For starters, the Plaintiff's claims that she was denied the AVP EPM promotion due to unlawful retaliation are without merit. It is undisputed that DeBose did not engage in any statutorily protected activity until *after* she learned that Hamilton had been appointed to the AVP EPM position. *Compare* (Doc. No. 79-8) (demonstrating that DeBose's first ethics point complaint was submitted on July 28, 2014), *with* (Doc. No. 77, at ¶ 19) (stating that Dosal notified DeBose of Hamilton's appointment to the AVP EPM position on July 15, 2014). Thus, Counts II and IV, to the extent they are based on Hamilton's promotion to AVP EPM, fail as a matter of law due to a lack of causation. *See Univ. of Tex. Sw. Med. Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013) (stating that to satisfy the causation element, the plaintiff "must establish that his or her protected activity was a but for cause of the alleged adverse action by the employer.").

The Plaintiff's claims that she was terminated and given a poor reference in retaliation for engaging in statutorily protected activities, however, require a more thorough analysis. USF does not dispute that the Plaintiff engaged in statutorily protected activity, or that she suffered an adverse employment action when she was terminated and given a negative reference to the Provost of UNF. To the contrary, USF attacks the Plaintiff's ability to establish the causation element of her prima facie case and, to the extent she can make out a prima facie case, USF contends that DeBose cannot show that her termination and any poor review were pretext for retaliation.

Prior to the Supreme Court's *Nassar* decision, a plaintiff could satisfy this requirement by showing, among other things, "close temporal proximity" between the protected activity and the adverse employment action. *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). Following *Nassar*, however, a plaintiff must show more than

temporal proximity between the protected activity and their termination. *Cf. Smith v. City of New Smyrna Beach*, 588 F. App'x 965, 981-82 (11th Cir. 2014). Instead, to establish a claim for retaliation, the plaintiff must present evidence "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar*, 133 S.Ct. at 2533.

Here, the record contains testimonial evidence that after DeBose filed her EEOC complaint on January 15, 2015, (Doc. No. 76, at 6), she was "asked into meetings with no agenda." (A. DeBose Dep. Tr. 230:6-20). Shortly thereafter, the Alexis Mootoo incident occurred, which DeBose claims was part of a deal in which Dosal promised Mootoo more favorable "pay and position." (A. Dep. Tr. 84:2—86:24). Approximately one month later, in February of 2015, USF engaged Ellucian to review and assess its implementation of Degree Works. (Doc. No. 76, at 8). This, as we now know, ultimately culminated in the Ellucian Report, which USF cited as its basis for its decision not to renew DeBose's employment. Shortly thereafter, Ralph Wilcox acknowledges that he told UNF Provost Earle Traynham that DeBose was "not collaborative and that she was resistant to change." (Doc. No. 78, at ¶ 9). DeBose's version of the negative reference is far more colorful, with DeBose claiming that people at USF and elsewhere told her Ralph Wilcox told Traynham he wanted DeBose "to have nothing . . . not even a shirt . . . . bare, exposed with nothing." (A. DeBose Dep. Tr. 290:1-11).

Clearly, things between DeBose and USF went sideways between 2014 and 2015, and during that period of time, DeBose filed multiple internal and external complaints alleging discrimination. DeBose's version of the facts, i.e. that she was the victim of a massive conspiracy because she filed complaints of discrimination, may not ultimately be

accepted by a jury, but there is certainly enough circumstantial evidence of retaliation to afford DeBose her day in Court. Specifically, given the close temporal proximity between DeBose's EEOC complaint and USF's decision to engage Ellucian, DeBose's testimony that the Registrar's Office was included in the scope of Ellucian's engagement at the request of USF, DeBose's testimony that she was treated differently following her complaints of discrimination, and the timing and circumstances surrounding the Traynham conversation, a reasonable jury could find that USF's actions were retaliatory. Thus, USF's motion for summary judgment is denied as to DeBose's claims that her termination and poor reference were retaliatory.

C. Disparate Impact Claims

A disparate impact theory of discrimination "prohibits *neutral* employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily-protected group." *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (emphasis in original). To prove a disparate impact claim, the plaintiff must show: (1) there is a significant statistical disparity between the proportion of minorities available in the labor pool and the proportion of minorities hired by the employer; (2) there is a specific, facially-neutral employment practice causing the disparity; and (3) that a causal nexus exists between the identified employment practice and the statistical disparity. *Id.* Importantly, to prevail on a claim for disparate impact, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* At 1274-75.

Here, the only statistical evidence offered in support of the Plaintiff's disparate impact claims is an "Affidavit of Expert Opinion" offered by Saba Baptiste-Alkebu-Lan, a

purported subject matter expert on employment discrimination, (Doc. No. 177), and an unauthenticated spreadsheet attached to Doc. No. 188. *See* (Doc. No. 188, at 179). Since Ms. Baptiste-Alkebu-Lan's report is dated September 5, 2017, well after the deadline to disclose expert reports and the close of discovery, the affidavit is untimely and inadmissible in response to USF's motion for summary judgment. The same holds true for the spreadsheets submitted by the Plaintiff, which have not been authenticated and, as a result, are not admissible in response to summary judgment. 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.

D. Breach of Contract

To recover damages for breach of contract, the plaintiff must prove: (1) the plaintiff and defendant entered into a contract, (2) the plaintiff did what the contract required, (3) all conditions required by the contract for defendant's performance occurred, (4) the defendant failed to perform under the contract, and (5) the plaintiff was harmed by that failure. *Atlantica One, LLC v. Adragna*, 177 So. 3d 89, 91 (Fla. 5th DCA 2015). The Court previously dismissed DeBose's claims for breach of contract not based on an express contract. (Doc. No. 50, at 3-4). While DeBose previously represented that USF withheld a copy of her written employment agreement, (Doc. No. 49, at 6), discovery is now complete, and no written employment agreement has been shown to exist. For this reason alone, DeBose's breach of contract claim fails as a matter of law.

Moreover, it appears that in actuality DeBose was employed pursuant to USF Regulation 10.210, which states that "employment is at will and . . . employees may be non-reappointed upon written notice from the CAO." (Doc. No. 206-1, at 2). Under

Regulation 10.201, "the [required] period of notification prior to the effective date of non-reappointment is . . . [t]hree (3) months' . . . for employees with two (2) or more years of continuous employment." (Doc. No. 206-1, at 2). "Following receipt of the notice of non-reappointment, the CAO has the option to assign the employee other duties and responsibilities and/or to require the employee to use accrued annual leave." (Doc. No. 206-1, at 3). It is undisputed that this is exactly what happened here: DeBose was given three months' notice of her non-renewal, and was required to use accrued annual leave during the three month period following receipt of the notice of non-reappointment. As a result, DeBose has failed to prove that USF breached any of its non-reappointment procedures.

E. Tortious Interference

Under Florida law, the elements of a claim for tortious interference are: "(1) the existence of a business relationship that affords the plaintiff existing or prospective rights; (2) the defendant's knowledge of the business relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff." *Int'l Sales & Serv., Inc. v. Austral Insulated Products, Inc.*, 262 F.3d 1152, 1154 (11th Cir. 2001). In the TAC, the Plaintiff asserts claims for tortious interference against USF and Ellucian, claiming that Ralph Wilcox's negative review of her performance cost her a prospective employment opportunity at UNF, and that Ellucian's statements criticizing the Registrar's Office in its report caused her termination from USF. Neither claim holds water for one very simple reason: despite DeBose's plethora of allegations concerning USF and Ellucian's improper behavior, the record is devoid of evidence that either entity *intentionally* interfered with her existing or prospective rights of employment.

With respect to USF, the only person who could have intentionally interfered with DeBose's prospective rights of employment at UNF is Wilcox. While DeBose claims Wilcox told Traynham he wanted DeBose "to have nothing . . . not even a shirt . . . . bare, exposed with nothing," (A. DeBose Dep. Tr. 290:1-11), during her deposition DeBose was unable to clearly articulate who informed her of Wilcox's alleged "not even a shirt" statement. (A. DeBose Dep. Tr. 290:12-20). The best DeBose could do was to identify "a guy named Lance . . . who works at USF." (A. DeBose Dep. Tr. 290:18-20). Given the lack of information regarding the proponent of the "not even a shirt" comment, DeBose has failed to demonstrate that the testimony can be reduced to an admissible form. The same holds true for any statements regarding Wilcox's conversation with Traynham that were relayed to her by her friend Albert Colom. Mr. Colom is not a USF employee and, as a result, anything he told DeBose in May of 2015 is hearsay, and does not qualify as an admission of a party opponent or under any other exception to the rule against hearsay. Thus, DeBose's recitation of Colom's alleged version of the Traynham conversation is inadmissible in opposition to USF's summary judgment motion. Since DeBose lacks any firsthand knowledge regarding Wilcox's intentions pertaining to the Traynham conversation, and Wilcox unequivocally denies interfering with DeBose's prospective rights of employment, USF is entitled to summary judgment on Count V of the TAC.

As for Ellucian, DeBose similarly lacks any firsthand knowledge regarding why Ellucian was critical of the Registrar's Office in its report. DeBose claims that Diamond's body language, face, and demeanor was "angry," (A. DeBose Dep. Tr. 97:16-23), that she "went out of her way . . . to cast a negative light on the registrar's office," and she that

did not sincerely or honestly believe the opinions she expressed regarding the Registrar's Office. (A. DeBose Dep. Tr. 98:3—99:24). However, having an "angry" demeanor does not equate to tortious interference, and DeBose's beliefs regarding Diamond's alleged targeting of her office and lack of sincerity are pure conjecture. As a result, Ellucian is entitled to summary judgment on Count VI of the TAC.

F. Civil Conspiracy

To prove a claim for civil conspiracy, the plaintiff must show: (1) the existence of an agreement between two or more parties, (2) to do an unlawful act, (3) the doing of some overt act in furtherance of the conspiracy, and (4) damages. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009). In the TAC, DeBose accuses USF and Ellucian of conspiring "to terminate Plaintiff's employment for pretextual reasons by knowingly including inaccurate and improper information in the Ellucian Report with the intent of damaging Plaintiff." (Doc. No. 45, at ¶ 230). The problem for DeBose, however, is that there is absolutely no record evidence of any agreement between USF and Ellucian to include information critical of the Registrar's Office in the Ellucian Report. There are no emails, letters, or alleged oral statements that show any anti-DeBose collusion between USF and Ellucian. Any belief by DeBose that such collusion occurred is pure conjecture and has not been properly supported for purposes of opposing the Defendants' summary judgment motions. As a result, DeBose's civil conspiracy claims fail as a matter of law.

V. Conclusion

Accordingly, it is

ORDERED that the Summary Judgment Motions are **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**:

(1) USF's motion for summary judgment is **GRANTED** with respect to DeBose's claims of gender discrimination (Count I);

(2) USF's motion for summary judgment is **GRANTED** with respect to DeBose's claims of race *and* gender discrimination based on Hamilton's promotion to AVP EPM (Count I and III);

(3) USF's motion for summary judgment is **DENIED** with respect to DeBose's claims of race discrimination based on DeBose's non-reappointment as Registrar (Counts I and III);

(4) USF's motion for summary judgment is **GRANTED** with respect to DeBose's claims of retaliation based on Hamilton's promotion to AVP EPM (Counts II and IV);

(5) USF's motion for summary judgment is **DENIED** as to DeBose's claims of retaliation based on her non-reappointment as Registrar and Wilcox's poor reference to UNF (Counts II and IV);

(6) USF's motion for summary judgment is **GRANTED** as to DeBose's claims for disparate impact, breach of contract, tortious interference, and civil conspiracy (Counts V, VI, VII, IX, X);

(7) Ellucian's motion for summary judgment is **GRANTED** as to DeBose's claims for tortious interference and civil conspiracy (Counts VIII and X).

It is further **ORDERED** that DeBose and USF are directed to confer and file a status report within 30 days that contains the following information:

(1) The status or result of any previously or currently scheduled mediation and, if already concluded, the result of such mediation;

(2) Proposed dates for the mediation (if not already conducted) and trial of the remaining claims in this matter; and

(3) Any remaining issues to be addressed by the Court.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 29th day of September, 2017.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIVIL ACTION NO. 8:15-cv-02787-EAK-AEP

ANGELA DEBOSE,
Plaintiff,

v.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, UNIVERSITY OF SOUTH FLORIDA, AND ELLUCIAN, L.P.,
Defendants.

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIDAVITS AS A SHAM, FOR SANCTIONS, AND FOR DEFAULT JUDGMENT

Pursuant to the Federal Rules of Civil Procedure 11, 26, 37, 41, and 60, Plaintiff Angela DeBose ("Ms. DeBose") files a Motion to Strike sham affidavits submitted by the Defendant University of South Florida Board of Trustee ("USFBOT") on January 23, 2017 (Doc. 66) and February 7, 2017 (Doc. 84). The defendants have, among other things "suborned perjury by providing [witnesses] with a 'scripted' affidavit from their attorneys to create twice, wholly fictitious narratives and chronologies about their use of a third party to, for the first time in the USF Registrar's Office department history, destroy Plaintiff's department files as its primary objective by shredding all the personnel files of active and former employees maintained in the department since the University's inception. The Defendant acted knowingly to suborn perjury to hinder the Magistrate's fair adjudication on the Plaintiff's Motion for Sanctions (Doc. 61) filed by Plaintiff's former counsel on December 30, 2016. The USFBOT witnesses' falsification of the affidavits concerned issues central to the truth-finding process. Plaintiff asks for reconsideration on Motion for Sanctions on the basis of new evidence and fraud on the court. Plaintiff also asks for default judgment, terminating the proceedings in her favor, for the Defendant unfairly

hampering the presentation of the Plaintiff's claims and defenses. In support of her motion, Plaintiff states as follows:

MEMORANDUM OF LAW

I. BACKGROUND

The history of the action is attached as **Exhibit A**. In November 2016, Ms. DeBose sought to obtain the affidavits of witnesses Ms. Delonjie Tyson ("Ms. Tyson") and Vanessa Centelles ("Ms. Centelles"). Ms. DeBose learned that USFBOT used student workers employed by the USF Office of the Registrar to aid in the destruction of the personnel files maintained in the department. [Affidavit of Delonjie Tyson Page 1, ¶4-5, Page 2, ¶6-7]. On November 22, 2016, Ms. Centelles provided her affidavit. (**Exhibit B**). On November 23, Ms. Tyson provided her affidavit. (**Exhibit C**). Both testified to their direct knowledge of the shredding and their participation to put the files into shred bins, including Ms. DeBose's files. Both students stated they were ordered by Suzanne McCoskey-Bishop to do so. (id.). Both stated the shredding occurred in **Summer 2015**, after Ms. DeBose's termination. (id.). In December 2016, USFBOT's counsels were notified by Ms. DeBose's former counsel of a pending motion for sanctions. On December 29, 2016, Ms. DeBose learned from Bushe-Whiteman that Suzanne McCoskey Bishop was summoned to the USF Office of the General Counsel by Gerard Solis about the departmental files and returned upset about not taking the blame (**Exhibit D**). On December 30, 2016, Plaintiff's Motion for Sanctions was filed (Doc. 61), with the affidavits of Vanessa Centelles and Delonjie Tyson, attesting to their direct knowledge of the shredding. On January 20, 2016, Ms. Bushe-Whiteman informed Ms. DeBose that Ms. McCoskey Bishop would be changing her story—that instead of naming Alexis Mootoo and Dr. Paul Dosal as having ordered the shredding of the files, the General Counsel's Office concocted a litigation scheme to have Ms. McCoskey Bishop state that "Victoria [Johnson]" in HR told her that it was okay to shred the records (**Exhibit D**). On January 23, 2017, USFBOT filed Opposition to the Motion for Sanctions (Doc. 66), submitting Affidavits from Suzanne McCoskey Bishop, Lois Palmer, and Victoria Johnson (**Exhibit E**) attesting to the story in the manner Ms. Bushe-Whiteman reported. Ms. McCoskey Bishop, Lois Palmer, and Victoria Johnson stated the shredding

occurred in October 2015 and not the Summer 2015, as attested to by Ms. Centelles and Ms. Tyson. On February 7, 2017, fourteen (14) days later, USFBOT filed a second round of affidavits from Suzanne McCoskey Bishop, Lois Palmer, and Victoria Johnson (**Exhibit F**), embellishing their stories about whether the destruction included Ms. DeBose's records (Doc. 84). This time, McCoskey Bishop, Palmer, and Johnson stated a lack of knowledge as to whether Ms. DeBose's files were put into the shred bins to contradict the student workers, Ms. Centelles and Ms. Tyson, who attested to the fact that Ms. DeBose's files were among the files placed in shred bins.

On February 21, 2017, Ms. DeBose filed a state court action (17-CA-001652) against USFBOT for violation of Chapter 119.11(4) which provides in pertinent part: "**the custodian of the public record… of such civil action shall not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined… until the court directs otherwise.**" On April 12, 2018, Kim Bushe-Whiteman signed a sworn statement with the Tampa Police Department (**Exhibit -- KBushe-Whiteman Police Statement**), affirming the statements in her March 16, 2017 Affidavit concerning the destruction. On June 30, 2018, Ms. DeBose requested to depose Lois Palmer, Suzanne McCoskey Bishop, and Victoria Johnson in connection with the state court case. On July 10, 2018, USFBOT's counsel filed a Motion for Protective Order. On June 30, 2018, Ms. DeBose requested issuance of a Nonparty Subpoena Duces Tecum to Accurate Paper Recycling, Inc., the third party company that shredded the files, to obtain documents, including the certificate of shredding for the Summer months of June to August of 2015. On July 10, 2018, USFBOT, having no standing, filed an Objection. On July 13, 2018, USFBOT filed a Motion to Quash. On July 18, 2018, Ms. DeBose deposed Delonjie Tyson to authenticate her affidavit and for other purposes. In her July 18, 2018 Deposition, Ms. Tyson testified once again that the shredding did in fact occur in the Summer of 2015, specifically the months of June, July, or August. [Affidavit of Delonjie Tyson Page 2, ¶8 c.]; [Deposition of Delonjie Tyson 7:23-25; 8:1]. Ms. Tyson stated that a standing registrar was there (Carrie Garcia) when the shredding occurred, until the other registrar could be brought in (Lois Palmer). [Affidavit of Delonjie Tyson, Page 2, ¶8 i-j]; [7/18/18 Deposition of Delonjie Tyson 16:9-.21]. Ms. Tyson testified that Ms.

DeBose's records were placed in the shred bins [Affidavit of Delonjie Tyson Page 2, ¶8 a-c] and that neither Ms. DeBose nor any former or current employees that were not present in the office, were notified. [7/18/18 Deposition of Delonjie Tyson 9:12-21]. Ms. Tyson stated only word of mouth communication was given in the office—that notices, flyers, and emails were not sent out to. [7/18/18 Deposition of Delonjie Tyson 8:2-23]; [Affidavit of Delonjie Tyson Page 2, ¶8 e-g]. The complete **July 18, 2018 Deposition of Delonjie Tyson (Exhibit – DJ Tyson Deposition)** is filed as if incorporated herein as well as the **July 28, 2018 Affidavit of Delonjie Tyson** for submission in this case (**Exhibit – DJ Tyson Affidavit**).

In filing this motion and this new evidence from Ms. Tyson, the Plaintiff contends that that Suzanne McCoskey Bishop, Lois Palmer, and Victoria Johnson perjured themselves, submitting fraudulent affidavits at the request of USFBOT's counsels to avoid sanctions. Ms. Tyson's affidavit is important because she is a *direct witness*, being one of several student workers that were ordered to place the files into shred bins during the summer of 2015, just a month or two after DeBose's termination. USFBOT's counsel devised or concocted a successful litigation scheme to change the time of the shredding from June 2015 to October because of the temporal proximity of the shredding to Ms. DeBose's termination. The summer months of June, July, or August would have placed the shredding within 3 months of Ms. DeBose's termination, establishing "bad faith" or willful destruction to prevent Ms. DeBose's evidence from being available for her pending litigation and available at trial. Additionally, by changing their stories with a second affidavit, USFBOT's counsels sought to raise a question in the Court's mind as to whether the shredding prejudiced Ms. DeBose. USFBOT only admitted to the shredding after the Motion for Sanctions was filed, and discovery was over. At all relevant times prior to the Motion, USFBOT vehemently denied that any shredding took place [**February 8, 2017 Hearing Transcript (Doc. 123), 14:23-25; 29:9-20**], as did USFBOT witnesses (i.e. Carrie Garcia, Paul Dosal, and Alexis Mootoo) at deposition.

The Court is asked to consider that Truth does not require protection but can defend itself. USFBOT is concerned because its lies have found it out.

II. ARGUMENT

Motion to Strike

Plaintiff has filed a Motion to Strike the Affidavits, or Portions Thereof, Filed by USFBOT in its Response to Plaintiff's Motion for Sanctions (Willful Destruction of Plaintiff's Files) (Doc. 61). Plaintiff contends that USFBOT General Counsel Gerard Solis may have committed solicitation to commit perjury and witness tampering.

Suzanne McCoskey Bishop

Mr. Solis summoned Ms. McCoskey Bishop to his office to testify untruthfully in her affidavit concerning the destruction of Ms. DeBose's files. Mr. Solis contrived the story that the destruction occurred in October 2015, instead of the summer months of June to early August. Mr. Solis told Ms. McCoskey Bishop to testify that Victoria Johnson in HR told her it was okay to destroy the files instead of Alexis Mootoo, on behalf of Paul Dosal.

Lois Palmer

Ms. Palmer lied that she was working in the Registrar's Office at the time the records were placed in shred bins for destruction. Ms. Palmer's start date at USF was August 17, 2015. Delonjie Tyson and Vanessa Centelles both state in their affidavits that the shredding occurred in the Summer of 2015, right after Ms. DeBose was no longer in the office. (**See Exhibits B-C**). Ms. Tyson states a "standing" or "standup" registrar was there until another one could be brought in. [Affidavit of Delonjie Tyson, Page 2, ¶8 i-j]. Carrie Garcia was paid as Acting Registrar from June 4, 2015 to August 17, 2015. Ms. Tyson confirmed that it was Carrie Garcia who was serving as registrar at the time the records were shredded. [Affidavit of Delonjie Tyson, Page 2, ¶8 i-j]. Ms. Palmer lied that the destruction occurred in October 2015 so that she could claim: 1) that she was present, 2) that she casually noticed files were in an unsecure location, 3) that she methodically worked with Victoria Johnson in Human Resources to determine the records were duplicates, and 4) took Victoria Johnson's advice to have them shredded because they did not need to be kept. However, Suzanne McCoskey Bishop testified in her February 7, 2017 affidavit that the Registrar's Office once again resumed the practice of maintaining department

personnel records, thereby contradicting Ms. Palmer's statement. Virtually every statement made by Ms. Palmer in her affidavit is a lie.

Victoria Johnson

Victoria Johnson lied that the files were duplicates. Ms. Johnson's affidavit is contradicted by the actual custodians who placed information in the files. Ms. Johnson did not meet with Ms. Palmer at the time the files were placed in shred bins because Ms. Palmer was not the sitting registrar at the time the records were shredded, Carrie Garcia was. Therefore, virtually every statement made by Ms. Johnson in her affidavit is also a lie.

Carrie Garcia

Carrie Garcia worked with Paul Dosal in several capacities in his efforts to retaliate and fire Ms. DeBose. It was Carrie Garcia who urged Sidney Fernandes to pick off Degree Works from Ms. DeBose in June 2014. It was Carrie Garcia who worked on Paul Dosal's behalf to obtain quotes to fund a consulting engagement by Ellucian and Andrea Diamond. It was Carrie Garcia, on behalf of Paul Dosal, who brought Ellucian's Andrea Diamond to USF for an onsite visit. It was Carrie Garcia who made the request to include the Registrar's Office in the Ellucian engagement and lured Angela DeBose to the "ambush" meeting with Ms. Diamond, and who also guided her in writing the Ellucian Report. It was Carrie Garcia who took DeBose's job and who was the standing or acting registrar when DeBose's files were shredded [Affidavit of Delonjie Tyson Page 2, ¶ 8 i-j]. It was Carrie Garcia who recommended Ellucian's Lois Palmer to Paul Dosal and Ralph Wilcox for the position of University Registrar. Carrie Garcia lied in her deposition on November 10, 2016 and disclaimed any knowledge about the shredding of the Registrar's Office, when she was one of the "higher ups" in the Registrar's Office who discussed it before the records were destroyed. [7/18/18 Deposition of Delonjie Tyson 10:13-19]; [Affidavit of Delonjie Tyson Page 2, ¶ 8d].

In her motion, Plaintiff provides new direct evidence of the improper acts that USFBOT has committed that may lead to sanctions—including perjury and a carefully executed scheme to defraud not only Ms. DeBose but the Middle District Court. USFBOT should be sanctioned for suborning perjury

from these witnesses in a calculated scheme to interfere with the judicial system's ability to adjudicate the matter of whether USFBOT willfully had Plaintiff's evidence in the case destroyed so that it would not be available litigation or trial. Witness Tampering and Solicitation of Perjury Title 18 U.S.C.A. § 1512, entitled "Tampering with a witness, victim or an informant provides, in relevant part, § 1512. Tampering with a witness, victim, or an informant . . . . (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-- (1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to-- (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; . . . . 18 U.S.C. §1512. Similarly, Florida Statute § 914.22 entitled "Tampering with or harassing a witness, victim, or informant; penalties", provides in relevant part, 5 (1) A person who knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, or offers pecuniary benefit or gain to another person, with intent to cause or induce any person to: . . . . (f) Testify untruthfully in an official investigation or an official proceeding, commits the crime of tampering with a witness, victim, or informant. Fla. Stat. § 914.22 (Westlaw 2008). Plaintiff also cites to Florida Statute § 837.02, entitled "Perjury in official proceedings," which states, ". . . whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree. . . ". Plaintiff further cites to § 777.04, entitled, "Attempts, solicitation, and conspiracy," which in relevant part states: (2) A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation. . . Fla. Stat. § 777.04 (Westlaw 2008).

Plaintiff argues that the chronology, affidavits, depositions, and emails submitted are evidence of a scheme of fraud on the court characterized by perjury, witness tampering and falsification. The back-to-back affidavits submitted by USFBOT on January 23, 2017 and February 7, 2017 is another indication of the scheme. Though Ms. Palmer, Ms. McCoskey Bishop, and Ms. Johnson were permitted to make

corrections to apparent errors in their affidavits (*see Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) (where affidavit was defective, party should have an opportunity —to file a corrected affidavit)), Plaintiff's former counsel contended it was more than a correction in that these witnesses changed their stories. [**February 8, 2017 Hearing Transcript (Doc. 123), 14:23-25; 29:9-20**]. Additionally, USFBOT's failure to comply with discovery is further proof of the Defendant's egregious actions. Plaintiff contends the evidence meets the standard requiring that the fraud is "conclusively demonstrated" through clear and convincing evidence.

I. Motion for Sanctions and Default Judgment

Plaintiffs seek sanctions based upon an alleged violation of Federal and Florida State criminal statutes for soliciting perjury and witness tampering. The Court's authority to issue sanctions based upon this purported conduct is not predicated upon a determination of criminal guilt of violating of these statutes but instead upon the Court's inherent power. Indeed, as the United States Supreme Court has recognized, the authority to sanction parties for bad faith litigation misconduct stems not only from the Federal Rules of Civil Procedure and the United States Code, but also from the Court's inherent power to effectively manage its affairs by punishing and deterring abuses of the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991). Thus, Courts may exercise their inherent power to impose sanctions in response to abusive litigation practices. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632, (1962); see also *Peer v. Lewis*, 606 F.3d 1306, 1316 (11th Cir. 2010). Such inherent power may be appropriately exercised particularly where a party "commits perjury or ... doctors evidence" that "relates to the pivotal or 'linchpin' issue in the case." *Qantum Commc'ns. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1269 (S.D. Fla. 2007) (citing *Vargas v. Peltz*, 901 F. Supp. 1572, 1581-82 (S.D. Fla. 1995)). However, "[t]he key to unlocking a court's inherent power is a finding of bad faith." *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) (alteration in original) (citing *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998)).

A. Bad Faith

In *Atlantic Sea Company, S.A. v. Anais Worldwide Shipping, Inc.*, No. 08-23079-CIV, 2010 WL 2346665, at *2 (S.D. Fla. June 9, 2010), the court noted that where the movant "offer[s] no direct evidence of bad faith, . . . this Court must assess the circumstantial evidence of bad faith under the standard set forth in Calixto." The following constitutes circumstantial evidence of bad faith:

> (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.

See Walter v. Carnival Corp., No. 09-20962-CIV, 2010 WL 2927962 (S.D. Fla. July 23, 2010) (citing *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)). The bad faith of USFBOT is demonstrated in several ways:

> (1) the Defendant, though on notice of the duty to preserve, failed to place an effective litigation hold on documents about or concerning Angela DeBose; (2) the Defendant knowingly shred public records in violation of the Florida Public Records Act and willfully shred documents to prevent Plaintiff from having the documents for litigation and trial. (3) the Defendant denied the shredding in its Answer of the TAC and sought dismissal of the related claim, failing to disclose that any destruction had occurred. **(4) the Defendant solicited or suborned perjury and tampered with witness testimony from Suzanne McCoskey, Lois Palmer, and Victoria Johnson by having them give false testimony about when the shredding occurred. Additionally, the Defendant had the witnesses testify falsely that Lois Palmer was serving in the position of University Registrar at the time the files were place in shred bins, when in fact the shredding occurred when Carrie Garcia was sitting registrar. Finally, the witnesses provided a subsequent false affidavit, disclaiming knowledge that Ms. DeBose's files were shredded. Vanessa Centelles stated Ms. DeBose's files were some of the first put in the shred bins.** (5) Paul Dosal, Alexis Mootoo, and Carrie Garcia lied in their depositions when questioned about the shredding/destruction of records by Plaintiff's former counsel. (6) USFBOT's counsel lied to the Magistrate Judge about the shredding—that notices were sent out, etc., and (7) the Defendant failed to produce other directly relevant, responsive evidence during discovery.

Ms. DeBose has experienced extreme prejudice as a result of the destruction of her files. See *Brown v. Chertoff*, 563 F. Supp. 2d 1378 (S.D. Ga. 2008), (finding that an employee suffered prejudice in proving a discrimination claim where his employer destroyed notes from an internal investigation into the

employee's discrimination claims because the notes would have "shed light on the decision-making process that led to [the employee's] termination" and may have been useful to undermine the employer's proffered legitimate reason for termination). USFBOT's action was more than mere negligence. *See Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). The destruction itself was unusual in that it was a "first time ever" shredding of files that had been maintained since the University's inception. USFBOT did not destroy files of inactive employees, with no useful life; rather, USFBOT had all the files shredded of both active and inactive employees, including Ms. DeBose, against a preservation notice and knowing she had requested her records. It wasn't enough that the Defendant engaged in an intentional affirmative act causing Plaintiff's evidence to be destroyed so that it would not be available for trial. *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994) and *Hicks v. Gates Rubber Company*, 833 F. 2d 1406, 1418-19 (10th Cir. 1987). The injury to Ms. DeBose is compiled because of the dishonest affidavit declarations and deposition answers that are grounds for a "fraud on the court" dismissal. See *Hull, 356 F.3d 98; Martin v. DaimlerChrysler Corp.*, 251 F.3d 691 (8th Cir. 2001); *Grant v. KMart Corp.*, No. 2000-CA-01367-COA, 2001 Miss. App. LEXIS 547 (Dec. 18, 2001). Ms. DeBose contends that the process of the trial itself has been subverted. *See Ruiz v. City of Orlando*, 859 So.2d 574, 576 (Fla. App. 2003). Plaintiff contends that she is "entitled to the benefit of a presumption that the destroyed documents would have bolstered her case." See *Favors*, 13 F.3d at 1239 (the plaintiff asserted a claim for race discrimination against her employer and the employer violated a regulation that required it to maintain employment records); *Hicks*, 833 F.2d at 1419 (plaintiff asserted claims for sexual and racial harassment against her former employer and the regulation violated by the employer required that personnel and employment records be kept by the employer).

B. The Prejudice cannot be Cured

In determining bad faith, "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." Flury, 427 F.3d at 946. In Flury, the Eleventh Circuit stated that: In determining whether dismissal is warranted, the court must consider: (1) whether the [plaintiff]

was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [defendant] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. Id. at 945. With respect to the fourth factor, whether the [party] acted in good or bad faith, the Eleventh Circuit stated that "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." Id. at 946 (citing *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 S.E.2d 923, 927 (Ga. Ct. App. 2003)). USFBOT answered falsely to Plaintiff's accusation about the shredding and did not disclose it when successfully requesting to dismiss the claim. USFBOT then contrived a false story about the shredding, having Lois Palmer, Suzanne McCoskey Bishop, Victoria Johnson, Carrie Garcia, Alexis Mootoo, and Paul Dosal to lie in their affidavits and depositions while under oath. The prejudice to Ms. DeBose cannot be cured, with dismissed claims and the Court perceiving her persistence as self-serving and an extreme bother. The practical importance of the evidence was shown in USFBOT's Lori Mohn desperately seeking the documents for discovery but because the records were destroyed a year earlier, and there were no duplicates to speak of, USFBOT was unable to provide them at all relevant times. The defendants central to the case in chief, acted in bad faith: Lois Palmer, Suzanne McCoskey Bishop, Victoria Johnson, Carrie Garcia, Alexis Mootoo, and Paul Dosal. Bad faith was also show by USFBOT's internal counsel, Gerard Solis, and external counsel, Richard McCrea, the architects of the calculated litigation scheme to defraud Ms. DeBose and the Court.

CONCLUSION

USF destroyed critical evidence to obstruct the Plaintiff's ability to prove her case. Accordingly, Plaintiff has been prejudiced by the loss of this evidence. Sanctions are appropriate to cure the prejudice and to address the lie and fraud that has been perpetrated upon Ms. DeBose and this Court. Likewise, Plaintiff has been significantly harmed by USF denials, nondisclosure, and untruthful disclosures. USF concealed their conduct and deceived Plaintiff and the Court in "bad faith" or certainly for no good faith reason at all.

WHEREFORE, Plaintiff respectfully requests that the Court to enter an Order striking the affidavits, sanctioning Defendant USFBOT, entering default judgment, and any other relief deemed just and proper—including reopening discovery to compel the depositions of Suzanne McCoskey Bishop, Lois Palmer, and Victoria Johnson and additionally compelling the production of documents from Accurate Paper Recycling, Inc., a nonparty.

Submitted: July 30th, 2018

/s/ Angela DeBose
Angela DeBose, Plaintiff

CERTIFICATE OF CONFERRAL

Plaintiff contacted the Defendants to inform them of the plan to file this motion.

CERTIFICATION OF GOOD CAUSE

Plaintiff states she is filing this motion for good cause and in good faith and not for any other purpose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **30th** day of July 2018, the above and foregoing was sent electronically to: Richard C. McCrea, Jr. and Cayla Page, Greenberg Traurig, P.A., 101 East Kennedy Boulevard, Suite 1900, Tampa, Florida 33602-5148; email: (mccrear@gtlaw.com; pagec@gtlaw.com) and Kimberly Doud, Littler Mendelson, 111 North Magnolia Avenue, Suite 1250, Orlando, Florida 32801; email: (kdoud@littler.com).

/s/ Angela DeBose
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1107 W. Kirby Street
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Telephone: (813) 932-6959
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From: cmecf_flmd_notification@flmd.uscourts.gov
To: cmecf_flmd_notices@flmd.uscourts.gov
Subject: Activity in Case 8:15-cv-02787-EAK-AEP DeBose v. USF Board of Trustees et al Order on Motion to Strike
Date: Tuesday, August 14, 2018 12:30:48 PM

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U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered on 8/14/2018 at 12:29 PM EDT and filed on 8/14/2018
Case Name: DeBose v. USF Board of Trustees et al
Case Number: 8:15-cv-02787-EAK-AEP
Filer:
Document Number: 311(No document attached)

Docket Text:
ENDORSED ORDER denying [295] Motion to Strike for the reasons articulated during the Final Pretrial Conference. Signed by Magistrate Judge Anthony E. Porcelli on 8/14/2018. (JMF)

8:15-cv-02787-EAK-AEP Notice has been electronically mailed to:

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Angela W. DeBose awdebose@aol.com

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,

Defendant.

COURT'S VERDICT FORM

Please carefully read the questions below and provide your answers in the spaces provided:

I. Race Discrimination

Do you find from a preponderance of the evidence:

(1) That the University of South Florida discharged Ms. DeBose from employment?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations as to Ms. DeBose's race discrimination claim, and you should skip to question II(1). If your answer to this question is "Yes," go to the next question.]

(2) That Ms. DeBose's race was a motivating factor that prompted the University of South Florida to take that action?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations as to Ms. DeBose's race discrimination claim, and you should skip to question II(1). If your answer to this question is "Yes," go to the next question.]

(3) That the University of South Florida would have discharged Ms. DeBose from employment even if the University of South Florida had not taken Ms. DeBose's race into account?

Answer Yes or No Yes

[If your answer to this question is "Yes," this ends your deliberations as to Ms. DeBose's race discrimination claim, and you should skip to question II(1). If your answer to this question is "No," go to the next question.]

(4) That Ms. DeBose should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No _____

If your answer is "Yes,"
in what amount? $_____

II. Retaliation

Do you find from a preponderance of the evidence:

(1) That Ms. DeBose engaged in protected activity?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer to this question is "Yes," go to the next question.]

(2) That the University of South Florida took an adverse employment action against Ms. DeBose?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer to this question is "Yes," go to the next question.]

(3) That the University of South Florida took the adverse employment action because of Ms. DeBose's protected activity?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer to this question is "Yes," go to the next question.]

(4) That Ms. DeBose suffered damages because of the adverse employment action?

Answer Yes or No Yes

[If your answer to this question is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

(5) That Ms. DeBose should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No Yes

If your answer is "Yes," in what amount? $ 310,800.00

SO SAY WE ALL.

Crystal Stephens
Foreperson's Signature

DATE: 9.26.18

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA DEBOSE,

Plaintiff,

v. **CASE NO. 8:15-cv-02787-EAK-AEP**

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, and ELLUCIAN COMPANY, L.P.,

Defendants.
_____/

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Defendant University of South Florida Board of Trustees ("USFBOT"), by and through its undersigned counsel and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, hereby renews its Rule 50(a) motion made at the close of plaintiff's proof and renewed at the close of all proof. Pursuant to Fed.R.Civ.P. 59, defendant USFBOT moves in the alternative for a new trial. The grounds upon which the instant motion is based are set forth in the following Supporting Memorandum of Law.

SUPPORTING MEMORANDUM OF LAW

I.

APPLICABLE LEGAL STANDARD

A party is entitled to judgment as a matter of law "if there is no legally sufficient evidentiary basis" for a reasonable jury to find for a plaintiff on a material element of his or her cause of action. Fed.R.Civ.P. 50; *Christopher v. Florida,* 449 F.3d 1360,

1364 (11th Cir 2006); *Pickett v. Tyson Fresh Meats, Inc.,* 420 F.3d 1272, 1278 (11th Cir. 2005).

"Motions for directed verdict and for judgment notwithstanding the verdict need not be reserved for situations where there is a complete absence of facts to support a jury verdict." *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208, 1230 (11th Cir. 2001). "There must be a substantial conflict in the evidence" to support a jury question. *Silvera v. Orange County School Board,* 244 F.3d 1253, 1258 (11th Cir 2001). *See also Abel v. Dubberly,* 210 F.3d 1334, 1337 (11th Cir. 2000) ("a substantial conflict in the evidence is required before a matter will be sent to the jury"). Instead, judgment as a matter of law under Rule 50 should be granted where "the evidence is so weighted in favor of one side that one party must prevail as a matter of law." *Thosteson v. United States,* 331 F.3d 1294, 1298 (11th Cir. 2003); *see also Bishop v. City of Birmingham Police Department,* 361 F.3d 607, 609 (11th Cir. 2004).

Rule 59—governing motions for new trial—provides a less stringent standard than motions filed under Rule 50(b). A new trial may be granted "for any reason recognized at common law, even where there is substantial evidence supporting the verdict." *George v. GTE Directories Corp.,* 195 F.R.D. 696, 701 (M.D. Fla. 2000). Under this standard, the court must determine if the verdict is against the clear weight of the evidence or, if sustained, will result in a miscarriage of justice. *Id.*

In determining whether a new trial is warranted, the trial court is free to weigh the evidence independently. *McGinnis v. American Home Mortgage Servicing, Inc.,* 817 F.3d 1241, 1254-55 (11th Cir. 2016); *Williams v. City of*

Valdosta, 689 F.2d 964, 973 (11th Cir. 1982). The trial court "is to view not only that evidence favoring the jury verdict but evidence in favor of the moving party as well." *McGinnis,* 817 F.3d at 1255, *quoting Williams,* 689 F.2d at 973.

II.

ARGUMENT

A. DeBose Failed To Establish A Condition Of Suit

Title VII requires a plaintiff to file a charge of discrimination and receive a Notice of Right to Sue from the EEOC as a condition of suit. *Forehand v. Florida State Hospital at Chattahoochee,* 89 F.3d 1562 (11th Cir. 1996); *H & R Block v. Morris,* 606 F.3d 1285, 1295 (11th Cir. 2010). Similarly, in order to bring a claim under the Florida Civil Rights Act ("FCRA"), a plaintiff must first file a charge of discrimination with the Florida Commission on Human Relations and exhaust the administrative remedies required by the FCRA. *Sunbeam Television Corp. v. Mitzel,* 83 So.3d 865, 873-74 (Fla. 3d DCA 2012).

Title VII's procedural requirements are not to be relaxed for *pro se* litigants. *See Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L. Ed. 2d 196 (1984) ("[p]rocedural requirements established by Congress for gaining access to federal courts are not to be disregarded by Courts out of a vague sympathy for particular litigants"); *Mohasco v. Silver,* 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L. Ed. 2d 532 (1980) ("[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

Here, the parties' Joint Pretrial Statement expressly stated that an issue of fact to be resolved at trial was whether Debose satisfied all conditions precedent to suit. [Doc. 361, p. 25]. Notwithstanding that fact, DeBose failed to introduce any evidence that she filed a charge of discrimination alleging retaliatory termination or that she received a Notice of Right to Sue on her termination claim. As such, DeBose failed to prove that she satisfied all conditions precedent to suit and, therefore, judgment as a matter of law should be entered for USFBOT.

B. DeBose Did Not Present Sufficient Evidence On Her Retaliation Claim To Reach the Jury

To establish a *prima facie* case of retaliation under Title VII[1], DeBose was required to show: 1) she engaged in protected activity; 2) she suffered an adverse employment action; and 3) there is a causal link between her protected activity and the adverse action. *Weeks v. Harden Mfg. Corp.,* 291 F.3d 1307, 1312 (11th Cir. 2002); *Gupta v. Florida Board of Regents,* 212 F.3d 571, 587 (11th Cir. 2000).

If DeBose established a *prima facie* case of retaliation, the burden shifts to USFBOT to provide a legitimate, non-retaliatory reason for the adverse action. *E.E.O.C. v. Reichhold Chemicals, Inc.,* 988 F.2d 1564, 1571-72 (11th Cir. 1993). Once USFBOT provided such a reason, the burden then shifts back to DeBose to prove, by a preponderance of the evidence, that USFBOT's reason was not a true reason, but merely pretext for retaliation. *Meeks v. Computer Associates Int'l.,* 15 F.3d 1013, 1019 (11th Cir. 1994). Pretext means more than inconsistency; pretext is

[1] Retaliation claims under the FCRA follow the Title VII analysis. *Harper v. Blockbuster Entertainment Corp.,* 139 F.3d 1385, 1389-90 (11th Cir. 1998).

"'a lie, specifically a phony reason for some action.'" *Brown v. Sybase, Inc.*, 287 F.Supp.2d 1330, 1340 (S.D. Fla. 2003), *quoting Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1261 (11th Cir. 2001). Whether the reason provided by USFBOT for terminating DeBose was a pretext for retaliation, must be established by DeBose through "significantly probative evidence." *Johnson v. Atlanta Indep. Sch. Sys.*, 137 Fed. Appx. 311, 315 (11th Cir. 2005); *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993) (citations omitted).

Importantly, DeBose could not meet her burden "by simply quarreling with the wisdom of that reason." *Wood v. Calhoun Cty. Fl.*, 626 Fed. Appx. 954, 956 (11th Cir. 2015), *quoting Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (*en banc*). "The inquiry into whether an employer's proffered reasons were merely pretextual centers on the employer's beliefs, not the beliefs of the employee or even objective reality." *Lopez v. AT&T Corp.*, 457 Fed. Appx. 872, 874 (11th Cir. 2012); *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1266-67 (11th Cir. 2010), *Barsorian v. Grossman Roth, P.A.*, 572 Fed. Appx. 864, 869 (11th Cir. 2014) ("[e]ven a showing that the employer fired the employee on the basis of an incorrect assessment is insufficient, for if the employer honestly but mistakenly believed it had accurate information, then its decision to terminate the employee was not discriminatory").

1. DeBose failed to introduce sufficient evidence to prove the causation element of a *prima facie* case.

As this Court noted in *Banks v. iGov Technologies, Inc.*, 2015 WL 12939794 at *12 (M.D. Fla. Oct. 27, 2015), following the Supreme Court's decision in

University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 133 S.Ct. 2517, 186 L. Ed. 2d 583 (2013), a plaintiff must show more than temporal proximity between the protected activity and his or her termination to satisfy the causation element of a *prima facie* case of retaliation. Instead, a plaintiff must establish that his or her protected activity was a "but-for" cause of the adverse action by the employer. *Nassar,* 133 S.Ct. at 2534.

The "but-for" cause element "requires a closer link than mere proximate causation, it requires that the proscribed animus have a determinative influence in the employer's adverse decision." *Sims v. MVM, Inc.,* 704 F.3d 1327, 1335-36 (11th Cir. 2013). *See also Smith v. City of Fort Pierce,* 565 Fed. Appx. 774 (11th Cir. 2014) (to establish a *prima facie* case of retaliation, a plaintiff must offer evidence from which a reasonable jury might conclude that an employer's retaliatory animus was the "but-for" cause of the adverse action).

In response to USFBOT's Rule 50 motion—and in closing argument[2] to the jury—DeBose argued that Wilcox and Dosal testified that DeBose's race discrimination complaints were a reason for her termination. [Doc. 461, p. 7]. DeBose's arguments, however, were an express misrepresentation of Wilcox's and Dosal's testimony. Contrary to DeBose's representations, both witnesses testified that DeBose's complaints of discrimination had nothing to do with the termination decision. [Trial Transcript, Day 3: pp. 154-55, lines 16-25; 1-4; Day 4:

[2] *See* Trial Transcript, Day 10: p. 7, lines 23-25; p. 16, lines 9-14.

pp. 23-24, lines 1-16; pp. 55-57, lines 8-25; 1-25; p. 192, lines 16-18; Day 6: pp. 134-35, lines 19-25; 1-9; Day 8: p. 37, lines 15-24).

With regard to temporal proximity, the evidence at trial was that DeBose filed her EEOC charge in late December of 2014 and filed her first federal action in January of 2015 - - - some 4-5 months before her termination. DeBose's other complaints occurred even earlier. As this Court recognized in *Banks*, a four to five-month gap between plaintiff's last protected activity and her termination "is too great even under pre-*Nassar* precedent, to give rise to an inference that [plaintiff] was terminated for engaging in a statutorily protected activity." *Banks, supra.* At *12.

Indeed, numerous other courts have similarly held that a three or four-month delay between the statutorily protected activity and the adverse employment action is too long to prove causation. *See Thomas v. Cooper Lightning, Inc.,* 506 F.3d 1361, 1364 (11th Cir. 2007), *citing Richmond v. Oveok, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); and *Hughes v. Derwinski,* 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4-month period insufficient). *See also Higdon v. Jackson,* 393 F.3d 1211, 1220-21 (11th Cir. 2004) (three-month period did not allow a reasonable inference of a causal relationship between the protected expression and the adverse action); *Wascura v. City of South Miami,* 257 F.3d 1238 (11th Cir. 2001) (3 1/2-month gap insufficient); *Embry v. Callahan Eye Found. Hosp.,* 147 Fed. Appx. 819, 831 (11th Cir. 2005) (three-month gap between protected activity and adverse employment action was insufficient to establish an inference of retaliation).

Moreover, as the Supreme Court explained in *Burrage v. United States,* 571 U.S. 204, 134 S.Ct. 881, 888-89, 187 L. Ed. 2d 715 (2014), a factor is a "but-for" cause even if "combines with other factors to produce the result, so long as the other factors alone would not have done so." Here, DeBose did not present any evidence proving that her protected activity was an indispensable factor, without which her termination would not have occurred.

To the contrary, the jury's mixed motion verdict on Count I - - - finding that, DeBose would have been terminated regardless of any racial motivation - - - completely negates DeBose's ability to prove that her protected activity was a "but-for" cause of her termination. That finding conclusively demonstrates that DeBose failed to prove that "other factors alone" would not have caused her termination. *Burrage,* 134 S.Ct. at 888-89. *See Smith v. City of Fort Pierce, supra* at 779 (affirming grant of summary judgment where employee could not "establish that a protected activity was the but-for cause of [the employer's] alleged unlawful retaliation").[3]

Finally, it is well established that intervening acts are sufficient to sever a causal connection between protected activity and an adverse employment action. *Banks, supra.* At *12; *see also Henderson v. FedEx Express,* 442 Fed. Appx. 502, 507 (11th Cir. 2011) ("[i]ntervening acts of misconduct can break any causal link

[3] *See also Jones v. Allstate Insurance Co.,* 281 F.Supp.3d 1211 (N.D. Ala. 2016) (multiple "but-for" employment discrimination claims may not proceed past summary judgment); *Mora v. Jackson Memorial Foundation, Inc.,* 597 F.3d 1201, 1204 (11th Cir. 2010) ("[b]ecause 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").

between the protected conduct and the adverse employment action"); *Hankins v. Airtran Airways, Inc.,* 237 Fed. Appx. 513, 521 (11th Cir. 2007); *Schoebel v. American Integrity Ins. Co. of Florida,* 2015 WL 4231670, at *3 (M.D. Fla. July 10, 2015).

Here, USFBOT's receipt of the Ellucian Report was an intervening event that severed any causal connection between DeBose's protected activity and her termination. As demonstrated at trial, USFBOT received the consultant's report from Ellucian four or five months after DeBose engaged in her last protected activity at USF. There is no dispute that the Ellucian Report was critical of DeBose and identified the Registrar's Office as a risk to the success of USFBOT's DegreeWorks initiative. [Trial Transcript, Day 3: p. 143, lines 18-20; Day 6: pp. 45, 95, 143]. Since it cannot be said that no employer could ever base a termination decision upon criticisms of DeBose contained in the Ellucian Report, USFBOT's receipt and review of the Report was an intervening event that severed any causal connection between DeBose's protected activity and her termination. For that additional reason, DeBose failed to meet her burden of establishing the third element of a *prima facie* case of retaliation.

In short, apart from the mere fact that one followed the other[4], DeBose failed to present sufficient evidence at trial to establish the requisite causation element of a *prima facie* case. Therefore, judgment as a matter of law should be

[4] *See McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2015) ("[t]he *post hoc ergo propter hoc* fallacy assumes causality from temporal sequence"); *Bermudez v. TRC Holdings, Inc.,* 138 F.3d 1176, 1179 (7th Cir. 1998) ("*[p]ost hoc ergo propter hoc* is not enough to support a finding of retaliation").

entered for USFBOT. Alternatively, because the verdict is against the clear weight of the evidence, a new trial should be ordered.

2. DeBose also failed to introduce sufficient evidence to prove pretext.

USFBOT articulated a legitimate, nonretaliatory reason for non-renewing DeBose's appointment as the USFBOT Registrar. More specifically, after an on-site evaluation of the Registrar's Office, including a face-to-face interview with DeBose, Ellucian made an official report to USFBOT that the office led by DeBose lacked collaboration and a willingness to embrace change, and posed a risk to the success of DegreeWorks. Indeed, the jury's finding on Count I—i.e., that USFBOT would have terminated DeBose notwithstanding any racial animus—conclusively demonstrates that USFBOT articulated a legitimate, non-retaliatory reason for DeBose's termination.

DeBose therefore had the burden of establishing, through significantly probative evidence, that USFBOT's reason for terminating her was a pretext for retaliation. *Crawford v. Carroll*, 529 F.3d 961, 976 (11th Cir. 2008). DeBose failed to meet her burden.

In denying USFBOT's request for summary judgment on DeBose's retaliation claims, this Court cited to DeBose's averments that she was "asked into meetings with no agenda" and to DeBose's claim that the Alexis Mootoo incident was part of a deal in which Dosal promised Mootoo more favorable pay and position. [Doc. 210, p. 20]. This Court concluded:

> DeBose's version of the facts, i.e. that she was the victim of a massive conspiracy because she filed complaints of discrimination, may not ultimately be accepted by a jury, but there is certainly enough circumstantial evidence of retaliation to afford DeBose her day in

> Court. Specifically, given the close temporal proximity between DeBose's EEOC complaint and USFBOT's decision to engage Ellucian, DeBose's testimony that the Registrar's Office was included in the scope of Ellucian's engagement at the request of USFBOT, DeBose's testimony that she was treated differently following her complaints of discrimination, and the timing of circumstances surrounding the Traynham conversation, a reasonable jury could find that USFBOT's actions were retaliatory.

[Doc. 210, pp. 20-21].

However, at trial, DeBose presented a considerably weaker case. In fact, *none* of the evidence that enabled DeBose to evade summary judgment on her retaliation claim was introduced at trial.

The undisputed trial testimony was that Provost Wilcox made the decision to terminate DeBose and that Paul Dosal was not involved in that decision. [Trial Transcript, Day 4: pp. 55-57]. There was *no* evidence introduced that the decisionmaker, Wilcox, ever asked DeBose into a meeting with no agenda. Furthermore, both Alexis Mootoo and Dosal testified without contradiction that the Mootoo incident was *not* part of a deal in which Dosal promised Mootoo more favorable pay and position, and there was no evidence presented to the contrary. [Trial Transcript, Day 3: p. 192, lines 7-11; Day 8: p. 109, lines 6-9].

Moreover, the evidence at trial did not support a finding of a close temporal proximity between DeBose's EEOC complaint and USFBOT's decision to engage Ellucian. To the contrary, the uncontradicted testimony of Carrie Garcia and Defendant's Exhibit No. 39 proved that the request for funding the Ellucian post-implementation assessment was made in September or October of 2014, *months before* DeBose filed her EEOC charge in December of 2014. [Trial Transcript, Day 9:

pp. 52-53, lines 16-25, 1-16]. Moreover, there simply was no credible evidence that USFBOT could have anticipated at that time that the Ellucian Report would contain the statements about DeBose that it ultimately did.

Similarly, the trial evidence did not support an inference that the Registrar's Office was included in the scope of Ellucian's engagement at the request of USFBOT. To the contrary, the uncontradicted testimony of Carrie Garcia and Defendant's Exhibit No. 71 demonstrated that it was the Ellucian consultant, Andrea Diamond, who proposed that the Registrar's Office be included in her interview schedule. [Trial Transcript, Day 9: p. 55, lines 12-23].

Turning to "the time of circumstances surrounding the Traynham conversation," the uncontradicted trial testimony was that UNF Provost Traynham contacted Wilcox inquiring about DeBose, not vice versa. [Trial Transcript, Day 7: pp. 38-39, lines 20-25, 1-8]. Moreover, Wilcox testified without contradiction that he told Traynham nothing different than what appeared in the Ellucian Report. While the jury may have considered Wilcox's statements to Traynham unkind, or even harsh, the trial evidence regarding that conversation does not logically support an inference that Wilcox's reason for non-renewing DeBose's employment was merely a pretext. *See Blackstone v. Shook & Fletcher Insulation Co.,* 764 F.2d 1480, 1482 (11th Cir. 1985) ("an inference based on speculation and conjecture is not reasonable"); *see also Landry v. Lincare, Inc.,* 579 Fed. Appx. 734, 738 (11th Cir. 2014); *Burrell v. Board of Trustees of Ga. Military College,* 970 F.2d 785, 791 n.15 (11th Cir. 1992).

Nor was fact that the Ellucian Report identified two other areas of risk for DegreeWorks sufficient to satisfy DeBose's burden of proving pretext. Courts require that "the quantity and quality of the comparators' misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Burke-Fowler v. Orange County, Fla.,* 447 F.3d 1319, 1323 (11th Cir. 2006), *citing Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1185 (11th Cir. 1984).

DeBose failed to show that her circumstances were "nearly identical" to that of Carrie Garcia and Travis Thompson, who were responsible for the other two areas of Risk identified in the Ellucian Report. In the first place, less than a year earlier - - - and before she engaged in any protected activity - - - DeBose had been stripped of the responsibility for managing DegreeWorks because of complaints about her lack of collaboration. [Trial Transcript, Day 4: p. 11, lines 13-18]. The same was not true of Garcia or Thompson.

More importantly, the nature and severity of the concerns raised about DeBose in the Ellucian Report were materially different than the concerns raised about Garcia and Thompson. In the first place, the Report directly referenced the Registrar's Office's lack of cooperation during the consultant's interview; no such criticism was made regarding Carrie Garcia or Travis Thompson. [Def. Ex. No. 108]. Moreover, as Wilcox explained in his testimony, the other two areas of risk identified in the Report had nothing to do with lack of collaboration or unwillingness to embrace change, but were technical IT issues that could be readily addressed through cross-training or by

putting controls in place to limit access. [Trial Transcript, Day 6: p. 151-54, lines 16-25; 1-3; Day 8: pp. 27-28, lines 7-25; 1-25].

Rather than proving that Wilcox's testimony that the decision to terminate DeBose was based on the Ellucian Report was "a lie" or "a phony reason," DeBose chose instead to attack the wisdom of USFBOT's actions and its alleged failure to afford her due process. In so doing, DeBose "confuse[d] *disagreement* about the wisdom of an employer's reasons with *disbelief* about the existence of that reason and its application in the circumstances." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1543 (11th Cir. 1997) (emphasis in original). While reasonable people could disagree about whether USFBOT should have terminated DeBose on account of the Ellucian Report, or whether it should have followed a different process to do so, "such potential disagreement does not, without more, create a basis to *disbelieve* an employer's explanation. . . ." *Id.* (Emphasis in original).

In short, DeBose has presented *no evidence* --- as opposed to mere speculation and argument --- that Wilcox's stated reason for DeBose's termination was a mere pretext for retaliation. Therefore, judgment as a matter of law should be entered for USFBOT. *See Combs v. Plantation Patterns, supra* at 1543 (reversing denial of motion for judgment as a matter of law because plaintiff failed to present sufficient evidence of pretext); *Walker v. NationsBank of Florida, N.A.,* 53 F.3d 1548, 1556 (11th Cir. 1995) (affirming judgment as a matter of law where plaintiff failed to present a jury question or pretext). Alternatively, because the verdict is against the clear weight of the evidence, a new trial should be ordered.

C. DeBose Should Not Have Been Allowed To Re-Open Her Case And Offer Previously-Undisclosed Damages Evidence

DeBose had the burden of establishing her damages. *Akouri v. Fla. Dept. of Transportation,* 408 F.3d 1338 (11th Cir. 2005); *Szeinbach v. Ohio State University,* 820 F.3d 814 (6th Cir. 2016) (a Title VII plaintiff is required to establish the appropriate amount of back pay with reasonable certainty. If the plaintiff fails to offer such proof, then an award of back pay is not warranted).

After USFBOT presented its Rule 50(a) motion on the issue of damages, the Court *sua sponte* granted DeBose leave to reopen her case in chief to testify about damages. [Doc. 462]. USFBOT objected to the re-opening of DeBose's case in chief, but that objection was overruled. [Trial Transcript, Day 9: p. 95]. While this Court had the discretion to allow DeBose to reopen her case in chief, USFBOT respectfully submits that, under the circumstances of this case, it constituted an abuse of discretion to do so.

Where, as here, the failure to offer evidence is attributable to the negligence or carelessness of a party's attorney, it is an abuse of discretion to reopen a case to consider the evidence. *Downey v. Dentar County, Texas,* 119 F.3d 381, 387 (5th Cir. 1997); *see also Wilson v. Good Humor Corp.,* 757 F.2d 1293, 1300 (D.C. Cir. 1985) ("a plaintiff's failure to call available witnesses or produce existing documents does not ordinarily constitute grounds to reopen a case"); *Guthright v. St. Louis Teacher's Credit Union,* 97 F.3d 266, 268 (8th Cir. 1996) (same).

Here, DeBose's failure to present damages during her case in chief cannot be excused as mere negligence or carelessness on the part of DeBose. Instead, it was a direct result of DeBose directly flouting the time limitations set for the trial and ignoring this Court's repeated cautions to her about the time she was using in presenting her case in chief. After informing the Court that she needed 20 hours to present her case, [Doc. 355, pp. 10-11], DeBose spent almost twice that, the better part of eight trial days, questioning two adverse witnesses, Wilcox and Dosal. Then, despite the Court repeatedly suggesting to DeBose that she would be wise to use her remaining trial time by taking the stand, DeBose rested her case-in-chief without taking the witness stand or introducing any damages evidence. [Trial Transcript, Day 8: p. 115, lines 3-8; pp. 125-127]. Therefore, DeBose should not have been permitted to re-open her case-in-chief to offer damages evidence.

Moreover, once her case in chief was reopened, DeBose was permitted to present damages evidence to the jury that was never previously disclosed to USFBOT. In her Rule 26 disclosures,[5] DeBose did not provide any computations for

[5] Rule 26(a)(1)(A)(iii) provides, in relevant part: "[A] party must, without awaiting a discovery request, provide the other parties . . . a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying under Rule 34 the documents or other evidential material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered. . . ." Rule 37(c) provides, in relevant part, that, "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. Rule 37(c)(1). "Substantial justification exists if there is "justification to a degree that could satisfy a reasonable person that parties differ as to whether the party was required to comply with the disclosure request." *Cinclips, LLC v. Z. Keepers, LLC*, 2017 WL 2869532 (M.D. Fla. July 5, 2017) (*citing Hewitt v. Liberty Mut. Grp., Inc.*, 268 F.R.D. 681, 682 (M.D. Fla. 2010)).

backpay damages or benefits and did not serve any documents supporting such computations. [Doc. 354-1].

Similarly, notwithstanding the express requirement of Local Rule 3.06(c)(7)[6], DeBose did not provide any statement of the amount of back pay or benefits she was seeking in the parties' joint pretrial statement. In fact, DeBose's statement of damages in the parties' joint pretrial stipulation did not even make reference to lost benefits. [Doc. 361, p. 22]. *See Mock v. Bell Helicopter Textron, Inc.,* 2007 WL 2774230 (M.D. Fla. Sept. 24, 2007) (excluding loss retirement benefits not included as a category of damages in the pretrial statement).

Allowing DeBose to re-open her case and present previously–undisclosed damages evidence caused substantial prejudice to USFBOT.

Notwithstanding USFBOT's motion in limine—Docs. 332, 412—DeBose was permitted to testify in a narrative fashion that: (1) she had to replace her vehicle because of three years of driving to her subsequent employer;[7] (2) she had to pay $4,172 per month for COBRA coverage for a family plan and lost an estimated 1,000

[6] Local Rule 3.06(c)(7) requires any party seeking money damages to provide a statement of the elements of each such claim and the amount being sought with respect to each such element "within the pretrial statement." Local Rule 3.06(e) further provides that "[t]he pretrial statement . . . control[s] the course of the trial and may not be amended except by order of the Court in the furtherance of justice." *See also G.I.C. Corp. v. United States,* 121 F.3d 1447, 1450 (11th Cir. 1997) ("parties are bound by their stipulations that a pretrial stipulation frames the issues for trial"); *Rockwell International Corp. v. United States,* 549 U.S. 457, 474, 127 S.Ct. 1397, 167 L. Ed. 2d 190 (2007) ("claims issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the complaint").

[7] *See United States v. Burke,* 504 U.S. 229, 239, 112 S.Ct. 1867, 119 L. Ed. 2d (1992) (noting that the damages available under Title VII do not include consequential damages).

hours in accrued USF sick and vacation leave benefits; [8] (3) her benefits at Florida Polytechnic University had to be paid out of her salary and were not matched by her employer; (4) any time that Florida Polytechnic was closed, she received no pay; and (5) based upon her summary, her lost benefits were approximately $187,000, despite the fact that she claimed lost salary in the amount of $118,000. [9] [Trial Transcript, Day 9: pp. 103-13]. In addition, over USFBOT's objection, DeBose was permitted to provide this testimony using a damages summary that she had prepared the night before. [Trial Transcript, Day 9: p. 110]. Importantly, DeBose's damage summary was never produced to USFBOT and DeBose never provided any underlying documents that would serve as a basis for it.

All of this testimony came as a complete surprise to USFBOT, not only the components of DeBose's claimed benefit losses, but also the damages figures and the basis for damages figures. Moreover, DeBose's testimony about her total lost benefits included components that either were not legally permissible or were the subject of the Court's prior rulings. Despite that fact, those components and amounts found their way into the verdict.

An award of back pay is designed to make a plaintiff whole, not to give the plaintiff a windfall or to punish the employer. *Joseph v. Publix Markets, Inc.,* 151 Fed. Appx. 760, 769-70 (11th Cir. 2001) (*citing Franks v. Bowman Trans. Co.,* 424 U.S. 747, 763-66 (1976). Moreover, "[t]he concept of trial by ambush has long ago fallen

[8] DeBose's breach of contract claim seeking these damages was dismissed by the Court.

[9] Normally, total benefits account for 30% of salary. U.S. Department of Labor, December 2008, *Employer Costs for Employee Compensation.*

into desuetude in both state and federal courts." *Bostick v. State Farm Mutual Automobile Insurance Co.,* 2017 WL 4518665, at *1 (M.D. Fla. Oct. 10, 2017) (internal citation omitted).

Under Rule 59, a court is required to grant a new trial if the verdict, if sustained, will result in a miscarriage of justice. *George v. GTE Directories, supra.* The circumstances of DeBose's damages evidence was prejudicial to USFBOT and inconsistent with fairness and due process. Therefore, a new trial should be granted on DeBose's entitlement to back pay and benefits.

CONCLUSION

For the foregoing reasons, judgment as a matter of law should be entered for USFBOT. Alternatively, because the verdict is against the clear weight of the evidence, a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

Pursuant to Local Rule 3.01(g), the undersigned attorney hereby certifies that he attempted to confer with plaintiff to conciliate the instant motion, but such attempt was unsuccessful.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES AND ELLUCIAN COMPANY, L.P.,

Defendants.

ORDER

Pending before the Court and briefed by the parties are the following three post-judgment motions:

1. Defendant University of South Florida Board of Trustees' ("**the Board**") Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial ("**Motion for Judgment as a Matter of Law**") (Doc. 504) and Plaintiff Angela DeBose's ("**DeBose**") Response in Opposition to the Board's Motion for Judgment as a Matter of Law (Doc. 505);

2. The Board's Motion to Supplement Motion for New Trial or, in the Alternative, for Relief from Judgment ("**Motion to Supplement**") (Doc. 539) and DeBose's Response in Opposition to the Board's Motion to Supplement (Doc. 540); and

3. DeBose's Motion for Sanctions or Alternatively Relief from Judgment ("**Motion for Sanctions**") (Doc. 541) and the Board's Opposition to DeBose's Motion for Sanctions (Doc. 542).

After careful consideration, the Court will grant the Board's Motion for Judgment as a Matter of Law. The Court will deny the Board's Motion to Supplement as moot. The Court will deny DeBose's Motion for Sanctions.

I. Background

This employment discrimination case was tried to a jury beginning on September 10, 2018. DeBose, a licensed attorney, represented herself *pro se*[1] against the Board[2]. On September 26, 2018, the jury returned its verdict. The jury found that race was a motivating factor in the Board's decision to discharge DeBose's employment as the Registrar of the University of South Florida, but also found that the Board would have made the same decision even it hadn't taken DeBose's race into account. Because the jury found that the Board had successfully proved its "same decision" affirmative defense, DeBose was precluded from recovering compensatory or back pay damages on her race discrimination claim. The jury further found that the Board retaliated against DeBose for engaging in certain protected activity and awarded

[1] Plaintiff has represented herself *pro se* in this action since her most recent counsel successfully withdrew on March 21, 2017. Plaintiff is admitted to practice law in Wisconsin and is currently in good standing. See State Bar of Wisconsin Lawyer Search, https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1101650 (last visited Feb. 14, 2019).

[2] The Court granted summary judgment in favor of Defendant Ellucian Company, L.P., on September 29, 2017.

DeBose $310,500. The Clerk entered judgment in favor of DeBose and against the Board on DeBose's race discrimination and retaliation claims on October 2, 2018.[3] The parties' respective post-trial motions followed on October 29, 2018, (Doc. 504), November 28, 2018, (Doc. 521), and December 31, 2018, (Doc. 541), respectively.

II. Discussion

The Court will address each of the parties' respective post-trial motions in turn:

A. The Board's Motion for Judgment as a Matter of Law

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, the Board renews its Rule 50(a) motion made at the close of DeBose's case-in-chief and subsequently renewed after both parties rested. The Board alternatively moves for a new trial pursuant to Rule 59. The Board levies the following arguments:

1. The Board is entitled to judgment as a matter of law on DeBose's retaliation claim because DeBose failed to introduce evidence at trial that she filed a charge of discrimination with the Equal Employment Opportunity Commission ("**EEOC**") alleging retaliatory termination or that she received a Notice of Right to Sue regarding the same;

2. The Board is entitled to judgment as a matter of law on DeBose's retaliation claim because DeBose failed to present sufficient evidence at trial to

[3] The Clerk entered judgment in favor of the Board and Ellucian Company, L.P., on DeBose's remaining disparate treatment gender discrimination, disparate impact race and gender discrimination, breach of contract, tortious interference, and civil conspiracy claims, which the Court dismissed at summary judgment.

establish a *prima facie* case of retaliation or, alternatively, a new trial should be ordered because the verdict is against the great weight of the evidence.

3. The Board is entitled to judgment as a matter of law on DeBose's retaliation claim because DeBose failed to present sufficient evidence to prove pretext or, alternatively, a new trial should be ordered because the verdict is against the great weight of the evidence; and

4. The Court should order a new trial on the issue of DeBose's damages because the Court abused its discretion in granting DeBose leave to re-open her case-in-chief in order to present testimony as to her damages – testimony that, the Board argues, was based on previously undisclosed evidence.

The Court will first address the Board's argument regarding DeBose's failure to establish a *prima facie* case of retaliation. Because the Court, as detailed more fully below, finds that DeBose failed to introduce sufficient evidence at trial for a reasonable jury to find a causal connection between her protected activities and the Board's adverse employment actions, the Court need not address the Board's remaining arguments.

To prevail on a Title VII retaliation case, a plaintiff must satisfy the traditional McDonnell Douglas burden-shifting framework. Goldsmith v. City of Atmore, 996 F.2d 1155, 1162–63 (11th Cir. 1993). Under this framework, the plaintiff must first establish a *prima facie* case of retaliation. Id. (citations omitted). The burden then shifts to the employer to articulate some legitimate non-retaliatory reason for the alleged

retaliation. Id. (citations omitted). Once the employer produces such a reason, the plaintiff must then prove that the legitimate reason was a mere pretext for retaliation. Id. (citations omitted).

To establish a *prima facie* case of retaliation, a plaintiff must establish that (1) she engaged in statutorily protected activity, (2) she suffered a materially adverse employment action, and (3) there exists a causal link between the two. Smith v. City of Fort Pierce, Fla., 565 F. App'x 774, 776–77 (11th Cir. 2014) (unpublished) (per curiam). See also Pattern Civ. Jury Instr. 11th Cir. 4.22 (2018). With respect to causation, in order to succeed on a Title VII retaliation claim, a plaintiff must establish "but-for" causation; the "lessened causation test" applicable to claims of unlawful discrimination under Section 2000e-2(m) does not apply. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013). Put another way, a Title VII plaintiff must prove by a preponderance of the evidence that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Id. Following Nassar, the Eleventh Circuit explained that "the plaintiff always has the burden of persuasion 'to proffer evidence sufficient to permit a reasonable fact finder to conclude that discriminatory animus was the 'but-for' cause of the adverse employment action.'" Smith, 565 F. App'x at 778–79 (quoting Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013)).

To establish a causal connection, a plaintiff must show that her employer was aware of her protected activity, and that her protected activity and the adverse

employment action taken by her employer "were not wholly unrelated." Greene v. Ala. Dep't of Revenue, 746 F. App'x 929, 932 (11th Cir. 2018) (per curiam) (unpublished) (quoting Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002)). That the protected activity and the adverse employment action were not wholly unrelated can be shown by establishing a "close temporal proximity" between the protected activity and the adverse employment action. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam) (citing Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 798–99 (11th Cir. 2000)). "Yet while temporal proximity between the . . . protected activity and the adverse employment action can be enough . . . 'mere temporal proximity, without more, must be *very close*.'" Hogan v. S. Georgia Med. Ctr., No. 17-14867, 2018 WL 4922777, at *5 (11th Cir. Oct. 10, 2018) (per curiam) (unpublished) (emphasis added) (quoting Thomas, 506 F.3d at 1364).

At trial, DeBose attempted to prove causation by showing that "one followed the other." To that end, DeBose introduced evidence that she engaged in three distinct acts qualifying as "protected activity" for purposes of a Title VII retaliation claim: (1) in July and August of 2014, respectively, DeBose filed internal complaints with the University of South Florida alleging that she had been subjected to unlawful discrimination; (2) in December of 2014, DeBose filed a charge of discrimination with the EEOC; and (3) on February 4, 2015, DeBose filed a civil action in this District seeking to preliminarily enjoin the Board from discriminating against her and

terminating her employment. In addition, DeBose proffered evidence of two adverse employment actions taken by the Board: (1) the Board's termination of DeBose's employment on May 19, 2015; and (2) University of South Florida Provost Ralph Wilcox's negative employment reference to University of North Florida Provost Earle Traynham on May 26, 2019. DeBose offered no direct evidence of retaliation. After deliberation, the jury found that the Board took these adverse employment actions because of DeBose's protected activities.

Upon careful consideration, the Court will reverse the verdict. DeBose's evidence was insufficient to convince a reasonable jury that her protected activities were the "but-for" cause of the Board's adverse employment actions. At best, more than three months – specifically, 104 days – passed between DeBose's most recent protected activity (DeBose's federal injunction action) and the earlier of the Board's adverse employment actions (Wilcox's decision to terminate DeBose's employment). This gap proves too large to establish a causal connection. To be sure, the Eleventh Circuit has held that a three- to four-month disparity between the statutorily protected activity and the adverse employment action is not enough to show "very close" temporal proximity. Thomas, 506 F.3d at 1364. See also, e.g., Embry v. Callahan Eye Found. Hosp., 147 F.App'x 819, 831 (11th Cir. 2005) (per curiam) (unpublished); Higdon v. Jackson, 393 F.3d 1211, 1220–21 (11th Cir. 2004); Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001). Other circuits have held likewise. See, e.g., Richmond v. Oveok, Inc., 120 F.3d 205, 209 (10th Cir. 1997); Hughes v. Derwinski,

967 F.2d 1168, 1174–75 (7th Cir. 1992). And just recently, the Eleventh Circuit held that, as a matter of law, even seventy-four days between the plaintiff's protected activity and the employer's adverse employment action, standing alone, is insufficiently proximate. Hogan, 2018 WL 4922777, at *5. Thus, because DeBose failed to present any "other evidence tending to show causation," the substantial delay between DeBose's protected activity and the Board's adverse employment action is fatal to her retaliation claim as a matter of law. Thomas, 506 F.3d at 1364.

In sum, DeBose failed to present a legally sufficient evidentiary basis for a reasonable jury to find a causal connection between her protected activities and the Board's adverse employment actions. Accordingly, the Court will grant the Board's Motion for Judgment as a Matter of Law. See Christopher v. Fla., 449 F.3d 1360, 1364 (11th Cir. 2006) ("[Judgment as a matter of law] is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for [her] on a material element of [her] cause of action.") (citation omitted).

B. The Board's Motion to Supplement

The Board moves to supplement its Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial with new evidence related to DeBose's benefits, which the Board obtained, post-trial, from the Florida Department of Management Services. The Board alternatively moves for relief from judgment Pursuant to Rule 60(b).

Having determined that the Board is entitled to judgment as a matter of law on DeBose's retaliation claim, the Court will deny the Board's Motion to Supplement as moot.

C. DeBose's Motion for Sanctions

DeBose moves for sanctions against the Board or, alternatively, relief, pursuant to Rule 60(b), from six interlocutory orders issued by the Court, (Docs. 50, 86, 144, 210, 263, 311), based on the discovery of "new" evidence and fraud. This Court and the assigned Magistrate Judge have exhaustively addressed on multiple occasions the issues and arguments raised by the instant Motion for Sanctions. Since the outset of this litigation, DeBose has failed to substantiate her allegations against the Board related to her "employment contracts," whether it be in the form of their concealment, destruction, or breach. The Court will deny the Motion for Sanctions for the reasons stated in the Board's response.

III. Conclusion

Accordingly, it is

ORDERED as follows:

1. The Board's Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial (Doc. 504) is **GRANTED**. The jury's verdict as to DeBose's retaliation claim is **REVERSED**. The amended final judgment (Doc. 482) is **VACATED**. An appropriate second amended final judgment will issue.

2. The Board's Motion to Supplement Motion for New Trial or, in the Alternative, for Relief from Judgment (Doc. 539) is **DENIED** as moot.

3. DeBose's Motion for Sanctions or Alternatively Relief from Judgment (Doc. 541) is **DENIED**.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 14th day of February, 2019.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record/
Unrepresented Parties

R.A. 188

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CIVIL ACTION NO. 8:15-cv-02787-EAK-AEP

ANGELA DEBOSE,	)
Plaintiff,	)
	)
v.	)
	)
UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, UNIVERSITY OF SOUTH FLORIDA, AND ELLUCIAN, L.P.,	)
Defendants.	)
	/

PLAINTIFF'S MOTION FOR SANCTIONS OR ALTERNATIVELY RELIEF FROM JUDGMENT

Plaintiff Angela DeBose ("DeBose") files a post judgment Motion for Sanctions or alternatively relief from judgment pursuant to the Court's order entered on July 6, 2016 dismissing Plaintiff's breach of 2019 contract claim (Doc. 50); the order entered February 8, 2017 denying the motion for sanctions for the destruction of Plaintiff's evidence (Doc. 86); the order entered on August 7, 2017 denying Plaintiff's motion for sanctions based on new evidence[1] (Doc. 144); the order entered on March 23, 2018 denying Plaintiff's motion for relief from judgment concerning the nondisclosure, misrepresentation, and concealment of Plaintiff's 2015 contract (Doc. 263); and the order entered on August 14, 2018 denying Plaintiff's motion to strike defendants affidavits as a sham and for sanctions for false testimony concerning the destruction of Plaintiff's evidence (Doc. 311). Final Judgment has been reached (Docs. 474 and 482 Court Decision), specifically with regard to the Court's September 29, 2017 Opinion and Order [210] entering judgment in favor of Defendant

[1] Reconsideration or Relief from Judgment.

University of South Florida Board of Trustees and against Plaintiff on Plaintiff's breach of contract and other claims and entering judgment in favor of Defendant Ellucian on Plaintiff's tortious interference, etc. claims. Plaintiff seeks sanctions or relief under Rule 60, based on new evidence and fraud on the court. In support of her motion, Plaintiff states as follows:

MEMORANDUM OF LAW

I.

INTRODUCTON

Plaintiff filed breach of contract claims, pursuant to her 2015 contract and 2019 contract extension in her Third Amended Complaint ("TAC"). Both contracts were in effect at the time of Plaintiff's termination. In the course of the litigation, Plaintiff's 2019 extended contract claim was dismissed on July 6, 2016 (Doc. 50), prior to summary judgment. Though Plaintiff produced written evidence that the contract was offered, Plaintiff did not have possession of the contract itself due to the willful destruction of Plaintiff's files in June-July 2015. In Opposition to the Defendants' motions for summary judgment, Plaintiff produced written evidence of her 2015 contract. However, on September 29, 2017, the Court granted summary judgment on Plaintiff's breach of contract claim in favor of USFBOT and tortious interference claim in favor of Ellucian because of representations to the Court that have since shown to be false, that USFBOT no longer utilizes employment contracts and had not since 2005. Therefore, the Court denied Plaintiff's motion for sanctions not convinced that evidence material to the case was destroyed. The Court dismissed Plaintiff's 2019 contract claim in the TAC because it was not convinced that a written contract ever existed and stated the Plaintiff should file a motion for sanctions if she was able to prove Defendant's intentional spoliation. At summary judgment, the Court denied Plaintiff's 2015 contract claim because it was not convinced of the documents authenticity, that the document Plaintiff filed was a contract, or that such a contract existed.

II.

PROCEDURAL HISTORY

On December 30, 2016, Plaintiff's former counsel, James Thompson, filed a motion for sanctions against USFBOT for willful destruction of Plaintiff's evidence. (Doc. 61). Additionally, on January 18, 2017, Mr. Thompson filed a motion to compel Ellucian to produce documents. (Doc. 64). On February 8, 2017, the Court denied the motion for sanctions; the motion to compel was denied without prejudice. (Doc. 86). On February 16, 2017, Plaintiff's counsels filed a motion to withdraw. (Doc. 93). On February 17, 2017, Plaintiff filed a Second Motion to Compel Ellucian to produce documents. (Doc. 99). At hearing on March 21, 2017, the Court granted the motion to withdraw filed by Plaintiff's counsels and granted Plaintiff's motion to continue pro se. (Doc. 122). The Court granted in part and denied in part Plaintiff's motion to compel the production of documents by Ellucian. (id.) The Court also ruled that Plaintiff Pro Se could file a motion for sanctions based on new evidence[2]. (id.) On March 29, 2017, Plaintiff filed the motion for sanctions (Doc. 23) and her supporting affidavit. (Doc. 124). On April 28, 2017, Plaintiff filed a Third Motion to Compel Discovery from Ellucian. (Doc. 132). On May 23, 2017, a hearing was held on Plaintiff's motion for sanctions and motion to compel. The motion to compel was granted in part and denied in part. (Doc. 139). The ruling on the motion for sanctions was deferred until August 7, 2017, at which time it was denied. (Doc. 144). On December 8, 2017, Plaintiff filed a Motion for Relief from Judgment on the basis of fraud, etc. for USFBOT's and Ellucian's nondisclosure or fraudulent concealment of Plaintiff's 2015 contract. (Doc. 238). On March 23, 2018, the Court denied the motion. (Doc. 263). On July 30, 2018, Plaintiff filed a motion to strike Defendant USFBOT's opposition to sanctions and affidavits concerning the destruction of Plaintiff's files as a Sham. (Doc.

[2] Rule 60 reconsideration or relief from judgment.

295). On August 14, 2018, at the pretrial hearing, the Court denied Plaintiff's motion to strike. (Doc. 311).

III.

NEW EVIDENCE

Plaintiff filed the above pleadings to bring to the Court's attention USFBOT's intentional destruction of Plaintiff's files; USFBOT's false statements to the Magistrate that USF stopped using employment contracts in 2005; and USFBOT's and Ellucian's nondisclosure, concealment, and misrepresentations concerning Plaintiff's 2015 and 2019 employment contracts and other discovery violations to defeat Plaintiff's breach of contract and tortious interference claims.

At hearing on February 8, 2017, the Court denied Plaintiff's motion for sanctions for the destruction, stating the following:

> **THE COURT: Contrary to the self-serving statement, there is evidence of record to demonstrate that the defendant has not used employment contracts since 2005**, and there's no other testimony that indicates some other -- that such contract existed, so substantively the Court is not satisfied that the plaintiff has made a sufficient showing that the contract did ever exist.
>
> - **[2/8/17 Transcript, 37:12-16]**

The Magistrate's decision reflects that the Court was influenced by the Defendant's denials that USFBOT used written contracts. Again, on September 29, 2017, the Court relied on USFBOT's and Ellucian's representations about DeBose's alleged non-contract status to grant summary judgment on Plaintiff's 2015 breach of contract claim against USFBOT and tortious interference claim against Ellucian. (See Order and Opinion, Doc. 210). Though Plaintiff provided evidence of her 2015 contract at summary judgment[3], the Court was not convinced the document was an employment contract or that such a contract existed because of USFBOT's misrepresentations—(i.e. paraphrased

[3] Charlotte Fernee Kelly, DeBose's former counsel, obtained the 2015 contract from USFBOT after the July 6, 2016 order dismissing the 2019 contract claim.

DeBose could not possibly have had a 2015 contract and neither could anyone else because USFBOT stopped using employment contracts in 2005).[4] Nevertheless, Plaintiff obtained the following new evidence to support the instant motion:

1. Paul Dosal's trial testimony (Doc. 503, #1);

2. Paul Dosal's employment contract (Doc. 503, #2);

3. Ralph Wilcox's employment contract (Doc. 503, #3);

4. Paul Dosal's appointment status contract identifying his employment classification (Doc. 503, #4);

5. First time acknowledgement of the written employment contracts by USFBOT's counsel in Defendant's Response to Plaintiff's Notice of Front Pay Calculations (Doc. 523, p. 4: "*DeBose provided this Court with written contracts through 2019 for two other USF employees.*");

6. Statements by the Defendant before the Magistrate at the December 11, 2018 evidentiary hearing on front pay that Dosal and Wilcox, the "*two other USF employees*," did in fact have a 2019 written contract[5], in contradiction to what the Court had been repeatedly told by USFBOT's counsel;

7. May 23, 2017 Hearing Transcript that shows the Court trying to get clarification on the issue of written contracts and being told by Defendant's Counsel that USFBOT has not used written contracts for a long time—since 2005.

8. May 23, 2017 Hearing Transcript that shows Plaintiff informing the Court that she made requests for Dosal's and Wilcox's 2019 contract extensions because they were in all ways like hers but USFBOT withheld them.

9. Statements by USFBOT's counsel and its Human Resources Witness at the December 11, 2018 hearing that USF no longer utilizes written contracts for "DeBose's classification";

10. Evidence that at the time Dosal offered DeBose the contract in 2014, at the time of DeBose's termination in 2015, and at present, Dosal had the same classification as DeBose;

11. Proof that the testimony by Ralph Wilcox in his January 31, 2017 affidavit (Doc. 78, p. 3, ¶ 4) was untruthful or contradicted by Wilcox's 2019 contract and that Defendants' no-

[4] USFBOT filed a motion in limine to exclude argument and evidence of USFBOT's destruction of DeBose's evidence as well as DeBose's discovery abuses, public record requests, or state court cases to obtain documents to prove the existence of the contracts and other claims. On September 9, 2018, Plaintiff filed a motion for entry of a stipulation and order concerning the destruction of Plaintiff's evidence. (Doc. 411). On September 17, 2018, the motion for entry of a stipulation and order was denied, referring to Defendant's motions in limine. (Doc. 443).

[5] Refer to Magistrate's notes or minute entry. (Doc. 534).

contract statements were used to expressly defeat Plaintiff's valid breach of contract and tortious interference claims.

12. Evidence that similar to the "denial-admission-change of story" tactic used to explain away the willful destruction of Plaintiff's files, USFBOT used *knowingly false* denials to defeat Plaintiff's 2015 and 2019 breach of contract claims and related damages. Ellucian was not only a benefactor but a willing participant that had actual knowledge of DeBose's 2015 contract. USFBOT used a latent admission and changed its story, stating *for the first time* at the December 11, 2018 evidentiary hearing that written contracts are not utilized for "DeBose's classification". At the May 23, 2017 hearing before the Magistrate, USFBOT confirmed that written employment contracts were not used period—for anyone.

IV.

ARGUMENT

The court relied on the Affidavit of Ralph Wilcox and statements made by Defendants' counsels in pleadings and at hearings that USFBOT does not use written contracts. See February 8, 2017 Hearing Transcript, pages 22:12 through 23:6, with emphasis on the paragraph below:

> **MR. MCCREA: With respect to the contract which Mr. Thompson says is his primary concern, we have a pending motion for summary judgment, it's supported by affidavits that say that USF has not used employment contracts since 2005.**

The Court has inherent authority to issue sanctions based upon the described conduct of Defendant USFBOT. The authority to sanction parties for bad faith stems not only from the Federal Rules of Civil Procedure and the United States Code, but also from the Court's inherent power to effectively manage its affairs by punishing and deterring abuses of the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991). Thus, Courts may exercise their inherent power to impose sanctions in response to abusive litigation practices. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632, (1962); see also *Peer v. Lewis*, 606 F.3d 1306, 1316 (11th Cir. 2010). "[T]he key to unlocking a court's inherent power is a finding of bad faith." *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) (alteration in original) (citing *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998)).

A. Bad Faith

The bad faith of USFBOT is demonstrated in several ways. Defendant unequivocally stated that USFBOT no longer utilizes written contracts. [See February 8, 2017 Hearing Transcript, 22:12-23:6; 37:12-16]. The Magistrate asked USFBOT's counsel at the May 23, 2017 hearing to confirm that not any written contracts are utilized at USF—not just concerning DeBose but anyone. Defendant's counsel confirmed that USFBOT no longer offered written contracts:

> **THE COURT:** Well, I'll ask Mr. McCrea, because that's one thing I seem to recall. Maybe I'm wrong about that. **I thought one of the arguments at the prior hearing was not only as to you** [DeBose]**, but there are no appointment contracts, that USF does not use the written contracts**. And I'll ask that, but I think that's one of the arguments.
>
> **MS. DEBOSE:** You're asking me?
>
> **THE COURT:** No, I'm going to ask Mr. McCrea, but I'm just reminding you I think that is one of the arguments, **is that there's not any written contracts that were utilized by USF**. Mr. McCrea, we'll just interrupt right there and ask you. Am I correct on that recollection?
>
> **MR. MCCREA: Your Honor, my understanding is that USF stopped using written employment contracts some years back.**
>
> **THE COURT:** Right.
>
> **MR. MCCREA:** It has one-year appointments. And everything in Ms. DeBose's official HR file was produced to her including those old appointment letters. But I would go on --
>
> **THE COURT:** Well, I'll come back to you. I just wanted to make sure I recalled that correctly.
>
> **MR. MCCREA: Yes.**

USFBOT's counsel did not state that this was only true for a particular classification. USFBOT's counsel did not disclose that Paul Dosal and Ralph Wilcox had written contracts and more specifically, 2019 contracts:

> **THE COURT:** So that would have been the same form that you're alleging as a contract or it would have been something different?
>
> **MS. DEBOSE:** You mean for the '19, the 2019?

> **THE COURT:** Yes.
>
> **MS. DEBOSE:** That would have been like that, but it would have also included -- I would -- **I wanted to see from Dosal, which is where it left off, the contract that he had, because he was given a contract through 2019 and so was Wilcox, Dr. Wilcox. So those were part of the production requests and those documents were never turned over**.

USFBOT knew that DeBose was seeking Dosal's and Wilcox's 2019 contracts to show additional proof of the 2019 contract offer by Dosal and that DeBose accepted the offer. Additionally, Plaintiff sought to establish that DeBose's 2019 contract was in all ways like Dosal's and Wilcox's; and provide written evidence of the 2019 contract itself from Human Resources for trial. DeBose contended in her motion for sanctions that but for USFBOT's destruction, she would have presented evidence of her 2019 contract. DeBose argued she would have no way of knowing about the contract extensions of Wilcox or Dosal, but for the fact she was offered and received a similar agreement by Dosal in 2014.

Damages

Because of USFBOT's destruction and also because of USFBOT's and Ellucian's misrepresentations, none of DeBose's contract claims survived. As a result, Plaintiff has experienced actual damages. Defendant engaged in intentional affirmative acts, including destruction and lying, causing Plaintiff's evidence to not be available for trial. *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hicks v. Gates Rubber Company*, 833 F. 2d 1406, 1418-19 (10th Cir. 1987). The injury to Ms. DeBose is multiplied because of the Defendant's dishonesty to exclude DeBose's contracts from the jury. The Defendant's false affidavits and declarations are grounds for a "fraud on the court." See *Hull, 356 F.3d 98; Martin v. DaimlerChrysler Corp.*, 251 F.3d 691 (8th Cir. 2001). Defendant USFBOT subverted DeBose's potential contract damages in the case. Plaintiff contended that she was "entitled to the benefit of a presumption that the destroyed documents would have bolstered her

case." See *Favors v Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hicks v. Gates Rubber Company*, 833 F.2d 1406, 1419 (10th Cir. 1987). However, no stipulation or adverse inference was given. Plaintiff lost one and half month of salary on the remainder of her 2015 contract; 325 days of sick leave[6]; and lost over 90 days of annual leave[7]. Additionally, Plaintiff lost five years of salary under her 2019 contract.

B. The Prejudice cannot be Cured

Plaintiff contends USFBOT destroyed and USFBOT and Ellucian withheld evidence to obtain favorable judgments. In determining bad faith, "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." *Flury v. Daimler Chrysler Corporation*, 427 F.3d 939, 946 (11th Cir. 2005). In *Flury*, the Eleventh Circuit stated that: In determining whether dismissal is warranted, the court must consider: (1) whether the [plaintiff] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [defendant] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. Id. at 945. With respect to the fourth factor, whether the [party] acted in good or bad faith, the Eleventh Circuit stated that "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." *Id.* at 946 (citing *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 S.E.2d 923, 927 (Ga. Ct. App. 2003)). USFBOT's continued tactic of denying, then admitting when caught, and changing stories is bad faith. USFBOT only conceded Dosal and Wilcox had employment contracts after DeBose produced them from a third party public records request. Prior to entering the contracts in the record, USFBOT unequivocally stated that USFBOT no longer utilized employment contracts, thus DeBose could not possibly have a contract. In response to this

[6] Plaintiff was not allowed to use her leave but was paid ¼ of her sick leave balance.
[7] Plaintiff was grandfathered in under a contract provision to pay her full salary during any separation, without use of her annual leave. USFBOT forced Plaintiff to exhaust her annual leave during the forced separation.

motion, USFBOT will argue that despite Dosal's and Wilcox's 2019 contract extension, DeBose cannot produce her 2019 contract—as it previously argued that DeBose could not produce a 2015 contract in USFBOT's and Ellucian's motions for summary judgment. The Defendants have lied to the Court repeatedly—not only about the Plaintiff's contracts and the destruction but also about other discovery matters in the case.[8] The Defendant's lies and misrepresentations have damaged Plaintiff, resulting in lost damages and more litigation.

CONCLUSION

WHEREFORE, Sanctions are appropriate to cure the prejudice and harm to Plaintiff and to address the lies and fraud that has been perpetrated upon DeBose and this Court. Plaintiff respectfully requests that the Court to enter an Order sanctioning the Defendants and granting other relief deemed just and proper.

Submitted: December 31st, 2018

/s/ Angela DeBose
Angela DeBose, Plaintiff

CERTIFICATE OF CONFERRAL

Plaintiff conferred with the Defendants regarding this motion.

[8] Plaintiff and her former counsel, James Thompson, requested Paul Dosal's emails in writing for the months leading up to DeBose's termination (i.e. March, April, and May 2015). Defendants USFBOT and Ellucian nevertheless withheld the emails from discovery and pursuant to valid public records requests. The emails were requested to prove the racially-charged, derogatory statements against DeBose by USFBOT and tortious interference by Ellucian. [See May 23, 2017 Hearing, 53:4-7]. The emails were also requested to show USFBOT's plans and collusion with Ellucian to retaliate and terminated DeBose for having engaged in protected activity. USFBOT's counsel falsely stated to the Magistrate that the documents were produce to Plaintiff through a public records request. [May 23, 2017 Hearing, 58:18-25; 59:1-15]. However, the emails for the months in question have never been produced to Plaintiff or her former counsel. In DeBose's state court action (15-CA-005663), USFBOT, a state agency subject to Florida's Sunshine Laws, has argued that DeBose wants the documents for her federal case. DeBose's reason for requesting the documents does not exempt them or provide an affirmative defense. Defendant filed motions in limine in the instant case to exclude any arguments or evidence related to Plaintiff's public records requests, statistical data requests, or state court actions in order that USFBOT might defeat Plaintiff's disparate treatment discrimination claims; however, USFBOT failed.

CERTIFICATION OF GOOD CAUSE

Plaintiff states she is filing this motion for good cause and in good faith and not for any other purpose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **31st** day of December 2018, the above and foregoing was sent electronically to: Richard C. McCrea, Jr. and Cayla Page, Greenberg Traurig, P.A., 101 East Kennedy Boulevard, Suite 1900, Tampa, Florida 33602-5148; email: (mccrear@gtlaw.com; pagec@gtlaw.com) and Kimberly Doud, Littler Mendelson, 111 North Magnolia Avenue, Suite 1250, Orlando, Florida 32801; email: (kdoud@littler.com).

/s/ Angela DeBose
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA DEBOSE,

Plaintiff,

Case No. 8:15-cv-02787-EAK-AEP

v.

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES, and
ELLUCIAN COMPANY, L.P.

Defendants.

PLAINTIFF'S MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE, ALTER OF AMEND JUDGMENT

Pursuant to Federal Rule of Civil Procedure 59, Plaintiff Angela DeBose ("DeBose") hereby moves for an Order Granting a New Trial, or in the alternative, for an Order amending the judgment entered on February 14, 2015. (Doc. No. 548). Under Rule 59, "[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party . . . (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . . " Fed. R. Civ. P. 59(a)(1). Under Rule 59(e), the grounds for granting relief from a judgment " include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. A Rule 59(e) motion is also appropriate where the court has misapprehended the facts, a party's position, or the controlling law. For those reasons more fully stated herein, DeBose respectfully requests that the Court grant her motion under Rule 59(a) and order a new trial or, in the alternative, amend the judgment under Rule 59(e)(3). In support of her motion, DeBose states the following:

MEMORANDUM OF LAW

INTRODUCTION

After approximately three years, a Jury Trial was held from September 10–26, 2018. A conscientious jury of six jurors deliberated and returned a verdict for the Plaintiff. DeBose prevailed on both her Disparate Treatment Discrimination and Retaliation claims. Judgment against USFBOT was entered on October 2, 2018 and amended on October 5, 2018 (Doc. 482). In a series of pleadings, the Defendant set out to undermine the jury's verdict. The Defendant reargued the case that *it lost before the jury*, to the Court in a renewed JMOL motion which is nearly devoid of facts. The Court granted the

Defendant's JMOL and conditional trial (Doc. 504) and reversed the judgment on the Retaliation claim in favor of USFBOT. Ultimately, the jury's verdict was thrown out. Plaintiff states the February 14, 2019 order [548] and second amended judgment [549] must be vacated and a new trial granted or, in the alternative, the jury's verdict reinstated on the ground that serious errors were made in granting USFBOT's renewed motion for JMOL as to Plaintiff's retaliation claim that should preclude a final judgment against DeBose and there is substantial evidence of a causal relationship between DeBose's protected activities and USFBOT's adverse employment actions.

FACTUAL CHRONOLOGY

May 2014: DeBose was the victim of a smear campaign to discredit her. Dr. Paul Dosal ("Dosal"), Vice Provost and DeBose's supervisor, acknowledged that emails were circulated about DeBose that were derogatory in nature and that he did nothing to stop them. [9/12/18 24:23-25; 25:1-11; 26:19-25; See also Exhibit B, Trial Evidence Chart, Ref. No. 3]. An email sent by Robert "Bob" Sullins ("Sullins"), Dean of Undergraduate Studies, accused DeBose of driving Caurie Waddell ("Waddell") from her position at USF. Sullins implied DeBose was a tyrant, expressing that she had *"tirades"*. Id. Dosal testified that he learned from both Waddell and Sullins that the allegation by Sullins was false. [9/12/18 152:24-25; 153:1-2]. Paul Dosal testified he shared the Waddell email with Dr. Ralph Wilcox ("Wilcox"), USF Provost, who later lied in his testimony [9/17/18 165:1025; 166:1-6] 9/18/18 44:12-17] that Dosal did not. [9/12/18 22:5-8 – *Q: "Did you testify yesterday and did you see an exhibit wherein you shared information with the Provost concerning Caurie Waddell? A: Yes*]. It was Wilcox, who at Dosal's urging and on his behalf, made the decision to terminate DeBose.

June 2014: Dosal testified that DeBose complained to him about possible discrimination. [9/11/18 153:14-20]. Dosal testified he knew about but kept hidden from DeBose an anonymous email from Webmaster@acad.usf.edu that referred to DeBose as *"a cancer"* and called for her termination. [9/12/18 30:2-4; See also Ref. No. 3, 4, and 32]. Dosal received the email from Wilcox. [9/11/18 181:1-25; 182:1-2]. Wilcox testified that he and Travis Thompson ("Thompson") had access to the Webmaster account. [9/18/18 93:2-8; 9/24/18 21:23-25; See Ref. No. 32]. Wilcox also testified that Thompson was the former Webmaster for the Provost's Office. [9/18/18 93:4-8]. Wilcox testified that he received Dosal's response about a plan to "reorganize", copying Sidney Fernandes ("Fernandes"), VP of Information Technology, after Wilcox forwarded the email. [9/19/18 86:22-25; 87:1-25; 88:1-19; 89:1-8; See also Ref. No. 32]. Wilcox thanked Dosal for the action he was about to take, "getting ahead of this". Id. Wilcox who testified he put no stock in "anonymous" Emails [9/19/18 88:5-7], did just that because he knew the Email sent to him on June 20th and the Sarah Thomas Email sent to Dosal within an hour of each other,

and incidentally on the same day as Caurie Waddell's last day or departure [9/20/18 183:2-10], was not really "anonymous" [9/18/18 89:1-8] but from Travis Thompson, the Provost's former webmaster. [9/18/18 93:4-8, 21-25; 94:1]. Just days after DeBose's discrimination complaint to Dosal (very close temporal proximity), Dosal and Wilcox retaliated and took an adverse employment action against DeBose: **(1)** Dosal and Wilcox decreased DeBose's scope (effectively demoting her) through a reorganization that moved Degree Works and staff from the Registrar's Office to IT; **(2)** Dosal, for the first, time failed to evaluate DeBose's annual performance [9/11/18 148:5-10; See also Ref. No. 1]; **(3)** Dosal approved an exceedingly small or disproportionately low salary increase to DeBose, compared to that of her white counterparts [9/11/18 167:15-25; 168:1-12]; **(4)** Dosal and Wilcox's action to demote DeBose made it appear as though the email smears about DeBose were true; and **(5)** Dosal and Wilcox violated Title VII in their supervisory roles by discriminating directly or knowingly allowing the discrimination against DeBose to continue. [See Ref. No. 9, 10].

July 2014: Thompson feigned an argument with DeBose in the breezeway in Sullins' presence. [9/12/18 25:18-25; 26:1-11]. DeBose informed Dosal who did nothing. Id. DeBose engaged in a protected activity and filed an EthicsPoint complaint against Dosal, Sullins, Thompson, and Wilcox. [9/12/18 51:1-10; 60:6-25: 61:1]. The complaint was assigned to Tonia Suber ("Suber"), Human Resources, and referred to Diversity, Inclusion and Equal Opportunity ("DIEO"). Id. Following DeBose's complaint, USFBOT retaliated and took adverse action against DeBose: **(1)** Suber failed to investigate DeBose's EthicsPoint complaint [9/24/18 29:2-4, 12-14 – *Q: "Did you ever respond to Ms. DeBose's EthicsPoint complaint." A. "I was never asked to respond."*; See also Ref. No. 2]; **(2)** Suber worked closely with Dosal, the party complained about, to undermine DeBose's interest in her employment [9/12/18 177:12-22; 9/17/18 115:1-11]; (3) Dosal and Wilcox concealed from DeBose that the Assistant Vice President of Enrollment Planning & Management ("AVP EPM") position was available; and (4) Billie Jo Hamilton ("Hamilton"), the Financial Aid Director, who Dosal had also informed of DeBose's discrimination complaint [9/13/18 60:17-24], was appointed to the position without a search [9/13/18 162:23-25; 163:1-16]. Dosal testified that DeBose trained and onboarded him to his position. Dosal testified DeBose frequently wrote responses for him. [9/12/18 54:1-2; 58:1-5]. Dosal testified he rated DeBose's performance as exemplary. [9/12/18 23:12-15]. Dosal testified that he and Wilcox made the decision to promote Hamilton, a white female. [9/11/18 173:9-25].

August 2014: Dosal informed DeBose, who was unaware, of Hamilton's promotion. [9/13/18 60:17-24]. Hamilton had been in the position for nearly a month. Dosal testified DeBose asked him to review DeBose's title and pay. [9/11/18 169:20-25; 170:1-25; 171:1-13; 9/12/18 61:2-5]. Though not admitted to at trial, Dosal offered DeBose a 2019 extended employment contract, like his. [9/13/18 163:3-23]. Dosal

testified his contract was through 2019 and that Wilcox had been extended too. (Doc. No. 503, #2 and #3). Dosal discussed DeBose's title and compensation with Suber. [9/17/18 58:5-15]. Dosal discussed DeBose's compensation with Wilcox. Dosal did not change DeBose's title or Pay. [9/13/18 166:18-21]. On August 4, 2014, DeBose engaged in a protected activity and filed an internal eeoc with DIEO. Dosal testified he told Wilcox about DeBose's discrimination complaint with DIEO. [9/12/18 22:9-11]. Wilcox admitted that Dosal informed him about DeBose [9/17/18 83:14-24; 84:4-25; 85:1, 5-25; 86:1, 24-25]. Wilcox and Dosal retaliated, subjecting DeBose to the following adverse employment actions: **(1)** DeBose failed to be considered for a promotion; **(2)** DeBose's request for a change in title or pay increase was denied; **(3)** Suber was assigned to work with Camille Blake, DIEO investigator, to undermine DeBose's discrimination complaint; **(4)** Dosal broadcast to a large number of employees that worked closely with DeBose that she filed discrimination charges against him: [*Q: "With whom did you share -- if you could identify all of the parties that you disclosed -- up until her -- the point of her termination, whom did you tell about the discrimination allegation against you by Angela DeBose? A: "I suppose I might have discussed it with my other leadership team, members of my other leadership team, other units, and some of my colleagues in the Provost's office."* See Ref. No. 9 also]; during his testimony, Dosal provide some of the names: [***Q:** "Of names of individuals that you told about Mrs. DeBose's complaint. **A:** Alexis Mootoo, Billie Jo Hamilton, who is AVP of Enrollment Planning & Management, Bob Sullins, Travis Thompson, David Henry. **Q:** Are all of those people with whom Ms. DeBose would have had to work closely? **A:** Yes.*]; [see also 9/13/18 60:5-25; 61:1-17; See Ref. Nos. 9-11]; **(5)** DeBose was isolated and excluded from meetings where her attendance was usual or expected [9/12/18 51:1-10; 9/17/18 85:1-15; 86:1-9, 24-25]; and **(6)** DeBose was marginalized, treated disrespectfully in an openly hostile environment. [See Ref. Nos. 9-11].

December 2014: DeBose faced the withholding of information; exclusion from meetings; isolation from others; solicitation of negative comments about her; or a complete refrain by others to not communicate with her. [9/12/18 51:1-10, 14-16]. DeBose again engaged in a protected activity and filed disparate impact, disparate treatment, and hostile work environment discrimination complaints with the U.S. Equal Employment Opportunity Commission ("EEOC") on December 26, 2014, when the situation at work grew progressively worse.

January 2015: Dosal learned about DeBose's EEOC charge of discrimination. Dosal testified he was upset or angry. [9/12/18 133:24-25; 134:1-8]. Dosal testified that he told Wilcox about DeBose's EEOC complaint. Wilcox testified that he knew about DeBose's EEOC complaint. [9/17/18 22:17-19]. Dosal stated he told Alexis Mootoo ("Mootoo"), Fiscal Assistant, about DeBose's discrimination complaint and received her help. [9/12/18 138:1-11; See Ref. No. 7]. Mootoo, an African American female, "helped

Dosal". [9/12/18 191:23-25; See Ref. 28]. Dosal and Mootoo testified that Mootoo had been promoted and given several pay increases. [9/12/18 191:1-11; 9/13/18 162:5-9]. Suber told Dosal it was "time to reward Alexis [Mootoo]". [9/12/18 189:10-19; 190:2-25; 191:1-25; 9/20/18 108:5-10]. Dosal also helped Mootoo get her Ph.D., when it was at a standstill. [9/12/18 193:5-9]. One month after DeBose's EEOC complaint (very close proximity), Dosal used the "Shared Services" meetings with Mootoo to retaliate against DeBose: **(1)** On January 27, 2015, Dosal became increasingly aggressive towards DeBose, after Alexis Mootoo left a meeting with them on Shared Services [9/12/18 67:3-25; 68:1-25; 69:1-23]; **(2)** Dosal followed DeBose to the elevator, closely on her heels and talking loudly, as DeBose left his office [9/12/18 171:11-14]; In response, DeBose wrote to Dosal the following: *"A complaint of illegal discrimination has been filed. My expectation is respectful and civil treatment."* [9/12/18 67:9-25; 68:1-25; 69:1-14]; On January 29th, DeBose and her staff met with Mootoo to discuss the Shared Services model and operation. Mootoo retaliated against DeBose on behalf of Dosal: **(1)** Mootoo was solicited by Dosal to file an HR complaint against DeBose for allegedly calling Mootoo a "little girl" [9/12/18 159:15-25; 160:1-21; Exhibit #77, #82]; **(2)** Mootoo was asked by Dosal to report the incident and get corroboration so that Dosal could take action against DeBose [9/12/18 156:21-25; 157:1-25; 158:14-24; See Ref. Nos. 5-7]; **(3)** Dosal and Suber targeted DeBose and collected reports against her for filing complaints in order to terminate her employment. Id.; **(4)** DeBose was not informed of Mootoo's complaint [9/12/18 153:17-24; 9/13/18 74:7-8], but other people were [9/13/18 74:4-6]; Dosal testified he informed Wilcox about the alleged incident [9/12/18 22:15-18]; Wilcox supported reprimanding DeBose. [9/17/18 108:13-22]. Dosal and Wilcox testified that they had not heard DeBose use terms like "little girl" in the time that she worked with them. [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].

February 2015: Two months after DeBose's EEOC complaint (very close proximity), USFBOT took several adverse, retaliatory employment actions against DeBose when DeBose engaged in another protected activity on **February 4, 2015** and filed a Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction with the Middle District Court of Florida ("MDF"). DeBose filed the TRO to stop USFBOT from carrying out illegal retaliatory acts against her and threatening her job.[1] DeBose's motion immediately became known, upon filing. Dosal and Wilcox testified that they knew of DeBose's court action. [9/13/18 55:5-25; 9/18/18 114:13-25; 115:1-25; 116:1-23; 117:20-25; 118:1-9]. Dosal testified he was removed from the decision-making by the Provost because of DeBose's complaints and

[1], Case No. 8:15-mc-00018-EAK-MAP. DeBose sought relief under Section 706(f)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(2)

legal activities. [9/13/18 56:1-4; 57:9-19]. The MDF complaint was publicized in the media. [9/18/18 119:14-25; 120:1-4; 125:9-25; 133:7-25; 134:1-25; 135:1-9]. Hours after the motion was filed, the same day **(very close proximity)**, Dosal and Wilcox retaliated against DeBose: **(1)** Dosal issued DeBose her first-ever written reprimand in violation of USF's policy/practice of progressive discipline. [9/18/18 43:6-16, 21-25; 44:1-4]; **(2)** Denelta Adderley-Henry, Human Resources, rejected DeBose's grievance and denied her access to the appeals process [9/20/18 17:1-25; 18:1-9; Exhibit #314]; and **(3)** Mootoo visited the Registrar's Office and used the word "*nigger*" to offend, humiliate, and embarrass DeBose before members of her staff. Notably, in her testimony, Mootoo did not immediately deny using the *n*-word but rather asked, *"When? No. I'm sorry. When?* [9/20/18 110:4-6]. Dosal knew about Mootoo's use of the *n*-word. He and Wilcox expressed their hostility towards DeBose when testifying that DeBose did not deserve "due process" [9/12/18 174:3-9; 9/13/18 54:23-25; 55:1-7; 9/17/18 138:11-25; 139:1-21; 9/19/18 81:18-25; 89:3-7; See Ref. Nos. 12, 14]. Dosal admitted during his testimony that the alleged 'little girl' comment was not the real reason but a fake or pretext reason for the reprimand. [9/12/18 174:3-5; 9/13/18 17:10-25]. Dosal testifed that DeBose was reprimanded because of her complaints. [9/12/18 174:18-24 [9/13/18 54:23-25; 55:1-15, 17-23]. Dosal testified DeBose would have been reprimanded anyway. [9/13/18 17:10-13]. Mootoo *testified falsely* that Dosal did not inform her of DeBose's discrimination complaint. [9/20/18 71:25; 72:1-8; 77:20-25; 78:1-13; 82:17-20, 23-24; See Ref. Nos. 7, 27]. Mootoo testified that her professional relationship with DeBose was "wonderful." [9/20/18 85:2-3. See Ref. No. 8]. Mootoo testified she confided in DeBose about discrimination that Mootoo experienced at USF and that USF did nothing. [9/20/18 75:13-25; 76:1-21]. Mootoo testified that Dosal did nothing. [9/20/18 77:6-10]. On **February 4, 2015**, Dosal asked Carrie Garcia to contact Ellucian, L.P. ("Ellucian") for an "*urgent*" Post Implementation Assessment ("PIA") Report of Degree Works. [9/13/18 63:15-22; 64:6-25]. The timing was very unusual for a PIA since Degree Works was successfully implemented four years earlier by DeBose. The system had "changed hands" and was moved to IT in June 2014. Dosal testified he funded and arranged the visit. [9/13/18 65:22-25; 66:1-25; 67:1-24]. Wilcox contradicted Dosal, testifying it was Fernandes who arranged the visit. [9/19/18 51:25; 52:1-2; 113:19-22]. Andrea Diamond was assigned to the consultation. In her [Exhibits #225A and #225B] submitted to the jury, Diamond testified USF asked her to add DeBose (i.e. the Registrar's Office) to the agenda for the visit. Travis Thompson stated it was Diamond's decision to add DeBose. [9/24/18 27:6-9]. While Dosal denied at trial telling Diamond about DeBose's EEOC complaint. [9/17/18 59:25; 60:1-5], he widely publicized it to a large number of people [See Ref. Nos. 9-11], including Carrie Garcia and Travis Thompson who could have easily shared this information with Diamond. At trial, there was testimony that the *urgent* PIA scheduled by Garcia in February 2015, would not actually occur until April 14-16, 2015, with the write-up (the "Ellucian Report") due May 4-8, 2015. [9/12/18 141:18-25; 142:6-21; 143:2-

18, 24-25; 144:1-18]. When asked about the urgency, Dosal testified [*"I wanted her to bring in a consultant to the campus as soon as practible"* 9/13/18 64:11-12]. The jury heard testimony that the report was due around the time of annual performance reviews and automatic contract renewals at USF. Dosal and other USFBOT employees and Ellucian's Diamond conspired together in a retaliatory scheme to **(4)** add DeBose to the agenda with all giving conflicting testimony as to whose decision it was to add the Registrar's Office to the agenda [9/24/18 27:6-9; Exhibits #225A, #225B] ; **(5)** create a pretext justification for DeBose's termination [9/13/18 123:4-24; 124:12-25; 124:13-25; 126:1-13; Exhibits #188, #189, #190, #191,#192, #194, #198]; **(6)** USFBOT and Ellucian scheduled the write-up of the Ellucian Report to fire DeBose before her 2015 evaluation and 2016 automatic contract renewal; **(7)** USFBOT lawyers advised USF to schedule the urgent PIA several months after DeBose's EEOC charge to evade a temporal proximity argument [9/18/18 130:5-25; 131:1-18; 132:15-25]. On February 23, 2015, DeBose contacted the EEOC.

March 2015: On March 16, 2015, DeBose engaged in another protected activity and amended her eeoc/EEOC complaints to include Retaliation.[2]

April 2015: Garcia asked DeBose to meet with Ellucian less than 24-hours of Diamond's visit to campus. DeBose was warned the meeting was a setup. DeBose and Shruti Kumar ("Kumar") met with Diamond. In the Ellucian Report, Diamond labeled DeBose (a.k.a. the Registrar's Office) as a "risk to Student Success". [Exhibit #224]. Diamond echoed similar words that she wrote in an Email to Paul Dosal on April 23, 2015 [#194] into the Ellucian Report. [9/13/18 126:1-10; 188:17-25; 189:1-3; 9/18/18 58:5-11; Exhibit #224]. In the Ellucian Report, Diamond stated that she was kept from meeting with Registrar's office personnel. Id. Wilcox testified that DeBose refused to answer Diamond's questions. [9/18/18 53:5-11]. Wilcox lied, stating that he did not debrief with Diamond. [9/18/18 146:19-22]. Dosal testified that Diamond debriefed with him, Wilcox, and others. [120:23-25; 121:1-9; 122:25; 123:1-25; 123:1-25; 124:1-25; Exhibit #192]. In Diamond's Affidavit [#225A], she testified falsely that she did not discuss the Ellucian Report with anyone but Garcia and Thompson. [Exhibit #225A, paragraph 18]; however, Diamond had several debriefings with executive leadership. [9/13/18 121:1-20, 24-25; 122:1-25; 123:1-25; 124:1-25; 127:14-16]. (Evidence was excluded at trial that shows that Diamond debriefed with Provost, Wilcox, Paul Dosal, Sidney Fernandes, Bob Sullins, and other in leadership positions at USF.)[3] Diamond lied that she did not debrief with Wilcox [#225A, paragraph 22] and Wilcox lied that he did not meet with Diamond. Dosal applauded Diamond's report. [9/13/18 123:21-24; 124:13-16]. From

[2] DeBose also put USFBOT on notice to preserve documents, in the event of further litigation.
[3] DeBose contends in this motion that it was error to exclude the documents.

the debriefing, Dosal knew that Diamond would write what he needed to terminate DeBose. [Plaintiff's Exhibit #192; 9/13/18 123:21-24]. Dosal testified he discussed the Ellucian Report with Wilcox and forwarded it to him. [Exhibit #192; 9/18/18 49:21-25; 137:12-25; 138:1-4]. In concert with the February 2015 scheduling of the urgent PIA of Degree Works that added DeBose to the agenda, USFBOT's Dosal and Wilcox and Ellucian's Diamond, held the PIA from April 14-16, 2015, to retaliate against DeBose. The urgent PIA was arranged one month after DeBose filed a complaint with the EEOC. In April 2015, one month after DeBose amended her EEOC complaint to include a charge of retaliation, USFBOT took the following adverse employment actions against DeBose: **(1)** In the Ellucian Report, Diamond wrote false and libelous statements about DeBose, whom Diamond referred to in the report as "the Registrar's Office" [Exhibit #224]; **(2)** USFBOT published and distributed the Ellucian Report, knowing the contents were false and damaging to DeBose; **(3)** DeBose was the only USFBOT employee asked to respond, under a threat of termination with Dosal declaring, *"I'm giving you an opportunity to respond."* [9/12/18 43:10-13; 44:1-6; Exhibit 121]; **(4)** Dosal, Wilcox, and Diamond agreed and set out to ruin DeBose's reputation and career.

May 2015: One month after the Ellucian Visit (PIA), two months after the EEOC Retaliation charge, three months after the TRO, Reprimand, and four months after DeBose's EEOC complaint, Wilcox through Kofi Glover, Vice Provost, retaliated against DeBose for filing complaints. [9/19/18 8:5-9; 15:4-25; 16:1, 8-25; 17:1-18; 18:2-25; 19:1-8]. DeBose was separated and given notice of her termination. Wilcox's termination letter stated DeBose was being terminated but not for cause or disciplinary reasons but at Wilcox's prerogative. [Exhibit #229]. However, Wilcox stated to the press that DeBose was terminated because of the Ellucian Report.[4] On May 20-21, 2015, DeBose was offered and accepted a position at the University of North Florida ("UNF") by Albert Colom ("Colom"), Vice President of Enrollment Services. On May 26, 2015, days after Wilcox terminated DeBose, Wilcox called and spoke to Traynham about DeBose. [9/19/18 38:13-15]. Wilcox testified that he did not inform Traynham of DeBose's exemplary performance [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][Exhibits #239A and #239B]. Wilcox admitted that DeBose did not ask him to be a reference for her [9/19/18 39:9-14; 60:19-25; 61:1-11]; Wilcox denied at trial that he referred to DeBose as *"toxic"* or stated to Traynham, *"you will regret it if you hire her,"* as reported to DeBose by Colom following the Wilcox-Traynham call. [9/19/18 60:3-10]. In May 2015, USFBOT retaliated against DeBose for filing complaints: **(1)** one month after the Ellucian visit and two months after DeBose filed an EEOC charge of Retaliation, USFBOT separated DeBose from her employment on May 19, 2015; **(2)** USFBOT terminated DeBose, effective August 19, 2015; **(3)**

[4] Newspaper article [Exhibit #230] was excluded.

USFBOT would not allow DeBose to grieve or appeal the termination; **(4)** USFBOT forced DeBose to exhaust her leave, in violation of a "grandfather" clause in her contract [9/11/18 43:10-18]; **(5)** Wilcox, USFBOT Provost, called Traynham, UNF Provost, and gave DeBose a "poor reference", to *"screw DeBose out of a job,"* in violation of USF policy [9/19/18 42:11-24]; **(6)** Judy Genshaft, USFBOT President, declined to hear DeBose's grievance, though Genshaft was DeBose's first level grievance and the USF Board of Trustees declined also as DeBose's second level grievance, in contravention of USF Policy [9/19/18 12:24-25; 13:5-16]; **(7)** Immediately following Wilcox's call to Traynham, Colom called DeBose and rescinded the job at Traynham's request.

ARGUMENT

I. Retaliation Claim

A. The Court Erred in Law and Fact in Granting Defendant's JMOL on DeBose's Retaliation Claim.

The Court granted USFBOT's renewed 50(b) JMOL motion, holding that DeBose failed to introduce sufficient evidence at trial for a reasonable jury to find a causal connection between her protected activities and USFBOT's adverse employment actions. To establish a claim of retaliation under Title VII, a plaintiff must prove that she engaged in statutorily protected activity, she 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). The Court acknowledged that DeBose established that she engaged in a protected activity at trial through three qualifying acts and offered evidence of two adverse employment actions taken by USFBOT. However, DeBose contends that she presented at trial a protected activity in June 2014 that the Court overlooked and offered multiple instances of adverse employment actions by USFBOT were that were continual and close in proximity, as evident by the preceding Factual Chronology. The Court's review appears to concentrate or hone in on only certain actions by USFBOT. In *Washington v. Ill. Department of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005), the court determined that 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. *Id.* The jury heard Dosal testify that he told a wide number of USF employees about DeBose's discrimination complaint, creating a very real potential for them to band against her. [9/13/18 60:5-25; 61:1-17]. The jurors witnessed Dosal's and Wilcox's animosity and hostility firsthand, in testifying that DeBose *"did not deserve 'due process.'"* [See Plaintiff's Affidavit, Exhibit A and Trial Evidence Chart, Exhibit B, Ref. Nos. 12-14]. The jury observed 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 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. This Court stated at trial, and understood just as the jury did, the following: *"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 F.3d 444, (3d Cir. 2006). Applying *Jensen*, DeBose presented evidence that showed that she was afforded no due process, and that those responsible for ensuring due process behaved in a hostile and retaliatory manner. *Id.* 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). In the instant case, the jury agreed that Dosal and Wilcox had a hostile, retaliatory animus against DeBose and therefore acted and caused others to act in a hostile manner towards her. The Plaintiff also presented evidence that DeBose complained to Dosal, as her immediate supervisor, about discrimination in June 2014. Dosal affirmed in his testimony that DeBose made such a complaint, as shown above. An employee's complaint about discrimination constitutes protected activity if the employee could "reasonably form a good faith belief that the alleged discrimination existed." *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999). Dosal also confirmed that he had knowledge and possession of emails that contained derogatory statements about DeBose, including the *anonymous* Webmaster email calling for DeBose's termination but he did nothing about it. His failure to act or report the charge is another form of retaliation. In June 2014, the same month that DeBose complained, Dosal and Wilcox reduced her scope in a reorganization to move Degree Works and the staff to IT. The reorganization was precipitated by the Webmaster email that referred to DeBose as *a cancer* and called for her termination. The court in *Kessler v. Westchester County Dep't of Social Sers.*, 461 F.3d 199 (2d Cir. 2006), determined that a reduction in scope (i.e. demotion) without change in salary, title or other conditions of employment can be adverse employment action. *Id.* In July 2014, DeBose presented evidence that she filed an internal EthicsPoint complaint that went uninvestigated. One month after the June complaint and in the same month as the July complaint, Dosal and Wilcox failed to consider DeBose for promotion or even inform her that the AVP EPM position was available. As noted by the Factual Chronology, Dosal and Wilcox made the decision to promote Hamilton. To make out a "failure to consider" adverse employment action,

the plaintiff must show that she was, on account of her protected conduct, disqualified from the position in a way that other employees were not. *Griffin v. GTE Florida Inc.*, 182 F.3d 1279, 1283 (11th Cir. 1999) (internal citations omitted). Dosal and Wilcox testified that DeBose was not considered. Dosal admitted he did not let DeBose know the job was available or that he had in fact already promoted Hamilton. DeBose presented to the jury that she filed an internal eeoc complaint of discrimination with USF DIEO in August 2014. DeBose was not considered for promotion and Dosal (and Wilcox) failed to consider DeBose for a title change or increase in pay. In DeBose's examination, Dosal admitted DeBose was isolated and banned from meetings where her attendance was usual or expected. DeBose presented evidence that her work environment became increasingly hostile. Dosal admitted he told other employees that worked closely with DeBose, that she filed discrimination charges against him. A jury could believe that Dosal's actions were retaliatory to have the employees form an alliance with Dosal, DeBose's superior. In December 26, 2014, DeBose filed an EEOC Discrimination complaint, with notification to USFBOT in January 2015. The jury heard evidence and viewed exhibits that on February 4, 2015, one month after DeBose filed her EEOC complaint, Dosal testified that he reprimanded DeBose for unprofessional conduct. The jury heard testimony that DeBose had never been reprimanded by USFBOT before. In being disciplined one month after her EEOC discrimination complaint, the jury could believe that 'but for' the Plaintiff engaging in this protected activity, Dosal would not have reprimanded DeBose. Furthermore, Dosal testified that DeBose would have been reprimanded no matter what—even if Mootoo had not made the "little girl" allegation. Dosal's statement registered with the jury. They understood that the allegation by Mootoo was false or pretext, for the retaliatory action. Dosal and Wilcox wanted DeBose out. The jury did not have to make any tall leaps or bounds to reach this conclusion. Dosal also conceded that the reasons given were not the real reasons the adverse actions were taken. Dosal stated for all the jurors to hear, that adverse action was taken against DeBose because *"she filed complaints."* In *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003), the court held that 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. *Id.* In other words, temporal proximity is not needed with *prima facie* evidence that the employer's proffered explanation was pretext from Dosal and Wilcox. DeBose filed the MDF complaint, another protected activity, for a TRO and injunctive relief on February 4, 2015. Dosal and Wilcox testified that DeBose's complaints and legal activities led to their decision. Dosal testified the complaints were in fact the real reason for USFBOT's action. 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. [9/13/18 55:8-25; 56:1-3, 15-25; 57:1-21; 9/19/18 5:2-25; 6:1-23; 11:6-13; See Ref. No. 39]. 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 is 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 put on evidence that she suffered both tangible and intangible adverse employment actions from the plots and schemes Dosal and Wilcox put into motion. On February 4, 2015, Garcia on Dosal's behalf contacted Ellucian, L.P. for an urgent PIA to write the Ellucian Report. Given the timing or temporal proximity of the MDF complaint, reprimand, and contract with Ellucian for an urgent PIA, the jury was entitled to find that 'but for' DeBose's complaints (i.e. protected activities), the actions taken and planned against her would not have occurred.

The jury verdict is decisive in showing that the jurors understood the causal relationship between the filing of DeBose's complaints and USFBOT's adverse actions. On that basis, the jury was entitled to find that USFBOT did not have a legitimate nonretaliatory reason for DeBose's termination.

B. The Court Erred in Finding that Temporal Proximity was not "Very Close" and "Close" to Uphold the Jury's Verdict.

In reviewing Plaintiff's retaliation claims at Summary Judgment, the Court stated as follows concerning the temporal proximity of DeBose's actions and USFBOT's adverse employment actions:

> DeBose's version of the facts, i.e. that she was the victim of a massive conspiracy because she filed complaints of discrimination, may not ultimately be accepted by a jury, but there is certainly enough circumstantial evidence of retaliation to afford DeBose her day in Court. **Specifically, given the close temporal proximity between DeBose's EEOC complaint and USF's decision to engage Ellucian, DeBose's testimony that the Registrar's Office was included in the scope of Ellucian's engagement at the request of USF, DeBose's testimony that she was treated differently following her complaints of discrimination, and the timing and circumstances surrounding the Traynham conversation, a reasonable jury could find that USF's actions were retaliatory.** [Document 210, Pages 20, 21].

Notably, the standard for summary judgment mirrors the standard for judgment as a matter of law, and the inquiry is the same for both. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Plaintiff argues the backlash of retaliation against her was a continuing action. The causal relationship element *may* be established by circumstantial evidence, including that the adverse action followed closely in time after the plaintiff engaged in protected activity. *Gordon v. NY City Bd of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000). However, this is not the only way to establish causation. In *Templeton v. First Tennessee Bank*, 2011 W.L. 1525559 (4th Cir. April 22, 2011), the Fourth Circuit held that a

former employee stated a viable Title VII retaliation claim regarding her former employer's refusal to rehire her, despite the passage of approximately two years between her harassment complaint and employer's refusal to rehire her. *Id.* Here, DeBose's case is very close comparatively, against the standard applied in *Templeton* under the court's "first opportunity" analysis. See also *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.* and *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). *Id.*

The adverse actions against DeBose occurred close after her complaints. The temporal proximity in DeBose's case was "very close" and "close", and therefore sufficiently close for a reasonable jury to find 'but for' causation of retaliation. It is unfathomable to think that a qualified jury that followed the Court's instructions would be perceived as unreasonable for reaching a verdict that is not at all impossible or farfetched under these facts. Plaintiff contends the "no reasonable juror" standard does not apply, when all of the evidence is reviewed. The jury deliberated and returned a verdict, finding that the preponderance (i.e. great weight of the evidence) was in DeBose's favor. Thus, it was error to overturn the jury's verdict.

C. The Court Erred that DeBose Did Not Establish Defendant's Reasons were Pretext

Under the *McDonnell Douglas* burden-shifting framework[5], if the defendant advances a legitimate, non-discriminatory reason, the plaintiff must then establish by a preponderance of the evidence that the proffered justifications are actually a pretext for discrimination. *Miranda v. B & B Cash Grocery Store*, Inc., 975 F.2d 1518, 1528-29 (11th Cir. 1992). The plaintiff may demonstrate pretext by showing that the defendant's proffered reason for an adverse action is a cover-up for a discriminatory decision. *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002). A reason is pretextual only if it is false and the true reason for the decision is discrimination. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007). Here, the jury followed the court's instruction including: [Y]ou may consider whether [defendant's] reason is merely a cover-up for retaliation. While Plaintiff cannot get into the minds of the jurors, it is clear from the verdict that the jury believed USFBOT's proffered reasons were pretext for retaliation. Wilcox's termination letter stated that DeBose was not terminated for cause or disciplinary reasons. [Exhibit #229]. However, Wilcox testified at trial that DeBose was terminated for three significant factors in the Ellucian Report. [9/18/18 137:25; 138:1-4; 139:1-25; 140:1-15, 23-25;

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

141:1-14]. The reasons were contradicted at trial by the record and testimony. Dosal testified he forwarded DeBose's response to Wilcox. [Exhibit #239]. Wilcox testified falsely in his deposition that he did not receive Kumar's email, et al.[6] Kumar's Affidavit [Exhibit #221] and Deposition [Exhibit #222] refuted the Ellucian Report and also Wilcox's trial testimony. [9/18/18 49:21-25; 50:1]. Wilcox testified falsely that he did not debrief with Diamond. [9/18/18 146:19-20]. Record evidence presented at trial shows Diamond met with a Provost and a Dean. [Exhibit #216][7]. Additionally, Dosal testified that Diamond debriefed with him and two or three others [9/13/18 121:1-9].

From Dosal's admission of pretext to the lies and contradictions, the jury decided for themselves that there was a whole lot of lying and contradictions between USFBOT's Wilcox and Ellucian's Diamond to show that USFBOT's justification for the actions taken against DeBose were pretext. Additionally, the jury did not miss that Ellucian's Diamond specifically took aim at DeBose in her engagement with USFBOT:

> The jury heard and viewed evidence that Diamond lied and testified falsely, when she said, *"I did not communicate with anyone else at USF regarding the contents of the Ellucian Report."* [Exhibit #225A, paragraph 18]. Following separate private debriefings with Dosal, Sullins, and Wilcox, Diamond called for DeBose's termination. The jury heard that like the Sarah Thomas and Webmaster 'risks' emails, Diamond stated, "[DeBose] *is a risk to Student Success…* [she] *could ultimately hold you back from your future goals*". Exhibit 224]; [9/11/18 35:10-25; 36:1-25; 37-1-25; 38:1-25[9/18/18 53:9-25; 54:1; 96:1-25; 97:1]
>
> The jury heard and viewed evidence that shows that USF wrote or strongly influenced the content in the Ellucian Report. At the exec debriefing", Garcia, Thompson, Dosal and others made recommendations and asked for changes to the report long before it was provided to them by Diamond. Dosal responded to Diamond on April 20, 2015 – four days after the debriefing, and before the rough and final drafts of the Ellucian Report were complete, saying: *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]
>
> The jury heard the following evidence how Diamond adopted the nomenclature of DeBose's alleged discriminators in the Ellucian Report. Wilcox – **"Non-collaborative"** = Diamond's – **"lack of collaboration"** [Ellucian Report, p.5, ¶6]; Wilcox – **"Resistant to change"** = Diamond's – **"unwilling to encompass change"** [Exhibits #224, and #238B]; [Trial Day 9/25/18 13:1-25; 14:1-8].
>
> The jury viewed emails exchanged between Dosal and Diamond prior to her writing the Ellucian Report: *"You have managed to create an atmosphere of working together for the good of the institution, staff and most importantly STUDENTS."* Diamond responded to Dosal's April 20th Email on April 23rd, using similar words and language that she would later use under the Areas of Risks section for the Registrar's Office section of the Ellucian Report, saying: *"You have created a great atmosphere of camaraderie and a*

[6] Rolanda Lewis's email was excluded.

[7] Document was excluded. DeBose contends this was this error.

focus on student success." Diamond states that she did not see this "atmosphere of working together in the Registrar's Office". [Exhibit #224]; [Trial Day 9/13/18 126:1-13]

Another proof for retaliation besides temporal proximity and pretext is found in *Burlington*. Specifically, *Burlington* held that"[t]o prevail on a claim for retaliation under Title VII, 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which ... means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. '" The jury may have believed, based on the evidence presented at trial, that USFBOT's actions against DeBose might dissuade [*any reasonable person*] from engaging in protected activity, especially after Dosal's widespread disclosure of DeBose's highly confidential complaints. In *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166-67 (D.C. Cir. 2010), three weeks after a federal employee sought EEO counseling regarding her complaint of disability and gender discrimination, her supervisor posted the EEO complaint on the agency's intranet where coworkers accessed it. *Id.* The court ruled it was materially adverse to publicize an employee's EEO complaint to her colleagues. *Id.*

Additionally, as evident by the verdict, DeBose successfully rebutted USFBOT's shifting reasons for her termination identified by Wilcox: Collaboration; Significant Reasons Ellucian Report; and No Reason—At Will. The jury did not find Defendant's witnesses believable or credible—only hostile and angry.

D. The Court Erred in Weighing the Evidence to Require "Direct" Evidence

The Eleventh Circuit examines claims of discrimination and retaliation under the same legal framework regardless of whether the plaintiff invokes section 1981 or section 2000e. See Chapter 7 *Trustee v. Gate Gourmet*, Inc., 683 F.3d 1249, 1256–57 (11th Cir. 2012) (discrimination); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008) (retaliation). And we review evidentiary rulings for abuse of discretion. *Furcron v. Mail Ctrs*. Plus, LLC, 843 F.3d 1295, 1304 (11th Cir. 2016). In Title VII discrimination cases, the plaintiff may prove [retaliation] through *circumstantial evidence*, using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Direct evidence is 'evidence, that, if believed, proves [the] existence of [retaliation] without inference or presumption.'" *Id.* at 1086 (first alteration in original) (quoting *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997)). In contrast, circumstantial evidence only "suggests, but does not prove, a [retaliatory] motive," id., and may be evaluated under the burden-shifting test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). DeBose presented substantial evidence and is not required to submit direct evidence, else *McDonnell Douglas Corp*. would not apply. The Order states, "DeBose offered no direct evidence of retaliation." [Order, 548, p. 7]. In considering a motion for JMOL, the court does not exercise discretion or weigh the evidence but instead makes an objective, legal determination, viewing the evidence in the light most favorable to the nonmovant.

E. The Court Erred in Substituting its Opinion for that of the Jury

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)). 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 Court states that after deliberation, the jury found that USFBOT took adverse employment actions because of DeBose's protected activities. However, the Court disagrees with the jury and stated the evidence was insufficient (i.e. the gap is too big) to convince a reasonable jury; however, the Court does not explain why the jury verdict was farfetched or why the jury could not have possibly reached such a conclusion. Per the Court, *"the trier of the facts is looking at the believability of witnesses."* [Trial Day 9/19/18 73:22-23]. DeBose's evidence about the retaliation she experienced was believed by the jury. The jurors found DeBose's testimony to be credible, with no material conflicts. USFBOT's case is riddled with lies and contradictions that should not result in scrapping the verdict. Wilcox's testimony that he did not debrief with Diamond is a material conflict with the evidence. Wilcox and Thompson testified that Thompson was the former webmaster for the Provost but was not the anonymous sender. The conflict occurs in that Wilcox and Thompson both had access to the Webmaster domain and account but testified that they did not know who accessed the account to send the webmaster email. The jury reasonably believed it was Thompson. It was error or the Court to grant the JMOL without resolving these material conflicts in the evidence. It was error for the Court not to explain with greater specificity or particularity why the jury verdict was so out-of-bounds to reverse it. Under the Seventh Amendment, jury verdicts are sacrosanct. The Court erred in not explaining how the jury's decision violates or falls extremely short to put it in the "no reasonable jury" category.

F. The Court did not give all favorable inferences to DeBose, the nonmoving party

On a JMOL, "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). DeBose's evidence is substantial and DeBose, though pro se, put on her case. The jury returned in DeBose's favor. The Court charged the jury and instructed them with examples on the dos and don'ts and what they were not required to believe. Unlike the Court, the jury was not required to give DeBose all favorable inferences; however, upon reviewing all evidence, the jury reached a conclusion well-supported by the record, to find in Plaintiff's favor. In legal terms, there was substantial evidence supporting the nonmovant's position [DeBose] such that reasonable persons would draw the same conclusion as the jury, in favor of the nonmovant.

G. USFBOT did not give unimpeached testimony to support a JMOL

USFBOT did not establish it claims and defenses by unimpeached testimony. "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). Here, Defendant's witnesses gave contradictory, false testimony. Simply put, they lied. **[See Plaintiff's Trial Evidence Chart, Ref. Nos. 7, 9, 11, 12, 14-15, 16-18, 22-23, 26-28, 30-33, 38, and 41]**. In *Reeves*, lies, contradictions, misfeasance or malfeasance do not support a JMOL. The testimony must be credible and truthful. *Id.* at 152.

II. Other Grounds for New Trial

A. A New Trial is Warranted to Correct Serious Errors to Preclude Judgment and Manifest Injustice Against DeBose.

In reviewing a motion for a new trial, [t]he court may grant a new trial, even though the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence or is based upon evidence which is false, or to prevent in the sound discretion of the trial court, a miscarriage of justice. *Roy v. Volkswagen of Americ*a, 896 F.2d 1174 (9th Cir. 1990) (citing *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976)). This Defendant wanted DeBose left with *"nothing, not even a shirt."* It would be a gross miscarriage of justice for DeBose to have proven her case and receive an "inexorable zero".

B. The Court Erred in Denying DeBose's Motion to Continue Trial

The Plaintiff, pro se, was prejudiced and did not have adequate time to prepare for trial and secure her witnesses. Service was attempted on Diamond, Traynham, and Colom but the witnesses did not accept service or did not appear. Plaintiff did not have a meaningful opportunity to object to Defendant's motions in limine, though she submitted an omnibus motion using her best efforts. The exclusion of evidence concerning the vandalism to DeBose's car, DeBose's public records cases, etc. were more prejudicial to Plaintiff than Defendant and potentially could have been fatal to Plaintiff's case. However, Plaintiff received the favorable jury verdict because Defendant's cobbled-together case fell apart, despite destroying Plaintiff's evidence, excluding her state court action evidence, excluding all of Plaintiff's witnesses, and withholding documents—because the truth is a stubborn thing and far more believable. Plaintiff, pro se, did not have opportunity to research and understand trial procedures. Defendant discussed Plaintiff's use of the clock; however, the record plainly reflects that Defendant's incessant objections (over 200) also wearied the Court. DeBose states that on a motion for consideration, the Court should have considered: (1) "the extent of her diligence in her efforts to ready her case, prior to the date set for hearing," (2) "how likely it is that the need for a continuance could have been met if the

continuance had been granted," (3) "the extent to which granting the continuance would have inconvenienced the court and the opposing party," and (4) "the extent to which the appellant might have suffered harm as a result of the district court's denial." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1351 (11th Cir. 2003) (alterations in original) (quoting *Hashwani v. Barbar*, 822 F.2d 1038, 1040 (11th Cir. 1987)). The Defendant, who was given an extension, for a much less serious matter, did not initially object.

C. The JMOL Order is Invalid

If the jury returns a general verdict on multiple causes of action, to be entitled to JMOL, Defendant must show that the plaintiff failed to make out a case under both causes of action. Thus, with regard to the JMOL motion, the "two-issue" rule applies. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1099 (11th Cir. 1983). Plaintiff prevailed on her discrimination claim. USFBOT's JMOL did not satisfy this rule and should be reversed.

D. USFBOT did not produce a preponderance of evidence or any evidence to prevail on the "same decision" defense

USFBOT did not produce a preponderance of evidence to support its same decision defense. To prevail on a same decision defense, USFBOT would have to prove it would have made the same decision in the absence of the impermissible "race motivating factor". If the Defendant establishes this defense, DeBose would only be entitled to declaratory and injunctive relief, attorneys fees and costs. Order of reinstatement and substitutes would be prohibited. 42 U.S.C. 84 §2000e-5(g)(2)(B). USFBOT produced no evidence at trial to support that it would have made to same decision concerning DeBose. USFBOT did not submit any evidence to support its same decision defense. Dosal's ambivalent testimony does not support USFBOT's same decision defense. [9/13/18 28:7-20; 54:7-22; 58:15-22; 59:6-11]. USFBOT produced no evidence that Wilcox was authorized to make the decision or whether it required some sort of committee review or vote as in some schools. Additionally, the Court's order fails to address the relief DeBose would be entitled to in terms of injunctive relief. DeBose sought injunctive relief in this case and in Case No. 8:15-mc-00018 -EAK-MAP, which DeBose voluntarily dismissed. Furthermore, it may not have been clear to the Jury that checking 'Yes' versus 'No' to the same decision interrogatory would result in no damages for the Plaintiff. The jury answers to the interrogatories suggest this was not plainly understood. Additionally, the same decision defense recognizes any other reason, impliedly legitimate reasons, that would lead to the decision. The jury observed USFBOT's deep animosity and vitriol towards DeBose and may have reasoned that their racial animosity could serve as any other reason. However, the same decision cannot be predicated on an unlawful purpose or it would defeat the purposes of Title VII.

E. The Court Erred in Excluding Diamond's Email to Susan Johnson [Plaintiff's Exhibit 216]

The Court would not allow DeBose to question Wilcox about the document. The evidence was relevant to show Diamond met with Wilcox, Wilcox was a part of the Executive Debriefing with Diamond, and Wilcox influenced what Diamond wrote about DeBose, a.k.a., the Registrar's office. It was not introduced to prove that Diamond's reasons to Susan Johnson were true.

F. The Court Erred in Not Giving Any Sanction or Holding an Evidentiary Hearing on Defendant's Destruction of Plaintiff's Evidence

The issue consumed much of the case and the Court repeatedly declined DeBose's request for an evidentiary hearing with direct eyewitness testimony concerning the destruction. An Adverse Inference was not given or a Stipulation that USF was on notice of its Duty to Preserve when DeBose's evidence was lost. The Defendant was not fined or made to pay the costs/appeals for DeBose having to bring an action. There are several cases which show retaliation against employees after separation and/or termination. USFBOT continued to retaliate against DeBose after her May 19, 2015 separation:

June 2015: DeBose filed a state court action to obtain documents (i.e. public records) from USFBOT, a state agency, under the Florida Public Records Act or Florida Sunshine Laws, to support her EEOC and MDF complaints. On June 26, 2015, DeBose, still employed by USFBOT, engaged in a protected activity and amended her EEOC complaint to add a charge of Unlawful Retaliation against USFBOT.

July 2015: In July 2015, one month after DeBose's state court action and EEOC Charge of Unlawful Termination, USFBOT (i.e. Dosal) retaliated against DeBose. Mootoo, on behalf of Paul Dosal, ordered Suzanne McCoskey-Bishop ("McCoskey-Bishop") to shred DeBose's departmental files. Dosal ordered all employee files to be shredded so that it "wasn't just Angela's." USFBOT retaliated to: **(1)** prevent DeBose from having use of the documents to prove her case at trial; **(2)** force DeBose to resort to other costly litigation; **(3)** lose on several claims and requests for damages for which the documents once existed but DeBose did not have possession of them to support her claims (e.g. DeBose's employment documents, including her employment contracts.)[8]

> Bad faith is presumed or not required under Florida law, § 119.11(4), which provides:
>
> Upon service of a complaint, counterclaim, or cross-claim in a civil action brought to enforce the provisions of this chapter, the custodian of the public record that is the subject matter of such civil action shall not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined, notwithstanding the applicability of an exemption or the assertion that the requested record is not a public record subject to inspection and examination under s. 119.07(1), until the court directs otherwise.

[8] USFBOT Counsels have continued to engage in prejudicial misconduct to withhold documents that should have been produced to DeBose.

The Defendant's act prejudice Plaintiff's case, particularly in terms of her contract claims, but also impacted the Court's view of Plaintiff and her persistence for a just result. Plaintiff contends it is ground for a new trial and not to have final judgment against her.

G. The Court Erred in Excluding Evidence Obtained from Plaintiff's Public Records Case

The Court's evidentiary rulings excluded relevant, admissible evidence from Plaintiff's state court public records cases. This evidence should not have rang forbidden evidentiary bells, since the Defendants witnesses at trial are the same ones that submitted affidavits and were deposed in the federal case. The testimony is also a part of the court record and should have been allowed substantively and for impeachment.

H. The Court Erred in Failing to Reopen Discovery as to this Defendant

The Defendant USFBOT was never compelled to produce documents. The Defendant has not produced the for the months prior to DeBose's termination (e.g. March, April, and May 2015) or the derogatory emails referred to by Paul Dosal, Bob Sullins, and others. USFBOT is continuing to withhold these documents, even against federal/state court-issued subpoenas. Again, this evidence should not have rang forbidden evidentiary bells since the cases involve the same parties and their representatives. Additionally, as Plaintiff was employed through August 19, 2015, documents during this period are also fair game. The excluded documents include relevant or material evidence. **Plaintiff respectfully asks the Court to enforce the subpoenas (Exhibit C) to require Defendant to produce the documents to Plaintiff or to the Court, pending a new trial and/or appeal.**[9]

I. A New Trial is Warranted because of the Prejudicial misconduct by Defendant's counsels

The case is rife with significant prejudicial misconduct by Defendants' counsels in discovery that have prejudiced the Plaintiff and perhaps wearied this Court but nevertheless, necessitates a new trial.

1. Averments and Suborning perjury from USFBOT employees that DeBose's files were not destroyed. (See Exhibit D, New Affidavit from Delonjie Tyson)
2. Averments that DeBose did not have a contract for 2015 or contract extension for 2019
3. Nondisclosure of DeBose's 2015 Employment Contract, though properly produced by DeBose's Counsels
4. Failure to produce the Ellucian Contracts and Agreements between USF-Ellucian and USFBOT-Ellucian-Diamond and other documents concerning Diamond
5. Failure to produce DeBose's leave records, including provisions to guarantee DeBose full pay if on a forced leave and full payout of her PTO)

[9] It should be noted that Defendant lied to the Magistrate at a hearing on March 23, 2017 that the documents were produced to DeBose and/or her counsel. Defendant has been fighting the release of these public records under Ch. 119, F.S., though a state agency, with no defenses or applicable exemptions.

6. Failure to produce DeBose's benefit records, including USFBOT agreement to pay DeBose's employee contribution as well as the employer portion towards DeBose's retirement through payroll adjustments/offsets

WHEREFORE, Plaintiff asks the Court to grant her motion and reinstate the jury's verdict. Should the Court decline to vacate the February 14, 2019 judgment and reinstate the verdict returned by the jury on September 26, 2018, Plaintiff asks the Court to grant her motion for a new trial by jury.

Submitted February **23rd**, 2019

Respectfully,

/s/ Angela DeBose.

Angela DeBose, Plaintiff

CERTIFICATION OF CONFERRAL

Under Local Rule 3.01(g): Plaintiff notified the Defendant of this motion. The Defendant opposes.

Respectfully submitted,

/s/ Angela DeBose

Angela DeBose, Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by CM/ECF service to all counsel of record this **23rd** day of February 2019.

Respectfully submitted,

/s/ Angela DeBose

Angela DeBose, Plaintiff

1107 W. Kirby St.
Tampa, Florida 33604
(813) 932-6959
awdebose@aol.com

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA DEBOSE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 8:15-cv-02787-EAK-AEP**
	)	
UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, UNIVERSITY OF SOUTH FLORIDA, AND ELLUCIAN, L.P.,	)	
	)	
Defendants.	)	
_____/		

NOTICE OF APPEAL

Plaintiff Angela DeBose (hereinafter "Plaintiff") hereby gives notice of her appeal to the U.S. Court of Appeals for the Eleventh Circuit from: **(1)** the Order of this Court entered on February 14, 2019 **[548]** (Exhibit A), granting the Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial by Defendant University of South Florida Board of Trustees ("USFBOT") (Doc. 504) and denying the Motion for Sanctions or Alternatively Relief from Judgment by Plaintiff (Doc. 541); **(2)** the Second Amended Judgment entered by this Court on February 15, 2019 **[549]** (Exhibit B), reversing the Jury Verdict in favor of Plaintiff and entering the Decision by the Court in favor of the University of South Florida Board of Trustees on Plaintiff's retaliation claim[1]; **(3)** the Orders entered on October 19, 2018 **[499]** (Exhibit C)[2],

[1] Plaintiff has filed a Motion for New Trial, or in the Alternate, Alter or Amend Judgment (Doc. 551) that is pending. The Court has entered an Order [555] referring the case to mediation on March 18, 2019. Defendant's response to Plaintiff's motion is due March 28, 2019. The Court's September 29, 2017 Order and Opinion [210] is presently stayed on appeal, Eleventh Circuit Case No. 18-14637.

[2] Plaintiff has requested recovery of fees/costs paid to her former counsels.

November 13, 2018 **[515]** (Exhibit D)[3], and February 15, 2019 **[550]** (Exhibit E),[4] denying the Motion for Attorney's Fees and Cost of Litigation and Other Miscellaneous Relief by Plaintiff (Doc. 472); and **(4)** the Order entered on March 5, 2019 **[560]** (Exhibit F), denying the motion for reconsideration of a front pay award by Plaintiff.

Submitted March 10, 2019

Respectfully submitted,

Angela DeBose

Angela DeBose

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **10th** day of March, 2019, the above and foregoing was filed electronically, which will email the following: Richard C. McCrea, Jr., Greenberg Traurig, P.A., 101 East Kennedy Boulevard, Suite 1900, Tampa, Florida 33602-5148; email: (mccrear@gtlaw.com); and other counsel of record.

Angela DeBose

Angela DeBose, Plaintiff

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[3] Id.

[4] On November 21, 2018, the Clerk taxed costs in the amount of $35,325 against Defendant USFBOT. (Doc. 520). On January 17, 2019, the Court referred the motion (Doc. 472) to the magistrate. In its February 15, 2019 Order [550], the Court stated the matter for front pay is no longer referred; the Court denied front pay. The Court was silent on the matter of Plaintiff's litigation costs.

Exhibit

A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES AND ELLUCIAN COMPANY, L.P.,

Defendants.

ORDER

Pending before the Court and briefed by the parties are the following three post-judgment motions:

1. Defendant University of South Florida Board of Trustees' ("**the Board**") Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial ("**Motion for Judgment as a Matter of Law**") (Doc. 504) and Plaintiff Angela DeBose's ("**DeBose**") Response in Opposition to the Board's Motion for Judgment as a Matter of Law (Doc. 505);

2. The Board's Motion to Supplement Motion for New Trial or, in the Alternative, for Relief from Judgment ("**Motion to Supplement**") (Doc. 539) and DeBose's Response in Opposition to the Board's Motion to Supplement (Doc. 540); and

3. DeBose's Motion for Sanctions or Alternatively Relief from Judgment ("**Motion for Sanctions**") (Doc. 541) and the Board's Opposition to DeBose's Motion for Sanctions (Doc. 542).

After careful consideration, the Court will grant the Board's Motion for Judgment as a Matter of Law. The Court will deny the Board's Motion to Supplement as moot. The Court will deny DeBose's Motion for Sanctions.

I. Background

This employment discrimination case was tried to a jury beginning on September 10, 2018. DeBose, a licensed attorney, represented herself *pro se*[1] against the Board[2]. On September 26, 2018, the jury returned its verdict. The jury found that race was a motivating factor in the Board's decision to discharge DeBose's employment as the Registrar of the University of South Florida, but also found that the Board would have made the same decision even it hadn't taken DeBose's race into account. Because the jury found that the Board had successfully proved its "same decision" affirmative defense, DeBose was precluded from recovering compensatory or back pay damages on her race discrimination claim. The jury further found that the Board retaliated against DeBose for engaging in certain protected activity and awarded

[1] Plaintiff has represented herself *pro se* in this action since her most recent counsel successfully withdrew on March 21, 2017. Plaintiff is admitted to practice law in Wisconsin and is currently in good standing. See State Bar of Wisconsin Lawyer Search, https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1101650 (last visited Feb. 14, 2019).

[2] The Court granted summary judgment in favor of Defendant Ellucian Company, L.P., on September 29, 2017.

DeBose $310,500. The Clerk entered judgment in favor of DeBose and against the Board on DeBose's race discrimination and retaliation claims on October 2, 2018.[3] The parties' respective post-trial motions followed on October 29, 2018, (Doc. 504), November 28, 2018, (Doc. 521), and December 31, 2018, (Doc. 541), respectively.

II. Discussion

The Court will address each of the parties' respective post-trial motions in turn:

A. The Board's Motion for Judgment as a Matter of Law

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, the Board renews its Rule 50(a) motion made at the close of DeBose's case-in-chief and subsequently renewed after both parties rested. The Board alternatively moves for a new trial pursuant to Rule 59. The Board levies the following arguments:

1. The Board is entitled to judgment as a matter of law on DeBose's race discrimination and retaliation claims because DeBose failed to introduce evidence at trial that she filed a charge of discrimination with the Equal Employment Opportunity Commission ("**EEOC**") alleging retaliatory termination or that she received a Notice of Right to Sue regarding the same;

2. The Board is entitled to judgment as a matter of law because DeBose failed to present sufficient evidence at trial to establish a *prima facie* case of

[3] The Clerk entered judgment in favor of the Board and Ellucian Company, L.P., on DeBose's remaining disparate treatment gender discrimination, disparate impact race and gender discrimination, breach of contract, tortious interference, and civil conspiracy claims, which the Court dismissed at summary judgment.

retaliation or, alternatively, a new trial should be ordered because the verdict is against the great weight of the evidence.

3. The Board is entitled to judgment as a matter of law because DeBose failed to present sufficient evidence to prove pretext or, alternatively, a new trial should be ordered because the verdict is against the great weight of the evidence; and

4. The Court should order a new trial on the issue of DeBose's damages because the Court abused its discretion in granting DeBose leave to re-open her case-in-chief in order to present testimony as to her damages – testimony that, the Board argues, was based on previously undisclosed evidence.

The Court will first address the Board's argument regarding DeBose's failure to establish a *prima facie* case of retaliation. Because the Court, as detailed more fully below, finds that DeBose failed to introduce sufficient evidence at trial for a reasonable jury to find a causal connection between her protected activities and the Board's adverse employment actions, the Court need not address the Board's remaining arguments.

To prevail on a Title VII retaliation case, a plaintiff must satisfy the traditional McDonnell Douglas burden-shifting framework. Goldsmith v. City of Atmore, 996 F.2d 1155, 1162–63 (11th Cir. 1993). Under this framework, the plaintiff must first establish a *prima facie* case of retaliation. Id. (citations omitted). The burden then shifts to the employer to articulate some legitimate non-retaliatory reason for the alleged

retaliation. Id. (citations omitted). Once the employer produces such a reason, the plaintiff must then prove that the legitimate reason was a mere pretext for retaliation. Id. (citations omitted).

To establish a *prima facie* case of retaliation, a plaintiff must establish that (1) she engaged in statutorily protected activity, (2) she suffered a materially adverse employment action, and (3) there exists a causal link between the two. Smith v. City of Fort Pierce, Fla., 565 F. App'x 774, 776–77 (11th Cir. 2014) (unpublished) (per curiam); see also Pattern Civ. Jury Instr. 11th Cir. 4.22 (2018), Pattern Civ. Jury Instr. 11th Cir. 4.22 (2018). With respect to causation, in order to succeed on a Title VII retaliation claim, a plaintiff must establish "but-for" causation; the "lessened causation test" applicable to claims of unlawful discrimination under Section 2000e-2(m) does not apply. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013). Put another way, a Title VII plaintiff must prove by a preponderance of the evidence that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Id. Following Nassar, the Eleventh Circuit explained that "the plaintiff always has the burden of persuasion 'to proffer evidence sufficient to permit a reasonable fact finder to conclude that discriminatory animus was the 'but-for' cause of the adverse employment action.'" Smith, 565 F. App'x at 778–79 (quoting Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013)).

To establish a causal connection, a plaintiff must show that her employer was aware of her protected activity, and that her protected activity and the adverse

employment action taken by her employer "were not wholly unrelated." Greene v. Ala. Dep't of Revenue, 746 F. App'x 929, 932 (11th Cir. 2018) (per curiam) (unpublished) (quoting Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002)). That the protected activity and the adverse employment action were not wholly unrelated can be shown by establishing a "close temporal proximity" between the protected activity and the adverse employment action. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam) (citing Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 798–99 (11th Cir. 2000)). "Yet while temporal proximity between the . . . protected activity and the adverse employment action can be enough . . . 'mere temporal proximity, without more, must be *very close*.'" Hogan v. S. Georgia Med. Ctr., No. 17-14867, 2018 WL 4922777, at *5 (11th Cir. Oct. 10, 2018) (per curiam) (unpublished) (emphasis added) (quoting Thomas, 506 F.3d at 1364).

At trial, DeBose attempted to prove causation by showing that "one followed the other." To that end, DeBose introduced evidence that she engaged in three distinct acts qualifying as "protected activity" for purposes of a Title VII retaliation claim: (1) in July and August of 2014, respectively, DeBose filed internal complaints with the University of South Florida alleging that she had been subjected to unlawful discrimination; (2) in December of 2014, DeBose filed a charge of discrimination with the EEOC; and (3) on February 4, 2015, DeBose filed a civil action in this District seeking to preliminarily enjoin the Board from discriminating against her and

terminating her employment. In addition, DeBose proffered evidence of two adverse employment actions taken by the Board: (1) the Board's termination of DeBose's employment on May 19, 2015; and (2) University of South Florida Provost Ralph Wilcox's negative employment reference to University of North Florida Provost Earl Traynham on May 26, 2019. DeBose offered no direct evidence of retaliation. After deliberation, the jury found that the Board took these adverse employment actions because of DeBose's protected activities.

Upon careful consideration, the Court will reverse the verdict. DeBose's evidence was insufficient to convince a reasonable jury that her protected activities were the "but-for" cause of the Board's adverse employment actions. At best, more than three months – specifically, 104 days – passed between DeBose's most recent protected activity (DeBose's federal injunction action) and the earlier of the Board's adverse employment actions (Wilcox's decision to terminate DeBose's employment). This gap proves too large to establish a causal connection. To be sure, the Eleventh Circuit has held that a three- to four-month disparity between the statutorily protected activity and the adverse employment action is not enough to show "very close" temporal proximity. Thomas, 506 F.3d at 1364. See also, e.g., Embry v. Callahan Eye Found. Hosp., 147 F.App'x 819, 831 (11th Cir. 2005) (per curiam) (unpublished); Higdon v. Jackson, 393 F.3d 1211, 1220–21 (11th Cir. 2004); Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001). Other circuits have held likewise. See, e.g., Richmond v. Oveok, Inc., 120 F.3d 205, 209 (10th Cir. 1997); Hughes v. Derwinski,

967 F.2d 1168, 1174–75 (7th Cir. 1992). And just recently, the Eleventh Circuit held that, as a matter of law, even seventy-four days between the plaintiff's protected activity and the defendant's adverse employment action, standing alone, is insufficiently proximate. Hogan, 2018 WL 4922777, at *5. Thus, because DeBose failed to present any "other evidence tending to show causation," the substantial delay between DeBose's protected activity and the Board's adverse employment action is fatal to her retaliation claim as a matter of law. Thomas, 506 F.3d at 1364.

In sum, DeBose failed to present a legally sufficient evidentiary basis for a reasonable jury to find a causal connection between her protected activities and the Board's adverse employment actions. Accordingly, the Court will grant the Board's Motion for Judgment as a Matter of Law. See Christopher v. Fla., 449 F.3d 1360, 1364 (11th Cir. 2006) ("[Judgment as a matter of law] is appropriate when a plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for [her] on a material element of [her] cause of action.") (citation omitted).

B. The Board's Motion to Supplement

The Board moves to supplement its Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial with new evidence related to DeBose's benefits, which the Board obtained, post-trial, from the Florida Department of Management Services. The Board alternatively moves for relief from judgment Pursuant to Rule 60(b).

Having determined that the Board is entitled to judgment as a matter of law on DeBose's retaliation claim, the Court will deny the Board's Motion to Supplement as moot.

C. DeBose's Motion for Sanctions

DeBose moves for sanctions against the Board or, alternatively, relief, pursuant to Rule 60(b), from six interlocutory orders issued by the Court, (Docs. 50, 86, 144, 210, 263, 311), based on the discovery of "new" evidence and fraud. This Court and the assigned Magistrate Judge have exhaustively addressed on multiple occasions the issues and arguments raised by the instant Motion for Sanctions. Since the outset of this litigation, DeBose has failed to substantiate her allegations against the Board related to her "employment contracts," whether it be in the form of their concealment, destruction, or breach. The Court will deny the Motion for Sanctions for the reasons stated in the Board's response.

III. Conclusion

Accordingly, it is

ORDERED as follows:

1. The Board's Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial (Doc. 504) is **GRANTED**. The jury's verdict as to DeBose's retaliation claim is **REVERSED**. The amended final judgment (Doc. 482) is **VACATED**. An appropriate second amended final judgment will issue.

2. The Board's Motion to Supplement Motion for New Trial or, in the Alternative, for Relief from Judgment (Doc. 539) is **DENIED** as moot.

3. DeBose's Motion for Sanctions or Alternatively Relief from Judgment (Doc. 541) is **DENIED**.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 14th day of February, 2019.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record/
Unrepresented Parties

Exhibit

B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES and ELLUCIAN COMPANY, L.P.

Defendants.

SECOND AMENDED JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff Angela DeBose and against Defendant University of South Florida Board of Trustees on Plaintiff's disparate treatment race discrimination claim, in accordance with the jury's verdict; Plaintiff takes nothing on her claim for compensatory or back pay damages.

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant University of South Florida Board of Trustees and against Plaintiff Angela DeBose on Plaintiff's retaliation claim, the jury's verdict notwithstanding.

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to the Court's Order entered on September 29, 2017, judgment is hereby entered in favor of Defendant University of South Florida Board of Trustees and against Plaintiff on Plaintiff's disparate treatment gender discrimination, disparate impact race and gender discrimination, breach of contract, tortious interference, and civil conspiracy claims.

ELIZABETH M. WARREN,
CLERK

s/S.Cohn, Deputy Clerk

Exhibit

C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES AND ELLUCIAN COMPANY, L.P.,

Defendants.

ORDER

Currently before the Court is Plaintiff's Motion for Attorney's Fees and Cost of Litigation and Other Miscellaneous Relief ("Motion") (Doc. 472). Defendant University of South Florida Board of Trustees ("USFBOT") responded in opposition ("Response") (Doc. 484). The Motion is thus ripe for decision.

I. Background

This employment discrimination case was tried to a jury beginning on September 10, 2018. Plaintiff, a licensed attorney, represented herself *pro se*[1] against Defendant USFBOT[2]. On September 26, 2018, the jury returned its verdict.

[1] Plaintiff has represented herself *pro se* in this action since her most recent counsel successfully withdrew on March 21, 2017. (Doc. 122). Plaintiff is admitted to practice law in Wisconsin and is currently in good standing. (Doc. 473, at ¶1).

[2] The Court granted summary judgment in favor of Defendant Ellucian Company, L.P., on September 29, 2017. (Doc. 210).

(Doc. 471). The jury found that race was a motivating factor in USFBOT's decision to discharge Plaintiff's employment as the Registrar of the University of South Florida, but also found that USFBOT would have made the same decision even it hadn't taken Plaintiff's race into account. Id. at 2. Because the jury found that USFBOT had successfully proved its "same decision" affirmative defense, Plaintiff was precluded from recovering compensatory or back pay damages on her race discrimination claim. The jury further found that USFBOT retaliated against Plaintiff for engaging in certain protected activity and awarded Plaintiff $310,500. Id. at 3–4. The Court entered judgment in favor of Plaintiff and against USFBOT on Plaintiff's race discrimination and retaliation claims on October 2, 2018. (Doc. 482). Plaintiff now moves for an award of attorney's fees and costs as the prevailing party, in addition to an award of front pay. (Doc. 427). USFBOT opposes Plaintiff's Motion in all respects. (Doc. 484).

II. Discussion

By her Motion, Plaintiff requests the Court: (1) award her $712,500 as a reasonable attorney's fee, (Doc. 72, at 2–5); (Doc. 473, at ¶3); (2) tax costs against USFBOT in the amount of $102,520, (Doc. 472, at 5–6); and (3) award her $170,000 in front pay. (Doc. 472). The Court will address each of Plaintiff's requests, in turn, below.

A. Attorney's Fees

Although a prevailing plaintiff in a Title VII action is ordinarily entitled to recover a reasonable attorney's fee, see 42 U.S.C. § 2000e–5(k), a *pro se* plaintiff, as a matter of law, cannot recover attorney's fees for representing herself, *even if she is a licensed attorney*, see Kay v. Ehrler, 499 U.S. 432, 435–38 (1991); Cofield v. City of Atlanta, 648 F.2d 986, 987–988 (5th Cir. 1981);[3] Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 694–95 (2d Cir. 1998); Smith v. Panera Bread, No. 0:08-cv-60697-AJ, 2009 WL 10666948, at *1 (S.D. Fla. Mar. 23, 2009) (citing Stephens v. U.S. Postal Service, No. 3:05-cv-120-TJC-TEM, 2006 WL 2729654, at *1 (M.D. Fla. Sept. 25, 2006)); Jones v. Mem'l Med. Ctr., Inc., No. 4:91-cv-00311-BAE, 1992 WL 512343, at *3 (S.D. Ga. May 1, 1992) (citations omitted).

The same holds true with respect to Plaintiff's claims under Florida's Civil Rights Act. See State v. Jackson, 650 So.2d 24, 27 (Fla. 1995) ("[A] long-standing rule of statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts."); Palm Beach Cnty. Sch. Bd. v. Wright, 217 So. 3d 163, 164–65 (Fla. 4th DCA 2017), review denied, No. SC17-1186, 2017 WL 4685625 (Fla. Oct. 19, 2017) ("We and other Florida

[3] In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

districts have recognized that [t]he [Florida Civil Rights Act] is patterned after Title VII and that federal case law on Title VII applies to [Florida Civil Rights Act] claims.") (alterations added) (internal quotations and citations omitted).

Plaintiff's request for a reasonable attorney's fee is accordingly due to be denied.[4]

B. Costs

"Unlike attorney fees, however, costs of litigation can be reasonably incurred even by a *pro se* litigant[.]" Clarkson v. I.R.S., 678 F.2d 1368, 1371 (11th Cir. 1982) (prevailing *pro se* plaintiff in Freedom of Information Act case entitled to costs); see also United States v. Evans, 561 F. App'x 877, 880 (11th Cir. 2014) (unpublished) (prevailing *pro se* plaintiff in Civil Asset Forfeiture Reform Act case entitled to costs); Gray v. Sec'y for Dep't of Homeland Sec., 452 F. App'x 873, 875 (11th Cir.

[4] The Court notes that, in the Eleventh Circuit, "*pro se* litigants are entitled to an award of attorney fees only to the extent that the services of an attorney were utilized and fees incurred," – i.e., that the *pro se* litigant actually "paid [an] attorney for work related to [the lawsuit]." United States v. Evans, 561 F. App'x 877, 880 (11th Cir. 2014) (alterations added) (internal quotations and citations omitted). In her "Itemization of Litigation Costs," (Doc. 473, at 3) (emphasis added), Plaintiff requests the Court *tax as costs* against USFBOT expenditures for "Other Attorneys" in the amount of $30,952.00 but provides no further information or supporting documentation. As explained by the Court, infra, expenditures for "Other Attorneys" are not recoverable under 28 U.S.C. § 1920. With regard to an award of attorney fees, Plaintiff requests an *attorney fee* award solely for time *she* spent litigating this case *pro se*. See (Doc. 473, at ¶1) ("Attorney Pro Se time spent on case[.]"). Moreover, there is no record evidence before the Court that Plaintiff, in fact, paid an attorney a fee for work related to her lawsuit, or that the fee charged was a reasonable one. Therefore, Plaintiff is not entitled to an award of attorneys' fees for time her former counsel may (or may not) have billed for in litigating this case.

2011) (unpublished) (prevailing *pro se* plaintiff in Equal Access to Justice Act case entitled to costs).

The general rule is that prevailing parties are presumptively entitled to costs. Marx v. Gen. Revenue Corp., 568 U.S. 371, 377 (2013); Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party."). "Notwithstanding this presumption . . . the decision whether to award costs ultimately lies within the sound discretion of the district court." Marx, 568 U.S. at 377 (citations omitted).

Federal Rule of Civil Procedure 54(d) permits recovery of those costs specifically enumerated in 28 U.S.C. § 1920.[5] See Arlington Cent. Sch. Bd. of Educ. v. Murphy, 548 U.S. 291, 301 (2006). Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

[5] Because Plaintiff, as the prevailing party, seeks an award of attorney's fees and costs pursuant to Rule 54, (Doc. 472, at 1), the Court need not decide whether Plaintiff is permitted to recover as costs "reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case" pursuant to 42 U.S.C. § 1988, under which "the traditional limitations of Rule 54(d) and 28 U.S.C. §§ 1920 and 1923(a) do not apply." Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1188–89 (11th Cir. 1983). Moreover, the Eleventh Circuit permits recovery of such costs *as part of an award of attorney's fees*, id. (holding that in civil rights cases reasonable attorney's *fees*, "must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the cost of litigation") (emphasis added), which, as already explained by the Court, supra, Plaintiff, as a *pro se* litigant, is not permitted to recover.

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title; and

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920(1)–(6).

The party requesting that costs be taxed bears "the burden of submitting a costs request that will allow the Court to determine which costs were incurred and whether [the requesting party is] entitled to them." Caballero v. Sum Yum Gai, Inc., No. 1:08-cv-23018-JJO, 2011 WL 1675001, *5 (S.D. Fla. May 3, 2011) (unpublished) (alterations added) (citing Lee v. American Eagle Airlines, Inc., 93 F.Supp.2d 1322, 1335 (S.D. Fla. 2000)). The requesting party "must state and support its request for costs with sufficient specificity so that the Court may determine whether the costs were necessarily obtained for use in the case." Crouch v. Teledyne Cont'l Motors, Inc., No. 1:10-cv-00072-KD-N, 2013 WL 203408, at *2 (S.D. Ala. Jan. 17, 2013).

Here, Plaintiff requests that costs be taxed against USFBOT in the amount of $102,520 as reimbursement for the following:

Case No.: 8:15-cv-2787-EAK-AEP

Item	Amount
Documents copies	$8,190.00
Filing Fees	$3,500.00
Postage	$2,225.00
Process Server	$4,000.00
Miscellaneous	$2,017.00
Medical Reports	$70.00
Subpoenas	$20.00
Court Records/ECF	$1,050.00
Travel – Mileage	$2,856.00
Witness Fees – Expert	$7,500.00
Witness Fees – Regular	$50.00
Supplies	$5,145.00
Hearing Transcripts	$595.00
Deposition Transcripts	$1,500.00
Exhibits	$825.00
Parking – Vehicle	$200.00
Outside Services	$5,625.00
Other Attorneys	$30,952.00

Printing/Scanning	$10,850.00
Other Fees	$7,000.00
Legal Research	$8,350.00
TOTAL	**102,520.00**

(Doc. 473, at 3).

Upon review, the following costs **do not** fall under Section 1920 are **not** taxable:

Item	**Total**
Postage	$2,225.00
Process Server	$4,000.00
Medical Reports	$70.00
Subpoenas	$20.00
Court Records/ECF	$1,050.00
Travel – Mileage	$2,856.00
Parking – Vehicle	$200.00
Other Attorneys	$30,952.00

As for the remaining costs, Plaintiff has failed to provide the Court with the requisite information to decide whether they are appropriately taxable against

USFBOT, and the Court will accordingly deny Plaintiff's request for costs without prejudice, as detailed infra.

C. Front Pay

In addition to back pay, prevailing Title VII plaintiffs are presumptively entitled to either reinstatement or front pay. U.S. E.E.O.C. v. W&O, Inc., 213 F.3d 600, 619 (11th Cir. 2000). "Although reinstatement is the preferred remedy in a wrongful discharge case, when extenuating circumstances warrant, the court may award a plaintiff front pay in lieu of reinstatement." Armstrong v. Charlotte Cty. Bd. of Cty. Comm'rs, 273 F.Supp.2d 1312, 1315 (M.D. Fla. 2003) (citing Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1339 (11th Cir. 1999)). "In deciding whether to award front pay, rather than reinstatement, courts look to whether discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy, the defendant's management [had] intimidated or threatened the plaintiff, or the termination had harmed the plaintiff's emotional well-being." W&O, Inc., 213 F.3d at 619 (alterations in original) (internal quotations and citations omitted).

Here, Plaintiff does not request reinstatement, and USFBOT does not contend that Plaintiff should be awarded reinstatement rather than front pay. This case involved sensitive claims for both race-based wrongful termination and retaliation. The hostility and discord between Plaintiff and her supervisors, peers, and

subordinates was a prevalent theme of USFBOT throughout the trial. Further, it appears that Plaintiff has secured satisfactory employment with another university. Accordingly, the Court finds that reinstatement is neither feasible nor desirable to either party. See Farley, 197 F.3d at 1339 (holding that the district court did not abuse its discretion in awarding front pay in lieu of reinstatement because of hostility between former employee and his supervisors). The issues, then, are (1) whether Plaintiff is entitled to an award of front pay and (2) if so, in what amount.

As explained above, there is a presumption in favor of an award of front pay to a prevailing Title VII plaintiff.[6] W&O, Inc., 213 F.3d at 619. Nonetheless, USFBOT contends that Plaintiff is not entitled to an award of front pay. (Doc. 484, at 7–13). Specifically, USFBOT contends that Plaintiff waived her ability to seek amounts for front pay because she neither disclosed that she would be seeking front pay in her Rule 26 disclosures nor provided any computation of front pay damages or served any documents supporting such a computation. Id. at 7–9. USFBOT further contends that Plaintiff waived her ability to seek amounts for front pay because she failed to provide a statement of the amount of front pay she was seeking in the parties' joint pretrial statement. Id. at 10. The Court rejects both contentions.

[6] The Court notes that the Eleventh Circuit's holding in W&O, Inc. cuts directly against USFBOT's contention that Plaintiff is not entitled to an award of front pay because "an award of front pay is . . . [a] special remedy . . . warranted only by egregious circumstances." (Doc. 484, at 10) (underline in original), and the Court accordingly rejects USFBOT's contention.

Each version of Plaintiff's complaint (of which there were three) includes a request – or can be read to include a request – for front pay. See, e.g., (Doc. 1 at ¶132) ("Except for reinstatement, DeBose demands *all relief* that is just *and equitable*[.]") (emphasis added); (Doc. 39, at ¶1) ("Plaintiff seeks equitable relief and damages including . . . front pay[.]"); (Doc. 45, at ¶1) (same). Thus, since the inception of this case, USFBOT has been on notice of Plaintiff's desire for an award of front pay. In any event, the Eleventh Circuit has held that an award of front pay may be appropriate even when not specifically requested. Nord v. U.S. Steel Corp., 758 F.2d 1462, 1474 n.12 (11th Cir. 1985); see also Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (holding that an award of front pay was appropriate even though the plaintiff did not request reinstatement); Austrum v. Fed. Cleaning Contractors, Inc., No. 9:14-cv-81245-KAM, 2016 WL 3526130, at *2 (S.D. Fla. June 23, 2016) (holding that the plaintiff did not waive his request for front pay notwithstanding his failure to identify the issue in the parties' joint pretrial stipulation). Accordingly, the Court finds that Plaintiff did not waive her ability to seek amounts for front pay.

That leaves only the determination of the appropriate amount of front pay. As a general matter, "front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). "The plaintiff carries

the initial burden to provide proof of a basis for a front pay award, and the burden then shifts to the defendant to prove it is inappropriate." Curtis v. Elecs. & Space Corp., 113 F.3d 1498, 1503–04 (8th Cir. 1997) (deciding issue in the age discrimination context) (citing Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995)).

Here, Plaintiff requests an award of front pay "for an estimated 5 years," which she "estimates" to be "in excess of $175,000." (Doc. 472, at 6). Regrettably, Plaintiff has submitted no evidence to support such an award. The only evidence the Court has is Plaintiff's trial testimony that she was earning "a little less than $135,000" annually when she was discharged from employment at the University of South Florida and is currently earning $124, 000 annually. (Doc. 495, at 103:1 – 18). Thus, questions of fact remain as to what amount of front pay, if any, is appropriate. Accordingly, the Court will refer the issue of an appropriate award of front pay to the assigned Magistrate Judge for an evidentiary hearing and report and recommendation.

III. Conclusion

Accordingly, it is

ORDERED and **ADJUDGED** as follows:

1. That portion of Plaintiff's Motion requesting an award of a reasonable attorney's fee is **DENIED**.

2. That portion of Plaintiff's motion requesting that the Court tax certain costs against USFBOT is **DENIED WITHOUT PREJUDICE**. On or before November 2, 2018, Plaintiff shall file a proposed Bill of Costs,[7] *not inconsistent with this Order*, along with supporting documentation that will allow the Court to determine which costs were actually incurred and in what amount. Failure to support her requests for costs with sufficient specificity so that the Court may determine whether the costs (1) as an initial matter, fall under Section 1920 and (2) were actually incurred and in what amount will result in the Court denying those requests outright.

3. That that portion of Plaintiff's Motion requesting an award of front pay is **REFERRED** to Magistrate Judge Anthony E. Porcelli for an evidentiary hearing, to be set by separate notice, and a Report and Recommendation to the undersigned.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 19th day of October, 2018.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

[7] A form proposed Bill of Costs can be found at http://www.uscourts.gov/forms/other-forms/bill-costs-district-court.

Copies furnished to:

Counsel of Record
Unrepresented Parties

Exhibit

D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANGELA W. DEBOSE,

Plaintiff,

v. Case No.: 8:15-cv-2787-EAK-AEP

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES AND ELLUCIAN COMPANY, L.P.,

Defendants.

ORDER

On October 19, 2018, the Court entered an Order denying *in toto* Plaintiff's request for an award for a reasonable attorney's fee because a *pro se* plaintiff, as a matter of law, cannot recover an attorney's fee for representing herself. (Doc. 499). Currently before the Court is Plaintiff's motion for reconsideration and clarification of that Order (**"Motion"**) (Doc. 501). Defendant, the University of South Florida Board of Trustees (**"USFBOT"**), opposes the Motion. (Doc. 510). Plaintiff's Motion is **GRANTED IN PART AND DENIED IN PART**.

I. Plaintiff's Request for Reconsideration

Plaintiff first requests that the Court reconsider its Order to the extent that she be awarded attorneys' fees for services rendered by her former counsel. In her fee motion, Plaintiff requested the Court *tax as costs* against USFBOT $30,952.00 for amounts paid by Plaintiff to her former counsel. (Doc. 472). The Court denied

Plaintiff's request, as those expenditures are not properly recoverable as *costs* under 28 U.S.C. § 1920. (Doc. 499). Through the instant Motion, Plaintiff asserts that she mistakenly believed this was "the proper way" to identify and recover those expenditures. (Doc. 501 at 3). Plaintiff asks the Court to relieve her of her misstep and "grant reimbursement of the costs incurred and paid to other attorneys," which Plaintiff claims is evidenced by bank statements, receipts, and invoices attached to her Motion, or, alternatively, "enlarge the time so that additional documentation might be provided." Id. at 4.

"Courts in this District recognize 'three grounds justifying reconsideration of an order: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice.'" Bussey-Morice v. Kennedy, No. 6:11-cv-970-CEM-GJK, 2018 WL 4091899, at *1 (M.D. Fla. Aug. 27, 2018) (quoting McGuire v. Ryland Grp., Inc., 497 F. Supp. 2d 1356, 1358 (M.D. Fla. 2007); Montgomery v. Fla. First Fin. Grp., Inc., No. 6:06-cv-1639-GAP-KRS, 2007 WL 2096975, at *1 (M.D. Fla. July 20, 2007)). To prevail on a motion for reconsideration, "the movant 'must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" Id. (quoting Lacy v. BP, PLC, et al., No. 11-cv-21855-MGC, 2015 WL 11822160, at *1 (S.D. Fla. Nov. 4, 2015)). "Reconsideration of a previous order is an extraordinary measure and should be

applied sparingly." Scelta v. Delicatessen Support Servs., Inc., 89 F. Supp. 2d 1311, 1320 (M.D. Fla. 2000).

Plaintiff has failed to satisfy the conditions for reconsideration. When Plaintiff submitted her fee motion, nothing precluded Plaintiff from providing the Court with a detailed accounting of amounts paid to her former counsel. Now, Plaintiff's request to submit that information and collect a fee award is out of time. Fed. R. Civ. P. 54(d)(2)(B)(i) ("Unless a statute or a court order provides otherwise . . . [a motion for attorneys' fees] must . . . be filed no later than 14 days after the entry of judgment[.]"); Horne v. Hamilton, Oh., 181 F.3d 101, 1999 WL 313902, at *1 (6th Cir. May 3, 1999) ("Numerous courts have applied Rule 54(d)(2)(B)'s fourteen day time limit to § 1988 motions for attorney's fees."). Moreover, even if the Court were to consider Plaintiff's untimely submission, the bank statements, receipts, and invoices Plaintiff provides simply show the *amounts* paid to Plaintiff's former counsel. Plaintiff has failed to provide any bases upon which to evaluate the work allegedly performed by her former counsel (e.g., attorney time records) or the reasonableness of her counsels' hourly rates (e.g., affidavits). And the Court declines the invitation to enlarge the time in which Plaintiff may submit additional documentation.

II. Plaintiff's Request for Clarification

Plaintiff further requests that the Court clarify its denial of $112,500 in legal assistant fees. In her fee motion, Plaintiff requested a total of $712,500. (Doc. 472). $600,000 of that total amount was earmarked for services Plaintiff provided to herself, and the remaining $112,500 was earmarked for "legal assistant" services provided by Plaintiff's sister. (Doc. 473 at ¶3). The Court denied Plaintiff's fee motion as to all amounts requested. (Doc. 499). Plaintiff now asks the Court to clarify whether, in denying her an attorney fee award, the Court intended to deny the $112,500 in legal assistant fees.

"It is well-settled that, in a § 1988 [attorney's] fee request, time reasonably expended by legal assistants is recoverable." Saleh v. Moore, 95 F. Supp. 2d 555, 581 (E.D. Va. 2000), aff'd sub nom. Saleh v. Upadhyay, 11 F. App'x 241 (4th Cir. 2001) (citing Spell v. McDaniel, 852 F.2d 762, 770 (4th Cir. 1988)); see also Missouri v. Jenkins by Agyei, 491 U.S. 274, 289 (1989) (affirming the district court's decision "to award separate compensation" to law clerks, paralegals, and recent law graduates at market rates as being "fully in accord with § 1988."). However, because fees for time expended by a legal assistant are recoverable *as part of* a reasonable attorney fee award, Plaintiff, a *pro se* litigant, is not entitled to recovery of those fees. See Kay v. Ehrler, 499 U.S. 432, 435–38 (1991); Cofield v. City of Atlanta, 648 F.2d 986, 987–988 (5th Cir. 1981); Hawkins v. 1115 Legal Serv.

Care, 163 F.3d 684, 694–95 (2d Cir. 1998); Smith v. Panera Bread, No. 0:08-cv-60697-AJ, 2009 WL 10666948, at *1 (S.D. Fla. Mar. 23, 2009) (citing Stephens v. U.S. Postal Service, No. 3:05-cv-120-TJC-TEM, 2006 WL 2729654, at* 1 (M.D. Fla. Sept. 25, 2006)); Jones v. Mem'l Med. Ctr., Inc., No. 4:91-cv-00311-BAE, 1992 WL 512343, at *3 (S.D. Ga. May 1, 1992) (citations omitted).

Accordingly it is,

ORDERED that Plaintiff's Motion for Reconsideration in Part and Clarification of the Order Denying Attorney's Fees (Doc. 501) is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Plaintiff's request for reconsideration of the Court's prior order denying an award of attorneys' fees for time billed by Plaintiff's former counsel is **DENIED.**
2. Plaintiff's request for clarification of the Court's prior order denying an award of attorneys' fees for amounts billed by Plaintiff's "legal assistant" is **GRANTED** to the extent that clarification has been provided.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 12th day of November, 2018.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

Exhibit

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
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ANGELA W. DEBOSE,

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UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES AND ELLUCIAN COMPANY, L.P.,

Defendants.

ORDER

In this Title VII case, after a trial on the merits, a jury found in favor of Plaintiff Angela DeBose ("**DeBose**") on her race discrimination and retaliation claims. With respect to DeBose's discrimination claim, however, the jury found that Defendant University of South Florida Board of Trustees (the "**Board**") proved its "same decision" affirmative defense, precluding DeBose from recovering compensatory or back pay damages on that claim. The jury awarded DeBose $310,500 on her retaliation claim.

On October 19, 2018, the undersigned determined that, having succeeded on her retaliation claim, DeBose was entitled to an award of front pay. (Doc. 499). Having found for DeBose on the issue of entitlement, the undersigned referred the ultimate issue of an appropriate award of front pay to the assigned Magistrate Judge for an evidentiary hearing and report and recommendation. Id. The Magistrate Judge heard argument and evidence on the issue of front pay on December 11, 2018. (Doc.

534). Following the hearing, but prior to the issuance of a report and recommendation by the Magistrate Judge, the undersigned granted the Board's motion for judgment as a matter of law, finding that DeBose failed to introduce sufficient evidence at trial for a reasonable jury to find a causal connection between her protected activities and the Board's adverse employment actions, and directed a verdict in the Board's favor on DeBose's retaliation claim. (Doc. 548). The Clerk subsequently entered a Second Amended Judgment in favor of the Board. (Doc. 549).

In light of the Second Amended Judgment, the Court must now decide whether DeBose is still entitled to an award of front pay. She is not. Although prevailing Title VII plaintiffs are presumptively entitled to front pay, U.S. E.E.O.C. v. W&O, Inc., 213 F.3d 600, 619 (11th Cir. 2000), DeBose is no longer the prevailing party on her retaliation claim. And while DeBose prevailed on her disparate treatment race discrimination claim, see Harris v. Shelby Cty. Bd. of Educ., 99 F.3d 1078, 1084 (11th Cir. 1996), the jury found that the Board proved its "same decision" affirmative defense. Where a defendant proves that it would have terminated a plaintiff's employment even it hadn't taken the plaintiff's race into account, the plaintiff's available damages are limited. See 42 U.S.C. § 2000e-5(g)(2)(B)(i). In such a situation, the district court may only award "declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable . . . to the pursuit" of the discrimination claim. Id. See also Harris, 99 F.3d at 1084; Quigg v. Thomas City. Sch. Dist., 814 F.3d 1227, 1239 n.9 (11th Cir. 2016) ("In Harris, we held that the 'same

decision' defense . . . allow[s] an employer to avoid damages and certain forms of equitable relief in a Title VII case."); Pattern Civ. Jury Instr. 11th Cir. 4.5, Ann. § II(F) (2018) ("[I]n cases where the employer prevails on the 'same decision' defense, the court may grant declaratory relief, *limited* injunctive relief and *limited* attorney's fees and costs; this is an issue for the court, not the jury.") (citing 42 U.S.C. § 2000e-5(g)(2)(B)) (emphasis in original). Front pay, however – a form of equitable relief, see Ramsey v. Chrysler First, Inc., 861 F.2d 1541,1545 (11th Cir. 1988) – is not specifically delineated in Section 2000e-5(g)(B)(i) and is not recoverable where the defendant proves its "same decision" affirmative defense, see Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 324 (D.N.J. Jul. 30, 1993) (Gerry, J.) ("If the defendant proves that it would have made the same decision, the remedies of front-pay and reinstatement will be barred.").

Because the jury found for the Board on its "same decision" affirmative defense, DeBose is foreclosed from recovering amounts for front pay.

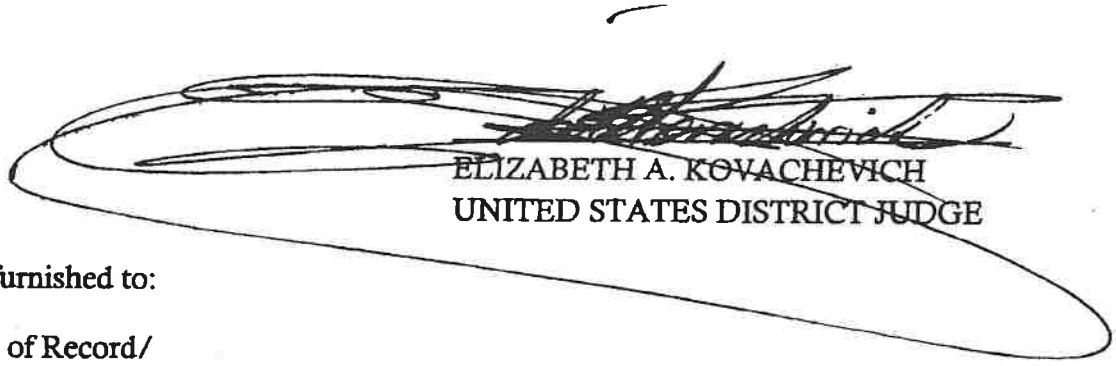
Accordingly, it is **ORDERED** as follows:

1. That potion of DeBose's Motion for Attorney's Fees and Cost of Litigation and Other Miscellaneous Relief ("**Motion**") (Doc. 472) requesting amounts for front pay is no longer referred to the Magistrate Judge;

2. DeBose cannot recover amounts for front pay, and the Motion is **DENIED**; and

3. The Clerk is directed to terminate the Motion.

DONE and **ORDERED** in Chambers, in Tampa, Florida this 15th day of February, 2019.



ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies furnished to:

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Unrepresented Parties