her objection to being touched by his "creepy hands" – was being punished because it was "deemed harmful to a fellow-co-worker" (App. 40a); the "fellow co-worker" "harm[ed]" by the allegation of sexual harassment was, of course, the alleged sexual harasser. The court of appeals concluded that Mercy was entitled to punish Debord for such a statement on her Facebook page about Weaver. "She admits

[12] The court of appeals' analysis encompassed both the text message and the asserted verbal communications about the harassment.

posting inflammatory material about her supervisor on the internet...." (App. 24a). The panel reasoned that Debord's "inflammatory" accusation of sexual harassment was not protected because it was made on Facebook, rather than being directed instead to Mercy's officials. "Her Facebook post was not in accordance with Mercy's otherwise flexible reporting system for sexual harassment complaints and the post, by itself, did not provide any notice to Mercy. Only when Weaver himself brought the post to Ammons's attention did Mercy learn that ... Debord disliked Weaver's 'creepy hands.'" (App. 26a). That was consistent with Mercy's contention that section 704(a) only protects sexual harassment complaints directed to an employer itself, and not to "griping with friends and co-workers."

The court of appeals also rejected "Debord's ... argument[ ] ... [that] Ammons could not lawfully terminate her for communicating with others about the pending investigations." (App. 24a). The panel concluded that Mercy was entitled to fire Debord if she violated a company policy that prohibited a victim of sexual harassment from disclosing the existence of any investigation of that harassment. The panel believed that Mercy's policies indeed required Debord to remain silent about her harassment complaint. "She admits ... discussing the ... harassment investigations with others." (App. 23a). "[I]nstead of trying to gather evidence, Debord's text messages merely shared information with co-workers about an investigation that company policy dictates should be confidential.... and one period Mercy's confidential-investigation rule

was not generated after the fact. In fact, the rule is stated in Mercy's harassment training materials." (App. 29a).

Because the court of appeals held that the Facebook post, the text message, and the discussion with co-workers were all unprotected by section 704(a), it did not reach the question of whether a reasonable jury could conclude that Debord would not have been fired but for those activities.

The court of appeals, while rejecting Debord's claim that her Facebook post and text message were protected activity, also addressed a third issue, whether Debord had been dismissed for having directly told Mercy officials (in response to their questions) about the harassment. Mercy acknowledged that a complaint about sexual harassment if made directly to a company official could constitute protected activity, but denied having dismissed Debord because of the complaint made to Mercy itself. The Tenth Circuit noted that Mercy had articulated a number of lawful alternative reasons for the dismissal, not only the Facebook Post and text message (which the appellate court held were permissible reasons for firing Debord), but also several matters not related to the harassment.[13] The court of appeals

[13] Those other, non-harassment-related matters raised a number of factual disputes. For example, with regard to Mercy's original explanation that it had fired Debord for lying about having been overpaid, the Tenth Circuit acknowledged – as Mercy itself had by this point in the litigation – that there had indeed been such an overpayment. The court of appeals believed,

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concluded that these various alternative reasons were not a pretext to cover up an intent to fire Debord because she had complained directly to Mercy. (App. 22a-23a).

Debord petitioned for rehearing en banc, arguing that the panel had erred in holding that her Facebook post, text message and discussion about sexual harassment – directed at friends or co-workers rather than to her employer – were not protected by section 704(a). The court of appeals denied rehearing.

REASONS FOR GRANTING THE WRIT

Section 704(a) of Title VII protects workers from retaliation because they "opposed" unlawful discrimination. 42 U.S.C. § 2000e-3(a). In *Crawford v. Metropolitan Government of Nashville and Davidson County* this Court addressed the issue of what content of a worker's statement would constitute "opposition" to

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however, that Mercy's officials were simply unaware, when they assertedly fired Debord for allegedly lying about this matter, that their own records demonstrated there had been an overpayment. Mercy's reliance on this purported falsehood on the part of Debord, the appellate court believed, was merely the result of "negligence, forgetfulness or confusion – not intentional ignorance to hide a retaliatory motive," and did not demonstrate that Mercy actually was retaliating against Debord for having told Mercy officials directly about the harassment.

discrimination, and thus be accorded protection from retaliation. This case presents the distinct issue – noted but not directly resolved in *Crawford* – of whether section 704(a) protects statements made to persons other than a worker's own employer.

Justice Alito noted in a concurring opinion in *Crawford* that "[t]he question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; the answer to that question is far from clear; and I do not understand the Court's holding to reach that issue here." 555 U.S. at 283. Justice Alito suggested in that opinion that applying section 704(a) to statements made to co-workers or friends would raise issues not posed by protecting statements to employers. 555 U.S. at 282. Several circuit courts have noted that this Court's decision in *Crawford* left that issue unresolved.[14]

Workers concerned about sexual harassment or other possible discrimination frequently discuss those issues with fellow employees, friends, relatives, or others. The question not posed by the circumstances in *Crawford* – but presented by the instant case – thus arises frequently. While serving on the Second and Third Circuits, respectively, then Judge Sotomayor wrote an opinion addressing that issue[15] and then

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[14] *Collazo v. Bristol-Myers Squibb Mfg., Inc.,* 617 F.3d 39, 47 (1st Cir. 2010); *Thompson v. North American Stainless, LP,* 567 F.3d 804, 812 (2009) (en banc), *rev'd on other grounds*, 131 S.Ct. 863 (2011).

[15] *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 566 (2d Cir. 2000).

Judge Alito joined another such opinion.[16] The same issue has been addressed by the lower courts under the Age Discrimination in Employment Act,[17] the Americans With Disabilities Act,[18] and the Rehabilitation Act,[19] and the Family and Medical Leave Act,[20] and Title IX.[21]

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ABOUT WHETHER SECTION 704(a) PROTECTS STATEMENTS BY A WORKER TO PERSONS OTHER THAN THE WORKER'S OWN EMPLOYER

The Fourth and Tenth Circuits hold that section 704(a) does not protect statements made by a worker to persons other than the worker's employer, the view

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[16] *Neiderlander v. American Video Glass Company*, 80 Fed.Appx. 256 (3d Cir. 2003).

[17] *Woodsford v. Friendly Ford*, 2012 WL 2521041 (D.Nev. June 27, 2012); *Barber v. CSX Distribution Services*, 68 F.3d 594, 702 (3d Cir. 1995); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989); *Chapin v. Nationwide Mutual Ins. Co.,* 2007 WL 915182 at *8 (S.D.Ohio March 26, 2007).

[18] *McMahan v. UMG Mfg. & Logistics, Inc.,* 2008 WL 906152 (S.D.Ind. March 31, 2008).

[19] *Montanye v. Wissahickon School Dist.,* 218 Fed.Appx. 126, 131 (3d Cir. 2007); *Stengle v. Office of Dispute Resolution,* 631 F.Supp.2d 564, 580 (M.D.Pa. 2009).

[20] *Fields v. Fairfield County Bd. of Developmental Disabilities,* 507 Fed.Appx. 549 (6th Cir. 2012); *Mondaine v. American Drug Stores, Inc.,* 2006 WL 626045 at *3 (D.Kan. Jan. 26, 2006).

[21] *Condiff v. Hart County School Dist.,* 770 F.Supp. 876, 882 (W.D.Ky. 2011).

advanced in the courts below by Mercy. The First, Second, Third, Fifth, Sixth and Ninth Circuits, on the other hand, hold that section 704(a) does apply to such statements. Debord's Facebook post and text message, and discussion of the harassment with co-workers, would have been protected activity if they had occurred in any of the six circuits that interpret section 704(a) more broadly. Whether a worker can safely discuss concerns about discrimination with co-workers or friends, indeed whether a victim of sexual harassment can even reveal that abuse to her or his spouse, depends on the circuit in which the worker is employed.

(1) The Tenth Circuit held that Debord's Facebook post about sexual harassment was not protected by section 704(a) because it "was not in accordance with Mercy's otherwise flexible reporting system for sexual harassment complaints and the post, by itself, did not provide any notice to Mercy." (App. 26a). Similarly, the court of appeals concluded that Debord's text message and discussion about the sexual harassment investigation were not protected because they "merely shared information with co-workers." (App. 29a). Those holdings were consistent with Mercy's contention that "griping with friends and co-workers is not statutorily protected activity."

The Fourth Circuit adopted the same narrow interpretation of section 704(a) in *Pitrolo v. County of Duncome, NC,* 2009 WL 1010634 (4th Cir. March 11, 2009). In that case, after the plaintiff applied for a county job, a county official "reported to Pitrolo that there was opposition to hiring her ... because of her

gender.... Pitrolo promptly informed her father ... of [the] statement; in response, her father contacted a [local business organization] and complained of discrimination.... Ultimately, the [county] learned about these allegations." 2009 WL 1010634 at *1 (footnote omitted). Pitrolo claimed that the county subsequently rejected her application because she had reported the discriminatory remark to her father. The Fourth Circuit held that Pitrolo's complaint about discrimination was not protected activity under section 704(a) because she had made her statements to her father, not to her prospective employer.

> Pitrolo's statements to her father do not qualify as protected activity under § 2000e-3(a). There is no evidence that Pitrolo intended for her father to pass along her complaints to Defendants.... Pitrolo did not communicate her belief to her employer and was not attempting to bring attention to the alleged discriminatory conduct. Instead, Pitrolo told her father of [the] statements because she was "close to [her] father" and "it was something that was very important that was going on in [her] life at the time." ... As noted by the district court, it would not be reasonable to characterize a private complaint to a close family member as an "informal grievance procedure" under *Laughlin* [*v. Metro Washington Airports Auth.,* 149 F.3d 153, 259 (4th Cir. 1998)].... Since Pitrolo's statement to her father was not protected activity, her retaliation claim fails.

2009 WL 1010634 at *3 (footnote omitted). The Fourth Circuit relied on Justice Alito's assertion in

Crawford that the majority opinion in that case permitted such a limitation on the scope of section 704(a). "We do not read *Crawford* ... to affect our analysis.... As Justice Alito noted, Crawford does not extend to cases where employees do not communicate their views to their employers through purposeful conduct." 2009 WL 1010634 at *3 n.6. Although the Fourth Circuit decision in *Pitrolo* is not officially reported, it has repeatedly been applied by district courts in that circuit.[22]

(2) Six circuits hold to the contrary that the protection of the opposition clause in section 704(a) is not limited to statements made to a worker's own employer.

The Second Circuit has concluded that

> [i]n addition to protecting the filing of formal charges of discrimination, § 704(a)'s opposition clause protects as well informal protests of discriminatory employment practices, writing critical letters to customers, protesting discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges.

Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990). The Second Circuit has repeatedly affirmed this rule that section 704(a) applies to complaints or other statements directed to persons

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[22] *DeMasters v. Carilion Clinic*, 2013 WL 5274505 at *7-*8 (W.D.Va. Sept. 17, 2013); *Harris-Rogers v. Ferguson Enterprises,* 2011 WL 4460574 at *7 (E.D.N.C. Sept. 26, 2011).

other than an employer's managers. *Hubbard v. Total Communications*, 347 Fed.Appx. 679, 679 (2d Cir. 2009) (quoting *Sumner*); *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 566 (2d Cir. 2000) (opinion by Sotomayor, J.); *Matima v. Celli*, 228 F.3d 68, 78 (2d Cir. 2000) (quoting *Sumner*); *Heller v. Champion Int'l Corp.,* 891 F.2d 432, 436 (2d Cir. 1989); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989) ("as this choice of language clearly indicates, Congress sought to protect a wide range of activity in addition to the filing of a formal complaint ... [such as] writing a letter to a customer of employer ... [or] boycotting and picketing of store....").

The Third Circuit noted that

> [w]e have previously ... cited with approval the Second Circuit's language in *Sumner*.... [P]ublic manifestations of disagreement with illegal employment practices can be protected under the opposition clause.... [A] district court held that an employee, who attended a public meeting of students and parents organized for the express purpose of challenging the allegedly discriminatory treatment of a black teacher, engaged in protected opposition activity.... [In] *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981) ... the Fifth Circuit upheld a district court conclusion that boycotting and picketing activity was protected conduct ... [because it] was directed at the employer's allegedly discriminatory employment practice of withholding certain jobs from black employees.

Curay-Cramer v. Ursuline Academy of Wilmington, Del., Inc., 450 F.3d 130, 135-36 (3d Cir. 2006). *Neiderlander v. American Video Glass Company*, 80 Fed.Appx. 256 (3d Cir. 2003), an opinion joined by then Judge Alito, specifically rejected an employer's contention that section 704(a) does not protect an employee who complains to co-workers.

> Neiderlander told ... co-workers about her displeasure with [a disputed promotion decision], alleging gender discrimination at AVG.... The District Court found that Neiderlander failed to establish the first prong of her *prima facie* case because her informal complaints of gender discrimination were directed to co-workers and not management. The Court ... concluded that this did not constitute "protected activity." We believe that this interpretation of protected activity is too narrow.... As established in *Sumner*, ... the opposition to discriminatory practices need not be made directly to managers in order to constitute protected activity, and Neiderlander's complaints to her co-workers, assuming they were communicated to management, would be the type of opposition to discrimination that § 2000e-3(a) seeks to protect.

80 Fed.Appx. at 260-61; see *Hazen v. Modern Food Services, Inc.,* 113 Fed.Appx. 442, 443 (3d Cir. 2004) ("informal complaints of discrimination that were directed at co-workers rather than management constitute protected activity"); *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 287-88

(3d Cir. 2001) (quoting *Sumner*); *Barber v. CSX Distribution Services*, 68 F.3d 594, 702 (3d Cir. 1995) (quoting *Sumner*).

The earliest appellate decision on this issue is in the Fifth Circuit, which held that section 704(a) protects complaints of discrimination directed to persons other than the employer. *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1136-42 (5th Cir. Unit A 1981). The plaintiff in that case had organized a consumer boycott of several retail businesses, including the store where he worked on a seasonal basis, and was actively involved in picketing one of those stores. 654 F.2d at 1134-35. The boycott and picketing were directed at members of the public; their purpose was to oppose the employer's discrimination in hiring and promotion. *Id.* at 1136. The district court held that the employer had violated section 704(a) by refusing to rehire Payne when it had vacancies, and the Fifth Circuit upheld the judgment in favor of the plaintiff. *Id.* at 1141.

The Sixth Circuit has expressly endorsed the EEOC's interpretation of section 704(a) as extending to a worker's expression to anyone of opposition to unlawful discrimination.

> The Equal Employment Opportunity Commission ... has identified a number of examples of "opposing" conduct which is protected by Title VII, including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices.... *EEOC Compliance Manual*, (CCH)

> ¶ 8006.... Of critical import here is the fact that there is no qualification on who the individual doing the complaining may be or on the party to whom the complaint is made known – i.e., the complaint may be made by anyone and it may be made to a co-worker, newspaper reporter, or anyone else....

Johnson v. University of Cincinnati, 215 F.3d 561, 579-80 (6th Cir. 2000) (footnote omitted); see *Fields v. Fairfield County Bd. of Developmental Disabilities,* 507 Fed.Appx. 549, 556 (6th Cir. 2012) ("an employee may complain about discrimination to anyone") (quoting *Johnson*); *Wasek v. Arrow Energy Services, Inc.,* 682 F.3d 463, 469 (6th Cir. 2012) (quoting *Johnson*); *Simpson v. Vanderbilt Univ.,* 359 Fed.Appx. 562, 571 (6th Cir. 2009) (quoting Johnson); *Niswander v. Cincinnati Ins. Co.,* 529 F.3d 714, 721 (6th Cir. 2008) (quoting *Johnson*); *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 211 Fed.Appx. 373, 375 (6th Cir. 2006) (quoting *Johnson*), *rev'd on other grounds*, 555 U.S. 271 (2009).

In *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983), the Ninth Circuit expressly rejected the contention that section 704(a) protects only statements of opposition that are made to an employer itself.

> Zellerbach argues strenuously that [plaintiff's] letter [objecting to discrimination], whatever its content, cannot constitute protected opposition because it was delivered to ... an outside party, rather than a Zellerbach

> official. We find no persuasive authority to support the proferred position.... Where the recipient of the "opposition" message is an ordinary public official or a customer of the employer, Zellerbach maintains, the expression is not statutory opposition. But [the Fifth Circuit decision in] *Payne* is to the contrary.
>
> In that case, the plaintiff's opposition to discriminatory practices was expressed by participation in a boycott and in picketing designed to convey a message to customers and the public as well as the employer.... The court held that ... the plaintiff ... successfully demonstrated a prima facie case of discrimination prohibited by the opposition clause of section 704(a)....

720 F.2d at 1014.

The First Circuit has adopted the same broad reading of section 704(a). *Concetta v. National Hair Care Centers, Inc.,* 236 F.3d 67 (1st. Cir. 2001). "Expressing opposition to harassment to management ... or 'anyone else,' *EEOC Compliance Manual* § 8-II.B.2 (May 20, 1998) is protected conduct...." 236 F.3d at 76; see *Fantini v. Salem State College,* 557 F.3d 22, 32 (1st Cir. 2009) (quoting *Sumner*).

II. THE COURT OF APPEALS HAS DECIDED INCORRECTLY AN IMPORTANT QUESTION OF FEDERAL ANTI-RETALIATION LAW

The Tenth Circuit decision in the instant case and the Fourth Circuit decision in *Pitrolo* are inconsistent with this Court's decision in *Crawford*. Although the statements at issue in *Crawford* had been made to the worker's employer, *Crawford*'s broad definition of "oppose" was not limited to statements made to any particular person. "'Oppose' goes beyond 'active, consistent' behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to 'oppose' slavery before Emancipation, or are said to 'oppose' capital punishment today, without writing public letters, taking to the streets, or resisting the government." 555 U.S. at 277. The requirement that an individual's objection to some action be "disclos[ed]" is satisfied without regard to the identity of the person to whom the disclosure is made. Most of the countless people who "were known to 'oppose' slavery before Emancipation, or are said to 'oppose' capital punishment today," did not express that opposition in statements to government officials. In ordinary discourse an individual would be said to oppose capital punishment if he or she posted an objection to the death penalty on his or her Facebook page, or criticized it in a text message. The disclosure of a speaker's (or writer's) position is "opposition"

under *Crawford* so long as it is "an ostensibly disapproving account." 555 U.S. at 276. In the instant case Debord's description of the harasser's hands as "creepy," and of his remarks and touching as "lewd," obviously manifested the disapproval deemed sufficient under *Crawford*.

The Tenth Circuit thought Debord's statements fell outside the scope of section 704(a) because they were not "in accordance with Mercy's otherwise flexible reporting system for sexual harassment complaints." (App. 26a). But section 704(a) is not limited to "report[s]" that are "in accordance with [an employer's] reporting system," but extends far more broadly to "oppos[ition]" to sexual harassment or other unlawful practices. The section 704(a) protection of workers who "opposed" discrimination is palpably and deliberately broader than the anti-retaliation provision of the Fair Labor Standards Act, which forbids only retaliation against a worker for having "filed any complaint." 29 U.S.C. § 215(a)(3). Protection of complaint-filing at least ordinarily would require that the complaint be made to an employer or government official. See *Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S.Ct. 1325, 1335 (2011) ("to fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection"). Similarly, the alternative language of section 704(a), forbidding retaliation against

a worker because he or she "filed a charge," envisions a statement made to a particular entity, the EEOC or other appropriate anti-discrimination agency. *Federal Express Corp. v. Holowecki,* 552 U.S. 389, 402 (2008) ("if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights...."). But the Tenth Circuit assuredly erred in imposing a similar limitation on the differently-phrased prohibition barring retaliation against a worker who "opposed" discrimination.

Like the limitation on section 704(a) rejected by this Court in *Crawford*, the Tenth Circuit rule has indefensibly peculiar consequences. The court of appeals suggested that Debord would have been protected if in her contacts with other workers she had been "trying to gather evidence." (App. 29a). On that view Debord could not have been fired if, for example, she had specifically asked other female employees if they too had been harassed by Weaver; as the court of appeals noted, proof of widespread harassment would have established a basis for holding Mercy liable for that harassment. (App. 31a-15a). But although, on the Tenth Circuit's view, Debord would have been protected if she *asked* other workers about harassment, under the court of appeals decision any worker she queried could be fired for *answering* Debord's questions (rather than using Mercy's reporting system to complain about harassment). And if, in response to Debord's query, a worker inquired why Debord was asking, Debord herself could not answer

(e.g., could not tell the worker she was trying to shore up the claim then being investigated by Mercy), because doing so would have been disclosing information about an investigation. That is precisely the type of "freakish rule" that this Court in *Crawford* refused to read into section 704(a).[23]

The rule in the Tenth and Fourth Circuits has a second implausible consequence. In order to establish a claim of unlawful sexual harassment, an employee must demonstrate that she subjectively perceived the harassment as creating a hostile work environment. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993). Plaintiffs frequently make that showing, rebutting defense contentions that they did not mind the remarks or touching involved, by offering evidence that at the time of the harassment they complained about it to family or friends. In the Tenth and Fourth Circuits, however, a harassment victim would have to keep that harassment secret from friends or family, thus potentially undermining her legal claim under Title VII. And a woman who, mindful of the risk of legally permissible retaliation, had initially

[23] The distinction is all the more indefensible because one worker's description of being sexually harassed could trigger a similar statement by a fellow employee. *E.g., Homesley v. Freightliner Corp.,* 61 Fed.Appx. 105, 108 (4th Cir. 2003) ("Rita Chitwood ... , [a co-worker], came to Homesley's welding booth and saw her crying. Homesley told her of the sexual harassment by Yarborough. Chitwood said Yarborough had been doing the same thing to her and to Tona Collins").

avoided telling her husband about being groped or sexually assaulted at work, might well hesitate to thereafter file a formal complaint or Title VII charge, understanding that the delay in disclosing that sexual contact to her spouse could raise serious problems in that relationship if her complaint or charge later brought that harassment to the attention of her spouse. "Nothing in the statute's text or [this Court's] precedents supports this catch-22." *Crawford*, 555 U.S. at 853.

The Tenth Circuit dismissed Debord's text message – objecting to the harasser's remarks and actions as "lewd" and describing the anticipated investigation – as "merely shar[ing] information with co-workers." (App. 29a). But sharing information is often a key method of opposing discrimination. For example, in *McMahan v. UMG Mfg. & Logistics, Inc.,* 2008 WL 906152 (S.D.Ind. March 31, 2008), a worker was fired for having warned a fellow employee that he was being singled out for television monitoring because of his disability. Applying the Second Circuit decision in *Grant* and the Sixth Circuit decision in *Johnson*, the district court in *McMahan* held this was protected activity.[24] In *DeMasters v. Carilion Clinic*,

[24] 2008 WL 906152 at 4 ("UMG argues that McMahan's report to [a fellow employee] was not protected activity because he did not communicate his complaint to company management.... Contrary to defendant's argument that McMahan is not protected by law unless he complained to a manager, ... opposition encompasses 'complaints about the employer to others that the employer learns about' ") (quoting 1 Barbara T. Lindemann

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2013 WL 5274505 (W.D.Va. Sept. 17, 2013), "DeMasters told Doe that 'it appeared to [DeMasters] that Doe was a victim of sexual harassment in violation of Carilion's sexual harassment policy.' ... DeMasters reviewed the steps of Carilion's sexual harassment policy with Doe and suggested a plan to report the harassment." 2013 WL 5274505 at *1. Applying the Fourth Circuit decision in *Pitrolo*, the district court in *DeMasters* held that this was not protected activity.[25] A worker often would never realize that he or she was the victim of discrimination in compensation unless other employees disclosed what they were being paid. See *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618, 650 n.3 (2007) (Ginsburg, J., dissenting) ("[O]ne-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers."). *Thompson v. North American Stainless,*

& Paul Grossman, Employment Discrimination Law 1013 (4th ed. 2007)).

[25] 2013 WL 5274505 at *7 ("DeMasters' conversations with Doe are not oppositional. DeMasters alleges that he told Doe that Doe was a victim of sexual harassment and that Carilion had mishandled Doe's complaints.... These statements were not made to Carilion, but rather were.... provided to Doe.... Statements made by DeMasters to Doe ... cannot qualify as oppositional conduct"; "DeMasters' statements to Doe ... are not protected oppositional activity. DeMasters did not make these statements to his employer, Carilion. There is no suggestion the DeMasters intended for Doe to pass his comments on to Carilion.... As in *Pitrolo,* this does not qualify as protected oppositional activity").

LP, 131 S.Ct. 863 (2011), held that the employer in that case could not retaliate against Thompson in reprisal for his fiancée's complaint about gender-based discrimination; but that unlawful retaliation would probably never have come to light if the fiancée had been forbidden to tell Thompson about her complaint.

The rule in the Tenth and Fourth Circuits creates perverse incentives for employers. "To immunize an employer from a retaliation complaint because one of its supervisors has not heard directly from the employee encourages the employer not to ask the employee about complaints of co-workers ... or to immediately retaliate against the employee before he or she can voice protected opposition directly to superiors. In either case, the employer has thwarted the purposes of the anti-retaliation laws." *Mondaine v. American Drug Stores, Inc.,* 2006 WL 626045 at *3 (D.Kan. Jan. 26, 2006) (citing the Third Circuit decisions in *Neiderlander* and *Hazen*). Often the decision to file a formal internal complaint, or a Title VII charge, will grow out of discussions with co-workers or family members;[26] the effective suppression

[26] See *Condiff v. Hart County School Dist.,* 770 F.Supp. 876, 882 (W.D.Ky. 2011) ("when confronted with allegations of sexual harassment of her stepdaughter [by a teacher], Plaintiff instructed her stepdaughter to document the incidents of sexual harassment on Plaintiff's personal e-mail account, informed her husband of the alleged harassment, forwarded the e-mail to her husband, discussed the incident with her husband, instructed

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of those exchanges could throttle complaints and charges. For that reason, *Woodsford v. Friendly Ford,* 2012 WL 2521041 (D.Nev. June 27, 2012), refused to "condone an employer's 'gag order' on all discrimination-related workplace conversation. To do so ... could produce a chilling effect that deters employees with meritorious claims from bringing discrimination suits." 2012 WL 2521041 at *9. And in *Chapin v. Nationwide Mutual Ins. Co.,* 2007 WL 915182 at *18 (S.D.Ohio March 26, 2007), the court – citing the Second Circuit decision in *Sumner* and the Third Circuit decision in *Neiderlander* – held that the ADEA does protect discussions with co-workers about the possibility of filing a lawsuit under the ADEA. In *Harris-Rogers v. Ferguson Enterprises*, 2011 WL 4460574 (E.D.N.C. Sept. 26, 2011), after a co-worker complained to Harris-Rogers that she was being harassed by her supervisor, Harris-Rogers sent an email to the co-worker urging her to file a complaint. "Please consider contacting HQ, otherwise he will continue to harass[ ] you on everything.... [H]e need[ ]s to feel a little more from HR, can't be harassing associates...." at *1. But in that case the district court, bound by the Fourth Circuit decision in *Pitrolo*,

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her husband to contact school officials regarding the harassment, and authorized him to forward the e-mail to school officials describing the sexual harassment....").

held that the suggestion that the co-worker file a complaint was not protected activity.[27]

Congress could not have intended to permit such preemptive retaliation, denying protection until a worker filed a complaint with his or her employer, a charge with the EEOC, or a lawsuit in federal or state court. The basic purpose of retaliation is to prevent aggrieved workers from opposing unlawful discrimination in the first place; making an example of a worker who already did so is only a means to that end. An employer intent upon preventing formal complaints or Title VII charges would be even more likely to utilize a type of retaliation that might silence a worker *before* he or she had even taken that step. Under *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), an employer would be under an obligation to investigate second-hand reports of sexual harassment, as indeed occurred in *Crawford*. 555 U.S. at 273. But under the decision below, as under the Fourth Circuit decision in *Pitrolo*, an employer could preemptively squelch those inconvenient rumors; indeed, the decision below is likely to have just that perverse effect.

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[27] 2011 WL 4460574 at *7 ("[P]laintiff admits that she intended to send the ... email solely to [the co-worker] and only mistakenly sent it to a broader audience that included management personnel. Therefore, it cannot be said that the ... email was sent with the intention of voicing opposition about Ferguson's employment policies, that is, to bring attention to any purported discriminatory activities by Ferguson. The ... email therefore does not qualify as opposition activity. *Pitrolo*....").

It is equally inconceivable that Congress, having undeniably extended protection to workers who file internal complaints or EEOC charges, could have intended to permit employers to muzzle discussion of the manner in which those complaints or charges were being handled. The purpose of protecting complaints and charges is to correct the discrimination at issue; exchanging information and even voicing criticism of those processes can be vital to their effectiveness. In *Woodsford v. Friendly Ford,* 2012 WL 2521041 (D.Nev. June 27, 2012), "[plaintiff's supervisor] asked that Woodsford not discuss his pay cut or the [EEOC] charge with other [F]riendly employees. Woodsford protested this, saying that his compensation change and EEOC charge were 'absolutely everybody's business.'" 2012 WL 2521041 at *2. "The listed reasons for suspending Woodsford [included] that ... he violated [his supervisor's] instruction not to discuss his compensation reduction and the EEOC charge with his co-workers...." The district court, citing the Second Circuit decision in *Grant* and the Sixth Circuit decision in *Johnson,* held that Woodsford's discussion of his discrimination claim and charge were protected activity. "Defendant argues that Woodsford was not engaging in a protected activity under the opposition clause when he spoke to non-management Friendly employees while on the job in violation of Defendant's instructions not to do so.... Friendly's instruction to Woodsford contradicts the plain language of [the anti-retaliation provision of the ADEA] ... 'Opposing' an unlawful action encompasses speaking to fellow employees about a charge filed *in opposition to* the alleged discrimination."

Woodsford v. Friendly Ford, 2012 WL 2521041 at *9 (emphasis in original). On the other hand, the court in *DeMasters*, applying the contrary Fourth Circuit rule in *Pitrolo*, held that the plaintiff was not protected by section 704(a) when he told a harassment victim that the employer "was mishandling [her] complaints." *DeMasters v. Carilion Clinic*, 2013 WL 5274505 at *2.

The majority rule, interpreting section 704(a) (and other similarly-phrased anti-retaliation provisions) to apply to statements of opposition made to anyone, not merely to employers, has been the consistent interpretation of the EEOC. The EEOC characterizes as "[e]xamples of [o]pposition" protected by section 704(a) and other statutes "[c]omplaining to anyone about discrimination." EEOC Compliance Manual section 8-II(B)(2).

> A complaint or protest about alleged employment discrimination to a manager, union official, co-worker, company EEO official, attorney, newspaper reporter, Congressperson, or anyone else constitutes opposition.... Example 2 – C[harging]P[arty] complains to coworkers about harassment of a disabled employee by a supervisor. This complaint constitutes "opposition."

Id.; see *id*. at section 8-II(B)(3)(a) ("Courts have protected an employee's right to inform an employer's customers about the employer's alleged discrimination, as well as the right to engage in peaceful picketing to oppose allegedly discriminatory employment practices"). "EEOC compliance manuals 'reflect "a

body of experience and informed judgment to which courts and litigants may properly resort for guidance."'" *Crawford*, 555 U.S. at 276 (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) and *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents an excellent vehicle for resolving the question presented. Because two assertedly protected statements were in writing – one in a Facebook post, and one in a text message – the exact nature of those statements is clear, presenting a highly concrete dispute. The precise date on which Mercy learned of the statements is known, and there is substantial contemporaneous evidence that Mercy officials objected to all the statements.

The case presents two types of statements to coworkers. First, both the Facebook Post (about "creepy" hands) and the text message (about "lewd" remarks and actions) constitute the type of disapproving comment that would be sufficient under *Crawford*. Second, the text message, in its reference to the Mercy investigation and to Debord's expectation that a Mercy official would be questioning the other women in the department, poses the question of whether the protections for such statements about the existence or handling of a discrimination complaint or charge are different than the protections

accorded to objections to particular discriminatory acts as such.

The court below noted that Mercy had advanced "a number of reasons – unrelated to Debord's complaint of sexual harassment," to defend its decision to dismiss her. (App. 28a). But Title VII does not require a plaintiff to show that retaliation (or discrimination) was the *sole* reason for a disputed termination or other adverse action. Even where an employer also had one or more other, lawful reasons for the action complained of, the plaintiff will still prevail if she demonstrates that an unlawful purpose (or two or more such purposes in combination) was the but-for cause of that action. *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013). If this Court holds that the Facebook post, text message, or discussion related to sexual harassment were indeed protected activity, Mercy will be free to argue on remand that any reasonable jury would have to find that Mercy would have dismissed Debord on other, lawful grounds, even in the absence of such protected activity. But because the Tenth Circuit believed that that Facebook post, the text message, and discussion were all unprotected by section 704(a), it had no occasion to reach that issue.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

MARK A. BUCHANAN
LAW OFFICE OF MARK A. BUCHANAN
712 Broadway, Suite 100
Kansas City, MO 64105
(816) 221-2288

Counsel for Petitioner

**Counsel of Record*

737 F.3d 642
United States Court of Appeals,
Tenth Circuit.

Sara C. DEBORD,
Plaintiff-Appellant/Cross-Appellee,
v.
MERCY HEALTH SYSTEM OF KANSAS, INC.,
Defendant-Appellee/Cross-Appellant,
and
Leonard Weaver, Defendant-Appellee.

Nos. 12-3072, 12-3109. | Nov. 26, 2013.

Attorneys and Law Firms

Mark A. Buchanan, Law Office of Mark A. Buchanan, Kansas City, MO, for Appellant/Cross-Appellee.

Sharon A. Coberly (Monika D. Jenkins with her on the briefs), Seigfreid Bingham, P.C., Kansas City, MO, for Appellee/Cross-Appellant.

Before KELLY, MURPHY, and TYMKOVICH, Circuit Judges.

Opinion

TYMKOVICH, Circuit Judge.

Sara Debord filed suit against her employer, Mercy Health Services of Kansas, for sexual harassment and retaliation in violation of Title VII. Debord claims Mercy knew or should have known that her supervisor created a hostile workplace through unwanted touching and offensive sexual remarks. She also claims that Mercy did not do enough to prevent

sexual harassment in the workplace, and that, when she finally reported the harassment, Mercy retaliated by firing her.

After reviewing the evidence at summary judgment, the district court concluded there was no triable issue of material fact. We agree. The record does not disclose that Mercy knew or should have known about Debord's allegations of a hostile workplace, and she has not provided a reasonable explanation for the nearly five years she waited to first report the harassment. Nor is there a genuine dispute about whether Mercy honestly held legitimate reasons for terminating Debord based on its conclusion that she was dishonest and disruptive during Mercy's investigation of allegations about her supervisor's conduct and claims she improperly received extra pay.

Debord resists these conclusions with myriad arguments, but none is sufficiently developed or supported by the record to merit a trial.

Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM.[1]

I. Background

Debord worked as a nuclear-medicine technician at Mercy Hospital in Independence, Kansas. Debord's

[1] Mercy also raises a cross-appeal for costs. On this issue, we reverse the district court, as explained below.

direct supervisor was Leonard Weaver, the hospital's director of radiology.

A. Debord's Allegations of Sexual Harassment

Soon after Debord was hired in 2004, she contends her supervisor Weaver began regularly placing his hands up her sleeve or down the back of her shirt.[2] According to Debord, this occurred "at least three days a week." Aplt.App. 169. Weaver claims he was just trying to show her how unusually cold his hands were, but Debord says the touching was sexual harassment. In any event, Debord did not tell Mercy's management that Weaver was touching her until July 2009.

Debord also says Weaver frequently made offensive sexual comments and advances, such as pulling down the neck of her shirt while she was leaning over a patient, asking her to show him her chest, and using sexually suggestive language when she wore certain clothing. *Id.* at 174-76. Although Debord told Weaver to stop this behavior, she did not report the misconduct to management.

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[2] In reviewing the district court's grant of summary judgment, we recite the facts presented in the light most favorable to Debord, the nonmoving party. *See Estate of B.I.C. v. Gillen,* 710 F.3d 1168, 1171 (10th Cir.2013). It is true that Debord separately moved for summary judgment, but that was against Weaver's counterclaim for defamation, a claim that is not before us in this appeal.

B. Debord's Facebook Posts and Mercy's Response

Mercy's management first received notice of this behavior on July 6, 2009, through a publicly available message on Facebook, a website for social networking. Earlier that day, Weaver had criticized Debord and then attempted to hug her. Angered by Weaver's comments, Debord logged onto Facebook and wrote several posts during work hours. The relevant posts said,

> (At 9:00 am) Sara DeBord loves it when my boss adds an extra $600.00 on my paycheck for hours I didn't even work . . . awesome!!
>
> (At 1:37 pm) Sara DeBord is sooo disappointed . . . can't believe what a snake my boss is . . . I know, I know everyone warned me:(
>
> (At 2:53 pm) Oh, it's hard to explain. . . . basically, the MRI tech is getting paid for doing MRI even though he's not registered and myself, nor the CT tech are getting paid for our areas . . . and he tells me 'good luck taking it to HR because you're not supposed to know that' plus he adds money on peoples checks if he likes them (I've been one of them) . . . and *he needs to keep his creapy hands to himself* . . . just an all around d-bag!!

Id. at 285-86 (emphasis added).

Many of Debord's co-workers saw these posts, including Weaver. Later that day, Debord met with Mercy's HR Director, Eric Ammons, to discuss a

gender-based pay-disparity claim that Debord had recently raised. Weaver interrupted the meeting to confront Debord about the posts. Ammons asked if Debord authored them, but she denied it. Then Weaver brought his laptop to show Ammons exactly what the posts said. Even though they appeared on Debord's Facebook page, Debord again denied writing them. She explained that anyone could access her Facebook page from her cellular phone, and because she left her phone unattended at times, someone else could have created the posts.

After Weaver left the meeting, Ammons asked Debord about the post that mentioned extra money on her paycheck, and Debord claimed that Weaver had in fact added money to her paycheck around Thanksgiving of 2006 or 2007, and that when she brought it to his attention, he did not correct the overpay. Ammons began investigating this overpay allegation.

Two days later, on July 8, Ammons again met with Debord about the Facebook posts. For a third time, she denied making the posts, so Ammons explained that Mercy would have to spend a lot of money to find the real culprit unless she confessed. Debord finally owned up to her conduct, and Ammons informed her she would be suspended for one day without pay for "[f]ail[ing] to conduct yourself in a manner consistent with a high degree of personal integrity and professionalism." *Id.* at 288.

Before ending the meeting, Ammons asked about the "creepy hands" comment at the end of Debord's posts. Ammons said this comment concerned him most. Debord then told Ammons that Weaver touched her and a lot of the women in the department with his cold hands. Ammons asked if she thought it was sexual harassment, and she replied that she did not think so – she just thought that Weaver was a "pervert." *Id.* at 233-34. Ammons said that Weaver's behavior was "inappropriate" and "should never happen," and that he would have Mercy's risk manager, Lana Brewster, investigate the matter to see if there was "any potential for sexual harassment." *Id.* at 166, 234-35. Meanwhile, he continued investigating Debord's claim that Weaver added money to her paycheck.

C. Mercy's Investigation

The next day, July 9, Debord met with Brewster. Brewster said she was there to talk about Debord's sexual harassment complaint, but Debord denied having made a sexual harassment complaint; she said she had only answered Ammons's questions. Brewster asked Debord what she meant by the "creepy hands" post on Facebook. Debord described Weaver's "daily touching" of her arm or neck with his cold hands, in addition to two sexual remarks Weaver had made to her. *Id.* at 188-89. Brewster asked Debord if she wanted to file a formal complaint, but Debord declined. Brewster then told Debord to let her know if there were any more problems. Debord assured

Brewster that the touching and comments "probably wouldn't happen again." *Id.* at 188.

That same day, Brewster also interviewed a long-time, female employee in Weaver's department. This employee denied the existence of any hostility or sexual tension in the department.

Also on that day, Brewster interviewed Weaver. He did not confirm making any sexual remarks to Debord but admitted to occasionally touching her and other employees on the arm to show them how cold his hands were. Brewster told him "if anything was going on to cease." *Id.* at 570. Based on these interviews, she concluded that Weaver had not violated company policy.

D. Debord's Termination

By July 13, Ammons determined that Debord's overpay claim was false. He also learned that Debord was sending messages to other employees in which she accused Weaver of destroying the overpay evidence. This troubled Ammons because he already told Debord that the overpay evidence was in his, not Weaver's, possession. Further, he learned that Debord's comments about the overpay and the related investigation had disrupted the workday for many hospital employees. Ammons thus decided, after conferring with Mercy's CEO and COO, to terminate Debord. Later that day, he told Debord she was terminated for disruption, inappropriate behavior, and dishonesty.

E. Procedural History

Debord filed suit against Mercy for sex discrimination and retaliation in violation of Title VII,[3] and she filed suit against Weaver for assault and battery. Weaver counterclaimed for defamation. Following discovery, all parties moved for summary judgment. The district court granted summary judgment against all claims and required each party to bear its own costs. *See Debord v. Mercy Health Sys. of Kan., Inc.,* 860 F.Supp.2d 1263 (D.Kan.2012) (summary judgment); Aplt.App. 764 (costs). Mercy made a special motion for costs as a prevailing party, which the court denied. Debord appealed the judgment on her sex discrimination and retaliation claims against Mercy; Mercy cross-appealed its denial of costs.[4]

We turn first to Debord's sexual harassment and retaliation claims. We conclude with a brief discussion of Mercy's cross-appeal for costs.

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[3] Debord also filed a complaint with the Kansas Human Rights Commission (KHRC), but the KHRC did not have jurisdiction over the case because Mercy is a "sectarian employer" under Kansas employment law. *See* Aplt.App. 261, 294. *See generally Van Scoyk v. St. Mary's Assumption Parochial Sch.,* 224 Kan. 304, 580 P.2d 1315, 1318 (1978).

[4] Weaver's counterclaim and Debord's claims against Weaver are not before this court.

II. Analysis

It is unlawful for an employer to permit sexual harassment in the workplace. *See* 42 U.S.C. § 2000e-2(a)(1); *see also Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 66-67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). It is also unlawful for an employer to retaliate against an employee for opposing sexual harassment in the workplace. See 42 U.S.C. § 2000e-3(a).

Here, Debord claims Mercy violated both provisions. She claims Mercy permitted sexual harassment in the workplace, and she claims Mercy terminated her for reporting it. The district court determined that Debord did not have enough evidence to merit a trial on either claim, so the court granted summary judgment in favor of Mercy on both. We review the district court's decision de novo. *Daniels v. United Parcel Serv., Inc.,* 701 F.3d 620, 627 (10th Cir.2012).

A. Sexual Harassment/Hostile Workplace

An employee who is sexually harassed by a supervisor may have a claim against the employer under Title VII of the Civil Rights Act. *See Meritor,* 477 U.S. at 66-67, 106 S.Ct. 2399; *see also* 42 U.S.C. § 2000e-2(a)(1). Under Title VII, harassment is actionable only when it is "sufficiently severe or pervasive" such that a reasonable person would find the work environment to be hostile or abusive *and* the employee in fact perceived it to be so. *Meritor,* 477 U.S. at 67, 106 S.Ct. 2399; *Faragher v. City of Boca*

Raton, 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

An employer may be directly or vicariously liable for a hostile workplace. To show direct employer liability, an employee must present enough evidence for a reasonable jury to find that the employer knew or should have known about the harassment but failed to stop it. *Burlington Indus. v. Ellerth,* 524 U.S. 742, 758-59, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). The "should-have-known" formulation is, in effect, a showing that the employer was negligent in failing to stop harassment.

Even without a showing of negligence, an employer can still be found vicariously liable for harassment committed by a supervisor against an employee. To avoid vicarious liability, an employer can take advantage of an affirmative defense – the *Faragher* defense – by showing both that the employer "exercised reasonable care to avoid harassment and to eliminate it when it might occur," and that the complaining employee "failed to act with like reasonable care to take advantage of the employer's safeguards." *Faragher,* 524 U.S. at 805, 118 S.Ct. 2275.

Debord raises both theories – direct and vicarious liability. We review each in turn.

1. Direct Employer Liability

"An employer is directly liable for a hostile work environment created by any employee if the

employer's negligence causes the actionable work environment." *Baty v. Willamette Indus.,* 172 F.3d 1232, 1241 (10th Cir.1999), *overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). "'An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.'" *Id.* at 1241-42 (quoting *Ellerth,* 524 U.S. at 759, 118 S.Ct. 2257).

a. Actual Knowledge

Debord admits that Weaver never made his sexual comments or advances in front of Mercy's management, and she admits she never told management about the harassment. Instead, to prove actual knowledge, she relies on a former employee's complaint to management about Weaver's touching. The complaint was made in 2001, but Debord argues that the complaint shows Mercy actually knew of the sexual harassment Debord experienced from 2004 to 2009.

Evidence of the former employee's complaint comes from an internal email summarizing the results of the employee's exit interview. On the subject of Weaver's touching, the email states, "[Weaver] learned that the cold hands on [sic] is not appreciated." Aplt.App. 650. Nothing more is said on the subject.

"In determining whether to consider acts alleged by other employees, we look to '[t]he extent and seriousness of the earlier harassment and the similarity

and nearness in time to the later harassment. . . .'" *Tademy v. Union Pac. Corp.,* 614 F.3d 1132, 1147 (10th Cir.2008) (quoting *Hirase-Doi v. U.S. W. Commc'ns,* 61 F.3d 777, 783-84 (10th Cir.1995)), *abrogated on other grounds by Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, *and Faragher,* 524 U.S. 775, 118 S.Ct. 2275.

On nearness in time, this prior event cannot support actual notice. Occurring three years prior to Debord's arrival, this notice of one instance of potential harassment of someone else cannot, without more, constitute actual notice of Debord's sexual harassment three years later. As to our requirement that evidence be produced showing the extent, seriousness, and similarity of the misconduct, not much can be said to support actual notice either. The record discloses one employee complained in 2001, but we do not know where or how often Weaver touched the employee, nor whether the touching was considered sexual harassment. And there is no evidence Weaver made any sexual comments or advances with the 2001 employee, as he purportedly did with Debord.

Ammons's reaction to Debord's complaint also suggests that Mercy did not know about any sexual harassment. According to Debord's own testimony, Ammons was surprised when she told him about Weaver sexually harassing her, and Ammons had been working at Mercy since at least the late 1990s.[5]

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[5] It is true that, by the time of his deposition, Ammons knew that Weaver "puts his cold hands on – on other women,

(Continued on following page)

In sum, Debord does not raise a genuine dispute about whether Mercy actually knew of her harassment prior to July 2009.

b. Constructive Knowledge

Debord also fails to present sufficient evidence showing Mercy should have known about the sexual harassment before July 2009.

"When a management-level employee has not been notified," as here, we apply "what amounts to a negligence standard: highly pervasive harassment should, in the exercise of reasonable care, be discovered by management-level employees." *Tademy,* 614 F.3d at 1147 (internal quotation marks omitted). Obviously, then, to find constructive notice, we first must find harassment. Harassment has both objective and subjective components. *Morris v. City of Colorado Springs,* 666 F.3d 654, 663 (10th Cir.2012). For the objective component, we look to the "totality of the circumstances" and "consider[ ] such factors as the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 664 (internal quotation marks omitted). For the subjective component, we look to see

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other people." Aplt.App. 547. But significantly absent from the record is any indication that Ammons knew of this conduct *prior* to Debord's Facebook post on July 6, 2009.

if the victim perceived the environment to be abusive. *Id.* at 665.

After an employee establishes the existence of harassment, we look to see whether the incidents of harassment were "so egregious, numerous, and concentrated as to add up to a campaign of harassment that the employer will be culpable for failure to discover what is going on." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 675 (10th Cir.1998) (internal quotation marks and alteration omitted); *cf. Harsco Corp. v. Renner,* 475 F.3d 1179, 1188 (10th Cir.2007). Only then do we find constructive notice. *Adler,* 144 F.3d at 675.

Debord claims Weaver touched at least six other female co-workers. But she provides the statements of only three co-workers, and these statements do not demonstrate that incidents of sexual harassment were "so egregious, numerous, and concentrated" as to create a jury question on constructive notice. *Id.* The three co-workers testified that Weaver showed them his cold hands by touching their forearms or necks. But they did not testify that the touching was sexual harassment; in fact, one explicitly dismissed Weaver's touching as not "sexual." *See* Aplt.App. 633. Although this co-worker considered Weaver's behavior inappropriate *after* learning about Debord's lawsuit, she testified that, *before* the suit, "[i]t didn't seem like [Weaver] was crossing the line." *Id.* at 635. And while another testified that the touches were unwelcome, *id.* at 642, and a third testified that the touches made her feel uncomfortable, *id.* at 612, not

one of Debord's co-workers said that Weaver had sexually harassed her, nor did any say that she reported his behavior.

Debord also offered evidence from an employee who worked under Weaver between 1994 and 1998 – years before Debord's employment. This former employee testified that Weaver regularly put his cold hands on her neck, but she also did not report these episodes to management at the time.

A comparison between this case and *Hirase-Doi* is instructive. In that case, we found a genuine factual dispute on constructive notice because the plaintiff introduced evidence showing that "as many as eight to ten [female] employees" were being sexually harassed during one male employee's three-month tenure. 61 F.3d at 784. The male employee made "persistent requests for sex and inquiries of [female employees'] sexual conduct," as well as "open-ended invitations to all female employees to satisfy his sexual desires" and "threatening and intimidating stares." *Id.* at 780. Worse, he "passed a sexually explicit note," "attempted to kiss [another] on the neck and brushed her breast with his hand," and "grabbed [yet another female employee] between her legs." *Id.* at 781. By contrast, the allegations in this case do not constitute a similar "campaign of harassment" blatantly obvious to management. *Adler,* 144 F.3d at 675.

In sum, the sexual harassment borne out by Debord's evidence does not rise to the level of "egregiousness" and "pervasiveness" that creates a genuine

dispute on constructive notice. *Tademy,* 614 F.3d at 1147.

We now turn to whether Mercy may nevertheless be vicariously liable for Weaver's behavior.

2. Vicarious Liability

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275. But when no tangible employment action is taken, as here, an employer may defeat liability by showing it took reasonable steps to avoid a hostile workplace by adopting policies available to employees to report harassment – the *Faragher* defense. *See id.*

The *Faragher* defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Helm v. Kansas,* 656 F.3d 1277, 1285 (10th Cir.2011) (citation and internal quotation marks omitted). These two elements are designed to "encourag[e] forethought by employers and saving action by objecting employees." *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275.

a. First Element – Prevention and Correction

The first element of the *Faragher* defense "actually imposes two distinct requirements on an employer": "(1) the employer must have exercised reasonable care to prevent sexual harassment and (2) the employer must have exercised reasonable care to correct promptly any sexual harassment that occurred." *Helm,* 656 F.3d at 1288 (citing *Pinkerton v. Colo. Dep't of Transp.,* 563 F.3d 1052, 1062 (10th Cir.2009)).

Prevention. "[An] employer[ ] act[s] reasonably as a matter of law [to prevent harassment if it] adopted valid sexual harassment policies [and] distributed those policies to employees via employee handbooks, [even if it] either provided no sexual harassment training or provided training only to managers." *Id.* at 1289. In Helm, the employer's policy "prohibit[ed] sexual harassment, contain[ed] a complaint procedure and [a] list of personnel to whom harassment may be reported, and include[d] an anti-retaliation provision." *Id.* at 1288. The employer then "distribut[ed] that policy to all employees via an employee handbook, requir[ed] employees to acknowledge in writing their understanding of the policies contained in the handbook, and provid[ed] training to managers regarding the sexual harassment policy." *Id.* at 1289. We concluded that the *Helm* employer's sexual harassment policy was "a reasonable mechanism for prevention." *Id.* at 1290 (internal quotation marks omitted).

Debord does not challenge the content or distribution of Mercy's sexual harassment policy. Rather, she says the fact that Weaver sexually harassed her shows the inadequacy of Mercy's efforts to prevent sexual harassment. But a plaintiff must do more than merely allege harassment to defeat this element of the *Faragher* defense. Otherwise, the *Faragher* defense would not work.

Given this obstacle, Debord also argues that Mercy's policy is "*per se* ineffective" because one manager, Brewster, testified that the policy prohibits only "intimate touching." Aplt. Br. at 36; Reply Br. at 7. But Brewster's testimony was *not* that Mercy's policy prohibited only intimate touching. Rather, in discussing Mercy's sexual harassment policy, Brewster verified that the policy prohibited a range of conduct, including "discuss[ing] sexual activities, tell[ing] off-color jokes, and touch[ing] unnecessarily." Aplt.App. 566. Brewster then testified that "[i]f it were intimate touching," she would consider the conduct a violation of the policy. *Id.* And, in fact, Mercy treated Debord's allegation of unwanted touching as an allegation of sexual harassment.

Mercy has shown that it "adopted valid sexual harassment policies [and] distributed those policies to employees via employee handbooks." *Helm,* 656 F.3d at 1289. The prevention component of the *Faragher* defense does not require more.

Correction. The second requirement is whether an employer can "show that it acted reasonably

promptly on [an employee's] complaint when it was given proper notice of her allegations as required under its complaint procedures." *Id.* at 1290 (internal quotation marks omitted). Obviously, the "most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." *Id.* (internal quotation marks omitted).

No genuine dispute exists here that Mercy's corrective measures were sufficient. As outlined above, Mercy acted "reasonably promptly" after learning of Debord's allegations on July 8 by launching an immediate investigation. As soon as he learned of Debord's allegations, Ammons referred the matter to Brewster, and Brewster promptly investigated the allegations.

Debord claims that is not enough. She claims Brewster acted unreasonably because (1) Weaver was not disciplined, (2) Brewster did not believe that Debord made a sexual harassment complaint in the first place, and (3) Brewster misled Debord into thinking there was an actual complaint form when no such form existed. Thus, says Debord, Mercy's efforts were insufficient to correct sexual harassment.

Debord's arguments do not raise a genuine dispute of material fact. First, corrective action does not always require discipline. *Cf. Pinkerton,* 563 F.3d at 1062-63 (finding "no genuine issue left" on whether the employer promptly corrected a harassment claim where "[t]he alleged harassment . . . ceased – without

resuming – after [the] complaint," the plaintiff did not then request any immediate corrective action, the employer launched a prompt investigation anyway, and the matter was resolved "in a matter of weeks"). Second, Brewster investigated Debord's complaint, even though Debord denied making a sexual harassment complaint at the time. And third, Debord did not need a written form; she had Mercy's HR Director (Ammons) and risk manager (Brewster) asking her to file a complaint, and she declined their offers. No genuine issue of material fact remains as to the adequacy of Mercy's corrective measures.

b. Second Element – Unreasonable Delay

An employer may satisfy the second element of the *Faragher* defense "by showing that the victimized employee unreasonably delayed in reporting incidents of sexual harassment." *Helm,* 656 F.3d at 1291.

The district court correctly concluded that Mercy meets the second element. In *Pinkerton,* we found "a reporting delay of approximately two or two and a half months" unreasonable where the plaintiff 's only explanation was a "generalized fear of retaliation," and the plaintiff "had received the harassment training and knew that the incidents should have been reported." 563 F.3d at 1063-64. Here, the reporting delay spanned *five years* – Debord did not report the harassment from 2004 until 2009 – and that amount of delay is unreasonable.

Debord's explanation for her delay is (1) she did not know it was harassment at the time, and (2) she thought the complaint would have been futile because Weaver's wife was one of the hospital's two surgeons.

Debord's first explanation suggests either that Weaver's behavior was not harassment at all (because Debord did not subjectively experience it as harassment) or that Debord unreasonably failed to consult the sexual harassment materials provided to her by Mercy. Either way, this explanation does not justify her failure to report Weaver's behavior to management.

Her second explanation is also inadequate. A failure to report harassment cannot be excused merely because the accuser believes the report will be futile; the accuser's belief must be reasonable. But saying that the accused's spouse is also employed by the hospital – without more – does not establish objective futility. *See Barrett v. Applied Radiant Energy Corp.,* 240 F.3d 262, 268 (4th Cir.2001) ("We cannot accept the argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends."). Besides, Debord does not dispute that Mercy offered an anonymous reporting system, and Debord has not offered a reasonable explanation for failing to use even that. Nor does she show any evidence that action would not be taken; to the contrary, her reports to HR prompted an immediate response.

In sum, Mercy cannot be held vicariously liable. Debord stayed silent even after Mercy provided sexual harassment training, annual reminders, an open-door policy with the management team, and an anonymous hotline to report harassment. Her sexual harassment claim fails to raise a disputed, material fact.

We now turn to Debord's retaliation claim.

B. Retaliation

Debord also claims Mercy fired her as retaliation for her complaint about sexual harassment in the workplace. Where, as here, the plaintiff does not have direct evidence of retaliation, we follow the three-step framework from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, Debord must present a prima facie case for retaliation. Next, Mercy must respond with "legitimate, nonretaliatory reason[s]" for Debord's termination. *Twigg v. Hawker Beechcraft Corp.,* 659 F.3d 987, 998 (10th Cir.2011). Then Debord must show that Mercy's stated reasons were pretextual. *Daniels,* 701 F.3d at 639.

Like the district court below, we assume without deciding that Debord made a prima facie case for retaliation. And Debord does not dispute that Mercy proffered legitimate, nonretaliatory reasons for terminating her. Rather, Debord claims that Mercy's proffered reasons are mere pretext for Mercy's actual

intention to punish her for reporting sexual harassment.

"To show pretext, [Debord] must produce evidence showing weakness, implausibility, inconsistency, incoherency, or contradiction in [the employer's] stated reasons, such that a reasonable jury could find them unconvincing." *Id.* "'In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision,*'" not as they appear to the plaintiff. *Luster v. Vilsack,* 667 F.3d 1089, 1093 (10th Cir.2011) (internal quotation marks omitted; emphasis in original). And we do not ask "whether the employer's proffered reasons were wise, fair or correct"; we ask only "whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." *Id.* at 1094 (internal quotation marks omitted).

Ammons's stated reasons for terminating Debord were her inappropriate, disruptive behavior and her dishonesty. Debord does not dispute these charges. She admits posting inflammatory material about her supervisor on the internet, sending text messages to co-workers bad-mouthing her supervisor (unrelated to the alleged sexual harassment), discussing the overpay and harassment investigations with others, knowingly pocketing overpayment in 2007, and thrice lying about posting information on Facebook while at work. No reasonable jury could find these reasons "unconvincing." *Daniels,* 701 F.3d at 639. Thus, no reasonable jury could find pretext.

Debord's many arguments to the contrary do not raise a genuine dispute of material fact. She argues that (1) Ammons willfully ignored evidence of her 2007 overpay, (2) Ammons could not lawfully terminate her for using Facebook to air her complaints, (3) Ammons's stated reasons for her termination are vague and subjective, (4) Ammons could not lawfully terminate her for making a false sexual harassment claim, (5) Ammons could not lawfully terminate her for communicating with others about the pending investigations, and (6) Mercy's management failed to investigate her sex-based pay-disparity claim.

First, Debord claims Ammons willfully ignored evidence showing that she had been overpaid. Ammons testified – and Debord does not dispute – that he reviewed call-back logs and pay stubs from 2006, and they do not show overpay. Therefore, as of July 13, 2009 (the date of Debord's termination), he reasonably believed that Debord's overpay claim was false. This belief was one reason that Ammons cited for why he considered Debord to have been dishonest.

Months later, however, Mercy's management discovered that, according to the logs and pay stubs for 2007, Debord had in fact been overpaid. Debord argues that Ammons's failure to review the 2007 documents demonstrates pretext.

But Debord does not dispute that she mentioned only 2006 at her second meeting with Ammons, the July 8 meeting – two days after she first told him "2006 or 2007." Aplt.App. 463. At most, this evidence

suggests Ammons's failure to review documents from 2007 resulted from negligence, forgetfulness, or confusion – not intentional ignorance to hide a retaliatory motive against Debord for her sexual harassment complaint.

Second, citing *Kasten v. Saint-Gobain Performance Plastics Corp.,* ___ U.S. ___, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011), Debord argues that terminating her for her post on Facebook was *per se* unlawful because that was her way of reporting sexual harassment.[6] And she says Mercy made up this reason *post hoc* anyway because her termination slip does not specifically reference those posts.

In *Kasten,* the Supreme Court held that the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), protects oral as well as written complaints. The Court therefore reversed summary judgment for the employer where the employee orally called attention to unlawful practices, and where, significantly here, the employee did so "in accordance

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[6] In a footnote, she also cites *Gresham v. City of Atlanta,* No. 1:10-CV1301-RWS, 2011 WL 4601022 (N.D.Ga. Aug. 29, 2011) (magistrate judge's recommendation), and *Mattingly v. Milligan,* No. 4:11CV00215JLH, 2011 WL 5184283 (E.D.Ark. Nov. 1, 2011), saying these decisions show that "similar complaints on Facebook . . . deserve protection." Aplt. Br. at 49 n. 3. But these unpublished opinions address First Amendment protection for Facebook posts related to matters of a public concern. These decisions are therefore irrelevant to this case, as Debord neither has raised a First Amendment claim nor has argued that her posts are related to a matter of public concern.

with [the employer's] internal grievance-resolution procedure." *Id.* at 1329. The Court later observed that "it is difficult to see how an employer who does not (or should not) know an employee has made a complaint could discriminate *because* of that complaint." *Id.* at 1335 (emphasis in original).

Under the logic of *Kasten,* Debord's sexual harassment complaint – *i.e.,* her Facebook post – falls short. Her Facebook post was not in accordance with Mercy's otherwise flexible reporting system for sexual harassment complaints, and the post, by itself, did not provide any notice to Mercy. Only when Weaver himself brought the post to Ammons's attention did Mercy learn that, among many other complaints, Debord disliked Weaver's "creepy hands." And even then, Debord thrice denied authoring the post. No jury could conclude that Mercy's management acted unreasonably in response to Debord's Facebook post. *Cf. Helm,* 656 F.3d at 1291 (concluding it was "entirely reasonable" not to investigate allegations of sexual harassment when the plaintiff told her employer she "did not wish to pursue her complaint").

Besides, Ammons's decision to terminate Debord did not turn on whether she aired her grievances on Facebook; instead, the decision turned on her dishonesty about authoring the posts while at work and her disruptive behavior during the investigation. Debord cannot dispute that dishonesty is a valid ground for terminating an employee. Nor can she genuinely dispute that she behaved inappropriately and disruptively by, for example, sending messages

to co-workers about confidential investigations in contravention of Mercy's policies.[7]

Third, Debord says that Ammons's stated reasons for terminating her are vague and subjective and therefore point to pretext. But the "dishonesty" here is not subjective at all, as Debord already conceded she lied. And "inappropriate and disruptive behavior" is not vague, given the context.

Nor do the cases Debord cites demand a different result. In *Riggs v. AirTran Airways, Inc.,* 497 F.3d 1108 (10th Cir.2007), for example, the employee's evidence of pretext was that the investigation into her misconduct focused on whether or not she had been rude to a customer. This, the employee argued, was subjective and hence pretextual. We disagreed. We noted that "the existence of subjective criteria alone is not considered evidence of pretext." *Id.* at 1120. We then affirmed summary judgment for the employer because the employee did not present evidence that

[7] Debord contends that Ammons was inconsistent about when he told her to keep the matter confidential and that a call log shows he is not telling the truth. But Ammons consistently testified that he called Debord *before* she sent text messages; it is Debord who said he did not call until *after* she sent the messages. And we cannot deduce from the numbers in the call-log exhibit who called whom. In any event, the record shows that Ammons told Debord to keep the investigation confidential, and later he learned that Debord sent co-workers text messages about the investigation anyway. Because we decide pretext based on what Ammons knew at the time, we cannot say these arguments raise a jury question.

similarly situated employees were treated differently, nor did she present evidence that others in management "deliberately withheld information" or otherwise misled the decisionmaker. *Id.* Likewise, Debord has not shown that similarly situated employees were treated differently or that Brewster withheld information from or otherwise misled Ammons.

In the other case Debord cites, *Hurlbert v. St. Mary's Health Care Sys.,* 439 F.3d 1286 (11th Cir.2006), the plaintiff 's termination slip omitted the reasons for his termination, and the plaintiff 's termination process conflicted with the employer's usual practice. *See id.* at 1298-99. By contrast, here, Debord's termination slip contained the reasons for her termination, and she has not shown that Mercy deviated from its usual disciplinary practices.

Fourth, citing an Eighth Circuit case, Debord says Mercy is not entitled to summary judgment when one of Ammons's reasons for terminating her was the falsity of her sexual harassment complaint. *See Pye v. Nu Aire, Inc.,* 641 F.3d 1011 (8th Cir.2011). In *Pye*, the Eighth Circuit found a genuine issue of material fact when the employer's sole reason for terminating the plaintiff was the plaintiff 's complaint of racial discrimination in the workplace. *See* 641 F.3d at 1021. But here, Ammons had a number of reasons – unrelated to Debord's complaint of sexual harassment – to support his conclusion that Debord's behavior was inappropriate, disruptive, and dishonest.

Fifth, Debord argues that terminating her for her disruptive text messages was pretextual because she was merely communicating about a pending investigation into harassment. She points to *Loudermilk v. Best Pallet Co.,* 636 F.3d 312 (7th Cir.2011), where the employer terminated the plaintiff for taking photographs at work. The Seventh Circuit concluded the employer evinced a retaliatory motive. The court reasoned, "If . . . Loudermilk snapped the photos [in order] to bolster his claim of discrimination, then forbidding picture-taking looks a lot like an attempt to block the gathering of evidence during an investigation." *Id.* at 315.

Here, instead of trying to gather evidence, Debord's text messages merely shared information with co-workers about an investigation that company policy dictates should be confidential. For example, Debord sent: "[Weaver] emptied out the drawer where all the call back papers were kept at work. Guilty as charged!" Aplt.App. 301. And: "To get rid of them. He's being investigated . . . but he doesn't know it. [Ammons] will be calling the techs . . . asking about his conduct . . . the lewd comments and t[ ]ouching." *Id.* at 302-03. Debord is not gathering evidence with these messages.

Further, unlike the employer's no-photography rule in *Loudermilk,* Mercy's confidential-investigation rule was not generated after the fact. In fact, the rule is stated in Mercy's harassment training materials. Debord had received this training, the materials were available online, and Debord does not allege that this

policy was only selectively enforced. Debord cannot show pretext here.

Sixth and finally, Debord claims Mercy failed to investigate Debord's allegation that a male co-worker made more money than she did. But Debord did not raise this argument before the district court, so we will reverse only if Debord "shows the district court's decision amounted to plain error." *Somerlott v. Cherokee Nation Distribs.,* 686 F.3d 1144, 1148 (10th Cir.2012). This Debord cannot do, because she did not present evidence that her pay-disparity complaint was ignored. Instead, she admitted that "the reason" Ammons first agreed to meet with her on July 6 was to discuss her claim of disparity in pay, Aplt. Br. at 52, and that shows good faith on Ammons's part, not pretext.

In sum, it is not reasonable to conclude Ammons fired Debord because she exercised her right to report sexual harassment. There were many nonretaliatory reasons for terminating Debord, and Mercy's management investigated the sexual harassment complaint even when Debord did not pursue the claim herself. Accordingly, we affirm the district court's grant of summary judgment for Mercy.

C. Cross-Appeal: Costs

After granting summary judgment against all claims, the district court, without explanation, ordered each party to bear its own costs. Having completely prevailed, Mercy filed a post-judgment motion

for costs. The court denied the motion because co-defendant Weaver lost his counterclaim against Debord, and Weaver and Mercy shared counsel. Mercy cross-appeals for costs.

Debord contends that Mercy's post-judgment motion was untimely. Before the district court, Mercy styled its motion as a Rule 59(e) motion to alter or amend a judgment. But as Debord points out, the Supreme Court declared in *Buchanan v. Stanships, Inc.,* 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988), that a motion for costs "does not seek 'to alter or amend the judgment' within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply." *Id.* at 268-69, 108 S.Ct. 1130. Thus, according to Debord, Mercy's motion should be treated as a Rule 54(d)(1) motion, and as such, it had to be filed 7 days after the clerk's entry of judgment. *See* Fed.R.Civ.P. 54(d)(1) ("[C]osts . . . should be allowed to the prevailing party. . . . The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action."). Because Mercy filed its motion 21 days after the entry of judgment, Debord concludes the motion was untimely.

We need not decide the timeliness of Mercy's costs motion because, even if the motion was untimely, the district court had discretion to consider it. *See Quigley v. Rosenthal,* 427 F.3d 1232, 1237 (10th Cir.2005) ("We review for abuse of discretion a district court's decision whether or not to consider such an

untimely motion."). And here, the court properly exercised that discretion. We presume a prevailing party is entitled to costs. *Zeran v. Diamond Broad., Inc.,* 203 F.3d 714, 721-22 (10th Cir.2000). Thus, while the district court may still withhold costs from a prevailing party, the court must provide valid reasons for doing so. *Id.* When a district court denies the prevailing party costs without explanation, we vacate the costs decision and remand for an explanation or reconsideration. *See, e.g., Utah Animal Rights Coal. v. Salt Lake Cnty.,* 566 F.3d 1236, 1245 (10th Cir.2009). And here, in its original judgment, the court did not explain why it denied costs to Mercy. Therefore, for efficiency's sake, it was proper for the district court to rectify that omission by responding to Mercy's post-judgment motion for costs.

That said, the district court's reasons for denying Mercy costs were invalid. "[T]o deny a prevailing party its costs is 'in the nature of a severe penalty,' such that there 'must be some apparent reason to penalize the prevailing party if costs are to be denied.'" *Marx v. Gen. Revenue Corp.,* 668 F.3d 1174, 1182 (10th Cir.2011) (quoting *Klein v. Grynberg,* 44 F.3d 1497, 1507 (10th Cir.1995)). Thus, the district court's discretion to deny the prevailing party costs is "not unlimited." *Cantrell v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local 2021,* 69 F.3d 456, 458 (10th Cir.1995) (en banc). The circumstances in which a district court may properly deny costs to a prevailing party include when (1) the prevailing party is "only partially successful," (2) the prevailing party was

"obstructive and acted in bad faith during the course of the litigation," (3) damages are "only nominal," (4) the nonprevailing party is indigent, (5) costs are "unreasonably high or unnecessary," or (6) the issues are "close and difficult." *See id.* at 459.

The district court here offered none of those reasons. Instead, relying on our decision in *Roberts v. Madigan,* 921 F.2d 1047 (10th Cir.1990), the court reasoned that denying costs to Mercy is appropriate because "'both parties have "prevailed" on at least one claim,'" which, according to the district court, happened here because Debord prevailed against Weaver's counterclaim, even though she lost all her claims against Mercy and Weaver. Aple.App. 1014 (quoting *Roberts,* 921 F.2d at 1058). The court further reasoned that separating Mercy and Weaver's defense costs from Weaver's counterclaim costs would have been "impracticable" given that Mercy and Weaver shared counsel and relied on overlapping facts. Aple.App. 1015.

These reasons do not justify withholding costs from Mercy. The court's reliance on our decision in *Roberts* is misplaced, because in *Roberts,* we upheld a costs award to a prevailing defendant where it prevailed "on the vast majority of issues and on the issues truly contested at trial." 921 F.2d at 1058. Here, by contrast, Mercy prevailed on *all* issues, and yet the district court *denied* Mercy costs. While perhaps applicable to Weaver, *Roberts* does not apply to Mercy.

The district court's other reasons are not supportive either. We do not want to discourage an efficient allocation of resources, so merely sharing counsel with a co-defendant who files an unsuccessful counterclaim does not make a fully prevailing party ineligible for costs. And overlapping facts may justify deducting some costs during the taxing process, but it is not a basis for altogether denying a prevailing party costs. After all, Debord brought Weaver into the case as a codefendant, and Weaver chose to bring a counterclaim; Mercy had no say, as far as we can tell, in either decision.

In sum, the district court did not provide an adequate basis for refusing costs to Mercy.

III. Conclusion

For the foregoing reasons, we AFFIRM the order of the district court granting summary judgment to Mercy, and we REVERSE the entry of judgment requiring each party to bear its own costs and REMAND to provide Mercy with an opportunity to submit a bill of costs consistent with this opinion.

860 F.Supp.2d 1263
United States District Court,
D. Kansas.

Sara C. DEBORD, Plaintiff,
v.
MERCY HEALTH SYSTEM OF KANSAS, INC., and Leonard Weaver, Defendants.

Case No. 10-4055-SAC. | March 20, 2012.

Attorneys and Law Firms

Bradley D. Serafine, Foulston Siefkin LLP, Wichita, KS, Mark A. Buchanan, Popham Law Firm, Kansas City, MO, Mary T. Malicoat, Law Office of Mary T. Malicoat, LLC, Wichita, KS, for Plaintiff.

Sharon A. Coberly, Monika D. Jenkins, Seigfreid, Bingham, Levy, Selzer & Gee, P.C., Kansas City, MO, for Defendants.

Opinion

MEMORANDUM AND ORDER

SAM A. CROW, Senior District Judge.

This case comes before the Court on the following motions for summary judgment: defendant Mercy Health System of Kansas' (Mercy) motion for summary judgment on Plaintiff Sara DeBord's sexual harassment and retaliation claims; defendant Leonard Weaver's motion for summary judgment on Plaintiff 's assault and battery claim; and Plaintiff 's motion for summary judgment on Weaver's counterclaim for defamation.

I. Summary Judgment Standard

On summary judgment, the initial burden is with the movant to point out the portions of the record which show that the movant is entitled to judgment as a matter of law. *Thomas v. Wichita Coca-Cola Bottling Co.,* 968 F.2d 1022, 1024 (10th Cir.1992), *cert. denied,* 506 U.S. 1013, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992). If this burden is met, the non-movant must set forth specific facts which would be admissible as evidence from which a rational fact finder could find in the non-movant's favor. *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 671 (10th Cir.1998). The non-movant must show more than some "metaphysical doubt" based on "evidence" and not "speculation, conjecture or surmise." *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bones v. Honeywell Intern.,* 366 F.3d 869, 875 (10th Cir.2004). The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether the evidence is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In applying this standard, all inferences arising from the record must be drawn in favor of the nonmovant. *Stinnett v. Safeway, Inc.,* 337 F.3d 1213, 1216 (10th Cir.2003). Credibility determinations and the weighing of the evidence are jury functions, not those of a judge. *Id.* at 1216. Nevertheless, "the non-movant must establish, at a minimum, 'an inference

of the existence of each element essential to [her] case.'" *Croy v. COBE Laboratories, Inc.,* 345 F.3d 1199, 1201 (10th Cir.2003) (quoting *Hulsey v. Kmart, Inc.,* 43 F.3d 555, 557 (10th Cir.1994)).

II. Facts

The relevant and admissible facts, construed in the light most favorable to the Plaintiff follow. Additional facts are set forth in the Court's analysis of the arguments.

Plaintiff worked in Mercy's radiology department in Independence, Kansas from March 19, 2004 to July 13, 2009, when she was terminated. She reported directly to Weaver, who was the director of radiology from 1996 until October 2010, when he chose to step down from that position.

Weaver has unusually cold hands and would often say to Plaintiff and her co-workers "feel my cold hands," then touch the employees' upper arms or the back of their necks. Responses to this practice varied. One employee told Weaver "don't touch me." Another asked him to keep rubbing, while several said, "your hands are cold, get them off me." Plaintiff 's response was to pull away. Weaver would sometimes rub Plaintiff 's back, and she would tell him "Stop, that hurts," although it didn't hurt. Weaver touched Plaintiff approximately three times a week. Plaintiff never contacted administration to report Weaver's touching, and Plaintiff knows of no co-employee who did so during her employment.

On July 6, 2009, Weaver made negative comments to Plaintiff about her work productivity, which upset Plaintiff. Later that day, Weaver went to the room where Plaintiff was working, put his arm around her and said, "You know I didn't mean it." Plaintiff spun away, saying, "You just don't talk to people like that." This event, which the Court refers to as a *hug* for purposes of convenience, is the sole basis for plaintiff 's assault and battery claims.

Later that day, because Plaintiff was upset with Weaver, she posted statements about him on her Facebook account. She did so three separate times, during work hours, via her cell phone, stating:

> 1. Sara DeBord loves it when my boss adds an extra $600.00 on my paycheck for hours I didn't even work . . . awesome!!
>
> 2. SB is sooo disappointed . . . can't believe what a snake my boss is . . . I know, I know everyone warned me.
>
> 3. . . . he adds money on peoples checks if he likes them (I've been one of them) . . . and he needs to keep his creapy (sic) hands to himself . . . just an all around d-bag!!

(Ellipses in original).

Plaintiff and other employees testified that Mr. Weaver had a habit of putting his unusually cold hands on their bare arms or on the back of their necks. When was asked what she meant by her "creepy hands" Facebook comment, Plaintiff stated that it referred to Mr. Weaver's cold hands:

> Q. And in your Facebook posts when you said "creepy hands," were you intending to describe something other than cold hands?
>
> A. No. Just that it just gave me the creeps. I mean, it was such an everyday thing that it got to where I could be sitting somewhere and he could come into the area and I wouldn't even have to look, my skin would crawl. I just knew he was there.

Plaintiff 's depo., p. 198-94 [sic].

Some radiology department employees, including Weaver, became aware of Plaintiff 's Facebook posts that same day. That afternoon Weaver took the posts to Eric Ammons, the Director of Human Resources, who was meeting with Plaintiff about an unrelated matter. Ammons asked Plaintiff if she had made the posts, and she denied it. Weaver then brought in his laptop and showed the posts to them. Ammons asked Plaintiff a second time if she had made the posts. Again Plaintiff denied having made them. After Weaver left, Ammons told Plaintiff that he would investigate who made the Facebook posts, as well as her Facebook allegations about Weaver.

On the morning of July 8th, Ammons met with Plaintiff. He told her if she had made the Facebook posts, it would be better for her to admit it. Plaintiff then admitted that she had made the posts, and Ammons responded that he had already discovered that. Ammons then told Plaintiff she was suspended

for one day without pay. Plaintiff's suspension form states:

> Work related conduct needing improvement: Failure to conduct yourself in a manner consistent with a high degree of personal integrity and professionalism, which is expected of Mercy coworkers. Engaged in behavior deemed harmful to a fellow co-worker. Supporting details: See attached Facebook documents. During counseling Sara admitted to posting information on Facebook.

Ammons depo., p. 5, Exh. C.

After Ammons informed Plaintiff of her suspension, he asked Plaintiff about the "creepy hands" comment, and Plaintiff replied that Weaver was a "perv." Ammons asked what she meant by that, and Plaintiff replied that Weaver had made comments about her body and would run his hands up inside the arm of her scrubs and down inside the back neck of the scrubs. Ammons asked Plaintiff if she considered that to be sexual harassment, and Plaintiff denied that it was, saying, "No, he is just a pervert." Ammons told Plaintiff that because the hospital takes such matters seriously, he would refer the matter to Lana Brewster, the risk manager.

Ammons also told Plaintiff that he had the callback papers. Those papers contained the information which would reveal whether Plaintiff's paychecks were incorrect, as she had alleged on Facebook. Later that afternoon, Plaintiff sent five text messages while

at work to co-employee Tena Walsh, including the statements: "Leonard emptied out the drawer where all the call back papers were kept at work. Guilty as charged. To get rid of them." Ammons became aware that Plaintiff was talking about the matter in the department during working hours, and specifically instructed Plaintiff to keep the matter confidential.

The next day, July 9th, Brewster met with Plaintiff at Ammons' request. Brewster thought that Plaintiff 's comment about "creepy hands" might indicate sexual harassment. Plaintiff denied having made and wanting to make a formal report of sexual harassment, but said she had made a verbal report to Ammons. Brewster asked Plaintiff to describe Weaver's conduct, beginning with the most recent to the most remote, and Plaintiff did so. Plaintiff told Brewster of other statements of a sexual nature that Weaver had made to her throughout the years. Brewster told Plaintiff to let her know if she had any more problems. Brewster interviewed Weaver and Kim Harris, a long-time radiology department employee, before concluding that Weaver had not violated Mercy's sexual harassment policy.

Four days later, Plaintiff was terminated. Ammons decided to terminate Plaintiff 's employment, and John Woodridge, CEO, and Reta Baker, COO, concurred. Ammons believed that Plaintiff had been dishonest in denying that she had made the Facebook posts, in denying that she had made the Facebook posts while at work, in making unfounded accusations against Weaver about her paycheck, and in

breaching confidentiality. Ammons believed that Plaintiff had been disruptive in openly discussing the investigation and in texting on the 8th, after he instructed her to keep the matter confidential. Ammons told Plaintiff she was terminated for disruption, continued texting, and dishonesty. Plaintiff's termination form states that she was terminated for "work related conduct needing improvement: Inappropriate and disruptive Behavior. Dishonest." Dk. 147, Exh. M.

Discovery in this case revealed that in 2007, Plaintiff had in fact been overpaid approximately $475 (not $600) for overtime that she had not worked. This mistake was due to Plaintiff's clock-in error which Weaver failed to catch in his routine review of the records. Ammons had looked at records from 2006, but not from 2007, when investigating Plaintiff's Facebook comments about Weaver, but had found no overpayment. So at the time of Plaintiff's termination, Ammons disbelieved Plaintiff's comment about having been overpaid.

After her termination, Plaintiff sued Mercy for retaliatory termination, and for sexual harassment. Plaintiff sued Weaver for civil assault and battery based on the alleged July 6th hug. Weaver counterclaimed for defamation, based on some statements Plaintiff made on Facebook and in her text messages, and similar statements Plaintiff made orally. The Court first addresses the Plaintiff's Title VII claims against Mercy for retaliation and sexual harassment, then addresses the individual's tort claims.

III. Retaliation

Plaintiff lacks direct evidence of retaliation, so must meet the three-part test established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to prove retaliation indirectly.

> Under the *McDonnell Douglas* /indirect approach, the plaintiff must first make out a prima facie case of retaliation by showing (1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action. If the plaintiff establishes a prima facie case, the employer must then offer a legitimate, nonretaliatory reason for its decision. Finally, once the employer has satisfied this burden of production, the plaintiff must show that the employer's reason is merely a pretext for retaliation.

Twigg v. Hawker Beechcraft Corp., 659 F.3d 987, 998 (10th Cir.2011) (citations and quotations omitted).

Defendant challenges the first and third elements of the prima facie case, contending that plaintiff has not shown protected opposition[1] or a causal

[1] Plaintiff relies, in part, on cases under Title VII's participation clause, rather than the opposition clause. But the pretrial order includes no claim under the participation clause, and

(Continued on following page)

connection. The Court assumes, without deciding, that Plaintiff has made a prima facie case of retaliation. Mercy has offered a legitimate, nonretaliatory reason for its decision – namely, that Plaintiff was terminated for her inappropriate and disruptive behavior and her dishonesty. This shifts the burden to the plaintiff to show that the employer's reasons are merely a pretext for retaliation. *Bryant v. Farmers Insurance Exchange,* in which this court held that, "As a general rule, an employee must proffer evidence that shows each of the employer's justifications is pretextual." *Bryant v. Farmers Ins. Exchange,* 432 F.3d 1114 (10th Cir.2005); *Luster v. Vilsack,* 667 F.3d 1089, 1093 (10th Cir.2011).

Pretext

To determine whether a proffered reason for a decision is pretextual, the court examines the facts as they appear to the person making the decision, not as they appear to the plaintiff in her subjective evaluation of the situation. *Luster v. Vilsack,* 667 F.3d 1089, 1093-94 (10th Cir.2011). "The relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." *Id.*

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alleges only protected opposition. *See* Dk. 141, p. 10, § 6.1 para. 2; id, p. 11, § 6.2 para. 2.

Plaintiff contends that her statements on Facebook and her texts were true. She thus contends that she was not dishonest, and that Mercy's finding that Weaver had not added money to her paycheck was false. The Court recognizes that falsity evidence is useful in retaliation cases as one means of establishing pretext. *Twigg,* 659 F.3d at 1001. But here, the circumstances cannot lead the trier of fact to reasonably infer from the falsity of the explanation that the employer was dissembling to cover up a retaliatory purpose.

The facts show that Ammons believed at the time of Plaintiff's termination that her paychecks were accurate. It was not discovered until discovery during this lawsuit that Plaintiff had, in fact, been overpaid approximately $475 due to Plaintiff's clock-in error, which Weaver failed to discover in his routine review of the records. At the time of Plaintiff's termination, Ammons had reviewed the call-back logs from 2006, had determined that those paychecks were in the correct amounts, and therefore believed that Plaintiff's statements about her boss having added money to her paycheck were false. Ammons' failure to review the records for 2007 which would have revealed the overpayment, although perhaps erroneous, raises no inference of pretext.

Plaintiff attacks Ammons' belief that Plaintiff had been disruptive in openly discussing the investigation and in texting on the 8th, after Ammons instructed Plaintiff to keep the matter confidential. Plaintiff contends that Ammons did not tell her to

keep the matter confidential until after she had sent the texts, making Ammons' statement false. But even assuming that Plaintiff is correct, Plaintiff has not cast any doubt upon the independent reason of given for her termination – dishonesty.

The facts show that Plaintiff made the Facebook posts via her cell phone during work hours; that employees saw and discussed the Facebook posts at work; that Ammons asked Plaintiff about them; and that Plaintiff denied having made those posts. Plaintiff lied to Ammons about that fact twice. Further, it is uncontested that after Ammons told Plaintiff that he had the call-back logs, Plaintiff told other employees that Weaver had taken and destroyed them. No facts suggest that Ammons did not reasonably or sincerely believe that Plaintiff 's acts were inappropriate, disruptive, or dishonest. These acts provided an independent and good faith basis for Plaintiff 's termination, even assuming the truth of her Facebook statements about her paycheck and the truth of her version of when Ammons told her to keep the matter confidential.

Plaintiff 's excuses for her dishonest acts are immaterial because in this inquiry, her state of mind is irrelevant. Nothing in the record suggests that Ammons did not believe the reasons stated for Plaintiff 's termination. No facts suggest that retaliation for Plaintiff's complaints of gender discrimination played a part in the employment decision. *Fye v. Okla. Corp. Comm'n,* 516 F.3d 1217, 1224 (10th Cir.2008). Instead, Ammons, the primary decisionmaker in Plaintiff 's

termination, was the very person who had initiated the sexual harassment investigation by referring Plaintiff 's vague complaints to the risk manager just the week before. Ammons thought Weaver's conduct was inappropriate, despite Plaintiff 's repeated denials to Ammons that she perceived Weaver's acts as sexual harassment. Because no facts justify an inference that Ammons harbored any retaliatory motive, summary judgment is warranted on Plaintiff 's claim of retaliation.

IV. Sexual Harassment – Employer Liability

Plaintiff contends that Weaver sexually harassed her at work over the course of her employment with Mercy. In support of her hostile work environment claim, she offers evidence, some of which Mercy contends should be excluded. Mercy additionally contends that Weaver's acts were not sufficiently severe or pervasive to constitute sexual harassment, and that in any event, Mercy cannot be held liable for them. Plaintiff argues that defendant is liable both vicariously and directly, but raises no alter ego theory. The Court addresses the issue of employer liability first, without resolving whether Weaver's alleged harassment of Plaintiff was actionable.

A. Vicarious Liability

Plaintiff does not contend that Weaver's harassment culminated in her termination, or in any other

tangible employment action.[2] Accordingly, the *Faragher/Ellerth* defense may be available. The *Faragher/Ellerth* framework is designed "to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority," and to accommodate "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Helm v. Kansas,* 656 F.3d 1277, 1285 (10th Cir.2011); quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 764, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Under the *Faragher/Ellerth* framework, the defendant bears the burden to show two elements:

> "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275; *Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257.

Helm, 656 F.3d at 1285. These elements are addressed below.

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[2] The pretrial order and plaintiff 's memo (Dk. 155) contend that harassment affected the terms and conditions of her employment only, and that retaliation caused her termination.

1. Employer's Reasonable Care to Prevent

The record reveals that Mercy implemented a sexual harassment policy that strictly prohibits sexual harassment, contains a complaint procedure listing multiple persons to whom harassment may be reported, and includes an anti-retaliation provision. Mercy distributed the policy to all of its employees via its employee handbook. Mercy trained its employees on that policy during employment orientation and during its annual corporate compliance education program, which it required all employees to attend. Plaintiff attended the orientation training which included a discussion of the sexual harassment policy, and received a Power Point presentation each year from Human Resources. She also completed the corporate compliance program annually, which provided continuing education on Mercy's sexual harassment policy. These facts establish, as a matter of law, that Mercy exercised reasonable care to prevent sexual harassment. *See Helm,* 656 F.3d at 1288-89.

2. Employer's Reasonable Care to Correct

The Court next asks whether the employer acted reasonably to remedy any harassment that occurred, despite the reasonable preventative measures.

> . . . in order "to establish that it took proper action to correct harassment, [the defendant] was required to show that it acted reasonably

> promptly on [plaintiff's] complaint when it was given proper notice of her allegations as required under its complaint procedures." *Frederick* [*v. Sprint/United Management Co.*], 246 F.3d [1305] at 1314 [(11th Cir.2001)]. "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." *Swenson v. Potter,* 271 F.3d 1184, 1192 (9th Cir.2001); *see also Cerros* [*v. Steel Technologies, Inc.*], 398 F.3d [944] at 954 [(7th Cir.2005)] ("Our cases recognize prompt investigation of the alleged misconduct as a hallmark of reasonable corrective action.").

Helm, 656 F.3d at 1290. Plaintiff contends that this requirement is not met because Brewster failed to investigate Plaintiff's allegations of harassment, and Weaver was not disciplined as a result of Plaintiff's complaint.[3]

Plaintiff's Facebook comments did not constitute "proper notice" sufficient to trigger defendant's duty to take corrective action. See *Helm,* 656 F.3d at 1290-91, and cases cited therein. But even assuming the contrary, an adequate investigation was timely begun.

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[3] Plaintiff also contends that this element is not met because Weaver had harassed many employees since 2001. Plaintiff's argument confounds the analysis of vicarious and direct liability. *See* Dk. 155, p. 59-61.

Plaintiff's Facebook posts were made on July 6th, and Brewster's investigation began on July 9th.

Plaintiff's conversation with Ammons on July 6th, viewed in the light most favorable to the Plaintiff, arguably provided such notice. Three days later, Mercy's risk manager, whose responsibility it was to investigate reports of sexual harassment, initiated a meeting with Plaintiff to ask about sexual harassment. Ammons had asked Brewster to look at the matter, and because of the "creepy hands" comment, Brewster thought she was looking at a sexual harassment complaint. When Brewster met with Plaintiff, Plaintiff said she had verbalized a complaint to H.R. against Weaver, but did not want to file a formal complaint. Brewster asked Plaintiff to describe Weaver's conduct, beginning with the most recent to the most remote, and Plaintiff did so. Brewster told Plaintiff to let her know if she had any more problems. Brewster also interviewed Weaver, who denied the bulk of Plaintiff's allegations but admitted putting his cold hands on employees. Brewster told Weaver "if anything was going on, to cease." Brewster depo. p. 36-37. After speaking with Plaintiff, Brewster interviewed a long-time radiology department employee, Kim Harris, who did not confirm any hostility or sexual tension in the department. Brewster concluded that Weaver had not violated company policy.

Because the investigation was adequate and did not reveal that Weaver was sexually harassing Plaintiff or other employees, Mercy's failure to discipline Weaver or terminate his employment does not show

lack of reasonable care. The Court finds that Mercy acted reasonably and timely to remedy any harassment of which it was aware.

3. Plaintiff's Failure to Use Preventive or Corrective Opportunities

The Court next examines whether Mercy has met its burden to show that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. "[T]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists." *Shaw v. AutoZone, Inc.,* 180 F.3d 806, 813 (7th Cir.1999) (internal quotations omitted). Plaintiff contends that Weaver's sexual harassment of her began in 2004 and continued throughout her employment, but she concedes that she never reported Weaver's acts before July 6, 2009. This delay, if unexplained, is unreasonable, given Plaintiff 's awareness of her ability to report harassing conduct.

Plaintiff first argues that her failure to report earlier was reasonable because she had "objective fears of significant retaliation for complaining." Dk. 155, p. 62. But the record fails to show any objective basis for such a fear. Mercy had an anti-retaliation policy, and Plaintiff shows no facts suggesting that this policy was not enforced. For purposes of this

affirmative defense, a generalized fear of retaliation simply is not sufficient to explain even "long delays" of two to four months in reporting sexual harassment. *Pinkerton v. Colorado Dept. of Transp.,* 563 F.3d 1052, 1063 (10th Cir.2009). Here, Plaintiff delayed for approximately five years before she arguably reported Weaver's acts.

Plaintiff also contends that she believed any report would be futile because Mercy "also employs Weaver's wife . . . who is one of only two surgeons at this small-town hospital." *Id.* But this fact is not part of the record, since it is not included in either party's uncontroverted statement of fact.[4] Even considering that evidence, however, and viewing it in the light most favorable to the Plaintiff, the testimony establishes only that Weaver's wife was employed as one of Mercy's two general surgeons on the date of Plaintiff 's deposition. Without showing that Dr. Herrin was employed by Mercy from 2004 through 2009, Plaintiff 's futility argument lacks an essential link.

Plaintiff believes that reporting Weaver's conduct would have been useless because if Weaver were terminated, his wife, Dr. Herrin, would leave the hospital, and Mercy would not want to lose her. Depo. Vol. 1, p. 195. But Plaintiff shows no factual basis for speculating that Mercy would ignore a sexual

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[4] *See* D. Kan. R. 56.1(b)(2). Plaintiff cites this record in improperly attempting to controvert Defendant's facts, but does not include it in her own statement of material facts.

harassment complaint against Weaver, or that Dr. Herring would leave Mercy if Weaver left. Plaintiff admits no one ever told her this would happen, and she provides no factual basis for her belief. "An employee's subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer. *See Lissau* [*v. Southern Food Service, Inc.*], 159 F.3d [177] at 182 [(4th Cir.1998)]." *Barrett v. Applied Radiant Energy Corp.,* 240 F.3d 262 (4th Cir.2001).

Because Mercy has presented undisputed evidence establishing that it acted reasonably to prevent and to respond to sexual harassment, and that Plaintiff unreasonably failed to take advantage of its preventive opportunities, Mercy is not vicariously liable for Weaver's acts.

B. Direct Liability

Plaintiff additionally contends that Mercy is directly liable for its own negligence. An employer may be directly liable if it fails to remedy or prevent a hostile work environment of which management-level employees[5] knew or should have known. *See Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 673 (10th Cir.1998). To determine whether an employer is liable for negligence in allowing employees to engage in

[5] Plaintiff does not attempt to show that Weaver was a management-level employee for purposes of direct liability.

sexual harassment, this court makes two inquiries: "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and preventative responses to any actually or constructively known harassment." *Adler,* 144 F.3d at 673.

1. Actual Knowledge

Actual knowledge will be demonstrable in most cases where the plaintiff has reported harassment to management-level employees. *Adler,* 144 F.3d at 673. Plaintiff admits that she did not report the alleged sexual harassment to administration any time before 2009, when Ammons spoke to her about her Facebook posts.

In contending that Mercy had actual knowledge of Weaver's acts, Plaintiff points to one event in 2001, before she was hired.[6] Plaintiff believes that a female employee resigned in 2001 because Weaver had touched her with his cold hands, had made negative comments about the Catholic religion, and had asked her if she'd considered artificial insemination. Although evidence of a perpetrator's bad acts toward other employees may sometimes be useful in imputing knowledge to the employer, this is not such an occasion.

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[6] The Court assumes, for purposes of this discussion, that evidence of this event is admissible.

The Tenth Circuit requires that such evidence be similar in nature and near in time. A plaintiff may rely on the employer's

> notice of any evidence of sexual harassment by [the harasser] that is similar in nature and near in time to his sexual harassment of [the Plaintiff] in order to raise a genuine issue of material fact as to whether [the employer] knew or should have known of [the harasser's] conduct.

Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 784 (10th Cir.1995), abrogated on other grounds as recognized in *Zisumbo v. McCleodUSA Telecommunications Services, Inc.,* 154 Fed.Appx. 715 (10th Cir.2005). In determining whether to consider acts alleged by other employees, the Court looks to "[t]he extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment. . . ." *Tademy v. Union Pacific Corp.,* 614 F.3d 1132, 1147 (10th Cir.2008), quoting Hirase-Doi. But Weaver's harassment of Plaintiff, which allegedly began in 2004, even if similar in nature, is not sufficiently near in time to the 2001 event to raise a triable issue regarding Mercy's actual knowledge of any hostile work environment to which Plaintiff may have been subjected, given the lack of intervening complaints.

2. Constructive Knowledge

Plaintiff relies on a constructive knowledge theory in contending that Mercy had notice of the sexually hostile environment "[b]ased solely on the large number of women who were sexually harassed by Weaver . . . " Dk. 155, p. 59. By this, Plaintiff refers mostly to Weaver's putting his cold hands on coworkers, who never reported that conduct. But only when the acts of harassment are "'so egregious, numerous, and concentrated as to add up to a campaign of harassment'" will the employer be liable for failure to discover the harassment. *Adler,* 144 F.3d at 675 (quoting *Baker v. Weyerhaeuser Co.,* 903 F.2d 1342, 1346 (10th Cir.1990)). The Court cannot find constructive knowledge of sexual harassment based solely on the frequency with which Weaver put his cold hands on employees. "[T]o infer employer knowledge from only the level of pervasiveness essential to make out a hostile environment claim would be illogical because if that were the rule, knowledge would be attributed to employers in all cases of hostile work environment founded on pervasiveness." *Ford v. West,* 222 F.3d 767, 776 (10th Cir.2000). The facts in this case fall short of the egregious conduct or campaign of harassment necessary to impose constructive knowledge on an employer.

Because no question of material fact has been shown regarding any basis for employer liability, summary judgment is warranted on Plaintiff 's sexual harassment claim against Mercy. Where a court disposes of a claim based on the absence of employer

liability, it need not resolve, apart from the question of employer liability, the issue of the presence of a hostile work environment. *See Ford,* 222 F.3d 767; *Adler,* 144 F.3d at 672.

V. Civil Assault and Battery

Defendant Weaver moves for summary judgment on Plaintiff 's claim of assault and battery, which is based solely on the hug defendant Weaver allegedly attempted to give plaintiff at work on July 6th, 2009.

A. Facts

Defendant denies that he ever attempted to hug Plaintiff, but admits that the facts, viewed in the light most favorable to the Plaintiff, show the following:

> On July 6, 2009, plaintiff commented to defendant Weaver that she would be doing mammograms all day and that no one would see her. Defendant Weaver responded, "How's that different from any other day? All you do is sit on your butt in your room." Plaintiff responded, "I have the highest productivity the department." When defendant Weaver disagreed, plaintiff replied, "Are you trying to tell me I'm worthless?" Defendant Weaver responded, "If that's how you want to put it." Plaintiff went to her work area and started crying. A little later, defendant Weaver entered the nuclear medicine room, put his arm around plaintiff, and

> said, "You know I didn't mean it." Plaintiff spun away, saying, "You just don't talk to people like that." Plaintiff admits that defendant Weaver "didn't fully complete the hug" due to her evasive actions.

Doc. 155, p. 64.

B. Intent to Harm

"The gravamen of a civil assault and battery is grounded upon the actor's intention to inflict injury." *Baska v. Scherzer,* 283 Kan. 750, 156 P.3d 617 (2007). Defendant Weaver contends that Plaintiff has failed to raise a material question of fact on the element of intent to harm.

Under Kansas law, the tort of assault is defined as "an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm." *Taiwo v. Vu,* 249 Kan. 585, 596, 822 P.2d 1024 (1991). *See* PIK Civ. 4th 127.01. The tort of battery is defined as "the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact, that is harmful or offensive." PIK Civ. 4th 127.02.

Both parties rely on the following testimony by Plaintiff, relative to the issue of intent to harm.

> "Q. Do you believe he intended to harm you?
>
> A. No. I believe he intended to hug me.

Q. Did you – do you allege that you sustained any damage as a result of the alleged hug?

A. Humiliation.

Q. How long did you feel humiliated?

A. I still feel humiliated.

Plaintiff 's depo., Vol. 2, p. 36.

To the extent that Plaintiff suggests that humiliation is sufficient harm for purposes of these torts, the Court disagrees. Emotional distress, such as humiliation, does not constitute bodily harm, either under the plain meaning of those terms, or under Kansas law. Instead, Kansas cases consistently distinguish between bodily harm, and emotional and psychological injuries. *See e.g., State v. Reitz,* 239 P.3d 114 (2010); *Lovitt ex rel. Bahr v. Board of County Com'rs of Shawnee County,* 43 Kan.App.2d 4, 221 P.3d 107 (2009).

The facts, viewed in the light most favorable to the Plaintiff, do not tend to show that defendant Weaver threatened or attempted to do bodily harm to Plaintiff. *See* PIK 127.01 comment (describing an assault as "an apparently violent attempt, or a willful offer with force or violence, to do corporal injury to another, without the actual doing of the injury threatened, as by lifting the fist or a cane in a threatening manner"); *Taiwo,* 249 Kan. 585, 822 P.2d 1024. Thus summary judgment in defendant's favor is warranted on the assault claim.

As for the battery claim, Plaintiff contends that no showing of intent to do bodily harm is necessary, since battery includes an unprivileged, intentional touching, which the recipient finds to be offensive. Plaintiff contends that because of Weaver's past acts and comments to her, she considered the hug to be hostile, offensive, and sexual in nature. But it is the actor's intent to harm or offend, not merely the recipient's offense, that must be shown. In order to establish a battery under Kansas law, plaintiff must show "an unprivileged touching or striking, done with the intent of bringing about either a contact or an apprehension of a contact that is harmful or offensive." *Marten v. Yellow Freight System, Inc.,* 993 F.Supp. 822, 830 (D.Kan.1998). Plaintiff 's tortured construction of the elements of battery ignores that the gravamen of a civil assault and battery, unlike a negligence claim, is grounded upon the actor's intention to inflict injury. *See Stricklin v. Parsons Stockyard Co.,* 192 Kan. 360, 366, 388 P.2d 824 (1964); *Murray v. Modoc State Bank,* 181 Kan. 642, 313 P.2d 304 (1957); *Hackenberger v. Travelers Mutual Cas. Co.,* 144 Kan. 607, 610, 611, 62 P.2d 545 (1936); *Hershey v. Peake,* 115 Kan. 562, 223 P. 1113 (1924). Battery is an intentional tort, and the term "intent," as it is used in the law of torts, denotes that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. *Baska,* 283 Kan. at 757, 156 P.3d 617, citing Restatement (Second) of Torts § 8A (1964).

Nothing in the facts tends to show that Weaver intended to offend or harm Plaintiff by hugging her. When asked whether she believed that defendant Weaver intended to harm her, Plaintiff replied: "No. I believe he intended to hug me." Weaver did not testify about his intent because he denied that the event occurred. No other circumstances of record suggest that defendant Weaver harbored any intent either to harm or to offend Plaintiff by hugging her. Under Plaintiff 's version of the facts, it is reasonable to infer that Weaver intended only to console her. Summary judgment in favor of the defendant is therefore appropriate. *See Stricklin,* 192 Kan. at 366, 388 P.2d 824 (1964); *Holdren v. General Motors Corp.,* 31 F.Supp.2d 1279 (D.Kan.1998).

VI. Defamation

Plaintiff seeks summary judgment on Weaver's counterclaim against her for defamation, contending that all statements she made were true and that none of them harmed Weaver's reputation.

A. Facts

Defendant Weaver claims that the following four statements by Plaintiff were false and defamatory:

> 1. Facebook Post on July 6, 2009: "Sara DeBord loves it when my boss adds an extra $600.00 on my paycheck for hours I didn't even work . . . awesome!"

> 2. Cellular Phone Text Message to co-worker Tena Walsh on July 8, 2009: "Leonard emptied out the drawer where all the call back papers were kept at work . . . Guilty as charged!" "To get rid of them."
>
> 3. Oral Statement to former co-worker Heather Boss on July 8, 2009: "Weaver had destroyed and in fact shredded the callback logs."
>
> 4. Oral Statement to former co-worker Melissa Stewart in 2009[7]: "Weaver took the callback logs from the Radiology Department."

Dk. 141, p. 9; Dk. 139. Weaver believes that these statements falsely accuse him of two matters: 1) falsifying Plaintiff's time records and intentionally paying her for time she did not work; and 2) removing the callback papers, which would have accurately reflected the time Plaintiff worked, to hide his guilt.

Under Kansas law, the elements of defamation are: (1) false and defamatory words; (2) communication to a third person; and (3) harm to the reputation of the person defamed. *Droge v. Rempel,* 39 Kan.App.2d 455, 459, 180 P.3d 1094 (2008). The Court focuses upon Plaintiff's claim that Weaver has failed to show that any of the allegedly defamatory statements caused harm to his reputation.

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[7] Ms. Stewart testified that plaintiff made this statement in 2010, then corrected the date to 2009 on her errata sheet.

B. Harm to Reputation

"[D]amage to one's reputation is the essence and gravamen of an action for defamation." *Gobin v. Globe Publishing Co.,* 232 Kan. 1, 6, 649 P.2d 1239 (1982). Damages recoverable for defamation cannot be presumed but must be proven. *Hall v. Kansas Farm Bureau,* 274 Kan. 263, 276, 50 P.3d 495 (2002). "Proof of such damages typically entails showing that persons were deterred from associating with the plaintiff, that the plaintiff's reputation had been lowered in the community, or that the plaintiff's profession suffered." *Ali v. Douglas Cable Communications,* 929 F.Supp. 1362 (D.Kan.1996). "[T]he plaintiff in an action for defamation must first offer proof of harm to reputation; any claim for mental anguish is "parasitic," and compensable only after damage to reputation has been established." *Gobin,* 232 Kan. at 7, 649 P.2d 1239. Evidence must permit the jury to determine what plaintiff's true reputation was in the community of his residence, and to determine whether the publication damaged that reputation. *Id.* Injury to one's personal sensitivities is insufficient to show harm to one's reputation. *Id.*

In this case, the parties agree that as to the third statement, allegedly made by Plaintiff to Heather Boss, Boss has no opinion concerning Weaver's character, other than that he's a nice man. Dk. 145, p. 8, Dk. 154, p. 6. No evidence shows that Plaintiff's statement to Boss about Weaver's destruction and shredding of callback logs damaged Weaver's reputation. Weaver appears to concede as much by his

failure to address this matter in his response. Because no evidence provides any basis for a jury to find that this statement damaged Weaver's reputation, this statement is not actionable.

Weaver contends that the other three statements damaged his reputation at work. To meet his burden to show damage to his reputation, Weaver offers testimony that before the statements were made, certain employees thought positively of him, but that after the statements were made, they thought differently. The Court examines this evidence below, focusing on the requisite causal connection.

Tena Walsh, an employee in defendant's radiology department, was a Facebook friend with Plaintiff. She saw Plaintiff 's Facebook Post on July 6th, which said: "Sara DeBord loves it when my boss adds an extra $600.00 on my paycheck for hours I didn't even work . . . awesome!" She also received the following text messages from Plaintiff on July 8th: "Leonard emptied out the drawer where all the call back papers were kept at work . . . Guilty as charged!" "To get rid of them."

When asked what her opinion was of Weaver before seeing the Facebook posts, Walsh testified:

> Well, obviously I didn't – you know, creepy when it comes to women. I can honestly say there was (sic) times, as far as him being a boss to me, there was good things that happened too. I mean, he pushed me to go back and get my schooling and education, so I

> mean, I'll give him credit for that, but this has gone – this whole line of everything, why we're here today has gone on far too long, and unfortunately – I'm allowed to say what I want to say; correct? Unfortunately, it took this happening to Sara and her finally doing something to pretty much bring this all out for all of us that have ever experienced anything that's gone on for all these years, so – and it's time he – it's totally unjustifiable, it's hurt a lot of people, and it's bringing out a lot of pain in the past for a lot of us. Me in particular, I know.

Walsh depo. p. 45-46.

Walsh was then asked whether her opinion of Weaver had changed since seeing Plaintiff's Facebook posts and text messages. She replied:

> My opinion for him is – I assume he just wants this to be done and over with. He doesn't – he doesn't deserve to still be employed with Mercy as far as I'm concerned. Maybe I don't either. Maybe none of us do. But it's really hard to see him now when I do see him, so – . . . I've known him because I started just a couple months before he did, and he's got away with this shit for too long. Got away with this stuff for too long.

Id.

In short, Walsh stated no opinion about Weaver's reputation. Nothing in her testimony raises an inference that she believed Weaver was padding Plaintiff's

paycheck, was a thief, or had destroyed company records. Her comments about Weaver were based her own experiences with or observations of him, and on what she believed to be Weaver's sexual assault of her outside of work. Her cited testimony fails to show that Plaintiff's statements may have caused any change in Walsh's opinion about Weaver, if there was any such change.

Angie Cessna was also aware of plaintiff's Facebook posts. Weaver cites Cessna's testimony that before the posts, "everybody probably thought he was a very nice guy," but now Cessna tries to avoid him when she visits his department. Cessna depo., pp. 51, 54, 55, 64. But Cessna's testimony states that the reason she tries to avoid Weaver is because Weaver's own statements make her feel uncomfortable. *Id.,* p. 55. She began avoiding Weaver when he started making strange comments, which was *after* Plaintiff's termination. *Id.,* p. 64.

Further, when asked whether her opinion of Weaver had changed since she became aware of the Facebook posts, Cessna replied:

> No. I find it very funny that – that his character is in question based on a post. I would be more concerned that his character would be in question due to the way he acted and the things he said in the department. That is – I'm laughing. I mean, that is almost comical to me.

Cessna depo. p. 50. As above, the causal element is lacking. Nothing in the cited record provides any

basis for a jury to find that plaintiff's Facebook posts about Weaver damaged Cessna's opinion of him.

Eric Ammons, Mercy's CEO and former head of human resources, saw the Facebook posts and texts in the course of his internal investigation about them. He testified that he still considers Weaver to be "a person of honesty, a person of integrity." Ammons depo. p. 58. Ammons does think differently of Weaver after July of 2009, but that is because Weaver had difficulty leading the department and voluntarily stepped down into a staff position. Depo. p. 61-62. Ammons believed that Plaintiff's lawsuit made Weaver an ineffective leader because Weaver is afraid to counsel employees or take action relating to performance issues. *Id.,* p. 62. Nothing in the cited testimony suggests that Ammons' opinion of Weaver changed because of Plaintiff's Facebook posts or texts.

Additionally, Plaintiff's statements would not have lowered Ammons opinion of Weaver unless Ammons believed those statements to be true. But Ammons investigated Plaintiff's Facebook posts about receiving extra money, and concluded they were not true. He also knew that Plaintiff's texts were false in alleging that Weaver had destroyed the call-back logs, since he had those call-back logs in his possession at the time.

Melissa Stewart, a former co-worker of plaintiff's, was a Facebook friend with Plaintiff, but never saw or heard about Plaintiff's post that Weaver had

added money to plaintiff's paycheck. She did hear about Plaintiff's Facebook post saying "at least now he'll keep his creepy hands off me." Stewart depo., p. 12-14. Additionally, Plaintiff told her sometime in 2009 that "Weaver took the callback logs from the Radiology Department." But Ms. Stewart was not asked if her opinion of Weaver had changed because of those statements. Instead, Weaver cites the following testimony as support for claiming damages to his reputation.

> Q. Do you consider Weaver a person of integrity or honesty or morality?
>
> A. No.

Stewart depo., p. 33. No causal connection is made, however, between this opinion and Plaintiff's allegedly defamatory comments. Instead, the immediately preceding testimony clarifies that Stewart's opinion was based Weaver's own acts, not on Plaintiff's comments:

> Q. Okay. What is your opinion of Weaver as a supervisor?
>
> A. I don't think that he should be in a position to supervise employees the way that he – the way that he is now because I feel like if you're a supervisor that there's – you should be concerned with managing your employees and not trying to be friends with them. I think he crosses the line a lot with his employees. He's too worried about their personal lives and being friends with them

> instead of the job that he's supposed to be doing.

Id., p. 33.

Weaver also points to the testimony of Kari Dunham, another Mercy employee. But Dunham testified that she has no idea what Plaintiff posted on Facebook, has never seen any text messages about Weaver, and was not aware that Plaintiff sent text messages to Tena Walsh. Although Dunham stated that her opinion of Weaver had changed, that change was caused by rumors relating to Plaintiff 's accusations of assault. Depo., p. 12-13. Her testimony does not suggest any causal connection between Plaintiff 's allegedly defamatory statements, which do not allege assault, and damage to Weaver's reputation.

Testimony from Dr. Herrin, Weaver's wife, does not assist his damages claim. She testified that she was aware of her husband's reputation generally at the hospital. She believes he had a good reputation, is respected and well-liked, and that his reputation had not changed since Plaintiff made her Facebook posts or sent her text messages to Tena. Herrin depo. p. 29-32. Weaver told her that he didn't feel like he could be effective as a manager because of the threat from the Plaintiff 's lawsuit, and because of Terri's allegations. Herrin depo. p. 34.

The sole remaining admissible testimony[8] offered to show damage to Weaver's reputation is his own testimony. He stated that he felt like he had lost control of his department partly because of Plaintiff's statements, but mostly because of another incident.[9] Weaver depo. p. 165. He believes that the following occurred as a result of Plaintiff's Facebook posts: people at work lost respect for him and no longer talked to him as much as they did before; he felt he could no longer effectively manage the radiology department so he chose to step down as its director over a year later; and Terri Wilson was contemptuous to him in September of 2009. *Id.,* p. 168-173, 187-191.

No facts show that Terri Wilson's acts were due even in part to Plaintiff's statements. In fact, Wilson testified that she has never used Facebook, and no facts show she was aware of Plaintiff's statements about Weaver. Wilson's contemptuousness to Weaver, if any, has not been shown to have been related to the challenged statements made by Plaintiff.

This leaves the sole proof of damage as Weaver's belief that people at work lost respect for him and no longer talk to him as much as they did before. A

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[8] The Court disregards all hearsay not shown to be justified by an exception.

[9] Allegedly, when employee Terri Wilson refused Weaver's instruction to do a task, Weaver grabbed her arm and told her to do it. But the citation is to pages of Wilson's deposition (9-10) that are not included in the record. *See* Dk. 155, Wilson depo., including pages 1-4 and 45-48 only.

victim's own observations may be suitable as proof of harm to his reputation for defamation cases in Kansas, see *Moran v. State,* 267 Kan. 583, 985 P.2d 127 (1999), but they must raise a reasonable inference that the damage was caused by the plaintiff's statements. Yet Weaver fails to name any person who was aware of Plaintiff's derogatory comments and who talked to him less, and fails to identify any other way in which employees demonstrated any loss of respect for him. "Broad and factually unsupported allegations . . . do not support a claim for damages for alleged defamation." *Davis v. Hildyard,* 34 Kan.App.2d 22, 30, 113 P.3d 827 (2005) (finding insufficient proof of damages for defamation where physician testified that patients had canceled their appointments).

Summary judgment is warranted on Weaver's claim of defamation for his failure to prove that any of Plaintiff's four statements damaged his reputation. The Court finds it unnecessary to reach other questions, including whether those statements were substantially true.

IT IS THEREFORE ORDERED that defendant Mercy Health System of Kansas' (Mercy) motion for summary judgment on Plaintiff's sexual harassment and retaliation claims (Dk. 146) is granted.

IT IS FURTHER ORDERED that defendant Leonard Weaver's motion for summary judgment on Plaintiff's assault and battery claim (Dk. 146) is

granted; and that Plaintiff's motion for summary judgment on Weaver's counterclaim for defamation (Dk. 144) is granted.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SARA C. DEBORD, Plaintiff-Appellant/ Cross-Appellee, v. MERCY HEALTH SYSTEM OF KANSAS, INC., Defendant-Appellee/ Cross-Appellant, and LEONARD WEAVER, Defendant-Appellee.	Nos. 12-3072 & 12-3109

ORDER

(Filed Jan. 16, 2014)

Before **KELLY, MURPHY** and **TYMKOVICH,** Circuit Judges.

Sara C. Debord's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk