No. 14-14596-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER CHAVEZ,

Plaintiff-Appellant,

v.

CREDIT NATION AUTO SALES, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia, Case No. 1:13-cv-00312-WSD/JCF

BRIEF FOR APPELLANT JENNIFER CHAVEZ

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DATED: November 19, 2014

AMENDED CERTIFICATE OF INTERESTED PARTIES

The Plaintiff/Appellant, Jennifer Chavez, certifies that the following is a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations known to her that have or may have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judges:

Duffy, Jr., William S. (District Court Judge)

Fuller, Clay J. (Magistrate Judge)

Plaintiff/Appellant:

Chavez, Jennifer

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Organizations Filing Amicus Briefs Below

U.S. Equal Employment Opportunity Commission

Lambda Legal Defense and Education Fund

Transgender Legal Defense & Education Fund, Inc.

Transgender Law Center

National Center for Transgender Equality

Freedom to Work

PFLAG National

Gay & Lesbian Advocates and Defenders

Defendant/Appellee:

Credit Nation Auto Sales, LLC

Torchia, James, Member of Credit Nation Auto Sales, LLC

Celello, Marc A., as Member, Officer or Incorporator of Credit Nation Auto Sales, LLC

Attorneys and Law Firms Representing Defendant/Appellee:

Celello Law Group, LLC

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Organizations Intending to Apply for Leave to File Amicus Briefs on Appeal

Transgender Law Center

PFLAG National

Freedom to Work

REQUEST FOR ORAL ARGUMENT

This case presents important issues relating to employment discrimination law, specifically when and how *McDonnell-Douglas* burden-shifting is applied to cases involving mixed motives and direct evidence at the summary judgment stage, involving an issue of first impression in this Court and a Circuit split. It also addresses whether evidence of discrimination goes to the *veracity* or the *wisdom* of employer's proffered rationale, and whether discounting such evidence impinges on the Seventh Amendment right to jury trial. Oral argument will provide significant and substantial aid to the Court because the complexities of these issues in the context of this fact-intensive case cannot easily be explained only via the written word.

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STATEMENT OF JURISDICTION

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 because the action is based on Title VII, 42 U.S.C. §2000e-1, *et seq.,* a federal statute, and pursuant to 28 U.S.C. §1337 because the action is based on a federal statute regulating commerce, and pursuant to 28 U.S.C. §1343 because the action is based on deprivation of the Plaintiff-Appellant, Ms. Chavez's right under color of state law as against a federal law providing for equal rights. Ms. Chavez appeals from a final decision of the District Court that disposed of all of her claims, and therefore this Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291. The judgment was rendered on September 12, 2014, and Ms. Chavez filed her Notice of Appeal on October 10, 2014, within the required 30 days.

STATEMENT OF ISSUES

(1) Whether the District Court erred by applying *McDonnell-Douglas* burden shifting to Plaintiff's mixed motive claim under 42 U.S.C. §2000e-2(m) – *See Argument Part I-A*

(2) Whether the District Court erred by finding no direct evidence of discrimination because of sex – *See Argument Part I-B*

(3) Whether the District Court erred by discounting facts and inferences in Plaintiff's favor to determine that no genuine issue of material fact existed – *See Argument Part I-C-1*

(4) Whether the District Court erred by holding that facts and inferences, tending to prove that the Defendant's proffered rationale for termination was not the true reason or did not deserve credence, were not cognizable because allegedly directed to the wisdom of Defendant's proffered rationale – *See Argument Part I-C-2*

(5) Whether the District Court, granting summary judgment where genuine issues of material fact existed and/or by declining to give Plaintiff the benefit of facts and inferences, violated Plaintiff's right to jury trial under U.S. Const., Amend VII – *See Argument Part II*

STATEMENT OF THE CASE

This case is about whether an employer, whose owner and decision-maker berated a transgender employee, about how her non-traditional gender made him "nervous" and would negatively impact his business and her co-workers, 48 days before he fired her, can avoid a jury because the employee inadvertently closed her eyes on an icy-cold early January morning "snow day" with no work to do because the parts truck was late. This a case brought by Plaintiff-Appellant, Jennifer Chavez, against her former employer, Defendant-Appellee Credit Nation Auto Sales, LLC, for employment discrimination because of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, *et seq.*

Course of Proceedings and Dispositions in the Court Below

Plaintiff-Appellant, Jennifer Chavez, filed this action on June 30, 2013. Doc. 1. Defendant filed a Motion to Dismiss. Doc. 6. Plaintiff filed an Amended Complaint on March 11, 2013, Doc. 9. The Magistrate recommended denial of Defendant's Motion to Dismiss, Doc. 20. Plaintiff filed Rule 72 objections, Doc. 26, which the District Court overruled, and denied Defendant's Motion to Dismiss, Doc. 35. Defendant answered Plaintiff's Amended Complaint, Doc. 23. Defendant filed a Motion for Summary Judgment, Doc. 48. The Magistrate granted leave for amici to appear and file briefs. Doc. 75. The Magistrate recommended granting the Defendant's Motion for Summary Judgment. Doc. 76. Plaintiff filed Rule 72

Objections, Doc. 78, which the District Court overruled, and adopted the Magistrate's Recommendations. Doc. 80. Plaintiff filed a Notice of Appeal. Doc. 82. The Clerk entered Judgment in favor of Defendant for costs, Doc. 81, and Defendant filed a Bill of Costs, Doc. 85. Plaintiff objected to the Bill of Costs on October 16, 2014, Docs. 87–88. Defendant filed a Motion For Bond Pending Appeal. Doc. 91. Plaintiff filed for extension of time to respond to the Motion for Bond, Doc. 92, and the Court denied the request for extension, Doc. 95.

Rulings Presented for Review

Plaintiff-Appellant, Ms. Chavez, appeals from and requests review of the ruling of the Hon. William S. Duffey, granting summary judgment to Defendant Credit Nation Auto Sales, LLC ("Credit Nation"), dated September 12, 2014, Doc. 80.

Statement of Facts

After Plaintiff-Appellant, Jennifer Chavez, advised her employer, Defendant-Appellee Credit Nation, of her intent to transition from male to female on October 28, 2009, Doc. 60, PSOMF[1] ¶1, she was initially treated nicely by Credit Nation's Vice-President, Cindy Weston. Doc. 61, Chavez Decl. ¶¶28–43. After James Torchia, Credit Nation's owner, learned of this, Ms. Weston told Ms.

[1] "SOMF" refers to Statement of Material Facts. "PSOMF" refers to Plaintiff's Statement of Disputed Material Facts and "DSOMF" refers to Defendant's Statement of Undisputed Material Facts.

Chavez on November 12, 2009 that she needed to "tone it down," and to be "very careful" because Mr. Torchia "didn't like it" (by inference, the situation regarding her gender transition). *Id.* ¶2. (The words in quotes are direct quotes, and the rest is Plaintiff's inference.) Ms. Chavez was subjected to hostility after November 12, 2009, from coworkers and managers. *Id.* ¶3. Mr. Torchia called Ms. Chavez into a meeting on November 24, 2009, *id.* ¶¶62-71, where she observed that Mr. Torchia acted in a manner she considered hostile, stating that Ms. Chavez's being transgender made him "nervous," implying that her being transgender would drive away customers and employees, and hurt the business, prohibiting her from addressing her gender transition with co-workers, and restricting her right to wear clothing to work or from work that any other woman could wear. *Id.* ¶4. Ms. Chavez observed that Defendant's managers subjected her work to unusual scrutiny. *Id.* ¶5. She was written up for telling co-workers that she had Ms. Weston's telephone number and not to mess with her, after co-workers accused her of getting "special treatment" because of her gender transition. Doc. 49, Chavez Dep. 59:5-61:23; 207:6-210:10; Doc. 76, R&R 11–12. She was told that she could no longer use the bathroom in the waiting area, but would instead have to use the other bathroom, *id.* ¶¶6–7, which she inferred was related to her gender. An email from Credit Nation's attorney implied that they should keep writing her up until they "get to a breaking point," and it is a reasonable inference favorable to Ms.

Chavez that Credit Nation followed its attorney's advice. *Id.* ¶¶9–11. On an icy-cold early January morning, with no work to do because of a missing parts truck, she sat in the back of a car in the shop with the door open in an effort to warm up. *Id.* ¶¶12–21. She inadvertently closed her eyes, and the shop foreman ran up and took a picture, and left her to sleep in the car for about 45 minutes. *Id.* ¶¶23–29. Ms. Chavez was fired by Credit Nation's owner, Mr. Torchia, for sleeping on the job. *Id.* ¶40–41. The shop manager, Kirk Nuhibian, later admitted to Ms. Chavez in writing that he knew "for a fact" that she was "run out of [C]redit [N]ation," which implied that she had been fired on a pretext, although he later gave a different interpretation at deposition. *Id.* ¶30. Defendant has changed its rationale for Plaintiff's termination to include many additional charges, including disciplinary charges that Credit Nation's Vice-President conceded were not a basis for termination (*id.* ¶49), for a "zero-tolerance" policy that appears fabricated post-hoc, and for a series of other violations of Credit Nation's policies piled on by Defendant in statements in courts and tribunals involving Ms. Chavez's termination. *Id.* ¶¶42–55.

Standards of Review

The standard for review of a denial of summary judgment is *de novo*. *Moorman v. UnumProvident Corp.*, 464 F.3d 1260, 1264 (11th Cir. 2006), as is the

standard of review of the legal issue of whether *McDonnell Douglas* burden shifting is properly applied to Plaintiff's mixed motive Title VII claim. These standards apply to all of Plaintiff's issues, except the issue regarding the Seventh Amendment, found in Part II.

The right to a jury trial under the Seventh Amendment is determined by "the nature of the issues involved and the remedy sought." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S. Ct. 1339, 1345 (1990) (Marshall, J.); *Blake v. Unionmutual Stock Life Ins. Co. of America*, 906 F.2d 1525, 1526–27 (11th Cir. 1990). Though neither the Supreme Court nor the 11th Circuit has conclusively decided what standard of review applies where plaintiff alleges a constitutional deprivation of her right to trial by jury, the Eighth Circuit provides some guidance. As per the Eighth Circuit, whether a party is entitled to a jury trial under the Seventh Amendment is a question of law is reviewed *de novo*. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 540 (8th Cir. 2004).

SUMMARY OF ARGUMENT

Plaintiff-Appellant, Ms. Chavez, should not have been required to show proof of pretext. Ms. Chavez clearly raised a mixed-motive causation theory, and amply pointed to evidence of discriminatory motive by decision-maker Mr. Torchia. The District Court erroneously required Ms. Chavez to fully rebut and essentially prove the employer's proffered rationale was untrue as well as prove a discriminatory motive.

Evidence of pretext was also unnecessary because of the *direct evidence* of animus by decision-maker Mr. Torchia 48 days prior to her termination. Direct evidence is that which reflects a "discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Statements of animus made by the decision-maker two months prior to discharge have been found to constitute direct evidence, rather than isolated remarks, in the 11th Circuit.

The District Court improperly discounted the employee's evidence of pretext in violation of Federal Rule of Civil Procedure 56. It weighed evidence in the place of a jury, putting the burden on the employee to prove pretext, instead of simply requiring citation of evidence that a reasonable jury could use to make such a finding. It improperly required additional evidence beyond the *prima facie* case, and then improperly ignored evidence and inferences in favor of the non-moving employee and credited inferences favorable to the moving employer. It erroneously

equated evidence attacking the *veracity* of employer's proffered rationale with evidence attacking the *wisdom* of employer's action, ignoring the employee's evidence that sleeping on the job *was not* the cause-in-fact for her termination.

By weighing the evidence instead of looking for genuine disputes of material fact, ignoring the employee's evidence and inferences in her favor, and using burden-shifting methods for direct evidence and mixed motive evidence, the District Court run afoul of Plaintiff's 7th Amendment right to a jury trial.

LEGAL ARGUMENT

I. The District Court erred in granting Defendant's Motion for Summary Judgment.

Jennifer Chavez disclosed to her employer that she is transgender in mid-October of 2009. Shortly thereafter, she was told that she needed to "tone it down" because James Torchia, Credit Nation's owner and decision-maker, "didn't like it." He told Ms. Chavez in a meeting shortly thereafter that he and others were uncomfortable with her transition and ordered her to stop expressing her gender identity through wearing feminine attire to and from work. A series of circumstances then occurred that suggested that Credit Nation was looking to find a reason to terminate her based on her gender identity. For example, she was told to "tone it down" because Mr. Torchia "didn't like it," and her work was subjected to unusual scrutiny, and she was disciplined for opposing harassment based on her transgender status. Credit Nation's counsel implied that she be written up until the "breaking point." See *infra* Section I-C-1-c for more discussion of circumstances suggesting discrimination. On an icy-cold January morning, that others took as a "snow day," with no work to do, she inadvertently closed her eyes, and Credit Nation had found its "legitimate reason."

A. The District Court erred by applying the *McDonnell Douglas* burden-shifting framework at the summary judgment stage to Plaintiff's mixed-motive evidence.

On January 11, 2010, less than two months after Mr. Torchia expressed his disapproval of Ms. Chavez's gender, and less than a month after Credit Nation's attorney advised Chavez's managers to establish a record of discipline, Ms. Chavez was fired for taking a brief nap while she did not have work to do." The Court below required Ms. Chavez to show proof of pretext in order to defeat summary judgment. This ruling was erroneous. The legal issue of whether *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973) burden-shifting is properly applied to Title VII mixed-motive methods of causation based on circumstantial evidence at the summary judgment stage has not been addressed by the United States Supreme Court.[2] It is an issue of first impression in this Court. *See EEOC v. TBC Corp.*, 532 Fed.Appx. 901, 903 (11th Cir. 2013) (declining to decide the issue).[3] "Mixed-motive" causation method refers to a Title VII case in which there is evidence of a discriminatory motive and a legitimate motive of an employer, and

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[2] While the Supreme Court has clearly articulated the requirements of *McDonnell* for cases already with the final trier of fact as well as for steps one and two in cases at summary judgment, it has never expressly reconciled step three's burdens with those assigned and shifted in summary judgment.

[3] *Cooper v. Southern Co.,* 390 F.3d 695, 725 n.17 (11th Cir. 2004) is not to the contrary, as that case addressed only the contention that *McDonnell Douglas* burden-shifting may never be applied in any Title VII case after *Desert Palace v. Costa,* 539 U.S. 90, 123 S.Ct. 2148 (2003).

the discriminatory motive is alleged to be a motivating factor. See 42 U.S.C. §2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") Until *Desert Palace v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003), it was not clear whether the plaintiff in a mixed-motive Title VII case could succeed by demonstrating circumstantial evidence. That case explicitly decided that circumstantial evidence was permitted, but did not address the question of whether *McDonnell Douglas* burden shifting applied to circumstantial mixed-motive cases.

All but one of the six Circuits that have directly addressed the issue have rejected required application of *McDonnell Douglas* burden shifting in cases involving mixed-motive causation theories based on circumstantial evidence.[4] The other five Circuits have not addressed the issue.[5] The requirement in a mixed-

[4] *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (permitting but not requiring use of *McDonnell Douglas* in mixed motive cases); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 (5th Cir. 2005) (rejecting use of McDonnell Douglas in mixed motive cases); *White v. Baxter Health Corp.*, 533 F.3d 381 (6th Cir. 2008) (rejecting use of *McDonnell Douglas* in mixed motive cases); *McGinst v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (permitting but not requiring use of *McDonnell Douglas* in mixed motive cases); *Frogg v. Gonzales*, 492 F.3d 447, 451 & n* (D.C. Cir. 2007) (same). *But cf. Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

[5] The First, Third and Tenth Circuits have not decided the issue. *See Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 45 n.8 (1st Cir. 2009) (noting issue)*; Houser v.*

motive causation claim that the employer's proffered rationale be entirely rebutted at the summary judgment stage defies logic, when the very nature of the mixed-motive claim presupposes the combination of a legitimate motive (the "proffered rationale") and an illegitimate motive.

In *White v. Baxter Health Corp.,* 533 F.3d 381 (6th Cir. 2008), the Sixth Circuit reasoned that the purpose of *McDonnell Douglas* burden-shifting is to "bring litigants and the court expeditiously and fairly to the ultimate question of whether the defendant intentionally discriminated against the plaintiff." *White*, 533 F.3d at 400 (citing and quoting *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981)). In single-motive cases, *McDonnell Douglas* works by smoking out the single, ultimate reason for the adverse employment decision. *White*, 533 F.3d at 400 (citations omitted). The *prima facie* case requirement helps eliminate "the most common nondiscriminatory reasons for the adverse employment action, and thus creates a presumption that the adverse employment action was not motivated by legitimate reasons, but rather by discriminatory animus." *White*, 533 F.3d at 400–01 (quotations omitted) (citing *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1093–94). Similarly, the pretext requirement

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Carpenter Tech. Corp., 216 Fed.Appx. 263, 265 (3d Cir. 2007) (unpublished, noting issue); *Furaus v. Citadel Comm. Corp.*, 168 Fed.Appx. 257, 260 (10th Cir. 2006) (unpublished) (noting issue). The Second Circuit has suggested mixed motive cases may be outside of the *McDonnell Douglas* framework. *Humphreys v. Cablevision Sys. Corp.*, 553 Fed.Appx. 13, 15 (2d Cir. 2014) (unpublished). The Seventh Circuit has never addressed it.

helps "test whether the defendant's allegedly legitimate reason was the real motivation for its actions." *White*, 533 F.3d at 401. Together, "narrowing of the actual reasons for the adverse employment action is necessary to determine whether there is sufficient evidence to proceed to trial in a single-motive discrimination case because the plaintiff . . . must prove that the defendant's discriminatory animus, and not some legitimate business concern, was the ultimate reason for the adverse employment action." *Id.*

These reasons simply do not apply to mixed-motive cases at summary judgment. As the Sixth Circuit observed, "[i]n mixed-motive cases, a plaintiff can win simply by showing that the defendant's consideration of a protected characteristic 'was *a* motivating factor for any employment practice, *even though other factors also motivated the practice*'." *White*, 533 F.3d at 401 (emphasis in original) (quoting 42 U.S.C. §2000e-2(m)). Thus, the plaintiff is not required to fully rebut ***any*** of the possible legitimate motivations of the defendant, as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take the adverse employment action. Once Ms. Chavez cited to record evidence showing that decision-maker Mr. Torchia had discriminatory animus, and therefore a discriminatory motive, she established a *prima facie* mixed-motive claim that should be brought forward to a jury.

Ms. Chavez clearly satisfied her initial burden under a mixed-motive analysis to demonstrate discriminatory motive. *See infra* Parts I-B and I-C-1-c for discussion of direct and circumstantial evidence of bias. The U.S. Supreme Court has held that there is not a difference between "single motive" and "mixed motive" claims, and that the "motivating factor" under 42 U.S.C. §2000e-2(m) is merely a question of how to assess causation. *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2530 (2013) (Thomas, J.). Thus, under *Nassar*, Ms. Chavez may simply assert "motivating factor" causation, as she did.

As set forth in Ms. Chavez's notes taken immediately after the meeting of November 24, 2009, less than one month after notification of her gender transition and slightly more than one month before she was terminated, Mr. Torchia stated as follows at that meeting:

> [H]e was very nervous about my situation and the possible ramifications from anyone. He stated "I know you are the best mechanic here and I have heard that from everyone." He asked me not to wear a dress back and forth to work. I change into a uniform before my scheduled hours and shortly before we leave. He said legally he could require us all to wear our uniforms back and forth to work. I told him I am only wearing jeans and a top with tennis shorts back and forth to work, nothing outlandish. I did put on a dress one day about a month ago on my way to a support group meeting, after work hours. He stated it was okay to wear what I was wearing, just don't wear a dress or miniskirt. I asked about when my transition is complete, could I wear a dress to work and he said no. That would be disruptive and any woman that wears a dress at the service department would be disruptive. I wondered if that included customers as well. He also stated he did not want any problems created for me or any of his other employees by my condition. I asked him if it was okay to talk about it,

> that I needed to try to educate others about this condition (transsexualism) so they might understand and not be afraid. He said only if I was asked. I shouldn't bring it up. I told him I was not forcing this on anyone, but it was medically necessary because of the treatment I was under...Jim also stated it was my fault they lost a tech applicant because of me. Mr. Torcia also stated he thought I was going to negatively impact his business.

Doc. 61-8, Chavez Decl., Exh. H 1-4..[6]

Mr. Torchia's statements explicitly and directly show that he thought that Ms. Chavez would cause harm to his business, his customers and potential customers and his employees and potential employees, that he was entitled to and did restrict her right to speak of her gender with co-workers to avoid this perceived harm to his business, and that he was entitled to and did restrict the gendered nature of what she could wear to and from work to mitigate this perceived harm.

There are a number of inferences that Plaintiff may reasonably draw from these statements:

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[6] These statements are admissible because not offered to prove the truth of the matter, but simply that they were made. *See* FED. R. EVID. 801 Adv. Comm. Notes, Subdivision (c); *Ramsey v. Board of Regents*, 2013 U.S. Dist. LEXIS 47085, *19 & n. 6 (N.D. Ga. 2013). *See also Howley v. Town of Stratford*, 217 F.3d 141, 155 (2d Cir. 2000) (statements questioning competence); *Stern v. Trustees of Columbia University*, 131 F.3d 305, 313 (2d Cir. 1997) (statement that Department needed more Hispanic members). These are also admissible under FED. R. EVID. 802(d)(2)(A), *Molinos Valle del Cibao v. Lama*, 633 F.3d 1330, 1342 (11th Cir. 2011); *Callon Petroleum Co. v. Big Chief Drilling Co.*, 548 F.2d 1174, 1177 n. 3 (5th Cir. 1977); *United States v. King*, 134 F.3d 1173, 1176 (2d Cir. 1998) (corporate shareholder statements admitted against corporation). *See also* FED. R. EVID. 802(d)(2)(D); *Kidd v. Mando American Corp.*, 731 F.3d 1196, 1207–08 (11th Cir. 2013); *Rowell v. Bellsouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005).

1. Mr. Torchia considered her presence disruptive.
2. Mr. Torchia implied that she could work there only if she did not cross any of the lines that he set up regarding her gender.
3. Mr. Torchia was willing to discriminate against her based on her gender.
4. Mr. Torchia would much rather that she did not work there.
5. Mr. Torchia would be looking for an excuse to terminate her.

The District Court, possibly distracted by the novel nature of the sex discrimination based on transgender identity status, characterized these remarks as a mere "mention" of potential impact on business. Doc. 80, Op. 23, n.3. That is one characterization of the evidence, but an equally reasonable characterization is that Mr. Torchia was perfectly willing to discriminate on the basis of Ms. Chavez's gender because of his fear that having an openly transgender employee would harm his business, and was looking for an excuse to get rid of this troublesome, disruptive employee. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (discrimination against a transgender individual because of her gender-nonconformity is sex discrimination—regardless of whether it is described as being on the basis of sex or gender).

In addition to disparaging her gender, Mr. Torchia's statements also constituted evidence of discrimination by manifesting assumptions about the prejudices of co-workers and customers. As this Court recognized in *Haynes v. W.C. Caye & Co., Inc.*, 52 F.3d 928, 930–31 (11th Cir. 1995), a decision-maker's

concern over business outcomes, premised on assumptions that customers will be prejudiced on account of protected status is direct evidence of bias. *Id.* at 930–31. No non-discriminatory inference can be drawn in such a situation because concern over business outcomes derives *only* from biased assumptions that customers will be prejudiced against the employee's protected status. *Id.* This is distinguishable from a decision-maker merely raising the specter of a business down-turn not linked to protected status. If Mr. Torchia had said he was concerned about business outcomes generally, then alternative inferences might be drawn. Here, however, he couched his projection of a threat to business outcomes *only* in relation to Plaintiff's protected status. His concern is directly tied to the projected effect Plaintiff's transgender status would have on his business. *See Rainwater v. AT&T Co.*, 1997 U.S. Dist. LEXIS 23921, *17–*18 (N.D. Ga. 1997), *aff'd* 190 F.3d 543 (11th Cir. 1999) (comments referring to presumed biased attitudes of customers and employees are direct evidence). *See also Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008) (deference to real or presumed biases of others against transgender persons is discrimination "no less than if an employer acts on behalf of his own prejudices"). Additionally, Mr. Torchia's disparaging statements chastising Plaintiff for wearing dresses to and from the workplace also fall directly in line with direct evidence of bias against transgender persons. As this Court recently held, a decision-maker's opinion that a transgender person dressing in

gender-affirming clothing is "inappropriate" or "unsettling" constitutes direct evidence of bias. *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011). There can be no question but that Ms. Chavez raised evidence that Mr. Torchia had a discriminatory animus that was a motivating factor in her termination only 48 days later.

Below, the District Court found Mr. Torchia's comments to be "isolated," and therefore incapable of bias. Doc. 80, Op. 23–24. As discuss above, Mr. Torchia's comments were not isolated, as discussed above, since he made multiple remarks disparaging Plaintiff on account of her protected status. Further, these remarks were not sufficiently separated in time to be "isolated." The temporal separation between the comments and Ms. Chavez's termination was 48 days, about one and a half months. Statements of animus by the decision-maker made within two months of termination have been found by the 11th Circuit and courts in the 11th Circuit to constitute evidence of discrimination. *See, e.g.*, *Sennello v. Reserve Life Ins. Co.*, 872 F.2d 393, 394–395 (11th Cir. 1989) (statement by decision-maker two months prior); *Morris v. Progressive Health Rehab.*, 2007 U.S. Dist. LEXIS 20259, *21 (S.D. Ga. 2007) (same); *Dixon v. Rave Motion Pictures*, 2006 U.S. Dist. LEXIS 77803, 18* (M.D. Ala. 2006) (same). Federal courts in other circuits have also found decision-maker statements within two months to constitute direct evidence. *Brewer v. New Era, Inc.*, 546 Fed.Appx. 834,

839 (6th Cir. 2014) (statements made by decision-maker two months prior); *Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC*, 464 F.3d 659, 666 (7th Cir. 2006) (same). Thus, Mr. Torchia's statements about Ms. Chavez's gender, were well within the time frame in which remarks are not found to be "isolated," and are even found to be "direct evidence."

The District Court also erroneously ruled that Mr. Torchia had no discriminatory animus because he expressed "unreserved support," demonstrated by Ms. Chavez's time off for medical treatments, and said at deposition that he had no problem with gender transition. This is factually incorrect – Mr. Torchia never gave Ms. Chavez time off – that was done by Vice-President Cindy Weston. Doc. 64-2, Memorandum of Understanding. In addition, it is legally insufficient. The Supreme Court has ruled against the idea that some positive treatment negates biased treatment. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 257, 109 S.Ct. 1775, 1794 (1989) (Brennan, J., plurality) (negative comments in a generally favorable review are nevertheless direct evidence); *Price Waterhouse*, 490 U.S. at 271, 109 S.Ct. at 1801–02 (O'Connor, J., concurring) (noting the evidence identified by the plurality opinion constitutes "direct evidence of discriminatory

animus").[7] This Court has never adopted such a ludicrous standard, and should not do so now.

There are several other items of circumstantial evidence that Ms. Chavez raised to show that Credit Nation had discriminatory intent. These items are discussed *infra* Part I-C. While discussed below to show pretext, these circumstances also sufficiently raise evidence of discriminatory motive for purposes of the argument regarding mixed-motive causation.

Ultimately, Ms. Chavez satisfied her burden at the summary judgment stage to cite to evidence in the record that decision-maker, James Torchia, had a discriminatory motive sufficient to establish a "mixed motive." The Magistrate found that Ms. Chavez had demonstrated a *prima facie* case and an "inference of discrimination" (Doc. 76, R&R 46), and the District Court also so found (Doc. 80, Op. 15, 16 n.2). Because the nature of a mixed motive claim admits the proffered rationale of the employer, the District Court should not have applied *McDonnell Douglas* burden shifting to this claim.

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[7] The plurality adopted this evidentiary rule. *See generally Marks v. U.S.*, 430 U.S. 188, 193, 97 S.Ct. 990, 993 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). Justice O'Connor's concurring opinion explicitly agrees with the Plurality that the employee presented direct evidence. *Price Waterhouse*, 490 U.S. at 261, 109 S.Ct. at 1796. Under the *Marks* Rule, Justice O'Connor's opinion constitutes the fifth vote in favor of the standard for direct evidence and thus is binding precedent

B. The District Court erred by applying the *McDonnell Douglas* burden-shifting framework at the summary judgment stage to Plaintiff's direct evidence.

The District Court required that Plaintiff-Appellant, Ms. Chavez, show evidence of pretext, despite the *direct evidence* of animus by Mr. Torchia, Credit Nation's decision-maker. Doc. 80, Op. 15–16 (analysis of whether Plaintiff pointed to evidence sufficient to fully rebut Defendant's proffered rationale). However, a Title VII plaintiff presenting direct evidence need not fully rebut the employer's proffered rationale and conclusively prove that the proffered rationale is untrue at the summary judgment stage. *Lee v. Russell Cty. Bd. of Educ.*, 684 F.2d 769, 774 (1982) (where a case of discrimination is "made out by direct evidence, reliance on [*McDonnell Douglas*] is obviously unnecessary").

This Court defines "direct evidence" as evidence which reflects a "discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) (emphasis added). "Direct evidence" in the Title VII context does **not** mean evidence that proves the existence of a fact in issue without inference or presumption. *Wright v. Southland Corporation*, 187 F.3d 1287, 1298 (11th Cir. 1999) ("[A]n examination of our cases in which we held that the plaintiff had 'direct evidence' of improper discrimination

shows that the term was not used in its traditional sense as evidence that, if believed, proves the existence of a fact in issue without inference or presumption.") The Magistrate incorrectly used the "without inference" standard, Doc. 76, R&R 37, and the District Court adopted the Magistrate's Report, Doc. 80, Op.

This Court has relied upon the *Wright* standard in recent unpublished opinions. *See Cobb v. City of Roswell*, 533 Fed.Appx. 888, 893 (11th Cir. 2013) (unpublished opinion), *East v. Clayton County*, 436 Fed.Appx. 904, 910 (11th Cir. 2011) (unpublished opinion). As the Seventh Circuit has noted, "direct evidence does not require a 'virtual admission of illegality.' It would cripple enforcement of the employment discrimination laws to insist that direct evidence take the form of an employer's statement to the effect that 'I'm firing you because you're in a protected group'." *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999). At the summary judgment stage, of course, Ms. Chavez need only point to such evidence in the record, from which a reasonable jury could find that it is more likely than not that Credit Nation's decision maker, Mr. Torchia, had biased attitudes towards Ms. Chavez based on her gender. Ms. Chavez need not prove or show that biased attitudes or the causal link definitively existed.

Below, Plaintiff-Appellant pointed to comments by decision-maker Mr. Torchia a mere 48 days prior to her termination that disparaged her on the basis of

her protected status. Doc. 58, Pl. Memo to Mag. At 8–10; Doc. 60, PSOMF, ¶¶1–4; Doc. 78, Pl. R. 72 Obj. 5 & App. A. Statements of animus by the decision-maker made within two months of termination have been found by the 11th Circuit and courts in the 11th Circuit to constitute evidence of discrimination, and the statements in this case are clear and egregious enough to constitute direct evidence. This evidence and the applicable case law is discussed in detail *supra* Part I-A. For the reasons set forth there, this Court should find that they constitute direct evidence. Thus, the District Court erred in applying *McDonnell Douglas* burden shifting to the direct evidence presented by Ms. Chavez.

C. The District Court improperly discounted Plaintiff's evidence showing a genuine issue of material fact regarding pretext.

1. The Court misapplied the *McDonnell Douglas* burden-shifting framework in the context of Rule 56 by weighing the evidence in the place of a jury.

The District Court improperly discounted Plaintiff's evidence showing a genuine issue of material fact regarding pretext by compounding two errors: 1) by misapplying the *McDonnell Douglas* burden-shifting framework in the context of Rule 56 by weighing the evidence in the place of a jury, and 2) by misapplying the *Chapman* Rule, confusing a challenge to *veracity* with an attack on the *wisdom* of

the employer's proffered rationale for termination by weighing the evidence in place of the jury.

a. *McDonnell Douglas* Framework

A conflict between *McDonnell Douglas* and Rule 56 occurs when a non-moving plaintiff is required to "point out" evidence at summary judgment that rebuts the employer's proffered rationale, but is not permitted to rest on that evidence without proving a final inference of discrimination. This conflict is exacerbated when non-moving plaintiff is denied the benefits of shifting burdens, inferences, and doubt assigned her under summary judgment.

McDonnell Douglas and progeny create a three-step framework shifting burdens from plaintiff to defendant in cases involving circumstantial evidence. *McDonnell Douglas*. At step one, plaintiff bears the burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1327. The Magistrate found that Ms. Chavez had demonstrated a *prima facie* case and an "inference of discrimination," Doc. 76, R&R 46, and the District Court also so found, Doc. 80, Op. 15, 16 n.2. The second step shifts the burden onto defendant to proffer a legitimate, nondiscriminatory rationale for its adverse employment action. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1327. Credit Nation did so. Doc. 80, Op. 16. The third step shifted the burden back to Ms. Chavez to establish that the proffered rationales were not the actual basis for

termination, and that discrimination was the actual basis (*McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825), *or would have done so if this case were at the trial stage*. However, at summary judgment, Ms. Chavez did not have the burden of disproving Credit Nation's rationales or proving discrimination.

There is an inherent conflict between step three of the *McDonnell Douglas* burden-shifting framework and Rule 56. Step three of *McDonnell Douglas* requires non-moving plaintiff to disprove the employer's proffered rationale and to prove discrimination. Under Rule 56, however, non-moving plaintiff has no burden of proof to *fully* rebut the employer's proffered rationale, but only a burden of production, to "point out" evidence at summary judgment that raises a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986) (the nonmoving party bearing the burden of proof at trial bears the burden of production under Rule 56). Courts are also guided by three key rules. First, all evidence is viewed in the light most favorable to nonmovant. *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997) citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Second, all benefits of doubt are given to the nonmovant. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) ("If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment."). Third, all benefits of inference are given to nonmovant. *Adickes*, 398 U.S. at 158,

90 S.Ct. at 1609. Under this schema, a nonmoving plaintiff need only *point to* evidence that a jury could use to find pretext. This is in contrast to the requirements of *McDonnell Douglas*, under which the plaintiff, whether moving or nonmoving, bears the *burden of proving* pretext. That line was crossed here.

b. *McDonnell Douglas* does not require additional evidence beyond the prima facie case.

The District Court required *additional evidence* to fully rebut Defendant's bald assertion that Mr. Torchia's comments were unrelated to the decision to terminate. Doc. 80, Op. 22–23. ("Mr. Torchia's isolated remarks...are insufficient to establish discrimination in the absence of some *additional evidence* supporting a finding of pretext.") (quotations omitted). Mr. Torchia's statements, and applicable law, are discussed in detail above, *supra* Part I-A. As discussed above, remarks of the decision-maker made within two months of the adverse action are within the temporal proximity that may attribute discriminatory animus to the adverse action. The U.S. Supreme Court has also held that additional evidence beyond the evidence of discriminatory animus is not needed. The same evidence that shows evidence of pretext can be used to show sufficient evidence of discriminatory purpose.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's

> proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is *required*."

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993) (citations omitted) (emphasis in original). Here, since there is no factfinder at the summary judgment stage, the question is whether a reasonable jury could disbelieve that Mr. Torchia's reason for termination was her brief, inadvertent nap, or, conversely, believe that it was due to the discriminatory animus toward her transgender status that he had revealed in his extended outburst at the meeting with Ms. Chavez 48 days before. Both the Magistrate and the District Court found that Mr. Torchia's multiple statements of discriminatory animus gave rise to an inference of discrimination (Doc. 76, R&R 46; Doc. 80, Op. 15, 16 n.2), and a reasonable jury could also so believe without requirement of any additional evidence, as permitted under *St. Mary's*. Insofar as the District Court required Ms. Chavez to present additional evidence in order to show discrimination, it erred.

c. Plaintiff's Additional Circumstantial Evidence of Pretext

In any event, Ms. Chavez did cite additional evidence in support of her claim of pretext, discussed in detail below, and the District Court ignored it all. The District Court consistently put the burden on Ms. Chavez to "show"—to prove—that the employer's rationale was a pretext and that discrimination was the real

reason, instead of evaluating whether she had produced evidence that a jury could use to make such a finding. The District Court also made findings of fact, which is prohibited at the summary judgment stage. *Williams v. DeKalb County*, 327 Fed.Appx. 156, 163 (11th Cir. 2009) ("The district court's words give us the impression that it weighed the evidence Williams offered instead of simply drawing a threshold admissibility line. While district courts must resolve admissibility-of-evidence questions, they are not permitted to weigh evidence. *See, e.g., Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1154-55 (5th Cir. 1981). That is the jury's job."). *See also In re Optical Technologies*, 246 F.3d 1332, 1335 (11th Cir. 2001) (standard of review for summary judgment by definition involves no findings of fact). Here is a partial listing of statements made in the District Court opinion faulting Ms. Chavez for not "showing" that discrimination was the real reason for her termination, making findings of fact, and ignoring genuine disputes:

> Defendant's Motion for Summary Judgment be granted because Plaintiff **failed to show** that Credit Nation's reason for terminating her employment was a pretext for unlawful discrimination." Doc 80, Op. 10 (emphasis added).
>
> Plaintiff contends that she raised five categories of evidence **to show** that Credit Nation's decision was a pretext for unlawful discrimination, and argues that the Magistrate Judge improperly discounted the strength of the offered evidence. The Court disagrees. Doc. 80, Op. 17. (emphasis added).
>
> **There is no evidence** to support Plaintiff's contention that Mrs. Weston made any statements that can be construed as a warning that Plaintiff "should tread carefully lest she find herself in disciplinary

trouble or worse" because of her protected status. Doc. 80, Op. 18 (emphasis added). [8]

Plaintiff has **failed to show** that the reason for her termination—sleeping on the job—was a pretext for unlawful discrimination. Doc. 80, Op. 20–21.

The uncontested evidence shows that another employee was immediately terminated for sleeping on the job, even though the employee **did not have any disciplinary problems**. Doc. 80, Op. 21 (emphasis added).[9]

The evidence further shows that Plaintiff previously had received two disciplinary warnings regarding work related conduct showing that progressive discipline was administered[10], even if not required in this case based on the sleeping episode. Doc. 80, Op. 21 (emphasis added).

Plaintiff has **failed to show** that Plaintiff's failure to conform to gender stereotypes was a "motivating factor" that drove Credit Nation's decision to terminate her employment. Plaintiff was terminated for sleeping on the job. That was the event that resulted in Plaintiff's termination. Doc. 80, Op. 24 n. 23 (emphasis added).

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[8] This is a reasonable inference favorable to Plaintiff from the evidence of Ms. Weston's statement. Doc. 60, PSOMF[8] ¶2, citing Doc. 61, Chavez Decl. ¶37; Doc. 64, Weston Dep. 33:23–34:25.

[9] There is no evidence of this employee's disciplinary record in the record evidence as far as Plaintiff can tell. Doc. 48-2, DSOMF ¶¶56–57.

[10] Cindy Weston, Credit Nation's Vice-President, testified that the two disciplinary actions were not part of the basis for Ms. Chavez's termination at the time of termination. Doc. 60, PSOMF ¶49. In fact, one of these disciplinary write-ups is further evidence of gender discrimination. Co-workers angrily accused Ms. Chavez of "special treatment" because she was allowed to attend medical appointments required for her gender transition. She was disciplined for telling her co-workers to stop harassing her and that she could contact Ms. Weston. Doc. 49, Chavez Dep. 59:5-61:23; 207:6-210:10; Doc. 76, R&R 11–12.

These statements demonstrate that the District Court required Ms. Chavez to prove her case, made findings of fact, and ignored genuine disputes of material fact, when she needed merely to point out evidence in the record that would have allowed a reasonable jury to rule in her favor. Ms. Chavez amply pointed out such evidence.

1. Ms. Weston's Statement

Ms. Chavez encountered a series of circumstances suggesting that Credit Nation, after its initial blush of acceptance, was starting to rethink its position regarding her gender transition. The first indication was on November 12, 2009, when Ms. Weston told Plaintiff that she needed to "tone it down," and to be "very careful" because Mr. Torchia "didn't like" the situation regarding her gender transition.[11] Doc 60, PSOMF ¶2. Mrs. Weston recalls making a statement, and indicates that there was a problem with co-workers who were uncomfortable with Ms. Chavez's gender transition. *See, e.g.*, Doc. 64, Weston Dep. 33:23–34:25. Ms. Chavez inferred a warning that she should be very careful because Mr. Torchia didn't like her gender transition and that Credit Nation would be looking for a reason to terminate.

[11] This statement is admissible because it is not offered for the truth of the matter, but simply for the fact that it was made. It is also admissible because she was a Vice-President of Defendant who participated in the termination of Ms. Chavez. *See* citations and discussion *supra* note 8. .

The Court failed to give reasonable inferences and benefits of doubt to the Plaintiff non-movant, taking the evidence in the light most favorable to the non-movant, credited all inferences to the Defendant, and made a finding of fact that Ms. Weston's statement was "perfectly reasonable.[12] It adopted Ms. Weston's interpretation of the statement, and ignored Ms. Chavez's reasonable inferences from it. Doc. 80, Op. 17–18. *See Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997) (all evidence to be viewed in the light most favorable to the nonmovant); *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (all inferences to the non-movant). The District Court should have recognized that Ms. Weston's statement raises a genuine dispute of material facts as to whether Mr. Torchia was expressing discriminatory animus, and was looking for a reason to terminate Ms. Chavez, and that a reasonable jury could have used these facts to find pretext.

2. Chavez was subjected to additional scrutiny.

Increased surveillance of an employee can be evidence of pretext. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993) (quoting B. Schlei & P. Grossman, *Employment Discrimination Law* 554 (2d ed. 1983) (noting that surveillance "strongly suggests the possibility of a search for a pretextual basis for

[12] The District Court claimed that Plaintiff conceded that the statement of Ms. Weston, Credit Nation's Vice-President, to Ms. Chavez that she "tone it down" because "Mr. Torchia didn't like it" was "perfectly reasonable." Doc. 80, Op. 17 citing Doc. 78, Pl. R.72 Obj. 8. Plaintiff never made such a concession.

discipline...")). Here, Ms. Chavez was subjected to additional scrutiny of her work and personal situation shortly thereafter, which had never before occurred. PSOMF ¶3, 5–8. Credit Nation's counsel advised Credit Nation to "focus on" her work and performance, and to write her up for disciplinary infractions. See discussion *infra* Part I-C-1-c-3 (next subsection). These circumstances raise an inference that Credit Nation and Mr. Torchia, its owner, were looking for a pretext. The District Court should have recognized that the additional scrutiny to which Ms. Chavez was subjected raised a genuine dispute of material facts as to whether Credit Nation and Mr. Torchia were looking for a pretext, and that a reasonable jury could have used these facts to find pretext.

3. Emails exchanged between Defendant and its counsel.

As noted above, increased surveillance of an employee can be evidence of pretext. *Hairston,* 9 F.3d at 921. The Plaintiff was told on December 30, 2009 that she could no longer use the bathroom in the waiting area, as other females in the shop were, but would instead have to use the unisex bathroom for technicians. PSOMF ¶¶6–8. Because she had previously been permitted to use the female bathroom, Ms. Chavez expressed her concern about this to the shop foreman. In response to this incident, Cindy Weston, the Defendant's Vice- President, communicated with Defendant's attorney, John J. McManus, with a copy to the

Defendant's owner, James Torchia (listed as nviceo@aol.com), regarding the incident. PSOMF ¶¶9–11. In response, Mr. McManus emailed Ms. Weston and Mr. Torchia:

> Cindy: I am concerned that no matter what you do, that Employee is going to come up with come [sic] complaint. I think you are correct in writing the medical report up, and I believe there needs to be some report written by Phil indicating the issues about the restroom and how that was resolved. Tomorrow will bring more issues and I think this will get to a breaking point before very long. Just have the management focus on work and performance of required duties and the other issues should be written up one at a time. Let me know how I can help...John

PSOMF ¶10.[13] The District Court denied reasonable inferences to the Plaintiff, such as the fact that Credit Nation would follow the advice of its attorney, and would be looking for a pretext. It is a reasonable inference that Credit Nation was seeking advice as to how to address its dislike of the perceived "disruption" Ms. Chavez's gender transition was causing, and that it followed the advice of its attorney. The District Court discounted this inference by stating that it was not imputable to Credit Nation because the statement came from Credit Nation's attorney. The imputability is not the issue, but the inference that Credit Nation

[13] Defendant's attorney has waived privilege for this document. Doc. 60, PSOMF ¶11. The email is admissible as to the statements of Mr. McManus because they are not offered for the truth of the matter, but for the fact that they were made. *See* citations and discussion *supra* note 8.. It is also admissible under FED. R. EVID. 802(d)(2)(C) as the statement of an authorized agent of the Defendant. See *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir. 1989) (statements by attorneys admissible).

followed the advice of its attorney to scrutinize her behavior and write her up until "get[ting] to the breaking point."

This email demonstrates cognizance that there was a problem with Ms. Chavez, and demonstrates a desire to create a written record against Ms. Chavez, discussing a perceived need to write reports about Ms. Chavez for purposes of pretext. It indicates an anticipation of a need to create a record allowing termination because "[t]omorrow will bring more issues and I think this will get to a breaking point before very long." The "breaking point" appears to be a reference to termination, which is presumed to occur "before very long," and Ms. Chavez was terminated within two weeks. The email abjures Ms. Weston and Mr. Torchia to "focus on work and performance" of Ms. Chavez, indicating increase scrutiny and surveillance in a search for deficiencies. It says that "the other issues should be written up one at a time," anticipating writeups of Ms. Chavez, and a desire to multiply them by writing them up one at a time. The substance and import of this email show that Credit Nation was looking for pretext. These inferences should have been given to Plaintiff. The District Court should have recognized that these facts raise a genuine dispute of material facts as to whether Credit Nation and Mr. Torchia were looking for a reason to terminate Ms. Chavez, and whether her brief and inadvertent nap was the reason for termination, and that a reasonable jury could have used these facts to find pretext.

4. Admission by Credit Nation's former foreman.

The District Court denied reasonable inferences to the Plaintiff from the admission of Credit Nation's former shop foreman. Shop foreman Kirk Nuhibian made a statement regarding the circumstances of Ms. Chavez's dismissal, stating that "I know for a fact you were run out of credit nation [*sic*.]". PSOMF ¶30. This statement raises an inference that Credit Nation was looking for a reason to terminate Ms. Chavez, and that her brief and inadvertent nap was not the true reason for termination. As shop foreman charged with enforcing Credit Nation policy, he was in a position to know his employer's intent with regard to the importance of various infractions. Mr. Nuhibian's state of mind is also relevant because it was on his evidence that Chavez was terminated. He testified at deposition that he believed that *his* actions were intended to "run [Ms. Chavez] out of [C]redit [N]ation."[14] PSOMF ¶30. Despite his subsequent gloss on his admitted words, the objective meaning of the words, taken in the light most favorable to plaintiff nonetheless stand. *See, e.g.*, *Horne v Russell County Commission*, 379 F.

[14] This statement is admissible because it reveals his and his employer's state of mind and/or intent at the time of taking the picture to "run [her] out of [C]redit [N]ation." FED. R. EVD. 803(3). *See, e.g.*, *Jenks v. Naples Community Hospital,* 829 F. Supp. 2d 1235, 1248 (M.D. Fla. 2011) (statement going to employer's state of mind admissible). To the extent that Mr. Nuhibian rejected his prior out of court statement, it is also admissible at trial as a prior inconsistent statement under FED. R. EVID. 613(b) and 801(d)(1)(A).

Supp. 2d 1305, 1322 (MD Ala 2005), *aff'd*, 2005 U.S. Dist. LEXIS 19541, *10 (M.D. Ala. Aug. 29, 2005), *aff'd*, 180 Fed.Appx. 903 (11th Cir. 2006) (objective meaning of statement referring to "that woman" controls meaning, despite subjective intent not to refer to gender, as an inference taken in the light most favorable to plaintiff). Therefore, the District Court should have recognized that Mr. Nuhibian's statement, taken in the light most favorable to Plaintiff, raises a genuine dispute of material facts as to whether Credit Nation and Mr. Torchia were looking for a reason to terminate Ms. Chavez, and whether her brief and inadvertent nap was the reason for termination, and that a reasonable jury could have used these facts to find pretext.

5. Circumstances at the time of the offense suggest that the Plaintiff's offense was seen by Defendant's managers as availing a pretext.

The circumstances under which Ms. Chavez was found to be sleeping also call into question the Defendant's belief in the truth of its rationale for termination—violation of Defendant's alleged zero tolerance policy for sleeping. Ms. Chavez's work rule violation occurred on Friday, January 8, 2010. The temperature that morning was 16 degrees Fahrenheit (PSOMF ¶12–14_[15] and it

[15] The Record of Climatological Observations for January 8, 2010, from the United States Department of Commerce, National Oceanic and Atmospheric Administration, is admissible pursuant to FED. R. EVID. 803(8) as a record of a public office. This Court may also take judicial notice of weather facts. *See, e.g., Great American Insurance Company of NY v. Summit Exterior Works, LLC*, 2012 U.S. Dist. LEXIS 24780, *2–*7 (D. Conn. 2012); *Pryor v. Chicago*, 2010 U.S.

was extremely cold in the shop. The parts necessary to begin the repairs had not yet arrived, and so there was no work for her to do. PSOMF ¶17. After about half an hour of waiting for the parts, she took refuge in the back of the white Chevrolet. PSOMF ¶20. She sat in the back of the car with the door open while she awaited the parts. PSOMF ¶21. Ms. Chavez was not hiding with an intent to sleep, and the car door of the white Chevrolet was left wide open. PSOMF ¶23. She unintentionally fell asleep. The shop foreman saw Ms. Chavez in the back of the car with her eyes closed at 9:22 a.m. PSOMF ¶24. Instead of waking Ms. Chavez, he snuck up to the car and clandestinely took a picture of Ms. Chavez in the back of the car with her eyes closed. PSOMF ¶25. Ms. Chavez's sleeping was not perceived as violation of any "zero tolerance" policy or "theft of services," as Credit Nation's managers, Mr. Nuhibian and Mr. Phil Weston, left her sleeping there undisturbed for approximately 40–45 minutes. PSOMF ¶27. Because Credit Nation's managers were charged with enforcing is policies, they were in a position to know Mr. Torchia's beliefs as to what constituted a serious infraction. This gives rise to an inference that Mr. Torchia did not believe that Ms. Chavez's inadvertent nap was a violation of a "zero-tolerance" policy or intentional theft of services. Therefore, the District Court should have recognized that there is a genuine dispute of material facts as to whether Credit Nation's decision maker,

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Dist. LEXIS 8072, *5 (N.D. Ill. 2010).

James Torchia, really and truly believed that Ms. Chavez's brief and inadvertent nap was the reason for termination, and that a reasonable jury could have used these facts to find pretext.

6. Failure to follow Credit Nation's progressive discipline policy.

An employer's deviation from its own standard procedures may serve as evidence of pretext. *Hurlbert v. St. Mary's Health Care System, Inc.*, 439 F.3d 1286, 1299 (11th Cir. 2006); *Ritchie v. Indus. Steel, Inc.*, 426 Fed.Appx. 867, 873 (11th Cir. 2011). Credit Nation failed to follow its own progressive discipline policy, jumping to step four, termination, in its four step process[16]. Doc. 60, PSOMF ¶32. These policies were mandatory. Doc. 60, PSOMF ¶31; Doc. 68, Df. Resp. to PSOMF ¶31. The District Court held that Credit Nation had no obligation to use its progressive discipline policy because of boilerplate in the employment handbook that it didn't have to follow its own policy. *Id.* However, the handbook contained the following statement: **"Progressive discipline means that, with respect to most disciplinary problems, these steps will normally be followed . . . ."**, Doc. 60, PSOMF ¶32, Policy 716, p. 44 Bates NO. 815 (emphasis added). Where a policy contains language to the effect that it will normally be followed, it

[16] There were two prior disciplinary incidents, one of which constituted discrimination based on Ms. Chavez gender. See infra Part I-C-1-c-9. Credit Nation, however, specifically disavowed that these disciplinary incidents were considered at all in her termination. Doc. 60, PSOMF ¶49, Exhibit 7; Doc. 64, Weston Dep. 113:6–9.

can still be used as evidence of pretext, despite boilerplate about its non-mandatory nature. *See Machinchick v. PB Power, Inc.,* 398 F.3d 345, 355 n.29 (5th Cir. 2005) ("[a]lthough [the employer] correctly notes that its policy is not mandatory, and that [the plaintiff] was an at-will employee, these facts do not eliminate the inference of pretext raised by its failure to follow an internal company policy specifically stating that it should be 'followed in most circumstances'."). Therefore, Credit Nation's failure to follow its progressive discipline policy to terminate Ms. Chavez creates an inference of discrimination that should have been given to the Plaintiff, and creates a genuine dispute of material fact that a reasonable jury could use to find pretext.

7. Fabrication of a *post hoc* "zero-tolerance" policy.

The District Court ignored evidence of *post-hoc* fabrication of the purported zero-tolerance policy. Evidence of a *post-hoc* attempt to justify an employment decision may be evidence of pretext. *Rosenfeld v. Wellington Leisure Prod. Inc.*, 827 F.2d 1493, 1496 (11th Cir. 1987). The District Court ruled that no such fabrication could have occurred, finding that "Credit Nation did not rely on any evidence obtained after Plaintiff was terminated." Credit Nation did, in fact, rely on irrelevant and incompetent reverse-comparator evidence of a *post-hoc* termination of another employee, who was terminated long after Ms. Chavez was terminated, to show that it had such a "zero-tolerance" policy. *See* discussion *infra*

Part I-C-1-d. Moreover, the "post-hoc attempt to justify" is well-evidenced from the fact that Credit Nation had no "zero-tolerance" policy in effect at the time of Ms. Chavez's termination, and asserted it well *post-hoc* in its brief to the Magistrate on summary judgment. Doc 48-1, DMOL 14.

There is a genuine dispute of material fact as to whether Credit Nation had a "zero-tolerance" policy for sleeping at the time of her termination. Ms. Chavez had never been told of such a policy, nor was any such policy put in writing. PSOMF ¶35–36. The Credit Nation Employee Handbook, which sets forth all of Credit Nation's disciplinary policies, contains nothing about a "zero-tolerance" policy for sleeping, and indeed, specifically calls for progressive discipline. PSOMF ¶37 Any change to the Employee Handbook must, by Credit Nation policy, be placed in writing and approved by the owner, James Torchia. PSOMF ¶38. No such change was made. PSOMF ¶39. These circumstances suggest that Credit Nation has engaged in post-hoc manufacturing of a zero-tolerance policy. An alleged "zero tolerance policy" is not a *bona fide* zero tolerance policy where the employer's written rules call for progressive discipline. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011). A zero tolerance policy must be shown to be mandatory in order to overcome a showing of pretext. *Edwards v. Grand Rapids Community College*, 2010 U.S. Dist. LEXIS 141549, *31 (W.D. Mich. 2010). Therefore, the District Court should have recognized that there is a genuine dispute

of material fact as to *post-hoc* fabrication that a reasonable jury could use to find pretext.

8. Changing rationales for termination.

Credit Nation has asserted a dizzying series of rationales for termination:

1. *In its separation notice:* "sleeping while on the clock on company time," Doc. 60, PSOMF ¶40,
2. *To the Georgia Employment Security Agency:* sleeping "in the back of a company vehicle," a prior disciplinary warning on November 17, 2009 (exchanging words with another employee), and failure to be in uniform shirt, Doc. 60, PSOMF ¶42-43
3. *To the EEOC:* sleeping, failure to wear uniform shirt, and "misusing customer property." Doc. 60, PSOMF ¶44-46 (to EEOC).
4. *To the Court below:* two prior disciplinary incidents, Doc. 48-1, Df. Mem. 16, Doc. 48-2, DSOMF ¶46, Business Ethics and Conduct Rule 501, Safety Rule 508 Use of Equipment and Vehicles Rule 701, Employee Conduct and Work Rules, Doc. 48-1, Df. Mem. 15-16, excessive unexcused absences, in violation of Rule 704 on Attendance and Punctuality, failure to wear uniform shirt, Rule 705, Personal Appearance, and "zero tolerance rule" for sleeping requiring immediate termination. *Id.*
5. *Magistrate's R&R and District Court Opinion:* Both the Magistrate and the District Court opined that Ms. Chavez's sleeping constituted theft based on Mr. Torchia's deposition. Doc. 76, R&R 18, 65, 68; Doc. 80, Op. 9.

The District Court held that shifting rationales for termination are not suggestive of pretext unless they are fundamentally inconsistent, citing *Phillips v. Aaron Rents, Inc.*, 262 Fed.Appx, 202, 210 (11th Cir. 2008) (unpublished). Plaintiff argues that unintentional sleeping is not fundamentally consistent with intentional theft-of-services, nor with alleged excessive unexcused absences, or any of the other piled-on charges. Therefore, these shifting rationales are evidence of pretext. More

significantly, in *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995), this Court did not refer to fundamental inconsistency, but relied on the fact that the employer had relied in court on reasons that they had previously disavowed. The Bechtel rule does not require fundamental inconsistency.

In the present case, Credit Nation has relied on reasons that it specifically disavowed on the record. Defendant has relied upon disciplinary write-ups against Ms. Chavez on the record twice. First, in the hearing before the Employment Security Agency Board of Review on February 23, 2010, Defendant gave as a reason for termination one prior disciplinary warning on November 17, 2009 for exchanging words with another employee. Doc. 60, PSOMF ¶42. Second, in its brief before the Magistrate, Credit Nation alleged reliance on both prior disciplinary incidents, forming part of the basis for her termination, DMOL 16, DSOMF ¶46. However, Credit Nation's Vice-President had specifically disavowed that these disciplinary incidents were, in fact, part of the reason for her termination. PSOMF ¶49; Exhibit 7; Doc. 64, Weston Dep. 113:6–9. Thus, with regard to the two disciplinary warnings upon which Credit Nation relied on the record in previous tribunals and the Court below, Ms. Chavez has shown pretext under the *Bechtel* holding.

9. Ms. Chavez's gender-based discipline.

The District Court found that "Plaintiff has not presented any evidence that

Credit Nation applied its disciplinary rules in a discriminatory manner." Doc. 80, Op. 21. However, the Magistrate's Report itself acknowledged that at least one such an incident occurred. Doc. 76, R&R 11–12. She was disciplined for standing up for herself in regard to co-worker harassment based on her gender. That is gender-based harassment. Co-workers angrily (inference) accused Ms. Chavez of getting "special treatment" from Ms. Weston because she was allowed to attend medical appointments required for her gender transition. She was disciplined for telling her co-workers to stop harassing her and that she could contact Ms. Weston. Doc. 49, Chavez Dep. 59:5–61:23; 207:6–210:10; Doc. 76, R&R 11–12.[17] This is evidence of application of disciplinary rules based on her gender.

d. Improper Findings

The District Court also improperly found that, "There also is no dispute that Credit Nation terminated another employee for sleeping on the job even though that employee had an unblemished disciplinary record." Doc. 80, Op. 20. This evidence is irrelevant. *Sirpal v. University of Miami*, 684 F. Supp. 2d 1349, 1359 (S.D. Fla. 2010) citing *Jackson v. BellSouth Telecommc'ns*, 372 F.3d 1250, 1270, 1272–73 (11th Cir. 2004) and *Ali v. Stetson Univ., Inc*., 340 F. Supp. 2d 1320,

[17] Cindy Weston, Credit Nation's Vice-President, testified that this disciplinary action was not part of the basis for Ms. Chavez's termination at the time of termination. Doc. 60, PSOMF ¶49.

1324–27 (M.D. Fla. 2004), *aff'd* 132 Fed.Appx. 824 (11th Cir. 2005) (presence of comparators is irrelevant under plaintiff's theory not based on comparator evidence.). Such comparators must be "nearly identical" in terms of job description, work and disciplinary history, or severity of offense in order to be relevant, and there is no evidence in the record of such facts. [In fact, that employee was found "in the back of the parking lot sleeping in his car," and had failed to show up for work on at least one previous occasion. Doc. S1, Consecutive Employee Warning Report of Lance Taylor; Doc. S2, Separation Notice of Lance Taylor.[18]] *Caraway v. Sec'y, U.S. Dept. of Transp.*, 2013 U.S. App. LEXIS 24849, *12–14 (11th Cir. 2013) (comparators must be "nearly identical to the plaintiff," and have "very similar job-related characteristics.").

The District Court also erroneously found that Mr. Torchia expressed "unreserved support" to Ms. Chavez. Doc. 80, Op. 23 n.3. Ms. Chavez disputed below the "fact" that Mr. Torchia "unreservedly supportive." Doc. 60, PSOMF ¶39. In fact, it was Cindy Weston, Credit Nation's Vice-President, who showed very clear sympathies to Ms. Chavez, (until she was directed by Mr. Torchia to tell Ms. Chavez to lay low.) Doc. 60, PSOMF ¶38. It is she who authorized the leave for medical treatments, Doc. 64-2, Memorandum of Understanding so that

[18] These documents, produced by Credit Nation, do not currently appear to be in the record below. Plaintiff-Appellant will move this Court for permission to include these as part of Appellant's Appendix. Until such time as the motion is approved, if it is, these documents are not part of the Record before this Court.

evidence cannot be used to suggest that Mr. Torchia was "unreservedly supportive." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) ("The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, **not on reality as it exists outside of the decision maker's head**.") (emphasis added).

e. Resolving the conflict between *McDonnell Douglas* and Rule 56.

The conflict between *McDonnell Douglas* and Rule 56 is supposedly resolved by means of asking District Courts not to weigh the evidence, but merely to see whether the nonmoving Title VII plaintiff has pointed to evidence in the record. Then, the Court must decide whether that evidence would allow a "reasonable jury" to decide in favor of the plaintiff, but without weighing that evidence. While there is no doubt that courts can utilize both *McDonnell Douglas* and Rule 56 to rule out certain kinds of evidence that simply are neither relevant nor admissible to demonstrate pretext, that line has been crossed in this case.

This Court need not issue a specific rule providing further guidance. However, if this Court should wish to establish a standard for determining which evidence a reasonable jury cannot use, an available standard is found in Federal Rule of Evidence 401. Under that rule, "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the

evidence; and (b) the fact is of consequence in determining the action." Rule 401. *See Williams v. DeKalb County*, 327 Fed.Appx. 156, 163 (11th Cir. 2009) ("The district court's words give us the impression that it weighed the evidence Williams offered instead of simply drawing a threshold admissibility line. While district courts must resolve admissibility-of-evidence questions, they are not permitted to weigh evidence. *See, e.g., Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1154-55 (5th Cir. 1981). That is the jury's job."). If Ms. Chavez's evidence of pretext has no tendency to make the fact of pretext more probable, then it could clearly be said that "no reasonable jury" could decide for Ms. Chavez, because there would be no logically relevant evidence of pretext. However, if her evidence does make such a fact more likely, and is not otherwise inadmissible, then it should not be said that no reasonable jury could use it to so find. *See, e.g., Multimatic, Inc. v. Faurecia Interior Systems USA, Inc.*, 58 Fed.Appx. 643, 652 (6th Cir. 2009) (Rule 401 sets low threshold for relevance on summary judgment); *Berkley v. Deutsche Bank National Trust Co.*, 2014 U.S. Dist. LEXIS 63179, *10-13 (W.D.Tenn 2014) (denying motion to exclude evidence relevant under Rule 401 on summary judgment)

2. The District Court erroneously equated evidence attacking the *veracity* of employer's proffered rationale with evidence attacking the *wisdom* of employer's action, leaving Plaintiff no means of rebutting Defendant's proffered rationale and foreclosing her ability to establish the existence of a genuine issue of material fact.

As this Court has held, plaintiffs may not rebut defendant's proffered rationale with bald assertions or evidence that merely attack the wisdom of the decision absent a taint of animus. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (holding that if the proffered rationale "is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and *the employee cannot succeed by simply quarrelling with the wisdom of that reason*."); *Rowell v. Bellsouth Corp.*, 433 F.3d 794, 798–99 (11th Cir. 2005) (Plaintiff may not generally quarrel with wisdom of employer, but may point to evidence showing that application of facially neutral selection criteria results in age discrimination); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (in order to challenge veracity of employer's proffered rationale Plaintiff must produce some evidence that employer's rationale is "false or unworthy of credence"). However, plaintiff may—indeed her only means of rebutting defendant's proffered rationale—rebut by introducing evidence that undermines the veracity defendant's proffered rationale. Evidence of the latter kind includes that which calls into question whether the defendant actually relied on its proffered rationale as well as that which suggests that credence should not be afforded to the

proffered rationale. *Springer v. Convergys Customer Mgmt. Group, Inc.*, 509 F.3d 1344, 1348–49 (11th Cir. 2007).

The District Court erroneously interpreted the *Chapman* standard. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (holding that if the proffered rationale "is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and *the employee cannot succeed by simply quarrelling with the wisdom of that reason*.") (emphasis added). The District Court equated all of Plaintiff's evidence challenging the *veracity* of Mr. Torchia's proffered rationale with evidence challenging his business judgment (the *wisdom* of an employer's decision). Had Ms. Chavez argued that Credit Nation *ought not* to have terminated her for sleeping on the job, that would be a direct attack on the *wisdom* of the employer's decision. Instead, Ms. Chavez argued that sleeping on the job *is not* the cause-in-fact for her termination, as shown by the circumstances raising questions about the veracity of Credit Nation's proffered rationale. The question here is not whether Credit Nation has the right to terminate an employee for sleeping on the clock. The question before the Court is whether Credit Nation's decision maker, James Torchia, actually believed that Ms. Chavez's offense merited termination. The circumstances under which she was terminated provides evidence from which a reasonable jury may determine that Mr. Torchia did not so believe, and was a pretext for discrimination.

Plaintiff is entitled to raise the issue of the honesty of Credit Nation's proffered rationale, "that the proffered reasons did not actually motivate [her] discharge." *See, e.g., Burroughs v. Smurfit Stone Container Corp.*, 506 F. Supp. 2d 1002, 1019–20 (S.D. Ala. 2007) (showing reasons to question employer's honesty). *Accord Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000) (plaintiff may establish that she was the victim of discrimination by showing that employer's proffered rationale is unworthy of credence); *Harding v. Career Builder*, 168 Fed.Appx. 535,538 (3d Cir. 2006) (unpublished); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) *overruled on other grounds Geiger v. Tower Auto.*, 579 F.3d 614 (6th Cir. 2009); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988). *See also Chapman*, 229 F.3d at 1031 (analyzing whether the proffered reason and its attendant circumstances would motivate a reasonable employer); *Joshi v. Florida State University Health Center,* 763 F.2d 1227, 1235 (11th Cir. 1985) (discussing whether the employer believed its own proffered reason). Because the District Court deemed all Plaintiff's evidence as an attack on *wisdom* rather than *veracity*, equating "ought" and "is," it discounted all Plaintiff's evidence of discriminatory animus and pretext.

In the present case, Defendant proffers that Plaintiff was terminated for taking an inadvertent momentary nap on an icy cold, early January morning in an

unheated auto garage when she had no work to do. Doc. 60, PSOMF ¶¶12–21, 23. In response, Ms. Chavez challenged, as permitted by law, the ***veracity*** of Credit Nation's proffered rationale, arguing that Credit Nation did not actually rely on its proffered rationale and that Defendant's proffered rationale should not be given credence. To support her argument that animus motivated Defendant's decision, Plaintiff pointed to several pieces of evidence that give rise to a permissible inference of discrimination and pretext, which is discussed in detail above, *supra* Part I-C-1-c. These did not challenge the *wisdom* of Mr. Torchia's decision. Rather, they directly challenged the *veracity* of Mr. Torchia's contention that he relied on her sleeping to make his decision. Nonetheless, Ms. Chavez's evidence was ignored by the District Court on the grounds that it merely attacked the ***wisdom*** of Credit Nation's decision. That was erroneous.

II. The District Court's grant of summary judgment ran afoul of Plaintiff's Seventh Amendment right to a jury trial by deciding genuine issues of material fact.

Ms. Chavez raised below to the District Court the argument that the Magistrate's Recommendation and Report not only overstepped the lines of summary judgment, but by doing so violated Ms. Chavez's Seventh Amendment right to jury trial of genuine disputes of material fact. *See* Doc. 78, Pl. R. 72 Obj.

24–25. The District Court neither addressed nor declined to address this argument.[19]

Plaintiffs in employment discrimination cases have long complained that summary judgment, when oversubscribed, can improperly foreclose access to a trial by jury on the merits. Indeed, there is evidence that suggests the Northern District of Georgia disposes of a striking percentage of these cases through summary judgment. *See* Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration's 'Signature' Achievement*, 5–6, 6 n.25 (2014), *available at* http://ssrn.com/abstract=2406671 (citing statistics for employment discrimination claims in the Northern District of Georgia of 95% partial summary judgment dismissal, and 81% in full, compared to 74–77% rate for the nation).

[19] Plaintiff's Seventh Amendment argument was properly preserved for this Court's consideration, though Plaintiff did not raise it to Magistrate Judge. The constitutional deprivation had not yet occurred, so it was not yet ripe before the Magistrate. *See O'Shea v. Littleton*, 414 U.S. 488, 493, 94 S.Ct. 669, 675 (1974) (it must be alleged that plaintiff has sustained or is in danger of sustaining some direct injury as a result of magistrate's official conduct); *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995) (holding that ripeness requirement precludes raising constitutional challenge until there is an actual constitutional deprivation). The District Court did not decline to address it, and it thus stands as an issue. *See, e.g.*, *Stephens v. Tolbert*, 471 F.3d 1173, 1175–78 (11th Cir. 2006) (holding a district court *may* consider an issue not presented to the magistrate judge); *Williams v. McNeil*, 557 F.3d 1287, 1290–91 (11th Cir. 2009) (district court's express declination to consider issue not raised before magistrate is reviewed for abuse of discretion). It is also proper for this Court to consider the argument. *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001) (noting that appellate courts may consider issues where it is necessary to avoid a miscarriage of justice, an interest of substantial justice is at stake, or the issue presents significant questions of general impact or of great public concern).

Thankfully, this Court need not wax poetically about Seventh Amendment deprivations in the abstract.

This case is an emblematic example of discrete, clearly identifiable Seventh Amendment violations. As argued above, the District Court impermissibly overstepped its limited role as trier-of-law and crossed over the line into resolving questions of fact. First, the District Court made it easier for the movant to prevail by giving it the benefit of burdens and inferences due to Plaintiff as nonmovant. *See* discussion *supra* Part I-B-1. Second, the District Court ignored the existence of genuine issues of material fact. *See* discussion *supra* Part I-B-2. Both of these errors result in constitutional deprivations if not reversed.

It is well established that summary judgment and similar devices do not generally impair plaintiffs' right to a jury trial under the Seventh Amendment because the Seventh Amendment only extends to having a jury determine questions of fact, not questions of law. *See generally Ex Parte Peterson*, 253 U.S. 300, 40 S.Ct. 543 (1920); *Galloway v. U.S.*, 319 U.S. 372, 63 S.Ct. 1077 (1943). Where no genuine issues of material fact exist, there is no Seventh Amendment violation. *Harris v. Interstate Brands, Corp.*, 348 F.3d 761, 762 (8th Cir. 2003).

However, where a court fails to abide by the strict burden-shifting framework and fails to apply the benefits of inference and doubt required by Rule 56, a constitutional deprivation of Seventh Amendment rights is sown. Making it

easier for the movant to prevail directly impairs nonmoving plaintiff's access to trial by jury. *Galloway*, 319 U.S. at 396, 63 S.Ct. at 1090 ("[The Seventh Amendment] requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them."). It is also a Seventh Amendment violation for a judge to ignore the existence of genuine issues of material fact and go on to grant judgment as a matter of law since permitting the judge to resolve questions of law on her own findings of fact deprives non-movant their right to resolution of questions of fact by a jury. *Garvie v. City of Ft. Walton Beach, Fla.*, 366 F.3d 1186, 1190 (11th Cir. 2004).

Here, the District Court transfigured genuine issues of material fact into competing but nonconflicting facts by dipping into a grab bag of undisputed facts or inferences outside the facts disputed. *See, e.g.*, Doc. 80, Op. 21 (discussing the fact that Defendant fired another employee for sleeping during work hours several months after it fired Plaintiff as means to resolve question as to whether at the time Defendant terminated Plaintiff the decision was in part or in whole because of Plaintiff's protected status); *id.* at 23 n.4 (inferring that Defendant did not ultimately discriminate against Plaintiff because Defendant permitted Plaintiff to use leave for gender affirming surgery as means to resolve question as to whether decision-maker's past disparaging comments constitute direct evidence of bias). This is an impermissible declination to afford Plaintiff her burdens and benefits of

inference and doubt, which violates the Seventh Amendment. Moreover, these kinds of fact-intensive credibility assessments are attempts to resolve questions of fact that should have been preserved for the jury and are thus a clear violation of the Seventh Amendment. The District Court cannot be permitted to step into the shoes of the jury at the summary judgment stage.

To the extent that the District Court decided genuine disputes of material fact and denied benefits of doubt and inferences to Ms. Chavez, the District Court opinion infringed her rights under the Seventh Amendment. Below, the District Court steadfastly ignored Plaintiff's argument that granting summary judgment where genuine issues of material fact exist violates her Seventh Amendment right to a jury trial. This Court should not let such a blithe discount of Plaintiff's constitutional rights stand.

CONCLUSION AND RELIEF SOUGHT

Jennifer Chavez disclosed to her employer that she is transgender in mid-October of 2009. In mid-November 2009, Ms. Weston, Credit Nation's Vice-President, told Ms. Chavez that she needed to "tone it down" because James Torchia, Credit Nation's owner and decision-maker, "didn't like it." He told Ms. Chavez in a meeting shortly thereafter that he and others were uncomfortable with her transition and ordered her to stop expressing her gender identity through

wearing feminine attire to and from work. In December, Ms. Chavez was disciplined for opposing harassment based on her transgender status in the workplace. It appeared that Credit Nation was looking for reasons to terminate her, and, on an icy-cold January morning, that others took as a "snow day," with no work to do, she inadvertently closed her eyes, and Credit Nation had found its "legitimate reason."

Plaintiff is just one of thousands of transgender Americans experiencing bias in the workplace. Workplace bias is the rule, not the exception for transgender Americans. *See generally* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 56 (2011) (finding 90% of transgender persons report discrimination in the workplace), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf. If we are to remedy this, our nation's federal courts must ensure that our highly sensitive and complex Title VII rules and precedents do not allow employers like Credit Nation to express animus openly and then discriminate on account of transgender status. Being "run out" of the workplace, as Credit Nation's shop foreman put it, because of transgender status cannot be permitted. This Court has the opportunity to send a clear message to employers that transgender discrimination will not be tolerated in our workplaces, and the Court should not

hesitate in so declaring. The lives and livelihoods of transgender Americans depend upon it.

For the foregoing reasons, this Court should reverse the District Court's grant of Summary Judgment to Defendant-Appellee Credit Nation Auto Sales, LLC, and remand this case for trial.

Respectfully submitted,

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STATUTES, RULES AND REGULATIONS

42 U.S.C. §2000e-2(a)

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(m)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Fed. R. Civ. P. 56(a)

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(c)(1) and (2)

(c) PROCEDURES.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains **13,802** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to FRAP 25 and the Circuit Rules and IOP of the Eleventh Circuit, I certify that on this 18th day of November, 2014, a true and correct copy of the foregoing Brief of Plaintiff Jennifer Chavez was served to all counsel of record who have appeared in this appeal via filing with the Court's CM/ECF system, including the following:

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