IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 16-16850

ANDREA GOGEL,

Plaintiff/Appellant,

v.

KIA MOTORS MANUFACTURING GEORGIA, INC.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
HONORABLE TIMOTHY C. BATTEN, SR.
(3:14-CV-00153-TCB)

APPELLANT'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant Gogel pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, hereby files her Certificate of Interested Persons and Corporate Disclosure Statement:

1. Batten, Sr., Timothy C. (District Court Judge)
2. Billips & Benjamin LLP (Former Counsel for Plaintiff)
3. Billips, Matthew C. (Former Counsel for Plaintiff)
4. Carter, Meredith J. (Counsel for Plaintiff)
5. M. Carter Law, LLC (Counsel for Plaintiff)
6. Clifton III, William M. (Counsel for Defendant)
7. Constangy, Brooks, Smith & Phophete, LLP (Counsel for Defendant)
8. Gogel, Andrea (Plaintiff/Appellant)
9. Greenberg Traurig, LLP (Counsel for Defendant)
10. Kia Motors Manufacturing Georgia, Inc. (Defendant/Appellee)
11. Lambert, Lisa C. (Counsel for Plaintiff)
12. Martin II, W. Jonathan (Counsel for Defendant)
13. Mays, John L. (Former Counsel for Plaintiff)
14. Mays & Kerr, LLC (Former Counsel for Plaintiff)

15. Murray, Jr., Joseph M. (Counsel for Defendant)

16. Valladares, Richard J. (Counsel for Defendant)

17. Vineyard, Russell G. (Magistrate Judge)

Defendant/Appellee Kia Motors Manufacturing Georgia, Inc. is a wholly-owned subsidiary of Kia Motors America, Inc. Kia Motors America, Inc. is a wholly-owned subsidiary of Kia Motors Corporation, a company that is publicly traded on the Korean stock exchange (KRX: 000270).

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant believes oral argument will assist the Court's disposition of this case. Oral argument will assist in focus and test the basis and validity of the contentions of the parties.

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STATEMENT OF JURISDICTION

This case is a plenary appeal of a final decision of a district court of the United States, specifically, the United States District Court for the Northern District of Georgia. Jurisdiction lies under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the District Court failed to examine the totality of the evidence in favor of Plaintiff, the non-movant;

II. Whether the District Court erred by resolving factual disputes and failing to take the facts and inferences therefrom in the light most favorable to the Plaintiff in contravention of the standards and case law interpreting FED.R.CIV.P. 56;

III. Whether the District Court erred in finding that Plaintiff engaged in no protected speech under the antiretaliation provisions of Title VII based on Defendant's mistaken belief that she assisted an employee in filing a charge of discrimination;

IV. Whether the District Court erred in applying a narrow interpretation of adverse acts under the antiretaliation provisions of Title VII;

V. Whether the District Court erred in failing to apply Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) directive regarding the evaluation of testimony of interested witnesses;

VI. Whether the District Court erred in failing to consider similar fact evidence under Fed. R. Evid. 404(b).

COURSE OF PROCEEDINGS BELOW

Plaintiff/Appellant Andrea Gogel filed her initial Complaint on June 19, 2014 in the Superior Court of Fulton County, Georgia alleging race and alienage discrimination and retaliation under 42 U.S.C. § 1981; and gender and national origin discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. § 2000e et seq. Defendant/Appellee Kia Motors Manufacturing Georgia, Inc., removed this matter to federal court on July 24, 2014 [Doc. 1]. Defendant filed its Answer on July 25, 2014. [Doc. 2]. Plaintiff amended her Complaint on September 22, 2014. [Doc. 19]. After the close of discovery, Defendant filed its Motion for Summary Judgment as to all of Plaintiff's counts on November 16, 2015. [Doc. 83]. Plaintiff also filed a Motion for Partial Summary Judgment on her retaliation claims. [Doc. 93]. Plaintiff filed her Response in Opposition to Defendant's Motion and Defendant filed a Reply Brief. [Docs. 101, 110]. Defendant filed its Response in Opposition to Plaintiff's Motion for Partial Summary Judgment and Plaintiff filed her Reply Brief. [Docs. 99, 109]. The Magistrate Judge's Report and Recommendation (R&R) recommended granting summary judgment to Defendant on all of the counts alleged in her Complaint, and denied Plaintiff's Motion for Partial Summary Judgment. [Doc. 125]. The R&R found that Plaintiff failed to demonstrate pretext for her retaliation claims. [Id. at 69-74]. As to Plaintiff's discrimination claims, the R&R found that Plaintiff failed

to demonstrate pretext and failed to create a genuine issue of material fact. [Id. at 77-80]. Plaintiff filed her Objections to the R&R and evidentiary rulings as to retaliation in response to her protected activity and discrimination as to her termination. [Doc. 127]. On September 27, 2016, Judge Batten issued the Court's Order adopting the R&R. [Doc. 130]. Judgment was entered the same day. [Doc. 131]. Plaintiff timely field her Notice of Appeal to this Court on October 27, 2016. [Doc. 133].

STATEMENT OF THE FACTS

Defendant Kia Motors Manufacturing Georgia, Inc. (KMMG) hired Plaintiff Andrea Gogel in March 2008 as a Team Relations Manager for its new plant to be located in West Point, Georgia. [Deposition of Andrea Gogel, [Doc. 117 at 17, 21, 111-12 (68:17-19, 82:18-83:3)]. At the time she was hired, Defendant was still building the plant; it was not complete until 2009. [Id. at 24 (93:20-94:8)]. She reported to Randy Jackson, who was Director of Human Resources and Administration; Jackson was the highest-ranking American at KMMG while Plaintiff was employed with the company. [Id. at 25, 111-12 (97:1-5); Doc. 93-3 at ¶23]. At KMMG, the Team Relations (TR) Department and Human Relations (HR) Department were separate entities. [Doc. 115 at 50 (193:12-18)]. Robert Tyler was the Human Resources Manager. [Doc. 122 at 18 (68:2-4)]. At KMMG, there were American and Korean counterparts for management level positions; the Koreans

were designated as Coordinators. [Doc. 117 at 25 (98:9-21)]. Justin Yoo was Plaintiff's Korean counterpart, K.S. Kim was Jackson's Korean counterpart and Kevin Kim was Tyler's Korean Coordinator. [Doc. 120 at 39 (149:8-150:3)].

Plaintiff's Duties

The Team Relations (TR) Manager's general duties were "to promote high team member morale and prevent unwelcomed activity within both KMMG and KMMG Suppliers." [Doc. 101-9 at 2]. The phrase "unwelcome activity" referred to any union organizing in the plant, not discrimination. [Doc. 101-1 at ¶5]. The TR Department created policies and standards to further the purpose of supporting "an environment of positive team relations," and assisted in helping employees "understand what the rules and guidelines of the workplace were." [Doc. 117, 87:17-88:2]. The TR Department conducted investigations regarding policy violations, attendance issues and internal allegations of discrimination. [Id. at 101:1-102:2]. The majority of these investigations concerned attendance issues or falsification of documents. [Doc. 101-1 at ¶7]. Any investigations regarding complaints of discrimination were done only at the direction of legal counsel. [Id.; Doc. 117 at 26 (101:16-102:2)]. However, the TR Manager did not have any role in the resolution of legal issues. [Doc. 101-1 at ¶6]. Only the legal department investigated Charges of Discrimination filed with the EEOC. [Doc. 115 at 40 (156:9-25); Doc. 119 at 24 (90:10-15)].

Failure to Promote Plaintiff

In March 2009, KMMG released an organizational announcement regarding new titles and designations throughout the company, including Head of Department (HOD) designations. [Doc. 117 at 29, 116-122 (113:3-25)]. Americans, not Koreans, were the only ones who filled HOD positions. [Doc. 93-3 at ¶24]. Plaintiff noticed that she was the only American in a management role who was not designated to serve as an HOD for her department; only men were promoted to these roles. [Id.]. Instead, Robert Tyler, the Human Resources Manager, was designated as HOD for **both** Human Resources and Team Relations. [Doc. 117 at 29, 118 (115:2-116:5)].

Plaintiff immediately complained to Jackson about the failure to promote her to HOD, especially since the official reclassification of Human Resources specifically separated TR and HR into 2 distinct departments. [Doc. 117 at 29-30 (116:23-117:2)]. Jackson claimed it was just a timing issue, but at the same time, he confirmed that the HOD designations were automatic. [Id. at 30, 32 (117:7-13, 127:1-3)]. They discussed her non-promotion on several other occasions and Jackson's excuses varied from the "timing" issue. [Id. at 30 (117:20-22)]. Plaintiff investigated complaints made by American females of treatment by Korean management that also led her to believe not designating her as HOD was discrimination. [Id. at 30 (119:17-22)]. She told Jackson and Tyler that she felt she

was being treated differently because of her gender and had great concern about the explanation that it was only an issue of timing when a male new hire was designated as an HOD. [Id. at 47 (185:21-186:2)].

In April 2010, Plaintiff was again passed over for a promotion to Senior Manager/HOD of Team Relations; instead, Tyler was promoted to this position. [Doc. 117 at 45, 140 (178:9-25)]. Again, no women were promoted to Senior Manager/HOD roles in 2010, only American males. [Id. at 140]. Jackson told Plaintiff that he would take care of her the following year. [Id. at 62 (247:22-248:10].

Discriminatory Culture in the Workplace

There were some extreme cultural differences between the Korean and American culture and these differences bled into difficulty adhering to, or understanding US employment laws, which gave Plaintiff concern. [Doc. 117 at 30 (118:12-18)]. Kevin Kim would not allow TR and HR to do training with Korean expatriates who came to work at KMMG to help them understand the American culture and laws. [Id. at 64-65 (256:20-258:4)]. Jackson told Plaintiff she was to determine the age of applicants for the Korean expatriates to make hiring decisions because it was important in their culture that the new hire being younger than their supervisor. [Id. at 65 (258:10-21)]. Plaintiff opposed Jackson's directive and told him that it would be an illegal practice. [Doc. 93-3 at ¶21]. Plaintiff was also told

that only young, pretty women could be hired in the General Affairs Department. [Doc. 117 at 30 (119:10-16)].

The Korean executives also treated Plaintiff differently than her male co-workers. K.S. Kim, Korean Senior Vice President, would yell at Plaintiff and tell her he did not understand anything she was saying to him and would ask for the males to explain what she was saying before he acted like he understood. [Doc. 117 at 40 (159:1-7)]. Plaintiff complained to Jackson several times about how K.S. Kim treated her. [Doc. 93-3 at ¶12]. In addition to K.S. Kim ignoring Plaintiff, her Korean counterpart, Justin Yoo would not speak or listen to Plaintiff. [Doc. 101-1 at ¶17]. Kevin Kim and Yoo would also exclude her from meetings, but invite her male subordinates; she would have to rely on them for information discussed in the meetings. [Id. at ¶¶34-35]. I.B. Jang, the former Korean Human Resources Coordinator, told Plaintiff to never disagree with Korean expatriates. [Doc. 93-3 at ¶18].

Jackson asked Plaintiff not to speak "strongly" in meetings with the Korean executives or management in attendance, but said nothing to male American subordinates regarding how to act at these meetings. [Doc. 117 at 44 (175:4-13)]. Plaintiff was directed to "hide" any female security officers when Korean expatriates visited the plant. [Doc. 101-1 at ¶20].

Kevin Kim told Plaintiff on more than one occasion that Korean children

were more intelligent than children of other races. [Doc. 93-3 at ¶17]. Jang told her that Korean people feared black people because of stereotypes portrayed on TV and movies. [Id. at ¶19]. Another Korean executive told Plaintiff that Koreans are superior because they are the descendants of Mongols and were smarter and better fighters than non-Koreans. [Id. at ¶20].

Diana Ledbetter, who held two degrees and worked as a General Affairs Specialist, was ordered to practice saying, "welcome Chairman," while holding flowers in front of male executives to perfect her delivery for any visiting male Korean executives. [Doc. 120 at 134]. She was also ordered to serve visiting male Korean executives wine and called a "geisha." [Id.]. When Ledbetter returned from maternity leave, then legal manager Richard Park (Korean) asked why she was at work and told her she should be at home with her baby. [Doc. 101-2 at ¶20]. Another female employee resigned after returning from maternity leave and being shunned, underutilized and finally told by a Senior Leadership manager that she was a bad mother because she worked and was not home with her baby. [Doc. 101-6].

Diana Ledbetter complained to Plaintiff, Tyler, Jackson, Latesa Bailey and Arthur Williams about an inappropriate relationship between her supervisor, Kisha Morris was have with President of the Company, Byung Mo Ahn. [Doc. 101-2 at ¶3]. She wanted to transfer from under Morris's supervision because she witnessed

Morris abusing her position and subordinates without fear of reprisal because of her relationship with Ahn. [Id.]. Ledbetter's complaints about this situation dated back to 2008, when she first met with Plaintiff. [Doc. 117 at 50 (200:13-16)]. Plaintiff was concerned that there was a quid pro quo relationship between Ahn and Morris. [Doc. 101-1 at ¶14]. She went up the chain of command to Jackson about the situation, but he **prohibited** her from investigating the complaint or relationship. [Doc. 117 at 31 (121:7-18]. A few weeks later, Kevin Kim approached Plaintiff and told her to investigate Ahn and Morris, but not to tell Jackson; a few weeks after that, he told her to stop her investigation and destroy all notes without explanation. [Id. (121:19-122:25)].

In response to Plaintiff's complaints of discrimination, Jackson told her that she had a "responsibility" to understand and respect Korean culture by supporting the patriarchal culture. [Doc. 93-3 at ¶21]. He also repeatedly told her that "change was slow" while lecturing her about the blending of the two cultures. [Id. at ¶15].

Report of Concerns

Throughout 2010, many American managers, including Plaintiff, expressed concerns about how they were being treated by Korean Management, such as not having appropriate decision-making authority, not being consulted on issues that they were being held accountable for, and generally not having voice in the company. [Doc. 117 at 48 (189:14-190:7]. Tyler raised these issues with Jackson;

Jackson asked Tyler to gather information regarding specific examples, which he did, culminating in the "Report of Concerns." [Id. at 48, 145-48 (190:8-24)]. Tyler drafted the Report in August and September 2010 based on feedback from other American managers, including Plaintiff; however, Plaintiff did not author the Report, her input only addressed discrete issues that she experienced. [Id. at 37-39, 48 (148:21-149:8; 191:14-22); Doc. 101-1 at ¶¶22-24]. At a company dinner held shortly after Tyler submitted the Report to Jackson, President Ahn berated the Americans in attendance, accusing them of being disloyal; Plaintiff interpreted his remarks to mean the American management should not raise issues or concerns about anything at KMMG. [Doc. 101-1 at ¶25; Doc. 122 at 35 (134:15-135:10)].

October 14, 2010 Meeting

Plaintiff met with Jackson, Charles Webb (former in-house counsel) and Tyler on October 14, 2010 to discuss her concerns regarding discrimination in the workplace. [Doc. 101-1 at ¶¶26-31]. Prior to the meeting, Webb approached her and said that she had no claims regarding being passed over for promotions and that any continuation of her complaints would be frowned upon. [Id. at ¶26].

During the meeting, Plaintiff reiterated concerns that she previously raised up the chain of command in 2009 and 2010. [Id. at ¶27]. She brought up Ledbetter's complaint about the relationship between Ahn and Morris and once again stated her concern that it may be a "quid pro quo" arrangement. [Id. at ¶28;

Doc. 115 at 56 (217:3-9)]. She again brought up the promotions of men over her and the fact that she thought this was gender discrimination because she was given multiple, different reasons for not choosing her for promotions. [Doc. 101-1 at ¶28]. Webb interrupted her and trivialized her promotions complaint. [Id. at ¶29]. Plaintiff complained that other American females were passed over for promotion and another woman was fired from a receptionist position because Kevin Kim did not think she was "attractive." [Id. at ¶31].

Plaintiff reiterated that she was not the only person being treated poorly by Korean management, that other American managers – male and female – felt the same, that they had no voice and were forced to be subservient. [Id. at ¶29]. Throughout the meeting, she repeatedly told Jackson and Webb that she was afraid of being retaliated against for coming forward with her concerns and complaints. [Id. at ¶¶30, 32].

Jackson ended the meeting after 45 minutes, stating he had another meeting to attend. [Id. at ¶33]. Plaintiff told him that she had more information to share; however, after that meeting, Jackson did not contact her regarding the complaints. [Id.]. Tyler informed Plaintiff that the "investigation" into her complaints was closed on November 3, 2010. [Doc. 118 at 1].

Plaintiff's Charge of Discrimination

Plaintiff went to the EEOC on November 10, 2010 and filed her first Charge

of Discrimination that same day, alleging discrimination based on her gender and national origin. [Doc. 117 at 38 137 (149:23-152:16)]. Defendant received the Charge on November 22, 2010 and filed its position statement in response to it on November 30, 2010. [Doc. 115 at 40 (156:2-4); Doc. 120 at 71 (278:6-279:6)]. After Defendant received Plaintiff's Charge, Jackson very loudly made comments about Plaintiff filing a Charge in the open administrative offices; people in the area readily overheard him discussing the Charge, including Ledbetter and Arthur Williams. [Doc. 117 at 50 (198:17-199:8)].

Demand to Sign Retaliatory Agreement & Suspension

On December 3, 2010, Webb and Jackson approached Plaintiff and demanded that she sign a document regarding her Charge, which states:

> A. I will not discuss my EEOC charge or similar claims against [KMMG] with Team Members and will not use my position to solicit or influence Team Members to make claims against KMMG;
> B. I will not put any Team Members, including my reports, in any conflict of interest by seeking their assistance in any fact finding or any information gathering related to my claim against KMMG;
> C. I will not make any written or verbal statements to Team Members that malign the company; and
> D. I will not seek access to any files or documents that relate in any way to the merits of my claim or similar claims against KMMG.

[Doc. 93-7; Doc. 117 at 53 (209:17-210:4)]. Plaintiff refused to sign it and Jackson suspended her from work until she signed it; this suspension was a disciplinary act. [Doc. 115 at 39, 41 (150:24-151:12, 152:19-24, 157:16-158:1); Doc. 117 at 53

(210:14-20)]. Plaintiff received no discipline or reprimands until this suspension. [Doc. 115 at 39 (150:24-151:12]. She ultimately signed the document the following week on December 6, 2010 and was permitted to return to work. [Doc. 117 at 53 (210:21-22)]. However, Jackson refused to answer at his deposition what would have happened to Plaintiff if she refused to sign the document. [Doc. 120 at 56-58 (220:15-227:7)].

Robert Taylor's Charge of Discrimination

Tyler filed an EEOC Charge on November 19, 2010 alleging national origin discrimination and retaliation. [Doc. 120 at 132]. On December 3, 2010, he was forced to sign the same document as Plaintiff after he filed his EEOC Charge. [Doc. 122 at 35 (136:13-24)]. Tyler was suspended on December 16, 2010 for an investigation regarding whether he violated the December 3 document and terminated on January 6, 2011. [Id. at 3 (5:24-6:23); Doc. 115 at 42 (161:16-162:3)].

Diana Ledbetter's Charges of Discrimination

Diana Ledbetter filed a Charge of Discrimination with the EEOC on December 10, 2010 alleging race, sex and national origin discrimination; the EEOC requested Defendant to submit its response to the Charge by January 17, 2011. [Doc. 115 at 52 (203:2-4); Doc. 120 at 134-35]. Plaintiff did not know Ledbetter was going to file a Charge and did not solicit or encourage her, or others,

to file one. [Doc. 101-1 at ¶¶48-49; Doc. 117 at 50 (199:23-200:5]. Ledbetter did not tell Plaintiff she was going to file a Charge before she filed it. [Doc. 101-2 at ¶¶8-11]. At her deposition, Plaintiff testified that Ledbetter asked whether she had an attorney and Plaintiff related the name of the attorney she was going to meet – but that she was not represented at that time. [Doc. 117 at 52 (208:18-21)]. After Jackson received Ledbetter's Charge on December 23, 2010, he emailed Keun Kim that he was trying to reach President Ahn to provide "an update on Bob [Tyler] and Andrea [Gogel]" and that "[i]t looks like Bob and Andrea are recruiting others." [Doc. 115 at 54 (210:9-24); Doc. 120 at 136].

Sham "Investigation" and Plaintiff's Second Suspension

Defendant claims that it launched an investigation into Ledbetter's claims in her Charge; however, the only persons "interviewed" prior to Plaintiff's termination were Plaintiff and her two subordinate employees: Arthur Williams and Paul Grimes. [Doc. 120 at 74 (290:7-292:23)]. Prior to January 2011, no one, including Williams and Grimes, ever complained about Plaintiff. [Id.].

Defendant's plant was closed for the holidays from December 23, 2010 through January 3, 2011. [Doc. 115 at 52 (203:4-7)]. Jackson claims that Arthur Williams (who reported to Plaintiff) complained to him about Plaintiff on January 4, 2011; however, Williams had no recollection of this alleged meeting. [Doc. 120 at 63-64, 137 (248:7-249:23); Doc. 123 at 65 (254:1-255:16)].

On January 5, 2011, Williams allegedly met with Jackson and Webb to complain about Plaintiff, Ledbetter and Tyler. [Doc. 123 at 153-54]. Webb did not type the notes regarding this meeting until January 7, 2011; Williams did not sign off on these notes until January 11, 2011. [Id.]. Webb's notes state that the meeting started with this notice to Williams:

> Randy [Jackson] and I reminded [Williams] that Bob was on administrative leave and Andrea was on PTO and indicated that while no final decision had been made, their [sic] were serious concerns about Bob's behavior which could lead to him not returning. **We further indicated that if there were serious concerns about Andrea, we were willing to address them including putting her on administrative leave while they were investigated.**

[Id.] (emphasis added). The notes relate that Williams provided a diatribe against Plaintiff including allegations that Plaintiff, as well as Taylor, had numerous meetings with Ledbetter prior to her filing a Charge as well as several derogatory comments about Plaintiff including the way that she dressed. [Id.]. But, Tyler had no knowledge of what Plaintiff and Ledbetter discussed in these meetings. [Id. at 63 (247:22-25)]. Williams replaced Plaintiff as TR Manager after she was fired. [Doc. 120 at 34-35 (131:7-134:13)].

Also on January 5, 2011, Paul Grimes (another subordinate of Plaintiff) allegedly met with Jackson and Webb to complain about Plaintiff, Ledbetter and Tyler. [Doc. 119 at 98-100]. This meeting was memorialized in a typewritten document dated January 10, 2011. [Id.]. Grimes claimed that he reviewed the notes

a few days after January 10, 2011. [Id. at 55 (213:24-214:2]. Contrary to the notes, Grimes testified that Jackson was not present at that meeting. [Id. at 54 (211:3-15)]. Like Williams, Grimes related personal attacks against Plaintiff regarding her attendance and performance and even accused her of being a racist. [Id. at 98-100]. He further opined as to Plaintiff, Taylor and Ledbetter acting in some sort of conspiracy to file their Charges of Discrimination or to seek legal help. [Id.]. But, Plaintiff never discussed her complaints of discrimination with Grimes and he admitted that he had no idea what Plaintiff and Ledbetter discussed. [Id. at 54, 55 (212:4-14, 215:22-216:13)]. Grimes was promoted to Manager of Team Relations after Williams was promoted to Sr. Manager/HOD of Team Relations. [Doc. 119 at 17 (63:4-5)].

On January 7, 2011, Jackson and Webb called Plaintiff from her vacation (she requested additional days beyond the closure) into a meeting and told her that they were investigating an accusation that she was "**colluding"** with Ledbetter to file a Charge with the EEOC. [Doc. 117 at 66 (261:9-15, 264:16-18)]. They asked her when she had talked to Ledbetter, grilled her about her relationship with Ledbetter and accused her of violating the December 6, 2010 "agreement." [Id. (261:19-262:10)]. Plaintiff answered all of their questions and explained that she had not violated the agreement or done anything inappropriate. [Id. (261:21-23, 263:6-8)]. She explained that her recent conversations with Ledbetter concerned an

issue regarding cafeteria coverage, and safety, during the annual shutdown. [Id. (262:4-263:4)]. Plaintiff reminded them about Ledbetter's prior complaints and the fact that she was prohibited from investigating Ledbetter's complaint about Ahn and Morris. [Doc. 101-1 at ¶58]. At the conclusion of the meeting, Webb looked at Jackson and asked what he wanted to do, Jackson said, "just to be safe, **why don't we go ahead as planned.**" [Id. at 66 (263:6-13)]. They suspended her until they "could sort things out" and had the security manager, who was standing outside the door, escort her out of the building. [Id. (263:14-264:8)]. This was Plaintiff's last day at KMMG. [Doc. 115 at 43 (165:21-23)].

Defendant did not speak to Ledbetter regarding her Charge until January 26, 2011, a week after Plaintiff's termination. [Doc. 101-2 at ¶13].

Plaintiff's Termination

Jackson never contacted Plaintiff again after the January 7, 2011 meeting; instead, he fired her via a letter dated January 19, 2011. [Doc. 117 at 54 (214:20-215:6); Doc. 93-8]. From the time KMMG received notice of Plaintiff's initial Charge, she worked only 17 days before she was terminated. [Doc. 117 at 63 (251:20-252:2)].

The termination letter states the reasons for Plaintiff's discharge are that "one could conclude that [Plaintiff] encouraged or even solicited [Ledbetter's] filing of the charge" and this represented a conflict of interest because she did not

"internalize" resolution of the complaints and implied a violation of the December 6, 2010 document. [Doc. 93-8]. The letter further claims that Defendant's "investigation" uncovered additional negative reports regarding Plaintiff's performance as a manager. [Id.].

Despite Jackson claiming in Plaintiff's termination letter that he had received additional reports from others that caused him to lose faith in Plaintiff as a manager, he could not provide any names other than Williams and Grimes. [Doc. 120 at 74 (291:10-22)]. Jackson did not see Plaintiff and Ledbetter engaged in meetings. [Id. at 73 (287:4-6)]. He also claimed that he searched Plaintiff and Ledbetter's computers and found a lot of "conversation" between the two women that supported his opinion that Plaintiff solicited or encouraged Ledbetter to file her Charge; however, he could not specify any particular email that he found "disturbing" or even testify whether he reviewed their computers before or after Plaintiff's termination. [Id. at 67, 73-74 (262:7-16, 287:9-290:1)]. There is no mention of emails in the termination letter. [Id. at 73-74 (288:24-289:1)].

On January 24, 2011, Defendant notified the State of Georgia that it terminated Plaintiff for a "violation of rules." [Doc. 120 at 140]. On February 3, 2011, it notified the State that the she "exposed KMMG to potential liability by failing to properly investigate claims and failure to properly record efforts to investigate/resolve problems." [Id. at 141].

Plaintiff filed a second EEOC Charge for retaliation on February 8, 2011. [Doc. 118 at 28]. Defendant's March 14, 2011 EEOC Position Statement basically mirrored the termination letter. [Doc. 93-10]. But, Ledbetter made her own decision to file an EEOC Charge and had told Defendant the same by that point in time; neither Plaintiff nor Tyler encouraged her to file a Charge, let alone to seek outside legal counsel. [Doc. 101-2 at ¶¶ 8-11, 13]. In fact, Ledbetter did not even tell Plaintiff she was going to file a Charge. [Id. at ¶ 11].

At its deposition, Defendant testified that Plaintiff was **not** terminated for violating any policies or failing to investigate any claims. [Doc. 115 at 42, 54 (163:17-164:2, 212:11-12)]. Rather, Defendant testified that she was fired because she "solicited" Ledbetter to file a Charge against Defendant and this allegedly violated the December 6th "agreement." [Id. at 54 (212:13-25)].

Williams' Meeting With Ledbetter

After hearing that Plaintiff and Tyler were terminated, Ledbetter, who was out on maternity leave, called Williams and asked if she was going to be fired as well. [Doc. 101-2 at ¶12]. Williams told her that he wanted to meet in person; Ledbetter agreed and they met in a Wal-Mart parking lot on January 26, 2011 to discuss her fears of retaliation. [Id. at ¶13].[1] During the meeting, Williams told Ledbetter to admit that Plaintiff and Tyler encouraged her to file her Charge and

[1] Williams did not take any notes during the meeting but typed a "summary" a couple days after the meeting from memory. [Doc. 123 at 68, 142-45 (266:4-18)].

"all would be forgiven." [Id.]. She refused and told him it was not true, that she made her own decision and no one coerced her to file the Charge. [Id.]. Williams tried to tell Ledbetter she was young and impressionable, and didn't know what she was doing, which Ledbetter found insulting. [Id.]. Williams also tried to get Ledbetter to withdraw her Charge and say that she made a mistake. [Id.]. Ledbetter refused because she had not made a mistake and had no feedback on her Charge or any assurance that Defendant would address her complaints. [Id.].

Jackson and Bailey Meeting with Ledbetter

The following year, in 2012, Ledbetter met with Jackson and Latesa Bailey about transferring her out of General Affairs under Morris's supervision; her Charge was still pending at that time. [Doc. 101-2 at ¶16]. Jackson and Bailey told Ledbetter if she withdrew her EEOC Charge, she would have a better chance of being transferred. [Id.]. She felt like a "black sheep" at KMMG the entire time her Charge was pending; she withdrew her charge to "get back in good favor with the company." [Id. at ¶17]. After she finally conceded and withdrew her Charge, Jackson told her there were no open assistant manager positions at that time. [Id. at ¶16]. Ledbetter ultimately resigned in June 2013 after she realized Jackson was never going to allow her to transfer from under Morris's supervision. [Id. at ¶¶16-17].

STANDARD OF REVIEW

The standard of review of an entry of summary judgment is *de novo*. See Jones v. UPS Ground Freight, 683 F.3d 1283, 1291 (11th Cir. 2012).

SUMMARY OF ARGUMENT

Plaintiff/Appellant Andrea Gogel, a white American female, began working for Defendant, a Korean company, in March 2008 as Defendant built its first manufacturing plant in the United States. Throughout her employment, the Korean executives and management disrespected and ignored her. She also fielded similar complaints from other females in the company. Plaintiff was passed over for promotion twice in favor of a male co-worker. She was told she could not investigate allegations of a quid pro quo sexual relationship between a Korean executive and his American subordinate. Her supervisor ordered her to list applicants by age for the Korean executives' review, but she refused. Plaintiff internally reported discriminatory acts based on her alienage, national origin and sex multiple times; however, nothing was done. Accordingly, she sought assistance outside the company and filed a Charge of Discrimination with the EEOC. Defendant promptly retaliated against her, demanding that she sign a document restricting her ability to support her Charge and suspending her when she refused. She ultimately relented to keep her job. A couple of weeks later, Defendant received another Charge from a female employee and accused Plaintiff of

"colluding" with her to file it with the EEOC (she did not) and suspended her again. Meanwhile, in the days before her suspension, Defendant sought to dig up dirt on Plaintiff from her subordinates to find some reason to fire her. Her supervisor terminated her employment two weeks later, claiming that he lost "trust" in her because she colluded with the other female to file Charges against the company. However, what the Defendant calls collusion, the law calls protected activity. She asserted her rights in a reasonable manner without disrupting the workplace and Plaintiff's job title does not exclude her from legal protections. Defendant was content to let Plaintiff suffer in a discriminatory environment, despite her numerous complaints, but fast tracked her departure for complaining about discrimination outside the workplace. In granting summary judgment, the District Court erroneously made credibility determinations, found facts in Defendant's favor and excluded or discounted Plaintiff's evidence. The order should be reversed and this matter remanded for a jury trial on the merits.

ARGUMENT

I. THE TOTALITY OF THE EVIDENCE WOULD PERMIT A JURY TO FIND THAT PLAINTIFF WAS THE VICTIM OF RETALIATION AND DISCRIMINATION

At summary judgment, there is no fixed formula or framework that a plaintiff alleging employment discrimination must satisfy in order to get her claims before a jury. See International Bhd. Of Teamsters v. United States, 431 U.S. 324,

358 (1977)("[o]ur decision in [McDonnell Douglas] however, did not purport to create an inflexible formulation"); Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011)("[e]stablishing the elements of the McDonnell Douglas framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment"). The relevance and probative value of a certain type of evidence in a given case is "determined in the context of the facts and arguments in a particular case, and thus [is] generally not amenable to broad *per se* rules." Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008). In considering the evidence presented – whether termed direct or circumstantial – "relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled 'direct' or 'indirect.'" Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765 (7th Cir. 2016). "Evidence is evidence." Id.

Plaintiff put forth her evidence of discrimination under a "convincing mosaic" paradigm; she proffered her evidence of retaliation under that paradigm and the McDonnell Douglas burden-shifting framework, as well as providing direct evidence. The trial court discounted the direct evidence and did not consider her evidence of retaliation as a "convincing mosaic," stating she failed to raise the argument prior to her objections to the magistrate judge's report and recommendation. [Doc. 130 at 8-9, 23, n. 11]. This is error. These judicial

constructs provide tools of organization to assist the evaluation of circumstantial evidence, but are not tests or hurdles for plaintiffs to overcome. See Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1194 (11th Cir. 2004)(noting McDonnell Douglas is "merely a procedural device to facilitate an orderly focused evaluation of the evidence"). When these constructs become rigid and mechanical evidence may be discarded, the truth obscured and plaintiffs denied their right to a jury trial. This is what happened in the present matter.

Of course, at this stage of the litigation, all facts and inferences must be taken in favor of Plaintiff, the non-movant. See Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014). This includes inferences that are "not necessarily the most plausible." Valderrama v. Rousseau, 780 F.3d 1108, 1120 n.14 (11th Cir. 2015). The court "may not weigh conflicting evidence or make credibility determinations" and if there are "disputed issues of fact, the court may not decide them; rather, [it] must deny the motion and proceed to trial." Jones v. UPS Ground Freight, 683 F.3d 1283, 1292 (11th Cir. 2012). The trial court also erred in failing to adhere to this standard of review by making credibility determinations, finding facts in Defendant's favor and discounting Plaintiff's evidence while accepting Defendant's facts that a jury is not required to believe. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-51 (2000).

But, the totality of the evidence taken in a light most favorable to the

Plaintiff shows that a jury should decide her claims. Simply put, "no matter its form, so long as the circumstantial evidence raises a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper." Lockheed-Martin Corp., 644 F.3d at 1328; see also, Ortiz, 834 F.3d at 766 (disavowing the "convincing mosaic" paradigm and the McDonnell Douglas framework as "rat's nest of surplus tests" and directing lower courts to examine the totality of the evidence to see if it would "permit a reasonable factfinder" to return a verdict in the plaintiff's favor).

The following facts and inferences taken in Plaintiff's favor would permit a jury to find that she is the victim of discrimination and retaliation:

- Defendant hired Plaintiff, an American woman, as the Team Relations Manager in March 2008; this department focused on employee morale and defeating any union organizing.

- The majority of investigations by Team Relations concerned attendance issues or falsification of documents; this department only investigated EEO issues at the direction of the legal department and was not responsible for resolving legal issues.

- Plaintiff was not disciplined or the subject of any complaints until **after** she filed a Charge of Discrimination with the EEOC.

- Defendant's workplace was rife with discrimination that Randy Jackson, Director of Human Resources, brushed off as cultural differences.

- Plaintiff was told to: respect the "patriarchal" Korean culture; never disagree with any Korean manager or executive; not speak "strongly" at meetings with Koreans in attendance; and even to "hide" female security officers when Korean expatriates visited the plant.

- Plaintiff's Korean counterparts and supervisors: yelled at her; acted as though they could not understand what she was saying; ignored her; and excluded her from meetings while inviting her male subordinates.

- Team Relations and Human Resources were prohibited from presenting a training session regarding American laws and culture to Korean executives transferring to the facility.

- Plaintiff was told to list applicants by age for the Korean managers' review and that only young, pretty women would be hired in the General Affairs Department.

- Other non-Korean employees experienced similar issues as Plaintiff and complained up the chain of command and to HR. In fact, the HR Manager compiled a list of issues and concerns that American managers had with their Korean counterparts or supervisors at Jackson's request in September 2010. Jackson did nothing in response; the President of the company accused the American employees of being disloyal.

- Plaintiff was passed over for 2 promotions in favor of a male co-worker; she complained to Jackson about the failure to promote and he said it was a "timing" issue.

- Plaintiff made multiple internal complaints about the discrimination she suffered to Jackson, as well as to him and in-house counsel, Charlie Webb, in October 2010; however, nothing was done to rectify the situation.

- Plaintiff filed her Charge of Discrimination with the EEOC on November 10, 2010; she did not announce this act internally, created no disruption in the workplace and continued to perform her job duties.

- After Defendant filed its position statement with the EEOC, on December 3, 2010, it ordered Plaintiff to sign a document that would restrict her ability to support her Charge such as talking to witnesses, accessing any documents related to her claims or making statements regarding her complaints that in Defendant's view would "malign the company;" she initially refused and was suspended immediately. Defendant provided no reason for demanding she sign this document.

- She relented the following week, signed the document and returned to work and performed her job without issue, creating no disturbances in the workplace.

- Diana Ledbetter filed a Charge of Discrimination on December 10, 2010; alleging, among other things, the failure to investigate the relationship between her supervisor and the President. Jackson was aware of Ledbetter's ongoing complaints of discrimination since 2008; she even complained to him directly. Plaintiff played no part in Ledbetter filing a Charge.

- On January 5, 2011, after the plant's 2-week holiday shutdown and while Plaintiff was still on vacation, Jackson and Webb called her 2 subordinates into meetings to dig up dirt on her. Each related personal attacks on Plaintiff and claimed they saw her with Ledbetter, though they admitted they had no idea what the two women may have discussed.

- Two days later, on January 7, 2011, Jackson and Webb called Plaintiff in from vacation on the false claim of investigating Ledbetter's charge. In response to asking her what contact Plaintiff had with Ledbetter, she explained that there was a misunderstanding in December regarding the cafeteria that they discussed, but nothing else new, just Ledbetter's continuous complaints over the prior 2 years. Jackson immediately suspends her for an "investigation" as to whether she "colluded" with Ledbetter.

- Defendant interviewed **no one** for this alleged "investigation" after Plaintiff was suspended until after her termination.

- Two weeks later, Jackson fired Plaintiff stating that she failed to do investigations and she colluded with others to file Charges against the company. Defendant later dropped the poor performance issue and solely claims the termination was based on Jackson's "good faith belief" that she solicited Ledbetter to file a Charge causing him to lose "confidence in her abilities."

- Plaintiff was fired less than 2 months after Defendant received her Charge.

- Defendant interviewed Ledbetter the week after Plaintiff's termination; she told Defendant that Plaintiff had nothing to do with her filing a Charge and

that she did it on her own. Defendant told Ledbetter to claim Plaintiff talked her into it and "everything would be forgiven." Defendant coerced Ledbetter into withdrawing her Charge the following year.

- Robert Tyler also filed a Charge in November 2010; he was suspended for an alleged investigation in mid-December and terminated on January 6, 2011 for allegedly violating the same document that Plaintiff was forced to sign.

- Jackson did not rescind his termination of Plaintiff even though Ledbetter confirmed that Plaintiff did not solicit or encourage her to file a Charge.

In sum, the evidence taken in a light most favorable to the Plaintiff shows that she endured a discriminatory work environment based on her gender, alienage and national origin that included belittling and demeaning acts by her Korean counterparts and supervisors as well as the denial of promotional opportunities. Plaintiff's internal complaints of the illegal behavior fell on deaf ears; Jackson cast it off as cultural differences and made no attempt to rectify the illegal acts. However, the minute she took her claims outside the company, Plaintiff was ordered to agree to restrict her rights and was disciplined when she refused. A month later, she was suspended again and accused of "colluding" with an employee to file a Charge. Notwithstanding the fact that such an act would be protected activity, Plaintiff did not assist the employee in filing her Charge. Less than two weeks after the second suspension, and less than two months after Plaintiff sought assistance with the EEOC, Defendant fired her. She was not the only victim of this discrimination and retaliation; two co-workers also filed formal charges and suffered adverse employment actions and other American managers

also voiced internal complaints about discriminatory conduct in the workplace.

These facts and inferences taken in Plaintiff's favor would permit a jury to find that Plaintiff's termination was motivated by her gender, alienage and national origin. See Ortiz, 834 F.3d at 766 (holding "all evidence belongs in a single pile and must be evaluated as a whole [and this] conclusion is consistent with *McDonnell Douglas* and its successors.")

The facts and inferences would also permit a jury to find that Plaintiff engaged in protected activity and suffered two suspensions, a mandate not to prosecute her claim, and ultimately, termination. A jury could find her protected speech was the straw that broke the camel's back, causing the adverse acts.

The trial court erred in making credibility determinations and finding facts in Defendant's favor; excluding relevant evidence; and misapplying the law. See Sections II-V, infra. Cumulatively, these errors lead to the order granting summary judgment; this Court should reverse the order and remand this case for a jury trial on the merits.

II. PLAINTIFF ENGAGED IN PROTECTED SPEECH AND COMMITTED NO ACTS THAT WOULD DENY HER PROTECTED STATUS UNDER THE ACT

Plaintiff filed a Charge with the EEOC complaining of gender and national origin discrimination, which is under the participation clause of Title VII and affords near limitless protection against retaliatory acts. See Johnson v. Univ. of

Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000). Defendant erroneously accused her of assisting Ledbetter to file a Charge, but this would be protected activity as well under the opposition clause. See Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 277-78 (2009)(holding the opposition clause under Title VII's antiretaliation provision should be interpreted expansively to further the remedial nature of the law); see also, Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)(noting that opposition clause activity can include supporting a co-worker who files a charge of discrimination). Defendant describes such an act as nefarious, but Defendant's hostility to the protected activity does not negate the fact that it would be protected.[2] Supporting Ledbetter in filing a Charge would be covered under the opposition clause; it would have been reasonable for Plaintiff to support Ledbetter and she would have had a good faith belief that Defendant was engaging in discriminatory practices. See Little v. United Technologies, Carrier Transicold Division, 103 F.3d 956 (11th Cir.1997)(setting out objective and subjective test for analyzing protected activity under the opposition clause). There is no inference or presumption to make regarding Defendant's reason for terminating Plaintiff's employment – she was fired for assisting or supporting Ledbetter in filing a Charge. This is an admission of retaliation.

[2] Jackson admitted that Ledbetter had a right to file a Charge but that he did not want employees "recruiting" others to file discrimination complaints; however, he refused to answer what he meant by "recruiting." [Doc. 120 at 242:24 - 246:15].

A. Mistaken Belief Does Not Absolve Defendant From Liability

Plaintiff denies helping Ledbetter file her Charge; Ledbetter confirms this fact. But this does not change the analysis. In April last year, the Supreme Court ruled that retaliation based on a mistaken belief of protected activity is actionable. See Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016). In Heffernan, a police chief mistakenly believed that an officer was supporting the challenger to the incumbent mayor and demoted him; however, he was merely picking up a yard sign for his mother, who supported that candidate. See id. at 1416. The Court held that an employee could challenge acts of First Amendment retaliation "even if [] the employer makes a factual mistake about the employee's behavior," because the motive or intent of the employer is at issue. Id. at 1418. The Court further noted the holding would promote the antiretaliation purpose, that others not be dissuaded from speaking. See id. at 1419.

In 2015, the Supreme Court stated the "intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge." EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015). There is no knowledge requirement under the antiretaliation provisions of Title VII, and applying Abercrombie to retaliation claims would be a "logical extension." Wang v. Wash. Metro. Area Transit Auth., 2016 U.S. Dist. LEXIS 96742, *106 (D.D.C. July 25, 2016)(analyzing Heffernan and Abercrombie).

Indeed, even before these two Supreme Court cases, Circuit Courts, including this one, have permitted retaliation claims to proceed on a "perception theory," that the employer perceived the plaintiff engaged in protected conduct. See, e.g., Carter v. Columbia Cnty., 597 F. App'x 574, 580 (11th Cir. 2014)(finding perception theory valid to support prima facie case); Fogleman v. Mercy Hosp., 283 F.3d 561, 565, 571-72 (3d Cir. 2002)(holding "it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable"). Accordingly, Jackson's mistaken belief demonstrates motive and does not affect Defendant's liability.

B. Plaintiff Committed No Acts That Would Deny Her Protected Status

The trial court found that Plaintiff did not engage in protected activity at all because she "solicited" Ledbetter to file a Charge, citing to Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986). [Doc. 130 at 10]. But Jones is easily distinguishable, not binding, and frankly, either outdated or limited to its specific facts. In Jones, the plaintiff was an attorney serving as the defendant's Manager of EEO programs and her "principal duties were to investigate charges of discrimination brought against the company, to represent the company before state and federal administrative agencies, to 'conciliate' such discrimination charges." Id. at 716. She filed suit against her employer for sexual harassment and

discriminatory pay. See id. The defendant suspended her the day after receiving her charge because it was concerned that she represented it before the very agency that was investigating her claims, that there was or would be a conflict of interest. See id. at 717. Later, when Jones filed a class action complaint against her former employer, it sought to disqualify her as the class representative because of her conflicts as its former counsel. See id. at 718. But here, Plaintiff did not have the same duties as Jones – while her department would investigate complaints of discrimination, it only did so at the request of the Legal Department. She had no authority for resolution of legal claims, let alone engaging in the conciliation process with the EEOC. Defendant's Legal Department retained **sole** responsibility for handling Charges. Plaintiff certainly had no ethical obligations as a legal representative for Defendant as the plaintiff in Jones apparently did for her employer. The Defendant greatly overstated Plaintiff's responsibilities in the Team Relations department and the trial court found these facts in its favor; this is error. See Morrison v. Amway Corp., 323 F.3d 920, 924 (11th Cir. 2003)(trial court may not resolve disputed facts). Although the Jones court presented the analysis as a balancing test, the result rested on the unique facts of the case that simply do not warrant application here.

However, the implicit ruling by the trial court – and argued by Defendant in its summary judgment motion [Doc. 83-1 at 20-22] – is that Plaintiff is not entitled

to protections under Title VII because she had responsibilities in human resources. Jackson testified that he "lost confidence" in Plaintiff's ability to perform her job because of his belief that she engaged in protected activity in assisting Ledbetter file her Charge. However, Plaintiff's job title and duties do not matter, the antiretaliation provisions protect **all** employees regardless of their position – no such imagined exception exists.

In 2015, both the Second Circuit and Fourth Circuit Courts of Appeals have flatly rejected the application of the "manager rule" in Title VII proceedings, stating there is no exemption for persons employed in an EEO or HR position, joining the Sixth Circuit's reasoning in Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579-80 (6th Cir. 2000). See Littlejohn v. City of N.Y., 795 F.3d 297, 318-19 (2d Cir. 2015) and DeMasters v. Carillion Clinic, 796 F.3d 409 (4th Cir. 2015). Plaintiff acknowledges that the Eleventh Circuit has applied the "manager rule" to a Title VII case in an unpublished decision, Brush v. Sears Holdings Corp., 466 F. App'x 781, 786-87 (11th Cir. 2012); however, that case turned on the plaintiff's disagreement or objection to the employer's investigative procedure rather than the underlying discrimination. Plaintiff argues that the analysis of Johnson, DeMasters and Littlejohn provide a persuasive application of the statute, that employees do not lose their protections under Title VII by virtue of their title or duties.

In Johnson, the plaintiff sued following his dismissal as Vice President of

Human Resources, claiming it was in retaliation for his advocating for minorities and complaining about discrimination in the hiring process. 215 F.3d at 566. The Sixth Circuit reversed dismissal of the retaliation claims, finding that whether he "had a contractual duty to voice such concerns is of no consequence to his claim." Id. at 579. The court stated there is no such qualification under the statute and that to hold otherwise would "run[] counter to the broad approach used when considering a claim for retaliation under this clause, as well the spirit and purpose behind Title VII as a broad remedial measure." Id. at 580.

In DeMasters, the plaintiff, an EAP counselor, filed a retaliation claim after his employer fired him, accusing him of supporting an employee's charge of discrimination and not taking "the pro-employer side," failing to protect the employer's interest and putting it "in a compromised position." 796 F.3d at 414, 418. The Fourth Circuit reversed dismissal of the plaintiff's retaliation suit holding "that the 'manager rule' has no place in Title VII jurisprudence." Id. at 413. The court noted that this "rule" first appeared in FLSA litigation and at some point, lower courts started applying it to Title VII retaliation claims. See id. at 421-22. However, there are statutory differences between FLSA and Title VII that warn against such an application; the FLSA antirelatiation provisions are more restricted than the expansive protections under Title VII. See id. at 422. The court found that eliminating an entire category of employees from statutory protections is "much

more troubling" than the defendant's "litigation minefield" argument. Id. at 423. And, the court agreed with Johnson that applying the manager rule to Title VII suits would frustrate the remedial purpose of the statute. See id. at 424.

In Littlejohn, the plaintiff was the employer's Director of EEO, who complained about discriminatory hiring procedures during a merger. 795 F.3d at 318-19. The court reversed the dismissal of her retaliation claims, noting that Crawford placed no limitation on the category of employees who may be protected after opposing discrimination in the workplace. See id. at 318. Indeed, "[t]he plain language of § 704(a)'s opposition clause [ ] does not distinguish among entry-level employees, managers, and any other type of employee." Id. The court held that,

> if an employee—even one whose job responsibilities involve investigating complaints of discrimination—actively "support[s]" other employees in asserting their Title VII rights or personally "complain[s]" or is "critical" about the "discriminatory employment practices" of her employer, that employee has engaged in a protected activity under § 704(a)'s opposition clause.

Id. at 318.

Following the plain language of the antiretaliation provision of Title VII, and the analysis of Johnson, DeMasters and Littlejohn, Plaintiff's job duties should not deny her protections from opposing discriminatory conduct. Indeed, Defendant makes the same accusations as in DeMasters, that Plaintiff failed to protect Defendant's interests and took the side of the employee, demonstrating its retaliatory motive. Plaintiff is protected under the law regardless of her job title or

duties.

Finally, even applying the balancing test adopted by this Court in Rollins v. FDLE, 868 F.2d 397, 400-01 (11th Cir. 1989), demonstrates that Plaintiff engaged in protected speech. The key in Rollins is that any opposition to illegal discrimination must be "reasonable." Id. at 401. Under this test, courts weigh, "on a case by case basis," the remedial purpose of Title VII and the employee's right to assert her rights with the legitimate business needs of the employer. Id. Conduct that may "otherwise [be] protected conduct may be so disruptive or inappropriate as to fall outside the statute's protection." Id. In Rollins, this Court found the plaintiff "went too far" by lodging her incredibly frequent complaints at inappropriate times and in inappropriate manners, such as bypassing the chain of command and in insubordinate and antagonistic tones that were disruptive to the workplace. Id. at 399, 401.

Here, there is absolutely no evidence that Plaintiff created problems in the workplace. She filed her initial Charge and continued to do her job and did not engage in any conduct that disrupted the workplace. See, e.g., Verney v. Pa. Tpk. Comm'n, 903 F. Supp. 826, 832 (M.D. Pa. 1995)(finding that in-house counsel filed a charge and prosecuted it; without more, there was no basis to find that her protected activity "so interfered with [her] performance" or "render[ed] her ineffective" for her job). Even if she had assisted Ledbetter in filing a Charge, that

would have been a discrete event; Defendant has not pointed to anything unreasonable about the manner in which Ledbetter filed her complaint. Indeed, the only "disruption" would be that Defendant had to answer another Charge; however, this was not the fault of Plaintiff but of Jackson failing to rectify or answer Ledbetter's prior complaints. And, whether this balancing test is even applicable to Plaintiff's protection under the participation clause is questionable. See, e.g., Glover v. S.C. Law Enf't Div., 170 F.3d 411, 415 (4th Cir. 1999)(declining to apply a balancing test noting that the participation clause "neither requires nor allows further balancing"). The trial court erred in finding that Plaintiff lost her protected status because she at no time asserted her rights in an unreasonable manner.

III. RETALIATORY ACTS DO NOT NEED TO RISE TO ULTIMATE EMPLOYMENT ACTION

Plaintiff suffered retaliation not only from her termination, but in being suspended two times and forced to sign the restrictive document. Defendant gave no reason for demanding that Plaintiff sign the retaliatory document that precluded her from talking to witnesses or accessing documents related to her claims supports

a finding of retaliation.[3] The trial court erred in ruling this was a "balancing" of the employer's rights, especially in light of the fact Defendant refused to provide a reason for doing the same. [Doc. 130 at 11, n.6]. A jury could find that the "agreement" and her immediate suspension were retaliatory acts, which include anything that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N & S.F.R. Co. v. White, 548 U.S. 53, 64 (2006). The document specifically discusses a restraint on her protected conduct. But, Title VII combats unlawful employment practices and does so by "maintaining unfettered access to statutory remedial mechanisms," and Defendant's demand for her to sign this document violates this mandate. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). Forcing her to sign the "agreement" is evidence of retaliation – "talking to coworkers to gather information or evidence in support of a potential EEO claim is protected opposition, provided the manner of opposition is reasonable." See EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 at §II.A.2.f.1 (Aug. 25, 2016), available at: https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#_ftnref82 (last visited Feb. 24, 2017). It further demonstrates Defendant's attitude towards

[3] Defendant invoked attorney-client privilege objections regarding any testimony about in-house counsel's creation of the "agreement" or discussions regarding the same. [Doc. 120 at 220:17 – 221:5]. See United States v. Workman, 138 F.3d 1261, 1263-64 (8th Cir. 1998)(finding party cannot "selectively" claim attorney-client privilege, prohibiting discovery into substance of legal advice and subsequently assert legal advice as a defense).

Plaintiff filing a Charge. See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1279 (11th Cir. 2008)(holding employer mandating that plaintiff sign forced arbitration agreement, affecting his pending charge of discrimination, was not a legitimate reason for employment action, but retaliation). There can be no doubt that the first, and second suspension would constitute retaliation. Indeed, there was no mention of whether she would be permitted to return to work if she refused to sign the document. See King v. Butts Cnty., 576 F. App'x 923, 927 (11th Cir. 2014) (reversing summary judgment on retaliation claims of suspension as well as termination). No reasonable employee would want to incur baseless discipline in response to asserting his or her rights.

IV. A JURY IS NOT REQUIRED TO BELIEVE INTERESTED WITNESSES AND THEIR TESTIMONY CANNOT SUPPORT SUMMARY JUDGMENT

The trial court erred in giving credence to the testimony of interested witnesses against Plaintiff in granting summary judgment. A unanimous Supreme Court held:

> although the court should review the record as a whole, **it must disregard** all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, **at least to the extent that the evidence comes from disinterested witnesses**."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000)(emphasis

added and internal citations omitted).[4] There is no doubt that Jackson is an interested witness, he was the decisionmaker. Plus, Williams and Grimes are interested witnesses as well; both were employees looking to keep their jobs and possibly replace Plaintiff. Indeed, Williams acquired her job after her termination. A jury is not required to believe their statements and as such, their testimony regarding their beliefs or state of mind cannot be used against Plaintiff at the summary judgment phase.

The trial court stated that Plaintiff "read[] too much into *Reeves*" and that "[s]tatus as an 'interested witness' is [] not sufficient to prove pretext." [Doc. 130 at 16, n.8]. However, this misunderstands the argument, which is not that their status as interested parties proves pretext – but that their testimony, as interested witnesses, cannot be used against Plaintiff at summary judgment when a jury does not have to believe the same. Plaintiff acknowledges that this Court found Reeves inapplicable to the acceptance of a defendant's alleged non-discriminatory reason for the adverse action. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1205 n.14 (11th Cir. 2013). However, the burden-of-production phase in a burden-shifting paradigm "precedes the credibility-assessment stage" – or the examination of pretext. Woods v. Delta Air Lines Inc., 595 F. App'x 874, 878-79 (11th Cir. 2014), quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993).

[4] Reeves analyzed the standard of granting a Rule 50 motion, an analogous standard to Rule 56. 530 U.S. at 150.

Further, in Kidd, the defendant claimed that the hired candidate was more qualified than the plaintiff; such a reason could be rebutted with objective evidence. See Kidd, 731 F.3d at 1205. That is not the issue here, where Defendant alleged an "honest (mistaken) good faith belief" as its reason for termination. The very definition of an "honest, good faith belief" calls for a credibility determination, which is, of course, the job of a jury. The trial court erred not only in failing to apply Reeves to Jackson's testimony, it erred in giving unfettered deference to Jackson's "belief" of Plaintiff's alleged misconduct or ability to do her job – in other words, it made a credibility determination. See Jones v. UPS Ground Freight, 683 F.3d 1283, 1292 (11th Cir. 2012)(noting courts "may not weigh conflicting evidence or make credibility determination of [their] own").

Here, Defendant is proffering the speculative testimony of Jackson, without objective, concrete evidence to support the same. See Smith v. Chrysler Corp., 155 F.3d 799, 807-08 (6th Cir. 1998)(noting "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action); see also, Lowe v. Ala. Power Co., 244 F.3d 1305, 1308-09 (11th Cir. 2001)(rejecting a "good faith belief" defense that lacks any legitimate factual basis)(citing Chrysler Corp.). Indeed, the timing of the retaliatory acts – being suspended less than two weeks after Defendant received her Charge; suspended a second time six weeks later; and terminated less than two months after

receipt of her Charge – to be highly suspect and indicative of retaliation. See Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007)(burden of causation can be met by showing close temporal proximity).

But, contrary to the trial court's order, Plaintiff does not rely on timing alone. [Doc. 130 at 21]. Defendant claimed that it obtained (vague and disputed) statements in an "investigation" that a jury could find was a sham at best. Defendant only interviewed Plaintiff's two subordinates two days **prior** to telling her that an investigation was launching – and those interviews were obvious attempts to dig up dirt to discredit Plaintiff and find other potential reasons for her termination. See, e.g., Thompson v. Quorum Health Res., LLC, 485 F. App'x 783, 793 (6th Cir. 2012)(upholding jury verdict in plaintiff's favor because timing and nature of alleged investigation permitted jury to find it to be a sham and infer retaliatory termination); Giardina v. Lockheed Martin, Corp., 2003 WL 21634934, *10 (E.D. La. 2003)(trying to "dig up dirt" on the plaintiff raises an issue of fact that she was terminated on the basis of her sex). In fact, Jackson and Webb told Williams that they would suspend Plaintiff and investigate anything that he said about her that raised a "concern" – an obvious green light that they were searching for any dirt on her. Williams was happy to oblige and provided ad hominem attacks against her and was rewarded with her job. Grimes likewise provided personal attacks against Plaintiff, going so far as to accuse her of being a racist. In

apparent prompting of Jackson wanting to blame Ledbetter's Charge on Plaintiff, each recounted that they saw the two talking in the office, but neither knew what the two women were meeting about. Plaintiff explained their meetings when she was interviewed two days later, that there were issues regarding cafeteria availability that needed to be resolved prior to the shutdown and nothing "nefarious" was occurring. Plaintiff was simply doing her job.

The trial court further disputes Plaintiff's argument that the fact she told Ledbetter who her attorney was – in response to a question from Ledbetter – was revealed only at her deposition and was not known to Jackson at the time of her termination. As such, it could not have served as a basis for the adverse action. See Walker v. Mortham, 158 F.3d 1177, 1182 n.8 (11th Cir. 1998)(noting that the proffered reason must include facts which show what the decision-maker knew at the time when the decision was made). The only evidence that Jackson had at the time of Plaintiff's second suspension and termination regarding the lawyers was a fax line at the top of Ledbetter's Charge. Representation by the same law firm does not mean "collusion." If Jackson automatically thought of employees engaging in protected activity in such nefarious terms, this would only underscore his retaliatory intent. As for Williams's allegation that Ledbetter told him that Plaintiff, Tyler and her were all joining together to sue Defendant, Ledbetter disputed this claim.

Further undermining Jackson's "good faith belief" is the fact that he was aware of Ledbetter's repeated complaints of discrimination in the workplace for approximately two years before she filed her Charge. Ledbetter went to the EEOC because her repeated internal complaints were not addressed; she did not need to collude with anyone to take this action. Likewise, Jackson was fielding complaints of discrimination from Plaintiff, as well as Tyler, during this time, including Plaintiff's complaints of failing to promote her in favor of male employees. See Allen v. Montgomery County, Ala., 788 F.2d 1485, 1488 (11th Cir. 1986)(pointing out that evidence of time-barred conduct may be relevant and admissible to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives). None of these Charges should have come as a surprise given that Jackson failed to take action on their internal complaints. And, this similar fact evidence demonstrates Defendant's discriminatory motive and intent.

Jackson's "belief" is suspect given that Defendant initially claimed Plaintiff engaged in poor performance to justify her termination (as well as the alleged "collusion") in her termination letter and before the Georgia DOL, yet dropped this claim during the present litigation. Why overstate the reasons for her termination? A jury could find these shifting rationales, or attempt to inflate her alleged wrongdoing in the first place, as pretext for discrimination. See Bechtel Construction Co. v. Secretary of Labor, 50 F.3d 926, 935 (11th Cir. 1995)(noting

"shifting explanations" for adverse action demonstrates pretext); see also, Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1194 (11th Cir. 2004)(holding that evidence of pretext can include where an employer gives "shifting reasons" for an employment decision, which permits the trier to question the employer's credibility).

Finally, Jackson did not rescind the termination after learning the truth from Ledbetter – that Plaintiff had nothing to do with her filing a Charge. When a person makes an honest mistake, a person acting reasonably (and honestly) is expected to correct the mistake. But, that did not happen here. A jury could find his inaction post-termination demonstrates that this was not a good faith mistaken belief at the time of the termination. See Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985)(noting that policymaker's post-event conduct, failing to issue reprimands or admit error, was evidence of his disposition at the time of the incident). Jackson simply exhibited no effort to garner the truth, but to fulfill his agenda of getting rid of the outspoken American female in the office and to punish her for complaining about discrimination.

A jury may believe Jackson – but a jury will not be required to do so. See Booth v. Pasco Cty., 757 F.3d 1198, 1207 (11th Cir. 2014) (noting if the jury was "required to believe the County's proffered explanation" then plaintiffs would fail to meet their burden of proving retaliation; however, "if the jury was permitted to

disbelieve the County, it may have been permitted to infer that the County's actions were retaliatory"). A jury could find Jackson's purported reason for her termination incredulous and that she was fired for engaging in protected activity in assisting another file a charge of discrimination – that it is an **admission** of retaliation. Alternatively, the fact that Plaintiff did not assist Ledbetter refutes Defendant's allegation of any misconduct or "collusion." See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1363 (11th Cir. 1999)(noting a plaintiff can demonstrate that the defense is pretextual if she submits evidence that she did not engage in the work rule or particular poor performance). A jury could also find that he terminated Plaintiff because she filed her own Charge – indeed Defendant's own testimony would support such a finding: "It's beyond my belief that someone in those positions, (anyone in a manager role) would file a charge (with the EEOC)." [Doc. 115 (Rule 30(b)(6) Depo), 201:11-13].

V. SIMILAR FACT EVIDENCE IS ADMISSIBLE

The trial court agreed with the R&R's dismissing Plaintiff's evidence of similar fact evidence, also referred to as "me too" evidence, as irrelevant because she has not alleged a pattern or practice claim and that this type of evidence is "suspect" and ultimately ruled that it did not relate to Defendant's intent to terminate Plaintiff. [Doc. 125 at 71; Doc. 130 at 21, n.10]. However, the law of this Circuit permits a trier of fact to consider this type of evidence under Rule 404(b) to

"prove intent to discriminate and retaliation." Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1309 (11th Cir. 2016). In Furcron, this Court found the trial court abused its discretion in failing to consider evidence that another employee suffered sexually harassing acts because there was no legal basis for the exclusion. See id. In Demers, this Court ruled that the trial court did not err in permitting testimony of three former employees regarding a supervisor's discriminatory acts, noting the jury could accept such similar fact circumstantial evidence to find discriminatory intent on behalf of the employer. See Demers v. Adams Homes of Northwest Florida, 321 Fed. App'x 849, 854 (11th Cir. 2009) (citing Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1285 (11th Cir. 2008)).

Here, Robert Tyler filed an EEOC Charge shortly after Plaintiff and was terminated only a couple weeks prior to Plaintiff being fired. Jackson was the decisionmaker who fired them both. Also, like Plaintiff, Tyler was forced to sign a retaliatory "agreement" restricting his rights. Further, after terminating Gogel and Tyler, Defendant bullied Ledbetter to drop her EEOC Charge and wanted her to falsely accuse Plaintiff and Tyler of encouraging her to file it. She refused to falsely claim she filed it at the behest of Plaintiff or Tyler, but was treated as a "black sheep" in the workplace while her Charge was pending. Both Jackson and Bailey both again tried to persuade Ledbetter to withdraw her Charge by enticing her with the transfer she had been desperately seeking in the first place. Ultimately,

Ledbetter withdrew her Charge in order to get back in good favor with the company, and when she did, Jackson told her there were no positions for her to transfer to, so Ledbetter resigned.

Defendant's treatment of other individuals who filed Charges near the same time as Plaintiff, all of whom suffered adverse actions at the hands of the same decisionmaker, is relevant to Plaintiff's claims and shows Defendant's retaliatory motives. The trial court erred in excluding this evidence and impermissibly weighed the evidence in the process. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)(trial court does not "weigh the evidence and determine the truth of the matter").

CONCLUSION

The District Court erred by failing to examine the totality of the evidence in Plaintiff's favor and by making credibility determinations and finding facts in the movant's favor. The District Court further erred legally in finding that Plaintiff did not engage in protected conduct, or perceived protected conduct, giving credence to testimony of interested witnesses that a jury may disregard and excluding Plaintiff's similar fact evidence that shows Defendant's intent and motive. These errors cumulatively lead to the ruling in granting Defendant's motion for summary judgment. For these errors, the District Court's Order should be reversed and this matter remanded for a jury trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with FRAP 32(a)(7)(c) that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). Specifically, it contains 11,855 words in the Brief.

/s/ Lisa C. Lambert
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via CMF and U.S. Mail to the attorneys identified below this 24h day of February, 2017:

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