Nos. 12-2477 & 12-2556

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VICKY T. BENNETT,

Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INCORPORATED,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of North Carolina
in Case No. 5:10-cv-00493-BO (Boyle, J.)

REPLY BRIEF OF DEFENDANT-APPELLANT CSX TRANSPORTATION, INCORPORATED

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ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT LIABILITY UNDER TITLE VII.

Bennett's case undisputedly hinges on her theory that one of her supervisors—either James Gilbert or Ed Howze—vandalized her vehicle.[1] *See* CSXT Br. 18-19, 27-28 & nn.9-10. But Bennett failed to prove that theory at trial (*see id.* at 28-33), and her brief serves only to confirm that.

Significantly, Bennett does *not* argue that she could establish liability without proving that Gilbert or Howze was responsible for the vandalism. Although Bennett characterizes the vandalism as the "culmination" of her experiences at CSXT (Bennett Br. 26), she also repeatedly relies on that single incident to demonstrate that she was subjected to "severe or pervasive" harassment based on her race or sex.

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[1] As noted in our opening brief (at 28 n.10), this case was tried on the assumption that Gilbert and Howze qualified as supervisors under Title VII and then-prevailing Fourth Circuit law. Last week, the Supreme Court held that, for purposes of Title VII, an employee qualifies as a "supervisor" only if he or she is authorized by the employer to take "tangible employment action" against the plaintiff. *Vance v. Ball State Univ.*, --- U.S. ---, 2013 WL 3155228 (2013). The Supreme Court expressly rejected the broader definition of "supervisor" previously adopted by this Court. *Id.* It does not appear that Gilbert or Howze would qualify as supervisors under the proper standard. *See*, *e.g.*, JA602 (trainmasters "don't have the authority" to fire crewmembers).

See, *e.g.*, *id.* at 28 (relying on "[t]he words spray painted on Ms. Bennett's car coupled with the mannequin head"); *id.* at 29 (similar). Indeed, Bennett never contradicts our argument that, without the vandalism, the other incidents about which Bennett complains are insufficient to support liability under Title VII. *See generally* CSXT Br. 33-36.

Bennett thus implicitly concedes that she was obliged to prove that Gilbert or Howze likely committed the vandalism—which she failed to do. Tellingly, Bennett remains unable to say *which* of her two suspects was responsible for the vandalism—instead pointing the finger at "Mr. Howze and/or Mr. Gilbert." Bennett Br. 20. Throughout her brief, moreover, Bennett mixes and matches the evidence of each man's involvement—contending, for example, that *Howze* was racially insensitive (*e.g.*, *id.* at 27) and that *Gilbert* had the opportunity to commit the crime (*id.* at 20-22).[2] Bennett's evidence would be insufficient even if it concerned a single person; when divided between

[2] For example, in an effort to suggest that Howze is a racist, Bennett invokes testimony that CSXT asked Howze to remove Civil War memorabilia from his office. Bennett Br. 27. It is undisputed however, that Howze was at home with his wife when the vandalism occurred. *See* JA604.

two different individuals, it falls far short of what would be needed for a reasonable jury to find either man responsible.

Tacitly acknowledging the lack of evidence directly linking Gilbert or Howze to the vandalism, Bennett argues that "direct evidence is not required." Bennett Br. 18. Although circumstantial evidence can be sufficient, Bennett's evidence does not rise above "[s]peculation and mere possibility" to reach the "'reasonable probability'" that is "the proper test of sufficiency of circumstantial evidence.'" *Disher v. Fast Fare, Inc.*, 898 F.2d 144 (table), 1990 WL 29208, at *3 (4th Cir. 1990) (per curiam) (quoting *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982)).

Bennett's overarching theory was that Gilbert or Howze wanted to force her out of CSXT and therefore "had the motive to vandalize [her] car." Bennett Br. 19. That theory is flawed on multiple levels.

To begin with, Bennett's paper-thin "motive" evidence does nothing to exclude the possibility that someone else had a motive to commit the vandalism.[3] Moreover, the record does not support the

[3] This case illustrates better than most why it is insufficient merely to introduce evidence that a supervisor may have had a motive to harm the plaintiff: Although erroneously excluded by the district court, there

inference that either Gilbert or Howze committed the vandalism in order to force Bennett to quit the railroad. Bennett hypothesizes that either Gilbert or Howse was upset about being required to attend a meeting with Wilkins about their run-ins with Bennett and vandalized her vehicle out of spite. Bennett Br. 18-19. But no rational jury could infer that either man would jeopardize a well-paying, long-term career and open himself to criminal prosecution over something as insignificant as a meeting to resolve an issue about interpersonal relations. Even if the jury could fairly infer that both men disliked Bennett, that does not equate to sufficient evidence that either man criminally vandalized her vehicle.

Bennett further surmises that the vandal had access to the railroad parking lot and knew which vehicle belonged to her. Bennett Br. 20-21. But this does not narrow the list of possible suspects to Gilbert and Howze, because many people, including members of the public, have access to that parking lot (JA216, 292; *see* CSXT Br. 8), several of whom doubtless were *more familiar* with Bennett's vehicle

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was undisputed evidence that Bennett was the victim of three other acts of vandalism between 2007 and 2010, none of which had any connection to the railroad. *See* CSXT Br. 16-17, 37-38.

than these supervisors who had known her only for a few days. Indeed, CSXT employee James Bradley gave a written statement to police two days after the incident attesting that he saw an unfamiliar car near Bennett's vehicle around the time of the vandalism (JA1074), and he later testified in addition that he saw an unfamiliar man standing next to the vehicle (JA666-70, 676-79). *See* CSXT Br. 10-11. Anyone with a grudge against Bennett could have driven up to the parking lot and vandalized her car.[4]

Bennett further contends that the message on her car, the use of ballast to shatter her window, and the fact that the vandalism occurred in a railroad parking lot all suggest that someone from the railroad was involved. Bennett Br. 20-21. But anyone who knew where Bennett worked could have committed the vandalism as easily as a railroad worker. Moreover, none of the facts recited by Bennett suggest that a

[4] Because the police who examined Bennett's vehicle at 5 a.m. "made no mention of seeing the mannequin head in the back seat" (Bennett Br. 21), Bennett assumes that the perpetrator must have returned to the vehicle and inserted the mannequin head after the police left (*id.*). The far more plausible explanation is that the police did not notice what was in the back seat because it was still dark out.

CSXT *supervisor*, as opposed to any one of the scores of non-supervisory railroad employees working at Rocky Mount, was the culprit.[5]

Finally, Bennett accuses CSXT of a "cover up" based on supposed inconsistencies in various witnesses' statements about the incident. Bennett Br. 22. First, she points out that "[t]he Rocky Mount Police Department noted that Mr. Gilbert stated that he saw a Dodge Charger park beside Ms. Bennett's car" but that "Mr. Gilbert denied ever giving that statement to the police." *Id.* In fact, the police report appears to have inadvertently misattributed information from James Bradley, who saw the unknown Dodge Charger in the parking lot, to James Gilbert, who relayed Bradley's statement to the police. *Compare* Bennett Br. 22 *and* JA957 *with* JA297-98. Nothing about this minor discrepancy suggests any effort at a cover up.

Bennett also accuses Bradley of embellishing his trial testimony in exchange for favorable treatment by CSXT. Bennett Br. 23-25. As noted in our opening brief (at 11 n.4), however, Bennett offers no reason

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[5] Bennett finds it significant that on the night of the vandalism Gilbert e-mailed training schedules to the other four members of her training class but excluded her. Bennett Br. 22; *see* JA956. Because Gilbert was scheduled to meet with Bennett the next day to discuss her schedule and other matters (JA330), however, it is entirely unsurprising that he did not e-mail her training schedule to her.

to doubt the reliability of Bradley's written statement, which he provided to police years before any theoretical conflict of interest developed.

In any event, as Bennett's use of the passive voice illustrates—"a cover up was orchestrated" (Bennett Br. 22)—Bennett remains unable to ascribe any misconduct to Gilbert, Howze, or any other supervisor through anything other than sheer speculation.[6] That is insufficient to sustain a verdict. *See* CSXT Br. 28-30 (collecting cases).

II. THE DISTRICT COURT'S ERRONEOUS EVIDENTIARY RULINGS NECESSITATE A NEW TRIAL.

A. The District Court Erroneously Excluded Evidence Indicating That The Vandalism Was Committed By Someone Other Than A CSXT Supervisor.

The central question in this case was the identity of the person who committed the vandalism. Evidence proffered by CSXT but excluded by the district court—which shows that the vandalism here

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[6] In an effort to suggest that CSXT supervisors behaved callously after the vandalism was discovered, Bennett contends that no one offered her a ride home that day. Bennett Br. 22. She ignores Wilkins' testimony that he planned "to make sure that personally she was okay … and see if we could help her get maybe some assistance with getting a ride home." JA 216-17. But even if no one did volunteer to drive her home, that fact would not support the finding of harassment, either standing alone or in conjunction with Bennett's other allegations. *See* CSXT Br. 32.

was part of a pattern of suspicious incidents in which Bennett reported being the victim of vandalism, then sought financial recovery for her losses (CSXT Br. 16-18)—suggests that the vandalism was committed by someone other than a CSXT supervisor, and may indeed have been staged by Bennett herself. *See id.* at 37-41. By refusing to allow CSXT to present this critical evidence to the jury, the district court abused its discretion and contravened this Court's precedents.

1. Echoing the district court's flawed reasoning, Bennett first argues that the evidence of other acts of vandalism was irrelevant because it concerned events that occurred outside the one-week period when Bennett worked in the field for CSXT. Bennett Br. 33 (citing JA149). "[R]elevance," however, "typically presents a low barrier to admissibility." *United States v. Leftenant*, 341 F.3d 338, 346 (4th Cir. 2003). In any event, the evidence that Bennett was the target of multiple acts of vandalism both before and after her stint at CSXT was *highly* relevant because it suggested that the same person—possibly Bennett herself—was responsible for the vandalism that occurred when Bennett was working at CSXT. *See* CSXT Br. 31. Particularly given Bennett's heavy reliance on the theory that Gilbert and Howze had a

motive to commit the vandalism, the evidence that someone else had been committing similar acts against Bennett was extremely probative. Indeed, much of the evidence that Bennett cites in support of her theory that Gilbert or Howze was the culprit (Bennett Br. 20-21) is equally or more consistent with the theory that someone connected to Bennett was involved.

Bennett further suggests that evidence of her other vandalism claims was inadmissible because CSXT lacked direct proof that she staged these other incidents. Bennett Br. 31-32. That argument is directly contrary to *Westfield Insurance Co. v. Harris*, 134 F.3d 608 (4th Cir. 1998), in which this Court held that an improbable pattern of suspicious claims *by itself* raises the inference that the person making the claims is responsible. *See id.* at 613-14. As the *Westfield* Court explained, under the "doctrine of chances, recognized by both courts and commentators" (*id.* at 615), "there comes a point when the accumulation of several claims, by itself, creates suspicion" (*id.* at 613 n.*). Other courts have recognized this same principle. *See, e.g.*, *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991).

Bennett contends that CSXT "fail[ed] to develop such a theory in front of the jury" (Br. 32), but she mischaracterizes the proceedings below. Bennett moved in limine to exclude the evidence of prior incidents (Dkt. No. 177), and CSXT responded that the evidence was relevant and admissible (Dkt. No. 183; *see also* Dkt. No. 215 at 10-13). After hearing argument, the district court declared that "this whole case is contracted into the arrival at work on [August] 18th and the precipitant event on the 25th" and ruled that "that's the way we're going to try it." JA149; *see also* Bennett Br. 33 (acknowledging the district court's "ruling" at "the outset of trial"); *id.* at 31 n.7. Because that ruling barred CSXT from presenting evidence or questioning Bennett about the other incidents, CSXT was limited to highlighting suspicious events on the night of the vandalism—such as Bennett's phone calls to an unknown number and her decision to park her car several hundred feet from the watch tower[7]—and making a proffer at the end of its case-in-chief (JA858-73). Given the limitations the court had put on it, CSXT hardly can be faulted for not doing more.

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[7] Bennett's statement that her car "could plainly be viewed" from the watchtower (Br. 20) is unsupported by the testimony she cites (*see* JA208). By contrast, there was affirmative testimony that her car could not be seen by the yardmaster when seated in the tower. JA768-69.

2. Bennett also misunderstands Rule 404(b). Although that rule does not permit introduction of evidence of prior acts "to prove a person's character in order to show that … the person acted in accordance with the character" (Fed. R. Evid. 404(b)(1)), it provides that evidence of a person's other crimes, wrongs, or bad acts "may be admitted [to show] 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident'" (*Westfield*, 134 F.3d at 614 (quoting Fed. R. Evid. 404(b)(2))). Our opening brief explained that the evidence of other alleged acts of vandalism was admissible to establish motive, intent, and common plan or scheme. *See* CSXT Br. 41-42 (collecting cases).

Ignoring the other cases we cited, Bennett attempts to distinguish *Westfield* by placing an unduly narrow focus on its particular facts. She is correct that here, unlike in *Westfield*, "there is no dispute that the vandalism of Ms. Bennett's vehicle was criminal." Bennett Br. 36. But just as the key question in *Westfield* was whether the plaintiff was the victim of an accident or instead set the fire herself, a key question here is whether Bennett was the victim of a crime or instead staged the vandalism herself. As *Westfield* teaches (*see* 134 F.3d at 613-15 & n.*),

the fact that Bennett experienced a series of highly unusual events suggests that Bennett herself (or someone associated with her), as the common link, was the person responsible for the vandalism—and Rule 404(b)(2) expressly permits other-acts evidence to prove "identity."

Moreover, just as Bennett hypothesizes that Gilbert or Howze are possible culprits because they had a motive (albeit a tenuous one), the excluded evidence tends to show that Bennett herself had a motive to stage acts of vandalism for financial gain—and Rule 404(b)(2) expressly permits other-acts evidence to prove "motive" and "intent." *See*, *e.g.*, *Rogers v. Allstate Ins. Co.*, 47 F. App'x 797, 798 (8th Cir. 2002) (per curiam); *York*, 933 F.2d at 1349; *Dial v. Travelers Indem. Co.*, 780 F.2d 520, 523 (5th Cir. 1986); *Hammann v. Hartford Accident & Indem. Co.*, 620 F.2d 588, 589 (6th Cir. 1980).

The excluded evidence also tends to show that the vandalism in this case was part of a common plan or scheme by Bennett to stage acts of vandalism against her own property in order to obtain financial recovery—and Rule 404(b)(2) expressly permits other-acts evidence to show a common "plan." *See*, *e.g.*, *Westfield*, 134 F.3d at 614 (permitting similar-fraud evidence to show that incident was "part of a plan or

scheme" to defraud); *Dial*, 780 F.2d at 522, 523, 524. Contrary to Bennett's arguments, therefore, the evidence was plainly admissible under Rule 404(b).

3. As to Rule 403, Bennett offers little more than a half-hearted defense of the district court's ruling that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice or confusion. *Westfield* shows that this sort of pattern-of-similar-fraud evidence is not just relevant, but is "critical" in a case such as this. 134 F.3d at 610. In fact, the inference that Bennett herself staged these crimes is *stronger* than the inference that either Gilbert or Howze was responsible—which rests solely on evidence of the encounters they had with her earlier in the week and the bare fact that a meeting had been scheduled to discuss the personality conflicts.

Although Bennett asserts that the evidence of other reports of vandalism would "inflame the jury" or somehow cause confusion (Br. 35, 37), she identifies no likely source of "prejudice" other than that which would have resulted from the jury's conclusion that Bennett herself quite possibly was responsible for the vandalism. As *Westfield* teaches, "[p]rejudice under Federal Rule of Evidence 403 is certainly not

established from the mere fact that the evidence is highly probative." 134 F.3d at 615.

Bennett also insists that the district court did not "'act[] arbitrarily or irrationally in admitting evidence.'" Bennett Br. 37 (quoting *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990)). However, Bennett invokes the wrong legal standard: Because all relevant evidence is presumed to be admissible (Fed. R. Evid. 402), and Rule 403 permits exclusion only when the probative value "is *substantially* outweighed by" some other danger (Fed. R. Evid. 403 (emphasis added)), review of a district court's decision to *admit* evidence is less stringent than review of a decision to *exclude* evidence. *See*, *e.g.*, *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006) ("The district court possesses broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue. Conversely, we are mindful that the court's discretion to exclude evidence under Rule 403 is narrowly circumscribed. … The balance under the Rule, therefore, should be struck in favor of admissibility.") (internal quotation marks omitted). Here, unlike in *Simpson*, Rules 402 and 403 weigh *against*—not in favor of—the district court's ruling.

Moreover, the district court here *did* act arbitrarily. As explained above (at page 10) and as Bennett has acknowledged (Bennett Br. 33), the district court announced at the outset of trial that it was limiting the evidence to matters arising within the one-week period when Bennett worked in the field for CSXT. *See* JA149. It deemed the similar-fraud evidence categorically irrelevant on that basis, even though the evidence is vital to CSXT's defense on a central issue. This Court has held that it is an abuse of discretion for a district court to impose such categorical limitations on admissibility instead of considering each item of evidence individually as it is offered. *See James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) ("Perhaps [the] most obvious manifestation" of an abuse of discretion "is in a failure or refusal … actually to exercise discretion, deciding instead as if by general rule"); *see also Westfield*, 134 F.3d at 614 ("[W]e believe that the court … abused its discretion in *categorically excluding* such evidence in this case.") (emphasis added); *id.* at 615 ("Because the prior-acts evidence was categorically excluded without being subjected to the necessary examination, a new trial is required."). The district court's

arbitrary temporal limitation and its refusal to consider all evidence on an item-by-item basis constitute reversible error.

Finally, Bennett argues that the Rule 403 balance tips against CSXT because "CSX[T] sought to offer [the evidence] through an expert." Bennett Br. 37. Bennett failed to raise that argument in the trial court, however, and has therefore waived it. *See* Dkt. No. 177 (Bennett's motion in limine to exclude certain evidence). Had Bennett timely raised this argument, CSXT could have offered to introduce evidence of her other dubious vandalism claims through other means, such as police reports and witness testimony. *Cf.* Dkt. No. 162, at 33, 71-74. Having failed to raise this objection, she cannot offer it as justification for the lower court's ruling now.

B. The District Court Erred In Admitting The Testimony Of William Darity.

Bennett fails to point to anything in Dr. Darity's testimony that constitutes more than a legal conclusion that she was subjected to a hostile work environment. Bennett insists that Darity's testimony "was helpful to the jury" (Br. 41) and that it "assisted the jury in understanding the social and cultural biases in the workplace" and "the role racial and gender stereotyping plays in the workplace" (*id.* at 39),

but she neither identifies any specific testimony that aided the jury's understanding of the facts nor offers *any* citations to the record.

In truth, Darity provided no insights outside the realm of common experience; nor did his opinions derive from special knowledge or expertise. Juries do not need expert help in identifying acts of discrimination, and such assistance certainly was not needed here. Darity's testimony thus had only the impermissible effect of "'tell[ing] the jury what result to reach.'" *United States v. Cecil*, 836 F.2d 1431, 1441 (4th Cir. 1988) (emphasis omitted). Indeed, Darity *hindered* the jury's understanding because he gave the jury the wrong legal standard: The trial judge correctly instructed the jury that Bennett had to prove that the hostile environment was *created by a supervisor* (JA938), but Darity incorrectly told the jury that Bennett had been subjected to a hostile work environment *no matter who* committed the vandalism (JA542-43).

Bennett contends that in *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir. 2000), this Court "admitted and relied upon" similar testimony. Bennett Br. 42. Not so. The *Lowery* Court merely noted in a single sentence that "an expert in the field of human resources" had

testified that the defendants' "subjective criteria system" for making promotion decisions "could easily result in discrimination." 206 F.3d at 437 n.2. Such testimony about an employer's policies and procedures bears no resemblance to the testimony offered here. In any event, *Lowery* said nothing about the admissibility of that testimony, which was not challenged in the appeal.

A closer authority is *Lipsett v. University of Puerto Rico*, 740 F. Supp. 921 (D.P.R. 1990), which we discussed in our opening brief (at 46-47). As in this case, the plaintiff in *Lipsett* sought to call a social psychologist "to testify about sexual harassment … and whether or not there has been sexual harassment and a hostile work environment." 740 F. Supp. at 925. The district court excluded that testimony because it "would not bring to the jury 'anything more than the lawyers can offer in argument'" and, moreover, "usurps the prerogative of the jury as the fact finder." *Id.*; *see also Barfield v. Orange Cnty.*, 911 F.2d 644, 651 n.8 (11th Cir. 1990) (expert testimony about whether the plaintiff was a victim of discrimination "would not assist" the jury).[8]

[8] *Lipsett* likewise rejected the argument, advanced by Bennett here (*see* Bennett Br. 42), that an expert may offer testimony that usurps the role of the jury because Rule 704 does not preclude testimony that

For similar reasons, Darity's testimony independently fails Rule 703 and *Daubert* because Darity did not apply reliable methods based on scientific, technical, or other specialized knowledge. *See* Fed. R. Evid. 703; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Darity said that he applied a "template or profile" that he had "mentioned" in a 1981 article (JA549-50), but he conceded that his profile has never previously been used or examined in *any* case (JA550). When pressed to explain his methodology, Darity described it as "[d]eductive reasoning maybe." JA54. And far from applying reliable methods, Darity conceded that another social scientist reviewing the same evidence could come to precisely the opposite result. *See* JA56.

Bennett contends that "the gate-keeping function set forth in *Daubert*" was nonetheless satisfied because "CSX[T] cross-examined Dr. Darity" at trial. Bennett Br. 45. But that is *the very opposite* of what *Daubert* requires. The point of *Daubert*'s gatekeeping requirement is that a party should not be allowed to introduce unreliable junk science *even though* the testimony will be subject to vigorous cross-examination and other constraints of the adversary system. *Daubert*, 509 U.S. at

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"embraces an ultimate issue" (Fed. R. Evid. 704). *See Lipsett*, 740 F. Supp. at 925.

595 ("'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'"); *see also*, *e.g.*, *United States v. Ozuna*, 561 F.3d 728, 736 (7th Cir. 2009) ("the district court serves a 'gatekeeping' function to prevent expert testimony from carrying more weight with the jury than it deserves"). While vigorous cross-examination undoubtedly aids a jury in understanding the limitations of expert testimony, it is no excuse for a district judge's failure to carry out the screening function required by *Daubert*.

III. THE DISTRICT COURT ERRED IN AWARDING FRONT AND BACK PAY.

A. Bennett Is Not Eligible For Front Or Back Pay Because She Neither Sought Nor Obtained A Finding Of Constructive Discharge.

1. Bennett does not dispute our showing that the eight other Circuits to consider the issue have held that a hostile-environment plaintiff who does not remain on the job is not entitled to an award of front or back pay for the period after his or her departure absent actual or constructive discharge. *See* CSXT Br. 52 & n.12 (collecting cases). Nor does she defend the district court's mistaken conclusion that this Court's decision in *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (4th Cir. 2002), established that Title VII plaintiffs in this

Circuit are never required to prove constructive discharge. *See* CSXT Br. 53-55 (explaining why *Dennis* does not absolve Bennett of the requirement to show constructive discharge).

Instead, Bennett now rests her argument on *Wells v. North Carolina Board of Alcoholic Control*, 714 F.2d 340 (4th Cir. 1983)—a case that was neither mentioned by the district court nor cited in Bennett's briefs to that court (*see* Dkt. No. 216), but that we discussed in our opening brief (at 55-56). The plaintiff in *Wells* was wrongfully denied a promotion from stock clerk to sales clerk because of his race. 714 F.2d at 341. Thirteen months later, he was forced to resign from the stock-clerk job because a back injury left him unable to perform the heavy lifting it required. *Id.* at 341-42.

Bennett quotes *Wells* for the proposition that "'the termination of [the plaintiff's] employment has no relevance to his entitlement to a back pay award,'" but instead "'bears only upon the amount of the award.'" Bennett Br. 49 (quoting *Wells*, 714 F.2d at 342). That statement was correct *under the circumstances of that case* because Wells's entitlement to back pay arose from the employer's earlier failure to promote him to sales clerk, not from the loss of his stock-clerk

position. Even if Wells had breached his duty to mitigate by voluntarily resigning from the stock-clerk position, he would have been entitled to the difference in pay between stock clerk and sales clerk, which was a loss attributable to the employer's discriminatory adverse action.[9] The plaintiff's reason for resigning in *Wells* accordingly "b[ore] only upon the amount of the award." 714 F.2d at 342. Here, in contrast, Bennett elected not to present to the jury a claim that CSXT took an action that deprived her of *any* pay, and she accordingly was not entitled to receive any back- or front-pay award.

Bennett also latches onto the *Wells* Court's statement that back pay may be proper "'whether or not Wells was constructively discharged'" (Bennett Br. 49 (quoting *Wells*, 714 F.2d at 342)), but she takes this line out of context. *Wells* held only that the plaintiff could recover full back pay (including for loss of the stock-clerk job) even though he had not been *intentionally* discharged. *See* 714 F.2d at 342. The Court held that, irrespective of its intent, the employer was

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[9] Bennett correctly observes that constructive discharge generally has no application to a failure-to-hire or failure-to-promote case, which—unlike a hostile-environment case—would not ordinarily involve any discharge. Bennett Br. 50; *see Hertzberg v. SRAM Corp.*, 261 F.3d 651, 660 n.8 (7th Cir. 2001) (citing *Wells*, 714 F.2d at 342).

responsible for Wells losing his job—and thus for full back pay—because "[h]ad [the plaintiff] not been wrongfully denied that promotion to relatively light work [as a sales clerk], it may reasonably be inferred that he would not have suffered an injury to his back." *Id.* Wells thus stands for the simple proposition that a discharge need not be intended for it to support an award of back pay, as long as it is ultimately attributable to an act of intentional discrimination by the employer. *See* CSXT Br. 55.

In fact, as we explained in our opening brief (at 55-56), *Wells* actually *confirms* that Bennett was required to obtain a finding of constructive discharge to recover front or back pay. *Wells* correctly states and applies the constructive-discharge standard: The plaintiff must prove that he "reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's wrongful [conduct]." 714 F.2d at 342; *accord*, *e.g.*, *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977) ("the trier of fact must be satisfied that the [employee's] working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"). The plaintiff in

Wells thus satisfied "the objective reasonable-employee constructive discharge standard" because, due in part to his employer's wrongful conduct, he "developed a condition that made his continuing in his same job station an extreme hardship." *Jurgens v. EEOC*, 903 F.2d 386, 389 n.2 (5th Cir. 1990) (discussing *Wells*, 714 F.3d at 342).

Here, too, Bennett was obliged to prove—and to obtain a jury finding—that CSXT engaged in conduct that would have caused a reasonable person to resign. Because she decided *not* to present that theory to the jury, she is not entitled to an award of front or back pay.

2. Unable to identify any decision from this Court or any other court generally permitting a Title VII plaintiff to recover front or back pay *without* proving constructive discharge, Bennett can argue only that there is "no authority … that the Fourth Circuit requires a claim or finding of constructive discharge." Bennett Br. 50. But even if the issue were an open one in this Circuit, the Court should resolve it now by joining the eight other Circuits to reach the issue and holding that a Title VII hostile-environment plaintiff must seek and obtain a constructive-discharge finding in order to recover equitable remedies such as front and back pay.

In contending that this Court should not require proof of constructive discharge, Bennett invokes Title VII's general goal of providing make-whole relief and quotes selectively from the broad remedial authority granted by 42 U.S.C. § 2000e-5(g)(1). Bennett Br. 46. But she conspicuously omits the final sentence of Section 2000e-5(g)(1), which imposes a "statutory duty to mitigate … damages." *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985); *see* 42 U.S.C. § 2000e-5(g)(1) ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.").

We explained in our opening brief (at 51-52 & n.12) that this duty to mitigate ordinarily requires a plaintiff to remain at her job while corrective measures are taken, because her continued salary and employment mitigate any damages. As this Court has put it, "a Title VII plaintiff cannot remain idle after an unlawful discharge and receive back pay for that period" when "suitable employment" is available. *Brady*, 753 F.2d at 1273. Thus, an employee who chooses to voluntarily leave her position may demand front and back pay (on top of

compensatory damages) only if her work conditions became so irremediably hostile that she had no choice but to resign—*i.e.*, if she proves constructive discharge. CSXT Br. 52.

3. Bennett baldly asserts that she satisfied the constructive-discharge requirement. Bennett Br. 49. As we explained in our opening brief (at 57-58), however, constructive discharge is an issue that must be submitted to and decided by the finder of fact. Bennett does not contend otherwise.[10] It is not enough, therefore, for Bennett to assert to this Court that she proved constructive discharge. Bennett was required to *ask the jury* to determine whether or not she was constructively discharged, and she undeniably failed to do so.

In fact, Bennett affirmatively waived any finding of constructive discharge. *See*, *e.g.*, *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006) (plaintiff who prevailed on a hostile-environment claim waived right to back pay by failing to submit constructive-discharge issue to the jury). We explained in our opening brief (at 18-20, 56) that

[10] In a bench trial, unlike a jury trial, constructive discharge may be decided by the court, because there the court is acting as the finder of fact. *See*, *e.g.*, *Clark v. Marsh*, 665 F.2d 1168, 1172 (D.C. Cir. 1981) (upholding front-pay award based on the trial court's finding of constructive discharge following a bench trial). This case, of course, involved a jury trial.

Bennett repeatedly declined to submit a constructive-discharge question to the jury—even after CSXT submitted an instruction on the issue and the court held that it was "up to the plaintiff" whether to pursue a constructive-discharge theory (JA885). Bennett does not challenge our recitation of that history. This Court should therefore hold that Bennett waived the essential issue of constructive discharge and, accordingly, is not entitled to front or back pay.

B. The Awards Of Front And Back Pay Are Excessive.

1. The district court exceeded its discretion in awarding 27 years of front pay at full salary.

As we explained in our opening brief (at 61-64), the district court's front-pay calculation is unsupported by—and, indeed, contrary to—the evidence presented at trial. Moreover, the award of *27 years* of front pay at *full salary* is legally excessive in a case in which the plaintiff has the potential to find work elsewhere. *See* CSXT Br. 59-61.

Bennett does not meaningfully challenge our showing that the front-pay award is contrary to the evidence. As we have explained, the district court adopted the front-pay estimate presented by Bennett's forensic economist, Dr. Oliver Wood, who testified that his calculations assumed that Bennett is "a hundred percent unemployable … [f]or the

rest of her adult life" and will "never earn another dime." JA501. He attributed this assumption to information provided by Bennett's vocational rehabilitation expert, Dr. Charles Vander Kolk. *Id.* But Dr. Vander Kolk *rejected* that assumption, testifying that Bennett was "on the edge" of "[t]he work world" (JA464) and could return to work in as little as a year (JA463-64). Indeed, at the time of trial Bennett was already working at a day-care center and remodeling real estate. JA464. And Dr. Wood conceded that his front-pay calculation would not be correct if his assumptions about Bennett's future work capacity were wrong, as the evidence shows. JA501. Accordingly, the district court abused its discretion when it adopted that calculation. *See generally* CSXT Br. 61-64.

Bennett's argument that 27 years of front pay at full salary was permissible to "place[] [her], as closely as possible, in the situation she would have enjoyed" had she remained in CSXT's employ for the remainder of her career (Br. 50) also ignores that make-whole relief is subject to the statutory duty to mitigate (*see supra* pp. 25-26). Title VII does not entitle Bennett to stay home and receive her full salary for the rest of her employable life, or to continue to draw her full CSXT salary

while also working other jobs. Front pay must be limited in both amount and duration to account for the income Bennett could earn through other employment.

This Court has thus held that "front pay from the date of termination until [the plaintiff's] planned retirement"—which is precisely what the district court awarded here—is "simply too speculative to award." *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 300 (4th Cir. 2009). And if the 15 years of front pay sought in *Dotson* were "unduly speculative" (*id.*), *a fortiorari* the 27-year award here cannot be sustained either.

Bennett does not even attempt to respond to the authorities we cited, from this Court and others, overturning front-pay awards that were far smaller and covered far less time than the award here. *See* CSXT Br. 59-61. Instead, she offers a cherry-picked list of five outlier cases with large awards. *See* Bennett Br. 52. Each of the cases she cites, however, is readily distinguishable from her own.[11] And it is most

[11] *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 504, 511 (9th Cir. 2000) (front pay awarded only on state-law claim, not on Title VII claim, and evidence showed that plaintiff could not get equivalent upper-management job with a new employer); *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1157 (9th Cir.

telling that Bennett has been able to identify *only five cases within the last 20 years* awarding front pay in amounts comparable to the award here. If anything, Bennett's struggle to identify such cases confirms how extraordinary—and unwarranted—the front-pay award is here.

Finally, Bennett complains that CSXT did not offer its own front-pay estimate and cites *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 392-23 (D. Md. 1997), as "awarding front pay when the employer defendant failed to present such evidence." Bennett Br. 51-52. But Bennett neglects to mention the *Ford* court's conclusion that the plaintiff should be awarded only *one year* of front pay, a far cry from the 27 years awarded in this case. *See* 984 F. Supp. at 392. Indeed, the *Ford* court reasoned that "a one-year front pay award, combined with time available to Plaintiff before [trial], amounts to a two-year period

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1999) (evidence showed that 59-year-old plaintiff "would be unable to work in the future" because of her age, education level, vocational background, and health); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992) (front pay awarded under New York state law, not Title VII, and defendant did not argue failure to mitigate); *EEOC v. Freeman*, 2011 WL 1226468, at *5-9 (M.D. Tenn. 2011) (defendant's sole objection to front-pay award was that plant closing should have cut off any front pay after the date of closing); *Warren v. Cnty. Comm'n of Lawrence Cnty.*, 826 F. Supp. 2d 1299, 1317 (N.D. Ala. 2011) ("negative publicity from the trial" made it "virtually impossible for [plaintiff] to find comparable local employment" despite "even the most diligent mitigation efforts").

for Plaintiff to seek reasonably comparable employment." *Id.* at 393. In this case, Bennett already received a generous 44-month back-pay award, obviating any need for front pay. *Cf. Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 504 n.3 (4th Cir. 2001) (denying front pay where plaintiff received back pay). *Ford* thus counsels *against* the lengthy front-pay award in this case, not in favor of it.

2. The district court miscalculated the amount of back pay.

Bennett's two-page discussion of back pay fails to meaningfully respond to our arguments. Indeed, Bennett makes no effort to defend the back-pay award except to insist that back pay is "within the district court's broad discretion and equitable powers." Bennett Br. 53. But that discretion is not unbridled; this Court has recognized, for example, that a court may not issue a back-pay award that exceeds the amount the plaintiff would have made had she been able to remain in her position. *Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992). Our opening brief explained why the district court abused its discretion by issuing a back-pay award that included amounts to which Bennett was not entitled. CSXT Br. 64-67. Bennett does not even try to refute our arguments on these points.

Bennett does assert—incorrectly—that CSXT failed to argue in the district court that the back-pay award "must be reduced to account for Ms. Bennett's ability to earn mitigating income in 2011 and 2012." Bennett Br. 54; *cf.* CSXT Br. 66-67. Under cross-examination by CSXT, Bennett's damages expert conceded that his back-pay calculation failed to deduct mitigating income for 2011 or 2012. JA495-96. CSXT then argued in opposition to Bennett's request for back pay that "facts in evidence demonstrate that, although plaintiff did not continue working, she possessed the ability to do so." Dkt. No. 202, at 2; *see also id.* at 3-4. And after the district court issued its order on back pay, CSXT objected that although the district court offset the back-pay award to account for mitigating income actually earned in 2009 and 2010, it erred by not further reducing the back-pay award to account for Bennett's full ability to mitigate damages. Dkt. No. 215, at 22-23; Dkt. No. 217, at 9. Insofar as Bennett means to contend that CSXT's objections should have made more specific references to the record, it was not possible to do so at that time because the district court adopted the back-pay calculation presented by Dr. Wood at trial (which differed from the calculation in his pretrial report), and the transcript of that testimony was not

available until after post-trial briefing was completed. *Cf.* Dkt. No. 213 (order denying CSXT's request for an extension of time to file its post-trial brief).

CONCLUSION

The Court should vacate the judgment below and remand with instructions to enter judgment as a matter of law for CSXT. In the alternative, the Court should order a new trial. Failing that, the Court should reverse the award of front and back pay or, at minimum, order that it be reduced to an amount supported by the evidence. If the judgment is vacated or modified, the Court should also vacate the order awarding attorneys' fees and costs.

Dated: July 1, 2013

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-2477 / 12-2556 Caption: Vicky T. Bennett v. CSX Transportation, Inc.

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I certify that on this 1st day of July, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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