No. 20-___

# In The
# Supreme Court of the United States

RODDIE MELVIN,

*Petitioner,*

v.

FEDERAL EXPRESS CORPORATION,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

## PETITION FOR A WRIT OF CERTIORARI


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February 8, 2021

## QUESTION PRESENTED

In evaluating motions for summary judgment under employment discrimination laws, such as the Age Discrimination in Employment Act, must a court examine all the evidence together to determine whether a reasonable jury could find discrimination by a preponderance of the evidence (as required by the Seventh Circuit), or must the court apply a special heightened standard of proof that separately evaluates different pieces of evidence based on the "stage" of the inquiry or on whether the evidence is "direct" or "circumstantial" (as required by the Eleventh Circuit, among others)?

## RELATED CASES

- *Melvin v. Federal Express Corporation*, No. 1:17-cv-00789-CC, U.S. District Court for the Northern District of Georgia. Judgment entered May 1, 2019.

- *Melvin v. Federal Express Corporation*, No. 19-11872, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 21, 2020. Petition for *en banc* rehearing denied September 10, 2020.

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## STATEMENT OF JURISDICTION

On May 21, 2020, the Eleventh Circuit issued its opinion affirming the district court's grant of summary judgment to Respondent. The full Eleventh Circuit issued an order denying *en banc* rehearing on September 10, 2020. Per this Court's Order of March 19, 2020, the deadline for filing petitions for writ of certiorari is extended to 150 days. 150 days from September 10, 2020 is Sunday, February 7, 2021. Per this Court's Rule 30.1, deadlines that end on a Saturday or Sunday are extended to the next business day. Here, that is Monday, February 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## PERTINENT STATUTORY PROVISIONS

The Age Discrimination in Employment Act of 1967 ("ADEA") provides that it is "unlawful" for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1).

## INTRODUCTION

Under the typical "preponderance of the evidence" standard of proof, the factfinder examines all the evidence as a whole and determines whether such evidence shows that the plaintiff has, more likely than not, proven her case. This standard is applicable in most civil cases. *Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993). And this Court has instructed that, at summary judgment, the evidence must be viewed "as a whole." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000). However, the lower courts have applied a special heightened standard of proof to employment discrimination cases, in contravention of this Court's precedent.

Employment discrimination lawsuits often turn on whether there is enough proof of discriminatory intent to survive a defendant-employer's summary judgment motion. But, instead of applying the simple "preponderance of the evidence" standard, the lower courts have fashioned special heightened standards of proof that add needless complexity to a straightforward inquiry. Some courts do this by mistaking the legal presumption created by this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973) for a standard of proof and requiring all discrimination plaintiffs to meet the elements of that "standard" to survive summary judgment. Others, like the Eleventh Circuit, utilize alternative tests, such as "a convincing mosaic of circumstantial evidence." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). Whatever the formulation, these departures from the basic preponderance standard

inevitably cause courts to focus on secondary issues like the distinction between direct and circumstantial evidence, the compartmentalization of that evidence, and the analysis of the part, rather than an examination of the whole. By applying these heightened standards of proof, employment discrimination cases at summary judgment have become "full-blown paper trial[s] on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 266-67 (1986) (Brennan, J., dissenting).

In this case, the Eleventh Circuit applied one such special heightened standard of proof ("convincing mosaic"), in conflict with the Seventh Circuit's rejection of the very same special standard of proof. More generally, the Eleventh Circuit and the Seventh Circuit are on opposite sides of a split among the federal courts of appeal over whether to apply special standards of proof to employment discrimination cases or, instead, to simply examine all the evidence and determine whether a reasonable jury could find that the evidence proves, more likely than not, that discrimination motivated the adverse action.

This Court, however, has squarely rejected heightened standards of proof in employment discrimination cases, including ones that depend on a distinction between "direct" and "circumstantial" evidence. Neither Congress nor the *McDonnell Douglas* legal presumption require otherwise. Nonetheless, special heightened standards of proof – like the one applied below – continue to bedevil lawyers and judges in lower courts. And, as some federal judges have themselves complained, such special heightened standards of proof lead them to

evaluate discriminatory intent evidence at summary judgment differently than they otherwise would, resulting in disproportionate dismissal of employment discrimination cases compared to other types of cases. This Court, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962 explained that "summary procedures should be used sparingly. . . where motive and intent play leading roles, the proof is largely in the hands of the conspirators, and hostile witnesses thicken the plot." While this Court, in *Poller*, was concerned with complex antitrust litigation, motive and intent are a significant part of employment discrimination cases. *Id*. Accordingly, this Court should grant this petition and answer the question presented.

## STATEMENT OF THE CASE

By 2016, Petitioner Roddie Melvin was a highly successful, award-winning executive of Respondent Federal Express Corporation ("FedEx"). He had, over the course of 33 years at the company, worked his way up the corporate ladder, receiving several promotions and internal job offers, rising from rank-and-file worker to Managing Director. App. 2a, 61a. FedEx awarded Melvin numerous merit awards for his exceptional work between 1990 and 2010. App. 2a, 61a.

Melvin's previous managers praised his work. Vice President Reggie Owens testified that Melvin was a "sound director" who "ran a good ship" and "took care of business." App. 3a. Senior Vice President Mike Pigors found Melvin to be an effective leader who "did good jobs" and even noted that "Rod did a good job or else he wouldn't have been promoted and moved

around." D. Ct. Doc. 60, pp. 23-25. Ricky Brock, the Vice President over Melvin until spring of 2016, testified that Melvin's peers respected him and that Melvin was receptive to changing his leadership style where needed. App. 3a. Brock testified that, in the spring of 2016, before a new Vice President was appointed, Melvin was not on a path toward termination. App. 3a.

In spring of 2016, a new Vice President, Joseph Stephens, became Melvin's supervisor. In their first conversation, Stephens asked Melvin when he was going to retire, how old he was, and why he would want to continue in the job "given [his] age," and encouraged him to "move on and let the 'young guys' take over." App. 3a-4a. Before Stephens, Melvin had only received two disciplinary letters in thirty-two years with FedEx, and no previous manager had ever issued more than one such letter to him. App. 3a, 31a. But, after the above conversation, Stephens issued three disciplinary letters against Melvin over six months. FedEx thereafter fired Melvin. App. 3a-6a.

As Senior Vice President (and, later, President of FedEx) Pigors testified, it was extremely rare for FedEx to issue disciplinary letters to Managing Directors, and the practice for managers at Melvin's level was to give them every opportunity to fix an issue and, if that failed, to advise them to move to a different position. D. Ct. Doc. 60, pp. 30-31. Pigors also testified that so many errors occur at FedEx each day that, if Managing Directors were held strictly accountable for each of the errors in their district, they would all be terminated every 90 days (including Pigors himself). *Id.* at pp. 45-46.

Melvin filed suit, alleging in part that FedEx had fired him because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1). The district court had jurisdiction under 28 U.S.C. § 1331.

On January 28, 2019, U.S. Magistrate Judge J. Clay Fuller issued a report recommending, among other things, that the district court grant FedEx's motion for summary judgment on Melvin's ADEA claim. App. 72a-97a. Magistrate Judge Fuller reasoned that because Melvin "does not point to direct evidence of discrimination," App. 74a (n. 6), he had to establish a *prima facie* case of age discrimination under the "*McDonnell Douglas* evidentiary framework." App. 75a. In turn, Magistrate Judge Fuller concluded that: (1) Melvin had enough evidence of a *prima facie* case; (2) FedEx had enough evidence of a non-discriminatory reason for firing Melvin; but (3) Melvin had not submitted enough evidence for a reasonable jury to find that FedEx's proferred reasons were pretext for firing him because of his age. App. 76a-90a. Magistrate Judge Fuller also considered, in the alternative, whether Melvin had "produced circumstantial evidence of discriminatory intent through the 'convincing mosaic' standard" of proof, and concluded that Melvin's evidence did not satisfy that standard. App. 90a-97a.

By order and opinion dated May 1, 2019, the district court granted summary judgment on Melvin's ADEA claim based in part on the Magistrate's report and recommendation. App. 28a. The district court concluded that Stephens' ageist comments, though "disturbing," were "not probative, circumstantial

evidence" that FedEx fired Melvin because of his age. App. 54a. Rather, Stephens's statements were "isolated remarks" that "alone" did not "establish a material fact on pretext or a convincing mosaic." App. 54a. The district court also concluded that, given the evidence in the record, no reasonable jury could find that FedEx's justifications for firing Melvin in the three disciplinary letters were pretext for firing him because of his age. App. 33a-34a, 37a-39a, 41a-42a, 45a-51a. Judgment was entered on May 1, 2019.

Melvin filed a notice of appeal on May 1, 2019, to the Eleventh Circuit, which had jurisdiction under 28 U.S.C. § 1291. On appeal, Melvin argued, *inter alia,* that the district court had erred in granting summary judgment under the Eleventh Circuit's "convincing mosaic" standard of proof and urged the court to interpret that standard to consider all the evidence together in "[w]hatever form it takes." Appellant's Corrected Initial Brief before Eleventh Cir., at p. 12 (Oct. 11, 2019) (quoting *Chapter 7 Tr. v. Gate Gourmet*, 683 F.3d 1249, 1256 (11th Cir. 2012)).

By opinion dated May 21, 2020, the Eleventh Circuit affirmed the district court's judgment. The Eleventh Circuit, applying its "convincing mosaic" standard,[1] first found that Stephens's ageist

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[1] The Eleventh Circuit noted that even assuming *arguendo* that Melvin "failed to create" a *McDonnell-Douglas prima facie* case, as FedEx had argued, it would "still" apply its "convincing mosaic" standard of proof, which it took "at least in this case" as "largely indistinguishable from our ordinary pretext analysis." App. 9a-10a (Op. n. 3).

comments to Melvin were not "direct" evidence of discrimination, but circumstantial. App. 10a. The court then concluded that Stephens's ageist comments were "probative as to whether age animus motivated" the termination and that the comments "certainly support a showing of discriminatory intent." App. 11a. Nonetheless, the Eleventh Circuit held that such evidence of discriminatory intent was not enough to defeat summary judgment; it also required Melvin to produce enough evidence that, on its own, would lead a reasonable jury to find that FedEx's proffered reasons for the termination were pretext. App. 11a-12a. The court then concluded that Melvin had not produced enough such evidence of pretext and, for that reason, affirmed summary judgment on Melvin's ADEA claim. App. 12a-24a. Melvin's petition for rehearing en banc was denied on September 10, 2020. App. 109a.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Conflicts with the Seventh Circuit's Rejection of Special Heightened Standards of Proof in Discrimination Cases

By applying its "convincing mosaic" standard of proof, the court below split with the Seventh Circuit, which: (i) expressly rejected "convincing mosaic" as a standard of proof and (ii) more generally rejected special heightened standards of proof in favor of a straightforward examination of whether the evidence supports a finding of discriminatory intent.

In *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016), the Seventh Circuit, in an opinion by Judge Frank H. Easterbrook, explained that "convincing mosaic" was originally "a metaphor to illustrate why courts should *not* try to differentiate between direct and indirect evidence," and thus to remind lawyers and judges that "*all evidence is inferential and cannot be sorted into boxes*. All evidence should be considered together to understand the pattern it reveals." *Id.* at 764 (emphasis added). In reaching this conclusion, Judge Easterbrook was in accord with Justice Thomas's opinion for this Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.") (cleaned up).

Unfortunately, Judge Easterbrook explained, district courts – and some panels of Seventh Circuit judges – took "convincing mosaic" as a legal test – a "governing legal standard" of proof in discrimination cases. *Ortiz* 834 F.3d at 765. To stop this, the Seventh Circuit rejected "convincing mosaic" as a standard of proof in discrimination cases, declaring that a district court acting otherwise is "subject to summary reversal," because the "correct" standard is simply "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.* And to forestall any other special standards of proof in discrimination cases that depend on distinguishing between "direct" and "indirect" evidence

– the original failed purpose of the "convincing metaphor" metaphor – the Seventh Circuit also held that "district courts must stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards." *Id.*

The circuit split is plain. The court below applied the very "convincing mosaic" standard of proof and direct-evidence/indirect-evidence distinction that the Seventh Circuit rejected. Indeed, the Eleventh Circuit first adopted "convincing mosaic" as a standard of proof by importing it from a Seventh Circuit opinion that had mistaken "convincing mosaic" as a special standard of proof for circumstantial evidence in discrimination cases. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (quoting *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 734 (7th Cir. 2011)). The Seventh Circuit, however, expressly overruled *Silverman* to the extent that it relied on "convincing mosaic" as a standard of proof, *Ortiz*, 834 F.3d at 764-65, and "insist[ed] on the use of the direct-and-indirect framework," *id.* at 766-67. To state the circuit split in stark terms: if the Eleventh Circuit's decision below were issued by a district court within the Seventh Circuit, it would have been subject to summary reversal. *Id.* at 765.

More generally, the Eleventh Circuit and the Seventh Circuit are now on opposite sides of a split among the circuits over whether to apply special standards of proof to employment discrimination cases or, instead, to simply examine all the evidence and determine whether it proves that a reasonable jury could find that, more likely than not, discrimination motivated the adverse action. The Seventh Circuit, as

noted above, rejects special standards of proof and directs its district courts to simply examine "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's [protected characteristic] caused" the challenged adverse action. *Id.* In contrast, the Eleventh Circuit in this case joins multiple other circuits in holding that, unless there is "direct" evidence of discrimination, a court *must* apply some special heightened standard of proof – either "convincing mosaic" or a misapplication of *McDonnell Douglas* as a standard of proof (when it is actually just a legal presumption).[2] *Compare, e.g., Zabala-De Jesus v. Sanofi-Aventis P.R., Inc.*, 959 F.3d 423, 428 (1st Cir. 2020) (ADEA); *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 94 (2d Cir. 2013) (Title VII); *Willis v. UPMC Children's Hosp. of Pittsburgh*, 808 F.3d 638, 644 (3d Cir. 2015) (ADEA); *Clark v. Champion National Sec., Inc.*, 952 F.3d 570, 579-82 (5th Cir. 2020) (Americans with Disabilities Act); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043-44 (8th Cir. 2011) (Title VII); *Aubrey v. Koppes*, 975 F.3d 995, 1014 (10th Cir. 2020) (ADA); *with Ortiz*, 834 F.3d at 765 (requiring district courts to "stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards"); *see also id.* at 766 ("[A]ll evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors."); *cf. Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 495 (D.C. Cir. 2008) (Kavanaugh, J.) (at summary judgment, where

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[2] More on the misapplication of *McDonnell Douglas* as a standard of proof in Section II.A, *infra*.

employer has proffered proof of a non-discriminatory reason, "the district court need not — *and should not* — decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*").

## II. The Eleventh Circuit's Decision Below Conflicts with This Court's Precedent

By applying its "convincing mosaic" standard of proof below, the Eleventh Circuit contravened this Court's precedent that no special heightened standards of proof apply in employment discrimination cases.

### A. No Special Heightened Standards of Proof Apply in Employment Discrimination Cases

Because the ADEA bars an employer from firing someone "because of such individual's age," 29 U.S.C. § 623(a)(1), this Court has held that a plaintiff alleging an employer fired them in violation of this provision "must prove, *by a preponderance of the evidence*, that age was the 'but-for' cause of the challenged adverse employment action." *Gross v. FBL Financial Services*, 557 U.S. 167, 180 (2009) (emphasis added).

The standard of proof is simply the "preponderance of the evidence" standard – the "most common" standard of proof in civil cases. *Concrete Pipe & Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993). There is no "heightened evidentiary requirement for ADEA plaintiffs," because Congress could have – but did not – write such heightened proof requirements into the ADEA. *Gross*, 557 U.S. at 178 n. 4; *see Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 148

(2000) ("[W]e have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact.") (cleaned up).

Likewise, plaintiffs suing under section 703(a)(1) of Title VII must prove, by a preponderance of the evidence, that the employer fired or otherwise discriminated against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The "conventional rule of civil litigation . . . generally applies in Title VII cases," i.e., a plaintiff must "prove his case by a preponderance of the evidence using direct or circumstantial evidence." *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) (cleaned up). That accords with a "clear and deep rooted" consensus that circumstantial evidence can be just as reliable as "direct" evidence, *id.* at 100; *see also Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957); *Holland v. United States*, 348 U.S. 121, 137-38 (1954), and that Title VII's text does not indicate otherwise, *Desert Palace*, 539 U.S. at 99 (relying on Congress' failure to refer to "direct evidence or some other heightened showing" in section 701(m) of Title VII, 42 U.S.C. § 2000e(m)); *see also Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (although "the question facing triers of fact in discrimination cases is both sensitive and difficult," courts should not "treat discrimination differently from other ultimate questions of fact"); *accord St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

Despite this Court's clear instruction that employment discrimination cases should be evaluated by the same standard of proof as any other civil case

in determining the ultimate question of fact, many lower courts mistakenly believe the legal presumption first declared in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is a standard of proof that must be applied in all employment discrimination cases.

On the contrary, with respect to plaintiffs who do not have "direct" evidence of discrimination, this Court's precedent does *not* provide that, at summary judgment, employment discrimination plaintiffs *must* produce evidence to meet the *McDonnell-Douglas prima facie* case. To require otherwise confuses a legal presumption with the ultimate standard of proof. A legal presumption is a rule that, if a party proves certain facts, the factfinder must take a material fact as if it is proven true, unless another party produces enough evidence to the contrary. 1 Jones on Evidence § 4:2 (7th ed. 2020). In this respect, legal presumptions in civil cases affect who bears the burden of producing evidence of a material fact. E.g., Fed. R. Evid. 301. Legal presumptions, however, do not alone alter the standard of proof that applies to that material fact – the point on the conceptual yardstick for deciding how much evidence is enough to find that material fact to be true. After all, if a presumption is not rebutted, the factfinder must take that material fact as if it is *already* proven true, and therefore, the standard of proof does not matter.

The *McDonnell Douglas* legal presumption is just that: a legal presumption. It is a tool to force defendant-employers to articulate their purported justification for the adverse action. *McDonnell Douglas* does not itself require any special heightened standard of proof to decide summary judgment

motions in Title VII and ADEA cases. If a Title VII or ADEA plaintiff chooses to rely on it, the *McDonnell-Douglas* presumption triggers if – and only if – the plaintiff establishes a "*prima facie* case" and the employer has offered no proof of a legitimate non-discriminatory reason for its adverse action. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.").

If the presumption triggers, the burden of production on the ultimate issue of fact – whether the defendant acted because of a discriminatory motive – shifts to the defendant. If the defendant then produces enough evidence of a legitimate non-discriminatory reason for its adverse action, *see Figueroa v. Pompeo*, 923 F.3d 1078, 1087-92 (D.C. Cir. 2019), the presumption is rebutted and therefore "drops from the case," *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), and "the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant," *Hicks*, 509 U.S. at 510; *see id.* at 510-511 ("The presumption, having fulfilled *its role of forcing the defendant to come forward with some response*, simply drops out of the picture.") (emphasis added); *see also Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (Kavanaugh, J.) (*McDonnell Douglas* prima facie case is "almost always irrelevant" because "by the time the district court considers an employer's motion for summary judgment or judgment as a matter of law, the employer ordinarily will have

asserted a legitimate, non-discriminatory reason for the challenged decision").

Whether "the *McDonnell Douglas* presumption" applies or is rebutted, the plaintiff "at all times" bears the burden of persuasion on the ultimate issue of discriminatory intent; "[i]n this regard [*McDonnell Douglas*] operates like all presumptions" in civil cases. *Hicks*, 509 U.S. at 507 (citing Fed. R. Evid. 301). If that presumption does not even affect who bears the burden of persuasion on the ultimate issue of discriminatory intent, it certainly cannot affect the standard of proof for deciding whether the plaintiff's evidence meets that burden. And, on that ultimate issue of fact, this Court's precedent is clear: only the preponderance-of-the-evidence standard applies and not any special heightened standard of proof, particularly one that depends on whether there is "direct" evidence of discriminatory intent. *Desert Palace*, 539 U.S. at 99; *Aikens*, 460 U.S. at 716; *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 148 (2000); *Gross v. FBL Financial Services*, 557 U.S. 167, 178 n. 4 (2009). That is no less so on summary judgment, where a court must take as given, not alter, the "substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Accordingly, the *McDonnell Douglas* presumption itself cannot justify lower courts imposing a special standard of proof in ADEA and Title VII cases at summary judgment that turns on whether there is "direct" evidence.

To be sure, this Court once tersely called the *McDonnell-Douglas* presumption "inapplicable" because, in an ADEA case, there was "direct evidence"

that the challenged employer policy discriminated by age "on its face." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). And a Justice of this Court once opined that the burden of proof on causation should shift to the defendant-employer if a Title VII "disparate treatment plaintiff" showed "by direct evidence that an illegitimate criterion was a substantial factor" in that employer's decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring in the judgment). Whatever their precedential value at the time, these references to "direct" evidence no longer matter, given this Court's subsequent rulings. *See Desert Palace*, 539 U.S. at 99-100; *Gross*, 557 U.S. at 178 n. 4.

Similarly, although lawyers and judges, including the Justices of this Court, sometimes refer to a "pretext" inference as an "indirect" way, as opposed to a "direct" way, to prove discriminatory intent, *see, e.g.*, *Burdine*, 450 U.S. at 256, such a distinction is colloquial at best. There is nothing special about a "pretext" inference in employment discrimination cases. It is just a variation on "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves*, 530 U.S. at 147 (cleaned up).

Thus, it does not matter whether a subset of evidence in the record supports a finding of discriminatory motive by way of a "pretext" inference, by inferring what someone believes from what they say out loud (a "comments" inference), or by another of the many ways to infer whether a material fact is true from some item of evidence. Whatever the labels

for the different inferences, the target is exactly the same: whether, under the preponderance standard, there is enough evidence to infer that the defendant acted "because of such individual's" race, age, or other protected category. 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1). "[P]roving the employer's reason false [is] part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Hicks*, 509 U.S. at 517. This is why evidence disproving the employer's proffered reason permits – but does not compel – a factfinder to find discriminatory motive. *Id.* at 519; *see also Reeves*, 530 U.S. at 148-149 (same for ADEA).

### B. The Court Below Ignored this Court's Precedent by Applying a Special Heightened Standard of Proof

The Eleventh Circuit's decision in this case conflicts with this Court's precedent, because of the special heightened standard of proof it applied below. First, the Eleventh Circuit's special "convincing mosaic of circumstantial evidence" standard, on its face, applies only if there is no "direct" evidence of discriminatory intent. App. 8a-9a; *Lewis v. City of Union City, Georgia*, 934 F.3d 1169, 1185 (11th Cir. 2019) (applying convincing-mosaic standard to claims under Title VII and 42 U.S.C. § 1981(a)); see also *Jefferson v. Sewon Am.*, 891 F.3d 911, 922 (11th Cir. 2018) ("Because Jefferson presented direct evidence of discrimination, the district court erred when it evaluated this evidence under the burden-shifting test

for circumstantial evidence established in *McDonnell Douglas*.").

This Court's precedent, *see Gross*, 557 U.S. at 178 n. 4; *Desert Palace*, 539 U.S. at 99-100; *Aikens*, 460 U.S. at 714 n. 3, however, requires only a preponderance-of-the-evidence standard of proof, regardless of whether the evidence of discriminatory intent is mostly "direct" or not. In contrast, the "convincing" mosaic standard is, by its own terms, a higher standard than preponderance, and resonates with the "clear and convincing evidence" standard. In any case, had the Eleventh Circuit followed this Court's precedent, it would not have mattered whether Stephens's ageist comments were "direct" or "circumstantial" evidence of discriminatory intent, because all the evidence would have been considered together. App. 10a-11a.

Second, the Eleventh Circuit's special heightened standard of proof caused it to over-compartmentalize evidence in a way that distracted from the ultimate question of whether the plaintiff can prove discriminatory intent by a preponderance of the evidence. That court first found that Stephens's ageist comments to Melvin were not "direct evidence of discrimination" but circumstantial. App. 10a-11a. Thus, though it found the substance, context, and timing of those comments to "certainly support a showing of discriminatory intent," the court below nonetheless required Melvin to also produce enough additional evidence that, on its own, would lead a reasonable jury to discredit the content of each of three disciplinary letters Stephens issued against

him.[3] App. 11a-12a. (The content of those letters, and that Melvin had received them during a twelve-month period, was FedEx's proffered basis for firing him. App. 5a-6a.)

In doing so, the court below isolated one subset of evidence, Stephens's oral comments to Melvin about his age, from another subset of evidence, the three disciplinary letters, only because it concluded the ageist comments were not "direct" enough evidence of discriminatory intent. Then, in analyzing "pretext", the court below ignored the evidence of discriminatory intent as if it had no weight.

Under this Court's precedent, however, the standard of proof does not vary with the different kinds of inferences that a reasonable jury could draw from the evidence in the record. Had the Eleventh Circuit followed this Court's precedent, it would not have evaluated what a reasonable jury could infer from the "pretext" evidence *separately* from the comments evidence. *Reeves*, 530 U.S. at 150 ("In the . . . context of

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[3] The Eleventh Circuit reached this conclusion, crediting Stephens' letters, even though this Court's summary judgment precedent does not require the jury to credit a defendant's proffered justification when it comes from an interested witness. *Reeves*, 530 U.S. at 151 ([A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.") (cleaned up; emphasis added).

summary judgment under Rule 56, we have stated that the court must view the record taken as a whole") (cleaned up). Instead, it would have simply asked whether a reasonable jury could find discriminatory intent, after taking into account all the evidence in the record as a whole. In turn, that would have led the court to consider, for example, whether a reasonable jury could discredit FedEx's proffered reasons for firing Melvin, in light of: (i) Stephens's baldly ageist comments, (ii) Melvin's many promotions and awards, (iii) the fact that (before Stephens) FedEx issued only two disciplinary letters to him over a 30-plus year career with FedEx, and (iv) Senior Vice President Pigors' deposition testimony about how rarely FedEx issues disciplinary letters to Managing Directors and how it gives them career counseling instead. That is something the court below did not do. App. 12a-24a.

## III. This Petition Concerns an Important Federal Question Because Special Heightened Standards of Proof Distort How Lower Courts Analyze Discrimination Cases

This petition's question is important. Special heightened standards of proof in federal discrimination lawsuits implicate an important part of the federal judiciary's work.[4] That may explain why,

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[4] In fiscal years 2015-2019, about 14,600 employment discrimination lawsuits on average were filed annually in the federal district courts. Federal Judicial Center, *Judicial Facts and Figures 2019*, tbl. 4.4. (nature of suit: civil-rights: employment and civil-rights: ADA-employment).

over the past two decades, federal judges have openly lamented the special standards of proofs that they believe they must use to decide summary judgment motions in employment discrimination cases. E.g., *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring); *Griffith v. City of Des Moines*, 387 F.3d 733, 743 (8th Cir. 2004) (Magnuson, J., concurring); *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1225-1228 (10th Cir. 2003) (Hartz, J., concurring); Denny Chin, Summary Judgment in Employment Discrimination Cases: A Judge's Perspective, 57 N.Y.L. Sch. L. Rev. 671 (2013) (Judge, Second Circuit); Timothy M. Tymkovich, The Problem with Pretext, 85 Denver U. L. Rev. 503, 521-522 (2008) (Judge, Tenth Circuit).

Among their concerns, some judges have criticized any special standard of proof that requires deciding, at summary judgment, whether evidence of discriminatory intent counts as "direct" evidence. Such an inquiry is unduly difficult. *Wells*, 325 F.3d at 1225 (Hartz, J.); Tymkovich, *supra* at 521. It distracts from and obscures the ultimate issue of whether the plaintiff has enough evidence of discriminatory intent to proceed to trial. E.g., *id.* at 522; *Wells*, 325 F.3d at 1225. It cuts against the "clear and deep rooted" consensus that circumstantial evidence can be as or more reliable than "direct" evidence, *Desert Palace*, 539 U.S. at 100. See Tymkovich, *supra* at 522.

These judges also critique the special heightened standards of proof for causing courts to over-compartmentalize evidence. *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." *Furnco Construction Corp. v. Waters*, 438

U.S. 567, 577 (1978). However, by applying *McDonnell Douglas* or its alternatives (like "convincing mosaic") as heightened standards of proof, the courts often commit the same fatal error as the Eleventh Circuit made below: considering certain evidence only with respect to one "stage" of the inquiry while ignoring it throughout the rest of the inquiry. *Wells*, 325 F.3d at 1225 (Hartz, J.); Tymkovich, *supra* at 521. In the case below, the Eleventh Circuit failed to consider evidence of discriminatory intent when evaluating whether Melvin had shown sufficient evidence of pretext. App. 10a-12a. Other courts never examine evidence of pretext because they determine a plaintiff did not show a *prima facie* case. *See Wells*, 325 F.3d at 1224 ("Is it really possible that *McDonnell Douglas* . . . could require judgment against a plaintiff when the evidence as a whole would support a plaintiff's verdict but the plaintiff somehow has not made out a prima facie case?").

Finally, judges have noted that special heightened proof standards defeat this Court's original purpose for *McDonnell Douglas*: "to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring). Despite the unavailability of direct evidence, this Court wanted to assure that the "plaintiff [has] his day in court." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

However, judges have noted that the special heighted proof standards have had the opposite effect. Chin, *supra* at 677. One frequently cited study found that employment discrimination cases ended at

summary judgment 77% of the time, whereas contract and tort cases had summary judgment grant rates of 59% and 61%, respectively. *See* Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson, at 9 (table 4) (Aug. 13, 2008). Judge Chin, of the Second Circuit, blames this disparity in summary judgment rates, at least in part, on the complexity and inefficiency of the *McDonnell Douglas* framework.[5] With their multiple stages and shifting burdens, special heightened standards of proof multiply the opportunities for discrimination plaintiffs' cases to be dismissed based on something other than failure to prove discrimination.

Accordingly, as this Court works to clarify how substantive employment discrimination law applies, *e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., with whom Thomas, J., and Gorsuch, J., join, concurring in the denial of certiorari), it should work to clarify the role of special heightened standards of proof, if any, in such cases at summary judgment. In the end, if judges continue granting defendants' summary judgment motions based on special heightened standards of proof that neither Congress nor this Court's precedent require, it will not matter who substantive employment discrimination laws are meant to protect. The protection will be an illusion.

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[5] Of course, the same critiques can be leveled at any of the similarly complex and distracting special heightened standards of proof.

## CONCLUSION

This Court should grant this petition.

Respectfully submitted,

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February 8, 2021

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 21, 2020**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

May 21, 2020, Decided

No. 19-11872 Non-Argument Calendar

D.C. Docket No. 1:17-cv-00789-CC

RODDIE MELVIN,

*Plaintiff-Appellant,*

versus

FEDERAL EXPRESS CORPORATION,

*Defendant-Appellee.*

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

Before ROSENBAUM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Roddie Melvin appeals the district court's grant of summary judgment in favor of his former employer,

Federal Express Co. ("FedEx"), on his age-discrimination and retaliation claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), (d). On appeal, Melvin argues that he created a "convincing mosaic" of circumstantial evidence showing that FedEx terminated his employment because of his age. He also argues that he established a *prima facie* case of retaliation and that FedEx's justifications were pretextual. After careful review, we affirm.

## I.

For purposes of reviewing the district court's grant of summary judgment, we present the facts in the light most favorable to Melvin and resolve all factual disputes in his favor. *See Alston v. Swarbrick*, 954 F.3d 1312, 1317 (11th Cir. 2020).

At the time of his termination, Melvin, an African-American man over forty years old, had been working for FedEx for thirty-three years. Nearly thirty of those years were spent in a management role, during which time he received several promotions and merit awards and worked at FedEx facilities around the country.

From 2006 until his termination in November 2016, Melvin was a managing director based in Atlanta. He oversaw one of four districts within the southern region of FedEx's Air Ground Freight Services Division ("AGFS") and supervised eight senior managers, who in turn supervised various operations managers. Over that time, Melvin reported to three successive vice presidents:

Reginald Owens, Sr., Ricky Brock, and Joseph Stephens. Stephens became vice president of the southern region in April 2016 after Brock retired.

Before being supervised by Stephens, Melvin had received two disciplinary letters at FedEx. The first letter came in 2008 from Owens, who issued it for failing to communicate critical information—damage to aircraft—to Owens and upper management. Then, on August 12, 2015, Brock issued Melvin written discipline for poor judgment and failing to meet established standards. As an "example of [his] poor judgment," the letter stated Melvin acted "directly in violation of [Brock's] instruction" with regard to ramp security and his personal vehicle. According to Brock's testimony, Melvin had continued to park his personal vehicle inside the secure area at the airport after Brock told him not to do so. Brock also cited Melvin's "failure to communicate major exceptions," which referred to issues like flight delays or mishandled packages.

Despite this discipline, both vice presidents thought favorably of Melvin. Owens testified that Melvin was a "sound director" who "ran a good ship" and "took care of business." Brock testified that Melvin was respected by his peers, that he was receptive to changing his style and approach to leadership, and that, after the August 2015 disciplinary letter, Melvin was on a path to correction, not a path to termination.

But that changed with Stephens. In May 2016, in his first one-on-one conversation with Melvin after becoming

his boss, Stephens asked Melvin his age and when he was going to retire.[1] Stephens wondered if Melvin would "be able to keep up" "given . . . [his] age." Questioning whether Melvin "really want[ed] to do this job anymore," Stephens suggested he was too old and should "let the young guys do it." Stephens fired Melvin within six months of this conversation.

On June 16, 2016, Stephens issued Melvin a disciplinary letter for leadership failure. According to the letter, Melvin falsely reported to Stephens that he had complied with Stephens's instruction to issue corrective action to his management team. The letter further admonished Melvin for simply forwarding emails from Stephens to his subordinates rather than "taking a sense of ownership and demonstrating a leadership role."

Approximately one month later, on August 11, 2016, Stephens issued Melvin a disciplinary letter for "continued deficiencies with your administrative responsibilities and for failing to anticipate and prevent, or adequately address, several operational issues." The letter documented several administrative deficiencies which, according to the letter, indicated that Melvin was "approving various activities without proper review" and "delegating without clear instruction and subsequent follow up to ensure proper completion and accuracy." Further, according to the letter, Melvin oversaw several delays and service failures, and an audit showed unacceptable ratings for Melvin's district.

1. Stephens denies making these comments, but we must credit Melvin's testimony for purposes of summary judgment. *See Alston v. Swarbrick*, 954 F.3d 1312, 1317 (11th Cir. 2020).

Stephens's original draft of the August 2016 letter terminated Melvin's employment. That was consistent with FedEx policy, which provided that three written notifications of deficiency within a twelve-month period normally results in termination. The August 2016 letter was Melvin's third disciplinary letter within a twelve-month period by one day. After Stephens spoke with FedEx's legal department, the letter was modified to provide that Melvin could retain employment provided he submitted and adhered to a performance-improvement agreement. Thereafter, Melvin and Stephens agreed on a performance-improvement agreement.

Less than 45 days after the August 2016 letter, Stephens spoke with his supervisor, Senior Vice President Michael Pigors, and stated that he wanted to give Melvin a third letter and terminate his employment. Pigors told Stephens that he needed to give Melvin more time and "a chance to fix what he needs to fix." Stephens did not issue a third letter at that time.

On October 27, 2016, Stephens suspended Melvin with pay. Then, eight days after that, on November 3, Stephens issued Melvin a disciplinary/termination letter for insubordination and leadership failure. Stephens listed four reasons for the letter: (1) Melvin allowed Manager Kenneth Baxter to be demoted in violation of Stephens's express direction; (2) Melvin repeatedly parked his personal vehicle in an unapproved location; (3) Melvin failed to report the mishandling of 141 packages on October 12; and (4) Melvin failed to eliminate use of a certain delay code as Stephens had instructed. The letter

explained that Melvin's employment was terminated because he had received three letters of deficiency within a twelve-month period.

After his initial conversation with Stephens and after receiving each of the three letters described above, Melvin complained verbally to human resource officials Wanda English and Shannon Brown. In these conversations, Melvin reported Stephens's ageist comments and conveyed his belief that Stephens had intended to get rid of him from the outset due to his age and then began "systemically . . . putting together a list of things" to push him out.

When Melvin first complained to Brown about Stephens's comments, Brown "seemed outraged" and promised that he was "going to be making some calls to follow up to insure that this doesn't happen again." After the June 2016 letter, Brown again promised Melvin that he was going to follow up. In their depositions, however, both Brown and English denied telling Stephens about Melvin's complaints. Stephens testified that he learned that Melvin had complained to Brown after receiving a disciplinary letter, but he denied knowing that Melvin had complained of age discrimination.

Melvin filed a charge of discrimination with the Equal Employment Opportunity Commission on November 11, 2016. He also appealed his termination and complained of age discrimination through FedEx's internal processes. FedEx's lead counsel investigated Melvin's complaint and found "no policy violations," concluding that Melvin's allegations were unsubstantiated. The appeals board

upheld Melvin's termination in early December 2016. Melvin's replacement was nine years younger than Melvin.

## II.

Melvin sued FedEx in federal court in March 2017, alleging, as relevant here, age discrimination and retaliation under the ADEA, 29 U.S.C. § 623(a)(1), (d).[2] Melvin alleged that Stephens terminated him based on his age and retaliated against him after he complained about Stephens's conduct. After discovery, FedEx filed a motion for summary judgment, which the district court granted in full based on a magistrate judge's report and recommendation. The district court concluded that Melvin had not produced sufficient evidence to rebut FedEx's proffered legitimate, nondiscriminatory reasons for his termination or to show that Stephens was aware of Melvin's complaints of age discrimination when he made the decision to terminate Melvin's employment. Melvin now appeals.

## III.

We review the grant of summary judgment *de novo*. *Alston*, 954 F.3d at 1317. "We view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Id.* (quotation

2. On appeal, Melvin does not address his claims of race discrimination and retaliation under 42 U.S.C. § 1981, so we deem these claims abandoned. *See Timson v. Sampson*, 518 F.3d 870, 873 (11th Cir. 2008) (issues not briefed on appeal are deemed abandoned).

marks omitted). Summary judgment is appropriate if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

At the summary-judgment stage, the judge's function is not to weigh the evidence but to determine if there is a "genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* Therefore, summary judgment may be granted "[i]f the evidence is merely colorable or is not significantly probative." *Id.* at 249-50 (citations omitted).

**IV.**

The ADEA prohibits private employers from firing an employee who is at least 40 years of age "because of" the employee's age. 29 U.S.C. §§ 623(a)(1), 631(a). "[T]he language 'because of' . . . means that a plaintiff must prove that discrimination was the 'but-for' cause of the adverse employment action." *Sims v. MVM, Inc.*, 704 F.3d 1327, 1332 (11th Cir. 2013). This standard is met if the plaintiff's age played a role in the employer's decision-making process and had a determinative influence on the outcome. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009).

We ordinarily evaluate ADEA claims based on circumstantial evidence, which is what Melvin relies on

here, under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Sims*, 704 F.3d at 1333. Alternatively, "the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.*

"A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker." *Id.* (quotation marks omitted). A plaintiff may establish a "convincing mosaic" with "evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements . . . , and other bits and pieces from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (quotation marks omitted).

Melvin contends that he demonstrated such a convincing mosaic with evidence of discriminatory comments by Stephens and of pretext in FedEx's rationale. The question before us, then, is whether Melvin's evidence is sufficient to raise a reasonable inference that FedEx discriminated against him because of his age.[3] *Chapter 7*

3. FedEx disputes whether Melvin established a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Its arguments on this point, however, relate primarily to its proffered reasons

*Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1256 (11th Cir. 2012) ("Whatever form it takes, if the circumstantial evidence is sufficient to raise a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper." (quotation marks omitted)).

**A. Discriminatory Comments**

Ageist comments that are not direct evidence of discrimination may still "provide circumstantial evidence to support an inference of discrimination." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998) (discussing racial comments). In *Damon v. Fleming Supermarkets of Florida, Inc.*, for example, we held that a supervisor's comment that he wanted "aggressive, young men" to be promoted was probative as to whether age animus motivated the decision to terminate the plaintiff. 196 F.3d 1354, 1362-63 (11th Cir. 1999). Likewise, in *Alphin v. Sears, Roebuck & Co.*, we stated that a comment by a supervisor that the plaintiff was "too old" "certainly supports a showing of discriminatory intent if we interpret the remark in the light most favorable to Alphin." 940 F.2d 1497, 1501 (11th Cir. 1991); *see also Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204-05 (11th Cir. 2010)

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for Melvin's termination and therefore are more appropriately addressed at the pretext stage of the analysis. *See Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010). In any case, even assuming FedEx is correct that Melvin failed to create a *prima facie* case, we would still analyze whether he created a triable issue of discrimination based on a "convincing mosaic" theory, which, at least in this case, is largely indistinguishable from our ordinary pretext analysis.

(comments by a supervisor that a plaintiff is "too old" can be circumstantial evidence of age discrimination).

Here, we agree with Melvin that Stephens's ageist remarks to him, if credited, are probative as to whether age animus motivated the decision to terminate his employment. *See Damon*, 196 F.3d at 1362-63. According to Melvin, Stephens pressured him to resign in their first one-on-one meeting because of his age, questioning whether he "wanted to continue to do this" "given . . . [his] age" and stating that he should "let the young guys do it." Approximately one month after this conversation, Stephens issued Melvin a disciplinary letter. And within six months of this conversation, Stephens fired him. Given the "substance, context, and timing" of the comments, *id.* at 1362, they "certainly support[] a showing of discriminatory intent if we interpret the remark[s] in the light most favorable to [Melvin]," *Alphin*, 940 F.2d at 1501.

Nevertheless, the comments alone are not sufficient to meet Melvin's burden of creating a triable issue of discriminatory intent, nor do we understand Melvin to argue as much. *E.g., Crawford v. City of Fairburn, Ga.*, 482 F.3d 1305, 1309 (11th Cir. 2007) ("Crawford erroneously argues that evidence of a discriminatory animus allows a plaintiff to establish pretext without rebutting each of the proffered reasons of the employer."). In *Damon*, for example, the plaintiff presented additional evidence demonstrating that the employer's proffered reasons were pretextual, which, when combined with the discriminatory comments, was enough to create a triable issue of discrimination. *See Damon*, 196 F.3d at 1363 ("[A]

reasonable jury could conclude that the specific reasons for termination given by Fleming were a pretext."); *see also Alphin*, 940 F.2d at 1501 (finding that other evidence of pretext, combined with the discriminatory comment, created a triable issue of discrimination). Accordingly, we consider the ageist remarks along with Melvin's other pretext evidence to determine whether there is a triable issue of discrimination.

**B. Pretext in Employer's Rationale**

A plaintiff may create an inference of discriminatory intent "by showing that [the employer's] proffered reasons are not credible." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010). To show than an employer's reason is not credible, the plaintiff "must meet that reason head on and rebut it," *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (*en banc*), demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's rationale." *Holland v. Gee*, 677 F.3d 1047, 1055-56 (11th Cir. 2012) (quotation marks omitted). But plaintiffs may not recast the reason or merely quarrel with its wisdom. *Chapman*, 229 F.3d at 1030. It is not our role to second-guess the business decisions of employers. *Id.* Our concern is whether an employment decision was motivated by unlawful discriminatory animus, not whether the decision was prudent or fair, and we limit ourselves "to whether the employer gave an honest explanation of its behavior." *Id.* (quotation marks omitted).

FedEx claims that it terminated Melvin's employment because of a pattern of insubordination and leadership failure, as documented in the three disciplinary letters Stephens issued Melvin. Melvin's deficiencies, according to FedEx, included administrative failures, insubordination, failure to manage his subordinates, and failure to timely notify Stephens of important matters. FedEx further argues that Melvin had been disciplined for similar deficiencies before Stephens became his supervisor. Melvin maintains that a jury could conclude that FedEx's proffered reasons—as reflected in the three disciplinary letters issued by Stephens—were pretextual.[4]

**1. June 16, 2016, Letter**

The June 16, 2016, disciplinary letter related to various past-due administrative matters that were pending when Stephens became vice president of the southern region. Early in his tenure, Stephens issued guidance to his managing directors that he expected them to bring their districts up to date and to counsel their senior managers that timely compliance would be enforced with more severe discipline going forward. According to Stephens,

4. In several footnotes, Melvin makes conclusory assertions that the district court violated Rule 56(f)(2), Fed. R. Civ. P., by granting summary judgment on a ground not presented in FedEx's motion for summary judgment. But these passing references are insufficient to raise that issue for appeal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."). Nor do we believe the court went beyond the grounds raised by FedEx.

he instructed the managing directors "to make sure that everyone gets a documented OLCC"—a form of written counseling—"that if this happens again in the future, you will receive discipline up to and including termination," and gave them a deadline of May 31. On or around May 18, Melvin wrote him a memorandum stating that everything had been taken care of. Stephens asked his assistant to take a closer look, and "what he said was completed, was not completed." Giving Melvin the "[b]enefit of the doubt," Stephens waited a couple weeks and checked again, but it was "[s]till not done." At that point, Stephens testified, he decided to discipline Melvin for failing to comply with Stephens's instruction and mispresenting that he had done so.

Melvin has not shown pretext with respect to this issue. The record shows that Melvin sent Stephens a memorandum on May 18, 2016, documenting the corrective actions that had been taken for all past-due items. Further, Melvin testified that he relied on his senior managers to issue written counseling to their subordinates but later learned that his senior managers "had not issued the written counseling." In order words, Melvin effectively admitted that his May 18 memorandum to Stephens was not accurate.

Nor was it unreasonable for Stephens to hold Melvin responsible for the inaccurate memorandum and the failure of his subordinates. Given that Stephens and his assistant were able to review whether the memorandum was accurate, there appears to be no reason Melvin could not have done the same thing before submitting

it to Stephens. And while Melvin claims that other managing directors also had past-due matters and were not disciplined, the evidence is undisputed that the other managing directors got their districts up to date and accurately reported doing so. Accordingly, Melvin has not demonstrated pretext with respect to this matter.

**2. August 11, 2016, Letter**

The August 11, 2016, letter disciplined Melvin for "continued deficiencies with [his] administrative responsibilities and for failing to anticipate and present, or adequately address, several operational issues." The letter documented several administrative deficiencies which, according to the letter, indicated that Melvin was "approving various activities without proper review" and "delegating without clear instruction and subsequent follow up to ensure proper completion and accuracy." These included inaccurate travel and expense reports and an inaccurate requisition for extra staff. Further, according to the letter, Melvin oversaw several delays and service failures and failed to timely record an injury, and an audit showed unacceptable ratings for Melvin's district.

Melvin contends that the matters identified in the letter did not warrant discipline and that there is a factual dispute as to the frequency of his paperwork errors. But while Melvin believed that his error rate was lower than that of other managing directors in the southern region, there is no evidence that another managing director had similar errors during the same time period and was not disciplined, let alone that another managing director

who had recently been disciplined for delegating without clear instruction and failing to ensure proper completion and accuracy had been. Nor does Melvin even address the various other matters identified in the August 2016 letter. He essentially argues that Stephens's expectations were unreasonable and unfair, but that is not enough to establish a violation of the ADEA, *see Chapman*, 229 F.3d at 1030, and he presents no evidence from which a reasonable jury could conclude that the manifold issues listed in the August 2016 letter were false or pretextual.

**3. November 3, 2016, Letter**

Stephens listed four reasons for issuing the November 2016 letter terminating Melvin's employment. We address each in turn.

**Demotion of Ken Baxter**

The November 2016 letter first asserts that Melvin violated Stephens's express instruction not to demote Baxter by permitting one of his senior managers to demote Baxter and "place him on a 90 day [personal leave of absence] dated September 11, 2016." Stephens testified that Melvin took it upon himself to demote Baxter, without involving human resources, in violation of both Stephens's express direction and FedEx policy.

In the light most favorable to Melvin, the relevant context is as follows. Baxter was a South Carolina operations manager within Melvin's district who wanted to transfer to Indianapolis, where his wife had recently

moved. After bidding unsuccessfully on management positions in Indianapolis, Baxter began applying for hourly positions. But because of the way FedEx categorizes employees, Baxter was always ranked lower than other applicants who were hourly employees. On August 26, 2016, Baxter emailed his senior manager, Fred Laskovics, to ask for help. Laskovics forwarded the email to George Sims, the human-resources personnel representative for that region, who responded, copying Melvin, that Baxter needed to request a "step down from his current position and be placed in an open Handler or Material position. He can then be placed on [leave of absence] from here."

Melvin discussed the matter with Stephens, who said he would help facilitate the transfer and that someone from Indianapolis would be sending a "PCN" number to enable Baxter to make the move. Stephens told Melvin not to demote Baxter in the meantime. Melvin waited three or four weeks without hearing anything.

Meanwhile, Laskovics met with Baxter to go over Sims's instructions, and Baxter said he would apply for an hourly position in South Carolina and then request a personal leave of absence to apply for jobs in Indianapolis. Baxter then did so and, as the only applicant for the position, was hired as an hourly employee on September 11, 2016. Baxter also completed paperwork to request a personal leave of absence, which Melvin granted. Neither Melvin nor Laskovics demoted Baxter, according to Laskovics.

In mid-September 2016, Stephens emailed Melvin and informed him that Baxter was applying for management positions and, despite his prior statements to Laskovics, was not interested in a handler position. Stephens wrote, "This is why I explicitly advised you NOT to simply demote and place this individual on a PLOA. He's not bidding on Handler or Material Handler positions, despite how you handled. In your situation, I don't understand why you wouldn't comply with my direction back on 09/01." Melvin wrote back that "this guy has cost me more than you know" and that he was simply trying to help Baxter and "thought [he] was doing the right thing."

Melvin testified that soon after, he and Stephens spoke, and Melvin explained what had happened and why. Stephens said he understood what Melvin had done and that he was "okay with it," and he did not give "any counseling other than to say let's make sure this doesn't happen again." Stephens did not "state or imply that [Melvin] had been insubordinate or that [he] had committed a discipline-worthy offense."

We conclude that Melvin has not shown pretext as to the Baxter matter. To be sure, Melvin presented some evidence to contradict the factual grounds asserted by Stephens. Testimony from Melvin and Laskovics, the senior manager most directly involved with the Baxter matter, established that Melvin and Laskovics received and followed guidance from human resources about Baxter's transfer request, did not demote Baxter, and granted a leave of absence only after Baxter had, consistent with FedEx policy, bid on and been hired for a handler position

in South Carolina. Further, Stephens testified that it was not inappropriate for a managing director to grant a leave of absence requested by an employee.

Despite this evidence, we agree with the district court's reasoning that, even if Stephens was mistaken as to the actual facts of what happened with Baxter, there was "no evidence to refute that Stephens had an honest, good-faith belief that [Melvin] had violated his directive not to demote Baxter." *See Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452-53 (11th Cir. 1987) ("[I]f the employer fired an employee because it honestly believed that the employee had violated a company policy, even if it was mistaken in such belief, the discharge is not 'because of [discrimination].'").

On September 14, 2016, Stephens wrote an email accusing Melvin of disregarding his direction not to demote Baxter. There is no evidence that, at the time he sent the email, he did not in good faith believe that accusation. Further, we agree with the district court that "there is no evidence that Stephens was aware Baxter independently applied for the hourly position in Columbia, South Carolina." In response, Melvin points to his testimony that, after the September 14 email, he spoke with Stephens and explained what had happened, and Stephens said he understood and was "okay with it." But the court persuasively explained that Melvin could not have told Stephens how Baxter got into an hourly position because Melvin did not know those facts until Laskovics's deposition for this case. And Melvin's mere denial to Stephens—that he did not demote Baxter—is not

enough, where there is no evidence that Stephens learned of information to corroborate that denial. Accordingly, Melvin has not established pretext with regard to the Baxter matter.[5]

**Unapproved Parking**

The November 2016 termination letter next asserted that, despite being "advised by both Corporate Security and VP Brock that [he] w[as] not permitted to park inside the perimeter fence at the FOPRT facility," Melvin continued to park his personal vehicle "in the unapproved location."

Undisputed record evidence shows that, in August 2015, Melvin's prior supervisor, Brock, issued a letter disciplining Melvin for "creat[ing] direction to security that was directly in violation of [Brock's] instruction" with regard to ramp security and his personal vehicle. Brock testified that the discipline was based on Melvin's parking of his car inside the secure area after Brock told him not to do so. Then, on September 20, 2016, Stephens received an email from Katina Burchfield, the managing director of security, memorializing a conversation between her and Stephens a few days earlier. According to the email,

5. We do not consider the October 27, 2016, email Stephens received from George Sims, in which Sims wrote that Melvin had admitted to Sims that he violated Stephens's instruction not to demote Baxter. Because there was evidence that Stephens had decided to terminate Melvin's employment by mid-October, a reasonable jury could conclude that any information learned by Stephens on or after that date played no role in the employment decision.

Burchfield had called Stephens to discuss "unauthorized employee parking." Burchfield reported that Melvin had been parking his personal vehicle inside the secure area, and that when confronted by another security employee, Melvin had stated that "he would discontinue." Yet as indicated in the November 2016 termination letter, Melvin parked his personal vehicle in the secure area nine additional times in less than a two-month period.

Melvin has not demonstrated pretext with regard to this issue. Melvin claims that he followed all appropriate parking rules and parked inside the security fence only with permission from security. But at best he has shown that security was internally conflicted as to the appropriateness of Melvin's parking of his personal vehicle inside the secure area. And it remains undisputed that Melvin was disciplined for disregarding the instruction of his direct supervisor not to park in the secure area, that no other supervisor had told Melvin he could park in the secure area, and that, according to the email Stephens received, Melvin continued to park in the secure area even after telling security he "would discontinue." Accordingly, Melvin's evidence is insufficient to show that his unauthorized parking was a false reason or a pretext for discrimination.

**Mishandling of Packages**

Third, according to the November 2016 letter, Melvin failed to report to the Regional Office the mishandling of 141 packages, and when questioned about why it was not reported, Melvin did not know the full impact, was

unaware of the root cause, and claimed that "[he] didn't think it was any big deal."

Melvin denies claiming that it was not a big deal, but he has not otherwise shown that this reason was false or pretextual. While Plaintiff essentially blames a subordinate manager for failing to report the incident to Stephens and states that he explained to Stephens that this manager was responsible for that failure to report, he does not dispute that the service failure was not promptly reported by him or one of his subordinates. The fact that Stephens held Melvin responsible for the failure to report the exception that occurred within his region is a business decision and is not evidence of pretext. *See Chapman*, 229 F.3d at 1030. Melvin presents no evidence of a comparator who was treated more favorably for the same conduct. We also note that Melvin's prior supervisors raised similar issues with his performance, and that Melvin was disciplined in 2008 for failing to report a service failure. Accordingly, Melvin has not shown pretext as to this issue.

**Use of Delay Code**

Finally, the November 2016 letter states that, despite instructions to "discontinue the application of the TD delay code due to the excessive use identified in [his] District (97 of 1,420 flights or 6.83% of all departures)," Melvin's district "continued to utilize the TD delay code 19 more times on 268 flights or 7.09% of all departures; actually increasing the frequency of use."

The relevant context is this. FedEx used various codes to classify the cause of flight delays. The "TD" code was used to note a delay caused by a discrepancy between the pilot's clock and the ramp's clock. At some point, FedEx adopted a new time-keeping system that was intended to synchronize employees' clocks and eliminate time discrepancies.

Stephens testified that, in light of the new system, he instructed his managing directors to eliminate usage of the TD delay code and to more accurately code the specific issue—such as weather, crew, etc.—that caused a delay. He stated that Melvin's district was using the TD delay code excessively and that the high rate of use was "covering up an operational deficiency." Melvin argues that Stephens never instructed him to eliminate usage of the code immediately. Rather, the instruction was to reduce it, and Stephens, according to Melvin, understood this to be Melvin's understanding.

Melvin has not shown pretext as to this issue. Even assuming Stephens instructed his managing directors to reduce, rather than eliminate, use of the code, and that some use of the code remained necessary, Stephens explained in the warning/termination letter that Melvin's district had actually increased the frequency of use of the TD delay code. Melvin points to no evidence creating a genuine issue of material fact concerning whether his district increased the use of that code. Nor does he identify evidence suggesting that the other managing directors under Stephens were unable to reduce use of the TD delay code within their districts, or that another

managing director was not disciplined despite overseeing an increase in its use. So even in the light most favorable to Melvin, the undisputed evidence still shows that Melvin failed to implement Stephens's instructions. Accordingly, there is no genuine issue to go before a jury relating to the TD delay code.

### C. Conclusion

Although Melvin has presented some evidence that Stephens, his supervisor, made ageist remarks to him within six months of his termination, he has not established pretext in FedEx's rationale for the termination decision. We therefore conclude that Melvin has not presented sufficient circumstantial evidence for a reasonable jury to conclude that his age was a "but-for" cause of the termination decision. *See Gross*, 557 U.S. at 176; *Sims*, 704 F.3d at 1332-33; *see also Crawford*, 482 F.3d at 1309. Accordingly, we affirm the district court's grant of summary judgment on Melvin's claim of age discrimination.

## V.

Turning to Melvin's retaliation claim, the ADEA prohibits private employers from retaliating against employees who "opposed any practice" made unlawful by the ADEA. 29 U.S.C. § 623(d). To succeed on a retaliation claim, the plaintiff must prove a causal connection between his protected activity and the alleged retaliatory conduct. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002). This generally requires a showing "that the decision

maker was aware of the protected conduct at the time of the adverse employment action." *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000). That requirement rests on the common-sense notion that "[a] decision maker cannot have been motivated to retaliate by something unknown to him." *Id.*

Therefore, even in cases where there is temporal proximity between the protected conduct and the adverse employment action, that proximity "alone is insufficient to create a genuine issue of fact as to causal connection where there is unrebutted evidence that the decision maker did not have knowledge that the employee engaged in protected conduct." *Id.* In other words, when there is "unrefuted testimony of the decision maker that he knew nothing of the protected conduct," temporal proximity alone is not a sufficient basis to allow a factfinder to decide "that the decision maker is lying." *Id.* Nor can knowledge held by other corporate officers be imputed either to the corporation or to the decision maker. *Id.*

Here, the district court properly granted summary judgment on Melvin's retaliation claim. Stephens, the decision maker, provided unrefuted testimony that he knew nothing about Melvin's complaints of age discrimination until after this lawsuit was filed. In addition, English and Brown, the human-resources officials to whom Melvin complained about Stephens, testified that they did not tell Stephens about Melvin's complaints. While Melvin maintains that a jury could infer Stephens's knowledge of Melvin's complaints of age discrimination from the timing of Stephens's disciplinary actions, we cannot, in light of

Stephens's unrefuted testimony, submit the issue to the jury based on temporal proximity alone. *See id.* Nor can English's or Brown's knowledge be imputed either to Stephens or FedEx. *See id.* Accordingly, Melvin has not presented sufficient evidence of a causal connection to withstand summary judgment.

## VI.

In sum, we affirm the entry of summary judgment in favor of FedEx on Melvin's claims of age discrimination and retaliation.

**AFFIRMED**.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, DATED MAY 1, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA, ATLANTA DIVISION

RODDIE MELVIN,

*Plaintiff,*

vs.

FEDERAL EXPRESS CORPORATION,

*Defendant.*

CIVIL ACTION NO.
1:17-CV-0789-CC

### ORDER

This is an employment discrimination case in which Plaintiff Roddie Melvin ("Melvin" or "Plaintiff") alleges claims of race discrimination and retaliation in violation of 42 U.S.C. § 1981 and age discrimination and retaliation in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"). This matter is before the Court on the Final Report and Recommendation (the "R&R") [Doc. No. 95] issued by Magistrate Judge J. Clay Fuller on January 28, 2019. Magistrate Judge Fuller recommends that the Court grant Defendant Federal

Express Corporation's Motion for Summary Judgment (the "Motion for Summary Judgment") [Doc. No. 57] and deny as moot Defendant's Motion to Exclude Testimony of Lorene F. Schaefer, Esq. (the "Motion to Exclude") [Doc. No. 90].

After receiving an extension of time, Plaintiff filed Plaintiff's Objections to the Magistrate Judge's Report & Recommendation [Doc. No. 99] on March 1, 2019. Plaintiff objects to the recommendation that summary judgment be granted as to the age discrimination and retaliation claims under the ADEA but does not specifically object to the recommendation that summary judgment be granted as to the race discrimination and retaliation claims under Section 1981. (R&R at 6.) Defendant Federal Express Corporation ("Defendant" or "FedEx") has filed a Response to Plaintiff's Objections to Report and Recommendation [Doc. No. 100].

For the reasons set forth below, the Court adopts the R&R, with the modifications set forth herein. Defendant's Motion for Summary Judgment is due to be granted, and the Motion to Exclude is due to be denied as moot.

## I. STANDARD OF REVIEW

After reviewing a magistrate judge's findings and recommendations submitted pursuant to 28 U.S.C. § 636(b)(1)(B), a district judge may accept, reject, or modify the findings or recommendations. 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). A party challenging a report and recommendation must "file . . . written objections

which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection." *Macort v. Prem, Inc.*, 208 F. App'x 781, 783 (11th Cir. 2006) (citation and internal quotation marks omitted); *see also* Fed. R. Civ. P. 72(b)(2). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990) (citation omitted). The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." *Id.* "Frivolous, conclusive, or general objections need not be considered by the district court." *Marsden v. Moore,* 847 F.2d 1536, 1548 (11th Cir. 1988) (citation omitted). Those portions of a report and recommendation to which an objection has not been made are reviewed for plain error. *See United States v. Slay,* 714 F.2d 1093, 1095 (11th Cir. 1983); *see also* Fed. R. Civ. P. 72(a).

## II. DISCUSSION

Plaintiff, who was a FedEx employee for 32 years and was terminated after receiving three disciplinary letters within a twelve-month period, objects to the R&R on the specific grounds that the Magistrate Judge: (1) failed to consider Plaintiff's (the non-movant's) evidence – including evidence that the supervisor who disciplined and terminated him, Joseph Stephens, was aware of Plaintiff's protected complaints – and to make all justifiable inferences in the non-movant's favor; (2) weighed evidence and made credibility determinations –

tasks that are reserved for the jury and not the Court; (3) misunderstood or mischaracterized Plaintiff's arguments, thereby failing to address them; (4) erred in holding that a party's own statements cannot defeat summary judgment if considered "self-serving"; (5) erred in incorrectly stating that Plaintiff's burden at summary judgment is not met under the traditional *McDonnell Douglas* framework if his evidence creates a genuine issue that the prima facie case is met and that Defendant's justification for the adverse action is false; (6) erred in failing to address Defendant's failure to respond to Plaintiff's Statement of Additional Facts in violation of this Court's Local Rules, which requires treatment of Plaintiff's facts as conceded for the purpose of summary judgment; (7) erred in rejecting relevant circumstantial evidence of age discrimination on the grounds that remarks of decisionmaker were "stray remarks"; (8) erred in failing to consider the expert report of Lorene F. Schaefer, Esq. and how it sheds light on the way Defendant enabled discrimination and retaliation; and (9) erred in excluding so-called "me too" evidence in the form of prior accusations of discrimination against Stephens by FedEx employees.

### A. Consideration of Plaintiff's Evidence

In connection with Plaintiff's first objection, Plaintiff argues that the Magistrate Judge failed to consider: (1) evidence of Plaintiff's successful, decades-long career with FedEx before Stephens became his supervisor; (2) evidence from which a reasonable jury could conclude Stephens was motivated by retaliation to discipline and terminate Plaintiff; and (3) the evidence of pretext

related to Plaintiff's parking inside the security fence, Plaintiff's use of the TD Delay Code, and the demotion of a subordinate manager, Ken Baxter. The Court rejects Plaintiff's arguments.

### 1. Plaintiff's Career with FedEx

As an initial matter, the Magistrate Judge did consider the history of Plaintiff's career with FedEx before Stephens became his supervisor, including both Plaintiff's career highlights and Plaintiff's occasional performance issues. (*See* R&R at 2-5.) While Plaintiff's job was not in jeopardy at the time Stephens became his manager in April 2016, Plaintiff had received a written Performance Reminder from his prior supervisor, VP Ricky Brock, on August 12, 2015. (Doc. No. 90-13 at 2-3.) After the issuance of the Performance Reminder, Plaintiff showed some improvement but had not "conquered the problem when [Brock] left" and "was still struggling" with respect to some of the issues identified. (Deposition of Troy Ricky Brock ("Brock Dep") [Doc. No. 63] at 52:8-53:7.) Thus, Plaintiff is correct in pointing out that he had only two disciplinary letters over the 32 years he worked for FedEx before Stephens became his manager and that he was not on a path to termination, but it also is true that Plaintiff already was having performance issues at the time Stephens became his manager. This is not evidence that the Magistrate Judge was required to disregard. Thus, the Court believes that the R&R includes an accurate description of Plaintiff's career with FedEx, and the Magistrate Judge properly considered the history of Plaintiff's career in accordance with the summary judgment standard.

### 2. Retaliatory Motivation of Stephens to Discipline and Terminate Plaintiff

Plaintiff next argues that a reasonable jury would be entitled to conclude that Stephens was motivated by retaliation because of Plaintiff's protected complaints against him. Here, there is no dispute that Plaintiff verbally complained to Human Resources about the letters issued by Stephens being discriminatory and retaliatory and that Plaintiff sent an email between the time of his suspension and termination making the same complaints. Further, the evidence indicates that these verbal and email complaints of retaliatory and discriminatory conduct were sufficient to trigger an investigation, according to FedEx's own policies. Plaintiff's decision not to enter FedEx's Guaranteed Fair Treatment Procedure/EEO Complaint process is not evidence that should be construed to suggest that Stephens was not motivated by retaliation, especially since Plaintiff did complain that Stephens's conduct was retaliatory. However, the missing link with respect to Plaintiff's retaliation claim is Plaintiff's inability to point to evidence that Stephens was aware of his complaints.

"In order to satisfy the 'causal link' prong of a prima facie retaliation case, a plaintiff must, at a minimum, generally establish that the defendant was actually aware of the protected expression at the time the defendant took the adverse employment action." *Raney v. Vinson Guard Serv., Inc.,* 120 F.3d 1192, 1197 (11th Cir. 1997) (citation omitted). While "awareness of protected expression may be established based on circumstantial evidence," the Eleventh Circuit "require[s] plaintiffs to show a

defendant's awareness with more evidence than mere curious timing coupled with speculative theories." *Id.* (citation omitted). The Court has reviewed and considered the evidence upon which Plaintiff relies to argue that a reasonable jury could find that Stephens was aware of his complaints against him, but the Court finds that Plaintiff's evidence and arguments present nothing more than "curious timing coupled with speculative theories." *Id.* The Court finds no error in the Magistrate Judge's analysis of this issue, and the Court agrees that "the record does not indicate that Stephens knew about any of Plaintiff's complaints such that his decision to discipline or terminate Plaintiff was based on that knowledge." (R&R at 45.)

**3. Pretext**

Plaintiff next asserts that the Magistrate Judge ignored evidence he presented to establish that several of the reasons articulated by Stephens as forming the basis for Plaintiff's final disciplinary letter and termination were actually "falsehoods" and a pretext for discrimination and retaliation. Plaintiff specifically complains about the analysis of his parking inside the security fence, his use the of the TD Delay Code, and the demotion of Ken Baxter. These issues also are the subject of Plaintiff's fifth objection to the R&R (regarding the analysis of whether the justification for the adverse action was false), and the Court addresses these issues in detail in Section II.E. of this Order. As to this objection specifically, however, the Court disagrees that the Magistrate Judge ignored Plaintiff's evidence.

The Magistrate Judge meticulously analyzed Plaintiff's claims and the evidence presented by Plaintiff in support of those claims, and he applied the appropriate law to the allegations and evidence. Plaintiff generally contends that the violations cited by Stephens were immaterial and/or baseless. However, as the Court will explain below, the violations were not baseless. Further, the materiality of the violations or mistakes, as Plaintiff characterizes them, is really a matter of business judgment that is inappropriate for the Court to review. *See Elrod v. Sears, Roebuck & Co.,* 939 F.2d 1466, 1470 (11th Cir. 1991). The Court rejects Plaintiff's objection that the Magistrate Judge ignored Plaintiff's evidence of pretext.

### B. Weighing Evidence and Making Credibility Determinations

The focus of Plaintiff's next objection is on whether the Magistrate Judge improperly weighed evidence and made credibility determinations. In this regard, Plaintiff argues the Magistrate Judge erred in determining that: (1) no jury could find Stephens's ageist remarks to be evidence of age discrimination because Plaintiff's co-workers, and his replacement, were over 50 years old; (2) no reasonable jury could find the disciplinary letters were discriminatory or retaliatory because Plaintiff did not formally contest them in writing; (3) no reasonable jury could find that Stephens was aware of Plaintiff's complaints against him; (4) no reasonable jury would believe Plaintiff's explanation for his continued use of the TD Delay Code, which was that Stephens had instructed Plaintiff and other Managing Directors to reduce usage of the code, not to eliminate

usage all together and immediately; and (5) Plaintiff demoted a subordinate manager, Ken Baxter, against Stephens's instructions.

### 1. Ageist Remarks

Plaintiff points to one occasion when Stephens made ageist remarks. In the regard, Plaintiff points to evidence that Stephens, during his very first conversation with Plaintiff in May 2016, asked Plaintiff his age, inquired about whether he was going to retire, and encouraged him to let the "young guys" take over. Plaintiff received a warning letter the following month regarding various past due or delinquent managerial tasks and Plaintiff's false representation that he had counseled his subordinates regarding the delinquent tasks. However, Plaintiff was not terminated until over five months after Stephens made the stray remarks. The Magistrate Judge found that the remarks were too remote in time from Plaintiff's termination to be probative evidence of discriminatory animus.

The Magistrate Judge likewise noted that other managing directors in Plaintiff's region were over 50 years old and that Plaintiff's replacement also was over 50 years old. By noting these facts, Plaintiff asserts that the Magistrate Judge impermissibly made credibility determinations and weighed the evidence, but Eleventh Circuit authority instructs that allegedly discriminatory remarks are to be viewed "in conjunction with entire record" to determine whether the remarks constitute circumstantial evidence of a discriminatory attitude. *Ross*

*v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1292 (11th Cir. 1998). The Magistrate Judge's consideration of the ages of Plaintiff's coworkers and replacements, among other evidence, was not improper.

### 2. Plaintiff's Decision Not to Contest Disciplinary Letters

Plaintiff contends that the Magistrate Judge improperly weighed the evidence when he determined that no reasonable jury could find Stephens's disciplinary letters to be discriminatory or retaliatory due to Plaintiff's failure to contest the disciplinary letters as such through FedEx's Guaranteed Fair Treatment Procedure/ EEO Complaint process. While the Magistrate Judge acknowledged that Plaintiff's failure to take advantage of this process was not dispositive of Plaintiff's claims, the Court agrees with Plaintiff that this is an instance of the Magistrate Judge not construing the evidence in a light most favorable to Plaintiff, as the non-moving party. It is undisputed that Plaintiff complained that Stephens issued the letters with discriminatory and retaliatory intent. The Court is aware of no legal authority supporting a finding that no reasonable juror could infer the letters were issued with discriminatory or retaliatory intent simply because Plaintiff did not make the complaints in writing or did not go through the Guaranteed Fair Treatment Procedure/ EEO Complaint process. Still, Defendant is entitled to summary judgment on Plaintiff's claims because evidence of pretext is lacking and there likewise is insufficient circumstantial evidence of discrimination to constitute a convincing mosaic.

### 3. Stephens's Awareness of Plaintiff's Complaints

Plaintiff argues that the Magistrate Judge improperly weighed evidence and made credibility determinations when he found that no reasonable jury could find that Stephens was aware of Plaintiff's complaints against him. The Court has reviewed the evidence relevant to this issue and the caselaw relied upon by Plaintiff in support of his arguments. As the Court indicated in Section II.A.2. above, the Court finds no error in the Magistrate Judge's analysis and agrees that there is no evidence that Stephens was aware that Plaintiff had complained of discrimination or retaliation.

### 4. TD Delay Code

Plaintiff next objects to the Magistrate Judge's finding that no reasonable jury would believe Plaintiff's explanation for his continued use of the TD Delay Code, which was that Stephens had instructed Plaintiff and other Managing Directors to reduce usage of the code, not to eliminate usage all together and immediately. As the Court explains below in Section II.E.4., even if a jury accepted or believed Plaintiff's explanation that he was instructed only to reduce the use of the code, the evidence indicates that Plaintiff did not do that. In the termination/warning letter, Stephens stated that Plaintiff's organization "actually increase[ed] the frequency of use" of the TD Delay Code. (Doc. No. 61-7 at 3.) Therefore, regardless of whether the jury believes Stephens's characterization of his directive or Plaintiff's

characterization of that directive, Plaintiff did not comply with either directive. Stephens articulated his belief that Plaintiff's organization had increased its use of the TD Delay Code, and he relied on that belief in finding that Plaintiff was in violation of the Acceptable Conduct Policy. Plaintiff's objection to the R&R is inconsequential.

**5. Demotion of Ken Baxter**

Plaintiff next takes issue with the Magistrate Judge's finding that Plaintiff demoted Ken Baxter and the Magistrate Judge's reliance on an email sent to Stephens by Human Resources advisor George Sims in support of that finding. Plaintiff denies the contents of the email, which stated, in pertinent part, the following:

> As we discussed, during a recent conversation with Rod Melvin the topic regarding the status of Ken Baxter surfaced. At that time, Rod stated that he was told by you explicitly not to allow Ken to be released from his assignment as CAER manager or be placed on an [sic] LOA to seek another position in Indianapolis. Rod then stated that although he received this directive from you, he decided to demote Ken to a Material Handler position so as to facilitate the move back to INDY and thereby allow Fred Laskovics to backfill Ken's position before peak season.

(Doc. No. 61-21 at 2.) The Magistrate Judge relied on the email to set forth the directive that Plaintiff had been

given by Stephens, but the Magistrate Judge also relied on an email that Stephens had sent Plaintiff, which was evidence of the directive Stephens had given Plaintiff. (R&R at 30.) The Magistrate Judge did not rely on the email from George Sims to support the proposition that Plaintiff admitted to going against the directive from Stephens. Rather, the Magistrate Judge relied on Plaintiff's deposition testimony to support that finding.

Regardless of whether the Magistrate Judge erred in relying on the email from Sims or Plaintiff's deposition testimony to support the proposition that Stephens gave Plaintiff a directive regarding Baxter that Plaintiff violated, there is ample, undisputed evidence that Stephens instructed Plaintiff not to demote Baxter. Further, as the Court explains below in Section II.E.1. of this Order, the evidence is undisputed that Stephens believed Plaintiff had violated that directive. Plaintiff points to evidence that he did not actually demote Baxter and he attempts to argue that he explained this to Stephens, prior to the termination decision, but that argument is without evidentiary support. There is no evidence to refute that Stephens had an honest, good-faith belief that Plaintiff had violated his directive not to demote Baxter. The email from Sims need not be considered to arrive at that conclusion, and that conclusion is dispositive of the issue of pretext concerning the demotion of Baxter.

### C. Failure to Address Plaintiff's Misunderstood Arguments

Plaintiff's next objection is based on his assertion that the R&R reflects a misunderstanding or

mischaracterization of his arguments and does not address those arguments. The Court has considered Plaintiff's arguments, as clarified in his Objections, but those arguments and the evidence on which they are based do not defeat Defendant's entitlement to summary judgment.

### 1. Circumstantial Evidence of Stephens's Awareness of Complaints

Plaintiff first argues that the Magistrate Judge mischaracterized his arguments regarding Stephens's awareness of Plaintiff's complaints of discrimination and retaliation, which would support a causal link between the complaints and Plaintiff's termination. The Magistrate Judge found a lack of evidence indicating that Stephens knew about any of Plaintiff's complaints. While the Magistrate Judge analyzed the temporal proximity between his complaints and his termination, Plaintiff contends that Magistrate Judge also should have analyzed the temporal proximity between his complaints and the disciplinary letters to conclude that Stephens was aware of the complaints Plaintiff made against him. Plaintiff further argues that additional circumstantial evidence exists in the form of Brown's knowledge of Human Resources policy requiring action upon a complaint of discrimination and Brown's representations to Melvin that he was going to make some calls and follow up on Plaintiff's complaints.

Assuming, arguendo, that this evidence is sufficient to create a genuine issue of material fact as to whether

Stephens was aware of Plaintiff's complaints, the Court still agrees with the Magistrate Judge that the evidence fails to support an inference that Plaintiff's complaints caused him to receive the adverse action of the written discipline. As the Court will explain more fully below, the record demonstrates that Plaintiff was disciplined based on his own discrete conduct, which breaks the casual link that would support the retaliation claims. *See Henderson v. FedEx Express,* 442 F. App'x 502, 506 (11th Cir. 2011) (unpublished decision) ("Intervening acts of misconduct can break any causal link between the protected conduct and the adverse employment action[.]"). Moreover, even if Plaintiff could establish a prima facie case of retaliation, he fails to point to evidence demonstrating a genuine issue of material fact regarding whether Defendant's legitimate, nonretaliatory reasons for terminating him are pretextual.

**2. Pretext**

Plaintiff next argues that the Magistrate Judge misunderstood or mischaracterized his arguments regarding whether Defendant's justification for his termination is pretext for discrimination and retaliation. In this regard, Plaintiff maintains that the R&R mischaracterizes his pretext arguments as mere arguments that his termination was not fair, that Stephens should not have disciplined him, and that the discipline was not warranted. Plaintiff states that he is not merely disagreeing with the discipline or arguing about the unfairness of the discipline. Instead, Plaintiff asserts that Stephens based the termination decision on "*known falsehoods.*" (Doc. No. 99 at 42-43 n.11.)

This Court has conducted a detailed, de novo review of whether the termination was based on "known falsehoods" or whether there are any genuine issues of material fact concerning the same. As explained in detail in Section II.E. of this Order, the answer to both inquiries is no. Accordingly, any error by the Magistrate Judge with respect to the characterization of Plaintiff's arguments is not grounds to reject the Magistrate Judge's recommendations.

**D. Self-Serving Statements**

Plaintiff complains that the Magistrate Judge incorrectly held that a party's self-serving statements cannot defeat summary judgment. Plaintiff is correct that sworn, self-serving statements by a party should not be disregarded by courts at the summary judgment stage and that such statements may provide a basis to properly deny summary judgment. *Strickland v. Norfolk S. Ry. Co.,* 692 F.3d 1151, 1160 (11th Cir. 2012); *Feliciano v. City of Miami Beach,* 707 F.3d 1244, 1253 (11th Cir. 2013). To the extent that the Magistrate Judge's mention of "[u]nsupported self-serving statements" encompassed sworn testimony of a party, Plaintiff raises a valid issue with respect to this statement of law included in the R&R's presentation of the "Summary Judgment Standard." Notably, however, Plaintiff does not point to any of his testimony that the Magistrate Judge rejected as self-serving and refused to consider. Therefore, this objection does not provide a basis for the Court to reject the recommendations within the R&R.

### E. Plaintiff's Satisfaction of His Burden at Summary Judgment

Plaintiff next objects to the Magistrate Judge's finding that he did not meet his burden under the *McDonnell Douglas* framework to withstand summary judgment. Plaintiff submits that the evidence he has presented creates a genuine issue that the prima facie case is met and that Defendant's justification for the adverse action is false. The Magistrate Judge agreed that Plaintiff met a prima facie case. (Doc. No. 95 at 18-19.) Thus, the Court's focus is on whether Plaintiff's evidence creates a genuine issue that Defendant's justification for the adverse action is false.

To show pretext, a plaintiff must show "that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (citation omitted). The court's role in conducting the pretext analysis is to "evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation omitted). "A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer." *Chapman*, 229 F.3d at 1030. The Eleventh Circuit has "repeatedly and emphatically held that a defendant may terminate an

employee for a good or bad reason without violating federal law." *See Damon v. Fleming Supermarkets of Fla, Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999) (citation omitted). The Court's role is not to judge "whether employment decisions are prudent or fair." *Id.*

Here, Defendant based its termination of Plaintiff upon a warning letter and two disciplinary letters that were issued to Plaintiff by Stephens within a 12-month period and its policy of terminating employees receiving three such letters within a 12-month period. Plaintiff maintains that if just one letter is baseless and Stephens knew the letter to be baseless, then a genuine issue regarding pretext is present. Plaintiff does not concede the legitimacy or accuracy of any of the letters, but Plaintiff's specific objection is to the Magistrate Judge's determination that there were no genuine, disputed facts concerning the disciplinary and performance issues raised in the third and final letter that Plaintiff received on November 3, 2016. Plaintiff asserts that a reasonable jury could find that this letter is full of falsehoods and is thus baseless.

Plaintiff's final letter was for insubordination and leadership failure and was based on the following, according to Defendant: (1) Plaintiff had ignored Stephens's instructions regarding the demotion of Ken Baxter; (2) Plaintiff continued to park in a secured lot, despite being told not to by former VP Brock and Corporate Security, on nine occasions in September and October 2016; (3) Plaintiff failed to report a mishandled delivery unit in his region, which caused 122 service failures; and (4) Plaintiff failed

to discontinue use of the Time Discrepancy ("TD") delay code, notwithstanding instructions that had been given to him to do so on October 11 and 18, 2016.

### 1. Demotion of Ken Baxter

Plaintiff contends that he did not demote Ken Baxter, a manager in Plaintiff's chain of command, as Stephens stated Plaintiff had done in the warning/termination letter. Plaintiff points to evidence in the record that Baxter applied for an hourly position in Columbia, South Carolina, and received it because no one else applied. After Baxter received that position, he then requested a Leave of Absence in writing, which Plaintiff granted. Thus, Plaintiff maintains that he did nothing to remove Baxter from the position he held, and Plaintiff further contends that Stephens could not have held an honest, good faith belief that Plaintiff was insubordinate because he told Stephens what actually happened.

Contrary to what Plaintiff argues, there is no evidence that Stephens was aware Baxter independently applied for the hourly position in Columbia, South Carolina. In fact, Plaintiff avers in the declaration that he submitted with his summary judgment response that "[his] understanding from Fred's *testimony* is that Ken applied for an open Handler position in Columbia, SC and got the job because – even though he was in Group 2 – nobody else applied for the position." (Declaration of Roddie Melvin "Melvin Decl." [Doc. No. 83-17] ¶ 74) (emphasis added). Plaintiff avers that he spoke with Stephens, explained that he had not disobeyed any of his instructions, and

explained what had actually happened. (*Id.* ¶ 82.) However, given Plaintiff's averment that a colleague's testimony informed his understanding of how Baxter obtained the hourly position in South Carolina, this is not information that Plaintiff could have shared with Stephens prior to Plaintiff's termination.

Unquestionably, Stephens was under the impression on September 14, 2016, that Plaintiff demoted Baxter and placed him on a leave of absence, as Stephens indicated as much in the email he sent Plaintiff. (Doc. No. 61-7 at 13.) Plaintiff did not state in his email response to Stephens that he did not demote Baxter; rather, he simply stated the following: "Joe this guy has cost me more than you know. He put an expense report in a drawer and now this. We were simply trying to HELP him get back to Indy. He indicated he was sick and needed to get back. I thought I was doing the right thing." (Doc. No. 61-7 at 14.) Plaintiff's deposition and declaration testimony indicate that Plaintiff subsequently spoke to Stephens about what transpired and that Stephens understood what Plaintiff had done, but Plaintiff has not pointed to any evidence that Stephens knew or should have known that Plaintiff had not demoted Baxter.

Having closely considered Plaintiff's arguments and the evidence upon which he relies, the Court finds that Plaintiff's objection is without merit. Even if Stephens's reliance on the demotion of Baxter as a basis for Plaintiff's termination was factually in error, Plaintiff has not pointed to any evidence tending to show that Stephens knew this reason to be a falsehood at the time that he terminated

Plaintiff. This is problematic with respect to Plaintiff's attempt to show a genuine issue concerning pretext, as Eleventh Circuit authority indicates the following:

> Evidence showing a false factual predicate underlying the employer's proffered reason does not unequivocally prove that the employer did not rely on the reason in making the employment decision. Instead, it may merely indicate that the employer, acting in good faith, made the disputed employment decision on the basis of erroneous information. It is obviously not a violation of federal employment discrimination laws for an employer to err in assessing the performance of an employee. Thus, establishing pretext is not merely demonstrating that the employer made a mistake, but that the employer did not give an honest account of its behavior.

*Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1564 (11th Cir. 1995) (internal citations omitted). Plaintiff has not presented evidence from which a reasonable jury could infer that Stephens did not genuinely believe that Plaintiff had not followed his directive concerning Baxter.

### 2. Parking Inside Security Fence

Plaintiff claims that he followed all appropriate parking rules and only parked inside the security fence with permission from Security. Plaintiff points to evidence that Stephens had previously seen Security allow him to

park inside the security fence, and Plaintiff also testified that he told Stephens, prior to the issuance of the warning/termination letter, that Security had authorized him to park inside the security fence.

The evidence indicates that Plaintiff had reached an understanding with Security Director Alex Kerr back in 2012 that Plaintiff would confer with Kerr's subordinates, Rich Landsiedel and Lois Burnett, whenever he was conducting employee meetings and other special events and needed permission to park inside the security fence to be able to transport items quickly to and from the meetings. However, in 2015, Ricky Brock, who was a VP and Plaintiff's supervisor at that time, sent Plaintiff a Performance Reminder that advised Plaintiff of various performance deficiencies, including that Plaintiff had gone to Security to get permission to park inside the security fence, which Brock said was directly in violation of his instruction regarding ramp security. Brock instructed Plaintiff in that Performance Reminder that any "[s]pecial request through any department that benefit[ted] [him] personally [was] not [to] be requested by [him]." (Doc. No. 61-7 at 18.)

Stephens specifically referenced the above Performance Reminder in the warning/termination letter issued on November 3, 2016, thus making the letter relevant to the termination decision and to the Court's pretext analysis. (Doc. No. 61-7 at 2.) Additionally, as the Magistrate Judge noted, the managing director of Security, Kristina Burchfield, sent Joe Stephens an email in September of 2016 indicating that Plaintiff was

observed parking his personal vehicle inside the perimeter fence. When asked about why he was parking inside the perimeter fence, Plaintiff stated that his knee was bad. Stephens was advised in that email correspondence that Plaintiff had stated he would discontinue parking inside the perimeter fence. (Doc. No. 61-7 at 17.) Yet, as indicated in the warning/termination letter issued on November 3, 2016, Plaintiff parked his personal vehicle in the unapproved location nine additional times in less than a two-month period after stating that he would discontinue parking inside the perimeter fence.

The information available to Stephens indicated that Plaintiff was no longer supposed to be parking inside the security fence, irrespective of Plaintiff's discussions with Security Managers Burnett and Landsiedel, but that he had continued to do so. This basis for the disciplinary action was not a "falsehood" or a pretext for discrimination, as Plaintiff contends.

**3. Reporting of Mishandled Delivery and Accompanying Service Failures**

With respect to the reporting of the mishandled delivery and the 122 accompanying service failures, Plaintiff states that he could not report the incident to Stephens because the incident had not been properly reported to him. According to Plaintiff, he thought that his Operations Administrator had reported the exception and did not learn that she had not done so until after someone else had already reported the exception to Stephens. Plaintiff points out that Stephens testified

that FedEx does not fire somebody every time there is a service failure, and Plaintiff maintains that it is "highly suspicious" that Defendant used this "*one* incident" as a basis for termination. (Doc. No. 99 at 49) (emphasis in original). The evidence relied on by Plaintiff does not create a genuine issue regarding pretext.

As an initial manner, Defendant did not base the termination decision on this one incident. Stephens cited four different reasons in the warning/termination letter for the disciplinary action. Additionally, while Plaintiff essentially blames his Operations Administrator for the failure to report the incident to Stephens and states that he explained to Stephens that his Operations Administrator was responsible for that failure to report, Stephens's apparent decision to hold Plaintiff ultimately responsible for the failure to report the exception that occurred within his region is a business decision and is not evidence of pretext. It is not this Court's role "to act as a super personnel department that second-guesses employers' business judgments." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1092 (11th Cir. 2004) (internal marks and citation omitted). Whether Defendant acted unfairly or unwisely to hold Plaintiff ultimately responsible for the failure and to include this failure among the reasons to support the termination decision is not for this Court to decide.

**4. TD Delay Code**

The final issue in the warning/termination letter concerns the TD Delay Code, which is a code that is entered into FedEx's system to classify certain incidents

when a plane is delayed in getting out. Plaintiff argues that Stephens never instructed him to halt the usage of the code immediately. Rather, the instruction was to reduce it, and Stephens, according to Plaintiff, understood this to be Plaintiff's understanding.

In the warning/termination letter, Stephens indicated that he had told Plaintiff to discontinue the application of the TD Delay Code multiple times. Regardless of whether there was a miscommunication about discontinuing the use of the code all together or reducing the use of the code, Stephens explained in the warning/termination letter that Plaintiff's organization had actually increased the frequency of use of the TD Delay Code. (Doc. No. 61-7 at 3.) As such, even if the instruction was only to reduce the use of the TD Delay Code or Plaintiff reasonably understood that to be the instruction, Plaintiff did not comply with that instruction. Plaintiff points to no evidence creating a genuine issue of material fact concerning whether his organization increased the use of the TD Delay Code, as Stephens stated in the warning/termination letter. Thus, Plaintiff's argument that Stephens could not have had a good-faith belief that Plaintiff was being insubordinate is not supported by the evidence, even when that evidence is construed, as it must be, in Plaintiff's favor. There is no genuine issue to go before a jury relating to the TD Delay Code.

### F. Plaintiff's Statement of Additional Facts

Plaintiff contends that the Magistrate Judge erred in failing to address Defendant's inadequate

response to Plaintiff's Statement of Additional Facts. Specifically, Plaintiff states that of Plaintiff's 218 additional facts, Defendant responded only to numbers 1-9, 11-20, 42, and 142-47. Plaintiff argues that Defendant's failure to respond to the remaining facts requires that those facts be treated as conceded for the purpose of summary judgment. Plaintiff further maintains that even Defendant's objections to the limited number of facts to which Defendant responded are deficient. For this reason, Plaintiff urges that all of Plaintiff's additional facts should be conceded for consideration at summary judgment.

In contrast to Local Rule 56.1.B(2)a(2), which specifically states that the Court will deem the movant's undisputed facts as admitted unless the respondent addresses each fact in the manner set forth in that rule, Local Rule 56.1B(3) does not require that the Court deem any additional facts as admitted if there is no response or an inadequate response to the additional facts. *See U.S. for Use and Ben. of WFI Georgia, Inc. v. Gray Ins. Co.*, 701 F. Supp. 2d 1320, 1333 n. 14 (N.D. Ga. 2010) (noting that Local Rule 56.1B(3) "does not require the court deem anything admitted"). The Magistrate Judge could have considered the additional facts at issue unopposed or admitted, and this is often what is done. *See, e.g., Gaylor v. Greenbriar of Dahlonega Shopping Center, Inc.*, 975 F. Supp. 2d 1374, 1391 n.12 (N.D. Ga. 2013); *E.E.O.C. v. Atlanta Gastroenterology Assocs., LLC,* No. Civ.A.1:05CV2504-TWT, 2007 WL 602212, at *3 n.2 (N.D. Ga. Feb. 16, 2007). However, the Magistrate Judge apparently opted in favor of deciding the case on the merits, which also is a permissible exercise of the Court's discretion. *See*

*Flores v. Ultimate Appearance Law Service, LLC,* CIVIL ACTION NO. 1:14-CV-485-RWS, 2016 WL 7437124, at *1 n.1 (N.D. Ga. Sept. 15, 2016) ("Plaintiff filed a Statement of Additional Facts in compliance with Local Rule 56.1B(3), but Defendants did not respond to the Additional Facts. The Court could deem these Additional Facts admitted. However, in an effort to decide this case on the merits, the Court has not done so."). For this reason, the Court overrules this objection.

### G. Rejection of Discriminatory Remarks as "Stray Remarks"

Plaintiff objects to the characterization of Stephens's questions and comments to him about his age as "stray remarks." Plaintiff argues that Stephens's discriminatory animus, as indicated by the remarks, prompted the June warning letter and the subsequent disciplinary letters that Plaintiff received and on which Stephens eventually based his decision to terminate Plaintiff's employment.

While acknowledging that discriminatory remarks made by a decisionmaker can be evidence of pretext, the Magistrate Judge reasoned that the remarks are not sufficient to create an issue of fact as to whether Stephens would not have terminated Plaintiff but for his age. First, the evidence relied on by Plaintiff indicated that Stephens had made age-related marks concerning Plaintiff on only one occasion. Second, Plaintiff provided no evidence that the remarks were linked to the termination decision. Third, the Magistrate Judge reasoned that the remarks were too remote in time from the date of Plaintiff's

termination to support Plaintiff's claims. Fourth, the Magistrate Judge considered that there were four other managing directors in Plaintiff's region over 50 years old, who were not disciplined as frequently as was Plaintiff, and that Plaintiff's replacement also was over 50 years old.

Having freshly considered the evidence concerning Stephens's discriminatory statements in conjunction with the entire record, the Court agrees that the statements, albeit disturbing, are not probative, circumstantial evidence of discriminatory intent with respect to Plaintiff's termination. The statements made by Stephens were isolated remarks, and there is no evidence that the statements were related to the decision to terminate Plaintiff. These statements, alone, are insufficient to establish a material fact on pretext or a convincing mosaic, and the record does not otherwise support Plaintiff's discrimination claims.

**H. Failure to Consider Expert Report**

Plaintiff next argues that the Magistrate Judge improperly ignored the testimony of his expert, Lorene Schaefer, Esq. According to Plaintiff, Schaefer's testimony supports that FedEx inadequately investigated Plaintiff's complaints of discrimination and that a thorough investigation of Plaintiff's complaints likely would have substantiated Plaintiff's claim that Stephens asked him about his age and retirement plans. Schaefer goes a step further and also opines that if Stephens's subsequent actions had been scrutinized, as they likely would have been, Plaintiff likely would not have been terminated.

The Magistrate Judge did not ignore this evidence. Indeed, the R&R includes a quotation of the summary from Schaefer's expert report. (Doc. No. 95 at 50.) In considering Defendant's Motion to Exclude the Expert Testimony, the Magistrate Judge stated that he had reviewed the report and concluded that testimony consistent with the report, even if admissible, still does not create an issue of fact as to any of Plaintiff's claims. (*Id.)* The Magistrate Judge reasoned that even an "investigation of the investigation" did not yield sufficient evidence to create an issue of material fact concerning whether the decision to terminate Plaintiff was discriminatory. (*Id.* at 51.) The Court agrees.

Plaintiff was disciplined and ultimately terminated for legitimate reasons, and Plaintiff has not persuasively shown that those reasons were a pretext for discrimination. Irrespective of any standards for effective workplace investigations and whether Defendant's response to Plaintiff's discrimination complaints met or failed to meet those standards, evidence that Defendant's investigations were deficient does not alter Plaintiff's failure to persuasively contest Defendant's showing that Plaintiff was terminated for legitimate, nondiscriminatory reasons.

Additionally, Plaintiff previously emphasized that his intent in using Schaefer's expert report at the summary judgment stage was merely to identify the standards for effective workplace investigations, not to prove Defendant's failure to meet those standards. (Doc. No. 94 at 2, 5.) Yet, in his objections, Plaintiff argues that the Magistrate Judge failed to consider the way the

expert report sheds light on the way Defendant enabled discrimination and retaliation. If the purpose of the expert report, on summary judgment, was simply to set forth the standards, Plaintiff cannot logically argue that the Magistrate Judge should have considered how the expert report demonstrated that the workplace investigations were deficient.

Plaintiff's objection concerning the Magistrate Judge's failure to consider the expert report is due to be overruled.

## I. Exclusion of "Me Too" Evidence

Plaintiff finally objects to the R&R on the basis that it ignores the history of discrimination allegations against Stephens, including accusations by five other FedEx employees that Stephens discriminated against them. In the context of employment discrimination cases, the Eleventh Circuit has held that "me too" evidence may be admissible under Federal Rule of Civil Procedure 404(b) to prove the employer's motive, intent, or plan to discriminate against a plaintiff. *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1286 (11th Cir. 2008); *Phillips v. Smalley Maint. Servs., Inc.,* 711 F.2d 1524, 1532 (11th Cir. 1983).

Contrary to Plaintiff's argument, the Magistrate Judge did not ignore this "me too" evidence or exclude it outright. Rather, the Magistrate Judge considered the particulars of those accusations, the investigations of those accusations, and the outcomes of the investigations before

concluding that the history of complaints is minimally probative and fails to help establish a "convincing mosaic" of circumstantial evidence creating a reasonable inference that Stephens terminated Plaintiff based on his age. (Doc. No. 95 at 34-36.) In addition to the reasons articulated by the Magistrate Judge for finding that the "me too" allegations do not create material issues of fact, many of the "me too" allegations occurred under very different circumstances and some of the allegations are quite remote in time. *See Davis v. Dunn Constr. Co., Inc.*, 872 F. Supp. 2d 1291, 1318 (N.D. Ala. 2012) (finding relevant to the analysis whether the other allegations of discrimination occurred close in time to the plaintiff's allegations, whether the other employees alleging discrimination had similar job positions as the plaintiff, whether the other employees suffered adverse employment actions for reasons similar to the defendant's proffered reason for demoting the plaintiff, and whether there was a common decisionmaker). Having conducted a de novo review of the issues and evidence concerning the "me too" allegations, the Court agrees that those allegations are only minimally probative and do not shed much light upon Stephens's alleged intent to discriminate against Plaintiff.

## III. CONCLUSION

Having conducted a de novo review of all portions of the R&R to which Plaintiff objects and having reviewed the remainder of the R&R for plain error, the Court agrees that Defendant is entitled to summary judgment on Plaintiff's discrimination and retaliation

claims. Accordingly, the Court **ADOPTS** the R&R as the decision of this Court. Defendant's Motion for Summary Judgment [Doc. No. 57] is **GRANTED** and Defendant's Motion to Exclude Testimony of Lorene F. Schaefer, Esq. [Doc. No. 90] is **DENIED as moot**. Plaintiff's claims are **DISMISSED**.

SO ORDERED this 1st day of May, 2019.

s/ CLARENCE COOPER
CLARENCE COOPER
SENIOR UNITED STATES
DISTRICT JUDGE

## APPENDIX C — FINAL REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, DATED JANUARY 28, 2019

CIVIL ACTION FILE NO.:
1:17-CV-00789-CC-JCF

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

RODDIE MELVIN,

*Plaintiff,*

v.

FEDERAL EXPRESS CORPORATION,

*Defendant.*

### FINAL REPORT AND RECOMMENDATION

This case is before the Court on Defendant's Motion For Summary Judgment. (Doc. 57) and its Motion To Exclude Testimony Of Lorene F. Schaefer, Esq (Doc. 90). For the reasons that follow, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED**. It is further **RECOMMENDED** that Defendant's motion to exclude testimony be **DENIED as moot.**

*Appendix C*

## Factual Background

The facts, for summary judgment purposes only, are derived from Defendant's statement of material facts (Doc. 57-2, "Def. SMF"); Plaintiff's response to Defendant's statement of material facts (Doc. 83-2); Plaintiff's statement of additional material facts (Doc. 83-3, "Pl. SMF"); Defendant's response to Plaintiff's statement of additional material facts (Doc. 92); and undisputed record evidence. The undersigned notes that the parties' factual assertions are taken in large part from the depositions of Plaintiff (Doc. 61, "Pl. Dep."); Michael Pigors (Doc. 60, "Pigors Dep."); Joseph Stephens (Doc. 70, "Stephens Dep."); George Sims (Doc. 62, "Sims Dep."); Bobby Willis (Doc. 71, "Willis Dep."); Reginald Owens, Sr. (Doc. 66, "Owens Dep."); Shannon Brown (Doc. 67, "Shannon Brown Dep."); Carla Laszewski (Doc. 77, "Laszewski Dep."); and Wanda English (Doc. 84, "English Dep.").

### I. Plaintiff's Employment With FedEx

Plaintiff Roddie Melvin ("Plaintiff"), an African-American who is over 40 years old, was employed by Defendant Federal Express Corporation ("Defendant" or "FedEx") from 1983 until he was terminated in November 2016. (Doc. 1 ¶¶ 8, 14; Def. SMF ¶ 4; Doc. 83-2 ¶ 4). From February 2006 to the date of his termination, Plaintiff held the position of managing director of one of four districts within the Southern Region of Defendant's Air Ground Freight Services Division ("AGFS"). Other managing directors in the Southern Region at the time of Plaintiff's termination included: Maurice Settles ("Settles"), an

African-American male aged 56; Bobby Willis ("Willis"), an African-American male aged 55; Jeff Brown ("Brown"), an African-American male aged 55; and Anna Lewis ("Lewis"), a white female aged 51. (Doc. 57-1 ("Def. MSJ") at 5[1]; Doc. 83-2 ¶ 6). Over the course of his employment with FedEx, Plaintiff was offered several management promotions. (Pl. SMF ¶¶ 58-59, 61-63, 66, 68). Plaintiff also received several management awards from 1990 to 2010. (*Id.* ¶¶ 60, 64, 65, 72, 74). Plaintiff was nominated for a vice president ("VP") position by his superior, VP Reginald Owens, Sr. ("Owens"). (*Id.* ¶ 75).

Prior to April 2016, Plaintiff reported to VPs Owens and Ricky Brock ("Brock"). (Def. SMF ¶ 7; Doc. 83-2 ¶ 7). In April 2016, Brock retired and was replaced by Joseph Stephens ("Stephens"), a VP in Defendant's Memphis hub. (Doc. Def. SMF ¶¶ 8, 9; Doc. 83-2 ¶¶ 8, 9). Prior to assuming VP over the Southern Region, Stephens was hired by FedEx's president of U.S. Operations, Michael Pigors ("Pigors"), to fill a VP position for Defendant's Memphis hub office. (Def. SMF ¶¶ 13-14). At one point, Plaintiff expressed interest in the Memphis VP position, but he was not nominated for it. (Def. SMF ¶¶ 12, 14, 15; Doc. 83-2 ¶¶ 12, 14, 15).[2]

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1. Citation is to ECF pagination except when citing to deposition testimony.

2. The parties disagree as to whether Plaintiff was fairly considered by Pigors for the Memphis hub VP position in 2015 and Plaintiff's interest in being nominated by his superior, Ricky Brock, before the position was filled by Stephens. (*Compare* Def. SMF ¶¶ 13, 14, 16 *with* Doc. 83-2 ¶¶ 13, 14, 16). However, this dispute appears to be immaterial, as Plaintiff has withdrawn his initial allegation that

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## II. Plaintiff's Warning Letters From Supervisors

During the time that Plaintiff reported to VP Owens, Plaintiff received discipline counseling concerning administrative failures. (Def. SMF ¶ 38; Doc. 83-2 ¶ 38). Owens testified that he issued the discipline to Plaintiff in the form of a "warning letter[,]" initiated by excessive absences and communications failures about managing operations. (Owens Dep. at 41:6-10; Def. SMF ¶ 38). Owens also testified that prior to Owens's issuance of the discipline letter, Plaintiff was not reachable during "critical points in [his] operation" when he needed to be there. (Owens Dep. at 44:9-11; Def. SMF ¶ 39). Owens also issued Plaintiff verbal counseling for taking Fridays off "for two to three months . . . as a liberty day[.]" (Owens Dep. at 49:14-16; Def. SMF ¶ 39; Doc. 83-2 ¶ 39). Plaintiff stated that the Fridays on which Owens believed he took "liberty days" were misclassified in the Microsoft Outlook calendar to which Owens had access. (Pl. Decl. ¶ 15). On May 14, 2008, Owens issued Plaintiff further discipline in the form of a warning letter. (Doc. 61-1 at 2-3; *see also* Def. SMF ¶ 40; Doc. 83-2 ¶ 40). Specifically, the letter cited Plaintiff's failure to contact members of upper management regarding an aircraft accident and resultant "asset damages[.]" (Doc. 61-1 at 2). The letter advised Plaintiff of his right to appeal the discipline's issuance through FedEx's "Guaranteed Fair Treatment Procedure/EEO Complaint Process[.]" (*Id.*). Plaintiff did not utilize Defendant's appeal process. (Doc. 83-2 ¶ 41).

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he was denied the opportunity to apply for the Memphis VP position on the basis of his race. (Doc. 83 at 4, n.1).

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On August 12, 2015, VP Brock issued Plaintiff a written Performance Reminder, which cited communications issues, Plaintiff's failure to follow uniform reporting mandates, and "poor judgment" resulting from occurrences such as Plaintiff's continued decision to park in a secured lot despite being told not to by a managing director of security, Alex Kerr ("Kerr"). (Doc. 63-1 at 1-2; *see also* Brock Dep. at 88:12-91:23; Doc. 83-2 ¶ 43). After Kerr directed managing directors not to park in the secured area, Plaintiff obtained approval to do so from Kerr's subordinates, security managers Lois Burnett or Richard Lansidle. (Doc. 83-2 ¶ 43;Pl. Decl. 84; Doc. 86 at 10:6-18). Plaintiff also sent an email to Kerr indicating that he would require parking within the security gates "when I am conducting employee meetings at and between ATLR and FOPRT" or "when a member of my team needs to bring in food for safety events, skip levels, or employee celebrations and meetings, etc." (Doc. 61-19 at 2). In a response, Kerr stated that he did "not see an issue with anything you have described we just need to make sure that this is properly communicated[. W]e have processes to deal with this at other locations that Lois [Burnett] can implement for you." (*Id.*).

On June 16, 2016, VP Stephens issued Plaintiff a warning letter regarding over forty past due or delinquent managerial tasks, referred to as "PRISMs," which included late employee performance reviews, past due mandatory Department of Transportation ("DOT") requirements, and past due safe driving awards. (Def. SMF ¶ 64; Doc. 83-2 ¶ 64). Specifically, Stephens's letter cited 26 late performance reviews, 20 past due DOT

requirements, and six past due safe driving awards. (Doc. 61-3 at 2). Stephens wrote that "[w]hile a select few were explainable, the majority were not and dated back to June, 2015 or 11 months delinquent." (*Id.*). Stephens's letter also stated that Plaintiff had falsely told Stephens he had counseled his subordinates for the late PRISM tasks when in fact he had not done so. (*Id.*). Instead, Stephens stated, Plaintiff had "merely forwarding my EMAIL communications, intended for you, to your team versus taking a sense of ownership and demonstrating a leadership role in upholding policy[.] . . . Your lack of ownership and associated leadership are a conduct issue and in direct violation of the Acceptable Conduct Policy, P2-5[.]" (*Id.* at 3). Stephens's letter stated that, "In accordance with policy, this Warning Letter will remain active for twelve months. Any three (3) notifications of deficiency (i.e., any combination of Warning Letters and/or Performance Reminders) received within a 12-month period may result in termination." (*Id.*).

Plaintiff received another disciplinary letter from Stephens on August 11, 2016, which referenced multiple inaccurate expense reports, unauthorized distribution of confidential information, operational failures resulting in delayed services, and non-compliance with capture rates and audit performance. (Def. SMF ¶ 75; Doc. 83-2 ¶ 75; Doc. 61-4 at 2-5). Further, that letter cited Plaintiff's requisition to replace an employee despite Plaintiff's unit being fully staffed. (Def. SMF ¶ 76; Doc. 83-2 ¶ 76; Doc. 61-4 at 2). Finally, Stephens's August 2016 letter referred to a May 16, 2016 discussion with Plaintiff regarding his failure to take responsibility for administrative shortcomings, as

well as a June 16, 2016 discussion regarding "the lack of follow up and improvement from our prior discussion[,]" which accompanied Plaintiff's first disciplinary letter from Stephens. (Doc. 61-4 at 2).[3]

## III. Plaintiff's November 2016 Disciplinary Letter And Termination

Plaintiff was suspended with pay on October 27, 2016 pending an investigation. (Def. SMF ¶ 84; Doc. 83-2 ¶ 84). On November 3, 2016, Stephens issued Plaintiff a Warning/Termination Letter from Stephens "for insubordination and Leadership Failure in violation of the Acceptable Conduct Policy (P2-6)[.]" (Doc. 61-7 at 2; *see also* Def. SMF ¶ 85; Doc. 83-2 ¶ 85). The letter stated that Stephens had a conducted an investigation resulting in a finding that Plaintiff had ignored Stephens's instructions regarding the demotion of a subordinate manager named Ken Baxter. (Doc. 61-7 at 2). Specifically, Stephens's letter states that Plaintiff demoted Baxter despite being told not to do so by Stephens. (*Id.*). The letter also stated that Plaintiff continued to park in a secured lot despite being told not to by former VP Brock and Corporate Security on nine occasions in September and October 2016. (*Id.*). Additionally, the letter referenced a mishandled delivery unit in Plaintiff's region that he failed to report, which caused 122 service failures and Plaintiff's failure to "discontinue the application of the T[ime] D[iscrepancy] ["TD"] delay code due to the excessive use identified in

3. In his response to Defendant's statement of material facts, Plaintiff disputes that the discussion referenced by Stephens ever took place. (Doc. 83-2 ¶ 75).

your District" despite instructions to do so on October 11 and 18, 2016.[4] (*Id.* at 3). Finally, the letter cited Plaintiff's two previous disciplinary Warning Letters and stated the following:

> Both the Performance Improvement Policy (P2-50) and the Acceptable Conduct Policy (P2-5) provide that three notifications of deficiency within a twelve-month period normally result in termination. Therefore, your employment is terminated effective today.

(*Id.*). The Warning Letter stated that Plaintiff was permitted to pursue an appeal of the disciplinary action under Defendant's Guaranteed Fair Treatment Procedures within five days of receipt of the letter. (*Id.*).

## IV. *Plaintiff's Complaints And Defendant's Internal Investigation*

In May 2016, Plaintiff told Human Resources Adviser Wanda English ("English") that Stephens had asked Plaintiff his age and whether or not he was planning on retiring soon, stating "just go ahead and move on and let the young guys take over." (Pl. Dep. at 226:5-16; *see also*

4. Defendant put into place TD delay codes "to account for the discrepancy between clocks on the wall, watches worn by employees, and clocks in the aircraft[.]" (Def. SMF ¶ 111; Doc. 83-2 ¶ 111). In an email dated October 11, 2016, Stephens told Plaintiff, "I want the use of TD delays eliminated. Either the flights departed on time or they didn't—we discussed this last week." (Doc. 61-11 at 2; Def. SMF ¶ 116; Doc. 83-2 ¶ 116).

Pl. SMF ¶ 22). In June 2016, Plaintiff verbally complained to English and Senior VP of Human Resources, Shannon Brown, that he believed Stephens had issued him the June 2016 warning letter on the basis of his age "and retaliating against him by creating a 'laundry list' of issues to justify terminating" him. (Pl. SMF ¶ 23). In August 2016, Plaintiff again verbally reported to English and Shannon Brown that he believed Stephens's August 2016 warning letter was issued "in an attempt to terminate him because of his age." (*Id.* ¶ 24).

On November 2, 2016, during the time he was suspended, Plaintiff sent an email to Shannon Brown and Wanda English complaining of "age/race discrimination, harassment and retaliation [] against Joseph Stephens." (Doc. 61-12 at 2). Plaintiff cited the ageist comments and questions about whether he was going to retire soon that gave rise to his verbal complaints, and he stated that he believed Stephens was about to terminate him based on his age and race. (*Id.* at 2-3). Carla Laszewski ("Laszewski"), Defendant's in-house counsel, investigated Plaintiff's internal EEO complaint initiated by his November 2 email. (*See* Doc. 57-25 at 2, ¶ 4). Laszewski compiled an investigative file containing approximately 220 pages of materials (*id.*), which found that Plaintiff's allegations were unsubstantiated, and his discipline and termination was issued without violations to FedEx's EEO policy. "no policy violations." (*Id.* at 7).

On December 5, 2016, FedEx Appeals Board Administrator Elizabeth Casteel sent Plaintiff a letter as a follow-up to the appeal of his termination, which stated in relevant part:

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> The Appeals Board convened on December 5, 2016, at your request, to review your Warning Letter/Termination on November 3, 2016, for violation of the Acceptable Conduct Policy.
>
> The Board carefully analyzed the facts surrounding your GFTP complaint and it was the Board's decision to uphold management's actions.

(Doc. 61-25 at 2). Shannon Brown was the head of Defendant's Appeals Board, and other Board members varied on a rotational basis. (Def. SMF ¶ 132; Doc. 83-2 ¶ 132). As part of Defendant's Human Resources department collected information, and the Appeals Board "reviewed the documentation and the facts, discussed the same, and rendered a decision to uphold Stephens' decision[.]" (Def. SMF ¶ 132; Doc. 83-2 ¶ 132).

After his termination, Plaintiff's position was filled by Thomas Maxwell, an Asian male aged 51 years old. (Def. SMF ¶ 134; Doc. 83-2 ¶ 134).

**Procedural History**

On March 3, 2017, Plaintiff filed a Complaint in which he alleges that Defendant terminated him because of his race and retaliated against him in violation of 42 U.S.C. § 1981. (*See generally* Doc. 1). Defendant filed an Answer on April 18, 2017. (Doc. 6). Plaintiff filed an Amended Complaint with the Court's leave on June 5, 2017, in which he added claims of discrimination and retaliation under

the ADEA, 29 U.S.C. § 621 *et seq.* (*See* Doc. 14 ¶¶ 59-72). Defendant answered the Amended Complaint on June 19, 2017. (Doc. 21).

Defendant has now filed a motion seeking summary judgment (Doc. 57) with supporting brief (Doc. 57-1), statement of material facts (Doc. 57-2), and exhibits (Docs. 57-3 through 57-27). Plaintiff submitted a response brief (Doc. 83), a response to Defendant's statement of material facts (Doc. 83-2), a statement of additional material facts (Doc. 83-3), and exhibits (Docs. 83-4 through 83-38). Defendant timely replied to Plaintiff's response (Doc. 91) and filed its own response to Plaintiff's statement of additional material facts on June 5, 2018 with exhibits (Doc. 92; Docs. 92-1 through 92-26).

On June 5, 2018, Defendant filed a Motion To Exclude Testimony Of Lorene F. Schaefer, Esq. (Doc. 90). Plaintiff responded to Defendant's motion to strike on June 20, 2018. (Doc. 94). Defendant has not filed a reply brief, and the time for doing so has passed. With briefing on both motions complete, the undersigned turns to the merits of Defendant's motions.

## Discussion

### I. Defendant's Motion For Summary Judgment (Doc. 57)

#### A. Summary Judgment Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact

and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by[] . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1). The moving party has an initial burden of informing the court of the basis for the motion and showing that there is no genuine issue of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *see also Arnold v. Litton Loan Servicing, LP*, No. 1:08-cv-2623-WSD, 2009 WL 5200292, at *4 (N.D. Ga. Dec. 23, 2009) ("The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact.") (citing *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246 (11th Cir. 1999)). If the non-moving party will bear the burden of proving the material issue at trial, then in order to defeat summary judgment, she must respond by going beyond the pleadings, and by her own affidavits, or by the discovery on file, identify facts sufficient to establish the existence of a genuine issue for trial. *See Celotex*, 477 U.S. at 322, 324. "No genuine issue of material fact exists if a party has failed to 'make a showing sufficient to establish the existence of an element . . . on which that party will bear the burden of proof at trial.'" *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186-87 (11th Cir. 2011) (quoting *Celotex*, 477 U.S. at 322).

Furthermore, "[a] nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot

meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, 506 U.S. 952 (1992); *see also* FED. R. CIV. P. 56(c)(1)(B), (c)(4). The evidence "cannot consist of conclusory allegations or legal conclusions." *Avirgan*, 932 F.2d at 1577. Unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

For a dispute about a material fact to be "genuine," the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). It is not the court's function at the summary judgment stage to determine credibility or decide the truth of the matter. *Id.* at 249, 255. Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255.

**B. Plaintiff's Claims**

Defendant seeks summary judgment on all of Plaintiff's claims, i.e., his discrimination and retaliation claims under section 1981 and his ADEA age discrimination and retaliation claims. (Doc. 57).

*Appendix C*

## 1. Age Discrimination Claim

### i. Analytical Framework

The ADEA provides in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's age." 29 U.S.C. § 623(a)(1); *see also Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1270 (11th Cir. 2014) ("The ADEA, whose purpose is 'to promote employment of older persons based on their ability rather than age,' 29 U.S.C. § 621(b), prohibits certain actions by an employer, including the termination of, or deprivation of employment opportunities against, an employee who is at least 40 years old because of that employee's age." (citing 29 U.S.C. §§ 623(a)(1)-(2), 631(a))).

"A plaintiff may support a claim under the ADEA through either direct evidence or circumstantial evidence." *Mazzeo*, 746 F.3d at 1270. "To ultimately prevail, '[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision.'" *Id.* (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009)). In *Gross*, the Court rejected the application to ADEA claims of the burdenshifting scheme used in Title VII mixed motive cases, i.e., if the plaintiff presents evidence that an impermissible characteristic played a motivating factor in the employment decision, the burden of persuasion shifts to the employer to prove

by a preponderance of the evidence that it would have taken the same action in the absence of the impermissible motivation. 557 U.S. at 171-74. Instead, the Court observed that, unlike Title VII, the text of the ADEA does not authorize a mixedmotive age discrimination claim, and held that "a plaintiff bringing a disparatetreatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action," and "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." *Id.* at 173-80.

Thus, "[t]he ADEA requires that 'age [be] the "reason" that the employer decided to act.'" *Mora v. Jackson Mem. Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (quoting *Gross*, 557 U.S. at 176). "Because an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist: the employer either acted 'because of' the plaintiff's age or it did not." *Id.* (citing *Gross*, 557 U.S. at 180); *see also Smith v. CH2M Hill, Inc.*, 521 Fed. Appx. 773, 774-75 (11th Cir. 2013) (unpublished decision) (explaining that it is not sufficient to allege that age "substantially motivated" the challenged employment decision, rather "[a]n age discrimination claim under the ADEA . . . requires that age be the but-for cause of the termination"); *Avera v. Airline Pilots Ass'n Int'l*, 436 Fed. Appx. 969, 978 (11th Cir. 2011) (unpublished decision) ("Although a Title VII plaintiff may prove his case by showing that his membership in a protected class played a 'motivating part' in the employment decision, an ADEA

plaintiff must prove that age was the 'but for' cause of the employer's adverse decision," i.e., "the ADEA does not permit a 'mixed-motive' claim for disparate treatment." (citing *Gross* and *Mora*)); *Collins v. Fulton Cnty. Sch. Dist.*, No. 1:12-CV-1299-ODE-JSA, 2012 U.S. Dist. LEXIS 187392, at *45 (N.D. Ga. Dec. 26, 2012) ("Under the ADEA, a plaintiff must ultimately prove at trial that age was a 'determinative factor' in the employment decision, or, in other words, that the decision at issue would not have occurred absent the age discrimination."), *adopted in part and modified in part on other grounds by* 2013 U.S. Dist. LEXIS 46388 (N.D. Ga. Feb. 27, 2013).[5]

"Where, as here, a plaintiff proffers circumstantial evidence to establish an ADEA claim, [the courts] apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)."[6] *Mazzeo*, 746 F.3d at 1270 (citing *Sims v. MVM, Inc.*, 704 F.3d 1327, 1332-33 (11th Cir. 2013)). "Under this framework, a plaintiff must first establish a *prima facie* case of age discrimination." *Id.* (citing *Chapman v. AI Transp.*,

5. Plaintiff asserts that but-for causation is not the standard at the summary judgment stage. (Doc. 83 at 28-29 (citing *Ramirez v. Bausch & Lomb, Inc.*, 546 Fed. Appx. 829, 833 (11th Cir. 2013)). However, Plaintiff's cited authority dealt with questions of causation in a case brought under the Florida Whistleblower Act pursuant to the district court's diversity jurisdiction. *See Ramirez*, 546 Fed. Appx. at 830. Further, *Ramirez* did nothing to change the "but-for" requirement in ADEA claims that has been consistently applied by the Eleventh Circuit.

6. Plaintiff does not point to direct evidence of discrimination. (*See generally* Doc. 83).

229 F.3d 1012, 1024 (11th Cir. 2000)). "If he does so, the burden of production shifts to the employer 'to articulate a legitimate, nondiscriminatory reason for the challenged employment action.'" *Id.* (quoting *Chapman*, 229 F.3d at 1024). "If the defendant articulates at least one such reason, the plaintiff is then given the opportunity to show that the employer's stated reason is merely a pretext for discrimination." *Id.* The Eleventh Circuit has made clear that courts continue to apply the *McDonnell Douglas* evidentiary framework to ADEA claims even after the Supreme Court's decision in *Gross* because the burden of *persuasion* never shifts to the employer under that framework. *See Sims*, 704 F.3d at 1332-33. The Eleventh Circuit has cautioned, however, that "establishing the elements of the McDonnell Douglas framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary judgment motion in an employment discrimination case." *Smith v. Lockheed Martin*, 644 F. 3d 1321, 1328 (11th Cir. 2011). Rather, "the plaintiff will always survive summary judgment if [s]he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* The court explained that "[a] triable issue of fact exists if the record, viewed in the light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.'" *Id.* (quoting *Silverman v. Bd. of Educ.*, 637 F.3d 729, 733 (7th Cir. 2011)).

### ii. Plaintiff's Prima Facie Case[7]

"[A] plaintiff may establish a *prima facie* case for an ADEA violation by demonstrating that: (1) he was a member of a protected class; (2) he was subjected to an adverse employment action; (3) he was qualified to do the job; and (4) he was replaced by or otherwise lost a position to a younger individual." *Mitchell v. City of Lafayette*, 504 Fed. Appx. 867, 870 (11th Cir. 2013) (unpublished decision). The fourth prong can also be satisfied by a showing that the employer "treated employees who were not members of the [plaintiff's] protected class more favorably under similar circumstances." *Washington v. UPS*, 567 Fed. Appx. 749, 751 (11th Cir. 2014) (unpublished decision).

Plaintiff has shown that he was a member of a protected class for purposes of the ADEA, i.e., he was 40 years of age or older. *See, e.g.*, *Queen v. Wal-Mart Stores East, L.P.*, No. 2:11-CV-00070, 2012 U.S. Dist. LEXIS 105839, at *11 (N.D. Ga. July 30, 2012) ("At all times during his employment with Wal-Mart, Plaintiff was a member of the ADEA protected-class because he was over 40 years old."). He has also shown that he was qualified to perform his job as evidenced by the fact that he held the position of managing director since 1998, and Defendant does not argue that Plaintiff was not qualified for the position. (Def. SMF ¶ 4). It is uncontroverted that

7. Plaintiff's response brief in opposition to summary judgment focuses on the "convincing mosaic" analysis contemplated in *Smith*, 644 F. 3d at 1328. However, in an abundance of caution, the Court assesses the merits of Defendant's motion under both the *McDonnell-Douglas* framework and the "convincing mosaic" approach.

Defendant terminated his employment, and "termination is an actionable materially-adverse employment action." *Id.* at *17. Finally, it is uncontroverted that Plaintiff was replaced by a younger individual in Thomas Maxwell, who is nine years younger than Plaintiff. (Def. SMF ¶ 134).

The Court therefore finds that, for summary judgment purposes, Plaintiff has established a *prima facie* claim of age discrimination.

### iii. Defendant's Legitimate, Non-Discriminatory Reason For Terminating Plaintiff's Employment

The employer's burden to articulate a legitimate, non-discriminatory reason for its employment decisions is one of production, not persuasion. *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1331 (11th Cir. 1998). This burden is "exceedingly light." *Turnes v. Amsouth Bank, N.A.*, 36 F.3d 1057, 1060-61 (11th Cir. 1994) (internal quotation omitted). Defendant has presented evidence that it terminated Plaintiff's employment because of his "recurrent patterns of deficiencies," which included discipline issued by three separate VPs of administrative failures, failing to hold his employees accountable, not meeting expectations, failing to notify supervisors of service delays, administrative lapses, inappropriate parking, failing to address late items with his staff and falsely representing that he had done so, failure to handle financial responsibilities, and insubordination. (Doc. 57-1 at 8). The record includes the disciplinary letters issued to Plaintiff from various VPs, which corresponds with Defendant's assertion of its reason

for Plaintiff's termination. (*See* Docs. 61-1, 61-2, 61-3, 61-4, 61-7). Specifically, Plaintiff's November 2016 letter states:

> A review of your disciplinary history indicates you have received three letters within the past twelve months:
>
> 1. November 3, 2016—Warning Letter / Termination 06-12-3T Insubordination/06-13-3T Leadership Failure
>
> 2. August 11, 2016—Performance Reminder 03-13-DD Other Performance Violation
>
> 3. June 16, 2016—Warning Letter 06-13-Leadership Failure Both the Performance Improvement Policy (P2-50) and the Acceptable Conduct Policy (P2-5) provide that three notifications of deficiency within a twelve-month period normally result in termination. Therefore, your employment is terminated effective today.

(Doc. 61-7 at 4).

The Court finds Defendant has satisfied its "exceedingly light" burden of articulating a legitimate, non-discriminatory reason for terminating Plaintiff's employment.

**iv. Pretext**

Because Defendant has articulated a legitimate, non-discriminatory reason for terminating Plaintiff's employment, in order to survive summary judgment on his ADEA discrimination claim, Plaintiff must "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman*, 229 F.3d at 1024 (quoting *Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997)). The court's role at this juncture is to "evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (internal quotation omitted). In making the required pretext showing, "[a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer." *Chapman*, 229 F.3d at 1030. Rather, "[p]rovided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id.*

Here, Plaintiff argues that "[t]he record will cast serious doubt on Defendant's 'legitimate reasons for termination' and show that a reasonable jury could find

pretext." (Doc. 83 at 7). The Court finds that none of these arguments is sufficient to create a genuine issue of material fact on whether Defendant's reasons were pretext for age discrimination.

For one, Plaintiff argues that Stephens' comments about Plaintiff's age in May 2016 constitutes evidence that Stephens's real reason for disciplining and terminating him was based on his age. (Doc. 83 at 15). Plaintiff testified that in May 2016, Stephens asked Plaintiff "if I was going to retire and how old I was and specifically if I wanted to continue to do this and why would I, given what my age was, and would I be able to keep up." (Pl. Dep. at 181:6-11). In his declaration, Plaintiff stated that Stephens "encouraged me to move on and let the 'young guys' take over." (Doc. 83-17 ¶ 20).

"A plaintiff can [] demonstrate pretext by showing that the decision maker made discriminatory remarks." *Ritchie v. Indus. Steel*, 426 Fed. Appx. 867, 873 (11th Cir. 2011) (citing *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1362 (11th Cir. 1999)). "Such remarks are evidence of pretext because they shed light on the decision maker's state of mind at the time that he made the challenged employment decision." *Id.* However, "stray remarks that are isolated and unrelated to the challenged employment decision are insufficient to establish a pretext." *Id.* (citing *Rojas v. Fla.*, 285 F.3d 1339, 1342-43 (11th Cir. 2002)). In *Ritchie*, pretext in an age discrimination case could not be shown where the plaintiff alleged the decision-maker frequently referred to him as "old man" and made other comments about his age

on two occasions as Plaintiff did not "link those statements to the decision to terminate his employment." *Id.* at 874.

Here, Plaintiff has pointed to only one occasion on which Stephens made mention of his age and has provided no evidence that it was linked to the decision to terminate him. At worst, these are merely stray remarks unrelated to Plaintiff's termination. *See Ritchie*, 426 Fed. Appx. at 873. Moreover, Plaintiff testified that the conversation took place on approximately May 16, 2016—over five months before Plaintiff was suspended in late October 2016 and ultimately terminated on November 3, 2016. (*See* Doc. 83-17 ¶ 20). Finally, it is undisputed that there were four other managing directors in Plaintiff's region over 50 years old. (*See* Doc. 83-2 ¶ 6). Settles is only three years younger than Plaintiff, and Willis is four years younger than Plaintiff. (Pl. Dep. at 142:2-19). Yet these individuals were not issued discipline as frequently as was Plaintiff, suggesting that Stephens did not have a discriminatory intent with regard to age. (Doc. 57-14 ¶ 5; Willis Dep. at 30:13-15). Plaintiff's replacement was also over 50 years old. (*See* Doc. 83-2 ¶ 134). Simply put, the age-related remarks alleged to have been uttered by Stephens in May 2016 are not sufficient to create an issue of fact on whether Stephens would not have terminated Plaintiff but for his age. *See, e.g.*, *Thomas v. Dolgencorp, LLC*, 645 Fed. Appx. 948, 951 (11th Cir. 2016) (unpublished decision).

Plaintiff also argues that his termination did not adhere to FedEx's progressive discipline policy because Stephens did not verbally counsel him before issuing written discipline. (Doc. 83 at 18). Plaintiff cites to the

testimony of VP Owens testimony, who stated that a supervisor should sit down with an employee and discuss a plan for improvement before issuing written discipline. (*See* Owens Dep. at 34:24-35:21). While Stephens may not have adhered to the policy as stated by Owens on every occasion, the record demonstrates that Plaintiff was informally counseled on several areas of concern that became the subject of his written discipline. For instance, on April 20, 2016, Stephens discussed his performance expectations with all the managing directors and provided to the managing directors, via email, a document titled "General Admin Expectations." (Pl. Dep. at 54:8-55:3, 60:3-61:10; Doc. 61-8; Doc. 61-9 at 2; Def. SMF ¶ 45; Doc. 83-2 ¶ 45). This document stated the following with regard to PRISM tasks: "All members of management must review DUE screens by the first week of every month, with all activities completed no later than the 15th of the noted period." (Doc. 61-8 at 3). Stephens reiterated his expectation to managing directors in an email dated May 17, 2016, which reflected that untimely compliance with PRISM tasks was "beyond unacceptable at the M[anaging] D[irector] level." (*See* Doc. 61-9 at 2-3). Yet, Plaintiff's June 16, 2016 disciplinary letter stated that Plaintiff still had failed to comply with the expectation that all PRISM tasks be completed by the 15th of the month. (Doc. 61-3 at 2).

Plaintiff's August 11, 2016 letter concerned inaccurate travel and expense reports, an inaccurate requisition for extra staff, and service failures resulting from failed process control, an air strike, overlooked and misrouted flights, and unacceptable audit ratings. (Doc. 61-4 at 2-3). Prior to issuing this letter, Stephens counseled Plaintiff

in emails about his service failures (Pl. Dep. at 21:23-22:4) and his poor audit results (Doc. 61-4 at 73), and he emailed Plaintiff about a missing expense report (*id.* at 19). Plaintiff also testified that Stephens called several times about his unacceptable audit scores and an inaccurate expense report. (Pl. Dep. At 91:10-17, 93:25-94:12). While the record does not show that Stephens provided Plaintiff with informal counseling for every instance included on the August 11 disciplinary letter, the record does not demand a conclusion that Defendant's policy required informal counseling before issuing discipline. For instance, Shannon Brown testified that "if an employee—or the manager feels that the employee is not doing what they're supposed to do, then they can issue any form of discipline." (Shannon Brown Dep. at 33:8-11). Brown further testified that that he did not think a conversation was required by policy before writing an employee up. (*Id.* at 31:2-12). And while Defendant's attached discipline policy states that managers "may choose to counsel the employee about acceptable conduct[,]" the policy is silent on whether a conversation is required or whether managers "may . . . counsel" employees concerning acceptable conduct using other means. (Doc. 61-28 at 6). In light of the testimony from Owens that a manager should try to provide counseling before imposing discipline, the Court will examine whether record evidence supports a conclusion that Plaintiff was counseled with respect to the subject matter of the disciplinary letters.

With regard to Plaintiff's final disciplinary letter issued on November 3, 2016, the record demonstrates that Plaintiff was counseled for several of the violations

the letter cites. First, Plaintiff and Stephens developed a performance agreement on August 12, 2016, about which they communicated directly. (Stephens Dep. at 118:3-10; Pl. Dep. at 41:4-11; Doc. 61-10 at 2-3). The performance agreement addressed areas of concern with regard to Plaintiff's performance, which included submitting accurate travel requests and expense reports, protecting sensitive information, performing well on audits, comply with requisitions requirements, displaying effective leadership, and eliminating "operational mishaps." (Doc. 61-10 at 2-3). Further, emails of record from Stephens to Plaintiff and from Human Resources Advisor George Sims to Stephens demonstrate that Stephens directed Plaintiff to take specific measures regarding Baxter's transfer and leave of absence approval. (Doc. 61-7 at 13; Doc. 61-7 at 16). Stephens also directed Plaintiff to "eliminate[]" the use of TD delay codes. (Doc. 61-7 at 34). And Plaintiff was instructed not to park his care in the secured lot by security on September 7, 2016. (*Id.* at 17). Plaintiff's November 11 letter references subject matter deficiencies that had already been addressed in by previous instruction and counseling, i.e., his team's continued use of TD delay codes, his failure to report a service failure, and his noncompliance with Stephens's directions associated with the transfer of Baxter to Indianapolis. (Doc. 61-7 at 2-3). In short, even if a reasonable jury could conclude that FedEx's discipline policy required counseling before issuing discipline (consistent with the testimony of Owens), and that this policy was not followed on certain occasions, the evidence of record demonstrates that Stephens satisfied even that (disputed) policy regarding several performance areas on each of Plaintiff's disciplinary

letters. The conduct which was the subject of informal counseling, standing alone or together, provides ample support for Defendant's legitimate, non-discriminatory reasons for terminating Plaintiff.

Plaintiff makes a series of related arguments in support of the contention that he was unfairly terminated. (*See* Doc. 83 at 8 (arguing that Plaintiff was "target[ed] with a flurry of discipline"); *id.* at 19-20 (arguing that Plaintiff was held to a different standard than other managing directors); *id.* at 20-27 (arguing that Plaintiff's discipline was groundless)). The undersigned finds that these arguments, which are aimed at the unfairness of Plaintiff's termination, fail to create an issue of fact as to whether Stephens in fact terminated Plaintiff because of his age. Plaintiff's contention that he was singled out and treated unfairly in comparison with his younger peers lacks merit. Plaintiff has not shown that younger managing directors engaged in the same conduct for which he was disciplined, such as obtaining permission from security managers to park in a secured area without Stephens's knowledge (*id.* at 2); failing to communicate with Stephens's office and ensure that phones were covered (*id.*); failing to provide counseling to his management team regarding the aircraft accident despite representing that he had done so (Doc. 61-1 at 2); failing to demote an employee despite directive from his supervisor (Doc. 61-7 at 2); failing to stay timely with PRISM tasks (Pl. Dep. at 54:17-57:19); improperly distributing privileged information (Doc. 61-4 at 3); and failing to eliminate the use of TD delay codes despite a specific directive to do so (Pl. Dep. at 81:17-25).

Moreover, Plaintiff does not dispute that he indeed engaged in much of the conduct for which he was disciplined. For example, Plaintiff does not deny that he had several late and overdue managerial "PRISM" tasks, some of which were eleven months overdue, as indicated in Stephens's first Performance Reminder letter to Plaintiff. (Doc. 83-2 at 42; Doc. 61-3 at 2). Nor does Plaintiff dispute that he received expectations that PRISM items were due "by the first week of every month, with all activities completed no later than the 15th of the noted period." (Doc. 61-8 at 3; *see also* Pl. Dep. at 60:3-12). Plaintiff also indicated he understood that Stephens believed noncompliance with PRISM tasks was unacceptable among managing directors. (Pl. Dep. at 62:23-64:5; *see also* Doc. 61-9 at 2). While Plaintiff argues that Stephens unfairly disciplined him about late PRISM items, Laszewski testified that managing director Lewis "didn't have any late entries" and Settles's late entries were "addressed and corrected in accordance with the specified time frame, which is why he didn't get any discipline." (Laszewski Dep. at 93:11-12). Regarding Stephens's second disciplinary letter, Plaintiff testified that there were inaccuracies on travel requests (Pl. Dep. at 67:15-21); he submitted the wrong requisition for a full-time position (*id.* at 68:24-69:6); and he failed to review expense reports before submitting them (*id.* at 75:18-20).

Plaintiff contends that his final disciplinary letter, issued on November 3, 2016, contains "falsehoods" that could have been cleared up "by running a simple inquiry[.]" (Doc. 83 at 22). However, Plaintiff's arguments boil down to assertions of why Stephens should not have issued him

discipline. For instance, Plaintiff asserts that he obtained approval to park in a secured area and that Stephens "could have learned this if he ever bothered to ask[.]" (*Id.*). It is undisputed that Security Director Alex Kerr sent an email requiring managing directors to park outside the secured lot. (Doc. 61-19 at 3). The record indicates that Plaintiff emailed Kerr to state that he should be excepted on certain occasions. (*Id.* at 2). Kerr replied that he did "not see an issue with anything you have described we just need to make sure that this is properly communicated . . . I will call in a few just finished a meeting." (*Id.*). In reply, Plaintiff stated that he would "take it from here . . . Thanks for the support." (*Id.*). Beyond this, Plaintiff testified that he did not recall discussing the issue with Kerr (Pl. Dep. at 151:18-21), and the record indicates that he simply attempted to obtain permission from Kerr's subordinates, Rich Landsiedel and Lois Burnett. (Doc. 61-20 at 2). An email from Kristina Burchfield, a managing director of security, to Stephens in September 2016 indicates that when confronted by a different security manager, Stan Carson, Plaintiff told Carson that he required a secured lot parking spot because "his [] knee is bad[.]" (Doc. 77-3 at 6).

Regarding Stephens's reference to Plaintiff's frequent use of TD delay codes, despite being told by Stephens "I want the use of TD delays eliminated[,]" (Doc. 61-11 at 2), Plaintiff testified that he interpreted Stephens to mean "that he wanted us to start ratcheting them down and get them eliminated over a certain time period." (Pl. Dep. at 83:3-5). Plaintiff also testified that he did not tell his team to stop using the use of TD codes. (*Id.* at 190:4-10).

Finally, Plaintiff argues that he was unfairly disciplined for insubordination concerning his assignment of Baxter to an hourly position in Indianapolis. (Doc. 83 at 25-27). However, the record indicates that Plaintiff was expressly directed "not to allow Ken [Baxter] to be released from his assigned as CAER manager or be placed on [a leave of absence] to seek another position in Indianapolis. (Doc. 61-21 at 2; *see also* Doc. 61-22 at 2 (email from Stephens to Plaintiff stating "This is why I explicitly advised you NOT to simply demote and place this individual on a [leave of absence]. . . . In your situation, I don't understand why you wouldn't comply with my direction back on 09/01.")). In his deposition testimony, Plaintiff agreed that Stephens wanted to wait to assign Baxter a position because he believed Baxter "was trying to circumvent the hiring process and obtain a manager position[.]" (Pl. Dep. at 163:14-20). Plaintiff also testified that the position in which he placed Baxter was a "demotion" (*see id.* at 127:20-23), in contradiction with his assertion that he "did not disobey Stephens's instruction because he did not demote Baxter."[8] (Doc. 83 at 26).

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8. An email from Sims to Stephens shortly after the incident contradicts Plaintiff's testimony that he did not disobey Stephens's instructions or demote Baxter:

> Joe,
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> As we discussed, during a recent conversation with Rod Melvin the topic regarding the status of Ken Baxter surfaced. At that time, Rod stated that he was told by you explicitly not to allow Ken to be released from his assignment as [] manager or be placed on a[ leave of absence] to seek another position

Despite the fact that Plaintiff has not disputed much of the conduct for which Stephens disciplined him, Plaintiff's beliefs about whether he should have been disciplined are ultimately immaterial because the pretext inquiry is concerned not with whether Plaintiff was fairly disciplined, but whether Stephens believed the discipline was warranted. *See Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1265 (11th Cir. 2002) (unpublished decision) (finding that pretext is not established by showing the decision-maker "was mistaken about the facts upon which [it] based [its] alleged non-discriminatory decision"); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("The inquiry of the ADEA is limited to whether [the employer] *believed* that [the plaintiff] was guilty . . . and if so, whether this belief was the reason behind [the plaintiff's] discharge."); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980 n. 2 (11th Cir. 1989) (that the employee did not in fact engage in misconduct reported to the employer is irrelevant to the question whether the employer believed the employee had done wrong). Here, Plaintiff's disagreements about the nature of discipline he received do not create an issue of fact on whether Stephens honestly believed that Plaintiff engaged in the conduct for which he was disciplined. *See Davis v. Mgmt. Tech.*, 193 Fed. Appx. 872, 875 (11th Cir. 2006) (unpublished decision) (explaining that the plaintiff's "denial that he violated

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> in Indianapolis. Rod then stated that although he received this directive from you, he decided to demote Ken to a Material Handler position so as to facilitate the move back to INDY[.]

(Doc. 77-4 at 1).

ManTech's policy [was] insufficient to prevent summary judgment" where he did not rebut the decisionmaker's explanation for believing that he had violated the policy). Furthermore, Plaintiff's "burden is to show not just that [Defendant] proffered reasons for firing her were ill-founded but that unlawful discrimination was the true reason." *See Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1267 (11th Cir. 2010). Plaintiff has not met that burden because he has not developed evidence sufficient to allow a jury to conclude that Stephens did not believe he engaged in the conduct cited in the discipline letters that formed the basis for his termination, i.e., failing to communicate with Stephens, evidencing leadership failure by failing to address late PRISM tasks with Plaintiff's senior managers, submitting inaccurate expense reports and inaccurate employment requisitions, failing to take responsibility for administrative shortcomings, failing to follow Stephens's directions regarding Baxter's position in Indianapolis, failing to report service failures, and failing to discontinue the use of TD codes. (*See* Docs. 61-3 at 2; 61-4 at 2-5; 61-7 at 2-3).

For the above reasons, none of Plaintiff's arguments in opposition to Defendant's motion create an issue of fact on whether Defendant's articulated reasons for terminating him were pretext for age discrimination under the *McDonnell-Douglas* burden-shifting framework. The undersigned now considers whether Plaintiff has produced circumstantial evidence of discriminatory intent through the "convincing mosaic" standard described in *Smith v. Lockheed.*

*Appendix C*

**v. Convincing Mosaic**

Plaintiff argues, "If the evidence is viewed through the correct lens in favor of the non-moving party, the record will present a convincing mosaic of circumstantial evidence to allow a reasonable jury to infer intentional discrimination by the decisionmaker." (Doc. 83 at 6-7). Plaintiff relies on many of the same assertions discussed above with regard to the pretext inquiry, including his denials of misconduct, his disagreement with the severity or accuracy of Stephens's discipline, and his position that he was treated differently from younger managing directors. (*See id.* at 7-27). As previously discussed, those allegations fail to suggest a reasonable inference of discriminatory intent. *See, e.g.*, *Flowers*, 1 F. Supp. 3d 1363, 1381 (N.D. Ga. 2014) (noting that "most of the evidentiary tiles [the plaintiff] proffers were discarded as insufficient or irrelevant in considering his other arguments against summary judgment" and "cannot now be reassembled to create a convincing mosaic of discriminatory intent").

Plaintiff also alleges that a history of discrimination complaints leveled at Stephens gives rise to an inference that he discriminated against Plaintiff. (Doc. 83 at 7-9). Plaintiff cites evidence that Stephens has been accused of age discrimination in the past. (*See* Pl. SMF ¶¶ 13-18). This type of "me too" evidence can be relevant to the issue of Stephens's intent or motive and thus may be admissible at trial under FED. R. EVID. 404(b). *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286-87 (11th Cir. 2008). However "if the 'me too' evidence is too far removed from the case at hand, it may be excluded as

overly prejudicial[.]" *Jackson v. UPS*, Civil Action No. 12-CV-01753-WMA, 2013 U.S. Dist. LEXIS 143755, at *35-36 (N.D. Ala. Oct. 4, 2013) (citing FED. R. EVID. 403), *aff'd* 2014 U.S. App. LEXIS 22092 (11th Cir. Nov. 20, 2014).

In this case, the "history" of complaints against Stephens is minimally probative because there is no indication that the allegations of discrimination were substantiated. In fact, two of the age-related complaints Plaintiff cites—filed by Calvin Casey and Raymond Flint—were found to be unsubstantiated by Defendant's internal complaint process after an investigation. (*See* Docs. 70-1 at 2; 71-2 at 2). The investigative report concerning Raymond Flint, conducted two years before Plaintiff was terminated, stated that "[t]he termination data does not reveal a pattern of targeting since discipline and involuntary terminations were administered to managers of varied ages including some under the age of 40." (Doc. 71-2 at 2).

Simply put, the accusations of discrimination against Stephens fail to create a genuine fact issue on whether Stephens possessed a discriminatory intent in terminating Plaintiff. *See Jackson*, 2013 U.S. Dist. LEXIS 143755, at *36 (past discrimination accusations were of "minimal probative value" because they involved charges that "were not pursued and for which no findings of fact were ever made"); *Andazola v. Logan's Roadhouse, Inc.*, Civil Action No. CV-10-S-316-W, 2013 U.S. Dist. LEXIS 73775, at *6-7 (N.D. Ala. May 24, 2013) (noting that while "district courts do not apply a blanket, *per se* rule excluding 'me too' evidence[,] . . . more often than not, 'me too' evidence

is not admitted at trial because the probative value of such evidence is judged to be 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence' ") (quoting FED. R. EVID. 403); *Johnson v. Interstate Brands Corp.*, 351 Fed. Appx. 36, 41 (6th Cir. 2009) (unpublished decision) ("trial courts regularly prohibit 'me too' evidence from or about other employees who claim discriminatory treatment because it is highly prejudicial and only slightly relevant") (citing *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988)).

Plaintiff has failed to establish a "convincing mosaic" of circumstantial evidence creating a reasonable inference that his termination was based on his age. Furthermore, the full scope of circumstantial evidence includes substantial evidence suggesting the termination was not the result of any discriminatory intent. For example, Plaintiff's replacement, Thomas Maxwell, was approximately 51 years old at the time he was hired, which is within Plaintiff's protected class. (Def. SMF ¶ 134; Doc. 83-2 ¶ 134). This fact cuts against the notion that Stephens maintained a discriminatory intent based on age. *See Shaw v. ASB Greenworld, Inc.*, Civil Action No. 7:05-CV-82(HL), 2007 U.S. Dist. LEXIS 49249, at *13 (M.D. Ga. July 9, 2007) (finding no circumstantial evidence of discrimination where the plaintiff's 51-year old "replacement was not outside the age group protected by the ADEA"). Additionally, four other managing directors in AGFS were in their 50s and reported to Stephens. (Def. SMF ¶ 6). Willis testified that Stephens "was very clear on

what he expected" and "was one of the best bosses I ever had." (Willis Dep. at 29:21-22, 31:21-22). In his declaration, Settles stated that he "was excited and was fine with" Stephens becoming VP of AGFS. (Doc. 57-14 ¶ 9).

Plaintiff's failure to appeal the issuance of his disciplinary letters is another piece of circumstantial evidence against finding that a jury could infer Stephens had a discriminatory intent. Plaintiff's letters included an addendum that stated the following in relevant part: "Should you in good faith believe this action is unfair, you have the right to enter the Guaranteed Fair Treatment Procedure/EEO Complaint process." (Doc. 61-3). Yet, prior to his suspension, Plaintiff did not submit any appeal or written internal complaints through FedEx's internal complaint process. (See Pl. Dep. at 27:19-28:1, 236:12-22). Plaintiff's failure to take advantage of this process, though not dispositive of his claims, is further circumstantial evidence in favor of a finding that no reasonable juror could infer the letters were issued with discriminatory intent. *See, e.g.*, *Simmons v. Neumann*, Case No. 97-8653-CIVSIMONTON, 1999 U.S. Dist. LEXIS 20664, at *48 (S.D. Fla. Nov. 5, 1999) (denying summary judgment on Plaintiff's disparate treatment claim where "Plaintiff never complained to anyone . . . that [his] evaluations were *racially* motivated) (emphasis in original).

Finally, the Court notes that this case stands in contrast to those in which courts have found a "convincing mosaic," including *Smith*. In *Smith*, the court found that the plaintiff, a white supervisor who was terminated for sending another employee a racially insensitive e-mail, was not required to produce evidence of a comparator, i.e., "a

black supervisor," in order to satisfy his *prima facie* case under *McDonnell Douglas* because "the record contained sufficient evidence to allow a jury to infer that Lockheed fired [the plaintiff] because he is white." *Smith*, 644 F.3d at 1327-28. That evidence included: evidence of more favorable treatment of nonwhite employees who engaged in similar misconduct (distribution of racially insensitive or derogatory e-mails in violation of Lockheed's "zero tolerance" policy); evidence of "a substantial incentive to discipline white employees more harshly than black employees" based on an employee (a white supremacist) who went on a shooting spree at a Lockheed facility, resulting in multiple lawsuits, an EEOC investigation, and negative publicity; and evidence that "Lockheed consciously injected race considerations into its discipline decision making without an adequate explanation for doing so," i.e., a matrix used by the disciplinary review committee that noted the race of the accused employees. *Smith*, 644 F.3d at 1328-46.

Similarly, in another case, the court found that the plaintiff, a female firefighter/paramedic, had "presented a 'convincing mosaic' of circumstantial evidence by which a reasonable jury could have inferred that the City was motivated by discriminatory intent to suspend and ultimately terminated Smith." *Smith v. City of New Smyrna Beach*, No. 13-13368, 2014 U.S. App. LEXIS 20772, at *33 (11th Cir. Oct. 23, 2014) (unpublished decision). The court noted: evidence that the Deputy Chief "harbored animus against Smith because of her sex, in view of his comments to Smith about her pregnancy and his indifference to her complaints of

discrimination"; evidence that other female firefighters also experienced discriminatory treatment, including differential application of work rules; evidence of sexist and derogatory comments by superiors and the creation of "new rules based on gender"; and evidence that the plaintiff was "systematically treated" worse than similarly situated male firefighters. *Id.* at *27-30. Likewise, in *Holland v. Gee*, the Eleventh Circuit found a "convincing mosaic of circumstantial evidence" to support the jury's finding that the plaintiff's pregnancy was a motivating factor for her termination. 677 F.3d 1047, 1063 (11th Cir. 2012). That "convincing mosaic" included evidence that after the plaintiff informed her employer of her pregnancy, she was treated differently from male employees, and her pregnancy became a factor in transferring her and "was a subject of discussions that led to her termination." *Id.* at 1062-63.

Plaintiff has not pointed to evidence similar to that cited in the above described cases in support of his claim. Even accepting as true Plaintiff's evidence that Stephens asked him about his age and retirement plans in May 2016, as discussed above, he fails to tie those comments to the event of his termination such that a reasonable juror could an infer Stephens possessed discriminatory intent. *See Connor v. Bell Microproducts-Future Tech, Inc.*, 492 Fed. Appx. 963, 967 n.1 (11th Cir. 2012) (unpublished decision) ("Conn[e]r's evidence, however, does not compare with that presented in *Smith* . . . . Indeed, [he] did not present sufficient evidence tying Bell's decisions to his age or race," or evidence of more favorable treatment of similarly situated employees.). In short, Plaintiff has failed

to adduce a sufficiently "convincing mosaic" of evidence such that a genuine issue of facts exists as to whether he was terminated on the basis of his age.

For the foregoing reasons, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED** on Plaintiff's ADEA discrimination claim.

### 2. Plaintiff's Discrimination Claim Under Section 1981

Defendant also seeks summary judgment on Plaintiff's race discrimination claim under § 1981. The *McDonnell Douglas* framework, already discussed above, also applies to Plaintiff's section 1981 race discrimination claim. *See Lewis v. Metro. Atlanta RTA*, 343 Fed. Appx. 450, 453, n. 4 (11th Cir. 2009) (unpublished decision) (section 1981 claims are analyzed under the *McDonnell Douglas* framework).

First, Plaintiff has established a *prima facie* claim of race discrimination under section 1981. Plaintiff satisfies the first element because, as an African-American, he belongs to a protected class. He satisfies the second and third elements for the same reasons referenced in his ADEA claim: his tenure at FedEx showed he was qualified for the job and his termination was an adverse employment decision. Finally, Plaintiff satisfies the fourth element by pointing to evidence that he was replaced by a member outside his protected class, i.e. Thomas Maxwell, who is Asian, not African-American. (Def. SMF ¶ 134). As more fully outlined above, Defendant satisfies its "exceedingly light" burden to articulate a legitimate,

nondiscriminatory reason for terminating Plaintiff by stating that his discharge was based on a "recurrent pattern of deficiencies" spanning the tenures of three VPs and resulting in repeated disciplinary reminders, warnings, and letters. (Doc. 57-1 at 8).

Plaintiff does not appear to extend his assertions of circumstantial evidence to race discrimination -- Plaintiff's argument section is titled, "PLAINTIFF HAS SET FORTH A 'CONVINCING MOSAIC OF CIRCUMSTANTIAL EVIDENCE' PROVING HE WAS TERMINATED BECAUSE OF HIS AGE AND IN RETALIATION FOR PROTECTED ACTIVITY." (Doc. 83 at 7). Regardless, the Court finds that Plaintiff has not created a genuine issue of fact on pretext or pointed to a "convincing mosaic" of circumstantial evidence from which a reasonable juror could infer racially discriminatory intent. For one, the undersigned has already reviewed and rejected Plaintiff's arguments in support of his assertion challenging the basis for his discipline and termination—arguments that Plaintiff may have intended to also form support assertions of pretext or a "convincing mosaic" under section 1981, though Plaintiff does not so state in his response brief. (*See* Section I.B.1.iv-v *supra*).

Further, even though a section 1981 claim does not require "but-for" causation, *see Davis v. Infinity Ins. Co.*, Case No. 2:15-cv-01111-JHE, 2018 U.S. Dist. LEXIS 98260, at *9 (N.D. Ala. June 12, 2018), Plaintiff's case is even weaker in the race discrimination context because it is undisputed that Stephens, the ultimate decision-maker in this case, did not make any race-related comments

to Plaintiff during the course of Plaintiff's employment with Defendant. (*See* Pl. Dep. at 26:22-24). And despite testifying that Pigors discriminated against him on the basis of race, Plaintiff never experienced "any conversation with [] Pigors in which [his] race, [his] ethnicity, [his] color, came up[.]"[9] (*Id.* at 143:11-15). The racial remark Plaintiff raises in support of his race discrimination claim was uttered by Pigors at a managers' meeting during the 2008 presidential campaign between Barack Obama and John McCain. (Pl. Dep. at 143:19-144:9). Plaintiff stated that Pigors made a joke about making sure that all managers voted for the Republican candidate. (*Id.*). Pigors admitted to making this comment in jest, stating that it was based on FedEx's contentious relationship at that time with labor unions. (Pigors Dep. at 38:2-39:5). However, Pigors's

9. In his Amended Complaint, Plaintiff makes reference to an unnamed source who told him AGFS "was 'too dark[]' " and AGFS "had been referred to as the 'Jungle Region.' " (Doc. 14 ¶¶ 20-21). It appears, however, that these comments were meant to support his claim that he was "denied the opportunity to apply for the VP position because of his race." (*Id.* ¶ 17). In any event, Plaintiff testified that he could not identify the individual who made the comments, just that fellow managing director Joe Brown had heard the comments made from someone else. (Pl. Dep. At 140:15-22). Plaintiff does not indicate how these comments were tied to his own adverse employment action. Even if they formed the basis for circumstantial evidence, they are insufficient, on their own, to create an issue of fact on whether Stephens's discriminated against Plaintiff because of his race because "[t]here is no indication . . . [the comments] can be reduced to admissible evidence at trial." *See Evans v. McClain*, 131 F.3d 957, 962 (11th Cir. 1997) (affirming district court's dismissal of evidence "based on gossip, common knowledge, and [a] hearsay statement of an unidentified representative").

comment is not even remotely "[]related to [Plaintiff's] challenged employment decision" and therefore fails to support Plaintiff's race discrimination claim. *Ritchie*, 426 Fed. Appx. 867 at 873.

In short, Plaintiff has not adduced sufficient evidence that Stephens's decision to terminate him was pretextual or that a "convincing mosaic" of circumstantial evidence exists sufficient to infer racial intent. Accordingly, it is **RECOMMENDED** that Defendant's motion for summary judgment as to Plaintiff's race discrimination claim under section 1981 be **GRANTED.**

### 3. ADEA and Section 1981 Retaliation

Finally, Defendant seeks summary judgment on Plaintiff's retaliation claim under the ADEA and section 1981. (Doc. 57-1 at 18-25). Because Plaintiff's retaliation claims under both statutes are based on the same facts, the undersigned analyzes the claims together. "The analytical framework for retaliation claims under Title VII, section 1981, and the ADEA is the same." *Monaghan v. Worldpay United States, Inc.*, Civil Action No. 1:16-CV-0760-CC-LTW, 2017 U.S. Dist. LEXIS, at *29 (N.D. Ga. Aug. 18, 2017) (citing *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th Cir. 2010)) (additional citations omitted), *adopted by* 2017 U.S. Dist. LEXIS 219038 (N.D. Ga. Sept. 27, 2017). "To establish a *prima facie* case of retaliation, a plaintiff must show that: (1) []he engaged in a statutorily protected activity; (2) []he suffered a materially adverse employment action; and (3) there was a causal link between the two events." *Redway v. Univ. of Miami*, Case No. 17-CV-

23326-WILLIAMS/LOUIS, 2018 U.S. Dist. LEXIS 184083, at *20-21 (S.D. Fla. Oct. 25, 2018) (citing *Jarvis v. Siemens Med. Sols. USA, Inc.*, 460 Fed. Appx. 851, 858 (11th Cir. 2012) (unpublished decision)).

The record indicates that Plaintiff complained of age discrimination and retaliation verbally to Chief Human Resources Officer Shannon Brown and Wanda English three times before his termination. (Pl. SMF ¶¶ Pl. Dep. at 27:13-15, 28:2-16, 29:15-34:23). As such, Plaintiff easily satisfies the first element as to his retaliation claim under the ADEA. *See Bowdish v. Fed. Express Corp.*, 699 F. Supp. 2d 1306, 1324 (W.D. Okla. 2010) (the plaintiff's verbal complaints constituted protected activity). Plaintiff has not referenced material in his verbal complaints to Brown and English having to do with his race. (*See* Pl. SMF ¶¶ 22-24). The verbal complaints are therefore not protected activity under section 1981. However, Plaintiff's November 2, 2016 email constitutes protected activity of both age and race discrimination, since it asserts his belief that his forthcoming termination were based on both protected characteristics. (*See* Doc. 61-12 at 2). Plaintiff satisfies the second element as to both age and race because it is undisputed that he was terminated from employment.

As to the third element, however, Plaintiff has not created an issue of fact regarding a causal link between his complaints and the discipline he received or his termination. "To establish the causal connection element, 'a plaintiff need only show that the protected activity and the adverse action were not wholly unrelated.'" *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir.

2000) (quoting *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1354 (11th Cir. 1999)). "At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took adverse employment action." *Clover*, 176 F.3d at 1354 (internal quotation omitted). "The defendant's awareness of the protected statement, however, may be established by circumstantial evidence." *Id.*

Here, the record does not indicate that Stephens knew about any of Plaintiff's complaints such that his decision to discipline or terminate Plaintiff was based on that knowledge. Stephens testified that he did not know Plaintiff ever verbally complained to English (Stephens Dep. at 94:22-23), and that he did not know that Plaintiff's complaints to Brown were about age discrimination (*id.* at 95:7-96:5). Shannon Brown and English both testified that they did not tell Stephens about Plaintiff's complaints. (Shannon Brown Dep. at 22:18-24, 67:14-19; English Dep. at 76:8-16).

Plaintiff responds to Defendant's statement of fact citing Shannon Brown's deposition by arguing that a jury could infer Brown's testimony was false and that, in actuality, he told Stephens of Plaintiff's complaints to him. (*See* Doc. 83-2 ¶ 31). This argument is a nonstarter and mistakes the Court's role at summary judgment, which is not to weigh evidence or assess witness credibility. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (rejecting argument that "the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses" and noting that "the plaintiff must

present affirmative evidence in order to defeat a properly supported motion for summary judgment"); *Clover*, 176 F.3d at 1355 (declining to speculate that the decision-maker knew of the plaintiff's protected activity where the individual to whom the plaintiff complained "could conceivably have told [him] about [the plaintiff's] protected activity"); *Frazier v. Burwell*, Civil Action File No. 1:14-cv-3529-WBH-JKL, 2016 U.S. Dist. LEXIS 194817, at *25 (N.D. Ga. July 15, 2016) (rejecting the plaintiff's argument that the Court must assume for purposes of summary judgment that the decisionmakers were lying in their depositions and affidavits), *adopted by* 2016 U.S. Dist. LEXIS 194818 (N.D. Ga. Aug. 2, 2016). Plaintiff has not pointed to affirmative evidence that Shannon Brown's deposition testimony should not be credited. Therefore, the Court considers his testimony, along with the other evidence of record, in determining whether Plaintiff has created an issue of fact.[10]

Even so, Plaintiff argues that the temporal proximity between his November termination and his May,

10. Plaintiff also asserts that it is the jury's province to determine whether "Shannon Brown told Stephens about [Plaintiff's] complaints of discrimination." (Doc. 83 at 34). Plaintiff premises this argument on "a consistent pattern within the lower federal courts of Georgia of failing to apply the correct standard of review" by substituting a judge's reasoning for the determinations of a jury. (Doc. 83 at 30-33). However, this argument fails to persuade the Court because the Eleventh Circuit has dismissed similar arguments in the past as meritless. *See Zivojinovich v. Barner*, 525 F.3d 1059, 1066 (11th Cir. 2008) (concluding that where summary judgment is appropriate, no Seventh Amendment violation occurs).

June, August, and November complaints establishes circumstantial evidence that creates an issue of fact as to whether Stephens knew of Plaintiff's complaints. (Doc. 83 at 27-28). This argument also fails. Plaintiff argues that "[b]ut for the 45-day performance period that the Company forced [] Stephens to extend to the Plaintiff, the termination would have taken place in early August." (*Id.* at 27). Indisputably, Plaintiff was terminated on November 3, 2016. (Pl. SMF ¶ 217), and the Court will not permit Plaintiff to use a hypothetical date for his termination to render his causation argument more plausible even if Stephens had already begun contemplating the termination at that time. As such, to the extent Plaintiff complained of discriminatory or retaliatory conduct in May, June, and August, those complaints—made three months before his termination—are too temporally remote to establish a reasonable inference that they were causally related. *See Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (finding that a threemonth period between protected activity and adverse action "does not allow a reasonable inference of a causal relation").

Plaintiff has also failed to establish an inference that those complaints caused him to receive the adverse action of the written discipline because the record demonstrates that the disciplinary letters were issued based on Plaintiff's own discrete conduct. *See Henderson v. FedEx Express*, 442 Fed. Appx. 502, 506 (11th Cir. 2011) (unpublished decision) ("Intervening acts of misconduct can break any causal link between the protected conduct and the adverse employment action[.]"). For example, Plaintiff allowed several PRISM tasks to lapse as late as

eleven months despite already being told by Stephens that he must be current on them, which was a topic of discussion in Plaintiff's June 2016 disciplinary letter. (Doc. 61-3 at 2; Doc. 83-2 ¶¶ 51, 61, 64 ("Plaintiff DOES NOT DISPUTE the date of the disciplinary letter or the number of late PRISM items.")). Plaintiff's second written discipline, issued in August 2016, was also issued on the basis of his own undisputed conduct. (*See* Doc. 61-4 (citing Plaintiff's inaccurate travel reports, requisition for full-time position despite being fully staffed, and inaccurately designating a part-time requisition); Doc. 83-2 ¶ 76)). Finally, Plaintiff's November 2016 disciplinary letter, which eventuated his termination, was based, *inter alia*, on Plaintiff's conduct surrounding the relocation of Baxter to Indianapolis, his team's use of TD delay codes after Stephens direction to "eliminate[]" their use,[11] and his failure to report a service failure (Doc. 61-7; Doc. 83-2 ¶¶ 110). Finally, Plaintiff testified that Stephens's disciplinary letters "dealt with items and things that occurred in [his] district" and were "based on information out of FedEx's computer system[.]" (Pl. Dep. at 41:24-42:8). Simply put, the record demonstrates that Stephens's disciplinary letters to Plaintiff were based on his objectively measured conduct. In the absence of any evidence beyond temporal proximity and in light of Plaintiff's failure to meet Stephens's expectations at various points during his employment, the Court observes no issue of fact regarding whether the discipline letters were issued on non-retaliatory bases. *See Schoebel v. Am. Integrity Ins. Co. of Fla.*, No.

11. Plaintiff does not dispute that Stephens stated "I want the use of TD delays eliminated," but argues that Stephens's really meant to reduce their use over a period of time. (Doc. 83-2 ¶ 116).

8:14-CV-426-T-27AEP, 2015 U.S. Dist. LEXIS 89868, at *6 (M.D. Fla. July 10, 2015) ("Schoebel's inappropriate emails constitute intervening misconduct which severed any causal connection which might otherwise be inferred from the close temporal proximity of her FMLA leave and termination.").

Finally, even if Plaintiff were able to establish his *prima facie* case of age or race retaliation, he fails to create an issue of fact on whether Defendant's proffered reasons for the adverse actions were pretextual. Plaintiff's brief appears to offer the same circumstantial evidence in support of pretext for retaliation as he does for his discrimination claims. (*See* Doc. 83 at 7-29). As the undersigned has already discussed at length, even viewing all inferences in Plaintiff's favor, the record simply fails to rebut Defendant's reasons for terminating Plaintiff, i.e. that he failed to meet expectations regarding behavior and performance despite having been issued multiple disciplinary letters from three different VPs. (*See* Doc. 57-1 at 6-18).

For these reasons, it is **RECOMMENDED** that Defendant's motion for summary judgment as to Plaintiff's retaliation claims under section 1981 and the ADEA be **GRANTED**.

## II. Defendant's Motion To Exclude Expert Testimony (Doc. 90)

Defendant moves to exclude an expert report proffered by Plaintiff and prepared by Lorene F.

Schaefer ("Schaefer"), which challenges the adequacy of Laszewski's internal investigation of Plaintiff's discrimination complaints. (*See generally* Doc. 90-25). Schaefer's report concludes with the following summary:

> In short, the Company's investigation fell far short of being prompt, impartial and thorough as required by the standard of care. To the contrary, it was conducted by the very attorney who had advised on the letters of discipline at issue in what appears to have been an effort to protect the Company and defendant the manager's actions. The investigating attorney deliberately ignored the very type of inquiry required in a claim of disparate treatment. This type of biased investigation is evidence of management's unlawful intent.

(*Id.* at 12).

The undersigned has reviewed Schaefer's report, and assuming without deciding that testimony consistent with the report were to be admissible, still it does not create an issue of fact on any of Plaintiff's claims. In particular, Plaintiff's ultimate conclusion concerning the report is that a more thorough investigation "would have meant any discipline issued by Stephens would have been much more closely scrutinized." (Doc. 83 at 13). Even after having engaged in an "investigation of the investigation" Plaintiff has still not proffered sufficient evidence to create an issue of material fact concerning whether the decision to terminate Plaintiff was the product of

discrimination. Under these circumstances, in light of the Court's recommendation that Defendant's motion for summary judgment be granted as to all Plaintiff's claims, it is **RECOMMENDED** that Defendant's Motion To Exclude Testimony Of Lorene F. Schaefer, Esq. be **DENIED as moot without prejudice** to Defendant's ability to renew the motion should the District Judge decide not to adopt the undersigned's recommendation on summary judgment.

## CONCLUSION

In light of the foregoing, it is **RECOMMENDED** that Defendant's Motion For Summary Judgment (Doc. 57) be **GRANTED** and that Plaintiff's claims be **DISMISSED**. It is further **RECOMMENDED** that Defendant's Motion To Exclude Testimony Of Lorene F. Schaefer, Esq. (Doc. 90) be **DENIED as moot without prejudice** to Defendant's opportunity to renew the motion should the District Judge decide not to adopt the undersigned's recommendation.

The Clerk is **DIRECTED** to terminate the referral of this case to the undersigned Magistrate Judge.

**IT IS SO REPORTED AND RECOMMENDED** this 28th day of January, 2019.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge

**APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED SEPTEMBER 10, 2020**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11872-HH

RODDIE MELVIN,

*Plaintiff-Appellant,*

vs.

FEDERAL EXPRESS CORPORATION,

*Defendant-Appellee.*

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

**ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC**

BEFORE: ROSENBAUM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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