**No. 12-2561**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| MARICA R. JOHNSON,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>KOPPERS, INC.,<br><br>Defendant-Appellee. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>Case No. 1:10-cv-03404<br><br>The Honorable Joan H. Lefkow |

# BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT MARICA R. JOHNSON

**ORAL ARGUMENT REQUESTED**

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## Disclosure Statement

I, the undersigned counsel for the Plaintiff-Appellant, Marica R. Johnson, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Marica R. Johnson.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

Sarah O'Rourke Schrup (attorney of record), Thomas C. White (senior law student), Suhas Subramanyam (senior law student), and David Zubricki (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law.

The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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## Jurisdictional Statement

Appellant Marica R. Johnson filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (2006). The district court therefore had subject matter jurisdiction under 28 U.S.C. § 1331 (2006).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), as this is an appeal of a final order from the district court granting a motion for summary judgment. The final order of the district court from which this appeal follows was entered on May 25, 2012. (A1.)[1] Johnson timely filed her Notice of Appeal on June 20, 2012. (A26.)

[1] Citations to the attached appendix are designated as (A__). Record citations are cited as (R__).

## Statement of the Issues

I. Whether a plaintiff can survive summary judgment under the cat's paw theory of liability when a coworker's accusations, which were affirmatively disputed by the plaintiff, led to the plaintiff's firing, and when the record contained evidence of discriminatory animus in the form of race and gender-based epithets that the coworker falsely claimed the plaintiff used against him.

II. Whether a plaintiff can survive summary judgment under the indirect method of proving employment discrimination when a similarly situated employee was treated more favorably than the plaintiff and when there was specific evidence that defendant did not believe its stated reasons for terminating the plaintiff.

## Statement of the Case

Marica R. Johnson filed this lawsuit against her former employer, Koppers Inc. ("Koppers"), in the United States District Court for the Northern District of Illinois alleging race and gender discrimination in violation of Title VII of the Civil Rights Act of 1964. Johnson had previously filed a discrimination charge with the United States Equal Employment Opportunity Commission ("EEOC") on June 6, 2008 (A187–89), and received a Notice of Right to Sue on April 28, 2010 (R1 at 2). Johnson filed her first complaint in federal court as a *pro se* plaintiff on June 3, 2010. (R1.) Simultaneously, Johnson applied to the court for leave to proceed *in forma pauperis* and for appointed counsel. (R4; R5.) The district judge granted the *in forma pauperis* motion and subsequently appointed counsel to represent Johnson. (R6; R8.)

With the aid of her new lawyer, Johnson filed an amended complaint on August 31, 2010, alleging race and gender discrimination under Title VII as well as race discrimination under 42 U.S.C. § 1981 (2006). (A182–86.) The case proceeded through discovery and the parties filed cross-motions for summary judgment. (R39; R47.) Johnson moved for summary judgment under a cat's paw theory, and Koppers moved for summary judgment both on that theory and under the indirect, burden-shifting method. (R39; R47.) On April 16, 2012, the district court granted Koppers's motion for summary judgment and denied Johnson's. (R61.) Johnson timely moved for reconsideration pursuant to Federal Rules of Civil Procedure 59(e) and 60(b)(1) on May 1, 2012, which the district court denied in an amended opinion

and order on May 25, 2012. (R67; A1–25.) Johnson filed her notice of appeal on June 20, 2012. (A26–27.)

## Statement of the Facts

Plaintiff-Appellant Marica Johnson was hired in 1995 by Defendant Koppers, Inc. as a laborer at Koppers's chemical plant in Stickney, Illinois. (A82; A113.) Johnson was soon promoted to the position of residue handler and by January 2000 she had risen to the position of lab technician. (A113.) According to Joseph Gerba, Johnson's direct supervisor, (A84), and Richard Wagner, the plant manager from 2007 on (A4), Johnson was proficient at her job (A82).

Johnson is an African-American woman. (A82.) During the time she worked at the Stickney plant, approximately 50% of the plant workers were white, while 40% were African-American. (A94.) She was one of fewer than ten female employees at a plant employing eighty-seven union personnel. (A94.)

Johnson was fired on May 12, 2008, after a dispute with a coworker, Michael O'Connell. (A32–33; A67–70.) O'Connell is a white male who worked as a lab technician with Johnson. (A82.) During their mutual tenures as lab technicians at Koppers, O'Connell and Johnson worked under the exact same chain of command. (A82.) It is undisputed that O'Connell did not like Johnson (A82), and that there was a great deal of tension between them (A84).

This tension led to several incidents, most of which could be characterized as minor workplace squabbles. It is undisputed that O'Connell and Johnson shared responsibility for many of these squabbles. Yet during this period, only Johnson was formally disciplined; O'Connell never was.[2] For example, in one incident

[2] Johnson was suspended and eventually fired for three transgressions (A60–70), but O'Connell received no formal discipline despite three transgressions of his own, one of

O'Connell falsely accused Johnson of making racial slurs against him (the "radio incident"). (A30; A63–64.) On that day, Johnson was working in the lab when O'Connell arrived for his shift and changed the volume on a radio, disrupting Johnson and causing an argument between them. (A63.) O'Connell went to management, claiming that Johnson called him a "faggot insulin dick" and a "white motherfucker." (A63–64.) Johnson denied making those comments (A63–64), and Wagner issued O'Connell a "written verbal warning," advising him that his "false accusations of others . . . need[] to stop immediately" (A30).[3]

Although Wagner only issued a minor reprimand to O'Connell for making false accusations, Wagner wrote Johnson up in the wake of the radio incident. (A64.) Wagner first consulted with his supervisor, division operations manager Gregory Traczek (A6–7), as to whether this incident was severe enough to merit Johnson's termination (A170). Another Pittsburgh headquarters official told Wagner he needed to get Johnson's side of the story before issuing discipline. (A146-47.) Afterwards, Wagner—relying solely on O'Connell's version of the story (he had not interviewed Johnson, disregarding the headquarters' directive to hear her side first)—gave Johnson a "written warning," a more severe punishment than

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which involved threatening Johnson's life (A63–64; A84). In short, Johnson received formal discipline for threatening behavior on three occasions discussed in detail below: after the guard shack incident, the radio incident, and the alleged push. (A62; A64; A69–70.) O'Connell also engaged in threatening behavior on three occasions (A30; A84), yet the only formal discipline he received was after the radio incident (A30), and that was later reduced to a non-disciplinary memorandum (A102; A137). He received no discipline for throwing a pen and glove at Johnson in 2003 or for threatening her life in 2006. (A84.)

[3] This was not the last time O'Connell falsely accused Johnson: in November 2007, O'Connell complained to Wagner that Johnson had recently hurled profanities at him, but then backtracked, later admitting that she had been well behaved. (A35.)

O'Connell's "written verbal warning." (A144–145; A147.) Johnson went to her union representatives, who filed a grievance on her behalf; as a result, Wagner reduced her punishment to a memorandum. (A97.) But even though the union did not file a grievance on O'Connell's behalf, Wagner without apparent reason also reduced his punishment to a memorandum.[4] (A102.)

Some of O'Connell's actions were significantly more severe. (A84.) For example, he threatened Johnson's life, both directly to her and also to another employee. (A84.) Specifically, in January 2006, O'Connell told a coworker that he could have Johnson killed if he wanted to. (A119.) Later that day, O'Connell threatened Johnson directly, telling her, "I can have you killed if I wanted to." (A120.) Johnson filed a police report (A84), and reported the threat to her supervisor, Gerba, who then told the plant manager at the time, Traczek (A180). In fact, the Koppers General Rules of Conduct ("Code of Conduct") required her to report O'Connell's threats to management. (A59.)

Koppers's investigation of O'Connell's death threats failed to reveal a witness who could have corroborated Johnson's report. (A166; A180.) As with the radio incident (A97), Koppers's entire investigation of O'Connell's death threats consisted of interviewing only O'Connell (A166–67; A180). Neither Gerba nor Traczek ever made himself aware that O'Connell had told another coworker he could have Johnson killed. (A166; A180.)

[4] In another incident, in 2003, O'Connell threw a pen and glove in the direction of Johnson. (A84.) Their supervisor at the time, Joe Gerba sent O'Connell home (A84), but did not write up O'Connell or formally discipline him in any way (A178–79).

After O'Connell's interview, Traczek spoke to O'Connell and told him that this kind of behavior was unacceptable and not to do it again. (A167.) Traczek admitted that O'Connell's death threats violated the Code of Conduct (A168), which prohibits "abusive or inappropriate, obscene or offensive language" and "[d]isorderly conduct, including assault on another employee or customer, fighting at work, swearing, shouting, threatening behavior and other actions of an offensive nature" (A58). Traczek, however, did not give O'Connell a warning letter, or any discipline whatsoever. (A167.)

With these incidents lurking in the background, events came to a head on April 28, 2008. That day, O'Connell became upset when Johnson supposedly would not give him a logbook and started complaining to management about it. (A66; A130; A133.) Later, the tar foreman, Xavier Kenyatta, called Johnson to his office to speak to the shift supervisor, who was on the phone. (A67.) Johnson complied and went to the foreman's office. (A67.) The parties dispute what occurred next. According to Johnson, as she entered the foreman's office, O'Connell was exiting and the two brushed shoulders as they passed. (A87.) But according to O'Connell's version—which ultimately resulted in Johnson's firing—Johnson had first thrown a logbook at him in the analysis lab and later pushed him into the wall of the tar foreman's office. (A32–33.) Johnson consistently denied these accusations. (A67–68.)

Wagner investigated O'Connell's allegations by interviewing nine Koppers employees, (A69; A154); only three of those employees—O'Connell, tar foreman

Xavier Kenyatta, and janitor Sam Wells—claimed to have observed the alleged push. (A42; A67–68.) Wagner soon learned that the three men were spotted by another employee, who described them "getting their stories straight" and collaborating against Johnson after the alleged push. (A37.) That employee, Tim Wright, told Wagner that he did not like the tone of their meeting because it "wasn't facts." (A37.) The first witness, Sam Wells, told management that he had seen Johnson push O'Connell. (A70.) The second person in the trio, Xavier Kenyatta, made two accusations against Johnson. First, he told Wagner that Johnson had left his office and then pushed O'Connell. (A42; A88.) Wagner later rejected this claim because it would have been physically impossible for Kenyatta to observe the incident he reported. (A153.) In any event, it was clear that his story contradicted O'Connell's, who told Wagner that Johnson pushed him as she *entered* the tar foreman's office. (A88.) Second, Kenyatta repeatedly insisted that Johnson had been insubordinate and hot-tempered that day. (A70.)

Throughout the investigation, Wagner frequently consulted with Traczek. (A174) (Traczek relating that he and Wagner spoke about the incident and what discipline to impose on Johnson at least two and as many as five or more occasions). Traczek recommended that Wagner fire Johnson (A174), which Koppers did by letter on May 12, 2008 (A32–33). The letter did not specify Johnson's supposed logbook throwing as a reason for Johnson's termination. (A32–33; A71.) Rather, Koppers fired Johnson because of her disciplinary history, which included "threatening, intimidating, disruptive and abusive behavior," and for pushing

O'Connell. (A32–33.) Wagner admitted that she would not have received her termination letter if it were not for the alleged push. (A150.)

As the letter mentioned, Johnson's disciplinary history factored into her termination (A32–33; A72), because the Stickney plant utilizes a policy of progressive discipline (A139). This policy is followed even though progressive discipline is not written in either the Code of Conduct or in union documents. (A94.) Under the progressive discipline policy, supervisors take into account an employee's record as well as the seriousness and character of previous offenses in determining the severity of punishment. (A139.)

Although Johnson had five disciplinary incidents in her thirteen-year tenure at Koppers prior to the alleged push incident, Koppers did not rely on three of them in making its decision to fire her: (1) Johnson's failure to punch out after she finished work one time in 1995 (A54); (2) Johnson's falling asleep at her desk one time in 1999 (A46); and (3) Johnson's smoking in a non-smoking area in 2000 (A44; A160).

Koppers did, however, consider the other two disciplinary incidents in deciding to fire Johnson for the alleged push. (A32–33; A61–62; A64–65.) The first incident that explicitly factored into Johnson's termination occurred on November 9, 2006, when Johnson got into an altercation with a security guard ("guard shack incident"). (A60–61.) That day, Johnson went to a guard shack at the plant to pick up some food she had ordered (A61), but the guard refused to give it to her (A123). An altercation ensued in which the guard grabbed Johnson and threatened her.

(A124–25.) Johnson pushed him away, yelled at him, grabbed a stapler to defend herself, and then tossed the stapler on the ground as she left. (A124–25.) Following the guard shack incident, the plant manager at the time, Traczek, suspended Johnson and issued her a final warning. (A61–62.) Johnson admits that she behaved inappropriately, thinks that she should have walked away from the altercation, and agrees that the discipline was justified. (A126.)

The other incident that implicitly factored into her termination was the above-mentioned 2007 radio incident where Johnson initially received a more severe punishment than O'Connell. (A32–33) (termination letter specifying that the company considered incidents from 2006 onward in Johnson's termination). The radio incident factored in even though, as mentioned, the union grievance ultimately reduced it to a memorandum, which Koppers does not consider discipline within its progressive discipline scheme.

Johnson sued Koppers, alleging discrimination on the basis of her race and gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*, and 42 U.S.C. § 1981. (A182–86.) Although Johnson sought to depose O'Connell during discovery, she was unable to because of difficulties in serving the subpoena on O'Connell. (A190–92.) Eventually, the parties stipulated that he would not be deposed or called at trial. (A190–92.) The parties filed cross-motions for summary judgment; Johnson sought judgment on the direct method of proof and Koppers sought summary judgment on both the direct and indirect methods. (R39;

R47.) On April 16, 2012, the district court granted Koppers's motion and denied Johnson's motion. (R60; R61.)

In its decision, the district court first addressed the cat's paw theory. In granting summary judgment to Koppers, the district court's rationale was that O'Connell's "false[] claims" attributing the epithets "white motherfucker" and "faggot insulin dick" to Johnson "cannot be reasonably characterized as utilizing a 'stereotype' about Johnson's gender or race." (A14–15.) With respect to the indirect method claim, the district court found neither a similarly situated employee in O'Connell nor evidence of pretext. (A17; A20.) The district court concluded first that "Johnson and O'Connell were disciplined under significantly different circumstances" because Johnson had been disciplined for a prior incident, whereas O'Connell had not. (A18.) The district court also found that Johnson did not show that "O'Connell was treated more favorably by the same decisionmaker" because Traczek was in charge of the disciplinary decision during the death-threat incident, whereas Wagner was in charge during the alleged push. (A18–19.)

As for pretext, the district court credited Wagner's deposition testimony that the reference to false accusations in O'Connell's "written verbal warning" was merely text from the Code of Conduct used to remind O'Connell that false accusations would be taken seriously (A144; A161), and inferred from that testimony that Wagner did not believe that O'Connell's attributing racial and sexual epithets to Johnson was false (A22) ("[Wagner] never concluded that O'Connell made false accusations."). The court also inferred that it was Wagner's

honest belief that O'Connell, Wells, and Kenyatta were not collaborating to frame Johnson. (A21) ("Wagner's decision not to credit Wright's accusation is reasonable in light of his follow-up with Wells, O'Connell, and Kenyatta, who denied that they had altered their stories and said that they were instead discussing what steps to take when the police arrived."). Wagner, however, had never testified that he believed them, only that they denied it. (A156) ["They were just discussing the – about the police – you know, calling the police"]. Wagner's notes reveal that he was on notice that at least one other employee had concluded these employees were conspiring against Johnson. (A37.) Johnson filed a motion for reconsideration (R67), which the district court denied in an amended opinion and order (A1–24).

## Summary of the Argument

This case is about an African-American woman who was fired after thirteen years of employment because a white, male coworker convinced their employer to do so. The employer seized the chance to cap a multi-year campaign of discriminatory treatment, cloaked in the guise of progressive discipline. The district court erred in granting summary judgment to Koppers because genuine issues of material fact remain as to whether Johnson suffered discrimination, under both the direct and indirect methods of proof. This case should have gone to a jury to resolve them.

First, the district court incorrectly concluded that Koppers did not engage in direct discrimination against Johnson under a cat's paw theory. Although the district court recognized in principle that a person's false "attribution of racial and gender-based epithets" to another could be "sufficient to survive a summary judgment motion" (A14), the district court erred in determining that "O'Connell's accusation that Johnson called him a 'white motherfucker' and 'faggot insulin dick' cannot be reasonably characterized as utilizing a 'stereotype' about Johnson's gender or race" (A14–15). The first insult is unequivocally race-based, and the second is gender based; it explicitly utilizes descriptors traditionally leveled only at men. The district court erred in brushing aside the discriminatory animus inherent in O'Connell's false accusations. Finally, there can be no question that O'Connell's actions proximately caused Johnson's firing. It was O'Connell, after all, who instigated the investigation against Johnson, levied false allegations against her

that were cited as the basis of her termination, and influenced his co-workers to similarly lobby for Johnson's termination.

Second, the district court erred in granting summary judgment to Koppers under the indirect method because Johnson amply satisfied her burden of setting forth a prima facie case of employment discrimination. Specifically, the district court erroneously concluded that O'Connell was not an adequate comparator under the "similarly situated" prong of the *McDonnell-Douglas* test. O'Connell and Johnson held the same position, had the same supervisors, and O'Connell lacked a disciplinary history only because Koppers structured a workplace where the transgressions of white males went unrecorded. Finally, an issue of fact exists as to whether Koppers's stated reasons for terminating Johnson were a pretext for discrimination. A jury was required to sort out conflicting testimony regarding Koppers management's beliefs and to decide if Koppers honestly believed its stated reasons for firing Johnson. Thus, this Court should reverse the district court's decision and remand the case for trial.

## Argument

The district court improperly granted summary judgment to Koppers on both the direct and indirect claims. Summary judgment is proper only if "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). This Court reviews the district court's grant of summary judgment de novo, *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 653 (7th Cir. 2010), examining the record in the light most favorable to the appellant and resolving all evidentiary conflicts and reasonable inferences in her favor, *Coleman v. Donahoe*, 667 F.3d 835, 842 (7th Cir. 2012). When examined in this light, it is clear that the district court should have granted Johnson's motion for summary judgment or, at a minimum, denied Koppers's motion and set the case for trial.

### I. The district court erred in granting summary judgment to Koppers under the "cat's paw" theory of direct discrimination.

O'Connell acted with discriminatory animus when he falsely accused Johnson of making racial and gender-based epithets towards him, and his actions proximately caused her termination. O'Connell's actions, as an agent of Koppers, were imputable to Koppers under a cat's paw theory of liability. The district court therefore erred in granting Koppers's motion for summary judgment.

Johnson can establish a Title VII claim under the direct method using the cat's paw theory of liability. *Smith v. Bray*, 681 F.3d 888, 897 (7th Cir. 2012). This theory applies in the employment discrimination context when "a biased subordinate who lacks decision-making power uses the formal decision maker 'as a dupe in a deliberate scheme to trigger a discriminatory employment action.'" *Id.* at

897 n.3 (quoting *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006)). In order to prevail on her summary judgment motion, Johnson needed to establish that: (1) O'Connell harbored a discriminatory animus against her; and (2) he took actions that proximately caused her discharge. *See id.* To withstand Koppers's motion for summary judgment, Johnson merely needed to show that reasonable jurors could disagree on these questions. *Id.* at 899–900. Johnson satisfied both standards, so this Court should reverse and remand.

Although the district court correctly recognized that the cat's paw theory can be applied to co-workers like O'Connell, it did not discuss causation at all (A13–14), and it erred in concluding that Johnson did not demonstrate O'Connell's discriminatory animus. Johnson was therefore entitled either to summary judgment or to a jury trial.

### A. Koppers was liable for employment discrimination under a cat's paw theory because a non-supervisory employee's discriminatory animus proximately caused Johnson's discharge.

The district court correctly concluded that Koppers could be liable for a non-supervisory coworker's discriminatory animus. (A12–14.) Indeed, this Court has routinely recognized that a coworker's discriminatory animus, rather than a supervisor's, can serve as the basis for cat's paw liability. *See, e.g.*, *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012) (noting post-*Staub* that "subordinates" with discriminatory animus, and not necessarily "supervisors," can give rise to a cat's paw claim); *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 379 (7th Cir. 2011) (explaining that a link between an employment decision made by an unbiased

individual and the impermissible bias of a non-decision-making coworker constitutes direct evidence of discrimination under the cat's paw theory). The operative term for cat's paw liability is "*subordinate*," which as this Court has noted, encompasses both co-workers and lower-level supervisory employees. *See Cook*, 673 F.3d at 628; *see also Smith v. Bray*, 681 F.3d 888, 897 (7th Cir. 2012) ("Our cases have long recognized that a final decision maker's reliance on an improperly motivated recommendation *from a subordinate* may render the corporate employer liable *because the subordinate acts as the firm's agent*." (emphasis added)).

O'Connell was the subordinate with the discriminatory animus that proximately caused Koppers to terminate Johnson. Because under this Court's precedent, coworkers can serve as an employer's agent for purposes of cat's paw liability, Koppers can be held liable for O'Connell's discriminatory animus.

### B. O'Connell exhibited a discriminatory animus toward Johnson on the basis of her race and gender.

O'Connell falsely claimed that Johnson called him a "white motherfucker" and a "faggot insulin dick" (A63–64); the district court erred in concluding that this false accusation did not exhibit the type of race and gender-based stereotyping that could serve as proof of discriminatory animus. *See Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 378–79 (7th Cir. 2011) (requiring a plaintiff to show discriminatory animus when proceeding under the cat's paw theory). As a threshold matter, the district court did not quibble with the baseline legal characterization of the issue: whether reverse race or gender-based stereotyping can

serve as proof of discriminatory animus. (*See* A14) (describing Johnson's argument as one where "O'Connell was motivated by a discriminatory animus because [he] falsely claimed that she called him a 'white motherfucker' and 'faggot insulin dick'" and then noting that "ambiguous statements may provide evidence sufficient to survive a summary judgment motion"). The district court's error lay in its conclusion that the terms O'Connell selected did not evince discriminatory animus.

O'Connell's choice of these particular terms was instructive. He could have chosen any number of slurs to attribute to Johnson; he chose racial and gender-based slurs. Had the tables been turned, for instance, and O'Connell had called Johnson a "black bitch" or "dyke insulin cunt," discriminatory animus could not be questioned. Given the summary judgment posture of the case, the district court should have credited the interpretation of O'Connell's false remarks that was most favorable to Johnson: that O'Connell's deliberate attribution of false race and gender-based epithets to Johnson showed discriminatory animus. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). If it had done so, it would have resolved this question in Johnson's favor or at least allowed it to go to a jury. *See id.* at 402 (resolving ambiguities against the movant, because "the task of disambiguating ambiguous utterances is for trial, not for summary judgment").

The district court's action takes on even more significance given that O'Connell refused to be deposed in this case and could not be a witness at trial. *See* (A190–92) (acknowledging Johnson's "difficulties" in serving a deposition subpoena on O'Connell). Even though O'Connell continued to work for Koppers during the

pendency of this lawsuit below, Koppers did not accept responsibility for securing his deposition testimony. (*See* A190–92.) And although the parties ultimately resolved this impasse by stipulating that O'Connell would be neither deposed nor a witness at trial (A190–92), the practical effect of this stipulation should have been—at a minimum—a trial date for Johnson. As noted above, O'Connell's false accusations when viewed in the worst possible light could be deemed evidence of racial and gender animus. And without O'Connell's testimony to explain away his choice of descriptors, the district court simply could not grant summary judgment to Koppers on this record.[5]

Even if there were some question as to whether this type of behavior was cognizable as animus, decades of psychological research shows that this phenomenon—"projection"—occurs when a person attributes a negative trait, such as racism or sexism, to others to avoid recognizing it in himself. *See, e.g.,* Anna Freud, *The Ego and the Mechanisms of Defense* (rev. ed. 1979); George E. Vaillant, *Ego Mechanisms of Defense: A Guide for Clinicians and Researchers* (1992); *see also* Galen V. Bodenhausen & Andrew R. Todd, *Social Cognition*, 1 Wiley Interdisc. Reviews: Cognitive Sci. 160, 160–71 (2010); Roy F. Baumeister, Karen Dale & Kristin L. Sommer, *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66 J. Personality 1081, 1081–1123 (1998) (finding that projection occurs when accusers try to suppress their undesirable

[5] Indeed, because O'Connell cannot testify at trial (A190–92), the district court could have easily entered summary judgment in Johnson's favor. The jury would have no contrary evidence to explain a potential non-discriminatory motive for O'Connell's choice of slurs.

traits, which inevitably force their way to the surface and then are applied to others rather than oneself in a form of denial). O'Connell attributed (false) racial and gender-based epithets to Johnson—a classic case of projection and sufficient evidence of discriminatory animus.

### C. O'Connell's discriminatory animus was a proximate cause of Johnson's termination.

Although the district court failed to address this prong of the test in its ruling, it can hardly be disputed that O'Connell's discriminatory animus proximately caused Johnson's termination. Moreover, contrary to the defendant's suggestion below, this causal link was not broken by Koppers's independent investigation.

The Supreme Court noted in *Staub v. Proctor Hospital* that proximate cause simply requires some direct relationship between the discriminatory animus and the adverse employment action, and only excludes "those links that are too remote, purely contingent, or indirect." 131 S. Ct. 1186, 1192 (2011). The causal link between the coworker's animus and the adverse employment action can only be broken by a subsequent "superseding cause"—an unforeseeable, independent cause. *Id*. An independent investigation cannot be considered a superseding cause if it takes into account the biased report of a coworker or supervisor with animus. *Id.* This is true even if the investigation concludes that the adverse action was, apart from that actor's recommendation, entirely justified. *Id*.

There can be no doubt that there is a direct relationship between O'Connell's animus and Johnson's termination. Koppers's termination letter lists O'Connell's

false claim that Johnson pushed him and acted in a threatening manner as the basis of its decision to fire Johnson. (A32–33; A70–71.) It also admits that Johnson was fired because of her disciplinary record, which included prior incidents where she was provoked by O'Connell, including the radio incident in which O'Connell revealed his racial animus via the false allegations of race- and gender-based epithets. (A63–64; A71–72.) Furthermore, Koppers's independent investigation of the alleged push, which led to Johnson's termination, was not a superseding cause. It not only incorporated O'Connell's story (A32–33; A69), but also Wells's and Kenyatta's, both of whom had been seen collaborating with O'Connell to get their stories straight (A32–33; A37; A69–70). All three were interviewed during the investigation (A69), but none were bias-free (A37). That Koppers took into account their versions of the story in deciding to fire Johnson does not interrupt the proximate causation of O'Connell's acts.

Therefore, Johnson's evidence adequately proved direct discrimination, or at a minimum, that a genuine issue of material fact exists as to whether O'Connell harbored discriminatory animus against Johnson that proximately caused her termination. Either way, the district court erred in granting summary judgment to Koppers. This Court should reverse and remand, either with instructions to enter summary judgment in Johnson's favor or to proceed to trial.

## II. The district court erred in granting summary judgment to Koppers on Johnson's indirect claim.

Johnson stated a claim of discrimination under the indirect method; therefore, the district court should not have granted summary judgment to Koppers.

Under the well-known *McDonnell-Douglas* burden-shifting method of proving discrimination, *see McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), Johnson was required to make a prima facie case of employment discrimination by showing that: (1) she is part of a protected class; (2) she satisfied her employer's legitimate work expectations; (3) she endured an adverse employment action; and (4) the employer treated a similarly situated coworker not in her protected class more favorably. *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012) (citing *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 750–51 (7th Cir. 2006)). This showing triggers a presumption of discrimination that Koppers could only rebut by showing a legitimate and nondiscriminatory reason for the termination. *Id.* If Koppers were able to make such a showing, then the burden would shift back to Johnson, who must present evidence that the proffered reason was a mere pretext for discrimination. *Id.*

### A. Johnson established a prima facie case of employment discrimination.

Koppers did not contest that Johnson was a member of a protected class or that she had suffered an adverse employment action. (R48 at 12.) Thus, the only prongs at issue below were the second and fourth: the legitimate-expectations and the similarly-situated-employee prongs. Johnson was meeting Koppers's legitimate employment expectations and presented evidence that Koppers treated O'Connell—a similarly situated white male—more favorably than her. Accordingly, Johnson established a prima facie case that triggered a presumption of discrimination.

#### *1. Johnson was meeting Koppers's legitimate employment expectations.*

As the district court correctly noted, there was no evidence that Johnson was not adequately doing her job as a lab technician. (A16.) Johnson was meeting Koppers's legitimate performance expectations. The legitimate expectations prong centers on the employee's performance at the time of her termination. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 336 (7th Cir. 1991). Thus, contrary to Koppers's assertion below, an employee's disciplinary record is only relevant to the extent that it sheds light on her performance at the time she is fired. *Id.*

Johnson's direct supervisor, Joseph Gerba, admitted that she was performing adequately as a lab technician. (A82.) Furthermore, the plant manager described her as proficient. (A82.) Koppers cannot overcome these clear statements regarding Johnson's satisfactory skills and performance by citing prior policy violations, the majority of which occurred years before the events leading to Johnson's termination. Koppers identified no authority below for the proposition that temporally remote disciplinary infractions can undercut the employer's affirmative statements approving of a plaintiff's work and skills. Nor does the event triggering the adverse employment action serve as proof that Johnson was not meeting Koppers's legitimate expectations; Johnson at all times vigorously disputed that this event occurred (A68), and presented additional evidence that she did not do it, *see* Section II(B)(2) *infra.* Because Johnson never admitted to the disputed act, Koppers cannot invoke it as proof that Johnson was not meeting its expectations. *But cf. Everroad v. Scott Trucks Sys. Inc.*, 604 F.3d 471, 478 (7th Cir. 2010) (holding plaintiff didn't meet employer's legitimate expectations because she

admitted that she was insubordinate); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 666 (7th Cir. 2006) (same).

*2. Koppers treated O'Connell, a similarly situated employee not in Johnson's protected class, more favorably than Johnson.*

O'Connell, a male employee who shared the exact same lab technician job as Johnson, was a similarly situated white male. He was treated more favorably than Johnson, as exemplified by the fact that he was not disciplined for threatening Johnson's life, behavior far more severe than either the guard shack incident or the alleged push that ultimately led to Johnson's termination. Therefore, the district court erred in failing to find that O'Connell was an adequate comparator.

Under this prong of the prima facie case, courts must flexibly examine the relevant factors to determine if discrimination can be inferred from an employer's disparate treatment of two similar employees. *Coleman v. Donahoe*, 667 F.3d 835, 846–47 (7th Cir. 2012) (describing a flexible standard designed to ferret out an inference of discrimination and stating that this question is usually left to the jury); *see also Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008). Minor differences should not defeat the plaintiff's prima facie case unless they are material and render a comparison useless. *Coleman*, 667 F.3d at 846. Furthermore, a plaintiff need only show one similarly situated employee to meet her prima facie burden; numerosity is not required. *Humphries*, 474 F.3d at 406–07. The differences between O'Connell and Johnson were not material, and a jury could infer from Koppers's treatment of them that it was discriminating against Johnson.

The striking similarities between O'Connell and Johnson make him a similarly situated employee and an adequate comparator for the fourth prong of Johnson's prima facie case. O'Connell and Johnson held the exact same position of lab technician (A82), worked together (A82), were subject to the exact same code of conduct (A138), and had the exact same chain of command throughout the relevant time period (A82). This is more than enough to allow a meaningful comparison between the two. *Humphries*, 474 F.3d at 406 (holding two employees were similarly situated when they held the same position and had the same responsibilities and chain of command).

Notwithstanding their similarities, O'Connell received more lenient discipline that Johnson for threatening behavior that was more severe. O'Connell threatened Johnson's life. This threatening conduct is unquestionably severe. *See Frazier v. Delco Electronics Corp.*, 263 F.3d 663, 668 (7th Cir. 2001) (holding that a death threat significantly contributed to a hostile work environment). It is more severe than any of Johnson's conduct, yet he was not punished at all and she was fired. (A33; A84.) By brushing aside this severe misconduct, Koppers treated O'Connell more favorably than Johnson, which would have allowed a jury to infer discrimination. *See Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 916 (7th Cir. 2010); *Fields v. Riverside Cement Co.*, 226 F. App'x 719, 722–23 (9th Cir 2007) (stating that the plaintiff submitted evidence that, if credited, showed that the defendant did not treat comparable employees similarly when investigating serious

accusations, including a death threat, or in meting out punishments, which was sufficient to meet plaintiff's prima facie burden on summary judgment).[6]

Any supposed differences between O'Connell and Johnson were illusory, irrelevant, or the product of discrimination, so the district court should not have used them to deny Johnson the opportunity to take her claim to a jury. Courts do examine differences between employees to ensure that they, and ultimately a jury, can reasonably infer discrimination from the employer's adverse treatment of the plaintiff, but these differences must be legitimate and not inconsequential. *Coleman*, 667 F.3d at 846–47.

The district court invoked two factors that this Court has traditionally used to reject similarity—the absence of a common decision maker and the plaintiff's disciplinary history. (A18.) As a threshold matter, Johnson's disciplinary history was a product of discrimination, as discussed more fully below. *See* Section II(B)(1) *infra*. For the same reasons that Koppers cannot overcome pretext, it cannot invoke Johnson's disciplinary history to overcome Johnson and O'Connell's similar status. *Cf. Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985) (explaining that "plaintiffs need not account for a potentially biased factor in establishing their prima facie case" in the context of a statistical analysis of discriminatory employment action).

[6] Koppers's failure to investigate this death threat (A166–67; A180), while conducting a full-blown, nine-person investigation of the alleged push (A154), that only three people claimed to have witnessed (A42; A67–68; A70), is further evidence that it treated O'Connell more favorably than Johnson. This failure to investigate likely explains why the plant manager never learned there was a witness to O'Connell's death threats. (A166.) Regardless, Johnson felt sufficiently scared by them to both file a police report and complain to her supervisor. (A84.)

Turning to the common-decision maker question, there are a number of ways to look at it, but viewing the facts through any lens shows that Johnson satisfied the similarly-situated prong of her prima facie case. Koppers tried to circumvent the fact that Johnson and O'Connell were subject to the same chain of command at all relevant times by urging the district court to compare O'Connell's prior misconduct (when Traczek was plant manager) only to Johnson's alleged push (when Wagner was plant manager). (R56 at 10.) This snapshot approach to comparison does not work here, however, because Johnson's disciplinary record itself was an important factor in her termination. In such instances, courts consider the history of the prior discipline in deciding whether to deem employees similarly situated. *See Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't.*, 510 F.3d 681, 691 (7th Cir. 2007) (using four separate and distinct complaints that led to plaintiff's termination to find that similarly situated employees existed); *Curry v. Menard, Inc.*, 270 F.3d 473, 478–79 (7th Cir. 2001) (focusing on the violations of store policy where the plaintiff had a common decision maker with other employees because all of plaintiff's violations were used to fire her pursuant to the company's progressive discipline policy). This is sensible because otherwise employers could dodge claims of discrimination simply by periodically shuffling management.

At all relevant times, Johnson and O'Connell had the same decision maker and those decision makers consistently treated O'Connell more favorably. First, when Gregory Traczek was plant manager he had the opportunity to discipline both O'Connell and Johnson. The guard shack incident was the explicit precursor to

Johnson's termination. Traczek investigated that incident, suspended Johnson for ten days, and gave her a final warning that future instances of misconduct would be met with termination. (A61–62.) Yet Traczek, who was also plant manager when O'Connell threatened Johnsons' life, decided that O'Connell's death threats did not warrant so much as an investigation, let alone discipline. (A166–67.)

Wagner too treated O'Connell more favorably during his tenure as plant manager. After the radio incident, he did not even interview Johnson before issuing her a more severe punishment than O'Connell. (A145; 147.) Wagner violated an explicit company directive in his rush to discipline Johnson without getting her side of the story first. (A146-47.) Wagner did, however, listen to O'Connell's side of the story before treating him more leniently than Johnson. (A145; A147.)

Even if this Court were to accept Koppers's argument below that the only proper comparison is between O'Connell's death threats and Johnson's alleged push, the district court still should not have granted summary judgment to Koppers. Traczek was so involved in all of these incidents that a jury could find Johnson and O'Connell similarly situated and that an inference of discrimination was reasonable. *See Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012) (explaining the common decision maker element does not automatically apply as the ultimate question is whether there was discrimination). The inference of discrimination is reasonable because Traczek was in a position to influence the ultimate decision maker: Wagner. *Cf. Ellis v. United Parcel Serv., Inc.*, 523 F.3d 823, 829 (7th Cir. 2008) (explaining derogatory remarks by a person who can

influence the decision maker can be direct evidence of discrimination). Traczek, as plant manager, failed to punish O'Connell for the death threats. (A167.) He was responsible for that decision. Traczek, as division operations manager and as Wagner's direct supervisor, exerted pressure and influence on Wagner and his decisions. Traczek was heavily involved in the investigation of the alleged push and the ultimate decision to fire Johnson. He spoke with Wagner about the investigation and discipline on at least two and as many as five or more occasions. (A174.) He also recommended that Wagner fire Johnson. (A174.) In short, he also bore responsibility for this decision.

Because common decision makers treated O'Connell more favorably, and because Johnson's disciplinary history was a result of discrimination, the district court should not have considered these factors as a basis for rejecting Johnson's prima facie case.

### B. Koppers's reasons for firing Johnson were either not legitimate or a pretext.

Not only did Johnson meet her prima facie burden, she also showed that Koppers's reasons for firing her were not legitimate or that they were pretexts for discrimination. Koppers said that it fired Johnson for two reasons: (1) her disciplinary history; and (2) her aggressive and threatening actions involving the alleged push of O'Connell. (A32–33.) As discussed below, its first reason was tainted by Koppers's discriminatory application of its disciplinary policy, and the second was pretextual.

1. *Johnson's disciplinary record was created through uneven application of the discipline policy and was not a legitimate reason for firing her.*

Johnson's disciplinary record was not a legitimate reason for terminating her because it was the product of discrimination. *Avila v. Jostens, Inc.*, 316 F. App'x 826, 832 (10th Cir. 2009); *see also Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007) (holding reasons for terminating plaintiff were not legitimate if based on discrimination). When a discipline policy is proffered as a legitimate non-discriminatory reason for termination, a plaintiff's evidence showing that the disciplinary policy was not uniformly enforced creates a material issue of fact as to pretext. *Curry v. Menard Inc.*, 270 F.3d 473, 479 (7th Cir. 2001). For example, as relevant here, courts have recognized that an employer's failure to interview both employees and then handing down a more severe punishment to only one of them is suspicious and would permit a neutral fact finder to infer discrimination. *See Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 916 (7th Cir. 2010) (noting that it was suspicious the employer did not interview both people involved in an incident and punished one while not the other).

Koppers did not apply its disciplinary policy in an even-handed manner. It did not punish O'Connell for his death threats, but it terminated Johnson for less threatening behavior. *See* Section II(a)(2) *supra.* Similarly, in 2003 O'Connell threw a glove and pen at Johnson, yet was not formally punished. (A84.) Then, in 2007, O'Connell and Johnson got into a verbal dispute during the radio incident. (A63.) The plant manager interviewed O'Connell about the incident but never got Johnson's side of the story. (A145; A147.) He then gave Johnson a more severe

punishment than O'Connell. (A145.) In short, Koppers had structured a workplace where the transgressions of white men were not recorded. It applied its disciplinary policies more harshly to Johnson and thus her disciplinary history was the product of discrimination and is not a legitimate reason for terminating her.

2. *Johnson presented evidence that would have allowed a jury to infer that Koppers did not believe the reasons it gave for firing her.*

Koppers's stated reason for firing Johnson—her alleged aggressive and threatening push of O'Connell—was mere pretext. The essential question in the pretext analysis is "whether the employer honestly believed the reasons it has offered to explain the discharge." *Coleman v. Donahoe*, 667 F.3d 835, 852 (7th Cir. 2012). Specific evidence that allows a jury to reasonably infer that the reasons for terminating the employee are not true creates a material issue of fact for which summary judgment is improper. *Filar v. Bd. of Educ.*, 526 F.3d 1054, 1063 (7th Cir. 2008); *Gordon v. United Airlines, Inc.*, 246 F.3d 878, 889 (7th Cir. 2001).

Johnson presented specific evidence that Wagner, the plant manager who fired her, may not have believed that Johnson pushed O'Connell. He admitted that he knew O'Connell disliked Johnson. (A157.) He also knew that he had written up O'Connell for falsely accusing Johnson of misconduct.[7] (A30.) Furthermore, in

[7] The district court credited Wagner's deposition testimony that he only put the reference to false accusations in the disciplinary letter to let O'Connell know that false accusations would be taken seriously and inferred that Wagner "never concluded that O'Connell made false accusations." (A22.) This conclusion denies Johnson the reasonable inference to which she is entitled. It is reasonable to infer from the disciplinary letter that Wagner did conclude that O'Connell made false accusations. Wagner had an incentive to hide such a conclusion in the context of this litigation so his credibility should be left to a jury. *Gordon*, 246 F.3d at 889 (holding triable issue of fact existed as to pretext when the truth or falsity

November 2007, O'Connell initially told Wagner that Johnson had been swearing at him. (A35.) Wagner's notes reveal that he pressed O'Connell on the issue, who then backed down and admitted that Johnson had been well-behaved. (A35.) Finally, although O'Connell told Wagner that Johnson had thrown a log book at him, Wagner did not include this as a reason for terminating her (A71), which a jury could conclude was: (1) proof that Wagner did not fully credit O'Connell's versions of events; and (2) recognition that O'Connell was making false accusations again.

Wagner also knew that the other witnesses gave contradictory accounts of what happened. Though Wagner ultimately concluded that it would have been impossible for Xavier Kenyatta to witness the push (A153), Wagner's notes reveal that Kenyatta gave him an account of the push that differed from O'Connell's (A42; A88). Thus, he was aware of the inconsistencies among the various witnesses' stories. Standing alone, this fact may not be significant. But when combined with the fact that Wagner was on notice that these very same witnesses were seen engaging in apparent collaboration against Johnson, getting their stories straight, then Wagner's honest beliefs about Johnson are thrown into question. (A37) (Wagner's notes from the interview with that employee indicating that O'Connell, Wells and Kenyatta "were collaboration [sic], everything against [sic] Marica" and that the employee "didn't like tone [sic], it wasn't facts."). Because Wagner knew that the primary witnesses against Johnson might be lying, a reasonable jury could

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of the legitimate reason for the adverse employment action turned on the credibility of witnesses).

have concluded that Wagner himself had doubts about the veracity of the reason he gave for firing her. *Collier v. Budd Co.,* 66 F.3d 886, 893 (7th Cir. 1995) (holding that when there is evidence that suggests the employer did not believe its reason for termination, "the case then turns on the credibility of the witnesses" and must be decided by a jury). Thus, a material issue of fact exists as to whether Wagner honestly believed the allegation that Johnson had pushed O'Connell.

## Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's grant of summary judgment and remand for further proceedings.

Respectfully Submitted,

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**No. 12-2561**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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|---|---|
| MARICA R. JOHNSON,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>KOPPERS, INC.,<br><br>Defendant-Appellee. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>Case No. 1:10-cv-03404<br><br>The Honorable Joan H. Lefkow |

**Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)(7)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 8123 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Dated: November 8, 2012

## Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Marica Johnson, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 8, 2012, which will send notice of the filing to counsel of record.

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## Circuit Rule 30(d) Statement

I, the undersigned, counsel for the Plaintiff-Appellant, Marica R. Johnson, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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Dated: November 8, 2012

**No. 12-2561**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

MARICA R. JOHNSON,

Plaintiff-Appellant,

v.

KOPPERS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 1:10-cv-03404

The Honorable Joan H. Lefkow

# ATTACHED REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT MARICA R. JOHNSON


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**No. 12-2561**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

MARICA R. JOHNSON,

Plaintiff-Appellant,

v.

KOPPERS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 1:10-cv-03404

The Honorable Joan H. Lefkow

# REQUIRED RULE 30(a) APPENDIX OF PLAINTIFF-APPELLANT MARICA R. JOHNSON

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RULE 30(A) APPENDIX TABLE OF CONTENTS

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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|---|---|---|
| **MARICA R. JOHNSON,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | **No. 10 C 3404** |
| | ) | |
| **v.** | ) | **Judge Joan H. Lefkow** |
| | ) | |
| **KOPPERS, INC.,** | ) | |
| | ) | |
| **Defendant.** | ) | |

**AMENDED OPINION AND ORDER**

Marica Johnson filed suit against Koppers, Inc., alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2 *et seq.*, and 42 U.S.C. § 1981. The parties have filed cross motions for summary judgment. For the following reasons, Koppers's motion [#47] will be granted and Johnson's motion [#39] will be denied.[1]

## BACKGROUND[2]

### I. Koppers and the Relevant Workplace Policies

Koppers is a chemical company that manufactures carbon compounds and commercial wood treatment products. The union employees in Koppers's plant in Stickney, Illinois are predominantly male. Out of eighty-seven employees, fewer than ten were women during the time period relevant to Johnson's claims. Approximately forty percent of the employees at the Stickney plant were African-American, and approximately fifty percent were white.

[1] This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). Venue is proper under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(b) because the alleged unlawful employment practice occurred in this district.

[2] The facts set forth in this section are derived from the statements of fact and supporting documents submitted by the parties to the extent they are relevant, supported by admissible evidence, and comport with Local Rule 56.1. They are taken in the light most favorable to Johnson.

Koppers's General Rules of Conduct state that employees shall "[r]efrain[] from behavior or conduct deemed offensive or undesirable, or which is contrary to the Company's best interests." (Def.'s Ex. F at KI0000165.) The rules prohibit "[t]he use of abusive or inappropriate, obscene or offensive language;" "[d]isorderly conduct, including assault on another employee or customer, fighting at work, swearing, shouting, threatening behavior and other actions of an offensive nature;" and "[t]hreatening or intimidating co-workers, security guards, customers, or guests." (*Id.* at KI0000165–66.) Koppers's policy is to investigate all threats of violence and to take disciplinary action, including termination, if it determines that prohibited conduct occurred. (Def.'s Ex. G at KI0000170.) Koppers also has a written anti-harassment policy.

Neither the union contract nor Koppers's employee code of conduct documents mention progressive discipline.

## II. Johnson's Employment History at Koppers

Marica Johnson is an African-American woman who was employed at Koppers's Stickney plant from 1995 until her termination on May 12, 2008. At the time of her termination Johnson was working as a lab technician, a position she had held since 2000, and she was supervised by Joseph Gerba. Johnson was proficient at her job.

Prior to May 2008, Johnson was disciplined five times. In December 1995, Johnson received a written warning because she had stayed on the clock after her work was finished. (Def.'s Ex. C.) In July 1999, Johnson was suspended without pay for ten workdays and received a written corrective action after the plant superintendent found her asleep at her desk in the

laboratory. (Def.'s Ex. D.) In August 2000, Johnson received a written warning letter because she had been observed smoking in the hourly lunch room. (Def.'s Ex. E.)

Johnson was disciplined again, for fighting with a security guard, in November 2006. Johnson had gone to the guard shack to pick up food that she had ordered. When the guard told Johnson not to take the food, she walked behind the guard's counter without authorization and grabbed it. The guard touched Johnson, and she responded by pushing him and telling him that he "better keep his hands off [her]." (Johnson Dep. at 111.) Johnson also told the guard that she was going "bust [his] head." (*Id.* at 112.) Johnson testified that the guard then picked up a phone, and threatened "[w]e're going to get to busting." (*Id.* at 116.) Johnson was holding a stapler and she then threw it down towards the floor. (*Id.* at 114–15.) The incident was recorded on video. The plant manager at the time, Gregory Traczek, investigated the incident and interviewed Johnson. She was eventually suspended for ten days without pay and warned that "future such occurrences will be met with termination of employment." (Def.'s Ex. J.) The notice of suspension and final warning states, "While it is in question as to who made the initial physical contact, a plant surveillance camera video recording and accounts of the incident given by you and the security officer indicate that your actions only prolonged the situation and included a physical threat." (*Id.*) Johnson admits that this discipline was justified.

In July 2007, Johnson was disciplined because of an alleged altercation with Michael O'Connell, another lab technician. O'Connell is a white male who worked in the same lab as Johnson, under the same supervisors. He did not like Johnson. From time to time, Johnson's and O'Connell's shifts overlapped.

The alleged altercation between O'Connell and Johnson took place on July 13, 2007, when Johnson was working in the lab with the radio on. O'Connell came in, turned down the volume, and turned on the air conditioner. Johnson asked O'Connell why he was "messing with stuff" because it "wasn't even his shift yet." (Johnson Dep. at 121.) According to Johnson, she and O'Connell had no further significant interaction. O'Connell, however, later told Richard Wagner, the plant manager at the time, that Johnson had said "old mother-fucker, I'll get you," and called him a "white motherfucker" and a "faggot insulin dick" (presumably a reference to the fact that O'Connell is diabetic).

Without interviewing Johnson, Wagner determined that both Johnson and O'Connell were at fault. After consulting with Traczek, Wagner decided that Johnson should be disciplined more severely than O'Connell because of her prior disciplines and because O'Connell's allegations of racial harassment, if true, warranted severe action. Wagner issued a written warning letter to Johnson, which states

> In the past few weeks you have exhibited disruptive behavior that has caused other employees to feel uncomfortable and intimidated. Your actions concern Koppers management especially since you have exhibited a propensity toward physical violence. This was recorded on [a] plant security video on 11/9/06 during your encounter with Louis Withers in the guard shack. At that time you were suspended for 10 days and given a "Final Warning" that a repeat of your actions "will be met with termination of employment at the Koppers Inc. Stickney Plant." Plant management has been notified by union employees that you exhibited offensive and intimidating language and behavior on a number of recent occasions. . . . .
>
> This behavior will not be allowed in the future and will result in discharge from Koppers.

(Dkt. #49-12.) O'Connell received a verbal warning letter, which was less severe than the written warning letter given to Johnson. Wagner's letter to O'Connell states in part, "Personality

conflicts between lab techs has [*sic*] resulted in a non-productive atmosphere in the lab. Horse play, false accusations of others, verbal harassment, and any other type of disruptive behavior needs to stop immediately. This disruptive action between you and other employees needs to stop before it escalates into physical violence." (Dkt. #42-4.)

The United Steelworkers Union filed a grievance on Johnson's behalf, arguing that Johnson should not have received a written warning letter because Wagner did not interview Johnson before he disciplined her. Pursuant to an agreement between the union representatives and Koppers's management, Johnson's written warning letter was reduced to a memo that summarized Johnson's work obligations and employment status. (Dkt. #49-13, #49-14.) O'Connell's letter was also reduced to a memo, even though the union did not file a grievance on his behalf.

**III. April 2008 Incident With O'Connell and Johnson's Termination**

On April 28, 2008, Johnson and O'Connell got into another argument, the details of which are unclear. During her deposition, Johnson had difficulty remembering the chronology of events. O'Connell, on the other hand, refused to be deposed in this case and the parties have agreed that he will not be called as a witness at trial. (*See* Dkt. #37.) Therefore the court relies on Johnson's deposition testimony in recounting the events of April 28. O'Connell's allegations (which Johnson denies) are relevant only insofar as they were reported to Koppers management and the police and provided the impetus for Johnson's termination.

On the afternoon of April 28, Johnson had stayed after the end of her shift to finish a distillation and test some samples. O'Connell's shift had just begun. At some point after O'Connell came into the lab, he told Tim Wright, an African-American co-worker, "tell her

[Johnson] to give me the log book." (Johnson Dep. at 163.) O'Connell soon became upset when he couldn't find the log book and started shouting, "I don't know where the book is, and she won't give me the book." (*Id.* at 165–66.) Johnson told O'Connell that he couldn't tell her what to do because he wasn't "the boss." (*Id.* at 168.) Johnson then left the lab with Xavier Kenyatta, the shift supervisor (also referred to as the tar foreman).

Sometime before or after this exchange, the lab phone rang. O'Connell answered the call and then asked Johnson whether the tank was "good." Johnson told him the tank was good and then asked who was on the phone. O'Connell asked her again whether the tank was good, and Johnson again asked who was on the phone. O'Connell slammed down the phone, said, "I'm tired of this shit," and then walked away.

At some other time that afternoon, Kenyatta called Johnson into his office to speak to the supervisor for the creosote tanks, who was on the phone. Johnson left the lab to go to Kenyatta's office. As Johnson was entering Kenyatta's office, O'Connell was exiting. Their shoulders brushed, and O'Connell said, "Excuse me." Johnson finished her work and left for the day.

After Johnson left the Stickney plant, O'Connell called the police and reported that Johnson had thrown a lab book and hit him in the face, harassed him, and pushed him into a wall outside of Kenyatta's office. Johnson was suspended from work the next day, pending Koppers's internal investigation of the incident.

Wagner investigated O'Connell's allegations. Wagner interviewed Johnson twice, as well as O'Connell, Kenyatta, Wright, and Sam Wells, a janitor who worked for Brothers Cleaning Services. Wagner also spoke with Gerba, Kevin Janda, who worked in the human resources department, and Traczek, who at that time was working as the carbon materials and

chemicals division operations manager, in Koppers's corporate office, and was Wagner's direct superior.

The only eyewitness to the alleged incident was Wells, who was cleaning the hallway outside Kenyatta's office and told Wagner that he saw Johnson deliberately push O'Connell. Wells showed Wagner the location where he was standing and Wagner was satisfied that Wells would have had a direct line of sight to Johnson and O'Connell. (Wagner Dep. at 122–23.) Kenyatta told Wagner that Johnson had been "totally insubordinate" and "out of control" on April 28 and that she should be terminated. (*Id.* at 145.)

Wright told Wagner that after Johnson had gone home, but before the police came, he saw several people in a meeting, including Wells, O'Connell, Kenyatta, some union representatives, and other managers who were on duty that day. Wright's impression was that everyone had been trying to make sure their stories were consistent. Wright told Wagner that he "didn't like the tone" of the meeting because "[i]t wasn't facts." (*Id.* at 131.) When Wagner asked Wright for more details, Wright admitted that he was not a party to the conversation and that he did not know what had been said. Wagner confronted O'Connell, Kenyatta, and Wells with Wright's allegation that they had been trying to coordinate their stories. They stated that they were merely discussing calling the police and "what actions to take next." (*Id.* at 134.)

At the end of the investigation, Wagner decided to convert Johnson's suspension into a termination. He terminated Johnson's employment by letter dated May 12, 2008. Johnson's termination letter refers to three allegations regarding her behavior on April 28, 2008: (1) throwing a logbook at O'Connell, (2) shouting and behaving in a threatening manner, and (3) aggressively pushing O'Connell into the wall outside Kenyatta's office. (Dkt. #42-6.) The letter

states that the Koppers's management spoke with Johnson, O'Connell, and other individuals regarding the incident and that "[i]t appears to the Company, based on those discussions, that you were, in fact, behaving in an aggressive, hostile and threatening manner on the afternoon of April 28 and that you did push Mr. O'Connell into the wall of the tar foreman's office as alleged." (*Id.*) The letter states that Johnson was terminated because "[s]ince November, 2006 [she had] been trained, counseled, warned and suspended as a result of violations of the standards of conduct that Koppers rightfully has of its employees" and that she had failed to change her behavior. (*Id.*) O'Connell's allegation that Johnson threw a logbook at him was not used as a basis for Johnson's termination because no one witnessed the incident.

Eventually an order of protection was issued against Johnson to stay away from O'Connell. Johnson was also criminally prosecuted. On October 27, 2008, the Circuit Court of Cook County entered a directed finding in favor of Johnson. The court based its ruling on the fact that the criminal complaint indicated that the incident had occurred on the wrong date and that Wells testified, inconsistently with the complaint, that Johnson had pushed O'Connell with one hand instead of two. (*See* Dkt. #55-1 at 50.) It is undisputed that O'Connell has friends on the Stickney police force.

**IV. Comparators**

Johnson has identified two individuals who she claims are similarly situated to her, although not female or African-American. The first individual is O'Connell. In July 2003, O'Connell and Johnson were in the lab together with Gerba, their supervisor. When O'Connell attempted to sit down before Johnson could finish her tests, Gerba said, "Move, Mike." (Johnson Dep. at 56–57.) O'Connell became upset and started "saying things" to Gerba. He

then took off his plastic lab gloves. One glove fell to the floor. O'Connell threw the other glove and a pen in the direction of Johnson and a garbage can that was located between Johnson and Gerba. The glove landed on the floor, about one foot in front of Johnson. The pen "flew towards" Gerba. Johnson believed that he was aiming for her when he threw the pen and glove. O'Connell then walked out of the lab. Gerba witnessed the incident, and sent O'Connell home for the day but did not otherwise discipline him. Gerba testified that he probably reported the incident to Traczek, although he had difficulty remembering whether Traczek or another Koppers employee was the plant manager at the time.

In January 2006, Rosalind Morris, a union representative, told Johnson that O'Connell had told her that he "could have [Johnson] killed if [he] wanted to." (Johnson Dep. at 75.) Johnson didn't report the comment because she didn't think that it was significant. (*Id.* at 76–77.) Later that day, O'Connell approached Johnson and told her, "You know I can have you killed if I wanted to." (*Id.* at 81.) Johnson reported O'Connell's threat to the Stickney Police Department and to Gerba. Gerba told his supervisor, Traczek, about the threat and then interviewed O'Connell. O'Connell denied that he had threatened Johnson. Gerba told O'Connell that "whether [he] said it or not, we can't have things like that around here. It's not tolerated." (Gerba Dep. at 34–35.) Traczek also talked to O'Connell and told him that threats were "unacceptable" and that he expected that O'Connell would "never do it again." (Traczek Dep. at 34.) O'Connell was not formally disciplined.

The second comparator is Steve Wass, a white shift supervisor. Wass was accused of grabbing an African-American employee to prevent the employee from walking away while he was giving him directions for the evening shift. The African-American employee reported this

incident to the plant manager and the union filed a grievance. Wass did not receive any discipline.

## LEGAL STANDARD

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed. R. Civ. P. 56(c) & advisory committee's notes. The party seeking summary judgment bears the initial burden of proving that there is no genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In response, the nonmoving party cannot rest on mere pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia* v. *Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A material fact is one that might affect the outcome of the suit. *Insolia*, 216 F.3d at 598–99. Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Bellaver* v. *Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000), the court must construe all facts in a light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson* v. *Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

## ANALYSIS

Johnson may establish sex and race discrimination using either the direct or the indirect method of proof. *See Scaife* v. *Cook Cnty.*, 446 F.3d 735, 739 (7th Cir. 2006) (citing *McDonnell*

*Douglas Corp.* v. *Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 36 L. Ed. 2d. 688 (1973)).[3] Koppers argues that it is entitled to summary judgment because Johnson has not presented direct or circumstantial evidence of discrimination under the direct method of proof and, alternatively, because Johnson cannot establish a *prima facie* case of discrimination under the indirect method of proof. Even if Johnson can establish a *prima facie* case, Koppers argues, she has not produced evidence of pretext. Johnson argues that summary judgment should be granted in her favor under the direct method of proof and that genuine issues of material fact exist under the indirect method of proof such that summary judgment in favor of Koppers is inappropriate.

**I. Direct Method of Proof**

Johnson asserts a claim under the "cat's paw" theory of liability. *See Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). The phrase "cat's paw" refers to the fable where a conniving monkey persuades an unintelligent cat to fetch roasting chestnuts from a fire. *Schandelmeier-Bartels* v. *Chicago Park Dist.*, 634 F.3d 372, 379 (7th Cir. 2011). The cat burns its paw in the process, but the monkey gets the chestnuts. *Id.* In the employment discrimination context, "the 'cat's paw' is the unwitting manager or supervisor who is persuaded to act based on another's illegal bias." *Id.* Thus the theory links "an employment decision made by an unbiased individual and the impermissible bias of a non-decisionmaking co-worker." *Id.* Accordingly, a plaintiff's evidence of the biased employee's discriminatory animus can provide direct evidence of discrimination sufficient to defeat her employer's motion for summary judgment. *See Shager*,

[3] The court analyzes Johnson's section 1981 claims in the same manner as her claims brought under Title VII. *See, e.g.*, *Bratton* v. *Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996).

913 F.2d at 402. Johnson's theory is that O'Connell was the monkey and Wagner the unwitting cat.

Koppers argues, as a threshold issue, that an employer may only be held liable under the cat's paw theory where the adverse employment action is caused by a supervisor's discriminatory bias. Because O'Connell was Johnson's co-worker, with no supervisory authority, Koppers concludes that Johnson's theory of liability must fail. In support, Koppers cites *Staub* v. *Proctor Hospital*, --- U.S. ----, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), which holds that a plaintiff seeking to establish cat's paw liability need only demonstrate that a biased employee's actions were the "proximate cause" of the ultimate employment action.[4] *See* 131 S. Ct. at 1194. The biased employee in *Staub* was a supervisor, and the Court reasoned that "[s]ince a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action,' precisely as the text requires." *Id.* at 1193 (quoting 38 U.S.C. § 4311(c)).[5] The Court expressly declined to consider whether an employer would be held liable if a co-worker, rather than a supervisor, acted with discriminatory animus and caused the adverse employment action. *Id.* at 1194 n.4. Therefore *Staub* neither precludes nor endorses the legal principle propounded by Koppers.

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[4] Previously, some Seventh Circuit cases had suggested that an employer could only be held liable if the biased employee had a "singular influence" over the decisionmaker. *Schandelmeier-Bartels*, 634 F.3d at 379 (citing cases).

[5] *Staub* examined the anti-discrimination provision in the Uniformed Services Employment and Reemployment Rights Act, which is very similar to Title VII. *See* 131 S. Ct. at 1190–90. Courts have subsequently looked to *Staub* for guidance in explaining cat's paw liability in the Title VII context. *See Cook* v. *IPC Int'l Corp.*, --- F.3d ----, 2012 WL 739303, at *3 (7th Cir. Mar. 8, 2012).

The Seventh Circuit has not addressed whether the biased employee must be a supervisor, rather than a co-worker, but it has suggested in dicta that the distinction is not significant. Most recently, Judge Posner explained:

> In employment discrimination law the "cat's paw" metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action. So if for example the subordinate has told the supervisor that the employee in question is a thief, but as the subordinate well knows she is not, the fact that the supervisor has no reason to doubt the truthfulness of the accusation, and having no doubt fires her, does not exonerate the employer if the subordinate's motive was discriminatory.

*Cook* v. *IPC Int'l Corp.*, --- F.3d ----, 2012 WL 739303, at *3 (7th Cir. Mar. 8, 2012). The example's use of the word "subordinate," rather than "supervisor," undermines Koppers's argument that the employee with discriminatory animus must be a supervisor and not a co-worker. *See also Wallace* v. *SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) ("There is only one situation in which the prejudices of an employee, *normally a subordinate but here a coequal*, are imputed to the employee who has formal authority over the plaintiff's job. That is where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision." (emphasis added)); *Willis* v. *Marion Cnty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("As the district court recognized, *there can be situations in which the forbidden motive of a subordinate employee can be imputed to the employer* because, under the circumstances of the case, the employer simply acted as the 'cat's paw' of the subordinate." (emphasis added)). Moreover, if the biased employee's motive is imputed to the supervisor, then it would not matter whether the biased employee is another supervisor or, as here, a co-worker. In either scenario, a supervisor

who is an agent of the employer has caused an adverse employment action that is motived, in part, by discriminatory bias. *Compare with Staub*, 131 S. Ct. at 1193. Taking the foregoing into account, Johnson will not be precluded from asserting a claim based on a cat's paw theory of liability simply because O'Connell was a co-worker and not a supervisor.

Johnson must still present some evidence of O'Connell's discriminatory animus, however. *See Eiland* v. *Trinity Hosp.*, 150 F.3d 747, 751–52 & 752 n.1 (7th Cir. 1998) (summary judgment should be granted for employer where employee fails to provide evidence of discriminatory animus); *Shager*, 913 F.2d at 402 (considering evidence of bias before turning to analysis of cat's paw liability); *Palermo* v. *Clinton*, No. 08 CV 4623, 2011 WL 1261118, at *7–8 (N.D. Ill. Mar. 31, 2011). She argues that a jury could infer that O'Connell was motivated by discriminatory animus because O'Connell falsely claimed that she called him a "white motherfucker" and a "faggot insulin dick." Johnson asserts that because "people often accuse others of what they themselves are guilty," O'Connell's attribution of racial and gender-based epithets to Johnson demonstrates that he, in fact, was racist and sexist.

While it is true that ambiguous statements may provide evidence sufficient to survive a summary judgment motion, *see Shager*, 913 F.3d at 402, O'Connell's accusations do not suggest that he harbored animosity towards women or African-Americans. Johnson cites only one case where a court concluded that the nature of an employee's false accusations provided evidence sufficient to support an inference of discriminatory animus. In *Oakstone* v. *Postmaster General*, 332 F. Supp. 2d 261, 271 (D. Me. 2004), a female employee falsely accused her ex-boyfriend, also a co-worker, of assaulting her in a parking lot, pushing her down, and dragging her across the lot. She also claimed that he had subjected her to an abusive relationship and that she was

afraid of him. *Id.* The court rejected the employer's argument that these accusations did not constitute evidence of sex-based animus on the grounds that a jury could reasonably conclude that the accuser, "as a female, was making a charge against [her co-worker], as a male, [that] she knew would trigger an immediate and irreparable consequence for him, due to a stereotype about his gender." *Id.* at 271–72. The court's conclusion was premised on the legal principle, derived from Eleventh Circuit case law, that Title VII protects employees who are subjected to "gender-based" means for revenge in "failed romance cases." *Id.* at 271. Apart from the fact that *Oakstone* is not binding and does not apply the law of this circuit, O'Connell's accusation that Johnson called him a "white motherfucker" and a "faggot insulin dick" cannot be reasonably characterized as utilizing a "stereotype" about Johnson's gender or race. Johnson has cited no other conduct or comments that might indicate that O'Connell's animosity was motivated by discriminatory animus. Because Johnson has not cited any evidence that O'Connell's animosity was based on her race or gender, her cat's paw claim cannot succeed.

**II. Indirect Method**

Under the indirect method, Johnson must first make out a *prima facie* case for discrimination by showing that (1) she is a member of a protected class, (2) she met Koppers's legitimate expectations, (3) she suffered an adverse employment action, and (4) similarly situated employees who were not in the protected class were treated more favorably. *See Scaife*, 446 F.3d at 739. Koppers does not contest that the first and third elements of Johnson's *prima facie* case are satisfied. Once Johnson has established a *prima facie* case, there is a presumption of discrimination. "The burden must then shift to [Koppers] to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802. Johnson must

then rebut Koppers's rationale "by presenting evidence sufficient to enable a trier of fact to find that the . . . proffered explanation is pretextual," which gives rise to the inference of discrimination. *Peele* v. *Country Mut. Ins. Co.*, 288 F.3d 319, 326 (7th Cir. 2002).

Koppers argues that Johnson cannot demonstrate that she was meeting its legitimate expectations because she was disciplined five times prior to April 2008. There is no evidence, however, that Johnson was not adequately performing her duties as a lab technician at the time of her termination. In addition, where a plaintiff alleges that similarly situated employees were disciplined less harshly, usually the "legitimate expectations" prong and the "similarly situated" prong merge. *See Weber* v. *Univs. Research Ass'n, Inc.*, 621 F.3d 589, 594 (7th Cir. 2010) (citing *Pantoja* v. *Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840, 846 (7th Cir. 2007); *Peele*, 288 F.3d at 329)).

Johnson asserts that she was treated more favorably than O'Connell and Wass, two white male employees. To be similarly situated, O'Connell and Wass must be "directly comparable" to Johnson "in all material respects, but they need not be identical in every conceivable way." *Coleman* v. *Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (quotations and citations omitted). In cases involving differential discipline, a plaintiff must show that comparators (1) "were treated more favorably by the same decisionmaker," *id.* at 848 (quotation and citation omitted), (2) "were subject to the same standards of conduct," *id.*, and (3) "engaged in similar misconduct," which means that they "engaged in conduct of comparable seriousness." *Id.* at 851 (quotation and citation omitted). A plaintiff must also show that a comparator does not have "such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Weber*, 621 F.3d at 594 (quoting *Peele*, 288 F.3d at 330).

Even under this "flexible standard," *Coleman*, 667 F.3d at 846, it is clear that Wass is not an appropriate comparator. There is no evidence that Wass's alleged misconduct was reviewed by the same decisionmakers who were involved in disciplining Johnson. Nor was Wass's misconduct hostile or threatening.

Whether O'Connell was a similarly situated employee is a closer issue, although ultimately this comparison also fails. Johnson argues that O'Connell was treated differently after the 2003 glove and pen throwing incident, the 2006 death threats, and the 2007 radio incident. The 2003 glove and pen throwing incident did not involve misconduct of comparable seriousness. There is no evidence that either object was dangerous. The glove landed on the floor about a foot away from Johnson, and O'Connell immediately left the lab. Neither Johnson nor Gerba testified that the incident was threatening. O'Connell's actions may have been insubordinate and inappropriate, but the record does not support the conclusion that his misconduct was as threatening as Johnson's.

With respect to the 2007 radio incident, there is no evidence that O'Connell engaged in threatening misconduct that went undisciplined by Wagner. Johnson testified that O'Connell "turned down the radio and turned on the air. And I asked him why did he do it. . . . I don't really consider that, you know, an altercation." (Johnson Dep. at 121.) Moreover, both Johnson and O'Connell received the same discipline. Therefore Johnson cannot rely on the 2007 radio incident to show that O'Connell was a similarly situated employee.

O'Connell's threats to Johnson in 2006, on the other hand, were comparably serious to the conduct that gave rise to Johnson's termination in 2008. Both forms of misconduct violated Koppers's written prohibition on threatening behavior. Johnson and O'Connell do not need to

have broken the rule in the same manner in order to be similarly situated employees. *See Coleman*, 667 F.3d at 851 (plaintiff who told her psychiatrist she was having thoughts of killing her supervisor was similarly situated to two other employees who had recently threatened another employee at knife-point).

Johnson and O'Connell were disciplined under significantly different circumstances, however. Johnson does not dispute that she had engaged in one prior physical altercation – throwing a stapler when she became angry at a guard – prior to her termination. Because of the stapler incident, Johnson had been suspended without pay for ten days and given a written warning that future instances of similar misconduct would result in termination. O'Connell, on the other hand, had not engaged in prior threatening misconduct. As discussed above, the pen and glove throwing incident is not of comparable seriousness and does not violate the same workplace policy against threatening behavior. Because O'Connell, unlike Johnson, had not previously violated Koppers's policy against threatening misconduct, he is not an appropriate comparator. *See Weber*, 621 F.3d at 594 (employees not similarly situated because there was no evidence that they had violated relevant workplace policies with the same "reckless abandon" as plaintiff); *Amrhein* v. *Health Care Serv. Corp.*, 546 F.3d 854, 860 (7th Cir. 2008) (employees not similarly situated because, unlike plaintiff, they had not previously engaged in misconduct).

Johnson has also failed to demonstrate that O'Connell was treated more favorably by the same decisionmaker. "Under Title VII, a decisionmaker is the person responsible for the contested decision." *Coleman*, 667 F.3d at 848 (quotations and citation omitted). Gerba disciplined O'Connell after the pen and glove throwing incident in 2003. Gerba's testimony indicates that he might have reported the incident to Traczek, but Johnson does not argue that

Traczek was involved in the disciplinary decision. Gerba was also responsible for investigating O'Connell's misconduct in 2006, and the evidence indicates that he and Traczek then determined how to discipline O'Connell. Johnson's misconduct in 2008 was investigated by Wagner, who had replaced Traczek as plant manager. Although Wagner consulted with Traczek during his investigation of the incident, Johnson does not contest that Wagner was the supervisor who decided to convert Johnson's suspension into a termination.[6] (*See* Dkt #54, Pl.'s Resp. to Def.'s Stmt. of Facts ¶ 55.) Nor does Johnson attempt to demonstrate that Traczek, who was apparently consulted about both disciplines, was the person responsible for both decisions. (*See* Dkt. #54, Pl.'s Stmt. of Addt'l Facts ¶ 79.) On this record, the evidence is insufficient to support the inference that the same individual disciplined O'Connell in 2006 and Johnson in 2008. *Compare with Coleman*, 667 F.3d at 848 (same decisionmaker was responsible for both disciplines where supervisor had participated in investigations of plaintiff's misconduct as well as comparators' misconduct and had signed the letters authorizing the relevant adverse employment actions). Because Johnson and O'Connell are not similarly situated employees, Johnson has not established a *prima facie* case.

[6] Johnson instead argues that in order to be similarly situated, employees do not need to have the same supervisor so long as they are subject to the same policies and standards. The case she cites in support, *Gary* v. *Carrier Corp.*, No. 04 CV 161, 2006 WL 758456, at *7 (S.D. Ind. 2006) (Hamilton, J.), considered an employer's non-discretionary policy of requiring employees to clock out when they left for lunch. The court noted, however, that the requirement that employees share the same supervisor is important in cases where the adverse employment action is dependent on the judgment of one's supervisor. *Id.* at *7. More recently, in *Coleman*, a case involving termination for threatening misconduct, Judge Hamilton emphasized the importance of demonstrating that similarly situated employees were subject to discipline by the same decisionmaker. *See* 667 F.3d at 848. Johnson's claims deal with an employment decision that was dependent upon her supervisor's judgment and therefore the identity of the decisionmaker is significant to the court's analysis.

Moreover, Johnson cannot demonstrate that Koppers's stated reasons for her termination are a pretext for discrimination. Koppers has offered a legitimate, non-discriminatory reason for terminating Johnson – the pushing incident and her prior warnings regarding aggressive conduct. To establish that Koppers's reasons are pretextual, Johnson must present evidence "suggesting that [Koppers] is dissembling." *Coleman*, 667 F.3d at 852 (quoting *O'Leary* v. *Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011)). "The question is not whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reasons it has offered" as to why Johnson was terminated. *Id.* (quoting *O'Leary*, 657 F.3d at 635).

Johnson argues that there is a discrepancy between the facts of the April 28 incident as described in Johnson's termination letter and the facts described by Koppers's witnesses in these proceedings. She cites no specific examples. Presumably, Johnson is referring to the fact that her termination letter states that Johnson pushed O'Connell "into a wall *of the tar foreman's office*," whereas the Wells's testimony indicates that the push occurred in the hallway *outside* the office. This small difference does not undermine Koppers's assertion that Johnson was terminated because she aggressively pushed O'Connell.[7]

Johnson also attacks the accuracy of Koppers's investigation in numerous ways, arguing that (1) Wagner was wrong to reject Wright's theory that there was a conspiracy among various employees to fabricate a common story, (2) Wells's testimony cannot be credited because he needs eyeglasses and may have owed twenty-seven dollars to O'Connell, (3) Wells's testimony

[7] Johnson also argues that Koppers's stated reason for terminating her has changed because Koppers now asserts that she was terminated because she failed to heed prior disciplinary warnings, whereas her termination letter mentions prior conduct only "in passing." This argument mischaracterizes the record. Wagner's termination letter to Johnson explicitly references her prior misconduct in November of 2006. (*See* Dkt. #42-6 at KI0000895–06.)

cannot be credited because he has testified inconsistently as to whether Johnson pushed O'Connell with one hand, or two, and whether the push occurred while Johnson was exiting or entering Kenyatta's office, (4) Kenyatta's testimony cannot be credited because he is a convicted sex offender, and (5) Wagner's notes from his interviews with Kenyatta, Wells, and O'Connell indicate that each employee told a slightly different variation of the same story. Many of Johnson's arguments are based on information that was not available at the time of the investigation. To the extent that Johnson's arguments are based on facts from the relevant time period, they do not indicate that Koppers's stated reasons for terminating Johnson are a lie. The Seventh Circuit has repeatedly cautioned that "the actual issue is not whether [the employer's] account of events is correct, rather it is whether [the employer] honestly believed the report of its officers." *Jones* v. *Union Pacific R.R. Co.*, 302 F.3d 735, 744 (7th Cir. 2002); *see also Kariotis* v. *Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677–78 (7th Cir. 1997). Wagner's decision not to credit Wright's accusation is reasonable in light of his follow-up with Wells, O'Connell, and Kenyatta, who denied that they had altered their stories and said that they were instead discussing what steps to take when the police arrived. Wagner's decision to credit Kenyatta is also reasonable. Johnson does not argue that Kenyatta's prior conviction would be admissible impeachment evidence, *see* Fed. R. Evid. 609, or that it somehow suggests that Kenyatta was biased against her. Finally, the fact that the incident may not have occurred exactly as O'Connell alleged does not indicate pretext. *See, e.g.*, *Luster* v. *Ill. Dep't of Corr.*, 652 F.3d 726, 733 (7th Cir. 2011) ("[W]hether the incident occurred exactly as described by Cole does not affect the outcome here."); *Bodenstab* v. *Cnty. of Cook*, 569 F.3d 651, 657 (7th Cir. 2009) ("[O]ur only concern is the the honesty of [Cook County's] beliefs, and not whether

Bodenstab actually made the specific threats, as claimed by Wengeler." (quotations and citation omitted)). Here, the record supports the conclusion that Koppers conducted a thorough investigation and that its belief that Johnson had threatened and pushed O'Connell was reasonable. This, of course, is the opposite of pretext. *See Flores* v. *Preferred Tech. Grp.*, 182 F.3d 512, 516 (7th Cir. 1999) (while an employer need only supply an honest reason, not necessarily a reasonable one, "the more objectively reasonable a belief is, the more likely it will seem that the belief was honestly held").

Finally, Johnson argues that Wagner was biased against her and that he clearly did not believe O'Connell's accusations because he had previously "classified . . . O'Connell as a false accuser." In support she cites Wagner's July 2007 written verbal warning letter to O'Connell, which merely states in general terms that "[h]orse play, false accusations of others, verbal harassment, and any other type of disruptive behavior needs to stop immediately." (Dkt. #42-4.) The warning letter does not state that O'Connell made false accusations against Johnson. Moreover, Wagner testified that he included the reference to false accusations in the warning because he wanted to make sure that O'Connell understood that false accusations would be taken seriously. He never concluded that O'Connell made false accusations. Nor does the record support the conclusion that Wagner conducted his investigation of Johnson in a biased manner. Indeed, he interviewed Johnson twice during the investigation and based his termination decision upon the only incidents that had been witnessed by third parties.

Taking the foregoing into account, Johnson has failed to demonstrate that there is a genuine issue of material fact using the indirect method of proof. Koppers's motion for summary judgment must be granted and Johnson's motion must be denied.

**CONCLUSION AND ORDER**

For the reasons set forth above, Koppers's motion [#47] is granted and Johnson's motion [#39] is denied. This case is terminated.

Dated: May 25, 2012 ENTER: _____

JOAN HUMPHREY LEFKOW
United States District Judge

# United States District Court
## Northern District of Illinois
**Eastern Division**

Johnson

**AMENDED JUDGMENT IN A CIVIL CASE**

v.

Case Number: 10 C 3404

Koppers, Inc.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that that defendant's motion for summary judgment being granted, judgment entered in favor of defendant and against plaintiff.

Thomas G. Bruton, Clerk of Court

Date: 5/25/2012

/s/ Michael Dooley, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

| | |
|---|---|
| Marica R. Johnson<br><br>Plaintiff,<br><br>v.<br><br>Koppers, Inc. Defendant. | No. 10-cv-3404<br><br>The Hon. Joan H. Lefkow |

**PLAINTIFF'S NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Marica R. Johnson in the above named case hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on May 25, 2012. Plaintiff is proceeding *in forma pauperis* by Order of the Court (Dkt. Nos. 6 and 34, attached), and therefore no fee is believed due. Plaintiff's Seventh Circuit Docketing Statement accompanies this Notice of Appeal.

Dated: June 20, 2012

Respectfully submitted,

/s/ Robert P. Greenspoon

Robert P. Greenspoon
Michael R. La Porte
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Tel: 312-551-9500
Fax: 312-551-9501

Attorneys for Plaintiff, Marica R. Johnson by Appointment of the District Court

**FLACHSBART & GREENSPOON IS NOT COUNSEL OF RECORD IN THE COURT OF APPEALS; PLAINTIFF IS CURRENTLY *PRO SE* FOR HER APPEAL:**

Marica R. Johnson
7141 South Euclid Avenue
Chicago, Illinois 60649
Tel: 773-425-5028

*Pro Se* in the Court of Appeals for the Seventh Circuit, until further notice

**CERTIFICATE OF SERVICE**

The undersigned attorney of record certifies that service of the foregoing document has been made on June 20, 2012, via the Court's CM/ECF system based on its electronic filing, under Local Rules 5.5(a)(3) and General Order 09-014 Section X.E. In this manner, service has been made on all attorneys of record in this case.

/s/Robert P. Greenspoon
Robert P. Greenspoon

# Exhibit 4

KOPPERS

# Memo

**To:** Mike O'Connell

**From:** Richard Wagner

**CC:** Employee File, Joe Gerba, United Steelers Workers Local 7-91

**Date:** July 17, 2007

**Re:** Disciplinary Action – Written VERBAL Warning Letter

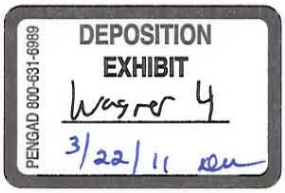
---

**WRITTEN VERBAL WARNING**

Personality conflicts between lab techs has resulted in a non-productive atmosphere in the lab. Horse play, false accusations of others, verbal harassment, and any other type of disruptive behavior needs to stop immediately. This disruptive action between you and other employees needs to stop before it escalates into physical violence.

As you are aware, Koppers has a zero tolerance for workplace violence, harassment and threatening behavior. We have an obligation to protect all employees. In addition, your actions have disrupted the work flow of the plant causing a loss of your productivity and the productivity of others.

As stated in Koppers Code of Conduct, it is management's responsibility to "provide a safe and secure workplace free from behavior or conduct deemed offensive or undesirable" and will do what is required to attain a safe atmosphere. This behavior will not be allowed in the future and will result in further disciplinary action. In addition, should we hear of any retaliation on your part as a result of this discipline, you will be subject to further disciplinary action.




1

KI0000741

# Exhibit 6

KOPPERS

Richard W. Wagner
Koppers Inc.
Carbon Materials and Chemicals
3900 South Laramie Avenue
Cicero, IL 60804-4523
Tel 708-222-3483
www.koppers.com

May 12, 2008

Via UPS To:

Ms. Marica Johnson
7141 South Euclid
Chicago, Il 60649

Re:Termination of Employment

Dear Ms. Johnson:

On April 30, 2008 you were suspended pending investigation into events which occurred on Monday, April 28, 2008 between you and Mr. Mike O'Connell, a co-worker assigned to the Stickney lab. Specifically, the Company investigated certain allegations made by Mr. O'Connell relating to your demeanor towards him on April 28 including:

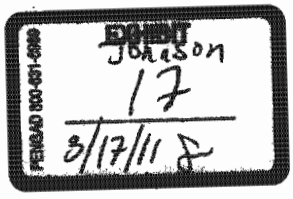
1.) throwing a log book at him and hitting him with it;
2.) shouting and behaving in an otherwise threatening manner; and
3.) aggressively pushing him, forcing him backward and into a wall of the tar foreman's office.

In conducting its investigation, the Company spoke with you, Mr. O'Connell and other individuals that may have had the opportunity to witness the events on afternoon of the incident. It appears to the Company, based on those discussions, that you were, in fact, behaving in an aggressive, hostile and threatening manner on the afternoon of April 28 and that you did push Mr. O'Connell into the wall of the tar foreman's office as alleged.

Your actions clearly violated the Koppers Code of Conduct which, among other things, commits to providing a workplace free from behavior or conduct deemed offensive or undesirable and forbids:

1.) disorderly conduct, including assault on another employee or customer, fighting at work, swearing, shouting, threatening behavior and other actions of an offensive nature;
2.) threatening or intimidating coworkers, security guards, customers or guests; and
3.) failure to wear assigned safety equipment or failure to abide by safety rules and policies.

A review of Company records reveals that this is not the first instance of threatening, intimidating, disruptive and abusive behavior that you have demonstrated during the course of your employment.




KI0000805

Since November, 2006 you have been trained, counseled, warned and suspended as a result of violations of the standards of conduct that Koppers rightfully has of its employees. You have been advised of the importance that Koppers places on maintaining a work place free from the disruptive influence of hostile, threatening and abusive behavior and warned that the continuation of such behavior would result in further disciplinary action including dismissal. Regrettably, those discussions and warnings have not resulted in the required change in your behavior.

Koppers considers safety to be a core value and no employee has the right to knowingly place his or her safety, or the safety of others, in jeopardy. Yet, this is precisely what you have chosen to do through the repeated and escalating nature of your altercations with others in the workplace.

The Company cannot condone such behavior and has elected to convert your suspension to discharge effective April 30, 2008. Your seniority has terminated in accordance with Article IV, Section 4(b) of the labor agreement and you no longer hold employment status under the terms and conditions of that agreement.

You are reminded that you are obligated to return any Company property which may be in your possession. Please contact me upon receipt of this letter to arrange for a mutually convenient time and place for the return of any such property.

Please do not hesitate to contact me with any questions.

Sincerely,

Richard W. Wagner

cc: J. Gerba, Quality Manager - Stickney
W. Owens, President USW Local 7-91

KI0000806

# Exhibit 9

11/26/07
R. Wagner

Mike O'Connell

- left message on office phone 1122AM Sun 11/25/07 requesting a short visit on Monday - "no big deal"

11/26 Approx. 0900 I stopped by lab to see O'Connell - he was calm but said that he was tired of Marica and having to deal with her. Koppers has had plenty of time to correct the problem, it's been going on for years and we have done nothing. I asked what has been going on and he brought up her excessive cell phone usage, not doing assigned duties such as transferring data from log sheets to log book for permanent record, drawing column lines in log books (Tar & PA). He stated he was filing an EEOC complaint 2 per day/week. I told him that sounded like poor job performance and we would talk to the supervisors & Joel Gerdes. He then said that she is still cussing him out. I asked when, he hesitated and said recently. I asked to be more specific. He again hesitated and said she's been doing it forever. I explained that in July (July 17th) she was disciplined and we can't go back in time forever.

He then admitted that she has been much better and under control. Ken Brubaker then entered lab and Mike asked him to describe Marica's behavior. He described an incident of how she brought in

# Exhibit 10

5/1/08
RWagner
1/2

Tim Wright Interviewed in my office 1630

1500 Tim brought in sample 1500
they were looking for book - Tarforce man wanted #'s
Mike said Marica Red book.

X (Chris on phone) called on radio said

1700 Mike said he couldn't find book. "Tell Marica to give me book." (told Timmy)
Tim @ sample board & logging in samples on cabinet
Tim saw a log book on desk near N door.

Mike went to look at it & said it wasn't it.

Marica was near cabinet @ tables. Mike @ Metlers

Marica didn't say a word when Mike looked @ book.

Marica then went to PA side.

(Note: Sean passed by Tim one way in)

1900 Timmy bringing up samples & All (X, Carter, Ronza, O'Connell, Fellers) sitting in lab. Carter talking & getting story together.

They were collaboration, everything against Marica.
Tim didn't like it. "I didn't like tone, it wasn't facts"

Later in men's Lockeroom Robert Carter Maxwell Payne, Tim Wright
Had conversation in locker room - argument ~~started~~
@ only state facts and I witness events





KI0000021

Tim Wright
2/2

1930 or 2000 Police arrived. Meeting occurred before police arrived

Tim Wright

# Exhibit 11

4/29/08
R Wagner

Interview w/ Xavier Kenyatta

1709 - Mike in front office looking for me, saw Steph Flynn. Monica had Angered 17152 confrontation, Xavier went to lab. Sharon took Cathi

1720 Monica was in smoking area & Xavier talked to her

1739 Mike left message on my home answering machine

Carla & Romza were in PA Lab when confrontation occurred

Xavier got
Marica @ N door
Mike @ S door & waste material
asking for sample results to book.
Give me book so I can do his job
Marica yelling & out of control.
Responding to Xavier - she said not calming down

She went to coffee pot in hallway but was yelling
at Xavier about not calming down.
Marica already told ~~Xavier~~ Chris & Migaki.
- Chris had called for results pre 5pm & Mike
answered. Marica was running test on
301 the for him. E

1730 Then went outside & smoked & drank coffee.
Asked her for book. She replied "Steven in lab & Mike
didn't need it." She already gave information to
Chris & Migaki."

1740 X went back to Tar foreman's office - Mike came over
Marica was still in lab & harassing him & carrying on.
She wouldn't give him book.
- X on phone with Chris.
- Marica said everything was good on 301 the Tar foreman's office heard
Mike & X went to coffee pot.

Mike left + walked past her in hallway.
(Sam was cleaning hallway at entrance)

Marisa still in doorway talking to X. (½ speed) slowed down some.

Few seconds later Marisa left + caught up to Mike + shoved him out of way. (SAM (partial) witnessed) while in hallway area.

Mike came back in + reported to X that she pushed him out of way. Mike was relatively calm but said he was calling police.

Marisa continued up front + X didn't see her again last night.

Mike called police.

1934 Wayne Dixon called me

1937 Latoya called me that police were to plant. } cellphone log

Stickney - #208-02096
took incident report + told him if he wanted her arrested he would have to go to station.
- Ronte Carter also present + called by Mike to attend as witnesses.
O'Connell said he would be back at 300 Tues 4/29/08

# EXHIBIT E

KOPPERS INDUSTRIES

Koppers Industries, Inc.
3900 S. Laramie Avenue
Cicero, IL 60804

Telephone: (708) 656-5900
FAX: (708) 656-6079

| | | | |
|---|---|---|---|
| **TO:** | Marica Johnson | **FROM:** | Mark A. Cilley |
| **LOCATION:** | Stickney | **LOCATION:** | Stickney |
| **SUBJECT:** | Warning Letter | **DATE:** | 8/10/00 |

At approximately 1229 hours on this date, I observed you smoking in the hourly lunch room. As you are aware, this is a non-smoking area and smoking is not allowed.

This letter is a warning that smoking in this area or any other area not designated as a smoking area will not be tolerated. If future infractions of the smoking policy are observed, disciplinary action will be taken.

Cc: D. Boyd
J. Gerba
M. Mancione
Employee File
Union (PACE 6-91)

Removed from file on 9-26-00.

**YOU WILL ACHIEVE THE LEVEL OF SAFETY THAT YOU DEMONSTRATE YOU WANT TO ACHIEVE**

# EXHIBIT D

TO: Marica Johnson

FROM: Joseph M. Gerba

DATE: July 16, 1999

SUBJECT: Corrective Action

On Sunday, July 11, 1999, you were working as a laboratory technician assigned to the phthalic anhydride lab. At approximately 8:10 a.m., the PAA Plant Superintendent entered the laboratory. He found you asleep at the desk adjacent to the LECO Sulfur analyzer. The lights in the lab were turned off, and the samples that were to be analyzed at 7:00 a.m. were undisturbed, still sitting on the hot plate where they were placed by the processman. At approximately 8:20 a.m., the tar plant shift supervisor entered the laboratory, and Mr. Vesely asked the supervisor to observe the situation in the phthalic anhydride lab, which Mr. Savare did.

One of the responsibilities of a laboratory technician is to analyze samples in a timely fashion, and report those results to the control room in order to ensure product quality. Sleeping on the job is a dischargeable offense and will not be tolerated. However, to be consistent with similar instances in other areas of the plant, you are suspended without pay for ten (10) workdays. The dates of the suspension will be July 26th through August 7th. You are expected to return to work on your regularly scheduled shift on Sunday, August 8th.

Please be aware that future occurrences of this nature will result in discharge.

Joseph M. Gerba

cc: M. Mancione
Employee File
PACE Local 7-91

# EXHIBIT F

# Policy



Code of Conduct: Workplace Conduct
**General Rules of Conduct on the Job**

Written by: Compliance
Approved by: Compliance Officer

**Purpose:**

This Policy sets out a series of general common sense "do's" and "don't." These rules not only tell us what to do (and what not to do); they also set the tone for the way we conduct ourselves on the job.

**Scope:**

This Policy applies to all employees, officers, directors and other personnel of Koppers Holdings Inc., Koppers Inc. and all North American subsidiaries of Koppers Inc. ("Koppers" or the "Company"). The terms "employee" or "personnel" as used in the Policy, are intended to encompass all employees, officers, directors and other personnel of Koppers.

**Policy Summary:**

*Conduct that interferes with operations, that discredits Koppers or that is offensive to customers or co-workers will not be tolerated. Each employee should conduct himself/herself in a manner conducive to the efficient operation of Koppers and for the benefit and safety of all staff. The General Rules of Conduct are not exhaustive. They are intended to serve as guidance of the standards of behavior expected. All employees have a responsibility to familiarize themselves with these Rules.*

**Policy:**

1. Expected Conduct. The purpose of having Rules of Conduct is to maintain a fair, efficient and safe working environment for all staff. The Company expects and will enforce reasonable standards of conduct and performance from Koppers employees. Employees are expected at all times to conduct themselves in a positive manner so as to promote the best interests of the Company. Such conduct includes:

   a. Reporting to work punctually as scheduled and being at the proper work location, ready for work, at the assigned starting time;

   b. Giving proper advance notice whenever unable to work or report on time;

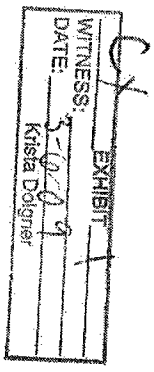
   c. Complying with all safety, environmental and security regulations, policies and procedures;

   d. Smoking only at times and places not prohibited by Company rules, local ordinances or customers;

   e. Wearing clothing appropriate for the work being performed, and appropriate for the location and circumstance;

   f. Maintaining work place and work area cleanliness and orderliness;

   g. Treating all customers and co-workers in a courteous manner;



h. Refraining from behavior or conduct deemed offensive or undesirable, or which is contrary to the Company's best interests;

i. Performing assigned tasks efficiently and in accord with established quality standards;

j. Cooperating with Company investigations; and

k. Adhering to the Code of Conduct of the Company and other Company policies.

2. Prohibited Conduct. The following conduct is prohibited and, in appropriate circumstances, will subject the employee involved to disciplinary action, up to and including immediate termination of their employment:

a. The use of abusive or inappropriate, obscene or offensive language;

b. Insubordination or the refusal by an employee to follow management's instructions concerning a job-related matter;

c. Disloyalty or breach of security;

d. Dishonesty;

e. Falsifying a qualification which is a stated requirement of employment or promotion;

f. A criminal offense arising from or related to the employee's work for the Company;

g. A criminal offense committed outside working hours which, in the Company's reasonable opinion, adversely affects either the Company's image or interests, or the employee's suitability for the type of work performed, or the employee's acceptability to other members of staff;

h. Disorderly conduct, including assault on another employee or customer, fighting at work, swearing, shouting, threatening behavior and other actions of an offensive nature;

i. Serious negligence which causes (or is capable of causing) unacceptable loss, damage or injury;

j. Rudeness or other unacceptable behavior to customers;

k. Gambling on Company or customer property;

l. Threatening or intimidating co-workers, security guards, customers, or guests;

m. Offensive or inappropriate horseplay, pranks, or practical jokes;

n. Unauthorized sleeping on the job;

o. Failure to wear assigned safety equipment or failure to abide by safety rules and policies;

p. Violation of any other Company policy or the Code of Conduct.

Examples are Not All-Inclusive. The examples in Item 2 above are illustrative of the type of behavior that will not be permitted, but are not intended to be an all-inclusive listing. Any violation of the Company's policies or any conduct considered inappropriate or unsatisfactory may subject the employee to disciplinary action.

**No. 12-2561**

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

| | |
|---|---|
| MARICA R. JOHNSON,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>KOPPERS, INC.,<br><br>Defendant-Appellee. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>Case No. 1:10-cv-03404<br><br>The Honorable Joan H. Lefkow |

## Circuit Rule 30(d) Statement

I, the undersigned, counsel for the Plaintiff-Appellant, Marica R. Johnson, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: November 8, 2012

## Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Marica Johnson, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 8, 2012, which will send notice of the filing to counsel of record.

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: November 8, 2012