No.: 18-8859

IN THE
SUPREME COURT OF THE UNITED STATES

LASHUNDA R. BORDEN,

Petitioner,

v.

CHEAHA REGIONAL MENTAL HEALTH CENTER, INC.,

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION

1. Whether Borden has presented the Court with any legitimate basis for granting her Petition for Writ of Certiorari.

LIST OF ALL PARTIES TO THE PROCEEDING AND CORPORATE DISCOSURE STATEMENT

The parties to this proceeding, as shown in the caption, are:

1. LaShunda Borden, Petitioner, and

2. Cheaha Regional Mental Health Center, Inc., Respondent, a non-profit corporation. Altapointe Health Systems, Inc., a non-profit corporation, merged with Cheaha Regional Mental Health, Inc. in 2016. Neither entity has any parent corporation nor does any publicly held company own 10% or more of either entity's stock.

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1. Borden v. Cheaha Regional Mental Health Center, Inc., 760 Fed. Appx. 828 (11th Cir. 2019) (Affirming the District Court's granting of Cheaha's Motion for Summary Judgment).

2. Borden v. Cheaha Regional Mental Health Center, Inc., 2018 WL 1431648 (N.D. Ala. 2018) (Memorandum Opinion granting Cheaha's Motion for Summary Judgment).

3. Borden v. Cheaha Regional Mental Health Center, Inc., 2016 WL 11047249 (N.D. Ala. 2016) (Vacating Order dismissing Borden's Complaint, item 4 below).

4. Borden v. Cheaha Regional Mental Health Center, Inc., 2016 WL 880155 (N.D. Ala. 2016) (Dismissing Borden's Complaint without prejudice).

BASIS FOR JURISDICTION

Borden's Petition for Writ of Certiorari review is before the Court pursuant to 28 U.S.C. § 1254 (1) and is based upon the 11th Circuit's Memorandum Opinion, entered on January 17, 2019, affirming the District Court's granting of Summary Judgment in favor of Cheaha.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDIANCES AND REGULATIONS INVOLVED IN THE CASE

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a):

   (a) Employer practices

   It shall be 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 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.

2. 42 U.S.C. § 1981:

   (a) Statement of equal rights

   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contacts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

   (b) "Make and enforce contracts" defined

   For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

   (c) Protection against impairment

   The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

Borden's Petition for Writ of Certiorari arises out of the 11th Circuit affirming summary judgment entered by the District Court in favor of Cheaha, her former employer, with respect to Borden's claims of racial discrimination and retaliation under Title VII and 42 U.S.C. § 1981.

Petitioner/Plaintiff, Lashunda Borden ("Borden"), pro se, filed an Amended Complaint (District Court Document 6) against Cheaha Regional Mental Health, Inc. ("Cheaha") alleging violations of Title VII and 42 U.S.C. § 1981. While the Complaint is poorly drafted, the District Court concluded that Borden intended to assert two wrongful discharge claims against Cheaha, one on the basis of race and the other on the basis of retaliation for previously filing an EEOC Charge. Borden v. Cheaha Regional Mental Health, Inc., 2018 WL 1431648 (N.D. Ala. 2018). Cheaha moved for summary judgment (District Court Document 26). The parties briefed their positions and submitted supporting evidentiary materials. (District Court Documents 27, 28, 31, 35, 38, 39 and 43). The District Court required the parties to support their positions on summary judgment with statements of fact, supported by citations to the submitted evidentiary materials, as set forth in Appendix II to the Uniform Initial Order entered by the District Court. (District Court Document 11). This process required Borden to dispute any factual statements relied upon by Cheaha in support of its Motion with proper references to the evidentiary record. Cheaha moved to strike certain aspects of Borden's opposition to Cheaha's Motion. (District Court Document 42). The District Court ultimately entered an Order granting summary judgment in favor of Cheaha and also granting, in part, Cheaha's Motion to Strike (District Court Memorandum Opinion, Document 44).

Borden then appealed the District Court's ruling to the 11th Circuit. The 11th Circuit ultimately affirmed the District Court's granting of summary judgment Borden v. Cheaha Regional Mental Health, Inc., 760 Fed. Appx. 828 (11th Cir. 2019).

In support of its Motion for Summary Judgment, Cheaha submitted evidentiary materials in compliance with the District Court's Uniform Initial Order, which the District Court found established the following undisputed material facts:

> Cheaha was a public, non-for-profit corporation governed by a twenty-one member Board of Directors (the "Board"). AF No. 2.1. The Board was appointed by local governments under Alabama Act 310 of the 1957 Alabama Legislature. AF No. 2.2. Cheaha provided a continuum of services for persons with intellectual disabilities, serious mental illness, and substance abuse problems in a four-County area in east Alabama, which included Clay, Coosa, Randolph, and Talladega Counties. AF No. 2.3. As part of its outpatient mental health services, Cheaha operated four separate outpatient clinics located in Sylacauga, Lineville, Talladega, and Roanoke. AF No. 3.
>
> At the time of her discharge, Ms. Borden was employed in the position of Consumer Clerk at Cheaha's Talladega outpatient clinic. (Doc. 39 at 64). This outpatient clinic provided mental health services to persons residing in Talladega County and the surrounding area (referred to as "consumers"). AF No. 4.2. Many of these consumers were indigent and had no other available source of treatment. AF No. 4.3. The Talladega clinic also included a professional staff consisting of a therapist, part-time psychiatrist, and a Certified Registered Nurse Practitioner. AF No. 4.4.
>
> As listed on the position description for Consumer Clerk, Ms. Borden's job
>
> **"DUTIES AND RESPONSIBILITIES" were:**
>
> **ACCOUNTS RECEIVABLE**
>
> 1. Ensures confidentiality is maintained in the administrative process.
> 2. Verbally requests correct payment/co-pay from each OP consumer.
> 3. Collects and records consumer payments.
> 4. Provide[s] receipts to consumers.
> 5. Drops each collection in the safe as it is received.
> 6. Prepares/makes a deposit at least once per week or as needed.
> 7. Reconciliation of deposits and fees weekly.
> 8. Ensures all accounts receivable processes follow [Cheaha] policies, maintaining detailed paperwork.
> 9. Notifies supervisor and Business Manager of any discrepancies related to accounts receivable process.
> 10. Notifies supervisor of any issues with fee collection.
>
> **GENERAL OFFICE DUTIES**

1. Reports and staffs any concerns and/or problems as they arise with community relationships.
2. Completes administrative review at 6 months and closes all files following center policy.
3. Copies and prepares and sends out disability determination paperwork in a timely manner.
4. Copies and prepares claims from Lawyers and outside sources following the center Release of Information policy.
5. Completes initial contacts in a timely manner as needed.
6. Follows schedule related to mail delivery and pick up.
7. Switchboard operator as needed following center protocol.
8. Assists in ensuring all cris[e]s are seen in a timely manner.
9. Assist[s] consumers with problems/concerns as needed.
10. Assist[s] with checking billing and taking to business office as directed.
11. Provide[s] Administrative Review at 6 month and closure keeping all forms as needed.
12. Provide[s] back up for setting appointments.
13. Assist[s] with the doctor schedule as needed.
14. Ensures all office duties are performed as assigned.
15. Serves as a liaison between the Business Office and the Sylacauga Outpatient Office.
16. Serves as a liaison between the direct care staff and support staff, ensuring an effective and smooth office flow.
17. Ensures confidentiality is maintained in the administrative process.
18. Works with Coordinator/Therapist to ensure all potential crises are screened and handled appropriately.
19. Assists doctors and center nurse with Doctor Day.
20. In the absence of the Coordinator, provides non- clinical oversight of office and ensures services are provided appropriately.
21. Ensures confidentiality is maintained in the administrative process.

TEAM WORK:

1. Establishes and maintains professional working relationships with staff, community agencies, and other professionals in the community. Exemplifies professional conduct as a representative of [Cheaha], responding to community needs and requests in a timely manner.
2. Observes and follows all center policies and procedures.
3. Performs other relevant duties as assigned.

(Doc. 39 at 66-67). This job description further indicated that "Job Duties are subject to change based on office needs." (Doc. 39 at 67).

As summarized by Ms. Atkinson, Ms. Borden's job duties and responsibilities at the Talladega location generally included:

a. Properly and efficiently answering the telephone. There were

occasionally instances where calls seeking emergency assistance were received from [c]onsumers or others dealing with issues pertaining to [c]onsumers.

b. Properly and efficiently managing scheduling appointments including issues that arose due to conflicts and communicating with the [c]onsumers and professional staff to make sure that the [c]onsumers understood when their appointments were set and handling the rescheduling of any appointments as may have been necessary, so that the professional staff was utilized to its fullest capacity.

c. Properly and efficiently managing the reception desk at the clinic, ensuring that [c]onsumers sign in and that the professional staff were alerted that the [c]onsumer had arrived for his or her appointment, so that [c]onsumers were not left waiting for extended periods of time.

d. Collecting and organizing the files for the [c]onsumers to be seen by the professional staff the day before their scheduled appointment, so that the professional staff did not encounter unnecessary delays while looking for files.

e. Maintain the confidentiality of the identity of the [c]onsumers, consistent with State and Federal law and regulations.

f. Supporting the general needs of the professional staff on a daily basis, and professionally interacting with that staff, to achieve the common goal of providing much needed mental health services to the [c]onsumers.

(Doc. 28 at 6-7 ¶¶ 9.a-9.f).

The importance of Ms. Borden's ability to properly perform her job responsibilities was particularly critical given the nature of the operation at issue. AF No. 6.1. The clinic provided much needed mental health services to consumers. AF No. 6.2. These individuals frequently had no other source of treatment or support. AF No. 6.3. Many of them were highly impaired or disturbed, and could potentially represent a risk to themself or others if they were not properly and timely treated. AF No. 6.4.

There were numerous severe issues with Ms. Borden's performance of critical elements of her job responsibilities in the months leading up to her termination. AF No. 7.1. Kathleen Robinson ("Ms. Robinson"), the Human Resources Coordinator for Cheaha, prepared a chronological summary of Ms. Borden's work-related problems and those underlying records are attached to Ms. Atkinson's affidavit. AF No. 7.2; (see also Doc. 28 at 19-72 (attaching chronological history of performance problems)). As summarized by Ms. Atkinson's affidavit, these job deficiencies included but were not limited to the

following:

> a. The telephone was not being properly answered, including occasions where Ms. Borden completely abandoned the telephone, resulting in no one answering the phone.
>
> b. Failing to properly manage the scheduling and rescheduling of [c]onsumer appointments, resulting in [c]onsumers not being seen and treated on a timely basis, and complaints from at least one [c]onsumer that Ms. Borden told them that they could not get an appointment anytime soon.
>
> c. Failing to alert the professional staff that [c]onsumers were in the waiting area, resulting in [c]onsumers waiting unnecessarily for an extended period of time and resulting in the professional staff not being utilized to its fullest extent.
>
> d. Failing and refusing to collect and organize the [c]onsumer files for the next day's appointments, resulting in disruption of the professional staff seeing and treating [c]onsumers efficiently.
>
> e. Failing to follow [Cheaha] protocol for protection of the [c]onsumers' identities.
>
> f. Failing and refusing to interact in a professional manner with the professional staff. The professional staff complained that when [Ms.] Borden was asked to perform essential tasks associated with her job, she responded in a rude and offensive manner and/or refused the request, acts of insubordination.

Ms. Borden was counseled numerous times in the months leading up to her termination. AF No. 8. Despite repeated efforts to encourage and counsel Ms. Borden to do a better job, she failed or refused to improve. AF No. 9.1. In fact, she refused to acknowledge any of her shortcomings and instead blamed her performance issues on others and/or claimed that the demands of the job were too much for her. AF No. 9.2.

All of this culminated on December 3, 2014, when both Ms. Atkinson and Ms. Robinson attempted to call the Talladega office from the Administrative Office in Sylacauga and nobody answered the phone. AF No. 10.1. This situation was deemed so critical that both Ms. Atkinson and Ms. Robinson left their office in Sylacauga and drove to Talladega to see what was going on there. AF No. 10.2. When they arrived at the Talladega location, they asked Ms. Borden why she had not been answering the phone. AF No. 10.3. She told them that she left the phone in order to attend to other tasks as directed by the professional staff. AF No. 10.4. Ms. Borden claimed that she needed to

go to an area where she could not hear the phone ring in order to complete this task. AF No. 10.5.

Given the history of her poor job performance, her failure to improve despite repeated counseling, and the events of that day, Ms. Atkinson, Ms. Robinson, and Karen McKinney ("Ms. McKinney"), the Clinical Director of Cheaha's Mental Illness Division, jointly decided that they would place Ms. Borden on paid administrative leave that day pending further investigation into the matter. AF No. 11.1. Thereafter, Ms. Robinson completed an investigation which, among other things, notably revealed that the other staff did not support Ms. Borden's stated reason for abandoning the telephone on December 3, 2014. AF No. 11.2. In fact, the employee that Ms. Borden claimed she was assisting stated that Ms. Borden was doing nothing other than watching her do a specific task. AF No. 11.3. Further, when that other employee asked Ms. Borden what she was doing, Ms. Borden responded by stating something to the effect of: "I am just trying to look busy." AF No. 11.4. Thus, the investigation revealed that Ms. Borden had no legitimate reason for abandoning the phones. AF No. 11.5.

After completing the investigation and giving the matter due consideration, Ms. Atkinson, Ms. McKinney, and Ms. Robinson collectively decided that Ms. Borden should be terminated for unprofessional conduct with fellow employees, neglect of duty which might cause psychological harm to consumers, and insubordination as evidenced by her failure by word or actions to carry out the orders of a supervisor, when such orders were a reasonable part of her job duties. AF No. 12. Ms. Borden was terminated on December 17, 2014, but was paid for administrative leave from December 3, 2014, to December 17, 2014. AF No. 13.

After Cheaha terminated Ms. Borden's employment:

> a. The vacant position was filled with temporary help provided by a temporary employment agency, until a suitable replacement could be found. Ultimately, Ms. Atkinson, Ms. McKinney, and Ms. Robinson (the same decision makers who jointly decided to terminate Ms. Borden) decided to fill this position with a black female.

AF No. 15.

Following her termination, Ms. Borden applied for unemployment benefits. AF No. 17.1. Cheaha opposed Ms. Borden's application for unemployment benefits on the basis that she was terminated for employee misconduct. AF No. 17.2. Based upon the parties' submissions, the Alabama Department of Labor deemed Ms. Borden ineligible for unemployment compensation benefits. AF No. 18.

Ms. Borden appealed the Alabama Department of Labor decision and a telephonic hearing before an Administrative Officer was held on April 6, 2015.

> AF No. 19.1. Ms. Borden (and her counsel at that time) participated in this telephonic hearing, offering testimony and evidence in support of her position. AF No. 19.2. Ms. Robinson also participated in this telephonic hearing and gave testimony. AF No. 19.3. Following the hearing, the Administrative Officer issued a ruling affirming that Ms. Borden was ineligible for unemployment compensation. AF No. 20

Borden v. Cheaha Regional Mental Health, Inc., 2018 WL 143164, pp 2-5 (District Court's Memorandum Opinion, Document 44, pp. 4-17. The numerous footnotes in this portion of the District Court's Memorandum Opinion reflecting the evidentiary support for these findings of fact have been omitted from the quoted text for the sake of brevity).

As noted in the District Court's Memorandum Opinion, Borden failed to adequately refute these material facts, and Cheaha objects to any effort made by Borden to interject any new "evidence" that was not properly before the District Court when it ruled upon Cheaha's Motion for Summary Judgment, including but not limited to the documentation and unsupported allegations in her Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Cheaha respectfully submits that Borden's Petition for Writ of Certiorari fails to present any legitimate basis to justify the Court granting it. Throughout the procedural history of this case, Borden has demonstrated a pattern of changing her legal theories and arguments, abandoning prior theories and arguments in the process, and submitting untimely new "evidence," some of which even contradicts positions that she has previously taken throughout the procedural history of the case. Cheaha respectfully submits that Borden has continued that approach in her Petition for Writ of Certiorari by advancing new legal theories and arguments that were not presented in the courts below, (which Cheaha submits the Court should not consider) by not supporting the issues she has raised with proper argument and citations to supporting legal authorities, by improperly submitting "evidence" that was not properly before the courts below (which Cheaha also submits the Court should not consider) and by essentially presenting the Court with nothing more than a self-serving plea that she was a good employee undeserving of any adverse employment action.

Accordingly, Cheaha respectfully submits that Borden's Petition lacks merit and should be denied.

ARGUMENT

While briefs filed by pro se litigants are read liberally, pro se litigates are still required to adequately brief the issues, or they are deemed abandoned. Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008). "A party seeking to raise a claim or issue on appeal must plainly and prominently so indicate...Where a party fails to abide by this simple requirement, he has waived his right to have the court consider that argument." United States v. Willis, 649 F.3d 1248, 1254 (11th Cir. 2011). "Any issue that an appellant wants the Court" to address should be specifically and clearly identified in the brief...Otherwise, the issue - even if properly preserved at trial - will be considered abandoned." Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004). Issues not clearly designated in the appellant's initial brief are considered abandoned. Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995). A party fails to adequately brief a claim when he does not "plainly and prominently" raise it, "for instance by devoting a discreet section of his argument to those claims." Cole v. U.S. Att'y Gen. , 712 F.3d 517, 530 (11th Cir. 2013). Merely making a passing reference to an issue or raising it in a perfunctory manner without supporting argument and citation to authority, results in abandonment of the issue. Walter Int'l Prods., Inc. v. Salinas, 650 F.3d 1402, 1413 n. 7 (11th Cir. 2011). An appellant's brief must include an argument containing appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies and " simply stating that an issue exists, without argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal." Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1278 (11th Cir. 2009). Reference to an issue in the statement of the case or summary of the argument is insufficient. Cole, at 530. Abandonment also occurs when the issue is addressed in the argument section of the

brief when references are "mere background" or when they are "buried" within the argument. Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 682 (11th Cir. 2014). Mere conclusory allegations and failure to cite authorities to support them result in abandonment. Sapuppo, at 682.

Additionally, when an appellant fails to properly challenge on appeal one of the grounds on which the District Court based its judgment, she is deemed to have abandoned any challenge to that ground, and it follows that the judgment is due to be affirmed. Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1306 (11th Cir. 2012).

In her Petition for Writ of Certiorari, Borden identifies four questions presented for review, specifically:

1. It is Illegal for a company to commit perjury to win a lawsuit?
2. The first Amendment gives everyone the right of freedom of speech does, not that include me?
3. Is it Against the law to Question your superiors concerning your pay?
4. Would a person who was truly guilty work this hard and this long to prove their innocence.

Supreme Court of the United States Rule 14.1(a) specifically states that: "Only the questions set out in the Petition, or fairly included therein, will be considered by the Court." Unfortunately, the questions presented for review by Borden do not correspond to her argument, and they raise issues that were not raised in the proceedings below.

Borden's first question involves an allegation of perjury. Borden fails to articulate any persuasive argument that any alleged perjury in the District Court proceeding justifies the Court granting a Writ of Certiorari. As noted by Supreme Court of the United States Rule 10, "A Petition for Writ of Certiorari is rarely granted when the asserted error consists of **erroneous factual findings** or the misapplication of a properly stated rule of law." (emphasis added).

Borden's second question presented involves first amendment rights. At best, Borden's argument merely addresses this issue in a perfunctory manner. Moreover, there has never been any first amendment claim raised in the proceedings below.

Borden's third question presented, "Whether it is against the law to question your supervisors concerning your pay?", appears to tie into her continuously changing theory of retaliation, which again is only raised in a perfunctory manner in her argument, is not supported by any legal authorities and which is contrary to her prior claims that she was retaliated against: (1) due to her religious beliefs (the District Court correctly concluded that Borden abandoned this theory), (2) that she was retaliated against for filing a previous EEOC Charge of Discrimination (a claim that she asserted at the District Court level and which the District Court properly dismissed on Cheaha's Motion for Summary Judgment), and (3) that she was retaliated against due to her race. Now, Borden alternatively argues that she was retaliated against for questioning her pay and benefits and complaining about a co-employee's job performance (an issue that is not stated in Borden's questions presented, but is raised in a perfunctory manner in her argument).

Borden's fourth and final question presented raises no legal issue appropriate for the Court's review, but instead is an argumentative statement, in violation of Supreme Court of the United States Rule 14.1 (a), suggesting to the Court that she would not have filed her Petition unless her self-serving allegations were truthful.

Cheaha respectfully objects to Borden asserting these issues at this stage in the proceeding, as they were not raised in the proceedings below. This Court generally does "not entertain arguments that were not raised below," as "[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first incidence." Star Athletica L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1009 (2017) (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) and CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642, 1653 (2016)).

In sum and substance, Borden's Petition does not even attempt to identify or address any legitimate reason for the Court granting her Petition. She does not argue that the 11th Circuit's Opinion conflicts with any legal precedent or decided an important question of federal law that has not been, but should be settled by this Court. Borden has not cited any legal authority supporting the proposition that the Court should grant her Petition. Instead, it is readily apparent that Borden claims that she failed to properly oppose Cheaha's Motion for Summary Judgment and submit evidence, which she now contends would have successfully defeated that Motion, because "I did not know what I was doing." Unfortunately, now is not the time and U.S. Supreme Court is not the place for Borden to effectively request that the case start from scratch. All litigation must come to a timely end, and that time has come for this case.

The District Court concluded that Cheaha was entitled to Summary Judgment on Borden's claim that she was subjected to disciplinary action and ultimately terminated, due to her race on two independent grounds. First, the District Court concluded that Borden did not have sufficient evidence to set forth a prima facie case. Alternatively, the District Court concluded that even if it is assumed that Borden could set forth prima facie case, she could not demonstrate that Cheaha's stated legitimate non-discriminatory reason for any adverse employment action was pretextual.

Similarly, the District Court concluded that Cheaha was entitled to Summary Judgment on Borden's retaliation claim on two independent grounds. The District Court first noted that Borden did not have sufficient evidence to establish a causal connection between any protected activity and any adverse employment action. Alternatively, even if it is assumed that she could establish such a causal connection, the District Court concluded that she did not have sufficient evidence to demonstrate that Cheaha's legitimate stated non-discriminatory reasons for any adverse employment action were pretextual.

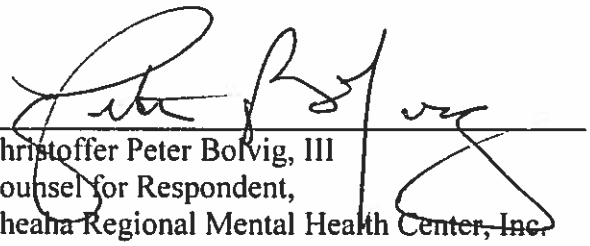
The District Court's Memorandum Opinion did a thorough job of analyzing the evidence submitted by the parties and correctly applied the law.

The 11th Circuit's Opinion affirming the District Court's Memorandum Opinion was likewise well founded in the applicable law and based upon the facts that were properly before the District Court, and Borden has failed to articulate anything to the contrary.

CONCLUSION

Cheaha respectfully submits that Borden's Petition For A Writ of Certiorari should be denied.

Respectfully submitted May 14, 2019.



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APPENDIX TO CHEAHA REGIONAL MENTAL HEALTH CENTER, INC'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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760 Fed.Appx. 828
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

LaShunda R. BORDEN, Plaintiff-Appellant,
v.
CHEAHA REGIONAL MENTAL HEALTH CENTER, INC., Defendant-Appellee.

No. 18-11392
|
Non-Argument Calendar
|
(January 17, 2019)

Synopsis
Background: Black former employee brought action against mental health center for racial discrimination and retaliation under Title VII and § 1981. The United States District Court for the Northern District of Alabama, No. 1:16-CV-00163-VEH, Virginia Emerson Hopkins, J., 2018 WL 1431648, granted summary judgment to center. Former employee appealed.

Holdings: The Court of Appeals held that:

[1] former employee failed to show prima facie case of racial discrimination, and

[2] former employee failed to show prima facie case of retaliation.

Affirmed.

West Headnotes (4)

[1] **Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

Black former employee of mental health center abandoned for appeal her claim of racial discrimination under Title VII and § 1981, where she did not point to reversible error by district court but simply disagreed with center's stated reasons for terminating her, and where, throughout her opening brief, she did not cite single case or point to admissible evidence suggesting that center discriminated against her because of her race. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2; 42 U.S.C.A. § 1981.

Cases that cite this headnote

[2] **Civil Rights**
Discharge or layoff
Civil Rights
Promotion, demotion, and transfer

Black former employee of mental health center failed to show prima facie case of racial discrimination under Title VII and § 1981 arising from denial of promotion and her subsequent termination; former employee did not challenge fact that she was replaced with employee of her own race and did not assert another avenue to establish prima facie case of race-based discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2; 42 U.S.C.A. § 1981.

Cases that cite this headnote

[3] **Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

Black former employee of mental health center abandoned for appeal her claim of retaliation under Title VII and § 1981, where her brief,

liberally construed, made only passing references to her claim that center retaliated against her for filing her complaint with Equal Employment Opportunity Commission (EEOC). 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2.

Cases that cite this headnote

[4] **Civil Rights**
Causal connection; temporal proximity
Health
Adverse employment action; wrongful discharge

Black former employee of mental health center, who was denied promotion and subsequently terminated, failed to show prima facie case of retaliation under Title VII and § 1981; former employee presented no evidence that center retaliated against her other than fact that she filed charge with Equal Employment Opportunity Commission (EEOC) four years before she was allegedly retaliated against, which was too long before alleged retaliation to establish causation. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2; 42 U.S.C.A. § 1981.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 1:16-cv-00163-VEH

Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

Opinion

PER CURIAM:

LaShunda Borden, an African-American female proceeding pro se, appeals the district court's grant of summary judgment to Cheaha Regional Mental Health Center, Inc., her former employer, on her racial discrimination and retaliation claims.

I

Ms. Borden began working at Cheaha in 2007. In October of 2010, she filed a charge with the Equal Employment Opportunity Commission, alleging that Cheaha racially discriminated against her by electing to promote a less-qualified white woman over her. Over four years later, in December of 2014, Ms. Borden was terminated for failing to perform her receptionist duties, among other issues. Ms. Borden subsequently filed a pro se complaint alleging that Cheaha terminated her because of her race and in retaliation for her 2010 EEOC charge. The district court liberally construed Ms. Borden's pro se complaint to state claims for race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 3, and 42 U.S.C. § 1981 and granted summary judgment to Cheaha on both claims.[1]

On appeal, Ms. Borden challenges Cheaha's stated justifications for terminating her and argues that she, in fact, was a good employee. Unfortunately for Ms. Borden, the basis for the district court's order was not Ms. Borden's lack of skill or work ethic as an employee. Because Ms. Borden does not challenge the district court's multiple reasons for concluding that her discrimination and retaliation claims fail as a matter of law, we affirm.

II

We review the district court's grant of summary judgment de novo, viewing all evidence and drawing reasonable inferences in the light most favorable to the nonmoving party. *See Crawford v. Carroll*, 529 F.3d 961, 964 (11th Cir. 2008). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)).

In determining whether summary judgment is appropriate, we liberally construe pro se briefs and pleadings, applying a less-stringent standard than we apply to attorneys. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008); *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). A pro se litigant, however, must do more than merely raise an issue in a perfunctory manner, without supporting arguments and citation to authorities, to avoid summary judgment. *See N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998). *See also Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (noting that a pro se litigant must follow the court's procedure and its rules of evidence). We will not scour the record or formulate arguments for a litigant appearing pro se, and all issues that are not briefed are abandoned. *See Timson*, 518 F.3d at 874. *See also T.P. ex rel. T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1291 (11th Cir. 2015) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research[.]").

To justify reversing a district court's judgment that is based on multiple, independent grounds, an appellant "must convince us that every stated ground for the judgment against [her] is incorrect." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Therefore, if an appellant's opening brief does not address "one of the grounds on which the district court based its judgment, [s]he is deemed to have abandoned any challenge on that ground, and it follows that the judgment is due to be affirmed." *Id. See also Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012) ("By failing to challenge in their opening brief the district court's ruling [on a particular ground] ... the plaintiffs have abandoned any contention that the court erred ... on that ground."); *United States v. Levy*, 416 F.3d 1273, 1278 (11th Cir. 2005) ("Requiring all parties to raise issues in their initial briefs is not unduly harsh or overly burdensome."). We similarly do not consider arguments that were not raised in the district court or arguments raised for the first time in a pro se litigant's reply brief. *See Timson*, 518 F.3d at 874; *Sapuppo*, 739 F.3d at 682–83 (collecting cases).

A

As relevant here, Title VII prohibits employers from making certain employment decisions, such as termination, based on an employee's race. *See* 42 U.S.C. § 2000e-2. Similarly, § 1981 similarly prohibits race discrimination in the performance of contracts, including employment agreements. *See* 42 U.S.C. § 1981. Both categories of claims—under Title VII or § 1981—are examined under the same legal framework, and where the plaintiff relies on circumstantial evidence of discrimination, we apply the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 919, 921–22 (11th Cir. 2018).

Under the *McDonnell Douglas* framework, the plaintiff must establish a prima facie case of discrimination by showing, among other things, that "[she] was replaced by a person outside [her] protected class or was treated less favorably than a similarly-situated individual outside [her] protected class." *Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ.*, 342 F.3d 1281, 1289 (11th Cir. 2003). *See also Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). In identifying a similarly situated employee, the plaintiff must present a comparator who is "nearly identical to the plaintiff[ ] to prevent courts from second-guessing a reasonable decision by the employer." *Trask v. Sec'y, Dep't of Veterans Affairs*, 822 F.3d 1179, 1192 (11th Cir. 2016) (quotation marks omitted).[2]

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *See Alvarez*, 610 F.3d at 1264. Finally, if the defendant produces a nondiscriminatory reason, the burden shifts back to the plaintiff to show that the employer's proffered reason is actually a pretext for discrimination. *See id.*; *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999). Although the *McDonnell Douglas* framework shifts the burden of production, "the ultimate burden of persuasion remains on the plaintiff to show that the defendant intentionally discriminated against her." *Alvarez*, 610 F.3d at 1264. *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518–19, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The district court granted summary judgment to Cheaha on Ms. Borden's discrimination claim in part because Ms. Borden did not establish a prima facie case of discrimination. Specifically, the district court noted that Cheaha replaced Ms. Borden with a member of her own race and that Ms. Borden produced no evidence that employees of a different race were accused of sufficiently comparable misconduct, but were not punished. To the

contrary, Ms. Borden asserted that she was the only employee, in an office mostly staffed with mostly black employees, that was punished for such misconduct and that all other employees—both black and white—received favorable treatment compared to her.[1] [*Id.*]

[1]In our view, Ms. Borden has effectively abandoned her discrimination claim on appeal. *See Timson*, 518 F.3d at 874. She does not point to a reversible error by the district court but simply disagrees with Cheaha's stated reasons for terminating her.[2] Throughout her opening brief, Ms. Borden does not cite a single case or point to admissible evidence suggesting that Cheaha discriminated against her because of her race.[3]

[2]Even if Ms. Borden did not abandon her discrimination claim on appeal, she has not established that the district court erred in concluding that she failed to show a prima facie case of discrimination. Ms. Borden does not challenge the fact that she was replaced with an employee of her own race and does not assert another avenue to establish a prima facie case of race based discrimination. *See, e.g.*, *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984). As explained by the district court, Ms. Borden's "subjective belief ... that her performance was acceptable and did not warrant and disciplinary action is simply not enough to establish a prima facie case of race discrimination." D.E. 44 at 35 (citing *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997)).

B

Title VII and § 1981 similarly forbid an employer from retaliating against an employee because she has opposed "an unlawful employment practice." 42 U.S.C. § 2000e-3(a). *See also CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452–57, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008). Such retaliation claims are analyzed under the same burden-shifting framework. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

To establish a prima facie case of retaliation, the plaintiff may show that (1) she engaged in a statutorily protected activity, (2) she suffered a materially adverse action, and (3) there was some causal relationship between the two events. *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008). To prove causation, a plaintiff must demonstrate that the protected activity and the adverse action were not "entirely unrelated." *Id.* at 1278 (noting other cases using the terms "wholly unrelated" and "completely unrelated"). "[T]o show the two things were not entirely unrelated, the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action." *Id.* (quoting *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000)).

If the plaintiff relies on proximity to establish the causal element of a prima facie retaliation case, the employer's knowledge of the employee's protected activity and the adverse action must be "very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (stating that an adverse action taken twenty months after a protected activity "suggests, by itself, no causality at all"). Applying the "very close" standard from *Clark Cty. Sch. Dist.*, 532 U.S. at 273, 121 S.Ct. 1508, we have concluded that a "three month period between the [protected activity] and the [adverse action] does not allow a reasonable inference of a causal relation[.]" *Higdon v. Jackson*, 393 F.3d 1211, 1221 (11th Cir. 2004). *See also Webb-Edwards v. Orange Cnty. Sheriff's Office*, 525 F.3d 1013, 1029 (11th Cir. 2008) (concluding that a six-month separation was insufficient); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (concluding a three-month separation was insufficient). This is consistent with other circuits that have faced the issue. *See, e.g.*, *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174–75 (7th Cir. 1992) (four-month period insufficient).

Similar to Ms. Borden's discrimination claim, the district court granted summary judgment to Cheaha on her retaliation claim, concluding that she failed to establish a prima facie case of retaliation. Specifically, the district court determined that Ms. Borden's protected action—her 2010 EEOC complaint—was not close enough in time to the alleged retaliation to establish the causal element.

[3]We conclude that Ms. Borden has abandoned her retaliation claim on appeal. Her brief, construed liberally, makes only passing references to her claim that Cheaha retaliated against her for filing her 2010 EEOC complaint. Such passing references are insufficient to raise a claim on appeal. *See Timson*, 518 F.3d at 874; *McClain of Ga.*, 138 F.3d at 1422.

[4]Even if Ms. Borden had not abandoned her retaliation claim, however, she has not established that the district court erred in concluding that she did not show a prima facie case for retaliation. Ms. Borden asserts that her supervisor "held a grudge" from the 2010 EEOC

complaint and that "[h]uman grudges can last years[,] even centuries." Appellant's Br. at 27. But she presents no evidence that Cheaha retaliated against her other than the fact that she had filed an EEOC charge in October 2010—four years before she was allegedly retaliated against. In our view, the district court did not err by concluding that Ms. Borden's 2010 EEOC charge occurred too long before the alleged retaliation in to establish causation. *See Higdon*, 393 F.3d at 1221.

For the forgoing reasons, we affirm the district court's grant of summary judgment to Cheaha on Ms. Borden's race discrimination and retaliation claims, and we deny Cheaha's motion to strike evidence submitted with Ms. Borden's reply brief as moot.

AFFIRMED.

All Citations

760 Fed.Appx. 828, 2019 Fair Empl.Prac.Cas. (BNA) 15,923

III

Footnotes

1 The complaint also appears to raise religious discrimination claims. The district court, however, determined that Ms. Borden abandoned those claims. Because Ms. Borden does not challenge this determination on appeal, we do not address it.

2 We recently held en banc oral argument to reconsider the "nearly identical" standard applied to comparators under Title VII. *See Lewis v. City of Union City*, 877 F.3d 1000 (11th Cir. 2017), *opinion vacated and rehearing en banc granted*, No. 15-11362 (11th Cir. June 28, 2018). Whether we continue to apply the "nearly identical" standard or articulate a lower standard for comparators, *see Coleman v. Donahoe*, 667 F.3d 835, 850 (7th Cir. 2012), Ms. Bowden does not present any evidence of disparate treatment of comparable black and white employees.

3 The district court also concluded that, even if Ms. Borden could present a prima facie case, she failed to show that Cheaha's nondiscriminatory reasons to terminate her were pretextual. Because Ms. Borden does not challenge the district court's conclusion that she failed to establish a prima facie case of discrimination, we do not address whether Cheaha's nondiscriminatory reasons were pretextual. *See Sapuppo*, 739 F.3d at 680.

4 In her opening brief, Ms. Borden states that in making her claims she seeks to "prove [her] innocence," be "vindicated," and "clear[ ] [her name] from all false accusations." Appellant's Br. at 10, 29. We sympathize with Ms. Borden's goal, and in affirming summary judgment for Cheaha, we do not conclude that Ms. Borden deserved to be fired or that she was not a hard-working employee. Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, [ ] high-handed its decisional process, [or] mistaken the firm's managers, [Title VII] does not interfere." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quotations and citations omitted). Our role is not "to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated." *Alexander v. Fulton Cty., Ga.*, 207 F.3d 1303, 1341 (11th Cir. 2000), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304, 1328 n.52 (11th Cir. 2003). In the end, an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984).

5 Ms. Borden does cite some evidence to argue that she did not engage in the alleged misconduct at Cheaha, but that evidence is not properly before us. Before granting summary judgment to Cheaha, the district court struck affidavits that Ms. Borden submitted in opposition to summary judgment for not complying with Rule 56(c)(4). Ms. Bowden later admitted her error and that she was "saving some of [her] evidence" to present to the judge at a summary judgment hearing. Appellant's Br. at 10. On appeal, we struck five additional exhibits that Ms. Bowden submitted with her opening brief as improper. After the parties briefed this appeal, Cheaha moved to strike evidence submitted for the first time with Ms. Borden's reply brief, and that motion was carried with this appeal. We deny that motion as moot.

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2018 WL 1431648
United States District Court, N.D. Alabama, Eastern Division.

LaShunda R. BORDEN, Plaintiff,
v.
CHEAHA REGIONAL MENTAL HEALTH, INC., Defendant.

Case No.: 1:16-CV-0163-VEH
|
Signed 03/22/2018

Attorneys and Law Firms

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MEMORANDUM OPINION

VIRGINIA EMERSON HOPKINS, United States District Judge

I. INTRODUCTION

A. Summary of Ms. Borden's Claims

*1 On January 29, 2016, Plaintiff LaShunda R. Borden ("Ms. Borden"), who is representing herself, initiated this job discrimination lawsuit against Defendant Cheaha Regional Mental Health, Inc. ("Cheaha"). (Doc. 1). Ms. Borden filed an amended complaint (doc. 6) on February 23, 2016, that was entered on March 25, 2016.[1] As amended, her lawsuit asserts violations of Title VII and 42 U.S.C. § 1981. (*Id.* at 4).[2]

While this amended pleading is not organized into consecutively numbered counts, a broad reading of it confirms that Ms. Borden is primarily asserting two wrongful discharge claims against Cheaha—one on the basis of race and the other on the basis of retaliation for previously filing an EEOC charge. (*See id.* at 3 ("Essentially [Cheaha] was trying to find a way to fire me because I had filed an EEOC charge."); *id.* at 4 ("[Cheaha] placed me on suspension and I was subsequently terminated on December 17, 2014."); *id.* ("I was targeted due to my race and because I had filed an EEOC [Charge] of Discrimination previously[.]")).

B. Summary of Pending Motions

Pending before the Court is Cheaha's Motion for Summary Judgment (doc. 26) (the "Rule 56 Motion") filed on May 31, 2017. Cheaha filed its brief (doc. 27) and evidentiary submission (doc. 28) on this same date. On June 1, 2017, the Court entered its customary *pro se* summary judgment scheduling order (doc. 29) that gave Ms. Borden special notice of her right to respond to Cheaha's Rule 56 Motion with affidavits or other opposing evidence and warned her about the consequences of not adequately responding to it. Ms. Borden opposed the Rule 56 Motion on June 30, 2017. (Doc. 31). Cheaha followed with its reply brief (doc. 32) on July 24, 2017. Cheaha also moved to strike Ms. Borden's evidentiary materials (the "Strike Motion"), including her purported affidavit, as procedurally defective and for other reasons. (Doc. 33 at 1-2 ¶¶ 2-5).

The Court subsequently discovered that Cheaha's brief in support of its Rule 56 Motion was missing multiple pages. (Doc. 34 at 1). The Court also agreed with Cheaha that Ms. Borden had "failed to substantially comply with Appendix II of its Uniform Initial Order...." (*id.* at 2) and that her affidavit was procedurally deficient. (*Id.* at 3). In light of these multiple problems, the Court ordered Cheaha to file a corrected brief (*id.* at 1), allowed Ms. Borden to refile her opposing materials (*id.* at 3), and granted Cheaha's Strike Motion to that limited extent. *Id.*

*2 Cheaha then filed its corrected brief on November 2, 2017. (Doc. 35). Ms. Borden filed her opposing materials on November 29, 2017. (Docs. 38, 39). Cheaha followed with a second Motion To Strike (doc. 42) (the "Second Strike Motion") and its reply (doc. 43) on December 14, 2017.

For the reasons explained below, Cheaha's Second Strike Motion is due to be granted in part and otherwise denied. Further, its Rule 56 Motion is due to be granted in part

and otherwise termed as moot.

II. FACTUAL BACKGROUND

Cheaha was a public, non-for-profit corporation governed by a twenty-one member Board of Directors (the "Board"). AF No. 2.1. The Board was appointed by local governments under Alabama Act 310 of the 1957 Alabama Legislature. AF No. 2.2. Cheaha provided a continuum of services for persons with intellectual disabilities, serious mental illness, and substance abuse problems in a four-County area in east Alabama, which included Clay, Coosa, Randolph, and Talladega Counties. AF No. 2.3. As part of its outpatient mental health services, Cheaha operated four separate outpatient clinics located in Sylacauga, Lineville, Talladega, and Roanoke. AF No. 3.

*3 At the time of her discharge, Ms. Borden was employed in the position of Consumer Clerk at Cheaha's Talladega outpatient clinic. (Doc. 39 at 64). This outpatient clinic provided mental health services to persons residing in Talladega County and the surrounding area (referred to as "consumers"). AF No. 4.2. Many of these consumers were indigent and had no other available source of treatment. AF No. 4.3. The Talladega clinic also included a professional staff consisting of a therapist, part-time psychiatrist, and a Certified Registered Nurse Practitioner. AF No. 4.4.

As listed on the position description for Consumer Clerk, Ms. Borden's job "**DUTIES AND RESPONSIBILITIES**" were:

ACCOUNTS RECEIVABLE

1. Ensures confidentiality is maintained in the administrative process.

2. Verbally requests correct payment/co-pay from each OP consumer.

3. Collects and records consumer payments.

4. Provide[s] receipts to consumers.

5. Drops each collection in the safe as it is received.

6. Prepares/makes a deposit at least once per week or as needed.

7. Reconciliation of deposits and fees weekly.

8. Ensures all accounts receivable processes follow [Cheaha] policies, maintaining detailed paperwork.

9. Notifies supervisor and Business Manager of any discrepancies related to accounts receivable process.

10. Notifies supervisor of any issues with fee collection.

GENERAL OFFICE DUTIES

1. Reports and staffs any concerns and/or problems as they arise with community relationships.

2. Completes administrative review at 6 months and closes all files following center policy.

3. Copies and prepares and sends out disability determination paperwork in a timely manner.

4. Copies and prepares claims from Lawyers and outside sources following the center Release of Information policy.

5. Completes initial contacts in a timely manner as needed.

6. Follows schedule related to mail delivery and pick up.

7. Switchboard operator as needed following center protocol.

8. Assists in ensuring all cris[e]s are seen in a timely manner.

11. Assist[s] consumers with problems/concerns as needed.

12. Assist[s] with checking billing and taking to business office as directed.

13. Provide[s] administrative Review at 6 month and closure keeping all forms as needed.

14. Provide[s] back up for setting appointments.

15. Assist[s] with the doctor schedule as needed.

*4 **16.** Enures all office duties are performed as assigned.

17. Serves as a liaison between the Business Office and the Sylacauga Outpatient Office.

18. Serves as a liaison between the direct care staff and support staff, ensuring an effective and smooth office flow.

19. Ensures confidentiality is maintained in the administrative process.

20. Works with Coordinator/Therapist to ensure all potential crises are screened and handled appropriately.

21. Assists doctors and center nurse with Doctor Day.

22. In the absence of the Coordinator, provides non-clinical oversight of office and ensures services are provided appropriately.

23. Ensures confidentiality is maintained in the administrative process.

TEAM WORK:

1. Establishes and maintains professional working relationships with staff, community agencies, and other professionals in the community. Exemplifies professional conduct as a representative of [Cheaha], responding to community needs and requests in a timely manner.

2. Observes and follows all center policies and procedures.

3. Performs other relevant duties as assigned.

(Doc. 39 at 66-67). This job description further indicated that "Job Duties are subject to change based on office needs." (Doc. 39 at 67).

As summarized by Ms. Atkinson, Ms. Borden's job duties and responsibilities at the Talladega location generally included:

a. Properly and efficiently answering the telephone. There were occasionally instances where calls seeking emergency assistance were received from [c]onsumers or others dealing with issues pertaining to [c]onsumers.

b. Properly and efficiently managing scheduling appointments including issues that arose due to conflicts and communicating with the [c]onsumers and professional staff to make sure that the [c]onsumers understood when their appointments were set and handling the rescheduling of any appointments as may have been necessary, so that the professional staff was utilized to its fullest capacity.

c. Properly and efficiently managing the reception desk at the clinic, ensuring that [c]onsumers sign in and that the professional staff were alerted that the [c]onsumer had arrived for his or her appointment, so that [c]onsumers were not left waiting for extended periods of time.

d. Collecting and organizing the files for the [c]onsumers to be seen by the professional staff the day before their scheduled appointment, so that the professional staff did not encounter unnecessary delays while looking for files.

e. Maintain the confidentiality of the identity of the [c]onsumers, consistent with State and Federal law and regulations.

*5 f. Supporting the general needs of the professional staff on a daily basis, and professionally interacting with that staff, to achieve the common goal of providing much needed mental health services to the [c]onsumers.

(Doc. 28 at 6-7 ¶¶ 9.a-9.f).

The importance of Ms. Borden's ability to properly perform her job responsibilities was particularly critical given the nature of the operation at issue. AF No. 6.1.[10] The clinic provided much needed mental health services to consumers. AF No. 6.2.[11] These individuals frequently had no other source of treatment or support. AF No. 6.3.[12] Many of them were highly impaired or disturbed, and could potentially represent a risk to themself or others if they were not properly and timely treated. AF No. 6.4.[13]

There were numerous severe issues with Ms. Borden's performance of critical elements of her job responsibilities in the months leading up to her termination. AF No. 7.1.[14] Kathleen Robinson ("Ms. Robinson"), the Human Resources Coordinator for Cheaha, prepared a chronological summary of Ms. Borden's work-related problems and those underlying records are attached to Ms. Atkinson's affidavit. AF No. 7.2;[15] (*see also* Doc. 28 at 19-72 (attaching chronological history of performance problems)). As summarized by Ms. Atkinson's affidavit, these job deficiencies included but were not limited to the following:

a. The telephone was not being properly answered, including occasions where Ms. Borden completely abandoned the telephone, resulting in no one answering the phone.

b. Failing to properly manage the scheduling and rescheduling of [c]onsumer appointments, resulting in

> [c]onsumers not being seen and treated on a timely basis, and complaints from at least one [c]onsumer that Ms. Borden told them that they could not get an appointment anytime soon.
>
> c. Failing to alert the professional staff that [c]onsumers were in the waiting area, resulting in [c]onsumers waiting unnecessarily for an extended period of time and resulting in the professional staff not being utilized to its fullest extent.
>
> d. Failing and refusing to collect and organize the [c]onsumer files for the next day's appointments, resulting in disruption of the professional staff seeing and treating [c]onsumers efficiently.
>
> e. Failing to follow [Cheaha] protocol for protection of the [c]onsumers' identities.
>
> f. Failing and refusing to interact in a professional manner with the professional staff. The professional staff complained that when [Ms.] Borden was asked to perform essential tasks associated with her job, she responded in a rude and offensive manner and/or refused the request, acts of insubordination.

***6** AF No. 7.3.[16]

***7** Ms. Borden was counseled numerous times in the months leading up to her termination. AF No. 8.[17] Despite repeated efforts to encourage and counsel Ms. Borden to do a better job, she failed or refused to improve. AF No. 9.1.[18] In fact, she refused to acknowledge any of her shortcomings and instead blamed her performance issues on others and/or claimed that the demands of the job were too much for her. AF No. 9.2.[19]

All of this culminated on December 3, 2014, when both Ms. Atkinson and Ms. Robinson attempted to call the Talladega office from the Administrative Office in Sylacauga and nobody answered the phone. AF No. 10.1.[20] This situation was deemed so critical that both Ms. Atkinson and Ms. Robinson left their office in Sylacauga and drove to Talladega to see what was going on there. AF No. 10.2.[21] When they arrived at the Talladega location, they asked Ms. Borden why she had not been answering the phone. AF No. 10.3.[22] She told them that she left the phone in order to attend to other tasks as directed by the professional staff. AF No. 10.4.[23] Ms. Borden claimed that she needed to go to an area where she could not hear the phone ring in order to complete this task. AF No. 10.5.[24]

***8** Given the history of her poor job performance, her failure to improve despite repeated counseling, and the events of that day, Ms. Atkinson, Ms. Robinson, and Karen McKinney ("Ms. McKinney"), the Clinical Director of Cheaha's Mental Illness Division, jointly decided that they would place Ms. Borden on paid administrative leave that day pending further investigation into the matter. AF No. 11.1.[25] Thereafter, Ms. Robinson completed an investigation which, among other things, notably revealed that the other staff did not support Ms. Borden's stated reason for abandoning the telephone on December 3, 2014. AF No. 11.2.[26] In fact, the employee that Ms. Borden claimed she was assisting stated that Ms. Borden was doing nothing other than watching her do a specific task. AF No. 11.3.[27] Further, when that other employee asked Ms. Borden what she was doing, Ms. Borden responded by stating something to the effect of: "I am just trying to look busy." AF No. 11.4.[28] Thus, the investigation revealed that Ms. Borden had no legitimate reason for abandoning the phones. AF No. 11.5.[29]

After completing the investigation and giving the matter due consideration, Ms. Atkinson, Ms. McKinney, and Ms. Robinson collectively decided that Ms. Borden should be terminated for unprofessional conduct with fellow employees, neglect of duty which might cause psychological harm to consumers, and insubordination as evidenced by her failure by word or actions to carry out the orders of a supervisor, when such orders were a reasonable part of her job duties. AF No. 12.[30] Ms. Borden was terminated on December 17, 2014, but was paid for administrative leave from December 3, 2014, to December 17, 2014. AF No. 13.

After Cheaha terminated Ms. Borden's employment:

> a. The vacant position was filled with temporary help provided by a temporary employment agency, until a suitable replacement could be found. Ultimately, Ms. Atkinson, Ms. McKinney, and Ms. Robinson (the same decision makers who jointly decided to terminate Ms. Borden) decided to fill this position with a black female.

AF No. 15.[31]

Following her termination, Ms. Borden applied for unemployment benefits. AF No. 17.1. Cheaha opposed Ms. Borden's application for unemployment benefits on

the basis that she was terminated for employee misconduct. AF No. 17.2. Based upon the parties' submissions, the Alabama Department of Labor deemed Ms. Borden ineligible for unemployment compensation benefits. AF No. 18.

***9** Ms. Borden appealed the Alabama Department of Labor decision and a telephonic hearing before an Administrative Officer was held on April 6, 2015. AF No. 19.1.[7] Ms. Borden (and her counsel at that time) participated in this telephonic hearing, offering testimony and evidence in support of her position. AF No. 19.2.[8] Ms. Robinson also participated in this telephonic hearing and gave testimony. AF No. 19.3.[9] Following the hearing, the Administrative Officer issued a ruling affirming that Ms. Borden was ineligible for unemployment compensation. AF No. 20.

III. STANDARDS

A. Summary Judgment Generally

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the nonmovant. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to 'come forward with specific facts showing that there is a genuine issue for trial.' " *International Stamp Art, Inc. v. U.S. Postal Service*, 456 F.3d 1270, 1274 (11th Cir. 2006) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

B. Employment Discrimination

A plaintiff in an employment discrimination case maintains the ultimate burden of proving that the adverse employment decision[5] was made because of intentional discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) ("Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981))); *Nix v. WLCY Radio/Rahall Comms.*, 738 F.2d 1181, 1184 (11th Cir. 1984) ("A Title VII disparate treatment plaintiff must prove that the defendant acted with discriminatory purpose." (citing *Clark v. Huntsville City Board of Education*, 717 F.2d 525, 529 (11th Cir. 1983))).

Although the Supreme Court has established the basic allocation of burdens and order of proof in a disparate treatment case, *see, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Burdine*, *supra*; *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003), that framework applies only in cases in which there is no direct evidence of discrimination. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987) ("The *McDonnell Douglas-Burdine* patterns of proof were designed to ease the evidentiary burdens on employment discrimin[a]tion plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination." (citing *Thornbrough v. Columbus and Greenville R.R.*, 760 F.2d 633, 638 (5th Cir. 1985), *abrogated on other grounds by St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993))).[6]

***10** Under the *McDonnell Douglas/Burdine* scheme, a plaintiff first has the burden of proving by a preponderance of evidence a *prima facie* case of discrimination. Second, once the plaintiff proves a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Finally, if the defendant carries its burden, the plaintiff must *either* prove by a preponderance of the evidence that the legitimate reasons offered by the defendant are merely a pretext for discrimination *or* present sufficient evidence, of any type, for a reasonable jury to conclude that discrimination was a "motivating factor" for the employment action,[7] even though the defendant's legitimate reason may also be true or have played some role in the decision. *McDonnell Douglas*, 411 U.S. at 802-05; *Burdine*, 450 U.S. at 252-54; *Desert Palace*, 539 U.S. at 101-02.

C. Retaliation

"Retaliation against an employee who engages in statutorily protected activity is barred under ... Title

VII...." *Chapter 7 Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1257-58 (11th Cir. 2012). Under the *McDonnell Douglas* model, a plaintiff first has the burden of proving by a preponderance of evidence a *prima facie* case of retaliation. Within the Eleventh Circuit:

> A plaintiff establishes a *prima facie* case of retaliation by showing that: (1) she "engaged in statutorily protected activity"; (2) she "suffered a materially adverse action"; and (3) "there was a causal connection between the protected activity and the adverse action." *Howard v. Walgreen Co.*, 605 F.3d 1239, 1244 (11th Cir. 2010); *accord Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 978 n.52 (11th Cir. 2008).

Gate Gourmet, 683 F.3d at 1258.[10]

First Element—Protected Activity

Concerning the first element, statutorily protected activity triggering coverage under Title VII's antiretaliation provision comes in two forms—opposition-based or participation-based conduct. More specifically, "[a]n employee is protected from discrimination if (1) 'he has opposed any practice made an unlawful employment practice by this subchapter' (the opposition clause) or (2) 'he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter' (the participation clause)." *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1350 (11th Cir. 1999) (on petition for rehearing) (citing 42 U.S.C. § 2000e-(3)(a)).

Concerning the opposition clause more specifically:

> [A] plaintiff can establish a *prima facie* case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. *See Rollins v. State of Fla. Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989). It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.
>
> ***11** A plaintiff, therefore, need not prove the underlying discriminatory conduct that he opposed was actually unlawful in order to establish a *prima facie* case and overcome a motion for summary judgment; such a requirement "[w]ould not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation o[r] informal adjustment of grievances." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978). *See also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. Unit A Sept. 1981) ("To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a *prima facie* case of retaliatory discharge under the opposition clause of [Title VII] if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices."), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1630, 71 L.Ed. 2d 866 (1982).

Little v. United Technologies, 103 F.3d 956, 960 (11th Cir. 1997) (emphasis by underlining added) (alteration added to correctly quote from *Sias*) (footnote omitted).

Regarding the broad coverage afforded under Title VII's participation clause, the Eleventh Circuit has explained:

> Congress chose to protect employees who "participate[ ] in *any* manner" in an EEOC investigation. 42 U.S.C. § 2000e-3(a) (emphasis added). The words "participate in any manner" express Congress' intent to confer "exceptionally broad protection" upon employees covered by Title VII. *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969). As we pointed out in *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997), "the adjective 'any' is not ambiguous.... [It] has an expansive meaning, that is, one or some indiscriminately of whatever kind.... [A]ny means all." (internal quotations and citations omitted). Because participation in an employer's investigation conducted in response to a notice of charge of discrimination is a form of participation, indirect as it is, in an EEOC investigation, such participation is sufficient to bring the employee within the protection of the participation clause.

Clover, 176 F.3d at 1353.

Second Element—Materially Adverse Action

As defined by the United States Supreme Court in *Burlington Northern*, a materially adverse action is one that is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57; *see also Gate Gourmet*, 683 F.3d. at 1259 (same); *id.* at 1260 (finding material adversity in an employer's decision to deny a light-duty position to the plaintiff after she filed and refused to settle an EEOC charge). A materially adverse action can arise within or without the workplace. *See Burlington Northern*, 548 U.S. at 57 ("[T]he antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.").

Third Element—Causal Connection

The third element requires proof of a causal connection between the plaintiff's protected activity and the materially adverse action. As a divided Supreme Court held, Title VII retaliation requires proof of customary but-for causation, rather than the less burdensome motivating-factor standard applicable to Title VII discrimination claims:

> Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

***12** *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (emphasis added); *cf. id.* at 343 ("An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act."); *id.* ("It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

"At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took [a materially] adverse ... action. The defendant's awareness of the protected statement, however, may be established by circumstantial evidence." *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993) (citations omitted).[10]

Post-*Prima Facie* Case Considerations

Once a plaintiff establishes a *prima facie* case of retaliation, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its materially adverse decision. If the defendant carries its burden of production, "[t]o survive summary judgment, the employee must come forward with evidence sufficient to permit a reasonable fact finder to conclude that the legitimate reasons given by the employer were not its true reasons, but were a pretext for discrimination [or retaliation]." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 771 (11th Cir. 2005) (citing *Reeves*, 530 U.S. at 143); ***see also*** *Reeves*, 530 U.S. at 148 ("[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated [or retaliated].").

A plaintiff can prove pretext by showing "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Vessels*, 408 F.3d at 771 (internal quotation marks omitted) (quoting *Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir. 2004), ***overruled on other grounds by*** *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006)).

D. *Pro Se* Filings

"*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be

liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (citing *Fernandez v. United States*, 941 F.2d 1488, 1491 (11th Cir. 1991)). Accordingly, Ms. Borden's allegations arising out of her former employment with Cheaha are not appropriately subject to dismissal simply because they lack procedural precision or completeness in the context of Rule 8 of the Federal Rules of Civil Procedure.

At the same time "if a [*pro se*] plaintiff pleads merely conclusory allegations [about her claims] and the defendant comes forward with affidavits setting out specific facts showing [why she cannot prevail on those claims], plaintiff cannot defeat summary judgment or dismissal for failure to state a claim by merely filing an affidavit that restates the conclusory statements asserted in the complaint." *Perry v. Thompson*, 786 F.2d 1093, 1094 (11th Cir. 1986). Similarly, "[i]f material undisputed facts show no cause of action or that summary judgment should be granted as a matter of law, the case can be disposed of[,] [and] [a] plaintiff may not frustrate this process by merely restating legal conclusions that [s]he has alleged." *Id.* at 1094-95. However, any "specific facts" pled in a *pro se* plaintiff's sworn complaint or affidavit must be considered in opposition to summary judgment." *Id.* at 1095.

E. Evidentiary Rulings

***13** "All evidentiary decisions are reviewed under an abuse-of-discretion standard" without regard to the type of proof challenged. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997); *id.* at 143 (concluding that the Eleventh Circuit Court of Appeals committed reversible error "[i]n applying an overly 'stringent' review to [the district court's experts' testimony] ruling [because] it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review"). "An abuse of discretion can occur where the district court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment." *United States v. Estelan*, 156 Fed.Appx. 185, 196 (11th Cir. 2005) (citing *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005)).

Moreover, as the Eleventh Circuit has made clear, not every incorrect evidentiary ruling constitutes reversible error:

> Auto-Owners' second argument is that it is entitled to a new trial on the basis of what it describes as a number of erroneous evidentiary rulings by the district court. Evidentiary rulings are also reviewed under an abuse of discretion standard. *Finch v. City of Vernon*, 877 F.2d 1497, 1504 (11th Cir. 1989). Moreover, even if Auto-Owners can show that certain errors were committed, the errors must have affected "substantial rights" in order to provide the basis for a new trial. *See* FED. R. EVID. 103(a). "Error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties." *Perry*, 734 F.2d at 1446. *See also Allstate Insurance Co. v. James*, 845 F.2d 315, 319 (11th Cir. 1988).

Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512, 1515 (11th Cir. 1993). Therefore, even the existence of many evidentiary errors does not guarantee the party appealing a new trial. Instead, such erroneous rulings by a district court must "affect the substantial rights of the parties" for reversible error to occur.

IV. ANALYSIS

A. Cheaha's Second Strike Motion

Cheaha seeks to strike Ms. Borden's opposition to its Rule 56 Motion (Docs. 38, 39) (either in whole or in part) from the record. (Doc. 42 at 4). Cheaha asserts a variety of different reasons to support this relief, including Ms. Borden's failure to comply with Appendix II of the Court's Uniform Initial Order. (*Id.* at 2 ¶ 5).

As set out above, this Court is obligated to apply a less demanding standard to Ms. Borden's filings as she is a *pro se* litigant. Given that overarching principle, the Court finds that Ms. Borden has at least attempted to comply with Appendix II and that her corrected opposition to summary judgment is easier to understand than her initial one. Consequently, the Court is not inclined to strike Doc. 38 or Doc. 39 entirely from the record. Accordingly, that part of Cheaha's Second Strike Motion is **DENIED**.

However, the Court does agree with Cheaha (doc. 42 at 3 ¶ 8) that Ms. Borden's various attempts to provide an opposing affidavit are procedurally infirm and cannot be considered as evidence in support of her case. (*See* Doc. 39 at 3 (failing to set out any facts relevant to her claims and/or neglecting to confirm the truthfulness of her attempted affidavit's contents through a sworn signature); *id.* at 61 (attempting to subject the entire contents of Doc. 39 to a non-compliant affidavit appearing on the last page that lacks a sworn signature)); *see also* FED. R. CIV. P.

56(c)(4) (describing procedural requirements for Rule 56 affidavits). To that limited extent the Second Strike Motion is **GRANTED** and Ms. Borden's two purported affidavits are **HEREBY STRICKEN**. Consequently, the Court will not treat any statements made by Ms. Borden in her opposition as evidence, but instead will consider their value from an argument-only perspective.

B. Cheaha's Rule 56 Motion

1. Ms. Cheaha's Amended Complaint Is Limited to Race Discrimination and Participation-Based Retaliation.

*14 Cheaha describes Ms. Borden's lawsuit as one "pursuing claims based upon race discrimination and retaliation." (Doc. 35 at 7).[4] Cheaha also indicates its belief that, in light of her amended complaint, "Ms. Borden has abandoned any claim of religious discrimination or [religious-based] retaliation." *Id.*; (*compare* Doc. 6 at 4 (mentioning only race discrimination and retaliation under Title VII and § 1981), *with id.* at 10 (attaching EEOC charge with "RACE", "RELIGION", and "RETALIATION" boxes marked as claims at issue in her administrative case before the EEOC)).

Ms. Borden's allegations included in her amended complaint do not reference anything related to religion. Instead, Ms. Borden summarizes that she was "subjected to discriminatory and retaliatory treatment ... due to [her] race and because [she] had filed an EEOC [Charge] of Discrimination...." (Doc. 6 at 4). Additionally in the "Relief" section she seeks to have a "judgment compelling Cheaha ... [to] [r]efrain from discriminating against African Americans and those who engage in activities protected under the law[.]" (Doc. 6 at 8). Further, nowhere in her response to Cheaha's "**STATEMENT OF THE CASE**" does Ms. Borden dispute Cheaha's understanding of the scope of her amended complaint. (Doc. 38 at 3-5).

Consequently, the Court agrees with Cheaha that Ms. Borden has abandoned any religious-based claims of discrimination and retaliation to the extent that she ever intended to pursue them in this action. *See, e.g.*, *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) (finding claim abandoned when argument not presented in initial response to motion for summary judgment); *Bute v. Schuller International, Inc.*, 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) (finding unaddressed claim abandoned); ***see also*** *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) (failure to brief and argue issue at the district court is sufficient to find the issue has been abandoned); *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) ("When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned." (citing *Dunmar*, 43 F.3d at 599)); *cf. McMaster v. United States*, 177 F.3d 936, 940-41 (11th Cir. 1999) (claim may be considered abandoned when district court is presented with no argument concerning a claim included in the plaintiff's complaint); *Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994) (concluding that a district court "could properly treat as abandoned a claim alleged in the complaint but not even raised as a ground for summary judgment").

*15 The Court now turns to an analysis of Ms. Borden's race discrimination and participation-based retaliation claims.

2. Summary Judgment Is Appropriate on Ms. Borden's Discriminatory Discipline and Discharge Claims Based on Race.

Cheaha initially challenges Ms. Borden's ability to support a *prima facie* case of discriminatory discharge due to race. (Doc. 35 at 16). Cheaha contends that because it "ultimately replaced her with a member of her own race[,]" Ms. Borden's discriminatory discharge claim must fail. (Doc. 35 at 17). A plaintiff can support a discriminatory discharge claim arising under Title VII or § 1981[5] by proving: "(1) that [s]he was a member of a protected class, (2) that [s]he was qualified for the position, (3) that [s]he was fired, and (4) that [s]he was replaced by one outside the protected class." *Hawkins v. Ceco Corp.*, 883 F.2d 977, 982 (11th Cir. 1989). Cheaha is correct that Ms. Borden cannot rely upon the *Hawkins* model given the uncontroverted fact that she and her replacement are both within the same racially-protected category.

However, that is not the only *prima-facie* formulation available to Ms. Borden to support her discriminatory discharge claim. *See id.* ("There are a number of ways of establishing a *prima facie* case pursuant to *McDonnell-Douglas*."). For example, she can also make out a *prima facie* case by "show[ing] that [s]he is a member of a protected class, that [s]he was qualified for the job from which [s]he was fired, and 'that the misconduct for which [she] was discharged was nearly identical to that engaged in by [an employee outside the protected class] whom [the employer] retained.' " *Nix*, 738 F.2d at 1185 (quoting *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. 1982)). Under this construct, "[t]he *prima facie* case is established even if the plaintiff's replacement is also a member of the protected class." *Nix*, 738 F.2d at 1185.

A plaintiff can alternatively show "that [s]he did not violate the work rule[.]" *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989). *See also Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980) ("With respect to discharge for violation of work rules, the plaintiff must first demonstrate by a preponderance of the evidence either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly.").[8] A plaintiff may also utilize these two additional *prima-facie* models when complaining about disparate treatment in discipline that falls short of discharge. *See Gerwens*, 874 F.2d at 1540 (describing holding as applicable to "cases involving alleged racial bias in the application of discipline for violation of work rules").

***16** However, even a liberal reading of Ms. Borden's amended complaint does not satisfy either one of these alternative models. As an initial matter, Ms. Borden's allegation that she endured discriminatory discipline presents no triable claim, as she fails to offer a sufficient description of those circumstances. For example, Ms. Borden merely vaguely states in her EEOC charge that she "[o]ften ha[d] to do the jobs of others" and that she was "disciplined if their jobs [were] not done." (Doc. 6 at 10).

Not all discipline qualifies as an adverse employment action under Title VII. *See, e.g., Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (holding that "to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment") (emphasis in original), *overruled on other grounds as recognized by Crawford*, 529 F.3d at 974; *Davis*, 245 F.3d at 1240 (concluding that neither "negative job performance memoranda placed in [a] file" nor "changes in ... work assignments" without "any economic injury" are sufficiently adverse to trigger Title VII protection against discrimination). Thus, Ms. Borden must have experienced discipline that rises to the level of a tangible job detriment to pass *prima-facie* muster when claiming discriminatory treatment. *See id.* at 1239 ("Although the statute does not require proof of direct economic consequences in all cases, the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment.") (emphasis added).

Ms. Borden's placement on paid administrative leave (which Ms. Borden refers to as a suspension) on December 3, 2014, is the only pre-termination discipline that Ms. Borden identifies with any degree of detail. While the Court has doubts about whether such discipline constitutes an adverse employment action given the absence of any economic consequences for Ms. Borden, even if it does, she still cannot establish a *prima facie* case based upon that pre-discharge treatment. Ms. Borden's discharge, on the other hand, is undoubtedly an adverse employment action within the meaning of Title VII discrimination. Nonetheless, Ms. Borden's *prima facie* case of discriminatory discharge fails on the merits for the same reasons her discriminatory discipline claim does.

In particular, Ms. Borden has not provided evidence of a specific white employee who was accused of nearly identical poor performance, but who (in contrast to Ms. Borden) was neither placed on paid administrative leave nor fired for that comparable misconduct. (*See, e.g.*, Doc. 6 at 10 ("Other Black or White employees are not disciplined.")). In fact, Ms. Borden's statements in her EEOC charge that she was "the only employee who [was] disciplined" and that both black and white employees received more favorable treatment than she did, actually undermine her reliance upon comparator evidence to establish a *prima facie* case. (Doc. 6 at 10 (emphasis added)). The pattern of disciplinary treatment Ms. Borden alleges indicates that Ms. Borden was not singled out for discipline because of her race; otherwise, her black co-workers would have received harsher treatment like she allegedly did.

Ms. Borden also has not adduced evidence from which a reasonable jury could conclude that she did not engage in the conduct which led to her paid-administrative-leave status or her discharge. Importantly, Ms. Borden's unsubstantiated and subjective belief (no matter how strong) that her performance was acceptable and did not warrant any disciplinary action is simply not enough to establish a *prima facie* case of race discrimination. *Cf.*,

e.g., *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997) ("While Holifield has testified that he felt discriminated against, his opinion, without more, is not enough to establish a *prima facie* case of race discrimination.") (emphasis added).

***17** Evidence of a decisionmaker's racial bias (depending upon its adequacy) can also support a *prima facie* case of race discrimination. However, Ms. Borden points to no examples of racially-based comments or jokes attributable to those supervisors who were responsible for placing her on leave and firing her. Accordingly, Cheaha's Rule 56 Motion is due to be granted because Ms. Borden cannot establish a *prima facie* case of race discrimination concerning discipline or discharge. *Cf. Burke-Fowler v. Orange County*, 447 F.3d 1319, 1325 (11th Cir. 2006) ("Because she failed to establish valid comparators and presented no other circumstantial evidence suggesting racial discrimination, Burke-Fowler did not establish a *prima facie* case of race discrimination.") (citing *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000)).

Cheaha alternatively asserts that, even if Ms. Borden is able to present a *prima facie* case of race discrimination, she is unable to demonstrate pretext. (Doc. 35 at 17, 19-20). As explained by Ms. Atkinson in her affidavit, she, Ms. McKinney, and Ms. Robinson jointly decided to place Ms. Borden on paid administrative leave on December 3, 2014. (Doc. 28 at 8 ¶ 15). They took that measure "[g]iven the history of [Ms. Borden's] poor job performance, her failure to improve despite repeated counseling and the events of that day [related to the telephone]." *Id.*

Ms. Atkinson, Ms. McKinney, and Ms. Robinson were also the supervisors who decided to fire Ms. Borden. (Doc. 28 at 9 ¶ 16). As sworn to by Ms. Atkinson in her affidavit, the reasons for that joint decision included Ms. Borden's "unprofessional conduct"; "neglect of duty which might cause psychological harm to [c]onsumers"; and "insubordination". *Id.* Cheaha not only has articulated its performance-based reasons for placing Ms. Borden on leave and discharging her, but also has substantiated that reasoning with undisputed sworn evidence as well as underlying documentary proof of Ms. Borden's performance issues.

The Court agrees with Cheaha that Ms. Borden has failed to present evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Vessels*, 408 F.3d at 771. Ms. Borden's personal disagreement with being placed on involuntary leave and ultimately discharged is, by itself, not sufficient to demonstrate pretext. Given Cheaha's "documentary evidence of misconduct and insubordination that demonstrate poor performance, [Ms. Borden]'s assertions of h[er] own good performance are insufficient to defeat summary judgment, in the absence of other evidence." *Holifield*, 115 F.3d at 1565.

Also, even if the Court were to accept the unsworn writings signed by Ms. Butler and Ms. Martin as evidence that Ms. Borden demonstrated professionalism on a consistent basis, Ms. Borden still lacks proof of pretext concerning Cheaha's other reasons for its adverse employment action(s). *See Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir. 2000) ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim." (emphasis added) (citing *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997))). Thus, Ms. Borden's efforts to show pretext are, at best, only partially successful and, regardless, legally inadequate.

***18** Alternatively, Ms. Borden can respond to Cheaha's satisfaction of its burden of production "by present[ing] other evidence to show that discriminatory intent was more likely the cause of [Cheaha]'s actions." *Nix*, 738 F.2d at 1184 (citing *Burdine*, 450 U.S. at 256). Here, Ms. Borden has presented nothing of that nature and she lacks sufficient evidence of a triable claim of race discrimination. Therefore, even if Ms. Borden had established a *prima facie* case of discriminatory discipline and/or discharge, her claim(s) would still independently fail under the Title VII framework applicable post-*prima facie* case.

3. Summary Judgment Is Appropriate on Ms. Borden's Retaliatory Discipline and Discharge Claims.

Ms. Borden also maintains that she suffered materially adverse actions in the form of retaliatory discipline and retaliatory discharge. The protected activity that Ms. Borden relies upon is an EEOC charge claiming race discrimination that she filed against Cheaha on October 14, 2010. (Doc. 6 at 3). Ms. Borden is claiming participation-based retaliatory treatment for the period beginning August 18, 2014, and ending on December 17, 2014.[11] (Doc. 6 at 10).

As the Supreme Court has instructed, in order to rely solely upon "temporal proximity between an employer's knowledge of protected activity and a[ ] [materially] adverse ... action as sufficient evidence of causality to establish a *prima facie* case [of retaliation] ... [the knowledge and materially adverse action] must be 'very close[.]' " *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (quoting *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)). *Breeden* further confirms that evidence of a 3-month (or longer) lapse in time (without more) is legally inadequate to show a causal connection. *See Breeden*, 532 U.S. at 273-74 (citing with approval authorities finding that a gap of 3 or 4 months is insufficient as a matter of law).

The only evidence that Ms. Borden has to establish a causal connection is temporal proximity. However, the lapse of time between her filing of the EEOC charge in 2010 and her first instance of any arguable retaliatory treatment claimed in this lawsuit is 3 years and 10 months. The passage of time tied to her discharge is even longer—over 4 years. Thus, bound by *Breeden*, this Court finds that Ms. Borden lacks adequate evidence of a causal connection and she cannot establish a *prima facie* case of participation-based retaliation. *See also Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) ("Thomas failed to present evidence from which a reasonable jury could find any causal connection between her April 2005 complaint(s) of sexual harassment and the termination of her employment three (3) months later in July 2005.") (emphasis added).

***19** Cheaha alternatively asserts that, even if Ms. Borden is able to present a *prima facie* case of retaliation, she is unable to demonstrate pretext. (Doc. 35 at 17, 19-20). The Court agrees with Cheaha that Ms. Borden's evidence of pretext concerning retaliation is deficient for those same reasons that apply to her race discrimination claims. Alternatively, Ms. Borden otherwise lacks sufficient evidence that retaliation was the but-for reason behind Cheaha's treatment of her. Therefore, even if Ms. Borden had established a *prima facie* case of retaliatory discipline and/or discharge, her claim(s) would still independently fail post-*prima facie* case.

4. Summary Judgment Is Appropriate on Ms. Borden's Religious-Based Claims.

To the extent that Ms. Borden's amended complaint could be construed to still include Title VII religious-based claims, the Court alternatively finds that summary judgment is appropriate on them too.

As stated in her EEOC charge:

> During one meeting, my supervisor, Karen McKinney, accused me of lying. I said I was raised correctly and my parents are Christians. Cindy Atkinson, the Director, told me that [my statement] could be offensive and there are consequences for saying things like that.

(Doc. 6 at 10). Ms. Borden further indicates (in that same administrative document) her belief that she "has been discriminated against based on ... [her] religion (Protestant) ... [and that she] did not request religious accommodation." *Id.* Thus, Ms. Borden's Title VII religious claims are not based on a failure of Cheaha to accommodate a religious-based request made by Ms. Borden.

The Eleventh Circuit has confirmed that *McDonnell Douglas* applies to religious disparate treatment claims arising under Title VII. *See Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1305 (11th Cir. 2002) (applying *McDonnel Douglas* to a failure-to-hire claim based on the applicant's religious status). Within her EEOC charge (or elsewhere within her amended complaint), Ms. Borden does not ever assert that she was treated more harshly than other non-Christians or non-Protestants employees at Cheaha, much less identify a specific comparator to support a *prima facie* case of religious discrimination.

Ms. Borden also lacks proof from which a jury could reasonably conclude that she did not engage in the conduct that resulted in her being placed on administrative leave and ultimately discharged. Therefore, Ms. Borden's religious discrimination claims are prima facially flawed in the same manner as her race discrimination claims.

Further, to the extent that Ms. Atkinson's (arguably) religious-based statement made to Ms. Borden could potentially establish a *prima facie* case of religious discrimination in terms of Cheaha's discipline and discharge decisions, Ms. Borden has not satisfied her pretext burden. Akin to her race and retaliation claims,

she lacks evidence that casts doubt upon or undermines Cheaha's multiple reasons for placing her on involuntary leave and discharging her.

Alternatively, Ms. Borden otherwise lacks evidence that creates a triable issue regarding her religious status as a motivating factor behind either one of those decisions. Therefore, even if Ms. Borden had established a *prima facie* case of religious discrimination, her claim(s) would still independently fail under a post-*prima facie* case evaluation.

As a result of the above analysis, Cheaha's Second Strike Motion is due to be granted in part and otherwise denied. Further, Cheaha's Rule 56 Motion is due to be granted in part and otherwise termed as moot.[4] Finally, in the absence of any pending claims remaining, the Court will enter a separate final judgment order dismissing Ms. Borden's lawsuit with prejudice.

***20 DONE** this the 22nd day of March, 2018.

All Citations

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V. CONCLUSION

Footnotes

1 The Court dismissed Ms. Borden's case on March 8, 2016, for her failure to prosecute. (Docs. 3, 4). On March 25, 2016, Ms. Borden's lawsuit was reopened (doc. 5) upon discovering that her amended complaint (doc. 6) had been mistakenly treated like an entirely separate action and was assigned a new case number of 1:16-CV-0300-VEH. (Doc. 5 at 2). Upon reopening this litigation, the Court directed the Clerk to close 1:16-CV-0300-VEH. *Id.*

2 All page references to Doc. 6 correspond with the Court's CM/ECF numbering system.

3 Keeping in mind that when deciding a motion for summary judgment the Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion, the Court provides the following statement of facts. *See Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1241 (11th Cir. 2007) (observing that, in connection with summary judgment, a court must review all facts and inferences in a light most favorable to the non-moving party). This statement does not represent actual findings of fact. *See In re Celotex Corp.*, 487 F.3d 1320, 1328 (11th Cir. 2007). Instead, the Court has provided this statement simply to place the Court's legal analysis in the context of this particular case or controversy.

4 "[Cheaha] was merged into Altapointe Health Systems, Inc. on or about July 29, 2016." (Doc. 28 at 5 ¶ 3). **(NOTE:** All page references to Doc. 28 correspond with the Court's CM/ECF numbering system.)

5 Under Appendix II of the Court's Uniform Initial Order (Doc. 11) entered on April 26, 2016, "[a]ll statements of fact must be supported by specific reference to evidentiary submissions." (*Id.* at 16). The designation "AF" stands for admitted fact and indicates a fact offered by Cheaha that it has adequately supported through citations to underlying evidence as Appendix II mandates. For Ms. Borden, more specifically, this means that "[a]ny statements of fact that are disputed by the non-moving party must be followed by a specific reference to those portions of the evidentiary record upon which the dispute is based." (*Id.* at 17). Consequently, whenever Ms. Borden has inadequately asserted a dispute over a fact that Cheaha has otherwise substantiated with an evidentiary citation, the Court has reviewed the cited evidence and, if it in fact fairly supports Cheaha's factual assertion, has accepted Cheaha's fact. On the other hand, whenever Ms. Borden has adequately disputed a fact offered by Cheaha, the Court has reviewed the evidence cited by Ms. Borden and, if it in fact fairly supports her factual assertion, has accepted Ms. Borden's version. The Court's numbering of admitted facts (*e.g.*, AF No. 1) corresponds to the numbering of Cheaha's statement of undisputed facts as set forth in Doc. 35 and responded to by Ms. Borden in Doc. 38. A number following a decimal point corresponds to the particular sentence within the numbered statement of facts. For example, (AF No. 2.2) would indicate the second sentence of paragraph 2 of Cheaha's statement of undisputed facts is the subject of the Court's citation to the record.

6 Cindy Atkinson ("Ms. Atkinson"), who "was the Executive Director of [Cheaha] during Ms. Borden's employment" (doc. 28 at 1 ¶ 4), indicates in her affidavit that "Administrative Support" was Ms. Borden's last position held at Cheaha. (*Id.* at 6 ¶ 8). The Court's review of the duties for either job title does not reveal a meaningful difference between Consumer Clerk or Administrative Support. Nonetheless, the Court uses Consumer Clerk as that position name is consistent with Ms. Borden's opposing evidence. (Doc. 39 at 64).

7 All page references to Doc. 39 correspond with the Court's CM/ECF numbering system.

8 The Court acknowledges that in her opposition to the Rule 56 Motion, Ms. Borden has attempted to dispute this fact (and others) offered by Cheaha. (*See* Doc. 38 at 6 ¶ 4 ("**I dispute this statement....**")). (**NOTE:** All page references to Doc. 38 correspond with the Court's CM/ECF numbering system.) However, Ms. Borden offers no underlying evidence to substantiate her purported factual challenge while Cheaha has adequately supported this fact through Ms. Atkinson's affidavit. (Doc. 28 at 6 ¶ 8). Consequently, the Court has treated this fact as admitted by Ms. Borden consistent with the evaluative procedures set out in footnote 5, *supra*.

9 The lack of consecutive numbering for **GENERAL OFFICE DUTIES** between paragraphs 8 and 11 is consistent with the underlying document filed into the record. (Doc. 39 at 66). Additionally, the duties listed in paragraphs 24-26 for this section of the job-description document are not restated here because they are identical to those descriptions contained in paragraphs 20-22, respectively. (*Compare* Doc. 39 at 66 ¶¶ 20-22 (describing duties associated with "potential crises", "Doctor Day", and "non-clinical oversight", *with id.* at 67 ¶¶ 24-26 (same))).

10 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

11 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

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15 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit and Ms. Borden's compilation of records. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

16 Cheaha has adequately supported these facts through Ms. Atkinson's affidavit and Ms. Robinson's compilation of records. In contrast, most of Ms. Borden's attempted challenges to Cheaha's facts concerning her poor performance lack any evidentiary references and, thus, fail to create a material factual dispute for that reason. Other times, the Court is unable to readily tell what a document referenced by Ms. Borden represents and Ms. Borden has not otherwise explained the importance of the document. (*See, e.g.*, Doc. 38 at 9 ¶ 7A (directing Court to review handwritten page no. 73 (doc. 39 at 78) when contents and context of picture are uncertain); Doc. 38 at 9 ¶ 7A (directing Court to review handwritten page no. 74 (doc. 39 at 79) when contents and context of picture are uncertain); Doc. 38 at 10 ¶ 7F (directing Court to review handwritten page nos. 76-77 (doc. 39 at 81-82) when the contents and context of pictures are uncertain)).
While the email dated September 10, 2014 handwritten page no. 67 (doc. 39 at 72) does indicate Ms. Borden's belief that she was not getting the assistance she needed with answering the telephone, she has not directly refuted Cheaha's concern over her mishandling of the phone and, at times, leaving it unmanned. Similarly, undated handwritten page nos. 68-71 (doc. 39 at 73-76) do not adequately refute that Ms. Borden failed to alert professional staff about consumers in the waiting area. At best, those reproduced text messages show that Ms. Borden properly did so once or twice as opposed to on a consistent basis. Ms. Borden additionally relies upon handwritten page no. 98 (doc. 39 at 103)—an undated communication to an unknown person—in an effort to show that she did not "fail to interact with professional staff in a professional manner." (Doc. 38 at 10 ¶ 7F). Assuming that this note was for one of Cheaha's professional employees, a lone example, once again, does not establish that Ms. Borden did act professionally on a regular basis. Finally, while the writings signed by Julie W. Butler ("Ms. Butler") and Pamela Martin, LPN ("Ms. Martin") do suggest that Ms. Borden demonstrated professionalism on a consistent basis (*see* Doc. 38 at 10 ¶ 7F (directing Court to review page nos. 10-11 of Exhibit C (*i.e.*, doc. 38 at 31-32))), that witness-based evidence is not presented in the form of an affidavit or declaration and does not otherwise comply with FED. R. CIV. P. 56(c)(4). Consequently, Ms. Borden has failed to "set out facts that would be admissible in evidence" *id.* and/or to present any material dispute as to Cheaha's facts concerning her poor job performance.

17 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit and Ms. Robinson's compilation of records. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

18 Cheaha has adequately supported this fact and AF No. 9.2 through Ms. Atkinson's affidavit and Ms. Robinson's compilation of records. Further, Ms. Borden's evidentiary references (doc. 38 at 11 ¶ 9) are inadequate to support her attempt to create a material factual dispute. The Court has already discussed above the insufficiency of the September 10, 2014, email (doc. 39 at 72 (handwritten page no. 67)). To the extent that the undated, reproduced text messages (doc. 39 at 99-101 (handwritten page nos. 94-96)) reflect a misunderstanding about a locked/unlocked door involving Ms. Borden, it does not refute that she was, nevertheless, counseled numerous times prior to being terminated or that she refused to accept and/or improve upon her performance-related shortcomings.

19 *See* footnote 18.

20 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit and Ms. Robinson's compilation of records. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

21 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit and Ms. Robinson's compilation of records. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

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33 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

34 Cheaha has adequately supported this fact through Ms. Atkinson's affidavit. In contrast, Ms. Borden's attempted challenge lacks any evidentiary reference and, thus, fails to create a material factual dispute.

35 The adverse-employment-action standard does not apply to Title VII retaliation claims as explained in the subsection III.C immediately below.

36 As the Eleventh Circuit has explained, "only the most blatant remarks, whose intent could be nothing other than to discriminate [or retaliate] on the basis of age, [race, or some other unlawful reason], ... constitute direct evidence of discrimination [or retaliation]." *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) (citing *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 610-11 (11th Cir. 1987)). A liberal reading of Ms. Borden's filings in no way suggests that she has properly presented a direct evidence case of discrimination or retaliation. (Docs. 6, 38, 39). Therefore, Ms. Borden necessarily relies upon the circumstantial-evidence model to support her claims.

37 The motivating-factor standard does not apply to Title VII retaliation claims, as explained in subsection III.C immediately below.

38 *Davis* (which *Gate Gourmet* relies upon) was abrogated on other grounds by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as stated in *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294 (11th Cir. 2018).

39 Ms. Borden's amended complaint indicates that Ms. McKinney was aware of her participation-based protected activity. (Doc. 6 at 3). Further, Cheaha has not challenged Ms. Borden's retaliation claim on the basis of an absence of awareness.

40 Although Ms. Borden signed parts of her amended complaint (doc. 6 at 8, 9), it is not a verified (sworn) pleading. Ms. Borden did sign her EEOC charge (doc. 6 at 10) (attached to her amended complaint) under penalty of perjury.

41 All page references to Doc. 35 correspond with the Court's CM/ECF numbering system.

42 The Court evaluates Ms. Borden's comparable § 1981 claims under the Title VII framework. *See Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.14 (11th Cir. 2011) ("Title VII and § 1981 have the same requirements of proof and utilize the same analytical framework.") (citing *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991)); *see also Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) ("[T]he analysis of disparate treatment claims under [§ 1981 by and through] § 1983 is identical to the analysis under Title VII where the facts on which the claims rely are the same.").

43 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

44 Here, the scope of Ms. Borden's amended complaint is limited to participation-based retaliation only. (*See* Doc. 6 at 3 (claiming differing treatment on the basis of an earlier EEOC charge of discrimination filed in October 2010); *id.* at 4 (asserting retaliatory treatment because of her prior EEOC charge)). Ms. Borden does, however, assert in her 2014 EEOC charge of discrimination (attached to her amended complaint) that she "complained to Human Resources about the treatment [she was] subjected to but nothing was done." (Doc. 6 at 10). To the extent that this statement could support a Title VII opposition-based retaliation claim, the Court finds that Ms. Borden has abandoned any pursuit of it consistent with those cases cited in subsection IV.B.1 above. Alternatively, such an opposition-based claim fails because Ms. Borden has neither shown how her report to human resources supports a *prima facie* case of retaliation—consistent with those cases discussed in subsection III.C above—nor otherwise demonstrated a triable issue post-*prima facie* case—consistent with those cases discussed in subsection IV.B.2 above—concerning pretext and/or retaliatory intent in Cheaha's treatment of her because of that arguable protected activity.

45 Several propositions relied upon by Cheaha to support its Rule 56 Motion either lack the development necessary to trigger the Court's consideration (much less to be persuasive) or are incorrect statements of currently applicable law. Given the ruling in Cheaha's favor for other reasons, the Court finds it unnecessary to reach any of those attempted

points. Those unaddressed issues include Cheaha's Title VII untimeliness contention tied to the inadequacy of Ms. Borden's initial filing and a lapse of over 90 days until she filed her amended complaint (doc. 35 at 24-25) and its argument that "[t]he Alabama Department of Labor's findings compel the conclusion that [it] had legitimate non-discriminatory reasons for any adverse action against [Ms.] Borden" due to estoppel. (Doc. 35 at 18). *See Maner v. Linkan LLC*, 602 Fed.Appx. 489, 491-92 (11th Cir. 2015) (affirming district court's exclusion of time attorneys spent litigating matters related to plaintiff's application for state unemployment benefits, because those hours "concerned a discrete state administrative proceeding and not her federal Title VII lawsuit," and were not "necessary" or "related" to her federal litigation). Cheaha's mistatements about the law include that pretext requires a showing of both the falsity of the employer's stated reason and that discrimination (or retaliation) was the real reason (doc. 35 at 21) (the so-called pretext-plus model overruled by the Supreme Court in *Reeves*) or that a retaliation claim must be supported by a tangible adverse employment action (doc. 35 at 22-23) (applicable standard for Title VII retaliation claims (as opposed to discrimination claims) modified by the Supreme Court in *Burlington Northern*).

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