No. 12-2561
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| MARICA R. JOHNSON<br>Plaintiff-Appellant,<br><br>v.<br><br>KOPPERS, INC.<br>Defendant-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from a Judgment of the<br>United States District Court for the<br>Northern District of Illinois,<br>Hon. Joan Humphrey Lefkow,<br>United States District Judge |

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# APPELLEE KOPPERS, INC.'S RESPONSE BRIEF

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ORAL ARGUMENT REQUESTED

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UNITED STATES COURT OF APPEALS
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| MARICA R. JOHNSON<br>Plaintiff-Appellant, | ) | Appeal from a Judgment of the |
| | ) | United States District Court for the |
| v. | ) | Northern District of Illinois, |
| | ) | Hon. Joan Humphrey Lefkow, |
| KOPPERS, INC.<br>Defendant-Appellee. | ) | United States District Judge |

## DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellee, Koppers, Inc., 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:
   Koppers, Inc.

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

   Faegre Baker Daniels, LLP, 311 S. Wacker Dr., Ste. 4400, Chicago, IL 60606

3. 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:

   Wildman, Harrold, Allen & Dixon, LLP, 225 W. Wacker Dr., Ste. 2800
   Chicago, IL 60606

4. If the party or amicus is a corporation:
   a. Identify all its parent corporations, if any; and
      Koppers Holdings, Inc.

   b. list any publicly held company that owns 10% or more of the party's or amicus' stock:
      Koppers Holdings, Inc.

/s/Stacey L. Smiricky
Date: December 10, 2012

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No


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## JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

## STATEMENT OF THE ISSUES

I. Whether the district court properly granted Koppers's motion for summary judgment and denied Plaintiff Marica Johnson's motion for summary judgment on a "cat's paw" theory where Johnson submitted no evidence that (1) her co-worker Michael O'Connell had a discriminatory animus against her race or sex; or (2) any action taken by O'Connell proximately caused her termination.

II. Whether the district court properly granted Koppers's motion for summary judgment under the indirect method where Johnson submitted no evidence that she was meeting the legitimate expectations of Koppers, that O'Connell was similarly situated, or that Koppers's stated reason for terminating her was pretextual.

## STATEMENT OF THE CASE

The Appellant has adequately set forth the necessary information for the statement of the case.

## STATEMENT OF FACTS

Koppers, Inc. is a chemical company that manufactures carbon compounds and commercial wood treatment products. (R481.) Koppers has a facility in Stickney, Illinois. (*Id.*) Marica Johnson, an African American female, worked at Koppers's Stickney plant from 1995 until her termination in May 2008. (R481-82, 489.)

Johnson was a union employee who, for eight to ten years of her employment at Koppers, worked in a laboratory in the production area of the Stickney plant. (R481-82, 486). Approximately 87 people worked in the production area at the time of Johnson's termination; the racial composition of employees was about 50% Caucasian, 30-40% African American, and the remaining employees were Hispanic. (R575.) Johnson was one of approximately ten females. (*Id.*)

Though Johnson performed her work at a technically proficient level, she had a history of disciplinary problems, including physical altercations, as further described below. (R482, 484, 488.) During the latter part of her employment at Koppers, Johnson was supervised by Joe Gerba, and she also reported to a shift supervisor. (R510, 578.) Gregory Traczek was Plant Manager until 2007, at which time he was promoted to operations manager and transferred to Pennsylvania. (R578-79.) Richard Wagner was Plant Manager from 2007 through the time of Johnson's termination. (R569.) During Wagner's tenure, he generally investigated and instituted discipline for violations of workplace policies in the area of the plant where Johnson worked, and direct managers sometimes handled lesser offenses in consultation with Wagner. (R578).

Johnson had a co-worker, Michael O'Connell, who also worked as a lab technician at the time of her termination. (R485.) O'Connell is a Caucasian male. (*Id.*) They normally worked different shifts but with some overlap. (*Id.*) Johnson and O'Connell did not like one another. (*Id.*)

Koppers's Code of Conduct

Johnson was aware that Koppers had in place several policies that prohibited workplace violence, harassment, and other inappropriate behavior. (R482.) In fact, Koppers had a written Code of Conduct, which included three policies relevant here: General Rules of Conduct on the Job, Workplace Violence, and Harassment. (A48-50; R625-26, 628-31.)

First, Koppers's policy for General Rules of Conduct on the Job contained a statement of "Expected Conduct," which required: "[r]efraining from behavior or conduct deemed offensive or undesirable, or which is contrary to the Company's best interests." (A49.) It also contained a statement of "Prohibited Conduct," which prohibited: "[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.*)

Koppers's policy on Workplace Violence provided: "Any act of violence or threat of violence by a Koppers's employee is expressly prohibited." (R625.) The policy explicitly barred "fighting or assaulting another person," and "aggressive, harassing, intimidating, or hostile words, gestures, expressions, or acts that create a reasonable fear of physical harm to another person or that subject another person to emotional distress." (*Id.*) The policy provided for the prompt investigation of "[a]ll reported or suspected occurrences or acts of violence or threats of violence," and "[w]here such conduct is determined to have occurred, Koppers will take

appropriate disciplinary action including, without limitation, immediate termination of the employee's employment." (*Id.*) Further, the policy requires an employee to report to his or her immediate supervisor or to the Koppers's Hotline if any employee "believes he or she may be the target of violence or threats of violence or … is aware of violent or threatening conduct by another individual that could result either in injury to a Koppers's employee or in the destruction of property." (*Id.*)

Koppers's Harassment policy states, "It is the policy of the Company to maintain a working environment free from sexual, racial, age-based, religious, ethnic, disability-based, national origin-based, color-based or any other form of forbidden harassment of any Company employee or applicant for employment." (R628.) The policy expressly forbids such harassment and provides for the investigation of reported or reasonably suspected occurrences of forbidden harassment. (*Id.*). "Where forbidden harassment has occurred, the Company will take appropriate disciplinary or other corrective action, up to and including termination, and no individual who has initiated or cooperated with an investigation of alleged forbidden harassment will be subject to retaliation." (*Id.*).

Disciplinary history

Before November 2006, Johnson received discipline for various problems that are not material to this case. Johnson's first physical altercation ("the Stapler Incident") occurred in November 2006, when she fought with a security guard. (R484.) She went to the guard shack to pick up food that she and a co-worker had

ordered, but the guard, an African American male, told her not to take the food. (*Id.*) She walked in the guard shack behind the counter without authorization, retrieved the food, and started to walk away. (R484, 610.) She turned around, went back into the guard shack, and at one point, pushed the guard. (*Id.*) She told the guard, "I'm going to bust your head," and called him a "raggedy mouth bitch." (R484.) During the altercation, Johnson wielded a stapler at the guard, which prompted the guard to pick up a phone – apparently to wield in response to Johnson's stapler rather than to call anyone. (A125, R484.) Angry and upset, Johnson threw the stapler, which landed on the floor. (*Id.*) A security camera caught the incident on tape. (R484.)[1]

Plant Manager Traczek investigated the Stapler Incident and interviewed Johnson at length. (R485.) At the conclusion of the investigation, Johnson received a disciplinary memo, entitled "Notice of Suspension and Final Warning." (R661.) The memo briefly recounted the incident, concluding that although it was unclear as to who made the first physical contact, Johnson's "actions prolonged the situation and included a physical threat." (*Id.*). Johnson was suspended for ten days, a punishment that she admitted was appropriate. (*Id.*; A126.)

Johnson's next disciplinary incident took place less than a year later in July 2007 ("the Radio Incident"). One day, Johnson was working in the lab with the radio on, and O'Connell came in. (R485.) He turned down the radio and turned on the air-conditioning, and then a verbal argument with Johnson ensued. (R485-86.) Johnson

[1] The guard was a contractor at the Stickney plant, and his supervisor at his agency was responsible for his discipline. (R646.)

asked O'Connell why he was messing with things in the lab when it was not time for his shift. (R486.) O'Connell reported to management that during the argument Johnson said something like "old mother-fucker, I'll get you," and called him a "faggot insulin dick" (O'Connell was diabetic) and a "white motherfucker." (R486.) Johnson denies making these statements. (*Id.*)

Wagner, who had taken over as Plant Manager upon Traczek's promotion in 2007, determined that both parties were at fault. (*Id.*; R569, 578-79.) Based upon Johnson's previous record and the severity of accusations of racial statements, Wagner concluded that Johnson should receive a higher level of discipline than O'Connell. (R486.) Johnson received a written warning letter stating that Koppers was concerned that she was exhibiting disruptive and abusive behavior that had caused other employees to feel uncomfortable and intimidated. (R486.) O'Connell received a written verbal warning. (A143.)[2]

Wagner met with Johnson after the incident and warned her that if she engaged in disruptive and abusive behavior again, she would be fired. (R486.) Johnson's union filed a Grievance Report on her behalf, claiming that she should not have received a written warning letter because Koppers did not get Johnson's side of the story before issuing the discipline. (*Id.*) Pursuant to a grievance adjustment between the union and Koppers, the written warning letter was reduced to a memo reminding Johnson of her work obligations and employment status. (R487.) O'Connell's discipline was also reduced to a memo. (*Id.*)

[2] A "written" verbal warning consists of written documentation that a verbal warning was given to the employee. (R583.)

Johnson's termination

On April 28, 2008, Johnson worked the first shift and stayed to work overtime. (R487.) O'Connell's shift started, and he asked co-worker Tim Wright to have Johnson give the lab's log book to O'Connell. (*Id.*) Shift supervisor Xavier Kenyatta, an African American male, came into the lab to ask Johnson a question and witnessed O'Connell shouting, "I don't know where the log book is, and she won't give me the book." (*Id.*) Johnson told O'Connell, "You don't tell me what to do, you're not my boss." (*Id.*) According to O'Connell, Johnson threw the logbook at O'Connell and hit him with it. (*Id.*) Johnson denies throwing the log book. (*Id.*)

Later that day, Kenyatta called Johnson into the foreman's office to speak on the phone with another supervisor whom Johnson had attempted to contact earlier about the specifications on the tank she had been testing. (R488.) As Johnson entered the foreman's office, O'Connell was leaving. (*Id.*) O'Connell stated that Johnson intentionally shoved him against the wall. (R688.) Johnson claims that they merely brushed shoulders. (R488.) Sam Wells, an African American male employed by an outside company to work as a janitor at the Stickney plant, also saw Johnson shove O'Connell. (*Id.*) After Johnson left for the day, O'Connell filed a police report. (*Id.*)

Wagner conducted an internal investigation of the logbook and shoving incident; Johnson was suspended pending the outcome of the investigation. (R489.) Wagner interviewed nine individuals – everyone who he thought knew or might know anything about the incidents: Johnson and O'Connell, the janitor Wells, the shift supervisor Kenyatta, the lab co-worker Wright, Johnson's manager Gerba,

former Plant Manager Traczek, and Kevin Janda, a human resources representative. (*Id.*; A152). Aside from Johnson and O'Connell, Wagner credited the statement of the one person who witnessed the shoving incident – Wells told Wagner that he saw Johnson deliberately push O'Connell. (R489.) Kenyatta, as the shift supervisor, had witnessed Johnson's behavior in the lab that day and specifically told Wagner that Johnson was totally insubordinate and out of control and that she needed to be terminated. (*Id.*) He reviewed a security video that Johnson thought would corroborate her contentions, but due to the camera's position, the video was not useful. (R603). Wagner interviewed Traczek regarding the 2006 Stapler Incident that occurred during Traczek's tenure as Plant Manager, and Wagner obtained and reviewed the security video showing Johnson throwing the stapler. (R579-80, 610.)

Based on his investigation, Wagner converted Johnson's suspension into a termination, and sent Johnson a termination letter dated May 12, 2008. (R489-90.) The letter recounts O'Connell's allegations that Johnson: (1) threw a logbook at him and hit him with it; (2) shouted and behaved in a threatening manner; and (3) aggressively pushed him, forcing him backward and into a wall of the tar foreman's office. (R688.) Based on Johnson's conduct witnessed by persons other than O'Connell, the letter stated that the company had investigated the allegations and concluded that Johnson behaved in an aggressive, hostile, and threatening manner, and pushed O'Connell into the wall of the tar foreman's office as alleged. (*Id.*)

Wagner did not make a finding "one way or the other" that Johnson had thrown the logbook at O'Connell because no one else had witnessed it. (A151; R490.)

The letter identified that Johnson had violated the Koppers Code of Conduct, and stated that a review of company records reveals that "this is not the first instance of threatening, intimidating, disruptive and abusive behavior," during her employment. (R688.) It further stated that since November 2006 Johnson 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 "[r]egrettably, those discussions and warnings have not resulted in the required change" in Johnson's behavior, and, accordingly, Koppers was terminating her employment. (R689).[3]

Johnson's lawsuit

Johnson filed suit against Koppers alleging sex and race discrimination in violation of Title VII and race discrimination in violation of 42 U.S.C. § 1981. The parties proceeded through discovery. Due to difficulties in obtaining O'Connell's deposition, the parties stipulated that they would not call him as a witness at trial and further stipulated that, "[n]either party shall comment in any way before the jury on the fact that Mr. O'Connell was not deposed or is not testifying or a witness

[3] Johnson's statement of the facts claims that the 2007 Radio Incident "factored in [to the termination] even though … the union grievance ultimately reduced it to a memorandum, which Koppers does not consider discipline." The termination letter mentions only that "since November 2006" – the time period that began with the Stapler Incident – Johnson had been counseled, warned, etc. regarding violations of Koppers's Code of Conduct. It does *not* expressly mention the Radio Incident, Wagner did not testify that the Radio Incident was a factor, and there is no evidence Koppers considered the Radio Incident in deciding to terminate Johnson. (R610, 689.)

at trial." (A191-92). The parties filed cross-motions for summary judgment. Koppers argued that Johnson failed to show discrimination based on the direct and indirect methods of proof. (R440-47.) Johnson argued that she proved discrimination under the direct method, using the "cat's paw" theory to claim that O'Connell harbored a discriminatory animus and convinced Wagner to terminate Johnson. (R150-52.)

The district court denied Johnson's motion and granted Koppers's motion. (R1194.) Johnson moved for reconsideration, asserting, among other things, that the court had made two factual errors that she contended should change the court's analysis of comparators under the indirect method, and that O'Connell's accusations that Johnson had called him a "faggot insulin dick" and a "white motherfucker" was evidence of discriminatory animus because he was "projecting" his racial and sex bias onto her. (R1214-20.) The court issued an amended opinion, correcting the two facts in Johnson's favor but not changing the outcome of the decision. (A1-23; R1227-30). The court found that Johnson had not presented evidence of O'Connell's discriminatory animus under the "cat's paw" theory. (A11-15.) Further, the court concluded that Johnson had not demonstrated that O'Connell was similarly situated to Johnson under the indirect method of proof because O'Connell had not engaged in prior threatening misconduct and was not treated more favorably by the same decisionmaker. (A15-22.) The district court entered a final order granting Koppers's motion for summary judgment and denying Johnson's motion. (A23.) Johnson appealed from that order. (A26.)

## SUMMARY OF THE ARGUMENT

The district court's decision granting Koppers's motion for summary judgment should be affirmed on the direct and indirect methods of proving discrimination. Johnson was terminated for her disciplinary history that included repeated instances of physical violence and threatening behavior. Johnson's evidence of discrimination was insufficient across the board. The absence of evidence supporting Johnson's claims cannot be cured by making broad arguments on appeal without evidentiary support (*e.g.* "Koppers has structured a workplace where the transgressions of white men were not recorded." Br. at 15).

On the direct method of proof, Johnson has asserted a "cat's paw" theory, claiming that her co-worker Michael O'Connell's alleged discriminatory animus resulted in her termination. The district court properly concluded that there is no evidence to support Johnson's claim of discriminatory animus. Instead, Johnson relies on speculation of O'Connell's alleged discriminatory animus because O'Connell had once reported to management that *she* called *him* names – a "white motherfucker" and a "faggot insulin dick." She then describes the psychoanalytical theory of projection (a theory waived by her failure to raise it until her motion for reconsideration) and makes a major leap in logic: she contends that the district court should have looked at her denial that she called O'Connell those names and inferred, with no other evidence to support this inference, that O'Connell was projecting hidden racial and gender-based animosity. Such an inference is contrary to established law that the non-moving party cannot defeat summary judgment by making speculative inferences about an individual's state of mind. Thus, Johnson

presented no evidence showing O'Connell had hidden racial and gender-based animosity.

In addition, Johnson failed to prove that O'Connell's alleged discriminatory animus was the proximate cause of her termination. Plant Manager Wagner conducted an extensive investigation of the Shoving Incident of April 28, 2008. Once the investigation was complete, Wagner terminated Johnson, crediting only those allegations that were supported by third-party witnesses (from whom there is no evidence of bias). The witnesses confirmed that Johnson had shoved O'Connell and that her behavior had been outrageous and threatening that day. Johnson violated Koppers's written Codes of Conduct on this day and through her prior disciplinary history, which was the proximate cause of her termination. Thus, the district court correctly found Johnson had not sustained her burden on the direct theory of discrimination to withstand summary judgment.

Likewise, the district court properly determined that Johnson did not present sufficient evidence to sustain her burden on an indirect theory. She did not set forth a prima facie case under the indirect method because she could not demonstrate that, given her disciplinary history, she was meeting the legitimate expectations of Koppers. Further, she did not demonstrate that O'Connell was a similarly situated individual who was treated more favorably than she was. As the district court correctly concluded, O'Connell had an important difference in his disciplinary history (no prior threatening behavior) and was disciplined by different individuals.

Finally, Johnson has no evidence that would suggest Koppers's decision to terminate her was pretexual.

For these reasons, the Court should affirm the district court's grant of summary judgment in Koppers's favor and denial of Johnson's motion.

## ARGUMENT

### Standard of review

This Court reviews the district court's decision to grant summary judgment in favor of Koppers de novo. *Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012). Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)). On appeal from cross-motions for summary judgment, this Court construes inferences in favor of the party against whom summary judgment was granted, *Davis v. Time Warner Cable of S.E. Wisc., L.P.*, 651 F.3d 664, 671 (7th Cir. 2011), but that "does not extend to drawing inferences that are supported by only speculation or conjecture." *Harper*, 687 F.3d at 306 (internal quotation marks omitted). Instead, "[a] genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Id.* (citing *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 640–41 (7th Cir. 2008)).

## I. The district court properly determined that Johnson failed to provide evidence of discrimination under the direct method of proof.

An employee alleging discrimination under Title VII or § 1981 may proceed via the direct or the indirect method of proof. *Harris v. Warrick County Sheriff's Dept.*, 666 F.3d 444, 447 (7th Cir. 2011). Under the direct method of proof, the plaintiff must demonstrate "either an acknowledgment of discriminatory intent or circumstantial evidence that provides the basis for an inference of intentional discrimination." *Overly v. KeyBank Nat. Ass'n*, 662 F.3d 856, 865 (7th Cir. 2011).

Without any evidence of bias by Wagner, the decisionmaker, Johnson asserted a cat's paw theory of liability. "Cat's paw" refers to a fable, in which "a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190 n.1 (2011). Under the cat's paw theory, "if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action," then the employer can be held liable for discrimination. *Id.* at 1194; *see also Harris*, 666 F.3d at 448. If the employer can show that the person who performed the termination "had a lawful motive uncontaminated by the monkey that would have led the supervisor to fire the employee even without the monkey's interference," the employer is not liable. *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012).

Johnson claims that O'Connell (the monkey in this fable) induced Wagner (the cat) to terminate Johnson due to O'Connell's alleged discriminatory animus. Johnson's theory fails on each level. First, Johnson fails to demonstrate any evidence of O'Connell's discriminatory animus. Second, she adduced no evidence that any action by O'Connell proximately caused Wagner to terminate her.

### A. The district court properly concluded that Johnson failed to prove that O'Connell harbored a discriminatory animus.

The district court correctly concluded that Johnson was unable to point to any evidence of O'Connell's discriminatory animus on summary judgment. Her "cat's paw" method of proving discrimination fails for three reasons. First, the district court properly determined that her purported evidence of O'Connell's discriminatory animus "[did] not suggest that he harbored animosity towards women or African Americans." (A14.) Second, the "projection" theory she asserted would have required evidence from an expert, which Johnson made no effort to procure. Third, Johnson waived the "projection" theory by first raising it in her motion for reconsideration.

#### 1. The district court correctly determined that Johnson's proffered evidence did not support her theory.

Johnson cannot prevail on her "cat's paw" theory because she did not adduce evidence of O'Connell's alleged discriminatory animus. On reconsideration, she raised the psychoanalytical theory of "projection," citing nothing more than a Wikipedia article on the subject. (R1220). She argued that O'Connell's report that

*she* called *him* a "white motherfucker" and "faggot insulin dick" was evidence that *he* harbored racial or gender animosity toward *her*. (*Id.*).

Johnson characterizes the district court opinion as embracing – or at least not rejecting – this theory. Br. at 18-19. But the court *did* reject her theory, at least based on the evidence in this case. The court's amended opinion distinguished the only case she cited (a district court case from Maine involving a failed workplace romance, not cited in her appellate brief). The court acknowledged the well-settled proposition that sometimes "ambiguous statements" can be sufficient to survive summary judgment in discrimination cases. (A14). The court concluded, however, that Johnson "ha[d] not cited to any evidence that O'Connell's animosity was based on her race or gender, [and, thus,] her cat's paw claim cannot succeed." (*Id.*). Before Johnson "can benefit from a favorable view of evidence, [s]he must first actually *place* evidence before the courts." *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010) (emphasis added). The court properly concluded that the only evidence placed in front of the court – that O'Connell said Johnson called *him* names – did not suggest that O'Connell "harbored animosity towards women or African-Americans." (A14).

Johnson cites to *Shager v. Upjohn*, 913 F.2d 398, 402 (7th Cir. 1990), for the proposition that "the task of disambiguating ambiguous utterances is for trial, not for summary judgment." Br. at 19. The evidence in *Shager* is of a completely different character than Johnson's evidence. Shager, who asserted age discrimination, placed in evidence ambiguous statements that nonetheless could be

construed as "direct evidence of hostility to older workers," such as a supervisor's statements that "[t]hese older people don't much like or much care for us baby boomers, but there isn't much they can do about it"; "the old guys know how to get around things"; and "It is refreshing to work with a young man with such a wonderful outlook on life and on his job." *Id.* at 400, 402. The statements were accompanied by evidence that Shager's job deficiencies had been exaggerated while excuses were made for the deficiencies of younger workers. *Id.* at 402. These are the types of ambiguous statements and actions that need to be "disambiguated" at trial. Johnson has no evidence of O'Connell making statements in the workplace or anywhere else that were racially charged or that evidenced a bias against women, no evidence that he showed any bias toward any of the African Americans or women that worked in the Stickney plant and no evidence that he even told off-color jokes.

With nothing else to support her argument, Johnson seeks this Court to make an inference to which she is not entitled. Johnson hopes to link the fact that she denies calling O'Connell names with the existence of a psychoanalytical theory called projection to create a speculative inference about O'Connell's state of mind – without any other evidence that would point to the existence of a discriminatory animus on O'Connell's part. But "a plaintiff cannot thwart summary judgment by asking a court to make inferences based on flights of fancy, speculations as to the defendant's state of mind, hunches, intuitions or rumors about matters remote from that experience." *Kodish v. Oakbrook Terrace Fire Protection Dist.*, 604 F.3d 490, 507-08 (7th Cir. 2010). A reasonable inference would be that O'Connell did not like

Johnson, but Johnson assigns error to the district court for not making a speculative inference about O'Connell's state of mind that was otherwise unsupported by the evidence. *Cf. Kodish*, 604 F.3d at 508 (noting that an inference of anti-union animus was warranted when the plaintiff presented concrete evidence of anti-union comments the individual made in other contexts).

Johnson also suggests that the parties' agreement that O'Connell would not testify at trial leaves the jury with only one option, to infer discriminatory animus. (Br. at 19-20.) In fact, she claims that she should have prevailed on summary judgment simply due to the fact that O'Connell did not testify to counter her claims that he was biased. (Br. at 20, n.1.) As explained above, Johnson is not entitled to such an inference because she did not adduce any evidence to support it, which the district court concluded in its amended order that explicitly addressed the "projection" theory. (A15). Furthermore, Johnson herself participated in the decision not to call O'Connell as a witness at trial or "comment in any way before the jury on the fact that O'Connell was not deposed or is not testifying or a witness at trial." (A191-92). Johnson cannot now take advantage of her own failure to pursue his testimony.

Courts in other similar contexts have rejected the notion that a witness's unavailability creates a presumption in favor of the plaintiff. *See, e.g., Bucalo v. Shelter Island Un. Free Sch. Dist.*, 691 F.3d 119, 132 (2d Cir. 2012) (rejecting plaintiff's argument in an age discrimination case that she was entitled to judgment as a matter of law under an indirect theory because the decisionmaker had been

unavailable to testify at trial as to a nondiscriminatory reason for not hiring her). Johnson's "cat's paw" theory fails because she did not provide any evidence that O'Connell had discriminatory animus.

### 2. Johnson's "projection" theory cannot be raised without expert testimony, and, therefore, it should be disregarded.

Johnson raised a contention that O'Connell was "projecting" but failed to provide any expert testimony during discovery to support this contention. In fact, the only support she had for this theory was a Wikipedia post that she cited in her motion for reconsideration. Evidence offered to support or oppose summary judgment must be admissible at trial. *Johnson v. Holder*, No. 12-1703, --- F.3d ----, 2012 WL 5457517, * 2 (7th Cir. 2012). By merely citing to an unsubstantiated article on the internet, Johnson has not laid an adequate foundation for this theory. *See Smith v. Bray*, 681 F.3d 888, 894 n.1 (7th Cir. 2012) (noting the district court had properly not considered evidence that lacked foundation).

Nor could the court have taken judicial notice of the theory. Federal Rule of Evidence 201(b) provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Johnson did not establish that the theory is not subject to reasonable dispute, that it is generally known within the court's territorial jurisdiction, or that Wikipedia is a source whose accuracy cannot reasonably be questioned.

"[E]xpert testimony is unnecessary where the matter is within the realm of lay understanding and common knowledge." *Lynch v. N.E. Reg'l Commuter R.R. Corp.*, No. 11-2173, --- F.3d ----, 2012 WL 5290146, *7 (7th Cir. 2012). The symptoms and behaviors exhibited by a person who is suffering from the psychoanalytical defense mechanism of projection are not within the realm of lay understanding or common knowledge. Something more than a Wikipedia article would be needed to establish what the markers for such a defense mechanism were, so that jurors could draw a connection (or note the absence of connection) between the behaviors of O'Connell and the symptoms exhibited by a person who was projecting racial animosity.

Discovery closed on April 12, 2011, and Johnson did not disclose any expert witnesses or produce any expert-related evidence in summary judgment. (Dkt. 36.) Without establishing what the district court should have been looking for in her purported evidence, Johnson cannot expect that the court could infer from the evidence presented that O'Connell was projecting his own racial animosity when he reported that Johnson called him names. Johnson's projection theory fails because she has not adequately established it.

### 3. Johnson waived her argument on the "projection" theory by first raising it in her motion for reconsideration.

Johnson did not raise her "projection" theory until her motion for reconsideration. (R1220.) Arguments raised for the first time in connection with a motion for reconsideration are generally deemed to be waived. *Mungo v. Taylor*, 355 F.3d 969, 978 (7th Cir. 2004). "[S]uch motions cannot be used to raise new

arguments which could and should have been raised before judgment was entered." *Havoco of Am., Ltd. v. Sumitomo Corp. of Am.*, 971 F.2d 1332, 1336 (7th Cir. 1992). Thus, Johnson has waived her argument based on the theory of projection.

### B. Johnson cannot prove that O'Connell proximately caused her termination.

Johnson did not demonstrate that O'Connell had discriminatory animus against women and African Americans; likewise she also did not produce evidence that O'Connell proximately caused her termination.[4]

Johnson cannot prove proximate cause because Koppers did not base its decision on O'Connell's statements. Wagner conducted a methodical investigation – interviewing *nine* different individuals, including Johnson and O'Connell, about the incident. (R489.) He questioned everyone who he knew or had heard rumor of being a witness, and he talked to some of them (including Johnson) more than once. (*Id.*; A152.) He attempted to find a security video that Johnson thought would corroborate her versions of the event, but due to the camera's position, it was not useful. (R603.) He also looked at Johnson's prior disciplinary history by interviewing Plant Manager Traczek and reviewing the video from the Stapler Incident. (R579-80, 610.) *Cf. Staub*, 131 S. Ct. at 1189 (noting the investigation could have been "more robust").

Wagner did not credit every allegation made by O'Connell as a basis for Johnson's termination. (R688.) In fact, Wagner based his decision only upon the

[4] The district court did not address the proximate cause prong of the direct method of proof, having already determined that Johnson's direct claim failed when she did not present evidence of O'Connell's alleged discriminatory animus. (A15.)

incidents that had been witnessed by someone *other than* Johnson and O'Connell – (1) shouting and behaving in a threatening manner, witnessed by Kenyatta; and (2) shoving O'Connell into the wall, witnessed by Wells. (*Id.*; R489.) Demonstrating his impartiality, Wagner did not "conclude one way or the other" whether the logbook incident had happened because no one other than Johnson and O'Connell had witnessed it. (R590.) He did not include the logbook as a reason for her termination.[5] (R688.)

For these reasons, the district court deemed Wagner's investigation "thorough" and found his belief that Johnson had threatened and pushed O'Connell "reasonable." (A22.) Koppers is not liable to Johnson because it had a lawful motive for her termination "uncontaminated" by O'Connell's supposed discriminatory bias. *Cook v. IPC Int'l Corp.*, 673 F.3d at 628.

Johnson claims that *Staub* required a superseding cause ("an unforeseeable, independent cause") to break the link between O'Connell's alleged discriminatory action and Johnson's termination. Br. at 21. The Court's discussion of superseding cause, however, was made in the context of rejecting the defendant company's argument that an unbiased decisionmaker's judgment broke the causal link between the biased supervisor and the adverse action, thereby insulating it from liability for carrying out an action recommended by a biased supervisor. *Staub*, 131 S. Ct. at 1192. Koppers is not suggesting that Wagner's unbiased decision

[5] Johnson's statement of facts section states that O'Connell's version of events, which included throwing the logbook, "ultimately resulted in Johnson's firing." Br. at 8. Yet, this statement is not supported by the record and contradicts Wagner's testimony and the termination letter itself. (R610, 688-89.)

immunizes it from liability – rather, Koppers argues that Wagner's independent investigation revealed legitimate reasons from unbiased sources that justified Johnson's termination. In post-*Staub* cases, this Court has confirmed the state of the law: "[if] the defendant in turn proves that it would have fired her anyway, for a lawful reason, then she has not been hurt by the illicit motive and cannot recover damages." *Cook*, 673 F.3d at 629. Because Wagner's decision was based upon statements of Wells and Kenyatta, and not upon the allegedly biased statement of O'Connell, Koppers could not be liable for any alleged role O'Connell played in terminating Johnson.

Johnson stresses that the individuals who witnessed Johnson push O'Connell were "seen getting their stories straight" after the event. (Br. at 22.) Johnson's contention is not supported by the record. The only evidence in the record is that Wagner investigated this rumor and rejected it. Wagner had heard that Tim Wright (O'Connell and Johnson's co-worker in the lab) was concerned about seeing individuals talking after the Shoving Incident, and Wright said "he didn't like the tone. It wasn't facts." (A155-56.) When Wagner pressed him for details, Wright said that he was not a party to the conversation and really did not know what was being said. (*Id.*). Wagner confronted each individual (O'Connell, Wells, and Kenyatta) about whether they were collaborating on their stories, and they told him that they had been discussing what to do next, including calling the police (whom O'Connell did, in fact, call after Johnson left for the day). (*Id.*) Johnson pointed to no evidence

to contradict Wagner's conclusion – a conclusion the district court found was "reasonable." [6] (A21.)

## II. The district court properly found that Johnson failed to prove discrimination via the indirect method of proof.

Under the indirect method, a plaintiff must first establish a prima facie case of discrimination with evidence that (1) she is a member of a protected class; (2) she met her employer's legitimate job expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees outside of the protected class were treated more favorably. *Montgomery*, 626 F.3d at 394. If that burden is met, the employer must then articulate a legitimate, non-discriminatory reason for the adverse action. *Id.* If the employer has done that, the burden shifts back to the plaintiff to show that the reason proffered is pretextual. *Id.* Though the employer has to articulate a reason for the action, the burden of proof at all times remains with the plaintiff. *Id.*

As the district court found, Johnson did not sustain her burden on a prima facie case under the indirect method. Koppers does not dispute that Johnson is a member of a protected class and that she suffered an adverse employment action. Johnson's claim fails, however, because she cannot demonstrate that she met Koppers's legitimate job expectations or that similarly situated employees outside of the protected class were treated more favorably. Johnson additionally did not demonstrate that Koppers's reason for terminating her – the Shoving Incident and

[6] Johnson's brief also refers to Wells and Kenyatta as biased. (Br. at 22.) Wells and Kenyatta were both themselves African American (R487-88), and no evidence exists that either harbored a discriminatory animus against other African Americans or women.

prior disciplinary history – was pretextual. The district court found that she had not demonstrated a prima facie case and that no evidence of pretext had been adduced. (A19, 22).

### A. The district court correctly concluded that Johnson did not make a prima facie case of discrimination under the indirect method.

An employee who does not comply with her employer's code of conduct does not satisfy its legitimate expectations. *See, e.g., Anders v. Waste Mgmt. of Wisc.*, 463 F.3d 670, 676 (7th Cir. 2006) (noting that it was indisputable that the plaintiff's attempted physical attack on his manager in front of witnesses did not meet the company's legitimate expectations); *see also Tomanovich v. City of Indianapolis*, 457 F.3d 656, 666 (7th Cir. 2006) (noting that evidence of insubordinate conduct supported employer's assertion that employee did not meet legitimate expectations). When a plaintiff claims uneven application of discipline, courts sometimes merge the "legitimate expectations" prong with the "similarly situated" prong, as the district court did in this case. *Rodgers v. White*, 657 F.3d 511, 518 (7th Cir. 2011); (A16).

#### 1. Johnson did not meet Koppers's legitimate job expectations because of her disciplinary history.

Johnson could not demonstrate that she met Koppers's legitimate job expectations because of her history of disciplinary problems, including two separate instances of physical altercations and threatening behavior. (A46, 54; R619, 661, 688-89.)

Koppers's Code of Conduct established its expectations for its employees. It prohibited conduct such as "[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." (A49.) It also expressly prohibited "Any act of violence or threat of violence by a Koppers's employee," including "fighting or assaulting another person," and "aggressive, harassing, intimidating, or hostile words, gestures, expressions, or acts that create a reasonable fear of physical harm to another person or that subject another person to emotional distress." (*Id.*)

Johnson did not dispute that the 2006 Stapler Incident occurred and did not disagree with the punishment. (A126.) On April 28, 2008, a third party, not employed by Koppers, witnessed Johnson shove O'Connell. (R489.) Her shift supervisor found her behavior that day to be totally insubordinate and out of control to the point that he mentioned termination. (*Id.*) The evidence shows that Johnson violated Koppers's workplace policies, which does not meet the legitimate expectations of Koppers. *See Anders*, 463 F.3d at 676 (noting that plaintiff's physical attack on his manager did not meet the company's legitimate expectations). Johnson rebuts this evidence only by claiming that her work performance was adequate (which Koppers does not dispute).

Her prior disciplinary behavior does not count, she contends, because it was too long ago, and the shoving incident does not count because she never admitted to

it. (Br. at 24.) "The proper inquiry," however, "mandates looking at [Johnson's] job performance *through the eyes of her supervisors* at the time of her suspension and termination." *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 689 (7th Cir. 2008) (emphasis added). Wagner viewed her performance – due to her prior disciplinary history and her behavior on April 28, 2008 – as violative of Koppers's written Codes of Conduct and he terminated her on that basis. (R688-89.)

### 2. The district court rightly determined that O'Connell was not a similarly situated employee treated more favorably that Johnson.

Johnson incorrectly claims that under the fourth element of the indirect method of proof, O'Connell was similarly situated to her and treated more favorably. (Br. at 25-30.) Again, the evidence does not support her contentions, and the district court properly rejected her arguments.[7]

To be similarly situated, employees must be "directly comparable in all material respects." *Hudson v. City of Chicago Transit Auth.*, 375 F.3d 552, 561 (7th Cir. 2004). The employees must not only meet factors such as reporting to the same supervisor, being subject to the same standards, and possessing comparable qualifications, *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002), – they must also possess a "comparable set of failings." *Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 751 (7th Cir. 2006). Thus, an employee would only serve as a useful comparator if he had "engaged in similar misconduct." *Argyropoulos v. City*

[7] Johnson incorrectly and inappropriately paints with a broad brush and states that her evidence shows that Koppers had a policy where the "transgressions of white men go unpunished." (Br. at 15.) She points to no white males other than O'Connell, and her observations of O'Connell are exaggerated and incorrect as explained throughout this brief.

*of Alton*, 539 F.3d 724, 735 (7th Cir. 2008). "[W]hen uneven discipline is the basis for a claim of discrimination, the most-relevant similarities are those between the employees' alleged misconduct, performance standards, and disciplining supervisor." *Rodgers*, 657 F.3d at 518.

Though the parties did not dispute that Johnson and O'Connell had many of the same characteristics as it relates to their job and performance at the Stickney plant, Johnson cannot prove that O'Connell possessed a comparable set of failings to her. Johnson points to O'Connell's alleged death threat in 2006 and avers that it was more severe than any of her physical altercations. In 2006, when Traczek was still the Plant Manager, O'Connell allegedly said that he could have Johnson killed if he wanted to. (R517.) She initially did not report the alleged threat to anyone, and she describes her reaction as "Like, yeah, okay, whatever." (A119.) Johnson was not afraid of O'Connell. (A121.) In any event, death threats are unacceptable and would be forbidden by Koppers's Code of Conduct. Johnson later reported it to her manager Gerba, who told her that O'Connell would be talked to. (R518-19.) She did not inform the union or file a grievance. (A119.) Traczek was Plant Manager at the time, and was informed by O'Connell's manager Gerba that the threat had been made. (R643.) Traczek felt the allegation was serious and he directly spoke to O'Connell about it, warning him that it was "unacceptable" and that he was expected to never do it again. (R643-44.) There is no evidence that O'Connell ever made a threat after that.

As the district court concluded, "Johnson and O'Connell were disciplined under significantly different circumstances." (A18). Johnson was terminated after other disciplinary issues, including another physical altercation in 2006, and after being "trained, counseled, [and] warned," with no behavioral improvement. (R688-89). On the other hand, Johnson adduced no evidence that O'Connell had been disciplined prior to making the alleged death threat in 2006.

Additionally, as the district court noted, Johnson cannot prove she was disciplined by the same decisionmaker. (A18); *Ellis v. United Parcel Serv. Inc.*, 523 F.3d 823, 826 (7th Cir. 2008) (holding that comparators were not similarly situated to plaintiff because they were not subject to the same decisionmaker when they violated the workplace policy). Having the same decisionmaker is key to an inference of discrimination because "[d]ifferent decisionmakers may rely on different factors when deciding whether, and how severely, to discipline an employee." *Ellis*, 523 F.3d at 826. Traczek was plant manager at the time of O'Connell's alleged death threat, and Wagner was the decisionmaker at the time of Johnson's termination. Johnson cannot speculate as to how Wagner might have handled the allegation if it had occurred when he was the Plant Manager. Without the same decisionmaker, Johnson's inference of discrimination is unsupported.

The district court accurately noted that Johnson "[did] not argue that Traczek was involved in [her termination]" and "did not contest [in her Rule 56.1 statement of facts] that Wagner was the supervisor who decided to convert Johnson's suspension into a termination." (A18-19). Though she waived that

argument by not raising it below, Johnson now argues that Traczek *was* involved in her termination in order to attempt to show a continuity of decisionmakers on appeal. (Br. at 29-30.) However, the evidence does not demonstrate Traczek was a decisionmaker because a "decisionmaker" is the "person *responsible* for the contested decision." *Jajeh v. County of Cook*, 678 F.3d 560, 571 (7th Cir. 2012) (emphasis added). Wagner consulted with and interviewed Traczek in his investigation because Traczek was involved in the 2006 Stapler Incident. (R579-80.) He considered Traczek an "advisor," but Wagner was "ultimately responsible for all… discipline at the plant" at the time of Johnson's termination. (R579.) Johnson has no evidence that Traczek was "responsible" for her termination.

Johnson has failed to demonstrate that O'Connell was similarly situated, treated more favorably than her, or disciplined by the same supervisor. Thus, she has failed in her prima facie case of proving discrimination by way of the indirect method, as the district court rightly concluded.

### B. The district court correctly determined that Johnson did not demonstrate that Koppers's decision to terminate her was pretextual.

Johnson did not establish a prima facie case of discrimination under the indirect method, and she also cannot establish that Koppers's reason for terminating her was pretextual. Koppers's letter articulated the legitimate non-discriminatory reasons for her termination: the shoving and threatening behavior on April 28, 2008, as well as past "threatening, intimidating, disruptive and abusive behavior," during her employment. (R688-89.) The letter advised that Johnson 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 "[r]egrettably, those discussions and warnings have not resulted in the required change" in Johnson's behavior. (*Id.*). Thus, Koppers terminated her.

Pretext means that the reasons were "factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge." *Rodgers*, 657 F.3d at 520. It is must be "more than a mistake on the part of the employer; pretext 'means a lie, specifically a phony reason for some action.'" *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997) (citing *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996)). In other words, "[t]he pretext analysis focuses on whether the reason was honest and not whether it was accurate or wise." *McGowan v. Deere & Co.*, 581 F.3d 575, 579 (7th Cir. 2009).

Thus, it does not matter whether Wagner was *correct* that Johnson behaved in an aggressive and threatening manner on April 28, 2008; it only matters whether he honestly held the belief that her termination was justified by the reasons given – the events of that day and her prior disciplinary history. The evidence shows that Wagner's belief was honestly held. Wagner conducted an independent investigation and interviewed nine employees – including interviewing Johnson twice. (A152; R489.) He questioned everyone who he knew or had heard rumor of being a witness. (*Id.*) ("I spoke with any and everyone that I was aware that had any – could have witnessed or was reported to have witnessed any events of that evening.") He located a non-biased witness to the shoving (who was not even a Koppers employee) and a non-biased witness to Johnson's aggressive behavior in the lab. (R489.) He

attempted to find a security video that may have corroborated Johnson's versions of the event. (R603). He spoke to Plant Manager Traczek about the 2006 Stapler Incident, and obtained and reviewed the video of the 2006 Stapler Incident. (R579-80, 610.) He spoke to an individual in human resources for guidance. (R579.) All of these factors demonstrate Wagner's honestly held belief that the termination was justified by her behavior on that day and in the past. Once an honestly held belief is established, the inquiry ends. "[T]his Court does not – and will not – sit as 'super-personnel' to question the wisdom or business judgment of employers…." *Gates*, 513 F.3d at 689.

Johnson asserts, however, that she has demonstrated pretext through a number of inferences that were considered and rejected by the district court in the initial order and amended order. (R1187-94.) First, she identifies purported "evidence" that Wagner, himself, may not have believed that Johnson pushed O'Connell. Second, she claims uneven application of discipline. There is no evidence for either inference.

Johnson's first point of "evidence" that Wagner did not believe his own investigation results is that Wagner knew O'Connell did not like Johnson. (Br. at 32.) No one disputed that O'Connell did not like Johnson, or, for that matter, that Johnson did not like O'Connell. She does not explain why that fact supports an inference that Wagner did not believe his own reasons for terminating her.

She also claims that Wagner "knew that he had written up O'Connell for falsely accusing Johnson of misconduct." (Br. at 32.) This is a gross exaggeration,

unsupported by the record. The "written" verbal warning that Wagner gave to O'Connell in 2007 included a reference to, among other things, making false allegations. (R670.)

Wagner testified that he did not believe O'Connell had made false accusations then and did not include that phrase in the memo for any reason other than that he was giving examples of violations of the Code of Conduct. (A147.) In fact, he testified that he was not aware of *any* false allegations O'Connell made during his tenure at the plant. (R607-08.) The written verbal warning also includes other behavior that O'Connell was never accused of – horseplay, for instance. (R670.) But Johnson concludes from that phrase that Wagner secretly thinks, contrary to his testimony, O'Connell *did* make false allegations against her in 2007. Johnson's conclusion, without support in the record, then leads her to speculate that Wagner must *also* have thought that O'Connell's accusations were false about the Shoving Incident. (Br. at 32-33.) As discussed *supra* at 17-18, Johnson cannot prevail on summary judgment by making unsupported inferences about someone's state of mind. *Kodish*, 604 F.3d at 507-08.

Johnson cites the fact that Wagner did not credit O'Connell's story about Johnson throwing the logbook in the termination letter, which she again infers means that Wagner secretly did not believe O'Connell. (Br. at 33.) Wagner explained, though, that he did not include the logbook as a reason to terminate Johnson it because it was a he-said, she-said situation, and no other witnesses were

present. (A151; R490.) On the other hand, the reasons he cited in the termination letter *were* witnessed by others and thus do not support her claim of pretext.

Next, Johnson points to fact that Wagner did not credit Kenyatta with having seen the shove as evidence that Wagner knew the parties were lying. (Br. at 33.) Wagner interviewed Kenyatta about the event and Kenyatta described what he perceived had happened. (R594-95.) Wagner concluded, however, that Kenyatta could not have been an eyewitness[8] due to his location in the office, and thus he did not count Kenyatta as an eyewitness to the shoving. (*Id.)* Johnson also contends that Kenyatta's version of events that he relayed to Wagner were different from O'Connell's and Wells's versions of events. (Br. at 33.) Wagner testified, however, that he did not see a difference in their accounts. (R595.) The evidence does not support Johnson's speculative conclusion that Wagner knew his termination was pretextual. The district court deemed Wagner's conclusions "reasonable." (A22.)

Finally, Johnson again raises the idea that O'Connell, Wells, and Kenyatta met to get their stories straight. As discussed *supra* at 23, her contentions are not supported by the evidence.

Johnson attempts to connect these random facts to create suspicion around Wagner's honestly held belief, but the evidence, whether looked at in isolation or in aggregate, does not support an inference that Wagner strayed from an honestly held belief that he terminated Johnson because of her behavior on April 28, 2008, and her prior disciplinary history. Thus, Johnson's indirect claim fails because she did

[8] He did not testify that Kenyatta claimed to be an eyewitness in his interview with Wagner. (R595.)

not prove that she was meeting Koppers's legitimate business expectations, that she and O'Connell were similarly-situated and that the reason for terminating her was pretextual.

## CONCLUSION

Johnson failed to demonstrate that the district court erred in any respect. Because Johnson failed to adduce evidence under the direct or indirect method sufficient to sustain her burden on summary judgment, Koppers respectfully requests that this Court affirm the judgment of the district court granting Koppers's motion for summary judgment and denying Johnson's motion.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word 2007 in 12-point Century font.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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