20-1140

No. 21-

In the Supreme Court of the United States

ANGELA W. DEBOSE, PETITIONER

v.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, RESPONDENT.

ORIGINAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Rule 42 consolidation can deprive a party of a substantive right—the right to an appeal from a final judgment—when the Rules Enabling Act prohibits the federal rules from abridging or modifying a party's rights.

2. Whether the Eleventh Circuit erred in holding the denial of a pro se litigant's right to self-representation and to testify at trial as the type of due process constitutional rights errors in which the harmless error standard could apply.

3. Whether a verdict winner must file a timely motion for a new trial after entry of judgment in order to raise new-trial arguments and preserve a sufficiency-of-the-evidence challenge on appeal, after both parties moved for judgment as a matter of law under Rule 50(a) before submission of the case to the jury, but only the opposing party renewed that motion under Rule 50(b) after the jury's verdict, and was granted JMOL and a conditional new trial, but the original prevailing party was denied a new trial under Rule 59.

PARTIES TO THE PROCEEDING

Petitioner Angela DeBose was the plaintiff-appellant below.

Respondent University of South Florida Board of Trustees ("USFBOT") was the defendant-appellee below.

Ellucian, L.P. ("Ellucian") was a defendant-appellee below. However, plaintiff and Ellucian jointly moved the Eleventh Circuit Court for a stipulation of dismissal against Ellucian as a party, which was granted. Therefore, Ellucian is not a party to the instant petition.

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PETITION FOR A WRIT OF CERTIORARI

Angela W. DeBose petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's unpublished opinion of consolidated appeals, affirming the summary judgment orders of district court in consolidated Appeal Nos. 18-14637 and 19-10865 that disturbed Petitioner's jury verdict and denied Petitioner a new trial, is attached as Appendix [A-1]. The Eleventh Circuit's published opinion, *DeBose v. USF Bd. Of Trs.*, No. 18-14637 (11th Cir. Apr. 27, 2020), is attached as Appendix [A-2]. The Eleventh Circuit order denying rehearing and rehearing *en banc* for the failure to review consolidated appeal 19-10865, is attached as Appendix [A-3]. The Eleventh Circuit order accepting a separate Reply Brief for consolidated appeal 19-10865 is found at Appendix [A-4]. The Eleventh Circuit order consolidating appeals 18-14637 and 19-10865 following Petitioner's Objection is found at Appendix [A-5]. The District Court's Order denying Petitioner's Motion for New Trial is found at Appendix [A-6]. The District Court Order Denying Attorney fees/costs Petitioner paid to her former counsels and no longer Referring Front Pay is found at [A-7]. The District Court's Second Amended Judgment and its Order granting the USFBOT's JMOL and Conditional New Trial is found at Appendix [A-8] and [A-9] respectively. The Costs Taxed by the Clerk are found at Appendix [A-11]. The District Court's Order denying Petitioner's Motion for Reconsideration of fees/costs paid to her former counsels is found at Appendix [A-12]. The District Court's Amended Judgment clarifying the verdict was not split but unanimous in favor of Petitioner on her discrimination and retaliation claims, is at Appendix [A-13]. The Judgment in favor of Ellucian, L.P. is at [A-14]. The original Judgment on the jury verdict in favor of DeBose is at Appendix [A-15]. The Court's Jury Verdict Form is at [A-16]. The District Court's unpublished Order and Opinion at Summary Judgment is at Appendix [A-17]. The District Court's published Order and Opinion at Summary Judgment, *DeBose v. Univ. of S. Fla. Bd. Of Trs.*, Case No: 8:15-cv-2787-T-17AEP (M.D. Fla. Sep. 29, 2017), is at Appendix [A-18].

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(l) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on April 27, 2020. The court of appeals denied Petitioner's petition for rehearing and petition for rehearing *en banc* on September 10, 2020. Petitioner sought an extension of time and was accorded 150 days under the Court's March 19, 2020 Order (589 U.S.) until February 7, 2021 for filing a petition for certiorari. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Jurisdiction was proper in the District Court pursuant to 28 U.S.C. § 1331, and jurisdiction in the appellate court was proper pursuant to 28 U.S.C. §§ 1291 and 1294(1).

STATUTORY PROVISION AT ISSUE

42 U.S.C. §2000e, *et seq.*, as amended ("Title VII") and Florida Civil Rights Act of 1992, §760.01, Fla. Stat., *et seq.* ("FCRA").

STATEMENT

1. The Case and Facts

Petitioner, Angela DeBose ("DeBose"), was hired by the University of South Florida ("USF") in January 1988, serving last in the position of University System Registrar. In 27 years of service, DeBose's performance was rated exemplary. In 2014, the situation dramatically changed. DeBose was the victim of an invidious email smear campaign. Dr. Paul Dosal ("Dosal"), Vice Provost, and Dr. Ralph Wilcox ("Wilcox"), USF Provost, and others in senior leadership circulated racially-charged derogatory (e.g. *black bitch, black witch*) emails about her. Dosal and Wilcox, in their supervisory capacity, failed to address these acts of racism against DeBose, doing nothing to put a stop to it, though in their control, to enforce nondiscrimination and similar policies.

In June 2014, DeBose complained to Dosal about possible discrimination. Thereafter, Dosal and Wilcox effectively demoted DeBose, reducing her scope of work, through a reorganization. Dosal and Wilcox isolated and excluded DeBose from meetings where her attendance was usual or expected. DeBose was marginalized and treated disrespectfully. Dosal failed to conduct DeBose's annual performance appraisal, impacting her consideration for merit-based salary increases and promotion.

In July 2014, DeBose filed an EthicsPoint complaint, which Human Resources ("HR") and Diversity, Inclusion and Equal Opportunity ("DIEO") failed to investigate. Dosal and Wilcox concealed from DeBose that the unadvertised position of Assistant Vice President of Enrollment Planning & Management ("AVP EPM") was available and failed to consider DeBose for promotion. Though DeBose was highly qualified and trained and onboarded Dosal, a history professor, to his interim role as AVP EPM, Dosal and Wilcox secretly promoted a less qualified candidate for the position—Billie Jo Hamilton, Financial Aid Director, without a search. Because of DeBose's protected conduct, Dosal and Wilcox disqualified DeBose from consideration for the position in a humiliating way that other employees were not. Consequently, in August 2014, DeBose filed an internal complaint of discrimination with DIEO.

In December 2014, DeBose filed a discrimination complaint with the United States Equal Employment Opportunity Commission ("EEOC") when the situation did not improve but instead grew progressively worse. Dosal and Wilcox showed heightened anger and aggression towards DeBose and widely publicized to DeBose's colleagues and a large number of employees that DeBose filed an EEOC complaint against them. Dosal solicited help from Alexis Mootoo ("Mootoo") concerning DeBose's discrimination complaints. Mootoo, when visiting the Registrar's Office, routinely and inappropriately used the word "nigger" around DeBose and her staff. Dosal knew of Mootoo's use of the "*N*"-word in the Registrar's office but did nothing. Because of DeBose's protected activity, Dosal solicited complaints about DeBose from those with whom she worked closely, including Mootoo, and scheduled meetings with DeBose, having no agenda, so that he could berate her.

On February 4, 2015, DeBose filed a motion for a Temporary Restraining Order ("TRO") and/or preliminary injunction with the Middle District of Florida ("District Court") to maintain the status quo during the pendency of the EEOC investigation.[1] Once notified of the legal action by the USF General Counsel, that same day, Dosal and Wilcox issued DeBose her first-ever *written reprimand for unprofessional conduct*, a terminable offense, in violation of USF's policy/practice of progressive discipline. Unbeknownst to DeBose, Mootoo alleged that DeBose called her a "little girl" in a meeting that was subsequently refuted by Registrar's Office staff in attendance. The President and the USF

[1] MDF Case No. 8:15-mc-00018 -EAK-MAP.

Board of Trustees ("USFBOT"), the first and second level to hear the grievance, rejected DeBose's request to grieve the reprimand, against USF policy. On February 4th, the same day as DeBose's MDF legal action and the subsequently issued written reprimand, Dosal also engaged Ellucian, L.P. ("Ellucian") to bring Andrea Diamond ("Diamond"), Functional Consultant, to campus to perform an "*urgent*" post-implementation assessment ("PIA") of Degree Works, a software system DeBose successfully implemented four years prior. The "urgent" visit was scheduled for April 14-16, 2015, with the write-up / report due on May 4-8, 2015. Unaware of the PIA, the agenda, the details of the visit, and the expectation that the Registrar would attend, DeBose was not asked to meet with Diamond until the day before Diamond's visit.

On April 15, 2015, DeBose and registrar's staff member, Shruti Kumar ("Kumar"), met with Diamond for 45 minutes, answering all questions asked. Afterwards, Diamond debriefed with Dosal, Wilcox, and others in senior positions to edit her report and/or request changes. Diamond submitted her final report on May 9, 2015. The report was critical and specifically targeted DeBose. Dosal wrote to Diamond on April 20, 2015, *"Based on our debriefing...you've given me a good idea of what needs to be done."* [Trial Day 9/13/18 123:21-24; Exhibit #192]. After which, Dosal, Wilcox, and Gerard Solis, USF General Counsel, set DeBose's termination in motion. Dosal forwarded the report to DeBose, stating, *"I'm giving you an opportunity to respond."* Diamond wrote that DeBose did not answer any questions, kept registrar's staff from meeting with her, and was a risk that could keep Student Success from achieving its goals. DeBose was the only person asked to respond to Diamond's report, under a veiled threat of termination. DeBose and two Registrar's Office employees, Kumar and Rolanda Lewis ("Lewis") mentioned/referenced in the report, submitted statements that refuted the contents in Diamond's report. Dosal forwarded the responses from DeBose, Kumar, and Lewis to Wilcox. USFBOT undertook no investigation to resolve the discrepancies in the report or determine its veracity. [Trial day 9/12/18 187:8-15; 9/13/18 101:12-18].

On May 19, 2015, DeBose was lured under false pretenses to a meeting with Kofi Glover ("Glover"), Vice Provost, on Wilcox's behalf, about the "Ellucian Report". When DeBose entered, Glover immediately hand-delivered a termination letter from Wilcox. The letter stated DeBose was being terminated—not for cause or disciplinary reasons but at Wilcox's prerogative.

However, in public / media accounts, Wilcox pointed to DeBose as an identified risk per the Ellucian Report. *See Farrell v. Planters Lifesavers Co.*, 55 206 F.3d 271, 280-81 (3d Cir. 2000)(circumstantial evidence, such as inconsistent reasons given by the employer for terminating the employee or the employer's treatment of other employees, give rise to an inference of causation when considered as a whole). The President and the USF Board again rejected DeBose's termination grievance, stating that DeBose was not terminated for cause. DeBose was separated on May 19, 2015, one week after Diamond's May 4-8 write-up. DeBose was forced to exhaust her leave in violation of a "grandfather" clause in her contract, which provided that she would receive regular pay in the event of a compulsory leave and receive full payout of PTO. USFBOT materially breached DeBose's regular employment contract and an extended contract to 2019-20 year.

On May 20-21, 2015, DeBose was offered and accepted a position at the University of North Florida ("UNF") by Albert Colom ("Colom"), VP of Enrollment Services. UNF notified USF as a courtesy of DeBose's hire. On May 26, 2015, Wilcox called and spoke to Earle C. Traynham ("Traynham"), UNF Provost, about DeBose and gave a "poor reference", in violation of USF policy. Following Wilcox's call, Colom called/texted DeBose at Traynham's request, to rescind the job offer. After her separation, DeBose made several public record requests for documents. In June 2015, DeBose filed a state court action upon refusal by Solis, USF General Counsel to provide the documents. Sometime in June 2015, Dosal, Wilcox, Mootoo and USFBOT's representatives, ordered the destruction of DeBose's personnel files, containing her work projects, awards, recognitions, performance evaluations, leave and attendance records, and her employment contracts. In a Herodian-like litigation scheme to have it appear that DeBose was not specifically targeted, all employee files maintained by the department were placed in bins for shredding by a third-party contractor. DeBose was officially terminated on August 19, 2015 and in the months that followed, voluntarily dismissed her federal action for injunctive relief to maintain the status quo. DeBose subsequently learned of the destruction of her personnel files after she filed a discrimination and retaliation lawsuit on December 4, 2015, for unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended ("Title VII") and the Florida Civil Rights Act of 1992, §760.01, Fla. Stat., *et seq.* ("FCRA"); intentional

interference with a business relationship; civil conspiracy; and breach of contract under Florida law.

2. District Court Proceedings

The complaint reviewed at summary judgment was Plaintiff's Third Amended Complaint ("TAC"). Pervasive discovery issues at summary judgment included Petitioner's allegation that: USFBOT concealed/withheld DeBose's current 2015 and extended 2019 employment contracts, (ECF.45, p. 20); USFBOT's willful destruction of DeBose's personnel files and contracts.[2] The date on which the United States District Court, Middle District of Florida, Tampa Division, decided the case at summary judgment was September 29, 2017, (App. A-17). The District Court misapplied Rule 56, excluding ~ 550 pages of Petitioner's summary judgment evidence because DeBose did not authenticate each page by affidavit. The District Court abused its discretion, impacting DeBose's substantial rights, by disallowing DeBose the constitutional right of self-representation—excluding her opposition briefs, statements of disputed fact, cross motion for summary judgment against USFBOT, etc. and evidence. The District Court relied exclusively on the pleadings of Defendants' representatives and DeBose's deposition, (App. A-17, pg. 10). The District Court excluded DeBose's statistical data which showed USFBOT's practice of direct appointments or promotions without a search had a discriminatory impact on Petitioner's classification. In that same vein, the District Court erred in refusing to review Petitioner's Cross Motion for Summary Judgment against Defendant USFBOT, (ECF-169). In a prior ruling, the District Court approved Petitioner's Motion to Proceed Pro Se, following the withdrawal of her counsels, (ECF-122). Petitioner sought to recuse the District Court Judge for fear she would not receive a fair trial, *denied*. Pursuant to the September 29, 2017 order, DeBose's disparate treatment race discrimination and retaliation claims against USFBOT proceeded to trial, and all other claims against USFBOT were dismissed. The claims against Ellucian were dismissed in the entirety.

A Jury Trial was held from September 10–26, 2018. At trial, Petitioner showed the *backlash* of retaliation against her was continual and progressive. DeBose established the causal

[2] In its July 20, 2016 Answer, USFBOT denied the destruction, (ECF-51). On January 23, 2017, after the close of discovery, USFBOT filed affidavits, admitting to the destruction, (ECF-61).

relationship element by direct and circumstantial evidence, including that the adverse actions occurred closely in time after she engaged in protected activity. *Gordon v. NY City Bd of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). In order for DeBose to establish a claim of retaliation under Title VII, she had to prove that she engaged in statutorily protected activity, suffered a materially adverse action, and there was some causal relation between the two events. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2410-16, 165 L.Ed.2d 345 (2006). DeBose introduced evidence that she engaged in six distinct acts qualifying as "protected activity" for purposes of a Title VII retaliation claim: (1) in June, July and August of 2014, respectively, DeBose filed internal complaints with USF alleging that she had been subjected to unlawful discrimination; (2) in December of 2014, DeBose filed a charge of discrimination with the EEOC; (3) on February 4, 2015, DeBose filed a civil action in this District seeking to preliminarily enjoin USFBOT from discriminating against her and terminating her employment; (4) in March 2015, DeBose amended her EEOC complaint and added a charge of retaliation following the written reprimand for unprofessional conduct, a terminable offense; (5) on May 21, 2015, DeBose amended her EEOC complaint again to include the unlawful, retaliatory termination; and (6) on June 26, 2015, DeBose requested the Right to Sue Letter following the separation from her employment and Wilcox's retaliatory negative reference. It was also in June 2015 that DeBose's personnel files were destroyed by USFBOT, following a public records request for them.

DeBose also met her burden to offer evidence of multiple adverse employment actions taken by USFBOT—that she was treated differently following her complaints of discrimination; she received a written reprimand for unprofessional conduct, a terminable offense; the Ellucian write-up labeling DeBose a risk to Student Success, calling for her to be fired; her separation and termination; and the negative employment reference that resulted in revocation of employment with UNF. Though the District Court granted USFBOT's motion in limine to preclude DeBose from offering any evidence of the vandalism of her car or the shredding of all her department personnel files, these acts also qualified as evidence of unlawful retaliation. *See Washington v. Ill. Department of Revenue*, 420 F.3d 658, 96 FEP 545 (7th Cir. 2005)(an employer's retaliatory response to protected activity need not necessarily affect the terms and conditions of employment in order to constitute a valid claim with respect to

contention that retaliation was caused by internal complaint). Additionally, Dosal testified that he told a wide number of USF employees about DeBose's discrimination complaint, creating the very real potential that actually developed for several of them to band against her. [9/13/18 60:5-25; 61:1-17]. *See Mogenhan v. Napolitano*, 613 F.3d 1162, 1166-67 (D.C. Cir. 2010), finding it was materially adverse to publicize an employee's EEO complaint to her colleagues. *Id.* Dosal's and Wilcox's animosity and hostility were also self-evident, as they both testified that DeBose *"did not deserve 'due process.'"* [Q. Did you testify yesterday that you did not believe Angela DeBose deserved due process. A. Yes – 9/13/18 55:5-7]. The jury witnessed Dosal's and Wilcox's demeanor and their teeth set on edge, when testifying they kept DeBose in the dark about derogatory emails circulating about her. [9/13/18 73:24-25; 74:1-18]. The jury heard testimony from Dosal and Wilcox that no effort was made to investigate Mootoo's allegation that resulted in the written reprimand or Diamond's Ellucian report. [9/12/18 174:3-5; 187:8-15]; [9/13/18 17:10-13, 73:23-25, 74:1-18, 101:12-18]. The jury heard Dosal and Wilcox admit that DeBose was not allowed to grieve the actions taken against her and most often had no notice of them or opportunity to respond—even when required by school policy, [9/19/18 13:6-16]. The District Court stated and understood, as did the jury: *"...the inquiry is addressed towards due process and whether or not the people charged with due process were acting in a hostile manner."* [9/19/18 89:15-20]. A hostile work environment is an adverse employment action for purposes of the retaliation provisions of Title VII. *See Jensen v. Potter*, 435 3d 444, 97 FEP 555 (3d Cir. 2006).

DeBose also proved that USFBOT's explanations for the adverse employment actions were pretext. Dosal testified that DeBose would have been reprimanded no matter what—even if Mootoo had not made the "little girl" allegation, [9/13/18 17:10-13], which DeBose offered evidence to show that he solicited Mootoo to go to HR, [9/12/18 137:20-25, 138:6-11; Exhibits 41,74, 75, 80]. Both Dosal and Wilcox admitted at trial that DeBose's EEO complaints and legal activities (i.e. the February 4, 2015 MDF TRO/injunction complaint), led to their decision, [9/13/18 55:5-25, 56:1-4 57:9-19]; [9:19/18 5:2-25; 6:1-23, 11:6-13]. Dosal admitted that the reasons given were not the real reasons adverse action was taken (i.e. *prima facie* evidence that the employer's proffered reason is pretext). In fact, Dosal stated at trial for all members of the jury to hear, that adverse action was taken against DeBose because of her legal action and because *"she filed*

complaints." [9/13/18 55:5-25; 56:1-3]. *See Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 91 FEP 1107 (5th Cir. 2003)(while lack of temporal proximity can render a retaliation claim meritless, the time lapse was rendered irrelevant when the decisionmaker listed the plaintiff's protected activity as among the factors leading to his decision); *See also Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002); *Miranda v. B & B Cash Grocery Store*, Inc., 975 F.2d 1518, 1528-29 (11th Cir. 1992). A plaintiff may demonstrate pretext by showing that the defendant's proffered reason for an adverse action is a cover-up for retaliation A reason is pretextual only if it is false and the true reason for the adverse action is retaliation. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). Dosal testified the complaints were the real reason for USFBOT's action, [9/13/18 55:5-25, 56:1-4 57:9-19]. Dosal testified that following DeBose's MDF complaint, it was decided that he would have a lesser role and by implication, Wilcox would play a more prominent role. [9/19/18 5:2-25; 6:1-23; 11:6-13]. Under federal and state law, the terms or conditions of employment can be altered constructively or explicitly. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998). Thus, claims are generally either: (1) claims of adverse, tangible employment actions, such as "discharge, demotion or undesirable reassignment"; or, (2) claims in which the work environment was sufficiently hostile, such that even though an adverse tangible employment action did not occur, the terms and conditions of employment were altered. *See Federick v. Sprint/United Management Co.*, 246 F. 3d 1305, 1311 (11th Cir. 2001), citing *Ellerth*, 524 U.S. at 761-63, 765; *Johnson v. Booker T. Washington Broad Serv., Inc.*, 234 F. 3d 501, 508 (11th Cir. 2000).

DeBose also successfully persuaded the jury that USFBOT's contact with Ellucian on February 4, 2015 to schedule an *urgent* visit to the USF campus to write the Ellucian Report was not a mere coincidence, given its same-day proximity and occurrence to the MDF TRO/injunction and written reprimand. DeBose introduced evidence to show that Ellucian added DeBose to the agenda, without her knowledge, though the Degree Works software system "changed hands" in 2014 and DeBose had not been involved or responsible for the system for approximately one year. DeBose introduced evidence that Ellucian's Diamond debriefed with Dosal and Wilcox and that Diamond permitted Dosal, et al., to make edit and make changes to the report, [9/13/18 123:21-24; 124:13-24; 126:1-13]; [Exhibits 17, 18, 24, 25, 194, 196, 224, 238A, 238B]. The Ellucian visit was very close in

proximity to the March 2015 EEOC updated complaint adding a charge of retaliation, particularly if analyzed under the "first opportunity" standard. *See Dixon v. Gonzales*, 481 F.3d 324, 335 (6th Cir. 2007), holding ("[A] mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality. *Id. See also McGuire v. City of Springfield, Ill.*, 280 F.3d 794, 796 (7th Cir.2002) (holding that although a ten-year delay between protected activity and the adverse employment action "was exceedingly long[,] ... the reason a long wait often implies no causation ... d[id] not apply" in that case because the employer had no earlier opportunity to retaliate)." (emphasis in the original).

With regard to Wilcox's negative reference, DeBose introduced evidence that on May 26, 2015, just days after Wilcox terminated DeBose, he called and spoke to Traynham, UNF Provost, about DeBose for six (6) minutes. [9/19/18 38:13-15]; [Exhibit #277]. DeBose presented evidence that the day after the call, the position DeBose accepted with UNF was rescinded. *See, e.g., Woodson* [*v. Scott Paper Co.*, 109 F.3d 913, 921 (3d Cir. 1997)], finding that where the time between the protected activity and adverse action is not so close as to be unusually suggestive of a causal connection standing alone, courts may look to the intervening period for demonstrative proof, such as actual antagonistic conduct or animus against the employee. Wilcox testified that he did not discuss DeBose's performance or the fact that she received the highest (exemplary) rating, [9/19/18 44:1-5; 45:3]. Wilcox testified that he stated DeBose was *"uncollaborative and resistant to change"* [9/19/18 45:5-20]. Wilcox testified that he was not aware of DeBose's performance, showing he was unqualified to give a reference. [9/19/18 120:6-9]. In the 6-minute phone call, Wilcox only spoke negatively about DeBose and he admitted that he was not asked to be a reference for DeBose [9/19/18 39:9-14; 60:19-25; 61:1-11], and was merely notified of DeBose's hire to determine her availability, [9/19/18 41:23-25]. DeBose presented evidence to show Wilcox harbored a retaliatory and discriminatory racial animus against DeBose, and other women of color (e.g. Jennifer Meningall), and took adverse action against them. [9:12/18 106:19-25, 107:1-25, 108:1-25; 109:1-25]; [9/18/18 63:4-7; 68:7-23; 71:16-25; 71:1-17]. DeBose introduced evidence that Wilcox ruined new job opportunities for other women by giving negative references against USFBOT policy (e.g. Noreen Noonan, et al.), [9/12/19 104:13-25; 105:1-25; 106:1-18]; [Exhibit #295]. DeBose presented evidence to show Wilcox's action did not comport with USF policy [9/19/18 42:11-24]. Though Wilcox denied that he

referred to DeBose as *"toxic"* or stated to Traynham, *"you will regret it if you hire her,"* [9/19/18 60:3-10], the jury was not required to believe him. The jury believed Dosal and Wilcox acted to *poison the well* against DeBose, leaving *DeBose without a job*.

Therefore, a conscientious jury returned the verdict for DeBose on both claims, (App. A-16), finding the adverse actions taken were discriminatory and motivated by Dosal's and Wilcox's racially-motivated animosity and hostility towards her. Because the jury was not properly instructed that the employer's reasons had to be lawful, the jury decided the employer would have taken the same action. The jury decided that DeBose successfully established a 'But For' *prima facie* case of retaliation—that Dosal and Wilcox retaliated because of DeBose's protected activity. The jury verdict is decisive in showing that they understood the causal relationship between the filing of DeBose's complaints and legal activities and USFBOT's adverse actions that occurred close in time, one after the other. The jury made a reasonable connection between the incidents and the complaints. Additionally, Dosal's and Wilcox's testimony that DeBose complaints and/or legal activities were the real reason adverse action was taken against DeBose was *prima facie* evidence of pretext.

The Amended Final Judgment, (App. A-13), was entered on October 5, 2018 in favor of DeBose in the amount of $310,500.00 and against Defendant USFBOT on plaintiff's disparate treatment race discrimination and retaliation claims. Pursuant to the September 29, 2017 order, final judgment was entered in favor of USFBOT and against DeBose on Plaintiff's breach of contract, conspiracy, tortious interference, promotion discrimination, gender discrimination, and disparate impact race discrimination claims, (App. A-15). On September 27, 2018, DeBose requested attorney's fees and litigation costs. On October 19, 2018, the court denied reasonable attorney fees/costs that DeBose paid to her former attorneys, (App. A-12). Petitioner Pro Se timely moved for reconsideration, again requesting fees/costs paid to her counsels. The District Court *referred* DeBose's motion for front pay, (ECF-499).

On October 29, 2018, USFBOT filed a renewed JMOL motion. DeBose filed a post-trial motion for sanctions on December 31, 2018, having obtained proof of the extended employment contracts of Dosal and Wilcox to 2019, similar to hers, through a third-party public records request, *denied*.[3] On February 14,

[3] Appeal No. 18-14535, *dismissed*.

2019, five months after the jury verdict, the District Court granted USFBOT's motion for JMOL and conditional trial, (App. A-9). A Second Amended Judgment was entered in favor of USFBOT on Plaintiff's Retaliation Claim, (App. A-8). On February 15, 2019, the court no longer referred the matter of front pay to the Magistrate, (App. A-7), and declined to reconsider DeBose's request for fees paid to her former counsels. Id. The District Court did not make any ruling on USFBOT's motion for the court to review the costs taxed by the Clerk, (App. A-11). On February 24, 2019, DeBose filed a motion to set aside the judgment in USFBOT's favor and reinstate the jury verdict, or in the alternate, grant a new trial. On February 28, 2019, the court ordered mediation. On March 10, 2019, DeBose filed an appeal of the Orders granting USFBOT's JMOL, denying Petitioner a New Trial, and other related post-judgment orders. Following an impasse, the District Court denied DeBose's new trial motion on April 24, 2019. (App. A-6). On April 25, 2019, Petitioner amended the appeal.

3. The Court of Appeals Panel Review.

The *Eleventh Circuit* has recognized that courts must *consider the record as a whole* in ruling on motions for summary judgment. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) ("[w]here the *record* taken *as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 998 (11th Cir. 1992) ("[i]n opposing summary judgment, the nonmoving party may avail itself of all facts and justifiable inferences in the *record* taken *as a whole*"). The *Eleventh Circuit* has also noted that a Pro Se plaintiff's pleadings and briefs are entitled to a more liberal construction. *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990). On April 27, 2019, the Panel entered an Order affirming the District Court's Orders. The Panel relied almost exclusively on the District Court's Summary Judgment Opinion, (App. A-17), and Appellees' Answer Brief, deeming itself merely the judicial echo of the District Court's rulings and the Appellees' conclusion that DeBose's substantial rights were not impacted. The Panel decision does not discuss the District Court's JMOL Order overturning the jury verdict, (App. A-9); the Panel denied DeBose

a new trial stating her motion for new trial was untimely, (App. A-6).

DeBose petitioned for Rehearing / Rehearing En Banc, review denied, (App. A-3), contending the Panel misapplied the harmless error rule to find that the district court's error was harmless and did not impact DeBose's substantial rights.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate because the Eleventh Circuit has decided an important federal issue that conflicts with relevant decisions of this court, and because the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a), (c).

1. Whether a Rule 42 consolidation can deprive a party of a substantive right—the right to an appeal from a final judgment—when the Rules Enabling Act prohibits the federal rules from abridging or modifying a party's rights.

Enacted in 1983, Rule 42(a)(2) Consolidation provides that if actions before the court involve a common question of law or fact, the court may consolidate the actions. Rather than focus on plain meaning, the term "consolidate" has a legal history dating back 125 years that makes it clear "that one of multiple cases consolidated under the Rule retains its independent character."[4] From the outset, the Supreme Court has understood consolidation "not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties to them."[5] Consolidation was held not to affect the amount in controversy of cases, the number of peremptory challenges available to parties, and the issues that parties could raise or appeal. Simply put, consolidation does not merge the suits, change the rights of parties, or make a party to one action a party to another consolidated action. Because Rule 42 was modeled on the 1813 statute and did not define "consolidate," "the term presumably carried forward the same meaning we had ascribed to it under the consolidation statute for 125 years." Thus,

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[4] Chief Justice John Roberts, Unanimous Supreme Court Opinion, *Hall v. Hall*, 138 S. Ct. 1118 (2018).

[5] *Id.*

Rule 42(a) did not transform consolidation. A unanimous Supreme Court in *Hall v. Hall* held that civil actions consolidated under Federal Rule of Civil Procedure 42(a) retain their separate identities, so that a final decision is immediately appealable by the losing party, regardless *of* whether any *of* the other *consolidated* cases remain pending.[6]

Under Section 1291, the right of appeal is a substantive right. The Rules Enabling Act, consistent with this Court's decision in *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933), does not allow the consolidation of cases to deprive a party of a substantive right to appeal a final judgment. Rather, the Rules Enabling Act, now codified at 28 U.S.C. § 2072, prevents federal courts from adopting rules that "extend or restrict the jurisdiction conferred by a statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941). *Accord Snyder v. Harris*, 394 U.S. 332, 337–38 (holding that the interpretation of the diversity of jurisdiction statute cannot be changed by a change in the rules). Based on the above reasoning concerning cases, the Eleventh Circuit order, (App. A-5), consolidating the two appeals should not have altered the character of Petitioner's appeals and thereby deprive her of the meaningful right to appeal granted by Section 1291. Court rule cannot modify this substantive right. Likewise, consolidation of appeals cannot be used to abridge the rights of a party. The Supreme Court has defined a final judgment as a judgment that "disposes of the whole case on its merits." *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4 (1882). Though this case law dates back nearly 140 years ago, the Court continues to hold that appeals may be taken from a judgment that disposes of a whole case on the merits under the plain language of 28 U.S.C. § 1291. The judgment at issue in this case falls within this core definition of the final judgment rule—a judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Here, the Eleventh Circuit's consolidation of the appeals (18-14637 and 19-10865) prevented Petitioner from effectively appealing the District Court's Order overturning the jury verdict and granting USFBOT's JMOL and conditional new trial, (App. A-9), and the District Court Order denying DeBose, the verdict winner, a new trial, (App. A-6). The orders were final and the District Court's Second Amended Judgment, (App. A-8), was also final.

Because the district court entered a final judgment, the plain language of 28 U.S.C. § 1291 gave petitioner a right of appeal.

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[6] *Id.*

DeBose filed notice of appeal, paid the docketing fee, and fully briefed 18-14637 and 19-10865. The Eleventh Circuit ordered consolidation of the appeals over Petitioner's objection that consolidation might confuse the issues and/or standard of review. For whatever tidbits the panel gleaned from either appeal, the Eleventh Circuit panel failed to review the record as a whole, as filed in 18-14637, and failed to review 19-10865—particularly the *de novo* review of the District Court's JMOL order entirely. The Eleventh Circuit's procedural rule modified DeBose's substantive rights to appeal. The appellate court's consolidating and sequencing of Appeal No. 18-14637 in relation to DeBose's other appeals had a widespread and obvious effect on the timing and scope of the appeals but moreover substantially altered important issues on appeal.[7] Notwithstanding Petitioner's objection, the Eleventh Circuit determined it appropriate to consolidate the consolidate appeals, on the basis that the appeals raise similar facts or issues, arising from the same case. Petitioner does not contend that it was not within the Appellate Court's election to consolidate appeals coming up from the District Court. Petitioner does not argue that the Appellate Court does not possess the skill to determine whether to consolidate the review of issues or orders on appeal. However, Petitioner asserts that no matter how the Appellate Court characterizes the reasons for consolidation, it may not abridge the rights of a party or deny, whether or not constitutional, the right to appeal. In the American justice system, appellate remedies play a significant role and perform several robust functions, including correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law.[8] Here the Eleventh Circuit panel decision fell substantially short of these goals. The Eleventh Circuit consolidated Petitioner's appeals and severely limited its review. It is of little consequence to Petitioner that the consolidation was done for

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[7] Appeal No. 18-14535 was filed upon DeBose moving for sanctions, *denied*, upon obtaining irrefutable proof that USFBOT continued to use written employment contracts well after 2005 (i.e. Dosal's and Wilcox's 2019 contracts). The appeal was initially dismissed on jurisdictional grounds but was subsequently reinstated. USFBOT made a late, unfiled challenge of jurisdiction, without the required notice to DeBose. Though the Eleventh Circuit was sitting in jurisdiction and could properly consider the matter, 18-14535 was dismissed. *See Pillow v. Bechtel Const., Inc.*, 201 F.3d 1348, 1351 (11th Cir. 2000). If reviewed, the Appeals Court may have found that the Respondent's misrepresentation that USFBOT stopped using written contracts in 2005 absolutely demands reversal.

[8] Robertson, Cassandra Burke, The Right to Appeal (2013), Case Western University School of Law Scholarly Commons, Faculty Publications.

reasons of judicial efficiency. "[T]he benefits of efficiency can never be purchased at the cost of fairness." *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350, 354 (2d Cir. 1993) ("[I]t is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process.").

2. Whether the Eleventh Circuit erred in holding the denial of a pro se litigant's right to self-representation and to testify at trial as the type of due process constitutional rights errors in which the harmless error standard could apply.

A. <u>The Structural Errors Demand Reversal</u>

The District Court's en masse exclusion of Petitioner's pleadings and evidence in the entirety at summary judgment and the destruction of Petitioner's employment records by Appellee should have raised an immediate red flag for the Appellate Court. It is a well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless*, 298 U.S. 342, 348; *United States v. River Rouge Co.*, 269 U.S. 411, 421 , 46 S.Ct. 144; *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 , 39 S.Ct. 435; *Williams v. Great Southern Lumber Co.*, 277 U.S. 19, 26 , 48 S.Ct. 417. In *McCandless*, the Supreme Court held that the [c]ourt(s) should never reject evidence, if it tends legally to prove any part of the case. *Id.*, 298 U.S. 342, 343. DeBose argued on appeal that the District Court's error to exclude her entire pleading at summary judgment, relying solely on the Defendants' pleadings, denied her the right to self-representation. In this vein, DeBose contended the District Court's error was structural. DeBose filed a motion to proceed *pro se*, which was granted following withdrawal of her counsels, (ECF-122). DeBose adequately represented herself, and the magistrate expressed at hearing that she was competent to represent herself, (ECF-222). DeBose objected to the District Court's action to deny her right to self-representation in her motion for reconsideration, (ECF-217). DeBose's pleadings were not incomprehensible, as the District Court granted motions by USFBOT and Ellucian to reply to DeBose's Response in Opposition to Summary Judgment, (ECF-205, ECF-206). USFBOT also submitted a response to DeBose's Cross Motion for Summary Judgment, (ECF-169). All parties fully briefed the issues; thus, the District Court's mass exclusion of pleadings and evidence applied only to DeBose. The Panel failed to consider this

structural error and its harmful and prejudicial effect on DeBose. At trial, the District Court put Petitioner on a chess clock and would not permit her to testify as a fact witness in her own case to the substantive issues but only as to damages.

The U.S. Supreme Court has recognized bias of the trial judge[9], the denial of the right to pro se representation as above, racial discrimination in the selection of the jury[10], and non-harmless errors in jury instructions[11], etc., as errors that cannot be harmless and necessarily must result in the reversal. *See, e.g., United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563-65 (2006); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The Eleventh Circuit did not address any of these structural issues raised by Petitioner on Appeal (and Rehearing / Rehearing En Banc) in its review. *Rankin v. Evans*, 133 F.3d 1425, 1433 (11th Cir. 1998) sums up the instant appeal:

> **The panel opinion in this case holds that once a jury has discharged its duty without error or misconduct has unanimously decided in favor of a plaintiff, a judge with demonstrated bias against the plaintiff and for the defendant, may overturn the jury's verdict and substitute the judge's own opinion. This is an unprecedented nullification of the Sixth Amendment right to a jury trial, an eclipse of the sacrosanct jury verdict, and an assault against civil rights plaintiffs wherein the government's interest in unlawful employment discrimination and retaliation against racial minorities is more compelling and protected to outweigh an individual's right to be free from unlawful employment discrimination and retaliation upon engaging in a protected activity.**

B. The Jury Verdict Finding Petitioner Established "But-For" Causation was Reasonable and Unanimous

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[9] The district court record reflects that DeBose sought the removal of the trial judge and declined the trial judge's offer of a bench trial before the magistrate, [9/17/18, pg. 42-43].

[10] The bias of Respondent was also shown in jury selection. Respondent's counsel supposedly gave a *"race neutral"* reason for wanting to strike the only remaining black (female) juror from the proceedings: *She's a housekeeper, she hasn't worked very long and she's very young.* [See Trial Day One 9/10/18 52:1 through 55:1-11; 131:19-25, 132:1-22]. Notably, the juror was over 40 and could have worked at a variety of other jobs.

[11] *See United States v. Kozeny*, 667 F.3d 122, 130 (2d Cir. 2011); the District Court misstated the clear record that DeBose did not object to the jury instructions. See ECF-409, 440, and 460, e.g.

To establish causation, there must be evidence of some causal relationship between the two events. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2410-16, 165 L.Ed.2d 345 (2006). To prove but-for causation required to establish a prima facie case, "A plaintiff making a retaliation claim under [Title VII] must establish that [] her protected activity was a but-for cause of the alleged adverse action by the employer". *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517, 2534 (2013). Petitioner established causation through direct and circumstantial evidence.

The plaintiff may demonstrate pretext by showing that the defendant's proffered reason for an adverse action is a cover-up for retaliation. *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002); *Miranda v. B & B Cash Grocery Store*, Inc., 975 F.2d 1518, 1528-29 (11th Cir. 1992). A reason is pretextual only if it is false and the true reason for the adverse action is retaliation. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). Dosal's and Wilcox's testimony admitting that the reason adverse action was taken against DeBose was because she engaged in protected activities (i.e. complaints and TRO/injunction). Their prima facie admission is direct evidence of causation and pretext. The Eleventh Circuit has held that sometimes causation can be established by "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action, . . . [but] *the temporal proximity must be 'very close.'" Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (emphasis added). A time period as much as one month between the protected activity and the adverse action is not too protracted to support causation. *Wideman*, 141 F.3d 1453, 1457 (11th Cir. 1998). But in the absence of any other evidence, three months between the protected activity and an adverse employment action to have been insufficient to establish causation. *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006); *see also Wascura v. City of South Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001) (holding that, by itself, three and one-half months between protected activity and adverse action was insufficient to prove causation). Petitioner established qualifying protected activities spanning from June 2014 to June 2015. DeBose established that following each complaint eeoc/EEOC complaint or related legal activity of discrimination was followed by an adverse action being taken by Respondent. The connection did not go "cold" or "stale," such that "no reasonable jury" could believe that the adverse actions and DeBose's complaints were related. The District Court and the Panel overlooked DeBose's protected

activities in June 2014 to excuse the failure to promote DeBose and to promote Hamilton. Both courts also overlooked the March 2015 EEOC complaint of retaliation concerning the written reprimand to find the gap too big concerning Diamond's negative write-up in the Ellucian Report, though one month is sufficiently close. Within 5 days of DeBose's EEOC complaint concerning the retaliatory termination, Wilcox called UNF and gave the negative reference. Where the time between the protected activity and adverse action is not so close as to be unusually suggestive of a causal connection standing alone, courts may look to the intervening period for demonstrative proof, such as actual antagonistic conduct or animus against the employee, *see, e.g., Woodson* [*v. Scott Paper Co.*, 109 F.3d 913, 921 (3d Cir. 1997)] (finding sufficient causal connection based on "pattern of antagonism" during intervening two-year period between protected activity and adverse action), or other types of circumstantial evidence, such as inconsistent reasons given by the employer for terminating the employee or the employer's treatment of other employees, that give rise to an inference of causation when considered as a whole. *Farrell v. Planters Lifesavers Co.*, 55 206 F.3d 271, 280-81 (3d Cir. 2000). DeBose experienced other adverse actions that were recurring, continuous, and close in time. A hostile work environment is an adverse employment action for purposes of the retaliation provisions of Title VII. *See Jensen v. Potter*, 435 F.3d 444 (3d Cir. 2006). DeBose's was isolated, excluded, and subjected to a hostile retaliatory work environment. DeBose was kept in the dark. Her complaints failed to be investigated by DIEO, and DeBose's grievances were rejected. The jury could also believe that disallowing DeBose to file a grievance to appeal the disciplinary action was causally related to DeBose's protected activities. This may have been solidified by Dosal and Wilcox expressions of hostility and animosity towards DeBose at trial, stating *DeBose did not deserve "due process."* Though Respondent argued, this is "not that kind of case," Title VII is specifically designed to protect the complainant's Civil Rights. The violations of the university's progressive discipline, employment verification/reference policy is also another indication that the reasons by the employer were pretext and that the "the desire to retaliate was the but-for cause of the challenged employment action." *Booth v. Pasco Cnty., Fla.*, 757 F.3d 1198, 1207 (11th Cir. 2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517, 2528 (2013)). Dosal's and Wilcox's testimony about the written reprimand (that it was going to happen no matter what), the shifting reasons

provided as to why DeBose was terminated, and the negative reference (Wilcox calling unsolicited to make only negative comments though he knew nothing about DeBose's performance or her high ratings) sufficiently convinced the jury that the Respondent's reasons were pretext and that *real reason* or "but-for" cause was because of DeBose's protected activity.

The Eleventh Circuit will "disturb the jury's verdict only when there is no material conflict in the evidence, such that no reasonable person could agree to the verdict reached." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014) (citing *Bagby Elevator Co.*, 513 F.3d at 1275)). The District Court expressed its disagreement with the jury, stating: *This gap proves too large to establish a causal connection.* (App. A-6, pg. 7). In analyzing the "no reasonable person" standard, the circuits have held, The Court " 'may not substitute its view of the evidence for that of the jury,' [and may] neither make credibility determinations nor weigh the evidence. *Costa*, id., quoting *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir.2001). The District Court did not give all favorable inferences to DeBose, the nonmoving party. "Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 151 (2000). There was substantial evidence supporting the nonmovant's position [i.e. DeBose] such that reasonable persons would draw the same conclusion as the jury, in her favor. In granting USFBOT's JMOL, the District Court weighed the evidence, opining, "DeBose offered no direct evidence of retaliation", thereby disregarding the direct testimony of the witnesses. (App. A-6, pg. 7). At trial, the District Court instructed the jury that it could consider both *direct and circumstantial* evidence. The District Court stated that it would be up to the jury to decide which witnesses to believe, and which witnesses not to believe, and how much of any witness's testimony to accept or reject. [9/10/18, pgs. 142:15-24]. In *Reeves v. Sanderson Plumbing Prods.*, Inc., weighing of the evidence is a jury function, not that of a judge. *Id.* at 150, 120 S.Ct. 2097. DeBose filed 96 Exhibits during Trial, and obtained testimonial evidence in her favor from all of Defendant's witnesses. USFBOT presented 61 Exhibits, of which 21 were decidedly favorable to DeBose. USFBOT did not establish it claims and defenses by unimpeached

testimony.[12] "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 that evidence comes from disinterested witnesses.' [citation omitted]." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). In *Reeves*, lies, contradictions, misfeasance or malfeasance do not support a JMOL. The testimony must be credible and truthful. *Id.* at 152. "The standard that [defendants] must meet is very high." *Costa v. Desert Place*, Inc., 299 F.3d 838, 859 (9th Cir. 2002). We can overturn the jury's verdict and grant such a motion only if "`there is no legally sufficient basis for a reasonable jury to find for that party on that issue.'" *Reeves*, 530 U.S. at 149, 120 S.Ct. 2097 (quoting Fed.R.Civ.P. 50(a)). The District Court misapplied the law to require a higher standard of "direct evidence," a threshold the court claimed that DeBose did not meet. Title VII does not impose this special or heightened evidentiary burden on a plaintiff in a "mixed-motive" case. *Costa*, 299 F.3d 838, 844; *Wright v. Southland Corporation*, 187 F.3d 1287 (11th Cir. 1999).

C. The Misapplication of Law was Harmful Error

The District Court's application of Rule 56 was incorrect law and an abuse of discretion. The Appellate Court footnoted that DeBose was correct that the District Court misapplied the law (i.e. Rule 56) but nevertheless affirmed the District Court, finding the error harmless, in conflict with *McCandless,* 298 U.S. 342, 343. The Panel stated, "a review of the [~ 550 pages of excluded] documents shows they would not have affected the outcome." (App. A-1, ftn. 1, pg. 5). *See Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999)(neither the Appellate Court nor the District Court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists); See also *Ike v. Kroger Co.*, 248 Ga. App. 531, 532 (Ga. Ct. ApA-p. 2001); *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), holding that an appellate court must

[12] USFBOT's witnesses gave contradictory, false testimony. See Petitioner's Evidence Chart filed with the Motion for New Trial, [#551]; Wilcox's affidavit that USF stop using employment contracts in 2005 is contradicted by the clear record. USFBOT concealed from DeBose its production of DeBose's 2015 employment contract to her former counsels. See 2/8/17, 3/21/17, and 5/23/17 hearing transcripts. USFBOT used a third-party contractor to shred DeBose's personnel files; USFBOT denied the destruction in its Answer, only to admit to it later, when DeBose submitted irrefutable evidence.

construe the evidence with every inference and presumption in favor of upholding the verdict.

Although a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings, the Eleventh Circuit Panel made a multitude of errors, which supports Petitioner's argument that the Panel did not review Petitioner's briefs for context to understand the issues on appeal or what DeBose's evidence was intended to prove:

The Appellate Court's narrative pointed to questions about DeBose's professionalism and alleged difficulty in collaborating, (App. A-1, pg. 16, ¶ 1). The Panel Opinion made no reference to direct testimony at trial in which Dosal testified he rated DeBose's performance as exemplary, [9/12/18 23:12-15], and that her communications were professional, [9/12/18 58:13-25, 59:1-24; 62:1-13, 95:2-16; 169:14-18; 9/13/18 6:7-14]. The Panel Opinion concerning DeBose's excluded evidence reflects no understanding of the professional skills assessments, (ECF-188, pgs. 59-63, 64-71, 72-74)[Exhibits #279, #280], letters, (ECF-188, pgs. 57-58, 78-80)[Exhibit #218, 271], and other documents [Exhibits # 319B-D], which showed that collaboration is one of DeBose's greatest strengths. DeBose presented "stereotype" evidence to the jury that African American/ black females, are often stereotyped as "uncollaborative or uncooperative", using a black female counterpart, Dr. Jennifer Meningall, former Vice President, Student Affairs, as an example at trial: [9/12/18 106:19-25; 107:1-25; 108:1-25; 109:1-25 -- **Q** Have you ever heard others use derogatory language concerning Jennifer Meningall? **A** I suppose it depends on one's definition of derogatory. I heard complaints about her management style and her ability or inability to work with others]. A professional jury reviewed the evidence, heard testimony, and was convinced that USFBOT's reasons about DeBose lacking collaboration was pretext. The Appellate Court stated that there was no evidence that any express employment contract was a part of the record or existed, (App. A-1, pg. 10, ¶ 2). The Panel overlooked DeBose's 2015 employment contract that was erroneously excluded by the District Court, (ECF-165, pg. 64-65). The document, labeled "Contract", specifies a 12-month definite term of employment. Id. The existence of the employment contract clearly disputed the statement by USFBOT's representative and Wilcox that USFBOT stopped issuing written employment agreements in 2005, [ECF-78]; [See Hearing Transcripts, ECF-222, 223]. The Appellate Court opined that DeBose had not supported her disparate impact allegations with any statistical evidence, (App. A-1, pg. 9, ¶ 1]. DeBose

produced an expert opinion and statistical data and analysis at summary judgment, (ECF-188, pgs. 120-128, 178-180), that showed the adverse impact ratio for Petitioner's classification is less than 80%, according to the four-fifths rule—evidence that the employment practice(s) of USFBOT is discriminatory towards the Petitioner's classification. Black Females represent 1.5% of the population and have an adverse impact rating of 3%--generally regarded as evidence of adverse impact. DeBose also submitted an Affidavit, (ECF-174, pg. 32). The Panel's statement is directly contradicted by the trial judge's order, (App. A-17, pgs. 22-23), where the District Court discusses the statistical evidence as "unauthenticated", though clearly supported by the expert's and the Petitioner's affidavits. The District Court concluded, "*Given, the Plaintiff's failure to support her disparate impact claims with admissible evidence in response to summary judgment, USF is entitled to summary judgment on Counts V and VI of the TAC.*" The District Court's strict requirement for admissible evidence at summary judgment was also improper. The standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it could be presented at trial in an admissible form. See Rule 56(c)(2).

The Appellate Court stated DeBose did not engage in any protected activity until after learning of Hamilton's promotion, (App. A-1, pg. 9, ¶ 2). DeBose filed the August 14, 2015 deposition of Dosal, in which he testified that DeBose complained to him about possible discrimination in June 2014, (ECF-181, pg. 19, #42:13-19). Dosal testified likewise at trial, [9/11/18 153:14-20]. The Appellate Court overlooked the June qualifying event because it failed to review DeBose's briefs on appeal and consider the record as a whole. The Appellate Court also overlooked evidence in the record that the Ellucian assessment, which took place in April of 2015. Here, the Panel stated the assessment was planned prior to DeBose's first complaint, (App. A-1, pg. 16, ¶ 1). The Panel disregarded that on February 4, 2015, Dosal had already taken one adverse action against DeBose in issuing DeBose a first-time, written reprimand for unprofessionalism, the same day that DeBose filed a TRO/preliminary injunction against USFBOT. The timing and circumstances (that same day) surrounding Dosal's request for an *urgent* PIA to write the Ellucian Report through Carrie Garcia could be perceived as retaliatory, (ECF-187, pgs. 105-106; see also pgs. 107-142), as noted by the District Court: *Specifically, given the close temporal proximity between DeBose's EEOC complaint and USF's decision*

to engage Ellucian..., a reasonable jury could find that USF's actions were retaliatory, (App. A-17, pages 20, 21).

The Panel surmised incorrectly and wrote a faulty narrative that DeBose's discrimination and retaliation claims stemmed from the written reprimand she received after insulting a coworker, (App. A-1, pg. 9). The record discloses a multiplicity of Emails, [Exhibits #ECF-70 -82], submitted for the jury's review to show that the "little girl" allegation was a complete fabrication. Dosal asked for and received Mootoo's help after DeBose's complaint of discrimination, (ECF-187, *passim*); [9/12/18 138:1-11; 9/12/18 191:23-25]. Dosal's testimony affirmed that he solicited Mootoo to file a complaint against DeBose, [9/12/18 159:15-25; 160:1-21] and that he asked Mootoo to get others to corroborate her story, [9/12/18 156:21-25, 157:1-25, 158:14-24]. Dosal testified that he did not inform DeBose of Mootoo's complaint, [9/12/18 153:17-24; 9/13/18 74:7-8], though he did inform Wilcox and others, [9/12/18 22:15-18; 9/13/18 74:4-6], and Wilcox strongly supported reprimanding DeBose, [9/17/18 108:13-22]. The jury saw evidence of the emails exchanged between Dosal, Mootoo, and others, [Exhibit 70-75]. Dosal and Wilcox admitted that they had not heard DeBose use terms like "little girl," [9/12/18 94:21-25, 95:1-16; 9/17/18 122:23-24; 9/18/18 95:1-4]. Dosal testified that DeBose's communications were professional. [9/12/18 95:2-16, 169:14-18; 9/13/18 6:7-14]. The first occurrence written reprimand violated USFBOT's progressive discipline policy, (ECF-188, pgs. 84-95). Most importantly, the Panel did not review the whole of the record to note that Dosal testified the reprimand was mere pretext:

> **Q** Did you testify that Ms. DeBose was going to be reprimanded even if the allegation of the "little girl" comment did not exist?
> **A** Yes." [9/13/18 17:10—13]
> **Q** Do you believe that she deserved to get the reprimand with no opportunity for due process?
> **A** Yes. [9/12/18 174:3-5]

The Appellate Court stated DeBose did not present any evidence that she had in fact received such an offer, <u>such as an affidavit</u>, (App. A-1, pg. 10, ¶ 3). DeBose submitted several text messages, phone logs, and emails between her and Colom to show that she was offered and accepted a job at UNF in the period from May 20-21, 2015. DeBose also submitted evidence to show that on May 26, 2015, Wilcox called and spoke to Traynham for 6

minutes, (ECF-188, pg. 118-119), and gave DeBose a negative reference, in violation of USF policy, (ECF-188, pg. 167-170); [9/19/18 pgs. 38:13-15, 42:11-24]. DeBose produced evidence that immediately after Wilcox's call with Traynham, Colom called and texted DeBose, rescinding the job. (ECF-188, pgs. 103-104, 113-117). The District Court and ultimately the jury both found the timing and the circumstances retaliatory, (App. A-17, pg. 21). The Panel claimed the existence of "undisputed" evidence in the record that Hamilton was highly qualified for the position to make DeBose's failure-to-promote claim fail. DeBose presented evidence that begged the question why Hamilton was promoted in secret, without a search and thus without competition, [9/11/18, pg. 173:9-25]. DeBose, better qualified, trained and onboarded Dosal, a history professor, to his position and wrote many times on Dosal's behalf. [9/12/18 pgs. 54:1-2; 58:1-5]. DeBose's performance was exemplary and she was commended in her reviews for collaboration, gaining consensus, and professionalism. [9/12/18 pg. 23:12-15]. It is not inconceivable that Dosal and Wilcox retaliated, making the decision to disqualify DeBose from consideration for the AVP EPM position, because she complained of discrimination, [9/11/18 pg. 173:9-25]. DeBose presented evidence that Hamilton knew about the discrimination, particularly from Wilcox, and decided that DeBose should go it alone.

The Appellate Court made other incorrect conclusions of law and fact—that DeBose failed to provide adequate information to tax costs, (App. A-1). The Clerk taxed costs of approximately $35,000 for Petitioner. USFBOT asked for review by the District Court, (ECF-521, 546), *denied* without prejudice, until a date certain. The District Court failed to Order USFBOT to pay the costs to DeBose after the expiry date. The Appellate Court misapprehended that DeBose requested fees to pay her former counsel for the first time on appeal, (App. A-1). DeBose requested the fees/costs timely. DeBose's request for reconsideration was also timely. However, the District Court misapplied Rule 15 "relates back" to deny DeBose the fees/costs paid to her former counsel noted in her initial request, (See App. A-7). The Appellate Court overlooked that the District Court stated at the end of trial that DeBose, pro se, could herself request attorney fees—though DeBose expressed her knowledge of Eleventh Circuit rule holding a contrary view, [9/26/18, pg. 12:18-23]. The Appellate Court failed to note that DeBose, the verdict winner, received nothing for her disparate treatment discrimination claim. The District Court did not grant declaratory relief, injunctive relief, nor

attorney's fees and costs. The Appellate Court improperly found that DeBose's motion for new trial was untimely, expecting that DeBose, as the verdict winner, would request a new trial within 28 days of the verdict, after USFBOT's failed part-A JMOLs, failed motion to alter/amend the judgment, and part-B JMOL. The Panel misconstrued that DeBose raised the issue about the District Court's refusal to continue the trial and/or reopen discovery, for the first time on appeal. The issues were preserved at trial and argued in DeBose's motion for new trial.

3. Whether a verdict winner must file a timely motion for a new trial after entry of judgment in order to raise new-trial arguments and preserve a sufficiency-of-the-evidence challenge on appeal, after both parties moved for judgment as a matter of law under Rule 50(a) before submission of the case to the jury, but only the opposing party renewed that motion under Rule 50(b) after the jury's verdict, and was granted JMOL and a conditional new trial, but the original prevailing party was denied a new trial under Rule 59.

The Eleventh Circuit Panel held that, notwithstanding Federal Rule of Civil Procedure 50(d), DeBose, the verdict winner, failed to move for a new trial timely, following the verdict, in order to preserve new trial arguments on appeal, (App. A-1). The Panel stated that "to the extent that DeBose challenged the *jury's discrimination verdict*," her motion for a new trial was untimely. Thus, Appellate Court declined to consider DeBose's preserved new trial and sufficiency-of-the-evidence arguments because DeBose, the verdict winner for nearly five months after entry of the judgment, did not file a motion for new trial within the 28-day time frame provided for in Federal Rule of Civil Procedure 59(b), of the judgment entered on October 2, 2018, (App. A-15). The Panel also noted that DeBose, still the verdict winner, did not file a motion for new trial within 28 days of the Amended Judgment on October 5, 2018, (App. A-13); rather, DeBose posed a challenge on February 24, 2019, within the requisite 28-day timeframe, of the Second Amended Judgment, (App. A-8), which rendered that DeBose was no longer the prevailing party on her retaliation claim. The Panel used this reasoning to justify its failure to review DeBose's new trial motion on the merits entirely—with regard to the sufficiency of the evidence on her retaliation claim, the structural issues that unfairly prejudiced her in the proceedings, and the manifest injustice that resulted from the

Respondent's misconduct that should have permitted a new trial under Rule 59 and/or Rule 60(b)(3).[13] The Panel's reasoning defies logic. First, the verdict was not split; DeBose was the prevailing party on both her discrimination and retaliation claims. With regard to the discrimination claim, the "same decision" defense precluded DeBose from taking any damages. Secondly, DeBose objected to the "same decision" verdict instruction and contended in her new trial motion that the jury would have responded "No" to the question on the verdict form, had the instructions or District Court clarified that the "same decision" could not be "any reason at all" but a lawful or legitimate reason. DeBose would argue that USFBOT was motivated by discriminatory and other unlawful reasons. The District Court's ruling, though factually incorrect, stated that DeBose never objected to any of the Court's retaliation instructions or requested different or additional instructions, though provided three opportunities to do so, (App. A-6). The fact is, DeBose did in fact file an objection to the jury instructions. (See ECF-409, 440, and 460). Petitioner timely appealed the District Court's denial of her motion for new trial. While the District Court raised questions about the sufficiency of the evidence, the timeliness of DeBose's motion was not challenged.

On a motion for new trial, the Eleventh Circuit emphasizes the District Court's "duty to safeguard the role of the jury" and notes the "exacting" standard of review for a district court's denial of a

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[13] All of Petitioner's witnesses were excluded based on the failure of DeBose's former counsels to make Rule 26 disclosures. Petitioner was not informed at the withdrawal of her counsels but told by the magistrate at the pretrial conference on August 18, 2018, before trial. The District Court declined Petitioner's request to move the trial back to its original date. USFBOT filed a motion for leave to take videotaped deposition of Andrea Diamond, *De Bene Esse, denied*, which Petitioner opposed. However, the District Court declined to enforce Petitioner's subpoenas of Diamond and also Colom and Traynham. The District Court allowed Diamond's deposition to be submitted to the jury, a poor substitute for having direct testimony from this key witness. The District Court excluded Exhibit [#216], which established Diamond debriefed with Wilcox (i.e. *the Provost*) and would not allow examination of Wilcox about this exhibit, on grounds that while Wilcox appeared for trial, Diamond was not available to testify. The District Court excluded Exhibit [#211], an email forwarded to Wilcox by Dosal; Lewis states that she had a conflict and could not meet with Diamond. Petitioner sought to admit the email to show that Wilcox received the email and therefore had information that Diamond's account of Lewis's absence in the Ellucian Report was contested. There was no evidence that DeBose kept Lewis from the meeting. These documents should have been admitted as either non-hearsay or hearsay exceptions. The District Court erred in failing to give an Adverse Inference jury instruction, as moved by DeBose, concerning the stipulation by the magistrate: (1) there was a duty to preserve; (2) the defendant USFBOT was on notice; and (3) *"there was a destruction of documents that may have been relevant to the litigation ..."* [2/8/17 Hearing, ECF-103, pg. 39:17-20].

motion for a new trial. *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982). On a motion for a new trial, the trial judge is free to weigh the evidence favoring both the jury verdict and the moving party. *Id.* As far as the motion for a new trial, the trial judge can grant a new trial if [s]he believes the verdict is contrary to the weight of the evidence. See, e.g., *Montgomery Ward Co. v. Duncan,* 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Marsh v. Illinois Central Rail Co.,* 175 F.2d 498 (5th Cir. 1949). However, the Eleventh Circuit recognizes the deferential abuse of discretion standard as particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed. *Id.* The Eleventh Circuit reviews a district court's denial of a motion for a new trial for "a clear abuse of discretion." *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524, 1528 (11th Cir. 1993).

Federal Rule of Civil Procedure 50(a)(1) provides in pertinent part that, "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party." A motion under Rule 50(a) may be made "at any time before submission of the case to the jury." Fed. R. Civ. P. 50(a)(2). The Respondent and Petitioner both moved for JMOL, *denied.*

Federal Rule of Civil Procedure 50(b) states: If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 28 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: (1) if a verdict was returned: (A) allow the judgment to stand; (B) order a new trial, or (C) direct entry of judgment as a matter of law. Here, a verdict was returned in DeBose's favor and against USFBOT on Petitioner's disparate treatment discrimination claim and retaliation. USFBOT did not poll the jury or appeal the verdict but renewed its JMOL on October 29, 2018. The District Court ruled on the motion, granting the JMOL, on February 14, 2019.

In construing a predecessor version of Rule 50(b), this Court held that "in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten

days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment." *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952); see *id.* at 50 n.1 (reproducing text of Rule 50(b) in effect at that time).

Rule 50(c) governs the case where a trial court has granted a motion for judgment *n. o. v.* Rule 50(c)(1) explains that, if the verdict loser, USFBOT, has joined a motion for new trial with its motion for judgment *n. o. v.*, the trial judge should rule conditionally on the new trial motion when [s]he grants judgment *n. o. v.* If [s]he conditionally grants a new trial, and if the court of appeals reverses his grant of judgment *n. o. v.*, Rule 50(c)(1) provides that "the new trial shall proceed unless the appellate court has otherwise ordered." The District Court granted USFBOT a conditional new trial. "Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n. o. v. against her, to move for a new trial in the usual course." 31 F.R.D. 646. The rule does not remotely indicate that the verdict winner loses this right to move for a new trial if the trial court's entry of judgment *n. o. v.* against her is on direction by the appellate court or its own initiative. DeBose file a motion for new trial, which the District Court denied. The Eleventh Circuit affirmed the District Court's Orders.

With regard to the Petitioner's New Trial Motion, the Court of Appeals has effectively deprived the verdict winner of the chance to move for a new trial. Rule 50(c)(2) and Rule 50(d) expressly preserve to the party who prevailed in the district court the right to urge a new trial should the jury's verdict be set aside on appeal. Though the District Court was not likewise obliged, the Appellate Court was required to view the evidence in the light most favorable to DeBose, the verdict winner and draw all reasonable inferences in her favor. See Hofkin v. Provident Life Accident Ins. Co., 81 F.3d 365, 369 (3d Cir. 1996); Frieze v. Boatmen's Bank of Belton, 950 F.2d 538, 540 (8th Cir. 1991). All inferences by the District Court were favorable to USFBOT. For instance, the District Court in its denial order stated: *"DeBose introduced no evidence that Wilcox was aware of her informal complaint to Dosal of "possible discrimination,"* (App. 6, pgs. 6-10). This misstates the record. The jury heard Dosal testify, admitting that he had shared the information with Wilcox.

> Q Did you testify yesterday that she reported to you in June 2014 that she felt that she was being discriminated against?

A Let me clarify. You're asking if I reported that to the Provost? [9/12/18 23:16-25]

Q I'm asking did you admit that in testimony yesterday.

A Yes.

Q Did you share Angela Debose's concerns with the Provost?

A I believe so, yes. [9/12/18 24:1-5]

Petitioner contends that a new trial was merited in the interest of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Submitted February **6th**, 2021

Respectfully,

Angela W. DeBose, Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served to all counsels of record this **6th** day of February 2021.

Angela W. DeBose, Petitioner