IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

KA'TORIA GRAY,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.**
v.	)	**2:17-cv-00595-RAH-JTA**
	)	
KOCH FOODS, INC.;	)	
KOCH FOODS OF ALABAMA, LLC;	)	
DAVID BIRCHFIELD; and	)	
MELISSA MCDICKINSON;	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR A NEW TRIAL

COMES NOW Plaintiff Ka'Toria Gray ("Plaintiff" or "Gray") and respectfully moves for a new trial pursuant to Federal Rule of Civil Procedure 59(a) on her claim of discrimination in violation of Title VII of the Civil Rights Acts of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, as amended, against Koch Foods of Alabama, LLC ("Defendant" or "Koch-AL") and her state law claim of negligent and wanton supervision, training and/or retention.

In support of this motion, Plaintiff states as follows:

A. RELEVANT BACKGROUND

Gray sued her former employer, Koch-AL, alleging it violated Title VII's prohibition of sexual harassment of sex discrimination by subjecting her to a sexually hostile work environment. (*See* doc. 3, at 41-42). Gray's Title VII claim

specifically alleged that Koch-Ala, acting through David Birchfield, Complex HR Manager, and Melissa McDickinson, HR Manager, subjected Gray to a hostile work environment through unwanted touching and sexual advances, both in the workplace and outside of it. (*See* doc. 5, ¶¶ 36-81, 139-147, 173-181). Birchfield was the highest-level managerial employee for Koch-AL at the time of Gray's claims. Those same facts supported Gray's Assault and Battery claims against Defendants Koch-AL, Birchfield and McDickinson. *Id.*

The jury concluded, by a preponderance of the evidence, that Gray had proved David Birchfield was liable to her for assault and battery. (Doc. 501, at 4). The jury also concluded, by a preponderance of the evidence, that Melissa McDickinson was liable to her as well. (Doc. 501, at 5). On this claim the jury determined that Gray should be awarded compensatory and punitive damages from Birchfield and McDickinson. (Doc. 501, at 4-5).

The jury found that Koch-AL was not vicariously liable for the actions of Birchfield and McDickinson. (Doc. 501, at 4-5). Because the jury determined that Birchfield and McDickinson has not harassed Gray because of her sex (Doc. 501, at 1) it made no further determinations with regard to Gray's Title VII claim, *i.e.* whether she was subjected to a hostile work environment, whether Koch-AL exercised reasonable care to prevent the conduct, and whether Gray failed to take

advantage of the opportunities provided of Koch-AL to avoid harm. (Doc. 501, at 1-2.) The jury also found in favor of Koch-AL on Gray's negligent and wanton supervision claims. (Doc. 501, at 10-11.)

B. APPLICABLE LEGAL STANDARD

Following a jury trial, the district court "may, on motion, grant a new trial on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "[G]ranting motions for new trial touches on the trial court's traditional equity power to prevent injustice and the trial judge's duty to guard the integrity and fairness of the proceedings . . . ." *Christopher v. Fla.*, 449 F.3d 1360, 1366 n.4 (11th Cir. 2006). Grounds for a new trial include, among many other things, "the verdict is against the weight of the evidence," "the trial was not fair to the party moving," "substantial errors in admission or rejection of evidence or instructions to the jury," "erroneous jury instruction[s]" that resulted in a "misleading impression" upon the jury; and the need to prevent a "miscarriage of justice." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940); *Weisgram v. Marley Co.*, 528 U.S. 440, 452 n. 9, 120 S.Ct. 1011, 1020 n. 9, 145 L.Ed.2d 958 (2000) (quoting *Duncan* with respect to grounds generally supporting relief in the form of a new trial); *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th

Cir. 2001).

"A judge should grant a motion for a new trial when 'the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.' " *Lipphardt*, 267 F.3d at 1186 (quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir.1984)). "Because it is critical that a judge does not merely substitute his judgment for that of the jury, 'new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence.' " *Lipphardt*, 267 F.3d at 1186 (quoting *Hewitt*, 732 F.2d at 1556).

C. ARGUMENT

1. THE JURY'S FINDING THAT BIRCHFIELD AND MCDICKINSON COMMITTED ASSAULT AND BATTERY OF PLAINTIFF IS INCONSISTENT WITH ITS VERDICT ON SEXUAL HARASSMENT.

The jury found both McDickinson and Birchfield liable for assault and battery of Gray. To reach this result the jury had to conclude, as a matter of fact, that Birchfield was in the garage and witnessed McDickinson's conduct (necessarily rejecting, as false, the testimony of Birchfield, McDickinson, Berry, and Summerville that Birchfield was not in the garage but was visiting a friend in

Florence)[1], and conclude that McDickinson and Birchfield: (1) touched Gray; (2) intended to touch Gray; and (3) did this touching in a harmful or offensive manner that would likely offend a reasonable person. (Doc. 500 at 12; Doc. 501 at 4-5). The jury found that Gray was not only entitled to compensatory damages but punitive damages as well. (Doc. 501 at 4-5)

These same factual findings and the greater weight of the evidence, when examined using the proper legal standards, establish Gray's Title VII claim. The jury's verdict otherwise is wrong, entitling Gray to a new trial on this claim.

a. The Events Were Severe

The events that occurred on November 14 shocked Gray. She testified that she

[1] After McDickinson testified, the Court, itself, made the comment that McDickinson may have engaged in perjury. By filling the record with false testimony, Defendants prevented Gray from fully and fairly presenting her case to the jury. This false testimony was not limited to one witness concerning an insignificant event. The only cure for the harm caused by Defendants would be the granting of a new trial. "[The trial judge] can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted, or a judgment entered under Rule 50(b), calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March v. Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418, 132 A. 355; *Bunn v. Furstein*, 153 Pa.Super. 637, 638, 34 A.2d 924. See also *Yutterman v. Sternberg*, 8 Cir., 86 F.2d 321, 324, 111 A.L.R. 736. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without delay, expense, or other hardships of an appeal.' See *Greer v. Carpenter*, 323 Mo. 878, 882, 19 S.W.2d 1046, 1047; Cf. *United States v. Johnson*, 327 U.S. 106, 112, 66 S.Ct. 464, 466." *Cone v. W. Virginia Pulp & Paper Co.*, 330 U.S. 212, 216, 67 S. Ct. 752, 755, 91 L. Ed. 849 (1947).

was very shocked, stunned, disgusted; she felt powerless while they were occurring. She went to the bathroom to devise a plan for escape. She was crying and very upset after leaving the home. Ultimately she sought medical treatment for the stress and anxiety she suffered as a result of those events. This evidence was undisputed and supports the jury's verdict for assault and battery, compensatory, and punitive damages. But it also establishes her Title VII claim.

Gray testified about how this treatment by Birchfield and McDickinson impacted and altered her work environment. She testified that after the events of November 14, she received additional text messages at work from McDickinson urging her to return to the River Birch house. She was reluctant to be blunt when responding to McDickinson's text messages for fear that she would be terminated. A few weeks later, McDickinson called Gray to her office where she again made improper and offensive advances towards Gary. After that incident, Gray became more fearful in the workplace. She approached Francisco Santos and told him about the incidents in the hopes that he would protect her: "Just don't leave me alone." She said the same to Tim Berry, who said he would respond if he heard Gray being paged over the radio. Gray did not want to be left alone at work.

After Birchfield made McDickinson Gray's supervisor, Gray became "scared" and "uncomfortable." Gray described this as a "tough time" during which

she experienced paranoia and loss of sleep. Defendants presented no evidence to rebut this testimony from Gray (other than their denials that Birchfield was in the garage, and that McDickinson did not engage in any improper conduct, both of which were rejected by the jury).

Defendants' conduct, on behalf of themselves and Koch-AL, constitutes sexual harassment and the jury's determination on this is not supported by the greater weight of the evidence.

The assault and battery that occurred in the garage was not a simple aggressive touching. It was an aggressive touching in a sexual manner, accompanied by invitations for sex. The jury's determination that Birchfield and McDickinson did not harass Gray because of her sex is not consistent with the determination that the events which occurred in the garage amount to assault and battery. Both Gray and Jackson described the interactions among Birchfield, McDickinson and Gray as sexual in nature. The jury's rejection of this conclusion is not consistent with the greater weight of the evidence.

While the number of incidents to which Gray was subjected are limited, even isolated instances may satisfy the severity requirement. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788(1998) ("[E]xtremely serious" isolated incidents can "amount to discriminatory changes in the terms and conditions of employment." *See*

also Arafat v. Sch. Bd. Of Broward Cnty, 549 Fed. Appx. 872, 874 (11th Cir. 2013) (per curiam) recognizing an isolated incident may be sufficiently severe but determining that an isolated shoulder touch was not sufficient because it was "unaccompanied by sexual suggestiveness or aggression"); *Livingston v. Marion Bank & Tr. Co.*, 30 F.Supp.3d 1285, 1309 (N.D.Ala. 2014) (egregious, yet isolated, incident can alter the terms, condition, or privileges of employment). In *Freitag v. Ayers*, 463 F.3d 838 (9th Cir.), *opinion amended on denial of reh'g*, 468 F.3d 528 (9th Cir. 2006), the plaintiff, a corrections officer in a maximum security prison, alleged that she had been sexually harassed by inmates who, on several occasions, masturbated in her presence in the prison yard andother open areas. She alleged that her supervisors failed to respond adequately to hercomplaints about this conduct and responded by terminating her. The court of appeals upheld a jury verdict in favor of the plaintiff, noting that, even if it credited the prison's argument that it was aware of only three such incidents, its failure to act after a single such occurrence would have been sufficient to establish liability. *Id.* at 850.

The severity assessment includes "careful consideration of the social context in which particular behavior occurs and is experienced by the target." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). Further, as the Koch-AL training materials instruct, and as various courts have held, conduct can be more

severe when a supervisor engages in it. *See Okoli v. City of Balt.*, 648 F.3d 216, 221 (4th Cir.2011) (noting significant "disparity in power"); *EEOC v. Reeves & Assocs.*, 68 F.App'x 830, 832 (9th Cir. 2003) (harasser's alleged conduct raised triable issue of abusive working environment where jokes, comments, leering and offensive touching, were combined with his position within the firm as the partner with final decision-making authority in all matters concerning the firm).

There can be no doubt that actions that arise to the level of an assault and battery, committed by the two individuals with Human Resources authority over Gray, for which a jury awarded punitive damages, is sufficiently severe to meet the Title VII standard. Indeed, in order to award punitive damages, the jury had to conclude that both Birchfield and McDickinson "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to Ka'Toria Gray." (Doc. 500, at 17.)

Further, the greater evidence supports a finding of pervasiveness. Where multiple supervisors, such as Birchfield and McDickinson, engage in the challenged conduct, pervasiveness is more readily established. *Hare v. H&R Indus., Inc.*, 67 F.App'x 114,117 (3rd Cir. 2003); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693-95 (7th Cir.2001) (gender harassment perpetrated by superintendent, principal, supervisor, and co-workers).

Birchfield was the highest-ranking official of Koch-AL and McDickinson was second in command, reporting only to Birchfield. Koch-AL is directly liable for the actions of Birchfield and McDickinson. Mr. Birchfield was the Complex Human Resources Manager. There was no Regional Manager[2], Division Vice President, Senior Vice President of Operations, or Executive Vice President of Operations over him. He reported to Mr. Elrod, an employee of a different corporation, Koch Foods, Inc. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 789–90 (1998), citing *Torres v. Pisano*, 116 F.3d 625, 634-635, and n. 11 (2nd Cir. 1997) for the principle that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer."3

A sexually hostile work environment can involve conduct away from the office. As noted in *Parrish v. Sollecito*, 249 F.Supp.2d 342, 349-350 (S.D. N.Y. 2003), the law does not permit a sexual harassment offender to compartmentalize his misconduct into inside and outside the workplace.

> The employment relationship cannot be so finely and facilely parsed. It comprises multiple dimensions of time and place that cannot be mechanically confined within the precise clockwork and four walls of the office. It comprises multiple dimensions of time and place that

2 While Wally Lewis was Koch Foods, Inc.'s Regional Vice President, he only supervised the operations at the Koch Foods of Alabama, LLC's de-bone plant. He did not supervise Birchfield and Birchfield did not report to him.

3 This analysis applies not only to Gray's Title VII claim against Koch-AL but also as to whether Koch-AL would be vicariously liable for the tort of assault and battery, as well as for negligent and/or wanton supervision, retention and training.

> cannot be mechanically confined within the precise clockwork and four walls of the office. * * * [A]s a practical matter an employment relationship and the employee's corresponding status, while generally commencing and grounded in what constitutes the office or plant, often carries beyond the workstation's physical bounds and regular hours. Thus, the working environment that characterizes the enterprise's home base – the governing rules and their enforcement, the prevailing attitudes and perceptions of what is expected, forbidden or condoned by the employer as defined workplace behavior – may project its effects outside, thereby setting the tone for how the employees comport themselves towards one another elsewhere.
>
> In fact, employees travel and transact business while "on the road" or "in the field." They may also interact outside the office at business- related meals and social events. And they may encounter one another in external contexts not strictly stemming from or compelled by a business purpose, but to which the employment relationship may necessarily carry over by reason of circumstances that may have their origins in the workplace itself. *See, e.g., Burlington,* 524 U.S. 742, 748, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (drinks with the supervisor in the hotel lounge during a business trip); *Meritor,* 477 U.S. at 60, 106 S.Ct. 2399 (sexual relations with the supervisor at motels and restaurants after regular hours); …

Id.

Bobby Elrod, VP of Human Resources, testified that, based on the training he approved that was provided to Koch Foods managers on harassment, an employer, like Koch-AL can be liable for sexual harassment that occurs outside of work and gave an example explaining that liability could exist if a supervisor sexually propositioned a subordinate while at Wal-Mart. Gray was sexually harassed

by Birchfield and McDickinson, managers of Koch-AL, in November 2015 at the River Birch house. McDickinson continued her harassing actions towards Gray a few weeks later while both were at work.

The conduct the jury determined amounted to assault and battery on Gray by Birchfield and McDickins is the same conduct that qualifies as sexual harassment and meets the hostile work environment test.

b. The Greater Weight of The Evidence Establishes Liability.

Liability for a hostile work environment can be established in various ways, typically depending on whether the harasser is the victim's supervisor or merely a co-worker. Where the harasser may be deemed an alter ego of the employer, as in this case, liability can be imputed directly. *Ackel v. National Commc'ns, Inc.*, 339 F.3d 376,384 (5th Cir. 2003) (harasser, as president and general manager of enterprise, was "proxy" for corporation whose activities impute liability to corporation, even in absence of tangible employment action). In determining how much authority is enough to qualify an individual as a supervisor, most courts look at the type ofa uthority wielded by the harasser, not the nomenclature of the job.

The undisputed evidence establishes direct liability for Koch-AL. Birchfield was identified by numerous witnesses as the highest-ranking HR employee in Koch Foods of Alabama, LLC. McDickinson was next in line. While Mr. Sheley, in

Georgia, was technically Gray's supervisor, Birchfield or McDickinson exercised practical control over Gray's day-to-day work environment. McDickinson issued a memorandum of understanding to Ms. Gray dealing with time and attendance, for example. When Gray wanted to submit a complaint to her own supervisor, Sheley, concerning work issues, McDickinson told her that Birchfield did not want her to send it to Sheley. McDickinson was emphatic in her email to Gray, accentuating her instructions with exclamation points. In March, 2016, following the meeting with Gray to discuss the problems with Betty Stabler, Birchfield and McDickinson decided to change Gray's supervisor and have her report toMcDickinson. Sheley was not involved in that decision. The evidence is undisputed that Birchfield and McDickinson acted as the *alter egos* of Koch-AL as to Gray.

There is evidence to establish both direct and vicarious liability. Direct liability requires a showing that Koch-AL knew or should have known about the sexual harassment and failed to stop it. *Minix v. Jeld-Wen, Inc.*, 237F. App'x 578, 580 (11th Cir. 2007). As this Court recognized in its order on summary judgment, and as the jury factually found, Gray's supervisor, Birchfield, directly observed Gray being harassed by another supervisor, McDickinson. And, as the jury also found, not only did Birchfield do nothing to prevent the harassment as it occurred, he actively participated in and exacerbated it.

These facts, as necessarily found by the jury, compel the conclusion that the supervisors of Koch-AL had actual notice of the hostile work environment to which Gray was being subjected, withour regard to whether Gray reported it. *Smelter v. S. HomeCare Servs. Inc.*, 904 F.3d 1276, 1287 (11th Cir. 2018). Because Birchfield/Koch-AL "knew" of the garage incident, as it was happening, and failed to stop it or take any remedial action, Koch-AL is directly liable for the garage incident and the subsequent office incident. The jury's verdict to the contrary is not supported by the greater weight of the evidence.

Even if Birchfield's observation and participation during the garage incident cannot impute actual notice, there is undisputed evidence that Gray told Francisco Santos (a shift manager), Kathie Denton (an HR generalist), Steve Jackson (a union steward who was also in attendance at the garage and saw the incidents), and Laura Cortes about the event. According to the Koch-AL's harassment policy, Francisco Santos was an individuals designated to receive complaints. Gray testified that she went to him because he was a shift manager and, because those who were harassing her were in HR, she did not know anyone else to tell. Significantly, the acknowledgment form signed by Gray, advising her of the Koch Foods' policy did not explain to her that she could go to anyone outside of Koch-AL to complain. It is undisputed that Gray did what the notice told her to do and this is sufficient notice

to Koch-AL of her complaint of sexual harassment, even if Santos failed to fulfil his responsibilities by doing nothing further.

The greater weight of the evidence, along with the jury's verdict in favor of Gray on assault and battery can supportonly one conclusion: Koch-AL, through the actions of Birchfield and McDickinson, subjected Gray to a sexually hostile work environment. The jury's verdict to the contrary is not supported by the greater weight of the evidence and is contrary to the law. Gray should be accorded a new trial on her Title VII hostile work environment claim.

2. GRAY IS ENTITLED TO A NEW TRIAL ON HER NEGLIGENT AND WANTON SUPERVISION CLAIM.

As discussed above, in order to award punitive damages against Birchfield and McDickinson, the jury had to conclude that their conduct towards Gray was oppressive, fraudulent, malicious or wanton. Birchfield was McDickinson's supervisor and observed her conduct towards another employee, Gray.

In order to establish negligent supervision, Gray had to establish that a Koch-AL employee committed a tort and that Koch-AL knew or should have known of the incompetence that resulted in the tort. (Doc. 500, at 19-20.) McDickinson was supposedly trained by Koch-AL about the proper interactions between supervisors and employees. Birchfield not only was trained but also conducted such training.

He observed McDickinson making sexually inappropriate advances towards Gray, in violation of Koch-AL's sexual harassment and anti-fraternization policies. But Birchfield did stop the conduct when it occurred nor discipline McDickinson afterwards. (Doc. 500, at 20: "An employer's failure to react to an employee's torious behavior may be evidence supporting a claim for negligent supervision, training and/or retention.") The greater weight of the evidence is that Koch-AL, through Birchfield, was negligent in its supervision, training, and retention of McDickinson.

This same evidence is sufficient to meet the standard for wanton supervision, training and/or retention as Birchfield, being present when the assault and battery was being committed, and participated in the tort, "consciously acted or failed to act with a reckless disregard of the rights or safety of others and with awareness that ham would likely or probably result." (Doc. 500, at 22.)

Contrary to the jury's verdict, the greater weight of the evidence supports Gray's negligent and wanton supervision, training and/or retention claim. Gray is entitled to a new trial on those claims.

3. JURY INSTRUCTIONS WERE CONFUSING AND PREJUDICIAL

a. Spoilation Adverse Inference Instruction

Evidence and testimony presented established that all Defendants failed to preserve evidence and that Birchfield and McDickinson also destroyed evidence. Plaintiff sent notice of the obligation to preserve evidence to counsel for Koch-AL while McDickinson and Birchfield were employed by the company. Koch-AL's own actions in sending out preservation notices showed its knowledge of its obligation to make sure that its Human Resources managers did not destroy or permit to be destroyed relevant evidence. However, it did not take the additional step of attempting to preserve the evidence.[4] The The Spoliation and Adverse Inference jury instruction based on all Defendants' failure to preserve evidence and the subsequent destruction of evidence was not presented to the jury as requested by Gray. Instead the Court limited the adverse instruction to only the failure to preserve text messabes by Defendants Birchfield and McDickinson. The data that Koch, Inc., Koch-AL, McDickinson and Birchfield failed to preserve was significantly more than text messages. The date not only included photographs, phone calls, GPS data and texts sent by McDickinson and Birchfield, but may also have included texts

4 McDickinson's testimony that she had to use her cell phone while away from work to address work issues that arose during the second and third shifts shows that Koch-AL viewed its HR Managers' cellular phones as tools of the company necessary for the managers to complete their jobs. Koch-AL knew or should have known that the people it had empowered to act on its behalf with respect to Human Resources had information on their phones relevant to this action and to Koch-AL's defenses. Its passivity toward the obligation to preserve this evidence warranted Koch-AL's inclusion in the spoiliation instruction.

discussing Gray. The Court denied Gray the opportunity to present some of this missing data thorugh witness Steve Jackson. The Court's instruction failed ot cure the harm to Plaintiff. Indeed, the Court stated that it was shocked by Defendants' arguments that the cell phones and date was lost through no fault of the individual Defendants. (Doc. 595, at 2.)

b. The Court's instructions were confusing.

On the last day of trial and prior to closing arguments, Defendants' submitted a proposed charge on contributory negligence/asumption of the risk which the Court gave to the jury. This was error. The Court required the parties to submit jury instructions well before trial. The Defendants did not timely submit their proposed jury instructions on contributory negligence. Plaintiff had no time in which to research the appropriateness of such a charge. It was error for the Court to charge the jury on contributory negligence.

Finally, the Court led the jury to believe that it had only a limited time in which to deliberate. The Court informed the jury it would be released on Tuesday afternoon. Closing arguments were Tuesday morning and the jury was charged during the noon hour and then released for lunch, returning at 2:00 p.m. The jury could reasonable have believed that it had less than three hours to deliberate before being released.

The jury was placed in this position in part because of the delays caused by Defendants on the first day of trial, Monday, February 28. This delay, and the Court's decision not to proceed in the Defendants' absences, created a situation where the jury was anxious to leave court. The number of exhibits and extensive testimony presented to the jury when compared to its deliberation time of approximately two hours is circumstantial evidence that the jurors did not follow the Court's instructions to review and consider all of the evidence.

3. PLAINTIFF IS ENTITLED TO A NEW TRIAL BASED ON EVIDENTIARY ERRORS EXCLUDING NUDE AND PARTIALLY NUDE PHOTOGRAPHS OF DEFENDANTS BIRCHFIELD AND MCDICKINSON AND THE EXCLUSION OF TESTIMONY OF PRIOR SEXUAL ACTS OF THESE DEFENDANTS

A new trial is warranted for an evidentiary error "where the error has caused substantial prejudice to the affected party." *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir.2004) (citations omitted). To answer the question of whether improperly admitted evidence affected the verdict, a court should consider the number of errors, the closeness of the factual dispute, and the prejudicial effect of the evidence. *See id.*

Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." F.R.E. 401; *see also Old Chief v. United States*, 519 U.S. 172, 179, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (explaining that "evidentiary relevance under Rule 401" is not "affected by the availability of alternative proofs," such as a defendant's admissions, and that the exclusion of relevant evidence "must rest not on the ground that other evidence has rendered it 'irrelevant,' but on its character as unfairly prejudicial . . .").

The nature of David Birchfield's and Melissa McDickinson's relationship during their employment at Koch Foods of Alabama, LLC, was of significant consequence to the determination of numerous material issues asserted by the Defendants in opening statements and during trial testimony. The attorney for Birchfield and McDickinson made a point in her opening statement to say that Birchfield and McDickinson knew how to live together without sex and did not begin a romantic relationship until July 2016, after McDickinson was no longer employed at Koch Foods. Bobby Elrod testified that Koch-AL's anti-fraternization policy was intended to supplement and work with the company's sexual harassment policy.

As reported in the A to Z investigation of Plaintiff's EEOC charge, Birchfield and McDickinson denied any physical relationship or romantic involvement during their employment at Koch Foods of Alabama, LLC. Counsel for the Koch-AL referenced this investigation in her opening statement as evidence that would show

the company was not liable in this action. Birchfield and McDickinson, both testified they did not begin any type of romantic or physical relationship while they were employed by Koch Foods ended and that Birchfield did not live at the River Birch Road house with McDickinson.

Koch-AL, Birchfield and McDickinson all represented to the jury in opening statements and throughout trial that any allegation that McDickinson and Birchfield were in a relationship while employed by Koch was only a rumor. The excluded evidence proves that the relationship was not merely a rumor, but a fact. And, of course, the evidence establishes that both Birchfield and McDickinson knew that the rumors were true. Because the Defendants, through their opening statements put at issue whether there was a relationship between them or whether it was just a rumor with no factual basis, this evidence was relevant.

The photographs taken by Steven Jackson in March 2016 rebut these factual claims. These photographs depict three persons in various stages of undress in a bedroom at the house where Melissa McDickinson lived on River Birch Drive. The Court requested testimony from Mr. Jackson outside of the hearing of the jury, and Mr. Jackson testified that he took the photographs with his phone and that the persons in the photographs were David Birchfield, Melissa McDickinson, and HR employee Rebecca Milam. McDickinson later testified on Friday, March

11, 2022, that she did not engage in a sexual relationship with Birchfield until after she was no longer employed by Koch. The Court then conducted a conference with all in chambers and stated he was concerned that McDickinson may have committed perjury regarding her relationship with Birchfield based on the pictures. The Court also stated, after hearing argument from counsel, that the pictures were now admissible as impeachment evidence. When Court resumed the following week, Plaintiff re-called Mr. Jackson to admit the pictures into evidence to rebut and impeach McDickinson's testimony, as well as the testimony of Birchfield. The Court allowed M. Jackson to testify about a picture and generally what the picture portrayed but refused to allow Plaintiff to admit any of the pictures into evidence.[5]

As this Court noted, most all the facts in this case were disputed at trial and credibility was a major issue for the jury to determine. Because these pictures directly contradict the testimony of Defendants Birchfield and McDickinson and provided a basis for the jury to resolve the credibility determinations, the

5 During the initial testimony of Mr. Jackson in the presence of the jury, three of these photographs were accidently flashed across the jurors' screens as Plaintiff's counsel was having Mr. Jackson testify about other relevant photographs. The Court asked the nine-member jury if any had seen the photographs. Three jurors responded that they had. The Court questioned each juror if having seen the pictures would affect their ability to be fair. All three responded that seeing the pictures had no effect and would not affect their decision in this case.

photographs should have been admitted as evidence for the jury to consider.

Plaintiff also attempted to obtain testimony from Mr. Jackson in the presence of the jury that he was present and witnessed McDickinson perform oral sex on Birchfield prior to November 2015. The Court denied Mr. Jackson's testimony regarding this incident even though the conduct of McDickinson and Birchfield, was the same that occurred in the presence of Plaintiff in November 2015 when she was sexually assaulted.

It was error for the Court to limit relevant evidence which rebutted opening statements of defense counsel, supported Birchfield's and McDickinson's prior sexual history and impeached the testimony of McDickinson and Birchfield, specifically Steve Jackson's testimony and photographs taken by Mr. Jackson showing Birchfield unclothed and McDickinson and Rebecca Milam (HR Generalist) in various stages of undress.[6]

In opening statements counsel for Koch-AL referenced the hiring of former FBI Agent Mike Callahan to conduct an investigation in response to Gray's EEOC Charge but did not testify who hired Callahan. During Koch Foods' cross

6 The Court invited Defendants to bifurcate their cases for trial. They did not, but held steadfast in limiting Plaintiff's evidence claiming they would be separately prejudiced by the evidence if the Court admitted evidence showing motive, intent and design. The record is riddled with curative instructions requested by the Defendants minimizing Plaintiff's evidence.

examination of Jackson, it revisited the investigation asking him about statements he made to the former FBI investigator denying a relationship between Birchfield and McDickinson. The investigator looked at text messages on McDickinson's phone but failed to review the phones of Birchfield and Jackson. Plaintiff presented evidence that Jackson's phone contained the pictures. Birchfield's and his counsel claim his phone suffered a reset and all content on the phone was lost.

While the pictures at issue do not include Plaintiff, they do include Rebecca Milam, another Koch-AL employee. These pictures are evidence that, three months prior to McDickinson and Birchfield being questioned during the A to Z investigation, both Birchfield and McDickinson were engaging in improper conduct that was the subject of that investigation.

These photographs, which the investigator would have found had he simply looked at Jackson's phone, prove that the Callahan investigation was intended to generate evidence to defend against Gray's claims, not to find out the truth of her allegations and then take any necessary corrective action. Koch-AL put at issue the A to Z Investigation conducted by a former FBI agent, and the photographs were admissible to show the investigation's shortcomings.

These pictures were also admissible due to the spoliation issues. During Jackson's testimony to this Court about the pictures in question, he testified

Birchfield also took similar pictures that night and made a comment along the lines that he would use the pictures to keep Milam from disclosing his relationship with McDickinson. Jackson further testified Birchfield made statements indicating he would destroy the information on his phone so that it could not be used against him. The photographs in question allow the jury to see the types of pictures and evidence on Birchfield's phone that he destroyed or failed to preserve.

These pictures would have allowed the jury to see an example of what evidence was destroyed or lost. It also would have shown the jury evidence Koch-AL failed to preserve after learning of it in its investigation. But for the efforts of Plaintiff's counsel to preserve the data on Jackson's phone through photographing the phone and then having Steve Coker do a Cellebrite extraction of photos and text messages, relevant and admissible evidence in this case would have been lost. Because the issue of what Defendants chose to preserve in terms of evidence is material in this case, the photographs were relevant to putting that issue in context.

All Defendants argued the pictures prejudiced them and asserted that the photos are inflammatory and unduly prejudicial them but failed to explain how or why. Defendants failed to identify any specific prejudice they would suffer from the pictures being admitted into evidence. Because the photographs are relevant,

they should have been admitted even if they are considered shocking. *See Dowthitt v. Johnson*, 180 F.Supp. 2d 832, 880 (S.D. Tex. 2000) ("Indeed, truly relevant photographs are admissible regardless of their inflammatory nature.")

Defendants Birchfield and McDickinson claimed they would suffer prejudice that outweighs any relevance if the pictures were admitted because they suggest sexual conduct. However, this is the very type of evidence Birchfield suggested to Kathie Denton was necessary to prove a relationship between him and McDickinson in the recording he made in her suspension meeting (Plaintiff's Trial Exhibits 145 (transcript) and 145(a) (recording)). He effectively said that if someone does not see something happening and/or is caught in the act, there is nothing that can be done about it. The pictures provide that type of evidence. Any prejudice to Birchfield and McDickinson is outweighed by their relevance to the issues discussed above.

Defendants further argued that the testimony of witnesses about the relationship between Birchfield and McDickinson made the photographs cumulative. However, Defendants attacked and attempted to impeach this testimony, calling it mere "rumor." The pictures, therefore, are not cumulative because they provide independent evidence of the relationship and also provide a tool with which to weigh testimony about the relationship. Regardless, the relevance of

evidence under Rule 401 is not "affected by the availability of alternative proofs." *Old Chief v. United States*, 519 U.S. 172, 179, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Finally, Defendants argued that the pictures were inadmissible under Rule 404 of the Federal Rules of Evidence because it would be impermissible character evidence. This is the same argument Defendants repeatedly made about any evidence concerning whether Birchfield and McDickinson engaged a sexual relationship asserting 404(b). Rule 404, Fed. R. Evid., provides that evidence "of other crimes, wrongs or acts" is not admissible to prove "the character of a person in order to show action in conformity therewith"; however, such evidence is admissible if offered for "other purposes." *U.S. v. Procopio*, 88 F.3d 21, 29 (1st Cir. 1996) (quoting *United States v. Moreno*, 991 F.2d 943, 946 (1st Cir. 1993), *cert. denied*, 510 U.S. 971 (1993). If evidence "supports a chain of inference independent of any tendency of the evidence to show bad character," it is said to have "special relevance" and is not barred by Rule 404. *Id.*

These photographs were not offered to prove that McDickinson and Birchfield acted in the presence of Plaintiff in November 2015 in conformity with what is depicted in the photographs. Rather, the photographs were offered as visual proof that both lied and committed perjury when testifying they were not in a relationship prior

to McDickinson leaving her employment with Koch. Defendants' Rule 404 objections did not warrant the exclusion of this evidence.

In the recent Eleventh Circuit case, *Doe v. Samford University*, 2022 U.S. App. LEXIS 7778 * | __ F.4th __ | 2022 WL 872338 (11th Cir. March 24, 2022). Doe alleges that [t]he [i]nvestigation [r]eport contained highly prejudicial hearsay statements purportedly made by law enforcement about [Doe]'s alleged attack of [Roe] and [Doe]'s suspected prior sexual history." And he alleges that the report also "contained highly prejudicial and inflammatory statements about John's mental health." But Doe's allegations that the statements were "prejudicial" and "inflammatory" are "not entitled to the assumption of truth" because these allegations are "labels" and "[un]supported by factual allegations." *See Iqbal*, 556 U.S. at 678-79, 129 S. Ct. 1937 (internal quotation marks omitted); *cf. Simpson v. Welch*, 900 F.2d 33, 35 (4th Cir. 1990) (explaining that a complaint was conclusory because the plaintiff "allege[d] that she was 'required to work in places and under conditions where prejudice and bias exist,' but her complaint nowhere allege[d] any specific oppressive conditions or expressions of 'prejudice and bias'" (citation omitted)). And the inclusion of hearsay in the investigation report was not necessarily improper because the Title IX policy provides that the report "may consist of any relevant information," including "any ... evidence obtained during the

investigation," and the prior sexual conduct of an individual accused of sexual assault may be relevant. *See, e.g.*, *United States v. Breitweiser,* 357 F.3d 1249, 1254 (11th Cir. 2004)(finding no error in the admission of the criminal defendant's history of sexual conduct because "[t]he evidence was relevant to show [his] motive, intent, knowledge, plan and preparation, and lack of mistake").

5. **PLAINTIFF'S JURY STRIKES FOR CAUSE**

Jurors should be, and are properly, struck "[w]hen a prospective juror reveals actual bias, or when bias is implied because the juror has some special relationship to a party…." *U.S. v. Rhodes*, 30 177 F.3d 963, 965 (11th Cir. 1999) (citing United *States v. Nell*, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976)). "To exclude a prospective juror for cause, a party must demonstrate through questioning that the juror lacks impartiality." *Bell v. U.S.*, 351 F. App'x 357, 359 (11th Cir. 2009) (citing *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)). Plaintiff's counsel questioned juror 42 during voir dire about his experience of having been accused of harassment and his unequivocal answers to clear and direct questions showed that he did not feel he could be fair. In contrast, defense counsel asked the juror leading questions using the legal term "preponderance of the evidence" without explaining the term or establishing that the juror understood the term. Plaintiff requested to strike Juror number 42 for cause after he revealed he had been accused

of sexual harassment and could not divorce that experience from his deliberations. While counsel for Koch-AL attempted to rehabilitate the juror through a question as to whether he could make a decision based on the preponderance of the evidence, she did not explain the legal term "preponderance of the evidence" to the juror and there is no indication that he understood what that meant.

Plaintiff also requested to strike Juror number 53 because her mother worked in management at the Koch Montgomery facility and was familiar with the names of many of Koch's witnesses. The juror indicated she coul dnot be fair and impartial. Plaintiff also moved to strike Juror number49, a civil rights lawyer with knowledge of the caps on damages for Title VII matters. The Court denied Plaintiff's strikes for cause of all three jurors, forcing Plaintiff either to use her peremptory charges or accept jurors in order to avoid biased jurors.

D. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Honorable Court grant her a new trial as requested.

Respectfully submitted this the 14th day of April 2022,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April 2022, I electronically filed the

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