No. _____

In The
Supreme Court of the United States

CAROLYN D. ROBINSON,

Petitioner,

v.

WALMART STORES EAST, L.P.,

Respondent.

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

APPENDIX

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-10560
Non-Argument Calendar

CAROLYN D. ROBINSON,
Plaintiff-Appellant,

versus

WALMART STORES EAST, LP,
Defendant -Appellee.

Appeal from the United States District Court for the
Northern District of Alabama
D.C. Docket No. 2:19-cv-00856-ACA

Before JILL PRYOR, BRANCH, and MARCUS,
Circuit Judges.

PER CURIAM:

Carolyn Robinson appeals from the grant of summary judgment to her former employer, Walmart, on her claims of race and age discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2; 42 U.S.C. § 1981; and the Age Discrimination In Employment

Act ("ADEA"), 29 U.S.C. § 623(a)(1). The district court, applying the *McDonnell Douglas*[1] burden-shifting test, concluded that Robinson's race discrimination claim failed because she did not identify a similarly situated comparator or otherwise make out a *prima facie* case, and she failed to show Walmart's articulated reasons for "coaching" and eventually terminating her were pretextual. It rejected her age bias claim because she did not show that Walmart's reasons for firing her were pretextual, or otherwise show that her age was the "but-for" cause of her firing. On appeal, Robinson argues: (1) for the first time, that the district court should have used a "but for" test, instead, to assess her race discrimination claim; and (2) that her pharmacy manager going unpunished for sleeping on the floor of the pharmacy while she was "coached" for allowing a visiting pharmacy technician to bring personal items into the pharmacy, was evidence that her age was the "but for" cause of her termination. After careful review, we affirm.

We review an order granting summary judgment de novo, "viewing all evidence, and drawing all reasonable inferences, in favor of the non-moving party." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005). Under Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment if she can show "that there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, when an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, she is deemed to

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

have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Moreover, an issue not raised in the district court and raised for the first time on appeal in a civil case will not be considered. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331–32 (11th Cir. 2004).

First, we find no merit in Robinson's challenge to the district court's grant of summary judgment on her race discrimination claim. Title VII makes it an unlawful employment practice for a private employer "to discharge any individual, or otherwise to discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of [her] race . . . "42 U.S.C. § 2000e-2(a). Similarly, § 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, including employment-related ones. 42 U.S.C. § 1981(a). Claims of employment discrimination under § 1981 are analyzed under the same framework as ones under Title VII. *Ferrill v. Parker Grp.*, 168 F.3d 468, 472 (11th Cir. 1999).

In the absence of direct evidence of discrimination, a plaintiff can prove a discrimination claim under Title VII through circumstantial evidence, which we generally analyze using the three-step, burden-shifting framework established in *McDonnell Douglas*. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002). Under this framework, the plaintiff must first establish a *prima facie* case of discrimination. *Id*. If the plaintiff succeeds in doing so, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id*. Should

the defendant carry its burden, the plaintiff must then demonstrate that the defendant's proffered reason was merely a pretext for unlawful discrimination, an obligation that merges with the plaintiff's ultimate burden of persuading the factfinder that she has been the victim of intentional discrimination. *Id.*

To establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework, a plaintiff bears the burden of showing, among other things, that her employer treated "similarly situated" employees outside her class more favorably. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220-21 (11th Cir. 2019) (*en banc*) (quotations omitted). An employee is "similarly situated" to the plaintiff when he is "similarly situated in all material respects." *Id.* at 1226 (quotations omitted). Ordinarily, this means that a similarly situated employee will: (1) have engaged in the same basic misconduct as the plaintiff; (2) have been subject to the same employment policy, guideline, or rule as the plaintiff; (3) have had the same supervisor as the plaintiff; and (4) will share the plaintiff's employment or disciplinary history. *Id.* at 1226-27.

Here, Robinson's challenge to the grant of summary judgment on her race discrimination claim fails for several reasons. As a preliminary matter, we will not consider her argument that *McDonnell Douglas* was the wrong standard because she raises it for the first time on appeal. *Access Now, Inc.*, 385 F.3d at 1331-32.[2] Accordingly, we will apply the

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[2] For the same reason, we will not consider her arguments that: (i) a "but for" standard should have controlled; and (ii) the "suspicious" timing of her termination rendered summary judgment inappropriate. *Access Now, Inc.*, 385 F.3d at 1331-32.

McDonnell Douglas burden-shifting standard in analyzing Robinson's claims. *Joe's Stone Crabs, Inc.*, 296 F.3d at 1272.

Further, it is likely that Robinson has abandoned any challenge to the district court's finding that she failed to establish a *prima facie* case. On appeal, Robinson, who worked as a pharmacist in a Walmart store, does not specifically argue that Walmart treated a similarly situated employee more favorably than her. She argues that Walmart treated a pharmacy manager, Zachary Martin, more favorably than her, but she does not present any argument as to why he was similarly situated to her, especially since he held a different position. Similarly, she likely has abandoned any challenge to the finding that she failed to show that Walmart's reason for terminating her was pretextual, because she does not expressly dispute this finding on appeal.

But even if we were to deem a challenge to the comparator finding implicitly preserved, it still fails on the merits. Among other things, Robinson failed to establish that Walmart treated a similarly situated employee outside of her protected class more favorably than her. *Lewis*, 918 F.3d at 1220-21. As we've noted, she offered Martin as a potential comparator whom she alleged was treated more favorably by Walmart. However, Martin was not an adequate comparator because he held a different position with different responsibilities, and he also had a different supervisor than Robinson. Further, Robinson did not establish that Martin engaged in the same basic misconduct she engaged in. *Id.* at 1226-27.

Robinson also failed to show pretext. Walmart gave reasons for each of the reprimands (or "coachings") they gave her, including that Robinson had failed to put "Teal Cards" -- which are medication reminders for patients who did not consistently take and refill their medications -- in designated patients' prescription bags. Walmart added that Robinson's final reprimand concerning her failure to use Teal Cards resulted in her termination. Yet Robinson did not rebut any of the bases for Walmart's coachings, nor for her final Teal Card policy violation. There was also no evidence of racial animus. For these reasons, the district court did not err in granting summary judgment to Walmart on Robinson's race discrimination claim.

We are also unconvinced by Robinson's age discrimination claim. Under the ADEA, it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

We use the framework established in *McDonnell Douglas* to evaluate ADEA claims that are based on circumstantial evidence of discrimination. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). If a plaintiff establishes a *prima facie* case of discrimination, and the defendant employer articulates a legitimate, nondiscriminatory reason for the challenged employment action, the plaintiff must produce evidence sufficient for a reasonable factfinder to conclude that the reason given by the employer was not the real reason for the adverse employment decision and was merely pretextual. *Id.* at 1024-25.

To demonstrate pretext, a plaintiff must show that the defendants' proffered reason for the employment decision is false and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). In doing so, the plaintiff cannot succeed simply by disputing the wisdom of the reason or by substituting her business judgment for the employer's. *Chapman*, 229 F.3d at 1030. Rather, she must meet the employer's reason head-on and rebut it. *Id.* Where an employer justifies termination based on a work rule violation, a plaintiff may prove pretext by showing "either that [s]he did not violate the work rule or that, if [s]he did, other employees not within the protected class who engaged in similar acts were not similarly treated." *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987) (quotations omitted), *abrogated on other grounds by Chapman*, 229 F.3d at 1025-26 (abrogating *Delgado* to the extent it applied a different summary judgment standard in employment discrimination cases than is applied in all other civil contexts). Ultimately, however, to prevail on an ADEA age discrimination claim, an employee must show that her age was the "but-for" cause of the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

Here, the district court did not err in granting summary judgment to Walmart on Robinson's age discrimination claim. As the record reflects, Robinson failed to offer proof that Walmart's reason for terminating her was pretextual and that her age was the "but for" cause of her termination. *Hicks*, 509 U.S. at 515; *Gross*, 557 U.S. at 177. Notably, Robinson does not argue on appeal that she did not violate the work rule regarding the proper use of

Teal Cards, and there was no evidence below indicating that she was not responsible for other alleged work violations. *Delgado*, 815 F.2d at 644. Nor, as we've explained, did she show that Walmart treated more favorably any employees outside her protected class who acted similarly. *Id.* Indeed, she did not show that the pharmacy manager, Martin, failed to comply with the Teal Card policy, or even if he had, that he had an active third "coaching" that would have subjected him to termination at the time.

Further, Robinson did not show that the reason Walmart gave for firing her was false, or that the true reason was her age. Thus, she offered no evidence that her age was the "but for" cause of her termination, and the district court did not err in granting summary judgment to Walmart on her age discrimination claim.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
SOUTHERN DIVISION

Case No.: 2:19-cv-00856-ACA

CAROLYN ROBINSON,
Plaintiff,

v.

WAL-MART STORES EAST, LP,
Defendant.

MEMORANDUM OPINION

Carolyn Robinson is an African-American pharmacist employed by Walmart Stores East, LP's ("Walmart") from 2005 until her termination in 2018. Ms. Robison was 51-years old when Walmart fired her. After her termination, Ms. Robinson filed suit against Walmart, asserting claims of race discrimination in violation of Title VII and 42 U.S.C. § 1981 and age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Before the court is Walmart's motion for summary judgment and motion for partial judgment on the pleadings (doc. 32) and motion to strike (doc. 44).

The court **DENIES** Walmart's motion for partial judgment on the pleadings because Ms. Robinson's complaint states a claim for discrimination in discipline. The court **GRANTS** Walmart's motion for summary judgment on Ms. Robinson's claims of race discrimination because Ms. Robinson has not presented a prima facia case of race discrimination

and even if she had, she has not presented evidence creating a dispute of material fact about whether Walmart's articulated reasons for disciplining and firing her were pretext for unlawful race discrimination. The court **GRANTS** Walmart's motion for summary judgment on Ms. Robinson's age discrimination claim because she has not presented evidence from which a reasonable jury could find that Walmart's articulated reason for firing her was pretext for unlawful age discrimination.

Finally, the court **DENIES AS MOOT** Walmart's motion to strike certain paragraphs of the declaration Ms. Robinson submitted in opposition to summary judgment because the court has relied on only admissible and material evidence in ruling on Walmart's motion for summary judgment.

I. MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Walmart moves for judgment on the pleadings as to any claim for race discrimination in discipline. (Doc. 32 at 1–2). In support of its argument, Walmart contends that Ms. Robinson's complaint does not allege facts related to any employment event other than her termination. (Doc. 35 at 20). Walmart's argument is belied by the face of the complaint.

Ms. Robinson's complaint alleges that her supervisor issued multiple write-ups for deficient job performance and held her to a higher standard of policy compliance than Caucasian employees. (Doc. 1 at ¶¶ 12, 19, 21). And the first count of Ms. Robinson's complaint specifically states that Walmart discriminated against her "because of her

race with respect to the assessment of discipline. . . ." (Doc. 1 at ¶ 20).

In reviewing a Rule 12(c) motion for judgment on the pleadings, the court accepts "as true all material facts alleged in the non-moving party's pleading" and views "those facts in the light most favorable to the non-moving party." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). Applying this standard, Ms. Robinson's allegations in the complaint regarding how Walmart disciplined her state a discrimination claim. Therefore, the court **DENIES** Walmart's partial motion for judgment on the pleadings.

II. MOTION TO STRIKE

Before turning to the merits of Walmart's motion for summary judgment, the court examines Walmart's motion to strike paragraphs 17, 18, 35, 38, 41, 45, 46, 47, and 48 of Ms. Robinson's declaration that she submitted in opposition to summary judgment. (Doc. 44). Walmart contends that these paragraphs contain information that is not based on personal knowledge or is conclusory or speculative. (*Id.*). Ms. Robinson counters that the challenged portions of the declaration are admissible for a variety of reasons. (Doc. 46). Some of the challenged portions to the declaration appear in admissible form in Ms. Robinson's deposition. To the extent that is the case, the court has considered any relevant testimony. Otherwise, consistent with its obligation under Federal Rule of Civil Procedure 56, the court has not considered any inadmissible or immaterial portions of the declaration.

Accordingly, the court **DENIES** as **MOOT** Walmart's motion to strike paragraphs 17, 18, 35, 38, 41, 45, 46, 47, and 48 of Ms. Robinson's declaration. (Doc. 48).

III. MOTION FOR SUMMARY JUDGMENT

1. Background

In considering a motion for summary judgment, the court "draw[s] all inferences and review[s] all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (quotation marks omitted).

In 2005, Walmart hired Ms. Robinson, an African-American, as a Staff Pharmacist to work at the Homewood, Alabama store. (Doc. 33-1 at 9). In 2006, Walmart promoted Ms. Robinson to Pharmacy Manager, a position she held until 2012 when she asked to step down and return to her position as a Staff Pharmacist. (*Id*. at 17). Thereafter, Ms. Robinson served as a Staff Pharmacist until Walmart terminated her employment in 2018. (Doc. 33-39 at 7–9).

In 2016, Zachary Martin, a Caucasian male in his thirties, became the Pharmacy Manager at the Homewood Walmart. (Doc. 33-4 at ¶ 4). Ms. Robinson reported to Mr. Martin, and Mr. Martin reported to Market Health and Wellness Director Billy Lawley. (Doc. 33-5 at ¶¶ 4, 7). Mr. Lawley reported to Chad Souers, the Market Manager for the area that included the Homewood store. (Doc. 33-2 at 4; Doc. 33-3 at 3–4).

Mr. Martin and Ms. Robinson were the only pharmacists assigned to the Homewood store, and each worked a 12-hour shift. (Doc. 33-3 at ¶ 7). They were subject to the same policies and procedures which, among other things, included a Coaching for Improvement Policy. (Doc. 33-7). The Coaching for Improvement Policy is designed to help employees identify, acknowledge, and change unacceptable job performance through three levels of coaching: first written coaching, second written coaching, and third written coaching. (*Id.* at 1–2). An employee may receive only one of each level of coaching in a 12-month period, and a coaching remains active for one year. (*Id.*). Supervisors have discretion to determine the appropriate level of coaching or to skip certain levels of coaching, depending on the circumstances of a particular situation. (*Id.*). If an employee's job performance warrants a level of coaching and the employee already has received a third written coaching within the previous 12 months, the employee may be terminated. (Doc. 33-7 at 2).

In August 2016, Mr. Martin issued a first written coaching to Ms. Robinson because she did not follow pharmacy procedures for returning expired prescription medication ("GENCO" returns). (Doc. 33-4 at ¶ 21; Doc. 33-15). Under previous managers, Walmart required pharmacists to complete GENCO returns by the 15th of every month. (Doc. 33-1 at 31–32). Shortly after Mr. Martin took over, Walmart implemented a new policy, requiring pharmacists to submit GENCO returns on the second Sunday of a given month instead of by the 15th day of every month. (Doc. 33-1 at 32; Doc. 33-4 at ¶¶ 12–18; Doc. 33-12; Doc. 34-10). During her shift on Sunday, August 14, 2016, Ms.

Robinson did not submit the GENCO returns. (Doc. 33-1 at 34; Doc. 33-4 at ¶ 21).

In her deposition, Ms. Robinson testified that she was unaware of the new GENCO procedure until Mr. Martin disciplined her, but she previously acknowledged in emails that she read notes from the store visit where management outlined the updated policy. (Doc. 33-1 at 3; Doc. 33-12; Doc. 33-4 at ¶¶ 14–16, 18). And in a July 14, 2016 email to Mr. Martin summarizing notes from a store meeting, Ms. Robinson stated: "Out of date processing on the 2nd weekend of month (have their drugs pull[ed] and counted)." (Doc. 33-13).

The day after Mr. Martin issued the GENCO coaching, Ms. Robinson emailed Mr. Lawley and requested a meeting to discuss the write-up. (Doc. 33-19 at 2). After the meeting, Ms. Robinson was under the impression that Mr. Lawley was going to talk to Mr. Martin about removing the written coaching from her record. (Doc. 33-9 at 2). Mr. Lawley testified that he reviewed Ms. Robinson's first written coaching and determined that Ms. Robinson had notice of the GENCO requirements and saw no need to overturn the written coaching. (Doc. 33-2 at 29).

In April 2017, Mr. Martin gave Ms. Robinson a second written coaching for allowing a visiting pharmacy technician to bring personal items into the pharmacy, in violation of Walmart policy. (Doc. 33-4 at ¶ 37; Doc. 34-35 at 1, 3; Doc. 33-18). Mr. Martin became aware of the incident after reviewing store video footage during his investigation into an unrelated matter. (Doc. 33-4 at ¶ 30). The footage revealed that the technician brought a bag of personal items into the pharmacy while Ms.

Robinson was the pharmacist on duty. In accordance with Walmart policy, Mr. Martin disciplined Ms. Robinson for allowing the visiting technician to bring personal items into the pharmacy. (Doc. 33-18). Mr. Martin did not discipline the visiting pharmacy technician because she was not a Walmart employee, and Mr. Martin did not have authority to coach the technician for her independent violation of pharmacy protocol. (Doc. 33-4 at ¶ 39).

After the second written coaching, Ms. Robinson realized that the first written coaching was still active. (Doc. 33-9 at 2). She emailed Mr. Souers and requested a meeting to discuss the first coaching. (*Id.*; *see also* Doc. 33-1 at 42). During this meeting, Ms. Robinson also raised other complaints. For instance, Ms. Robinson was upset that Mr. Martin had not disciplined the visiting technician for violating pharmacy policy. (Doc. 33-1 at 42; Doc. 33-9 at 1). Ms. Robinson also complained that Mr. Martin had not submitted GENCO returns but was not disciplined and that Mr. Martin had been seen sleeping on the pharmacy floor. (Doc. 33-1 at 54; Doc. 33-9 at 1). Several days after her meeting with Mr. Souers, Ms. Robinson emailed Mr. Souers and Mr. Lawley an undated picture of Mr. Martin lying on the pharmacy floor. (Doc. 33-1 at 44–45; Doc. 33-2 at 14).

Before Ms. Robinson's meeting with Mr. Souers, Mr. Lawley had in fact issued a first written coaching to Mr. Martin for failing to submit GENCO returns on time. (*See* Doc. 33-9 at 1; Doc. 34-31). After Ms. Robinson's meeting with Ms. Souers, Mr. Lawley issued a second written coaching to Mr. Martin for not completing other medication returns. (Doc. 33-4 at ¶ 95; Doc. 34-31). During this second

coaching session, Mr. Lawley told Mr. Martin that someone reported that he had been lying on the pharmacy floor during his shift. (Doc. 33-2 at 14; Doc. 33-4 at ¶ 95). Mr. Martin told Mr. Lawley that on one occasion, he felt ill during his shift and had lain down between tasks, but that he was never asleep. (Doc. 33-4 at ¶¶ 95–101). Mr. Lawley did not issue a separate written coaching for Mr. Martin's lying on the floor. (Doc. 33-2 at 14; Doc. 39-3 at 1). Instead, he decided to address the concern as part of Mr. Martin's second coaching session. (*Id.*)

In November 2017, Mr. Martin issued a third written coaching to Ms. Robinson because she documented that she had cleared a patient's flagged medication as "doctor approved" when it was not. (Doc. 33-21). Walmart's Drug Utilization Review ("DUR") Policy requires that a pharmacist review a patient's prescribed medication with additional scrutiny when the pharmacist receives certain color-coded alerts. (Doc. 34-36). For example, a "red alert" notifies a pharmacist of a possible drug allergy, and a pharmacist, in her judgment, must contact the prescribing physician, counsel the patient, or both. (Doc. 33-4 at ¶ 49; Doc. 34-36 at 3). The pharmacist must then select the type of intervention from a drop down box in the computer system. (Doc. 34-36 at 3). One choice from the drop down box is "Dr. Approved." (Doc. 33-4 at ¶ 50). Another choice is "other," for which the pharmacist must type in the reason for overriding the alert. (*Id.*; Doc. 34-36 at 3).

Mr. Martin received a call from a patient that prompted him to review the patient's record for a possible DUR violation. (Doc. 33-4 at ¶¶ 52–54). Mr. Martin discovered that Ms. Robinson filled a hydrocodone prescription for a patient even though

the patient was allergic to codeine. (*Id.*). Ms. Robinson marked a DUR override for the patient's hydrocodone as "Dr. Approved," but the comments explained that Ms. Robinson had counseled the patient only. (*Id.*). Ms. Robinson admitted that she did not speak to anyone at the patient's physician's office or get approval from the doctor to dispense the medication despite the allergy alert and that she did not select the right DUR code. (Doc. 33-1 at 47, 50, 52). Mr. Martin issued the third written coaching because Ms. Robinson tagged the DUR override incorrectly. (Doc. 33-4 at ¶ 57; Doc. 33-21).

Around the same time Ms. Robinson received her third written coaching, Walmart's pharmacies began an initiative to improve customer adherence with certain maintenance medications like those that treat high cholesterol, high blood pressure, and diabetes. (Doc. 33-4 at ¶¶ 63–64). In early December 2017, Mr. Martin emailed Ms. Robinson and instructed Ms. Robinson on the use of "Teal Cards" to address patient compliance. Under this approach, a pharmacist filling a prescription would place a plastic card in an external bag holding the medication if a patient had not refilled the medication regularly and had an adherence percentage below a particular number. (Doc. 33-4 at ¶ 66; Doc. 34-23). The existence of the card alerted the pharmacist on duty to counsel the patient about medication adherence. (Doc. 33-4 at ¶ 66). Between December and late March 2018, Mr. Martin emailed Ms. Robinson two more times instructing her on the use of the Teal Cards and requesting that she document incidents where she elected against counseling a patient with a Teal Card in their

prescription. (Doc. 33-4 at ¶ 70; Doc. 33-24; Doc. 33-25).

In late March 2018, Walmart's Pharmacy Clinical Services Manager audited the Homewood store's Teal Card program. (Doc. 33-4 at ¶ 72; Doc. 34-26). After the audit, the Pharmacy Clinical Services Manager emailed Mr. Lawley and Mr. Martin to inform them that for the days he audited, Ms. Robinson did not have an opportunity to use a Teal Card, but she had missed immunization prescreens during that time. (Doc. 33-4 at ¶ 73; Doc. 34-26). The Clinical Services Manager asked Mr. Martin to track Ms. Robinson's Teal Card and immunization prescreens in the coming weeks. (Doc. 33-4 at ¶ 76; Doc. 33-28).

Between March 20, 2018 and April 5, 2018, Mr. Martin determined that Ms. Robinson had thirteen opportunities to use Teal Cards but had not done so on any of those occasions, and she had not issued any immunization prescreens. (Doc. 33-4 at ¶ 76; Doc. 33-27; Doc. 33-28). On April 5, 2018, Mr. Martin met with Ms. Robinson and told her that the thirteen missed Teal Card opportunities warranted a written coaching because she had received multiple reminders about following the procedure but did not do so. (Doc. 33-4 at ¶ 85; Doc. 33-27). Even though a violation of the Teal Card procedure is not itself a terminable offense, because Ms. Robinson already had three active coachings, Mr. Martin terminated Ms. Robinson's employment for "misconduct with coachings" pursuant to the terms of the Coaching for Improvement Policy. (Doc. 33-49; *see also* Doc. 33-2 at 17; Doc. 33-4 at ¶ 86; Doc. 33-27; Doc. 33-7 at 2).

Ms. Robinson was 51-years old when she lost her job. (Doc. 1 at ¶ 24; Doc. 1-1 at 2). Walmart hired a

37-year old African-American to fill Ms. Robinson's position. (Doc. 33-2 at 28; Doc. 33-4 at ¶ 113; Doc. 34-48).

2. Discussion

Walmart moves for summary judgment on all of Ms. Robinson's claims, arguing that Ms. Robinson has failed to present evidence creating genuine disputes of fact about whether it discriminated against her on the basis of race or age.

In deciding a motion for summary judgment, the court must determine whether, accepting the evidence in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Hamilton*, 680 F.3d at 1318. "[T]here is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Looney v. Moore*, 886 F.3d 1058, 1062 (11th Cir. 2018) (quotation marks omitted).

A. Title VII/§ 1981 Claim

In Count One of her complaint, Ms. Robinson alleges that Walmart discriminated against her because of her race "with respect to discipline, including termination" in violation of Title VII and § 1981. (Doc. 1 at ¶ 20).

Title VII prohibits an employer from discriminating against a person based on race. 42 U.S.C. § 2000e-2(a)(1). Section 1981 prohibits intentional discrimination "in private employment on the basis of race." *Johnson v. Ry. Express Agency*,

421 U.S. 454, 4659–60 (1975). As a general rule, claims brought under Title VII and § 1981 "are subject to the same standards of proof and employ the same analytical framework." *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). A plaintiff may establish discrimination under Title VII and § 1981 through direct evidence, circumstantial evidence, or statistical proof. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

Here, Ms. Robinson has not presented direct evidence of discrimination, and the record contains no statistical evidence of discrimination. Therefore, the court must determine whether Ms. Robinson presented sufficient circumstantial evidence for a reasonable jury to find that Walmart discriminated against her because of her race. To do this, Ms. Robinson relies on the test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (*See* Doc. 40 at 10–11).

Under that test, a plaintiff must first make out a prima facie case of discrimination by showing "(1) that she belongs to a protected class, (2) that she was subjected to an adverse employment action, (3) that she was qualified to perform the job in question, and (4) that her employer treated 'similarly situated' employees outside her class more favorably." *Lewis v. City of Union City*, 918 F.3d 1213, 1220–21 (11th Cir. 2019). If the plaintiff can establish a prima facie case of discrimination, the burden shifts to the defendant to present evidence showing a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 1221. If the defendant can satisfy that burden, the plaintiff must present evidence from which a reasonable jury could find that the proffered reason was pretext for unlawful

discrimination. *Id.* To establish that a reason was pretextual, the plaintiff must present evidence that "the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007).

Walmart argues that Ms. Robinson cannot establish a prima facia case of race discrimination because written employment actions do not constitute adverse employment actions and because Mrs. Robinson has not demonstrated that Walmart treated her differently than similarly-situated employees. (Doc. 35 at 23–24, 27–33). Even assuming that the written employment actions are adverse actions, the court finds that Walmart is entitled to summary judgment because Ms. Robinson failed to establish that Walmart treated her differently than similarly situated employees.

A plaintiff relying on the *McDonnell Douglas* burden-shifting framework to establish a race discrimination claim must show that she and her comparators are "similarly situated in all material respects." *Lewis*, 918 F.3d at 1224. In most cases, adequate comparators are those who have been "engaged in the same basic conduct (or misconduct), . . . subject to the same employment policy, guideline, or rules, . . . under the jurisdiction of the same supervisor, . . . and [] share the [same] employment or disciplinary history" as the plaintiff. *Lewis*, 918 F.3d at 1227–28. In this case, Ms. Robinson offers Mr. Martin (doc. 40 at 10–11), and—possibly—the visiting pharmacy technician (*id.* at 8, n.1) as comparators. Neither comparator is adequate.

Ms. Robinson appears to suggest that Walmart treated her differently than the visiting technician who brought personal items into the pharmacy in violation of company policy but was not disciplined like Ms. Robinson was. (*See* Doc. 40 at 8, n. 1). Putting aside the fact that the visiting technician is African-American and therefore not outside Ms. Robinson's protected class, the technician is not a proper comparator. Although Ms. Robinson and the technician were subject to the same workplace policy, they share no other characteristics. Importantly, they did not work for the same employer and did not have the same supervisor. (Doc. 33-4 at ¶ 39–40). In fact, the undisputed evidence is that Mr. Martin did not have the authority to discipline the visiting technician. (Doc. 33-4 at ¶ 39). Accordingly, Ms. Robinson and the visiting technician are not similarly situated in "all material respects," and their difference in treatment does not raise an inference of intentional discrimination. *Lewis*, 918 F. 3d at 1229.

Ms. Robinson's comparison to Mr. Martin also fails. Ms. Robinson claims that Walmart treated her less favorably than Mr. Martin with respect to discipline and termination because she received written coachings and was fired while Mr. Martin was not disciplined or terminated for sleeping on the pharmacy floor. (Doc. 40 at 10–11).

First, with respect to discipline, Ms. Robinson and Mr. Martin did not engage in the same basic misconduct. Ms. Robinson received a written coaching for allowing a pharmacy technician to bring prohibited items into the pharmacy and for not properly entering a DUR code. (Doc. 33-18; Doc. 33-21). Mr. Martin slept on the pharmacy floor. (Doc.

33-29 at 1–2). And "[a]n employer is well within its rights to accord different treatment to employees who are differently situated in 'material respects'—*e.g.*, who engaged in different conduct . . . ." *Lewis*, 918 F.3d at 1228.

Moreover, Ms. Robinson and Mr. Martin did not share a supervisor. Mr. Martin reported to Mr. Lawley, and Ms. Robinson reported to Mr. Martin. (Doc. 33-4 at ¶¶ 4, 7). "Although not dispositive," the fact that Mr. Lawley was responsible for disciplining Mr. Martin while Mr. Martin was responsible for disciplining Ms. Robinson is a "meaningful distinction." *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248 (11th Cir. 2020); *see also Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1312 (11th Cir. 1998) ("Different supervisors may have different management styles that—while not determinative—could account for the disparate disciplinary treatment that employees experience.").

With respect to Ms. Robinson's termination, Mr. Martin likewise is not a valid comparator. Mr. Martin terminated Ms. Robinson's employment pursuant to Walmart's Coaching for Improvement Policy for repeated Teal Card violations while having three active written coachings. (Doc. 33-49; *see also* Doc. 33-2 at 17; Doc. 33-4 at ¶ 86; Doc. 33-27; Doc. 33-7 at 2). Again, and as explained above, *see supra* p. 16, Mr. Martin did not engage in similar conduct, and he reported to a different supervisor. In addition, Ms. Robinson has not shown that she and Mr. Martin shared the same disciplinary history. She has pointed to no evidence that Mr. Martin had three active written coachings and then engaged in any conduct (much less similar conduct) that warranted a level of coaching subjecting him to

termination. Accordingly, Ms. Robinson has not presented evidence creating a genuine dispute about whether she and Mr. Martin are "sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'" *Lewis*, 918 F.3d at 1228 (citing *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1355 (2015)). Therefore, Ms. Robinson cannot establish a prima facie case of race discrimination.

But even if she could establish a prima facie case of race discrimination, Ms. Robinson has presented no evidence from which a reasonable jury could infer that Walmart's articulated reasons for her coachings and termination are false and pretext for unlawful discrimination. *See Smith*, 644 F.3d at 1326; *Springer*, 509 F.3d at 1349. Ms. Robinson does not argue that any of Walmart's legitimate, non-discriminatory reasons for its actions are false. (*See generally* doc. 40 at 10–11). Rather, she claims that Walmart's proffered reasons for disciplining her and terminating her employment are pretext for race discrimination because Walmart did not discipline Mr. Martin for sleeping on the pharmacy floor. (*Id.*). This is the same evidence that Ms. Robinson offered in support of her prima facie case.

A plaintiff may use evidence "necessary and proper to support" a prima facie case to show that an employer's explanations for its conduct are pretextual. *Lewis*, 918 F.3d at 1229. However, as explained above, *see supra* pp. 15–17, Walmart's decision to treat Mr. Martin differently than Ms. Robinson does not raise an inference of discriminatory intent. Therefore, Ms. Robinson has not presented evidence from which a reasonable jury could infer that Walmart's true reason for

disciplining her and terminating her employment was racial discrimination. Therefore, Walmart is entitled to judgment as a matter of law on Ms. Robinson's Title VII and § 1981 claims of race discrimination.

B. ADEA Claim

In Count Two of her complaint, Ms. Robinson alleges that Walmart discriminated against her because she was 51-years old at the time of her termination. (Doc. 1 at ¶ 24).

Under the ADEA, an employer may not discriminate against an employee who are is least forty years old on the basis of her age. 29 U.S.C. § 623(a)(1). As in the race discrimination context, when, as here, a plaintiff relies on circumstantial evidence to make that showing, the court evaluates the claim under the *McDonnell Douglas* burden shifting framework. *Liebman v. Metropolitan Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015).

For purposes of summary judgment, Walmart concedes that Ms. Robinson can establish a prima facie case of age discrimination. (Doc. 35 at 23 n. 3). Therefore, to survive summary judgment, Ms. Robinson must show that Walmart's articulated, non-discriminatory reason for terminating her employment is pretext for unlawful age discrimination. *Liebman*, 808 F.3d at 1298. In this regard, Ms. Robinson has the "burden of persuasion . . . to proffer evidence sufficient to permit a reasonable factfinder to conclude that the discriminatory animus was the 'but-for' cause of the adverse employment action." *Sims v. MVM, Inc.*, 704

F.3d 1327, 1332 (11th Cir. 2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

Where an employer justifies termination based on a work rule violation, a plaintiff may prove pretext by showing "either that [s]he did not violate the work rule or that, if [s]he did, other employees not within the protected class who engaged in similar acts were not similarly treated." *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987) (quotation marks omitted). Ms. Robinson cannot sustain her burden.

Walmart terminated Ms. Robinson because when Mr. Martin coached Ms. Robinson for Teal Card violations, she already had three active written coachings which subjected her to termination under the Coaching for Improvement Policy. Ms. Robinson does not argue that she failed to use Teal Cards consistently. (*See generally* doc. 40). And she has pointed to no evidence that Mr. Martin failed to comply with the Teal Card policy or even if he had, that he had three active written warnings that would have made his susceptible to termination.

Ms. Robinson appears to suggest that Walmart's proffered reason for her termination is pretext because she received a written coaching for allowing a visiting technician to bring prohibited items into a secure area of the pharmacy, but Mr. Martin, her younger supervisor, was not disciplined for sleeping on the pharmacy floor. (Doc. 40 at 13). According to Ms. Robinson this written coaching "advanced [her] towards discharge," while Mr. Martin received more lenient treatment for what she describes as a similar offense which allowed him to remain employed. (*Id.*). Again, and as explained above with respect to her race discrimination claims, *see supra* pp. 15–17, Ms.

Robinson's conduct and Mr. Martin's conduct in this regard is too dissimilar for a reasonable juror to infer that Walmart treated Ms. Robinson differently because of her age.

In sum, Ms. Robinson has offered no evidence to suggest that age was the "but for" cause of her termination.

Therefore, Walmart is entitled to judgment as a matter of law on Ms. Robinson's ADEA claim.

IV. CONCLUSION

The court **DENIES** Walmart's partial motion for judgment on the pleadings and its motion to strike portions of Ms. Robinson's declaration. The court **GRANTS** Walmart's motion for summary judgment and **WILL ENTER SUMMARY JUDGMENT** in favor of Walmart on all of Ms. Robinson's claims.

DONE and **ORDERED** this January 27, 2021.

/s/
ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE