20-1622

No. 19-13788-b

ORIGINAL

IN THE

Supreme Court of the United States

Ramonica M. Luke

Petitioner,

v.

University Health Services, Inc.

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals

For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Applicable to the Title VII of the Civil Rights of 1964 or 42 U.S.C. 1981, did Plaintiff prove pretext by discrimination by showing "weakness, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reason for its action"?

2. Circuit Courts are in conflict with the phrase "similarly situated" and the stage of McDonnell Douglas comparator evidence should be analyzed. Applicable to Supreme Court precedent, what is the proper standard to apply to similarly situated comparators: "nearly identical' standard, "all material respects" standard or some other standard?

3. When there is evidence of "comparable seriousness," does the Honest Belief Rule apply to comparator evidence at the tertiary stage of McDonnell Douglas framework?

4. Are Courts allowed to use untested or inadmissible evidence at the second stage of McDonnell Douglas framework?

PARTIES TO THE PROCEEDING

Petitioner Ramonica M. Luke was the Plaintiff in the United States District Court for the Southern District Court of Georgia and the Appellant at the United States Court of Appeals for the Eleventh Circuit. Respondent University Health Services, Inc., was the Defendant in the District Court and the Appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Ramonica Luke is an individual and brings the claims in this matter on her behalf.

Respondent University Health Services, Inc, is a subsidiary of University Health, Inc.

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Petitioner Ramonica M. Luke respectfully petitions this court for a writ of certiorari to the Eleventh Circuit Court of Appeals, to review the decision below regarding his discrimination claims brought under Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 § 1981.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit for which Petitioner respectfully petitions this Court for a writ of certiorari, Luke v. University Health Services, Inc., No. 19-13788, is unpublished and marked with a "DO NOT PUBLISH" notation. It is viewable Luke v. Univ. Health Servs., 2021 U.S. App. LEXIS 2421, Fed. Appx.2021 WL 289307 See Petitioner's Appendix ("Pet. App.") A, 1a-14a

The Opinion of the United States District Court for the Southern District of Georgia, which was appealed to the United States Court of Appeals for the Eleventh Circuit, Luke v. University Health Services, Inc., No. 17-00125, is unreported, but viewable at Luke v. Univ. Health Servs., 2019 U.S. Dist. LEXIS 163494, 2019 WL 4670757 .See Petitioner's Appendix ("Pet. App.") B, 15a-44a

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 28, 2021. See Appendices A at 1a - 14a, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a)(1)("TitleVII"), provides in pertinent part: "It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, o otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The Civil Rights Act of 1866, 42 U.S.C. § 1981 (a) ("Section 1981") provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exacions of every kind, and to no other."

The Equal Protection Clause of the Fourteenth Amendment provides, in part, that no State shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amen. XIV, #1. The Due Process Clause has procedural and substantive components. Substantive due process prohibits the government's abuse of power or its use for the purpose of oppression, whereas procedural due

process prohibits arbitrary and unfair deprivations of protected life, liberty, or property interests without procedural safeguards.

STATEMENT OF THE CASE

The petition seeks to challenge the rulings below which summarily dispose of Petitioner's claims of disparate treatment or intentional discrimination based on race, brought under Title VII of the Civil Rights Act of 1964 and Section 1981. Petitioner, Ramonica Luke, worked in the laboratory at University Hospital for 10 years as a phlebotomist/processor under the supervision of Vicki Forde. On January 11, 2017, petitioner received a phone call from laboratory director, Christa Pardue, Human Resources Specialist, Vita Mason, and Lab Manager,Vicki Forde, explaining she was terminated immediately. Petitioner was recommended for termination for a missed punch which occurred on Dec. 31, 2016, which resulted in the decision to terminate for failure to adhere to the attendance policy. On February 24, 2017, Petitioner filed a charge with the U.S. Equal Employment Opportunity Commission alleging she was discriminated against due to her race. Petitioner alleged in her complaint that there were similarly situated Caucasian co-workers who were not discharged for failure to clock in and out and/or tardies, violating the attendance policy. On July 24, 2017, the EEOC issued a Notice of Right to Sue; petitioner filed a lawsuit in District Court on Oct. 17, 2017. The parties filed cross-motions for summary judgment in the District Court. The District Court granted University Health Services Inc. Summary Judgment on September 24, 2019. The United

States Court of Appeals for the Eleventh Circuit affirmed, by way of decision dated May 31, 2019. Petitioner now seeks a writ of certiorari to the Eleventh Circuit, based on the improper application of several standards as to Petitioner's racial discrimination claim under Title VII and Section 1981.

REASON FOR GRANTING THE PETITION

I. Petitioner proved weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons" and racially discrimination was the motivating factor.

The Eleventh Circuit erred when it concluded Plaintiff did not prove pretext by showing any "weakness, implausibilities, inconsistencies, incoherencies or contractions in the employer's proffered legitimate reason for its actions." The McDonnell Douglas legal framework was applied to determine whether intentional discrimination has occurred based on circumstantial evidence. At the first step of McDonnell Douglas, the employee must make out a prima facie case of discrimination, which gives rise to a rebuttable presumption that the termination was discriminatory. In the context of a race discrimination claim, prima facie stage of McDonnell Douglas, comparators must be similarly situated in all material respects. A plaintiff must establish that the alleged comparator: will have engaged in the same basic conduct or misconduct as the plaintiff; will have been subject to the same employment policy, guidelines, or rule as the plaintiff; will ordinarily although not invariably have been under the jurisdiction of the same supervisor of the plaintiff; and will share the plaintiff's employment or disciplinary history. A

valid comparison is based on substantive likeness; plaintiff and her comparators must also be similar in an objective sense. Under this standard, an employee is well within its rights to accord different treatment to employees who are differently situated in material respects' who engaged in different conduct, who were subject to different policies, or who have different work histories. In Luke, all comparators met all four prongs of the all material respect standard: each comparator had five years of employment history, all comparators engaged in the basic misconduct as plaintiff (tardies and missed punches); all comparators were subject to the same attendance policy(no one was allowed a seven minute grace period, therefore any clock in after the start of shift was considered late, moreover, all employees were required to clock in and out; all comparators were under the jurisdiction of the same supervisor, Vicki forde (supervisor was the timekeeper). There were eight comparators listed. The Eleventh Circuit concluded the "immaterial" difference between Plaintiff and comparators was a complaint from a co-worker about her tardiness and the subjective belief of falsification of time records. The honest belief rule is applied to the second and third stage of the McDonnell Douglas framework, moreover, the two "immaterial" differences are not work rules violated by plainitiff. "If an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown." This application is not legally justifiable.

Once the prima facie case is made, the burden shifts to the employer at the second step to provide a "legitimate, nondiscriminatory reason for its action." "If a plaintiff alleging disparate treatment makes a prima facie case showing, then the employer must have an opportunity to articulate some legitimate, nondiscriminatory reason for treating employees outside the protected class better than employees within the protected class. If the employer articulates such a reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant, i.e., the employer, were not its true reasons, but were a pretext for discrimination." Young v. UPS, 575 U.S. 206, 135 Supreme Court 2015

In Luke, defendants states it terminated Plaintiff:

> Because she violated Defendant's attendance policy when she failed to show up to work at her scheduled time and when she failed to clock in according to the policy. Plaintiff not only had a long history of failure to follow the attendance policy, but she was put on notice of the consequences if she continued to violate the policy.

An unarticulated proffered reason for treating employees outside the protected class better than employees within the protected class was "Vicki Forde subjectively believed that plaintiff falsified time records and Amita Simmons complained about Luke's tardiness," and also argued in the defendant's brief. The Court of Appeal erred when it allowed unarticulated proffered reason in the "burden of production stage." "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's

evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff rejections." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 Supreme Court 1981 There is clearly no evidence on record stating plaintiff was terminated for falsification of time records. Moreover, Amita Simmons was not used as a witness in Defendant's initial or supplemental disclosure and her complaint Defendants argued in oral argument that the reason Plaintiff was out of a job and her comparators were not similarly situated, was due to supervisor's subjective belief and co worker's complaint. The burden shifts to the defendant to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected for a legitimate nondiscriminatory reason. This subjected belief, proffered reason and co worker complaint is unworthy of credence because there is no evidence on record that Plaintiff was terminated for falsifying time records or due to a co worker's complaint. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff rejection. An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet the burden merely through an answer to the complaint or by argument of counsel. The

explanation provided must be legally sufficient to justify a judgment for the defendant." citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248

The District Court concluded that the defendants satisfied its burden of production by offering evidence documenting Plaintiff's attendance issues, multiple warnings, a coworker complaint, and a termination letter identifying attendance as the reason. The defendants did not satisfy the burden of production by offering evidence that Plaintiff was terminated due to falsification to time records or a co worker's complaint. Even with this evidence presented the burden of production was satisfied; thus, the burden shifts back to Plaintiff to establish the proffered reason was pretextual.

Finally, at the third step, if the employer provides such a reason, the burden shifts back to the employee to show that the employer's proffered reason is a "pretext for illegal discrimination." To show pretext at this third step, the evidence must show "such weakness, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reason factfinder could find them unworthy of credence." By showing pretext using similarly situated comparators at the third stage, a plaintiff has to offer evidence sufficient to support a finding that comparators received more lenient punishment for a comparable serious violation of the same rule. Plaintiff should "be afforded a fair opportunity to show that petitioner's stated reason for respondent's [termination] was in fact pretext. "Especially relevant to such a showing would be

evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired." McDonnell Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 1973 U.S.

In Reeves v. Sanderson Plumbing Products Inc., the Supreme Court decided that the prima facie case together with sufficient evidence to disbelieve employer's justification held potentially sufficient to support finding of discrimination. Moreover, petitioner placed the veracity of University Health's explanations at issue, pointing both to substantial inconsistencies and weaknesses in the proffered reasons, as well as circumstantial evidence of intentional discrimination:

a. Discrediting the employer's assertion that human resources personnel, Vita Mason and Christopher Westbrook, were the ultimate decision makers, when in fact, hospital policy states that supervisor and human resource collaborate together to determine the outcome of the decision to terminate; therefore, plaintiff supervisor, Vicki Forde, was a decisionmaker in employee's adverse action.[1] The separation letter also states Vicki Forde was a decisionmaker.[2] Employer deviated from this policy.
b. Creating an issue as to the falsity of the claim that the employee was fired because of a supervisor's subjective belief that she falsified time records.[3] The District used the honest belief rule at the pretext stage of McDonnell Douglas to determine if Plaintiff was similarly situated to comparators. The Seventh Circuit concluded "so long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless." Plaintiff was not terminated for falsification of time records, so honest belief rule should not have been applied. The Sixth Circuit, concluded when applying

[1] See Doc 54-4 at 29 Progressive Performance Management Policy
[2] Doc. 58 Separation Letter dated for January 25, 2017
[3] This statement was given in oral argument by defendant's counsel

the honest belief rule "an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish it's reasonably reliance on the particularized facts that were before it at the time the decision was made," University Health did not rely on the facts presented in regards to the falsification of time records claim. Human Resources denied the claim due to lack of evidence.

c. Luke has also presented additional evidence of pretext: her evidence that similarly situated employees outside her protected class received more favorable treatment from the same decision-maker.[4] The attendance policy required all employees to clock in and all employees were considered late one minute after the start of shift. There were eight comparators who violated the attendance policy and were not terminated. Frances Nicole Darnell had 231 tardies and 48 missed punches from January 1, 2015 to January 1, 2017. From January 1, 2012 to December 31, 2014, she had 390 tardies and 51 missed punches; she was not terminated for failure to adhere to attendance policy. Pamela Evans had 193 tardies and 8 missed punches from January 1, 2015 to January 1, 2017. From January 1, 2012 to December 31, 2014, she had 434 tardies and missed punches. Jennifer Campbell had 153 tardies and 11 missed punches from January 1, 2015 to January 1, 2017. From January 1, 2012 to December 31, 2014, she had 252 tardies and 26 missed punches. Janet Neal had 90 tardies and 8 missed punches from January 1, 2015 to January 1, 2017. From January 1, 2012 to December 31, 2014, she had 186 tardies and 19 missed punches; she was not terminated for failure to adhere to attendance policy. Alice Mueller had 34 tardies and 21 missed punches from January 1, 2015 to January 1, 2017. Blake Wojtaszok had 35 tardies and 8 missed punches. Joy Elaine Sizemore had 21 missed punches from January 1, 2015 to January 1, 2017. From January 1, 2014 to December 31, 2014, she had 56 tardies and 108 miss punches. Laura Glossom had 85 tardies and 21 missed punches. From January 1, 2012 to December 31, 2014, she had 110 tardies and 48 miss punches. The evidence of similarly situated co-workers is also relevant to the pretext inquiry. In Luke, her comparator evidence shows that her managers did not enforce this rule evenhandedly. "A showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the

[4] See Appellant Brief at 15 to 21

employer's proffered legitimate, nondiscriminatory reason for the adverse job action was a pretext for racial discrimination." quoting Graham v. Long Island R.R., 230 F. 3d 34, 43 (2d Cir. 2000) Such evidence of selective enforcement of a rule "calls into question the veracity of the employer's explanation." Olsen v. Marshall & Ilsley Corp., 267 F. 3d 597, 601 (7th Cir 2001) The plaintiff's "showing that the company did not enforce such a policy" is evidence from which the jury...could rationally conclude that the legitimate non retaliatory reason offered by [the employer] was a pretext for discharging [the plaintiff].") Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 202 (3d Cir, 1996)

d. The employer's shifting explanation surrounding the final incident of the date in question, Dec. 31, 2016, prior to the adverse action. At the time of separation, the defendant articulated a missed punch resulted in the recommendation for termination which resulted in plaintiff's termination for a missed punch.[5] During litigation, the defendant's explanation shifted to a co-worker's complaint of a tardy led to the recommendation to termination which resulted in plaintiff's termination for a tardy.[6] The District Court erred when it allowed a co worker complaint as evidence; it is inadmissible hearsay. It violates Fed. R. Evid. 801 (c), which also violated Federal Rule 56(c) (2). Moreover, Amita Simmons was not listed as a witness on Defendant's Initial Disclosure or Supplemental Disclosure.

e. Plaintiff's supervisor deviation from policy. Vicki Forde supplemental declaration states that the process of termination outlined in the Progressive Performance Management Policy(A25) is applied when employees are in violation of the attendance policy.[7] The Eleventh Circuit was correct that Vicki Forde had the discretion to implement

[5] See Doc 58 Separation Letter dated for January 25, 2017

[6] See Appellee's Brief at 14

[7] The steps of progressive performance management:

1. Supervisor will verbally counsel with the employee and record anecdotal notes.
2. Supervisor will give a formal written warning to be documented in the employee's personnel record.
3. In the event of another violation of the Standards of Behavior or UH Policy (the same standard or a different one) during the twelve months following a written warning, the supervisor will give a final written warning to be documented in the employee's personnel record.
4. Supervisor will make a recommendation for termination to HR and notify his/her next level of management.
5. Supervisor and HR will collaborate to determine the outcome. (See Doc 54-2 at 27)

> this policy; however, Angela Thomason termination was an example of how this policy was not evenly applied at Vicki Forde's discretion. She also deviated from this policy when she did not apply fairness and consistency when applying corrective measures.[8] Making false entries or altering any hospital record or report would have resulted in discharge without progressive performance actions, but failure to adhere to the attendance policy was not listed as an example of behavior that would have resulted in an immediate dismissal. Petitioner had only one reprimand within a 12 month period prior to her discharge.

II. The Circuits are split on a "Similarly Situated" Comparator, What is considered "comparable" by the Supreme Court? Is it a nearly identical standard, all-material-respect standard or some other standard? Eleventh Circuit erred when it applied the Defendant's Burden of Production to the prima facie case.

The Supreme Court has held that in order to make out a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, or 42 U.S.C. § 1981, a plaintiff must prove, among other things, that she was treated differently from another "similarly situated" individual. The Eleventh Circuit Court is applying rigorous guidelines and standards to the prima facie stage which is in conflict with the precedent set by the Supreme Court. The burden of establishing a prima facie case of disparate treatment is "not onerous." Burdine, 450 U.S. at 253. The Supreme Court concluded, in McDonnell Douglas, that comparators are to be "comparable." The Supreme Court "never intended" the requirements "to be rigid, mechanized, or

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[8] Fairness and consistency are essential when applying corrective measures to remedy employee misconduct. Consistency requires that measures be applied equally to all employees. Fairness, however, requires that measures be applied as warranted by the specific circumstances surrounding each episode of employee misconduct; Mverover, Supervisors should strive to maintain consistency in the use of discipline, but consider the degree of misconduct involved or extenuating circumstances that may temper the response to a specific act. (See Doc 54-4 at 28)

ritualistic... [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears in the critical question of discrimination." Furnco Construction Corpv. Waters, 438, U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). The Court has cautioned "premise equivalence... between employees is not the ultimate question." McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283 273, 283 n. 11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976). The touchstone of the similarly-situated inquiry is simply whether the employees are "comparable." quoting McDonnell Douglas, 411 U.S. at 804. In Luke, all guidelines, in accordance to the Eleventh Circuit precedent were followed and applied to the comparator analysis, but this wasn't enough. The Eleventh Circuit added "immaterial" explanatory variables to determine a difference between plaintiff and her comparators. Thus, the Eleventh Circuit applied outrageous guidelines to determine if comparators were similarly situated which is in conflict with Supreme Court precedent set in McDonnell Douglas framework.

The Eleventh Circuit erred when a proffered reason for termination was applied at the prima facie stage stage of McDonnell Douglas, rather than the second step of McDonnell Douglas framework. In Lewis vs. Union city (en banc), the 11th circuit held that all comparators must be "similarly situated in all material respects." ; which means a comparator will have "engaged in the same basic conduct (or misconduct) as the plaintiff, "been subject to the same employment policy," been under the jurisdiction of the same supervisor," and "will share the plaintiff's

employment or disciplinary history." In Luke, all eight comparators were similarly situated in all material respects. All comparators had evidence of tardies and missed punches, all comparators were not allowed a seven minute grace period (any clock-in time one minute after start time was considered tardy) and all comparators were required to clock in per hospital policy; all comparators were under the jurisdiction of the same supervisor, Vicki Forde,; all comparators had five years of employment history and five year history of excessive tardiness and missed punches. They are similar enough to permit a reasonable inference of discrimination, and that is all McDonnell Douglas requires, that all comparators are "comparable." Most importantly, no comparators listed were terminated for failure to adhere to the attendance policy; in which this evidence was also overlooked in the pretext stage of McDonnell Douglas... "especially relevant to [a pretext showing] would be evidence that white employees involved in acts against petitioner of "comparable seriousness to the [plaintiff's civil disobedience] were nevertheless retained or rehired."

Moreover, The Eleventh Circuit concluded the "immaterial difference" between Plaintiff and her comparators were due to the two unarticulated or untested reasons for termination' and applied this standard to the prima facie stage. Under the McDonnell framework applied to circumstantial evidence cases, a plaintiff must first make a prima facie case of employment discrimination. To establish a prima facie case of intentional discrimination under a disparate treatment theory, the

plaintiff must demonstrate that she (1) is a member of a protected class; (2) was qualified for the position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class, or in the case of disparate treatment, shows that other similarly situated employees in the protected class were treated more favorably. In Burdine, after the plaintiff in a job discrimination action under Title VII of the Civil Rights Act of 1964 (42 USCS 2000e.) has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant is to rebut the presumption of discrimination that the prima facie case has raised by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason; the defendant need not persuade the court that it was actually motivated by the proffered reason, it being sufficient if a defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff by clearly setting forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection, and the explanations being legally sufficient to justify a judgment for the defendant; the defendant cannot meet its burden through an articulation not admitted into evidence, such as an answer to the complaint or an argument of counsel.

Hence, "a court cannot consider subjective evaluations in the similar analysis. In McDonnell Douglas, Rather...a Title VII plaintiff need only show that he or she satisfied an employer's objective qualifications. The employer may then introduce its subjective evaluations of the plaintiff at the later stages of the

McDonnell Douglas framework. A contrary rule, under which an employer's subjective evaluation could defeat the plaintiff's initial prima facie case, cannot be squared with the structure and purpose of the McDonnell Douglas framework. Specifically, we have made clear that the prima facie case is designed to include only evidence that is objectively verifiable and either easily obtainable or within the plaintiff's possession. Walker v. Mortham, 158 F.3d 1177, 1192-93 (11th Cir. 1998). This permits the plaintiff who lacks direct evidence of invidious intent to force the employer to articulate its motives for the challenged employment action so that the plaintiff has an opportunity to show intentional discrimination by circumstantial evidence. If we were to hold an employer's subjective evaluations sufficient to defeat the prima facie case, the court inquiry would end, and the plaintiff would be given no opportunity to demonstrate that the subjective evaluation was pretextual. Such a blind acceptance of subjective evaluations is at odds with the intent that underlies the McDonnell-Douglas framework. This is particularly important because we have emphasized that subjective criteria can be a ready vehicle for race-based decisions. See, e.g., Miles v. M.N.C Corp., 750 F.2d 867, 871 (11th Cir. 1985). Furthermore, we cannot reconcile a rule that would essentially require a plaintiff to prove pretext as part of his prima facie case at the summary judgment stage with the Supreme Court's instruction that the plaintiff's prima facie burden is not onerous. Patterson v. McLean Credit Union, 491 U.S. 164, 186, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989); see also Isenbergh v. Knight-Ridder Newspaper Sales,

97 F.3d 436, 439 (11th Cir.) 1996) (characterizing plaintiff's prima facie burden as "light"). Thus, subjective criteria does not play no part in the plaintiff's prima facie case. Rather, they are properly articulated as part of the employer's burden to produce a legitimate race-neutral basis for its decision, then subsequently evaluated as part of the court's pretext inquiry. Accord Fowle v. C & C Cola, 868 f.2d 59,65 (3d Cir. 1989); Medina v. Ramsey Steel Co., 238 F. 3d 674, 681 (5th Cir. 2001); Wexler v. White's Fine Furniture, 317 F.3d 564, 575 (6th Cir. 2003) (en banc); Jayasinghe v. Bethlehem Steel Corp., 760 F. 2d 132, 135 (7th Cir. 1985); LeGrand v. Tr. of Univ. of Ark., 821 F.2d 478, 481 (8th Cir. 1987); Lynn v. Regents of Univ. of Cal., 656 F. 2d 1337, 1344-45 (9th Cir. 1981); Burrus v. United Tel. Co., 683 F.2d 339, 342 (10th Cir. 1982); Stewart v. Ashcroft, 211 F. Supp. 2d 166, 170-71 (D.D.C 2002) 359 U.S. App. D.C. 139, 352 F.3d 422 (D.C. Cir. 2003); LaFleur v. Wallace State Cmty. College, 955 F. Supp. 1406, 1418 (M.D. Ala. 1996).

The Eleventh circuit also erred because it applied the nearly identical under different circumstances standard to plaintiff's prima facie case. The nearly identical standard explains when a claim alleges discriminatory discipline, to determine whether employees are similarly situated, The Eleventh Circuit evaluates "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) also see Burke-Fowler v. Orange County, Fla., 447 F. 3d 1319, 1323 (11th Cir. 2006); since plaintiff was in a situation dissimilar to [her] proffered

comparators due to accusations of falsifying time and attendance records and accusations of tardiness, Luke was not similarly situated in all material respects to her comparators. In Lewis, the Eleventh circuit adopted the "all material" standard because the nearly identical standard was considered too strict. Not only is this standard too strict, but it implements one's subjective belief or the "honest belief" rule. The application of the honest belief rule at the prima facie stage or any accusation conflicts with Supreme Court precedent because it does not give the plaintiff the opportunity to prove if those reasons are false; which petitioner proved at the pretext stage the proffered reason was pretextual. The material difference between comparators at the prima facie stage is if other non minority individuals who violated the same work rule but were not retained.

III. Eleventh Circuit and District Court erred when it applied inadmissible evidence and unarticulated/untested reasons for termination at the second stage of McDonnell Douglas. District Court erred when it failed to consider Petitioner's comparator evidence at the prima facie stage.

The District Court erred when it failed to consider Plaintiff's comparator evidence at the prima facie stage.[9] Defendants did not properly articulate all of their proffered reasons; it was the argument of the defendant's attorney to

[9] Plaintiff expends seven pages of her brief outlining her comparators who are similarly situated for the purposes of proving her prima facie case. (Appellant's Br. pp. 15-21). She states that the District Court applied the law incorrectly because the information "was not applied even in the prima facie stage of the case" and the Court "erred when [it] did not consider similiarly situated comparators." (Appellant's Br. pp. 9-10). Plaintiff is correct that the law was not applied at the prima facie stage of the case, because the District Court assumed without analysis of Plaintiff's proffered evidence that she made out a prima facie case for the purposes of the summary judgment order. (Doc. 73, p.14). In its analysis, the District Court jumped straight to the second stage of the McDonnell Douglas analysis. (Id. at 14-15). Therefore, whether or not Plaintiff has proffered similarly situated comparators is a non-issue. See Appellee's Brief at 12

implement the honest belief rule at the burden of production or burden of persuasion stage of McDonnell Douglas. At the second stage of McDonnell Douglas, the employer's burden is to produce evidence or persuasion by articulating the reason for the employer's rejection. At this stage, it is not sufficient for the employer to state what motivated the termination; thus, the properly articulated rejection will give the Plaintiff a fair opportunity to prove pretext or to prove that employer's explanation was false. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection...The explanation provided must be legally sufficient to justify a judgment for the defendant."(Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 Supreme Court 1981) In oral argument, defendant's counsel argued that the reason for plaintiff's rejection was due to the subjective belief or falsification of time and attendance records and a co-worker's complaint; the reason she was dissimilarly situated from her comparators was due to these two untested reasons. A dissenting opinion in St. Mary vs. Hicks explains the procedural defect of when proffered reasons are not properly articulated at the second stage of McDonnell Douglas:

> The dissent repeatedly raises a procedural objection that is impressive only to one who mistakes the basic nature of the McDonnell procedure. It asserts that "the Court now holds that the further enquiry [i.e., the inquiry that follows the employer's response to the prima facie case] is wide open, not limited at all by the scope of the employer's proffered explanation." The plaintiff cannot be expected to refute "reasons not articulated by the employer, but discerned in the record by the factfinder." He should not "be saddled with the tremendous disadvantage of having to confront, not the

> defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record. "Under the scheme announced today, any conceivable explanation for the employer's action that might be suggested by the evidence, however unrelated to the employer's articulated reasons, must be addressed by [the] plaintiff. These statements imply that the employer's "proffered explanation." his "stated reasons," his "articulated reason," somehow exist apart from the record--in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder. ("Your honor, pursuant to McDonnell Douglas the defendant hereby formally asserts, as its reason for the dismissal at issue here, incompetence of the employee.") Of course it does not work like that. The reasons the defendant sets forth are set forth "through the introduction of admissible evidence." In other words, the defendant's "articulated reasons' themselves are to be found "lurking in the record." It thus makes no sense to contemplate "the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions." There is a "lurking-in-the-record' problem, but it exists not for us but for the dissent. If, after the employer has met its preliminary burden, the plaintiff need not disprove all other reasons suggested, no matter how vaguely, in the reccord) there must be some device for determining which particular portions of the record represent "articulated reasons" set forth with sufficient clarity to satisfy McDonnell Douglas framework makes no provision for such a determination, which would have to be made not at the close of the trial but in medias res, since otherwise the plaintiff would not know what evidence to offer. It makes no sense. (St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502 Supreme Court 1993)

Defendant's did not specify that petitioner was terminated for falsification of time records; however, the laws used to determine if petitioner was similarly situated to her comparators at the pretext stage indicated this proffered reason was implied as the reason for rejection. Since the defendant's attorney listed falsification of time records as a reason why she was not similarly situated to her comparators at the pretext stage, petitioner applied the "work rule" defense to

prove that Forde's belief was not honestly held.[10] The honest belief rule, subjective belief, was applied in the second stage of the McDonnell Douglas test, but it was not articulated as a proffered reason by the defendants. Since it was not properly articulated, it was confusing to apply the law when the petitioner was not terminated for one's good faith belief. The honest belief is only invoked when the rule is properly articulated as the proffered reason for termination. Defendants provided an explanation why petitioner was terminated:

Because she violated Defendant's attendance policy when she failed to show up to work at her scheduled time and when she failed to clock in according to the policy. Plaintiff not only had a long history of failure to follow the attendance policy, but she was put on notice of the consequences if she continued to violate the policy.

The District Court stated that defendant's satisfied its burden of production because the record contained evidence documenting Plaintiff's attendance issues, multiple warnings, a coworker complaint, and a termination letter identifying attendance as the reason. However, the co worker's complaint was inadmissible evidence; in the defendant's undisputed material statement of facts, the reference number on the record citing the co worker's complaint was the Plaintiff's deposition.[11] There is no witness testimony for Amita Simmons (Goodman v.

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[10] While comparator evidence may be considered at the pretext stage, it is not enough for Plaintiff to simply point out employees outside her protected class who she believes were treated differently-which is all that is required at the prima facie case state. Plaintiff must also put forth evidence that the employer subjectively believed the comparators in question were similarly situated and treated them differently. See Alvarez v. Royal Atl. Developers, Inc., 610 F. 3d 1253, 1266 (11th Cir. 2010)("the inquiry into pretext centers on the employer's beliefs, not the employee's belief and, to be blunt about it, not on reality as it exists outside of the decision maker's head'). As outlined above, Forde did not believe that the other employees were similarly situated. Further, Plaintiff failed to provide any evidence that the HR personnel subjectively believed that the comparators were similarly situated. (Doc. 73, pp. 24-25) See Appellee's Brief at 12-13

[11] See Doc 64-2 at page 4

Kimbrough, 718 F 3d. 1325, 1332 (11th Cir. 2013) (stating that "to defeat a motion for summary judgment, [the defendant] must adduce specific evidence from which a jury could reasonably find in his favor; [t]he mere existence of a scintilla of evidence in support of her position will be insufficient.")[12]. Furthermore, Amita Simmons was not listed as a witness in defendant's initial disclosure or supplemental disclosure.

IV. Does the honest belief rule or "subjective belief" standard apply to comparator evidence at the tertiary stage of McDonnell Douglas conflicting with the Supreme Court "comparable seriousness" standard?

The District court erred when it concluded "at the pretext stage, a plaintiff must put forth evidence the employer subjectively believes the comparators in question were similarly situated and treated them differently." Moreover, the district court quoted, "Treating different cases differently is not discriminatory, let alone intentionally so. See Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1186 (11th Cir. 1984) ('If an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown.')." Lewis, 918 F.3d at 1222-23 (emphasis expanded). The District Court stated that this reason aligns with traditional pretextual analysis; the District Court was incorrect of it's analysis at the pretext stage. In Nix, he could not establish a prima facie case of racial discrimination by establishing that he was fired but his comparator was retained for "nearly identical" conduct. Another reason he could not establish a

[12] See App. B at

prima facie case because his comparator was not retained because the station's policies did not apply to him. This comparator analysis should have been determined at the prima facie stage; however the district court failed to consider comparator evidence at the prima facie stage, but applied this standard at the pretext stage. The Defendant's counsel argued, citing Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1266 (11th Cir. 2010), plaintiff must also put forth evidence that the employer subjectively believed the comparators in question were similarly situated and treated them differently. The difference between Alvarez and Luke's case, Alvarez could not point to any similarly situated employees as comparators who were treated more favorably, therefore, she could not prove discrimination at either stage. The difference between Elrod and Luke's case, Elrod v. Sears, Roebuck & Co, the employer applied the honest belief rule as the proffered reason for termination or rejection.[13]

Under the "honest belief" rule developed by the Seventh Circuit, "so long as the employer honestly believed in the proffered reason," an employee cannot prove pretext even if the employer's reason in the end is shown to be "mistaken, foolish, trivial, or baseless." Smith v. Chrysler Corp., 155 f.3d 799, 806 96th Cir. 1998) (citing, inter alia, Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672,676 (7th

[13] The inquiry into pretext centers on the employer's beliefs, not the employer's belief and, to be blunt about it, not on reality as it exists outside of the decision maker's head"). As outlined above, Forde did not believe that the other employees were similarly situated. Further, Plaintiff failed to provide any evidence that the HR personnel subjectively believed that the comparators were similarly situated. See Appellee's Brief at 13

Circ. 1997)). There is no law that specifies that an honest belief rule should be applied to determine if a plaintiff and her comparators are alike or similarly situated at the pretext stage of McDonnell Douglas. The United States Court of Appeals for the Eleventh Circuit concluded, 'in order for an employer's proffered non-discriminatory basis for its employment action to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made. If the employer is unable to produce such evidence to support its employment action, then the honest belief rule does not apply. In Luke, human resources denied the claim of falsification of time records due to lack of evidence.[14]

[14] Ms. Mason examined the claims made by Ms. Forde and found that she could not definitively prove nor disprove that Plaintiff had falsified her time records. (Mason's Dep., at 19:3-20:5 ("[I]t wasn't proven but it wasn't disproven either.").) (Pet. App B at)

CONCLUSION

For the foregoing reasons, the petitioner asks that this Court grant this Petition, so her case may be examined on its merits and the law.

Respectfully submitted,

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