No. 12-14341

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Appellant,

v.

CARROLL'S, LLC, d/b/a CARROLL TIRE CO.,
Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia
Augusta Division, No. 10-00115

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PETITION FOR REHEARING AND FOR REHEARING EN BANC

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I hereby certify that this list names each person and entity that, as far as the EEOC knows, has an interest in this case and appeal.

/s/ Donna J. Brusoski

Donna J. Brusoski
November 25, 2013

RULE 35(b) STATEMENT

In *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011), the Supreme Court held that an employer is liable for discrimination where "one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." Although *Staub* interpreted the causation language in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*, the Court noted that USERRA's causation language--requiring proof that membership in the uniformed service is "a motivating factor in the employer's action" is "very similar" to the language in Title VII, which imposes liability for discrimination when a protected basis "was a motivating factor for any employment practice, even though other factors also motivated the practice." *Staub*, 131 S. Ct. at 1191 (citing USERRA § 4311(c) and Title VII, 42 U.S.C. § 2000e-2(m)). The *Staub* Court also specifically held that an independent investigation by the decision maker does not relieve the employer of "fault" for the discrimination; the employer "is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did, in fact cause, an adverse employment action." *Id.* at 1193.

In this case, the panel concluded, contrary to the record evidence and the district court's factual finding, that the decisionmaker, Wommack, "independently confirmed the information on which he based his decision to fire Holliday" and thus eliminated the causal link between McCullough's animus toward women and Holliday's termination. Slip op. at 4. This conclusion cannot be squared with the Supreme Court's explanation that the animus of a subordinate remains a proximate cause of an adverse employment action he set in motion even where the decisionmaker exercises independent judgment, because, as the Court said, "[w]e do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias 'remote' or 'purely contingent.' The decisionmaker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes." *Staub*, 131 S. Ct. at 1192.

On the record facts taken in the light most favorable to the Commission, as required on summary judgment, and under a proper application of the mixed motive theory of causation, which the panel correctly held the district court was required to consider, Carroll Tire is liable for sex discrimination in the termination of Holliday. The panel's contrary conclusion rests on a misinterpretation of the mixed motive theory of liability and conflicts with Supreme Court precedent on

point, and the case should be reheard by the panel or the full Court en banc if necessary. *See* Fed. R. App. P. 35(b).

Accordingly, I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the Supreme Court's decision in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), and that consideration by the panel or the full Court is necessary to secure and maintain uniformity of the decisions in this Court. 11th Cir. R. 35-5(c).

/s/ Donna J. Brusoski_____

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U.S. EQUAL EMPLOYMENT
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INTRODUCTION

In this mixed motive sex discrimination case the panel correctly held that the district court erred in refusing to consider the Commission's mixed motive theory of liability. But it then affirmed summary judgment for Carroll Tire on the ground that "the Commission failed to create a genuine factual dispute that Carroll[] fired Holliday, even in part, because of her gender." Slip op. at 4. In so holding, the panel stated that Steve Wommack fired Holliday "because she had sought employment elsewhere and refused to work with her new branch manager, Richard Ramirez" and that he "independently confirmed the information on which he based his decision to fire Holliday." *Id.* These conclusions contradict the express finding of the district court that Wommack "did not conduct an independent review sufficient to sever any causal connection between the alleged discriminatory animus of McCullough and the decision to terminate Holliday." DN53, op. 23-24 n.7.

STATEMENT OF THE ISSUE

Whether the panel opinion reflects a misapprehension of record facts and a misapplication of the mixed motive liability standard in its conclusion that "the Commission failed to create a genuine factual dispute that Carroll[] fired Holliday, even in part, because of her gender." Slip op. at 4.

COURSE OF PROCEEDINGS AND DISPOSITION

The Commission filed this Title VII suit against Carroll's, LLC, d/b/a Carroll Tire Company, alleging that defendant terminated the employment of Terilyn Holliday because of her sex. DN1; DN7. Carroll sought summary judgment, arguing that the Commission had no direct evidence to support its disparate treatment claim, had not established a prima facie case, and had not raised a triable question of pretext. DN23. In response, the Commission argued, inter alia, that the evidence of intentional discrimination on the basis of sex should be evaluated under a mixed motive framework. DN37. The district court granted Carroll's motion for summary judgment, DN53, and entered judgment in favor of Carroll. DN54. The district court refused to evaluate the case under a mixed motive framework because the Commission had not pled this theory of proof in its complaint.

On appeal, the Commission argued that the district court erred by refusing to evaluate at summary judgment the Commission's evidence of intentional discrimination under a mixed motive framework because a mixed motive theory is not a new claim for relief, and the court improperly held the Commission to a requirement that it plead a theory of proof in its complaint. The Commission also emphasized that because the district court failed to consider a mixed motive

analysis in this case, it did not acknowledge that evidence demonstrating that gender was a motivating factor in an employment decision can establish Title VII liability under section 703(m), 42 U.S.C § 2000e-2(m). The court only considered the Commission's evidence of animus on the issue of whether the statements of bias constituted direct evidence of discrimination and whether, under a pretext analysis, the statements of bias were sufficient, standing alone, to rebut the non-discriminatory reasons Carroll articulated for its decision to terminate Holliday's employment.

The panel agreed with the Commission that the district court erred in refusing to consider the Commission's argument that Carroll acted with mixed motives. Slip op. at 3. However, the panel concluded that the district court did not err in granting summary judgment for Carroll because there was "no factual dispute that Carroll[] fired Holliday, even in part, because of her gender." *Id.* at 4. The panel acknowledged statements by James McCullough, Holliday's regional manager, that he wanted Holliday denied a promotion and fired because he did not want a woman in management, but said that because Steve Wommack, not McCullough, made the decision to fire Holliday, there was no triable question on the reason for Holliday's termination, even under a mixed motive theory. Wommack stated the reasons for firing Holliday were that she had sought employment elsewhere and "refused to work with her new branch manager,

Richard Ramirez." *Id.* The panel rejected the Commission's argument that Wommack was a conduit for McCullough's animus because, in its view, "Wommack independently confirmed the information on which he based his decision to fire Holliday" in that he had conversations with Ramirez, in which Ramirez said that she was being disrespectful to him and failing to follow company policies. *Id.* at 4-5.

STATEMENT OF FACTS

Terilyn Holliday worked for Carroll Tire in its Grovetown, Georgia store for eight years (from January 1999 to November 2007). DN28, Holliday Dep. at 52; DN28-2, Holliday Dep. at 225; DN28-3 at 1, Pl's Ex. 1; DN29-3 at 83-84, Ex. 9. In her last three years, she served as assistant branch manager, until she was fired at the end of November 2007. DN28-2, Holliday Dep. at 226-27; DN28-3 at 3, Pl's Ex. 3; DN29-3 at 83-84, Ex. 9. James McCullough became the Regional Manager in January 2006, for Carroll Tire facilities in the area covering Grovetown, DN29, McCullough Dep. at 15-16, and Marty Wommack became Vice President of Human Resources during the same time period; Wommack had to approve all hiring and firing decisions. DN33, Wommack Dep. at 17, 20.

Clifford Watts, who was Holliday's manager until he resigned in early 2007, testified that Holliday "did a good job" and that her job performance was

"[e]xcellent." DN32-1, Watts Dep. at 44, Ex. P1 at ¶5. He said, "I had no problems with her. I did more sales on the road. I could rely on [Holliday] to take care of business." *Id.* Watts described Holliday's strengths as handling customers and paperwork, and said she really did the branch manager's job because he (Watts) was out making sales calls a lot and she was there in the warehouse. DN32-1, Watts Dep. at 95; *see also* DN32-1 at 45, Ex. P1 at ¶8 (Watts stated that Holliday, as assistant manager, had the same job duties as he did, as branch manager). Watts gave Holliday a favorable performance rating in 2005 (DN32-1 at 41, Ex. D4), and testified that between 2005 and 2007, Holliday's performance improved in all areas. DN32-1, Watts Dep. 91-92. The record contains no additional performance evaluations for Holliday as assistant manager with Carroll Tire.

Watts testified that in 2006 McCullough made a negative remark about women's suitability for management positions, stating "women wasn't [sic] the right place in management in the workplace." DN32, Watts Dep. at 22. In addition, Watts stated in an affidavit to the EEOC that, in late 2006 or early 2007, McCullough told him that "[Holliday] did not need to be an Assistant Manager … [and t]o get rid of her because she was a woman and did not need to be a manager." DN32-1 at 45, Pl's Ex. 1 at ¶19; *see also* DN32-1, Watts Dep. at 87. McCullough denied making either statement attributed to him by Watts (DN29-2,

McCullough Dep. at 274), but the record also shows that McCullough did not promote any women into management while he was Regional Manager with Carrol, DN29-2, McCullough Dep. at 296, and specifically told Wommack that Holliday was not "ready" for a promotion to branch manager when the position became open in September 2007, *id.* at 112. In addition to his comments about women in management and about Holliday's unsuitability to be a manager, McCullough exhibited general animosity towards the women he supervised. DN37, Ex. A, Taylor Aff. at ¶14; DN28, Holliday Dep. at 100. Holliday testified that McCullough would come into the Grovetown branch and have conversations with all of the men at the warehouse but ignore her. DN28-3, Holliday Dep. at 235.

After Watts resigned in 2007 (DN32-1 at 43, Ex. D6, Watts's Febuary 2007 resignation letter), Holliday served as interim branch manager of Grovetown for approximately six weeks. DN53, op. at 3. In late March or early April 2007, at McCullough's recommendation (to Wommack), Carroll transferred James Spivey into the position of branch manager of the Grovetown facility. DN31, Spivey Dep. at 18; DN33, Wommack Dep. at 58. Spivey left in mid-August, and on September 4, 2007, Richard Ramirez was promoted to branch manager of the Grovetown facility and became Holliday's immediate supervisor. DN30-2 at 96, Ramirez

Dep., Ex. 2. Ramirez attempted to change many aspects of the Grovetown facility's operations. DN38 at 12, ¶41.

Carroll claimed that Holliday refused to follow many of Ramirez's directives (DN38 at 12, ¶42), but Holliday said his rules were inconsistent and that she did try to catch up on inventory receiving. DN38 at 12-13, EEOC response to ¶42. Ramirez had limited experience managing employees and knew very little about the operations side of the branch when he first started working as branch manager, which required Holliday and other employees to "teach him how to enter a[n] order for a customer, or enter a transfer [of product] to another branch of the company." DN30 & DN30-2, Ramirez Dep. at 35-36, 42, 253, 256-57; DN29-2, McCullough Dep. at 250-52; DN28-3 at 16-17, Holliday Dep. at Ex. 8; DN26, Alleva Dep. at 30, 49-50. Customers and employees continued to turn to Holliday because she had been at the Grovetown facility for several years and was more knowledgeable. DN28-3 at 16, Holliday Dep., Ex. 8.

McCullough testified that the decision to terminate Holliday was developed jointly by Ramirez, Wommack, and himself. DN29-3, McCullough Dep. at 304, 306, 335-36, 339. However, Ramirez testified that it was McCullough who raised the idea of terminating Holliday's employment. DN30-2, Ramirez Dep. at 220. McCullough testified that he talked with Wommack on several occasions about terminating Holliday's employment due to her failure to cooperate with Ramirez.

DN29-3, McCullough Dep. at 325-28, 335-42. Wommack testified that it was McCullough's suggestion to fire Holliday (DN33-1, Wommack Dep. at 174), and that he concurred in Holliday's termination based solely on information he received from McCullough. DN33-1, Wommack Dep. at 176-77, 183; *see also* DN33-1, Wommack Dep. at 130, 139-40, 143, 149-50, 158 (Wommack made no independent inquiry about Holliday).

On November 27, 2007, McCullough went to the Grovetown branch, met with Holliday, and fired her, saying they needed to part ways because the branch needed a new management team and she "butted heads" with Ramirez. DN28-2, Holliday Dep. at 149; DN28-3 at 16-17, Ex. 8 (Holliday's letter to EEOC); DN29-3, McCullough Dep. at 308-10, 312-13, 324, 441-42.

ARGUMENT

The Commission offered sufficient evidence of discriminatory intent to survive summary judgment when the evidence is properly analyzed under the cat's paw and mixed motive theories of liability.

A. The panel overlooked compelling record evidence that McCullough's animus led to the decision to fire Holliday.

The Commission offered evidence showing that McCullough's gender animus was a motivating factor in the decision to fire Holliday and was attributable to Carroll Tire. The evidence of McCullough's bias included his unfavorable treatment of women, his gender-biased comments to Watts that women do not belong in management, and his September 2007 statement to Wommack that

Holliday was not ready for promotion. All of this evidence, taken together, creates a chronological link connecting McCullough's gender-biased comments in 2006 and 2007 and the November 2007 termination decision.

McCullough's bias is attributable to Wommack, as the district court properly found. The district court explained:

> Here, Wommack failed to do any independent investigation. His decision was based largely on his discussions with McCullough and to some degree on his conversations with Ramirez. Wommack never discussed any of the complaints with Holliday nor did he interview any other employees beyond McCullough and Ramirez to determine whether the complaints were true. (Wommack Dep. at 174, 177-80, 183, 196, 203, 241) Wommack did not review Holliday's personnel file or otherwise review any other materials in coming to his decision to terminate. (Id. at 132-33.) Therefore, the Court finds that Wommack did not conduct an independent review sufficient to sever any causal connection between the alleged discriminatory animus of McCullough and the decision to terminate Holliday.
>
> Thus, McCullough's alleged discriminatory animus could be attributed to Defendant.

DN53, op. 23-24 n.7.

The district court's factual conclusion that McCullough's alleged animus could be attributed to Carroll is well-supported by the record. Wommack repeatedly testified that he did not make his decision to terminate Holliday independently. *See* DN33-1, Wommack Dep. at 174 (asked if he made his decision independently, Wommack testified "I was contacted by Jim McCullough

and he in turn--he said that he had discussed with Richard [Ramirez] and that he thought that the best course of action" was to fire Holliday); *id.* at 183 (asked if he had discussed his decision to terminate Holliday with Ramirez, Wommack testified that he did not speak to anyone except McCullough).

Wommack also repeatedly testified that he relied almost exclusively on McCullough's recommendation and his reports about Holliday's performance issues, and to a certain extent on conversations with Ramirez. *Id.* at 129-30 (testifying that his understanding of Holliday's problems came from discussions with McCullough and that McCullough's information came from conversations with Ramirez); *id.* at 158-59 (testifying that he had no firsthand knowledge of whether Holliday was improving on identified areas of performance because he knew "only what I was told"); *id.* at 203 (stating he had no sources of information other than McCullough saying Holliday and Ramirez were not getting along); *id.* at 241 (information about Holliday came through conversations with McCullough; he also counseled Ramirez, who asked for advice about how to work with Holliday).

Wommack repeatedly conceded that he did no independent investigation of Holliday's alleged problems. *Id.* at 143 (asked if he did "any investigation to find out the details about what happened or her version of the story," Wommack answered "No."); *id.* at 177-180 (agreeing that he did no independent investigation

because he had heard enough from McCullough about the problems; he listened to McCullough and Ramirez but did not talk to Holliday or anyone else). Wommack also repeatedly testified that he never talked to Holliday about the problems McCullough reported she was having with Ramirez. *Id.* at 139-40 (testifying that he did not discuss any of the problems McCullough reported with Holliday, including the fact that he had heard she was looking for work elsewhere and he believed she had just "checked out"); *id.* at 149-50 (testifying that he did not know if McCullough or Ramirez had talked to Holliday about the problems, and that he never discussed them with her himself); *id.* at 176, 178 ("I listened to what [Mccullough and Ramirez] said but I did not talk to Ms. Holliday directly.); *id.* at 196 (stating he fired Holliday because she was "unhappy where she was" but he never spoke to her; he understood from McCullough that she was unhappy and had conflicts with Ramirez).

In short, Wommack specifically and repeatedly testified that he had no independent basis for making the decision to fire Holliday, and concurred in McCullough's recommendation based only on information from McCullough. Wommack repeatedly testified that he never conducted any independent investigation of any of the complaints about Holliday's performance, all of which were relayed by McCullough, and that he never discussed her alleged problems with Holliday. He concluded that she was unhappy in her work, and looking for

other employment based solely on McCullough's reports and concluded that was a reason to terminate her employment without any independent verification that Holliday was actually unhappy or intending to seek employment elsewhere. This evidence fully supports the district court's conclusion that McCullough's gender bias could be imputed to Carroll Tire under a cat's paw theory of liability, and that Wommack had no independent basis for his decision to fire Holliday. DN53, op. at 23-24 & n.7.

B. The panel misapplied controlling legal principles in rejecting the Commission's theory of "cat's paw" liability.

In addition to overlooking the record evidence that Wommack relied almost exclusively on information from McCullough in deciding to terminate Holliday, the panel misapplied controlling legal standards when it concluded that Wommack's stated reasons for firing Holliday eliminated the causal connection between McCullough's animus and her termination. The panel cited *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), for the proposition that Wommack "independently confirmed the information on which he based his decision to fire Holliday" and thus eliminated the possibility that he functioned as McCullough's "cat's paw." Slip op. at 4.

But *Stimpson* is no longer good law for this point in light of the Supreme Court's more recent decision in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011), which held that an independent investigation does not relieve an employer

of fault for discrimination where "one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." [1] The Court explained that "the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* at 1192. That is precisely what the Commission alleges happened in this case. McCullough, motivated by animus against women in management positions, and against Holliday in particular, made numerous reports to Wommack about her performance problems and her failure to work well with Ramirez, culminating in a specific recommendation to fire her, and Wommack acted in accordance with that recommendation. All that the cat's paw theory of liability requires is that the bias of the subordinate be the proximate cause of the adverse employment action, *id.* at 1194, and that standard is met on these facts.

This Court recently recognized the applicability of the *Staub* Court's analysis of cat's paw liability to Title VII cases in *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335 (11th Cir. 2013), an age case, in which the Court observed that the

[1] Although *Staub* construed the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.*, the statutory causation language at issue is nearly identical to that codified in the mixed motive provision of Title VII. *See* 131 S. Ct. at 1191 (making the comparison to the motivating factor language in Title VII, 42 U.S.C. § 2000e-2(m)).

motivating factor causation standard of USERRA and Title VII "is simply the traditional tort law standard of proximate cause, requiring only 'some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those link[s] that are too remote, purely contingent, or indirect.'" (quoting *Staub*, 131 S. Ct. at 1192, omitting internal quotation marks). Because the Supreme Court rejected the notion that an independent investigation could disrupt the causal connection between a biased subordinate's efforts to get someone fired and the fulfillment of those efforts by the decisionmaker, the panel here erred in concluding that Wommack's "independent" knowledge of Holliday's unhappiness and friction with Ramirez (which the evidence cited above demonstrates was virtually all knowledge obtained through McCullough) could immunize Carroll from liability for Holliday's termination. *See Staub,* 131 S. Ct. at 1192 (even if the decisionmaker's independent investigation identified an entirely separate reason to take an adverse action against the plaintiff, that would only mean the adverse action had two proximate causes, and "it is common for injuries to have multiple proximate causes").

Accordingly, a reasonable jury could conclude that McCullough's gender-based animus against Holliday was a motivating factor, under section 703(m), 42 U.S.C. § 2000e-2(m), in Carroll's decision to fire Holliday. If it concluded that gender was a motivating factor, Carroll would have an opportunity to attempt to

persuade the jury that it would have made the same decision "in the absence of the impermissible motivating factor" which might limit the relief available to the Commission. *See* 42 U.S.C. § 2000e-5(g)((2)(B)(i)-(ii). The relief question, like the question of liability on the facts in this record, cannot be decided on summary judgment.

CONCLUSION

For the reasons discussed, the Commission urges the panel, or the full Court, if necessary, to grant rehearing to correct the factual and legal errors in the panel's affirmance of the district court's summary judgment ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the page limitations set out in Fed. R. App. P. 40(b) and 35 (b)(2) and (3) because it is 15 pages in length, excluding the parts of the petition exempted by Fed. R. App. P. 32 and 11th Cir. R. 35-5.

This petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by e-mail sent by the appellate CM/ECF system.

I also certify that on this same date, I sent the original and 15 copies of this petition via U.S. mail, first class, postage pre-paid to the Clerk of this Court, and one copy of this petition to opposing counsel via U.S. mail, first class, postage pre-paid:

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14341

D.C. Docket No. 1:10-cv-00115-JRH-WLB

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

TBC CORPORATION,
d.b.a. Carroll Tire Company, LLC,

Defendant,

CARROLL'S, LLC,
d.b.a. Carroll Tire Company,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(October 1, 2013)

Before PRYOR and HILL, Circuit Judges, and O'KELLEY,* District Judge.

PER CURIAM:

The Equal Employment Opportunity Commission appeals a summary judgment in favor of Carroll's, LLC. The Commission filed an amended complaint that Carroll's terminated Terilyn Holliday because of her sex, in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2. Carroll's moved for summary judgment, and the Commission responded that Carroll's acted with mixed motives and gender was one factor that motivated Carroll's to fire Holliday, see id. § 2000e-2(m). The district court refused to address the issue of mixed motives on the ground that it was untimely raised, and the district court granted summary judgment in favor of Carroll's. Although the district court erred when it failed to consider the argument of the Commission about mixed motives, the district court correctly entered summary judgment in favor of Carroll's because there was no genuine factual dispute that its decisionmaker did not act with a discriminatory motive. We affirm.

We review de novo the summary judgment in favor of Carroll's and view the evidence in the light most favorable to the Commission, the nonmoving party. See Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1331 (11th Cir. 1999).

* Honorable William C. O'Kelley, Senior United States District Court Judge for the Northern District of Georgia, sitting by designation.

The district court erred by refusing to consider the argument of the Commission that Carroll's acted with mixed motives. The Commission was entitled to offer evidence that Carroll's had mixed motives when it committed "an unlawful employment practice," in violation of Title VII, by "discharg[ing] [Holliday] . . . because of her sex," 42 U.S.C. § 2000e-2(a)(1). Section 2000e-2 provides that one way in which "an unlawful employment practice is established [is] when [a plaintiff] demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." Id. § 2000e-2(m). The Commission was not required to identify its method of proof in its complaint. A complaint need contain only "a short and plain statement of the claim showing that the plaintiff is entitled to relief," Fed. R. Civ. P. 8(a)(2), and "need not pin [the] plaintiff's claim for relief to a precise legal theory," Skinner v. Switzer, 562 U.S. ____, 131 S. Ct. 1289, 1296 (2011). As explained in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989), a plaintiff should not be required to "label[] [her complaint] as either a 'pretext' case or a 'mixed-motives' case from the beginning in the District Court" because "[d]iscovery often [is] necessary before [she] can know whether both legitimate and illegitimate considerations played a part in the decision against her." Id. at 247 n.12, 109 S. Ct. at 1789 n.12. The Commission had only to argue that the "case involve[d] mixed

motives . . . [a]t some point in the proceedings," id., which it did in its response to the motion of Carroll's for summary judgment.

But the district court did not err by entering summary judgment in favor of Carroll's. The Commission argues that, after the decision of the Supreme Court in Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148 (2003), a claim of discrimination based on proof of mixed motives is not governed by the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), but we need not decide that issue because the Commission failed to create a genuine factual dispute that Carroll's fired Holliday, even in part, because of her gender. Although Holliday's regional manager, James McCullough, allegedly twice stated that he wanted Holliday denied promotions and fired because she was a woman in management, McCullough did not fire Holliday. Steve Wommack testified that he fired Holliday because she had sought employment elsewhere and refused to work with her new branch manager, Richard Ramirez. See Pennington v. City of Huntsville, 261 F.3d 1262, 1270 (11th Cir. 2001). The Commission argues that Wommack was a "mere conduit, or cat's paw," for McCullough's discrimination, but Wommack independently confirmed the information on which he based his decision to fire Holliday. See Stimpson, 186 F.3d at 1332. Wommack testified that he had several conversations with Ramirez about Holliday being disrespectful to him and disregarding company

policies that prohibited sales to end users and that limited the number of smoke breaks. The Commission offered no evidence to the contrary. The Commission also argues that Ramirez failed to issue a final written warning to Holliday in compliance with its progressive disciplinary policy, but it is undisputed that Carroll's often failed to follow that policy.

We **AFFIRM** the summary judgment in favor of Carroll's.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 01, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 12-14341-AA
Case Style: EEOC v. Carroll's, LLC
District Court Docket No: 1:10-cv-00115-JRH-WLB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Eleanor M. Dixon, AA at (404) 335-6172.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs