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**AMENDED OPINION,
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
(DECEMBER 27, 2023)**

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAWANNA TYNES,

Plaintiff-Appellee,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellant.

No. 21-13245

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cv-62891-WPD

Before: Jill PRYOR, NEWSOM, and
GRANT, Circuit Judges.

GRANT, Circuit Judge:

This appeal results from an all-too-common confusion in employment discrimination suits: whether the evidentiary framework set out in *McDonnell Douglas* is a stand-in for the ultimate question of

liability in Title VII discrimination cases. We repeat today what our precedents have already made clear: It is not. Properly understood, *McDonnell Douglas* is an evidentiary framework that shifts the burden of production between the parties to figure out if the true reason for an adverse employment action was the employee's race. It is not a set of elements that the employee must prove—either to survive summary judgment or prevail at trial.

To be sure, in some cases a lack of success in establishing a prima facie case will also reflect a lack of success in showing employment discrimination. But, as both this Court and the Supreme Court have explained, the ultimate question in a discrimination case is whether there is enough evidence to show that the reason for an adverse employment action was illegal discrimination. The prima facie case in the *McDonnell Douglas* framework can help answer that question—but it cannot replace it.

Here, the Florida Department of Juvenile Justice is distracted by a perceived failure on the part of its former employee, Lawanna Tynes, to meet her initial burden of production at the prima facie stage of *McDonnell Douglas*. But that distraction comes with a price—a lack of focus on whether Tynes put forward enough evidence to show that she was fired because of racial discrimination. The jury thought so, and the Department does not challenge the sufficiency of the evidence for that conclusion. The verdict thus stands.

The Department also argues that Tynes did not adequately plead a claim for race discrimination under 42 U.S.C. § 1981, which requires a different standard of causation than Title VII—and, perhaps more importantly for the Department's purposes here,

offers a higher level of potential damages. But again, the Department sets its sights on the wrong target. Though the district court's order expressly relied on its authority to permit amendments to the pleadings under Rule 15(b)(1) of the Federal Rules of Civil Procedure, the Department does not even cite Rule 15(b)(1) on appeal. That means the challenge is forfeited, so we also affirm the district court's order denying the Department's motion for judgment as a matter of law on Tynes's § 1981 claim.

I

Tynes was employed by the Florida Department of Juvenile Justice for sixteen years. At the time of her termination, she was the superintendent of the Broward Regional Juvenile Detention Center. The superintendent's responsibilities include overseeing the facility's operations and ensuring that both juvenile detainees and staff are in a safe environment.

One Sunday, while Tynes was off for medical leave, an unusually high number of incidents required an officer to call for backup. The assistant secretary of detention services, Dixie Fosler, followed up by assembling a technical assistance team to review staffing and personnel issues. After the team's review was complete—but before its report was issued—Fosler terminated Tynes. Tynes had no prior negative performance review or reprimands. Even so, the Department offered a laundry list of reasons for the termination: poor performance, negligence, inefficiency or inability to perform assigned duties, violation of law or agency rules, conduct unbecoming of a public employee, and misconduct.

Tynes sued, alleging race and sex discrimination. Her complaint unambiguously alleged two violations of Title VII of the Civil Rights Act of 1964, which prohibits employers from terminating employees because of their race or sex. 42 U.S.C. § 2000e-2(a)(1). The complaint also stated that it brought "other causes of actions [sic] which can be inferred from the facts herein."

The basis of Tynes's discrimination case was that similarly situated white and male employees were treated differently and that the Department's stated reasons for her termination were pretextual. For comparator evidence, Tynes pointed to Joseph Seeber, a white male, and Daryl Wolf, a white female, who were both superintendents of juvenile detention centers with incidents that reflected a lack of control or failure to abide by the Department's policies.[1] But, unlike Tynes, neither was terminated. Far from it—they received only oral reprimands, were allowed to transfer to different facilities, and were granted multiple opportunities to comply with various recommendations for improvement.

As for pretext, Tynes presented evidence of Fosler's personal bias against her. Gladys Negron, Tynes's direct supervisor, testified that she believed Tynes's termination was based on Fosler's personal feelings rather than professional concerns. She said that Fosler's written report "contained several inaccuracies," and even characterized the technical assistance team's efforts as a "search-and-kill mission" against Tynes. At trial, Fosler faltered in her testimony; she could not

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[1] At summary judgment, the district court held that Seeber and Wolf were both appropriate comparators.

recall the basis for her conclusion that Tynes had engaged in "conduct unbecoming as a public employee," nor could she point to another employee fired without negative performance reviews or prior reprimands.

The jury returned its verdict in favor of Tynes and made specific findings in a special verdict form: (1) "race or sex was a motivating factor"; (2) the Department would not have discharged Tynes if it had not taken into account her race or sex; and (3) Tynes's race was a but-for cause of her termination. The jury awarded $424,600 in compensatory damages and $500,000 in damages for emotional pain and mental anguish. The district court ordered the Department to reinstate Tynes to a similar position—but not under Fosler's supervision.

The Department filed a renewed motion for judgment as a matter of law or, alternatively, for a new trial. It argued that the Department was entitled to judgment on Tynes's Title VII claims because she did not present comparators who were "similarly situated in all material respects" and therefore failed to satisfy her burden to establish a prima facie case under *McDonnell Douglas*. The filing also asserted that Tynes had not properly pleaded her § 1981 claim. A § 1981 claim differs in two relevant ways from a Title VII claim—there is no cap on damages and the causation standards are higher. 42 U.S.C. § 1981a(b)(3)–(4); *see Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017-19 (2020).

The district court denied the motion on both issues. It rejected the Department's Title VII arguments because "the circumstantial evidence regarding the two comparators was sufficient to establish the discrimination claims," and "[c]redibility was for the

jury to decide." The court also rejected the § 1981 argument, saying that even if Tynes had not properly pleaded that violation in the first place, Rule 15(b)(1) of the Federal Rules of Civil Procedure gave it "the discretion to allow an amendment" to the complaint during the trial.

The Department now appeals the district court's denial of its renewed motion for judgment as a matter of law.

II

Judgment as a matter of law is appropriate when "the facts and inferences point so overwhelmingly in favor of one party that reasonable people could not arrive at a contrary verdict." *Brown v. Alabama Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010) (alterations adopted and quotation omitted). We review the denial of a motion for judgment as a matter of law de novo. *Id.*

III

A

Title VII of the Civil Rights Act of 1964 outlaws employment discrimination because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Likewise, 42 U.S.C. § 1981 prohibits employers from intentionally discriminating on the basis of race in employment contracts. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472 (11th Cir. 1999). To prove a claim under either statute, a plaintiff can use direct evidence, circumstantial evidence, or both.

See Jenkins v. Nell, 26 F.4th 1243, 1249 (11th Cir. 2022).

Early on, though, it became clear that when only circumstantial evidence was available, figuring out whether the *actual* reason that an employer fired or disciplined an employee was illegal discrimination was difficult and "elusive." *Texas Dept of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 n.8 (1981). After all, an employer can generally fire or discipline an employee for "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all," so long as that action "is not for a discriminatory reason.'" *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) (quoting *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984)).

To deal with the difficulties encountered by both parties and courts, the Supreme Court in *McDonnell Douglas* set out a burden shifting framework designed to draw out the necessary evidence in employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It works like this. Step one is for the plaintiff, who establishes what *McDonnell Douglas* calls a "prima facie" case of discrimination when she shows that (1) "she belongs to a protected class," (2) "she was subjected to an adverse employment action," (3) "she was qualified to perform the job in question," and (4) "her employer treated 'similarly situated' employees outside her class more favorably" *McDonnell Douglas*, 411 U.S. at 802; *Lewis v. City of Union City*, 918 F.3d 1213, 1220-21 (11th Cir. 2019) (en banc). The last requirement is met when the plaintiff presents "evidence of a comparator—someone who is similarly situated in all material respects." *Jenkins*, 26 F.4th at 1249 (quotation omitted). The prima facie

showing entitles the plaintiff to a rebuttable presumption of intentional discrimination. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). The defendant then rebuts that presumption (if it can) by offering evidence of a valid, non-discriminatory justification for the adverse employment action. *Id.* at 714. Once that justification is offered, the presumption of discrimination falls away and the plaintiff tries to show not only that the employer's justification was pretextual, but that the real reason for the employment action was discrimination. *Id.* at 714-15; *Burdine*, 450 U.S. at 256. This final question "merges with the plaintiff's ultimate burden of persuading the factfinder that she has been the victim of intentional discrimination." *Lewis*, 918 F.3d at 1221 (quoting *Burdine*, 450 U.S at 256 (alterations adopted)).

McDonnell Douglas, in short, is an evidentiary tool that functions as a "*procedural* device, designed only to establish an order of proof and production." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993); *see also Burdine*, 450 U.S. at 255 n.8; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). What *McDonnell Douglas* is not is an independent standard of liability under either Title VII or § 1981. Nor is its first step, the prima facie case—"establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011); *see also Brady v. Off of the Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008). Often, however, parties (and sometimes courts) miss this fundamental point and wrongly treat the prima facie case as a substantive standard of liability.

To be fair, the *McDonnell Douglas* court's terminology likely bears some responsibility for the continuing confusion on this point. When the Supreme Court uses the term "prima facie case" in this context, it does so "in a special sense." *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1223 (10th Cir. 2003) (Hartz, J., writing separately). The Court itself has explained that although that phrase may sometimes "describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue," within the *McDonnell Douglas* framework the term "prima facie case" has a different meaning—it marks "the establishment of a legally mandatory, rebuttable presumption." *Burdine*, 450 U.S. at 254 n.7 (citing 9 J. Wigmore, Evidence § 2494 (3d ed. 1940)).

So, although in other contexts a prima facie case typically *does* mean enough evidence for a plaintiff to prevail on a particular claim, here the meaning is different. Under *McDonnell Douglas*, a plaintiff who establishes a prima facie case is entitled to a "legally mandatory, rebuttable presumption" that the employer intentionally discriminated against her. *Id.* What that means is that once a plaintiff satisfies her prima facie burden, the defendant "knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it." *Hicks*, 509 U.S. at 510 n.8. The presumption of discrimination introduced by the prima facie case thus helps narrow things down and "frame the factual issue" by drawing out an explanation that the plaintiff can then seek to demonstrate is pretextual. *Burdine*, 450 U.S. at 255. In this way, the prima fade showing exerts a sort of "practical coercion" that forces the defendant to "come forward" with evidence explaining its actions. *Hicks*, 509 U.S.

at 510 n.8, 511. It also offers a benefit for the defendant employer, who now has a better idea of what evidence needs to be rebutted. *See id.*

But once the prima facie case has "fulfilled its role of forcing the defendant to come forward with some response," it no longer has any work to do. *Id.* at 510-11. Where "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is *no longer relevant*." *Aikens*, 460 U.S. at 715 (emphasis added). This is so because the "district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff." *Id.* (quotation omitted). So when the defendant employer offers evidence of the reason for its actions toward the plaintiff, the presumption of discrimination created by the prima facie case "simply drops out of the picture." *Hicks*, 509 U.S. at 511; *see also Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1061 (11th Cir. 1994). That is a far cry from serving as a substitute standard necessary to survive summary judgment.

Another reason for the confusion? A failure in the prima facie case often also reflects a failure of the overall evidence. Even though we do not dwell on whether the technical requirements of the prima facie case are met once the defendant has met its burden of production, we keep in mind that the *questions* the plaintiff must answer to make a prima facie case are relevant to the ultimate question of discrimination. A plaintiff who fails to prove that she was a member of a protected class, for example, or that she suffered an adverse employment action, will be unable to prove that she was unlawfully discriminated against. *See*

Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1327-28 (11th Cir. 1998); *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1202-04 (11th Cir. 2013). We'll admit that we have at times framed that analysis in terms of whether the plaintiff has established a prima facie case, but the more fundamental problem with such a failure of evidence is that it means the plaintiff cannot prove a necessary element for his employment discrimination case. *See, e.g.*, *Kidd*, 731 F.3d at 1202-04.

This distinction is important because the components of a prima facie case are not necessarily coextensive with the evidence needed to prove an employment discrimination claim. That is why a plaintiff need not plead the elements of a prima facie case to survive a motion dismiss. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002). And it explains why courts in this Circuit do not instruct juries on the prima facie case or the *McDonnell Douglas* framework. *See Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999).

It is also why "the plaintiff's failure to produce a comparator does not necessarily doom the plaintiffs case." *Smith*, 644 F.3d at 1328. Indeed, "the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* at 1328. That is because *McDonnell Douglas* is "only one method by which the plaintiff can prove discrimination by circumstantial evidence." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 n.3 (11th Cir. 2005). A plaintiff who cannot satisfy this framework may still be able to prove her case with what we have sometimes called a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional

discrimination by the decisionmaker." *Smith*, 644 F.3d at 1327-28 (footnote and quotation omitted); *see also Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (*Lewis II*).

This rearticulation of the summary judgment standard arose in large part because of widespread misunderstandings about the limits of *McDonnell Douglas*—the same misunderstandings that persist today. A "convincing mosaic" of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action—the ultimate inquiry in a discrimination lawsuit.[2] *Jenkins*, 26 F.4th at 1250. This approach to analyzing the evidence treats an employment discrimination suit in same way we would treat any other case—jumping directly to the ultimate question of liability and deciding whether the moving party is entitled to judgment at that stage of the case. It is no different than the standards we ordinarily apply in deciding summary judgment and post-trial motions.

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[2] A plaintiff proving her case through the convincing mosaic standard may point to any relevant and admissible evidence. As we have said, "no matter its form, so long as the circumstantial evidence raises a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper." *Smith*, 644 F.3d at 1328. Evidence that is likely to be probative is "evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) systematically better treatment of similarly situated employees, and (3) pretext." *Jenkins*, 26 F.4th at 1250 (quotation omitted). Given the wide scope of available evidence, the convincing mosaic standard "can be of particular significance when the plaintiff cannot identify a similarly situated comparator," as the *McDonnell Douglas* framework requires. *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1273 n.1 (11th Cir. 2021).

"If the plaintiff presents enough circumstantial evidence to raise a reasonable inference of intentional discrimination, her claim will survive summary judgment." *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1320 (2012).

All that to say, in deciding motions for summary judgment or judgment as a matter of law, parties already understand that, when we use what we have called the convincing mosaic standard, we look beyond the prima facie case to consider all relevant evidence in the record to decide the ultimate question of intentional discrimination. But parties do not always understand that we are answering that same question when using the *McDonnell Douglas* framework. Under *McDonnell Douglas*, the failure to establish a prima facie case is fatal only where it reflects a failure to put forward enough evidence for a jury to find for the plaintiff on the ultimate question of discrimination. This may mean that there was not enough evidence to infer discrimination. Or it may be that there was no adverse employment action. But the analysis turns on the substantive claims and evidence in the case, not the evidentiary framework.

For these reasons, we have repeatedly emphasized that after a trial we "should not revisit whether the plaintiff established a prima facie case." *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1194 (11th Cir. 2004); *see also, e.g.*, *Holland v. Gee*, 677 F.3d 1047, 1056 (11th Cir. 2012); *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1150 (11th Cir. 2005); *Tidwell v. Carter Prods.*, 135 F.3d 1422, 1426 n.1 (11th Cir. 1998); *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 806 (11th Cir. 1995); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1129 (11th Cir. 1984).

Instead, we ask only one question: whether there is a sufficient evidentiary basis for the jury to find that the defendant intentionally discriminated against the plaintiff. *Cleveland*, 369 F.3d at 1194.

B

That analysis solves this case. The Department's only argument is that the comparator employees that Tynes offered were not adequate to establish a prima facie case of discrimination under *McDonnell Douglas*. That may be true; under our precedent a comparator employee must be "similarly situated in all material respects"—a high bar to meet. *Lewis*, 918 F.3d at 1218. But the jury's factual inquiry was whether the Department intentionally discriminated against Tynes, and its answer was "yes." The Department does not contend that the evidence, taken as a whole, could not support the jury's verdict. By focusing exclusively on Tynes's comparator evidence, the Department has forfeited any challenge to the ultimate finding of discrimination.

Of course, the strength of Tynes's comparator evidence is relevant to the ultimate question of intentional discrimination. *Holland*, 677 F.3d at 1056-57. But to the extent that there are material differences between Tynes and her comparators at this stage of the case, it is the jury's role—not ours—to determine how much weight the comparator evidence should be given. In other words, it is possible that her comparators were insufficient to establish a prima facie case yet still relevant to the ultimate question of intentional discrimination. *See Lewis II*, 934 F.3d at 1187-88. To win after trial, the Department would have needed to

explain why the evidence, taken as a whole, was insufficient to support the jury's verdict. Because it failed to do so, we affirm the judgment of the district court denying the Department's renewed motion for judgment as a matter of law on the Title VII claims.

IV

The Department also challenges the jury's verdict on Tynes's § 1981 claim, arguing that her complaint did not adequately plead the § 1981 claim and that she did not prove that race was a "but-for" cause of her termination.[3] The Department, however, has forfeited both arguments.

The Department is right about one thing—Tynes's complaint may not have set out a separate claim under § 1981. *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313,1322-23 (11th Cir. 2015) (requiring a complaint to set out a different count for each cause of action or claim for relief).[4] Even so, the district court held that it had discretion to allow an amendment to the pleadings during the trial under Rule 15(b)(1). That rule permits the pleadings to be amended at trial when "a party objects that evidence is not within the

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[3] In *Comcast*, the Supreme Court held that but-for causation was required to prove a § 1981 claim. 140 S. Ct. at 1019.

[4] In addition to the Title VII claims, the complaint says it brings "other causes of actions [sic] which can be inferred from the facts herein." But it does not set out a § 1981 claim in its own count; instead, it refers to § 1981 in the jurisdictional section of the complaint as a federal question presented in the case. What's more, each of Tynes's Title VII counts alleges that she "is a member of a protected class under § 1981," and the prayer for relief requests that the court "[a]djudge and decree that Defendant has violated 42 U.S.C. § 1981."

issues raised in the pleadings" so long as "doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b)(1). The district court stated that it found that permitting amendment would not prejudice the Department.

The Department does not challenge the district court's authority under Rule 15. Indeed, at oral argument counsel expressed a lack of familiarity with that rule. And when "an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). So while it is not clear whether the district court properly invoked Rule 15(b)(1)—after all, Tynes did not actually move to amend her complaint—any challenge on that ground is forfeited. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1352 (11th Cir. 2011); *Green Country Food Mkt., Inc., v. Bottling Grp., LLC*, 371 F.3d 1275, 1281 (10th Cir. 2004).

The Department's second § 1981 argument—that Tynes did not prove that race was a but-for cause of her termination—is also forfeited. In its post-trial motion, the Department argued that because Tynes did not plead a § 1981 claim, her complaint did not *allege* that race was a but-for cause. But it did not argue that Tynes failed to *prove* that race was a but-for cause.[5] "It is well-settled that we will generally

[5] The clear intention of the Department's Rule 50 motions was to challenge the adequacy of the pleadings. The Department may contend (though it did not do so directly before this Court) that

refuse to consider arguments raised for the first time on appeal." *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1249 (11th Cir. 2012). The Department cannot now repackage its pleading argument into a claim that Tynes did not prove an essential element at trial.

* * *

After a full trial on the merits, a defendant cannot successfully challenge the jury's verdict by arguing only that the plaintiff's comparators were inadequate or that the prima facie case was otherwise insufficient. Here, the Department was required to demonstrate why the record evidence could not support the jury's verdict and failed to do so. Because the Department also failed to adequately challenge the grounds upon which the district court denied its motion with respect to Tynes's § 1981 claim, the district court's order is AFFIRMED.

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it preserved a proof-based argument with this statement: "Plaintiff offered no testimony or evidence at trial that her race was the 'but-for' cause of her termination." In context, both we and the district court read this as support for the pleading-based argument, but in any event, such a statement is far too conclusory on its own to preserve the issue for appeal.

CONCURRING OPINION OF JUDGE NEWSOM

NEWSOM, Circuit Judge, concurring:

Today's majority opinion offers an important critique of the role that *McDonnell Douglas*'s burden-shifting analysis has come to play in deciding Title VII cases. In particular, the majority explains that *McDonnell Douglas* (1) provides only an "evidentiary framework" and (2) was never meant to establish "an independent standard of liability" or specify a "set of elements that the employee must prove—either to survive summary judgment or prevail at trial." Maj. Op. at 2, 9. Unfortunately, as the majority notes, "parties (and sometimes courts)" often "miss this fundamental point and wrongly treat" *McDonnell Douglas*, and in particular its initial prima-fade-case step, "as a substantive standard of liability" *Id.* at 9. And although this case doesn't arise on summary judgment, the majority correctly observes that the overreading of—and consequent overemphasis on—*McDonnell Douglas* has become particularly acute at the Rule 56 stage, where courts have increasingly taken to treating the test's prima-facie-evidence benchmark "as a substitute standard necessary to survive summary judgment." *Id.* at 11; *see also id.* at 9-12 (detailing the problems with courts' applications of *McDonnell Douglas* at summary judgment).

Yes, yes, and yes—I completely agree. I'll confess, though, that I've developed an even deeper skepticism of *McDonnell Douglas*. The majority opinion seeks to put courts back on the right path in their application of *McDonnell Douglas*; I tend to think we might be better off on an altogether different path. Here's what I mean: I'd long taken for granted that *McDonnell*

Douglas's three-step framework provided the presumptively proper means of deciding Title VII cases at summary judgment. I've changed my mind. *McDonnell Douglas*, it now seems to me, not only lacks any real footing in the text of Rule 56 but, worse, actually obscures the answer to the only question that matters at summary judgment: Has the plaintiff shown a "genuine dispute as to any material fact"—in the typical Title VII case, as to whether her employer engaged in discrimination based on a protected characteristic. Instead of *McDonnell Douglas*—which, to be clear, neither the Supreme Court nor we have ever said provides the sole mechanism for adjudicating summary judgment motions—courts should employ something like our oft-maligned "convincing mosaic" standard, which I had always viewed as something of a rogue but which, upon reflection, much more accurately captures and implements the summary-judgment standard. For me, it's quite the turnabout, so I should explain myself.

I

Title VII of the landmark Civil Rights Act of 1964 broadly prohibits workplace discrimination. In relevant part, its operative provision states that—

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or 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 . . . .

42 U.S.C. § 2000e-2(a)(1). Title VII was (and is) an historic piece of legislation that tackled (and continues to tackle) one of the country's weightiest social problems. Legally speaking, though, it's just a statute, no different from hundreds of others. And so, as the Supreme Court has repeatedly reminded us, the "ordinary rules" of civil procedure apply to Title VII cases. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("[T]he ordinary rules for assessing the sufficiency of a complaint apply"); *see also, e.g.*, *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("[N]one of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

Many, if not most, Title VII cases are decided at summary judgment. The "ordinary rule[ ]" for evaluating the propriety of summary judgment, of course, is Federal Rule of Civil Procedure 56:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). In the mine-run discrimination case, the key issue is whether the employer engaged in some action, in the statute's words, "because of" an employee's race, sex, religion, or other protected characteristic. Accordingly, the fundamental question at summary judgment is—or should be—whether there is a genuine dispute of material fact about that all-important causation issue.

But not all analytical frameworks hew closely to that question. Briefly, we assess employment-discrimination cases at summary judgment using one or more of three approaches. First, a reviewing court might consider whether the plaintiff has pointed to *direct* evidence of discrimination. If the case instead turns on *circumstantial* evidence, the court might ask—second—whether the plaintiff can survive *McDonnell Douglas*'s burden-shifting analysis or—third—whether she can assemble what we have called a "convincing mosaic" of evidence suggesting discrimination, *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

In terms of consistency with Rule 56, the direct-evidence analysis, reserved for cases featuring particularly "blatant" and overtly discriminatory comments or conduct, *see Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1156 (11th Cir. 2020), performs well enough. But direct-evidence cases are increasingly rare, so most Title VII suits these days turn on circumstantial evidence. Among those, *McDonnell Douglas* is clearly the dominant framework, with "convincing mosaic" trailing along as something of an afterthought.[1] And until recently, that seemed exactly right to me—I had

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[1] So far as I can tell, we have considered the convincing-mosaic test in only five published Title VII decisions, three of which involved cursory single-paragraph rejections of a plaintiffs invocation of it. *See, e.g., Smith v. Lockheed*-Martin *Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011); *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1335 (11th Cir. 2015); *Trask v. Secretary, Dep't of Veterans Affs.*, 822 F.3d 1179, 1193 (11th Cir. 2016), *abrogated on other grounds by Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (on remand); *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1273 n.2 (11th Cir. 2021).

marinated in *McDonnell Douglas* and its progeny for so long that I had come to view the convincing-mosaic test as an interloper, a hack contrived to save cases that might otherwise go out on summary judgment.

I've concluded that I was wrong about that—as in 180 wrong. Upon reflection, it now seems to me that *McDonnell Douglas* is the interloper—it is the judge-concocted doctrine that obfuscates the critical inquiry. The convincing-mosaic standard, by contrast—despite its misleadingly florid label—is basically just Rule 56 in operation. Quite unlike *McDonell Douglas*, it actually asks the key question: Does the "record, viewed in a light most favorable to the plaintiff, present[ ] a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker"? *Smith*, 644 F.3d at 1328 (internal quotations and footnote omitted). Strip away the grandiloquence—after all, "convincing mosaic of circumstantial evidence" just means "evidence"—and that is *exactly* Rule 56's summary-judgment standard.

In the discussion that follows, I'll explain briefly why I've come to believe (1) that *McDonnell Douglas* is the wrong framework to apply in deciding Title VII cases at summary judgment and (2) that our convincing-mosaic standard—which I'd rebrand slightly—is the right one. I'll also try to anticipate and respond to a few objections.

II

To start, why the loss of faith in *McDonnell Douglas*? In short, I fear that it doesn't reliably get us to the result that Rule 56 requires. *See also* Maj. Op. at 11 (noting that "the components of a prima facie case are not necessarily coextensive with the evidence

needed to prove an employment discrimination claim"). And in retrospect, that shouldn't be particularly surprising, because *McDonnell Douglas*'s reticulated, multi-step framework forces courts to ask and answer a series of questions that only peripherally relate to the one that Rule 56 poses: Has the plaintiff presented "a genuine issue as to any material fact"—in the typical Title VII case, about her employer's discriminatory intent? Let me unpack my concern, in three parts.

First, as a threshold matter, *McDonnell Douglas* seems (in retrospect) awfully made up. Here's how the Supreme Court has described its handiwork:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima fade case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252-53 (1981) (internal citations and footnote omitted). There's certainly no textual warrant in Title VII or the

Federal Rules for so elaborate a scheme, and so far as I know, no one has ever even sought to justify it as rooted in either. Perhaps a product of its time, the whole thing is quite legislative, quite *Miranda*-esque—"set forth," to use the Supreme Court's own words. *See also* Maj. Op. at 7-8 (observing that *McDonnell Douglas* "set out" the burden-shifting framework). And for me, the framework's made-up-ed-ness is a flashing red light—prima facie evidence, if you will, that something is amiss. *Cf. Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring) ("[U]nelected, unaccountable federal judges shouldn't make stuff up.").

Second, whatever it was that the Supreme Court initially conjured, it seems to have taken on a life of its own. Perhaps most jarringly, *McDonnell Douglas*'s burden-shifting framework has become the presumptive means of resolving Title VII cases at summary judgment—despite the facts (1) that *McDonnell Douglas* itself arose not on summary judgment but out of a bench trial, *see Green v. McDonnell Douglas Corp.*, 299 R Supp. 1100, 1102 (E.D. Mo. 1969), and (2) that, so far as I can tell, the Supreme Court has specifically addressed *McDonnell Douglas*'s application to Title VII cases at summary judgment only once, and in that decision held that it didn't apply, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 118-19 (1985).[2] Even beyond that, despite the Supreme

[2] Ironically, resolving cases at summary judgment seems to be McDonnell *Douglas*'s sole remaining office. The Supreme Court has clarified that its burden-shifting analysis is inapplicable both at the pleading stage, *see Swierkiewicz*, 534 U.S. at 508, and in deciding post-trial motions, *see Aikens*, 460 U.S. at 715, and most courts of appeals have excised references to *McDonnell Douglas*'s framework from their pattern jury instructions, *see* Timothy M.

Court's occasional reminders that *McDonnell Douglas*'s "procedural device" was intended "only to establish an order of proof and production," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993),[3] lower courts have become progressively obsessed with its minutiae, allowing it to drive substantive outcomes. The framework's constituent details have grown increasingly intricate and code-like, as courts have taken to forcing a holistic evidentiary question—whether all the evidence, viewed in the light most favorable to the plaintiff, creates a genuine factual dispute—into a collection of distinct doctrinal pigeonholes. For instance, we have explained—and we're hardly alone—that *McDonnell Douglas*'s first stage, the prima-facie case, further entails a "four-step test," one step of which requires the plaintiff to show that she was treated differently from a similarly situated "comparator." *Lewis v. City of Union City*, 918 F.3d 1213, 1220-22 (11th Cir. 2019) (en Banc). We've then treated these requirements as a series of standalone, case-dispositive elements—boxes to be checked—rather than simply

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Tymkovich, *The Problem with Pretext*, 85 Deny. U. L. Rev. 503, 528 & nn.189-91 (2008) (collecting cases).

To be fair, the Court has utilized *McDonnell Douglas* to evaluate claims under *other* statutes at summary judgment. None of those decisions, though, has squarely addressed *McDonnell Douglas*'s consistency (or inconsistency) with Rule 56. *See, e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 231 (2015); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-52 (2003); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

[3] *See also Burdine*, 450 U.S. at 255 n.8 (observing that the *McDonnell Douglas* framework was designed merely to help the parties progressively "sharpen the inquiry into the elusive factual question of intentional discrimination").

asking the controlling question whether the facts give rise to a triable issue of discrimination. In so doing, we've mistakenly allowed the tool to eclipse (and displace) the rule.[4]

Finally, and perhaps worst of all, it now strikes me that the *McDonnell Douglas* three-step—particularly as supplemented by the first step's constituent four-step—obscures the actual Title VII inquiry, especially at summary judgment. I'll readily confess that others have beaten me to this conclusion, but they make for pretty good company. For instance, while a judge on the D.C. Circuit, Justice Kavanaugh described the fixation on the plaintiffs prima facie case as "a largely unnecessary sideshow" that "has not benefited employees or employers," has not "simplified or expedited court proceedings," and, in fact, "has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Worse, he explained, the *McDonnell Douglas* framework isn't just wasteful, it is potentially misleading in that it entices reviewing courts to focus on non-core issues: At summary judgment, the prima facie case is "almost always irrelevant" and "usually [a] misplaced" inquiry—because once the defendant

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[4] *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 71 (2011) ("[T]he key question in modem discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination."); *see also* Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 374-75 (2021) ("In practice, however, the causation standard employed is less important than whether a plaintiff can successfully squeeze the evidence into an arcane and complicated body of judge-made law . . . . ").

offers an explanation for its decision, "whether the plaintiff really" made out a prima facie case no longer matters. *Id.* at 493-94 (quoting *Aiken*, 460 U.S. at 715). Rather, then Judge Kavanaugh continued, once the defendant explains itself, "the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that . . . the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id.* at 494. That, of course, is the Rule 56 question—shorn of all its *McDonnell Douglas* prophylaxis.[5]

To be clear, Justice Kavanaugh is hardly alone. Justice Gorsuch made similar observations during his tenure on the Tenth Circuit. Using the very same descriptor that Justice Kavanaugh had, he explained

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[5] One clarification: While the prima-facie-case question is undoubtedly "irrelevant" as a formal matter following an employer's summary-judgment motion—at that point, the employer having explained itself, the focus turns to the ultimate question—that's not to say that the sort of proof that might inform a plaintiff's prima facie showing is irrelevant as an evidentiary matter. As the majority opinion observes, "the *questions* the plaintiff must answer to make a prima facie case are relevant to the ultimate question of discrimination"—whether she was a member of a protected class, whether she suffered an adverse employment decision, how her colleagues were treated, etc. Maj. Op. at 11. So it may well be that a plaintiff who lacks the evidence necessary to make out a prima facie case should lose at summary judgment. Importantly, though, she shouldn't lose because she has failed to dot her Is and cross her Ts under *McDonnell Douglas*, but rather because she has failed to proffer evidence that gives rise to a genuine issue of material fact concerning whether her employer engaged in unlawful discrimination. *Cf. also id.* at 11 ("A failure in the prima fade case often also reflects a failure of the overall evidence.").

that *McDonnell Douglas*'s staged inquiries "sometimes prove a sideshow," *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008), that the framework itself "has proven of limited value," *Walton v. Powell*, 821 F.3d. 1204, 1210 (10th Cir. 2016), and that courts too often get bogged down engaging] in the business of trying to police the often fine line between" when *McDonnell Douglas* does and doesn't apply, *id.* at 1211.[6]

* * *

So, what's my takeaway regarding *McDonnell Douglas*? From a case that didn't even arise on summary judgment has emerged a purported "procedural device" that, in day-to-day operation, disregards the duly promulgated rules of summary judgment procedure, that overrides the substance of Title VII, and whose multi-step burden-shifting formula obscures

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[6] Others have voiced similar complaints. Judge Easterbrook has described Title VII summary-judgment cases generally as implicating a "rat's nest of surplus 'tests.'" *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 766 (7th Cir. 2016). Judge Hartz has observed that the *McDonnell Douglas* framework, in particular, "only creates confusion and distracts courts from 'the ultimate question of discrimination.'" *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring). Judge Wood has lamented the "snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike" and expressed her view that *McDonnell Douglas*'s successive inquiries have "lost their utility." *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring). And Judge Tymkovich, training his critique on *McDonnell Douglas*'s third step, has complained that the "focus on pretext has shifted the emphasis of an employment discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee." Tymkovich, *supra* note 2, at 505.

the decisive question: Does the summary-judgment record reveal a genuine dispute of material fact about whether an employer discriminated against its employee "because of" a protected characteristic?

III

So, as it turns out, there's plenty not to like about *McDonnell Douglas* as a summary judgment tool. And what of the convincing-mosaic standard, which I've confessed to having long dismissed as a secondary corollary of sorts or, worse, a manipulable workaround? Turns out there's a lot to like.

McDonnell Douglas, it now seems to me, leads us away from—or at the very least is orthogonal to—Rule 56's north star. By contrast, the convincing-mosaic standard points, even if a little clumsily, right at it. Here's what we said in *Smith*:

> [T]he plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.

644 F.3d at 1328 (internal quotation marks, citations, and footnote omitted). Stripped of the rhetorical flourish—the superfluous "convincing mosaic of" preface—that is, in essence, just a restatement of Rule 56's summary-judgment standard. No bells, no whistles—just reasonable inferences and triable facts.

What accounts, then, for the convincing-mosaic standard's failure to launch? Well, inertia for starters. By the time the convincing-mosaic option came along, at least as a stand-alone test, parties, courts, and commentators had been debating and applying *McDonnell Douglas* for decades. Separately, I think the convincing-mosaic framework suffers from a branding problem of sorts, of which its rhetoric is a big part. The informal moniker—"convincing mosaic"—just sounds contrived, and thus sends formalists like me into a dither. It's also a little misleading: Satisfying the test requires *neither* "convincing" a reviewing court nor presenting enough evidence to compose a "mosaic." Summary judgment turns on the existence of a genuine factual dispute; courts deciding summary judgment motions don't weigh evidence, and they don't decide (let alone announce) whether they're convinced. And a mosaic—in its truest sense a collection—isn't necessary to defeat summary judgment; a single item of evidence can at least theoretically suffice.

In any event, as between the two current contestants, it now strikes me that the convincing-mosaic standard—which I'd be inclined to re-brand as, perhaps, just the "Rule 56" standard, to denude it of its unnecessary ornamentation—comes much closer to capturing the essence of summary judgment than does *McDonnell Douglas*.

IV

Let me try, in closing, to anticipate and address a few likely objections.

A

First, does any of this really matter? I think it does. We shouldn't perpetuate the existing regime by dint of its sheer existence. We should strive to get the cases right according to the governing law. And for present purposes, the "governing law" comprises (1) Title VII's prohibition on employment discrimination perpetrated "because of" an employee's protected characteristics, 42 U.S.C. § 2000e-2(a)(1), and (2) Rule 56's focus on the existence of a "genuine dispute" about that causation issue, *see* Fed. R. Civ. P. 56(a). For reasons I've tried to explain, *McDonnell Douglas* is at best only tangentially directed to those issues; the convincing-mosaic standard—or something like it—is much more immediately so.

Moreover, I fear that our increasingly rigid application of *McDonnell Douglas* may actually be causing us to get cases *wrong*—in particular, to reject cases at summary judgment that should, under a straightforward application of Rule 56, probably proceed to trial. A plaintiff who can marshal strong circumstantial evidence of discrimination but who, for whatever reason, can't check all of the *McDonnell-Douglas*-related doctrinal boxes—for instance, because she can't *quite* show that her proffered comparator is sufficiently "similarly situated," *see supra* at 9—may well lose at summary judgment, whereas a plaintiff who has a slightly better comparator but little other evidence of discrimination might survive. Especially in light of Rule 56's plain language—which focuses on the existence of a "genuine dispute as to any material fact," Fed. R. Civ. P. 56(a)—that seems a little topsy-turvy.

B

Second, wouldn't a wholehearted embrace of the convincing-mosaic framework result in more cases going to trial and thereby overburden already busy district courts? Well, maybe. To the extent that *McDonnell Douglas*'s judge-created elements and sub-elements are currently causing courts to grant summary judgment in cases where, in Rule 56 terms, a genuine dispute exists, then yes, ditching them in favor of something that looks more like the convincing-mosaic standard would lead to more trials.[7] But inasmuch as that's a problem, courts shouldn't manufacture or jerry-rig doctrine to fix it. I've never thought that judges should decide cases in an effort to drive good outcomes or avoid bad ones, and now's not the time to start. For good or ill, the facts are (1) that Title VII gives plaintiffs a right to a jury trial in appropriate circumstances, *see* 42 U.S.C. § 1981a(c), and (2) that Rule 56 forestalls jury trials only where there is "no genuine dispute as to any material fact"—here, as to the employer's causal motivation. Some cases will warrant trial under Rule 56's standard, some won't. But neither Title VII nor the Federal Rules make an

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[7] Reasonable minds can differ about how many cases are wrongly decided because of *McDonnell Douglas*. Many of our early cases doubted whether an employer's motive is susceptible to summary judgment at all. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1025 (11th Cir. 2000) (en banc) (collecting cases). When we held that it is, we did so on the ground that "the summary judgment rule applies in job discrimination cases just as in other cases" and, thus, that "[n]o thumb is to be placed on either side of the scale." *Id.* at 1026. But the questions (1) whether the summary-judgment procedure applies to Title VII cases—of course it does—and (2) how many cases it will weed out are, to my mind, different.

exception for claims that, while legally viable, might prove time- and labor-intensive.

C

Finally, isn't the idea of scrapping *McDonnell Douglas* in favor of something like the convincing-mosaic standard pretty radical? Not particularly. After all, we've been using (or at least incanting) the convincing-mosaic standard as an alternative to *McDonnell Douglas* for more than a decade now, and other courts have similarly renounced any slavish devotion to *McDonnell Douglas*'s rigid three-step analysis.

Interestingly, we borrowed the phrase "convincing mosaic" from the Seventh Circuit. *See Smith*, 644 F.3d at 1328 (quoting *Silverman v. Board of Educ. of Chi.*, 637 F.3d 729, 734(7th Cir. 2011)). That court has since (and wisely) jettisoned the "convincing mosaic" label, but not its substance. Instead, it has adopted what it calls a "direct method"—in effect, a merger of our direct-evidence and convincing-mosaic frameworks—which permits an employee to oppose her employer's summary-judgment motion using any evidence, whether technically direct or circumstantial, so long as it creates a triable issue of discrimination. *See Sylvester v. SOS Child.'s Vills. Ill., Inc.*, 453 F.3d 900, 902-03 (7th Cir. 2006). The court has described its approach in the following terms, which, to me, sound pretty convincing-mosaic-ish:

> [The] legal standard . . . is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse

> employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."

Ortiz v. Werner Enters. Inc., 834 F.3d 760, 765 (7th Cir. 2016).

For its part, the D.C. Circuit has likewise taken steps to reorient *McDonnell Douglas* toward the ultimate question whether the plaintiff has presented a genuine factual dispute about intentional discrimination. By the time the employer files a summary judgment motion, that court has explained, it "ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision" at step two of *McDonnell Douglas*'s three-step analysis. *Brady*, 520 F.3d at 493. At that point, the D.C. Circuit continued, "whether the employee actually made out a prima facie case is 'no longer relevant' and thus 'disappear[s]' and 'drops out of the picture.'" *Id.* (quoting *Hicks*, 509 U.S. at 510-11, and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)). Rather, the reviewing court then "has before it all the evidence it needs to decide" the ultimate question—namely, "whether the defendant intentionally discriminated against the plaintiff" *Id.* at 494 (quoting *Aikens*, 460 U.S. at 715). So, to avoid any "lingering uncertainty," the D.C. Circuit concluded by emphasizing that in the mine-run summary judgment case, where the employer

has offered a non-discriminatory reason for its action, a reviewing court "*should not* . . . decide whether the plaintiff actually made out a prima facie case" under *McDonnell Douglas* but, rather, should resolve the "central question" whether the "employee [has] produced sufficient evidence for a reasonable jury to find" that "the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id.*

All of which is simply to say: It's not quite as heretical as I once assumed to question whether *McDonnell Douglas* is *the*—or even *an*—appropriate means of deciding Title VII cases at summary judgment. And it wouldn't be quite as radical as it once seemed to shift the focus away from *McDonnell Douglas*'s judge-made formulation and toward Rule 56's plain language.[8]

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[8] Bulky footnote alert: At this point, inside baseballers may be asking, "What about the en banc decision in *Lewis*, which you wrote?" *See Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc). Fair question. To be clear, though, I needn't renounce *Lewis*. For what it set out to do—as we explained there, "to clarify the proper standard for comparator evidence in intentional-discrimination cases" brought under *McDonnell Douglas'*s burden-shifting regime, *id.* at 1220—I continue to believe that *Lewis* gave the right answer. It's just that I've come to doubt that *McDonnell Douglas*—and our downstream application of it—asks the correct questions.

In *Lewis*, we noted that a Title VII plaintiff can respond to her employer's summary-judgment motion in "a variety of ways"—"one of which," we said, "is by navigating the now-familiar three-part burden-shifting framework established by the Supreme Court in *McDonnell Douglas*," whose first part, of course, requires the plaintiff to make out a prima facie case of discrimination. *Id.* at 1217. We further noted the Supreme Court's repeated directive that one of the ways—seemingly, the presumptive

V

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). For a while now, I've uncritically accepted the *McDonnell Douglas* framework as the proper means of resolving Title VII cases on summary judgment, and I've long scorned the

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way—that the plaintiff can demonstrate a prima facie case is by satisfying a constituent four-step test, one prong of which requires her to show "that she was treated differently from another 'similarly situated' individual—in court-speak, a 'comparator.'" *Id.* (quoting *Burdine*, 450 U.S. at 258-59). Faced with an entrenched intra-circuit split, we granted en banc rehearing to answer a discrete question about the proper implementation of that *McDonnell-Douglas*-related "comparator" element: "What standard does the phrase 'similarly situated' impose on the plaintiff: (1) 'same or similar,' (2) 'nearly identical,' or (3) some other standard?" *Id.* at 1218. Our response: A Title VII plaintiff must show that her proposed comparators are "similarly situated in all material respects." *Id.* at 1224-29.

I stand by *Lewis*'s answer to that operational question—one of the many such questions that lower courts, including ours, have taken to asking in the wake of *McDonnell Douglas*. I will confess, though, that the question that we confronted and answered in *Lewis* now strikes me as awfully weedsy-indicative, I worry, of an analysis that (to continue the botanical metaphor) risks missing the forest for the trees. Rather than getting tangled up in prima facie cases, four-step tests, similarly situated comparators, and the like, I've come to believe that we'd be better off cutting straight to the Rule 56 chase: Has the plaintiff presented evidence that gives rise to a genuine factual dispute about whether her employer engaged in intentional discrimination? To my surprise, the convincing-mosaic standard—shorn of its frills—does pretty much exactly that. (Interestingly, and perhaps tellingly, on remand from our en banc decision, Lewis *won—i.e.*, survived summary judgment—on convincing-mosaic grounds. *See Lewis*, 934 F.3d at 1186-90 (on remand)).

convincing-mosaic standard as a judge-made bypass. I repent. I had it backwards. Whereas *McDonnell Douglas* masks and muddles the critical Rule 56 inquiry, "convincing mosaic," for all intents and purposes, is the critical Rule 56 inquiry. On a going-forward basis, therefore, I would promote the convincing-mosaic standard to primary status and, to the extent consistent with Supreme Court precedent, relegate *McDonnell Douglas* to the sidelines.

ERRATA

The concurring opinion has been changed as follows:

Page # Conc. Op 4	
Old	these days are turn
New	these days turn
Page # Conc. Op 9	
Old	the prima facie case
New	the prima-facie case
Page # Conc. Op 12	
Old	dismissed as secondary corollary
New	dismissed as a secondary corollary
Page # Conc. Op 15	
Old	Fed. R. Civ. P. 56(a)— that seems a little topsy-turvy.
New	Fed. R. Civ. P. 56(a)—that seems a little topsy-turvy.
Page # Conc. Op 18	
Old	*Ortiz*, 834 F.3d at 765.
New	*Ortiz v. Werner Enters. Inc.*, 834 F.3d 760, 765 (7th Cir. 2016).

**ORIGINAL OPINION,
U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(DECEMBER 12, 2023)**

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAWANNA TYNES,

Plaintiff-Appellee,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellant.

No. 21-13245

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cv-62891-WPD

Before: Jill PRYOR, NEWSOM, and
GRANT, Circuit Judges.

GRANT, Circuit Judge:

This appeal results from an all-too-common confusion in employment discrimination suits: whether the evidentiary framework set out in *McDonnell Douglas* is a stand-in for the ultimate question of liability in

Title VII discrimination cases. We repeat today what our precedents have already made clear: It is not. Properly understood, *McDonnell Douglas* is an evidentiary framework that shifts the burden of production between the parties to figure out if the true reason for an adverse employment action was the employee's race. It is not a set of elements that the employee must prove—either to survive summary judgment or prevail at trial.

To be sure, in some cases a lack of success in establishing a prima facie case will also reflect a lack of success in showing employment discrimination. But, as both this Court and the Supreme Court have explained, the ultimate question in a discrimination case is whether there is enough evidence to show that the reason for an adverse employment action was illegal discrimination. The prima facie case in the *McDonnell Douglas* framework can help answer that question—but it cannot replace it.

Here, the Florida Department of Juvenile Justice is distracted by a perceived failure on the part of its former employee, Lawanna Tynes, to meet her initial burden of production at the prima facie stage of *McDonnell Douglas*. But that distraction comes with a price—a lack of focus on whether Tynes put forward enough evidence to show that she was fired because of racial discrimination. The jury thought so, and the Department does not challenge the sufficiency of the evidence for that conclusion. The verdict thus stands.

The Department also argues that Tynes did not adequately plead a claim for race discrimination under 42 U.S.C. § 1981, which requires a different standard of causation than Title VII—and, perhaps more importantly for the Department's purposes here,

offers a higher level of potential damages. But again, the Department sets its sights on the wrong target. Though the district court's order expressly relied on its authority to permit amendments to the pleadings under Rule 15(b)(1) of the Federal Rules of Civil Procedure, the Department does not even cite Rule 15(b)(1) on appeal. That means the challenge is forfeited, so we also affirm the district court's order denying the Department's motion for judgment as a matter of law on Tynes's § 1981 claim.

I

Tynes was employed by the Florida Department of Juvenile Justice for sixteen years. At the time of her termination, she was the superintendent of the Broward Regional Juvenile Detention Center. The superintendent's responsibilities include overseeing the facility's operations and ensuring that both juvenile detainees and staff are in a safe environment.

One Sunday, while Tynes was off for medical leave, an unusually high number of incidents required an officer to call for back up. The assistant secretary of detention services, Dixie Fosler, followed up by assembling a technical assistance team to review staffing and personnel issues. After the team's review was complete—but before its report was issued—Fosler terminated Tynes. Tynes had no prior negative performance review or reprimands. Even so, the Department offered a laundry list of reasons for the termination: poor performance, negligence, inefficiency or inability to perform assigned duties, violation of law or agency rules, conduct unbecoming of a public employee, and misconduct.

Tynes sued, alleging race and sex discrimination. Her complaint unambiguously alleged two violations of Title VII of the Civil Rights Act of 1964, which prohibits employers from terminating employees because of their race or sex. 42 U.S.C. § 2000e-2(a)(1). The complaint also stated that it brought "other causes of actions [sic] which can be inferred from the facts herein."

The basis of Tynes's discrimination case was that similarly situated white and male employees were treated differently and that the Department's stated reasons for her termination were pretextual. For comparator evidence, Tynes pointed to Joseph Seeber, a white male, and Daryl Wolf, a white female, who were both superintendents of juvenile detention centers with incidents that reflected a lack of control or failure to abide by the Department's policies.[1] But, unlike Tynes, neither was terminated. Far from it they received only oral reprimands, were allowed to transfer to different facilities, and were granted multiple opportunities to comply with various recommendations for improvement.

As for pretext, Tynes presented evidence of Fosler's personal bias against her. Gladys Negron, Tynes's direct supervisor, testified that she believed Tynes's termination was based on Fosler's personal feelings rather than professional concerns. She said that Fosler's written report "contained several inaccuracies," and even characterized the technical assistance team's efforts as a "search-and-kill mission" against Tynes. At trial, Fosler faltered in her testimony; she

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[1] At summary judgment, the district court held that Seeber and Wolf were both appropriate comparators.

could not recall the basis for her conclusion that Tynes had engaged in "conduct unbecoming as a public employee," nor could she point to another employee fired without negative performance reviews or prior reprimands.

The jury returned its verdict in favor of Tynes and made specific findings in a special verdict form: (1) "race or sex was a motivating factor"; (2) the Department would not have discharged Tynes if it had not taken into account her race or sex; and (3) Tynes's race was a but-for cause of her termination. The jury awarded $424,600 in compensatory damages and $500,000 in damages for emotional pain and mental anguish. The district court ordered the Department to reinstate Tynes to a similar position—but not under Fosler's supervision.

The Department filed a renewed motion for judgment as a matter of law or, alternatively, for a new trial. It argued that the Department was entitled to judgment on Tynes's Title VII claims because she did not present comparators who were "similarly situated in all material respects" and therefore failed to satisfy her burden to establish a prima facie case under *McDonnell Douglas*. The filing also asserted that Tynes had not properly pleaded her § 1981 claim. A § 1981 claim differs in two relevant ways from a Title VII claim—there is no cap on damages and the causation standards are higher. 42 U.S.C. § 1981a(b)(3)–(4); *see Comcast Corp. v. Nat'l Assn of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017-19 (2020).

The district court denied the motion on both issues. It rejected the Department's Title VII arguments because "the circumstantial evidence regarding the two comparators was sufficient to establish the

discrimination claims," and "[c]redibility was for the jury to decide." The court also rejected the § 1981 argument, saying that even if Tynes had not properly pleaded that violation in the first place, Rule 15(b)(1) of the Federal Rules of Civil Procedure gave it "the discretion to allow an amendment" to the complaint during the trial.

The Department now appeals the district court's denial of its renewed motion for judgment as a matter of law.

II

Judgment as a matter of law is appropriate when "the facts and inferences point so overwhelmingly in favor of one party that reasonable people could not arrive at a contrary verdict." *Brown v. Alabama Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010) (alterations adopted and quotation omitted). We review the denial of a motion for judgment as a matter of law de novo. *Id.*

III

A

Title VII of the Civil Rights Act of 1964 outlaws employment discrimination because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Likewise, 42 U.S.C. § 1981 prohibits employers from intentionally discriminating on the basis of race in employment contracts. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 472 (11th Cir. 1999). To prove a claim under either statute, a plaintiff can

use direct evidence, circumstantial evidence, or both. *See Jenkins v. Nell*, 26 F.4th 1243, 1249 (11th Cir. 2022).

Early on, though, it became clear that when only circumstantial evidence was available, figuring out whether the actual reason that an employer fired or disciplined an employee was illegal discrimination was difficult and "elusive." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 n.8 (1981). After all, an employer can generally fire or discipline an employee for "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all," so long as that action "is not for a discriminatory reason.'" *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) (quoting *Nix v. WLCY Radio/Rahall Commc'ns*, 738 E2d 1181, 1187 (11th Cir. 1984)).

To deal with the difficulties encountered by both parties and courts, the Supreme Court in *McDonnell Douglas* set out a burden shifting framework designed to draw out the necessary evidence in employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It works like this. Step one is for the plaintiff, who establishes what *McDonnell Douglas* calls a "prima facie" case of discrimination when she shows that (1) "she belongs to a protected class," (2) "she was subjected to an adverse employment action," (3) "she was qualified to perform the job in question," and (4) "her employer treated `similarly situated' employees outside her class more favorably." *McDonnell Douglas*, 411 U.S. at 802; *Lewis v. City of Union City*, 918 F.3d 1213, 1220-21 (11th Cir. 2019) (en banc). The last requirement is met when the plaintiff presents "evidence of a comparator —someone who is similarly situated in all material respects." *Jenkins*, 26 F.4th at 1249 (quotation omitted).

The prima facie showing entitles the plaintiff to a rebuttable presumption of intentional discrimination. *U.S. Postal Sera Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). The defendant then rebuts that presumption (if it can) by offering evidence of a valid, non-discriminatory justification for the adverse employment action. *Id.* at 714. Once that justification is offered, the presumption of discrimination falls away and the plaintiff tries to show not only that the employer's justification was pretextual, but that the real reason for the employment action was discrimination. *Id.* at 714-15; *Burdine*, 450 U.S. at 256. This final question "merges with the plaintiff's ultimate burden of persuading the factfinder that she has been the victim of intentional discrimination." *Lewis*, 918 F.3d at 1221 (quoting *Burdine*, 450 U.S. at 256 (alterations adopted)).

McDonnell Douglas, in short, is an evidentiary tool that functions as a "*procedural* device, designed only to establish an order of proof and production." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993); *see also Burdine*, 450 U.S. at 255 n.8; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). What *McDonnell Douglas* is not is an independent standard of liability under either Title VII or § 1981. Nor is its first step, the prima facie case—"establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011); *see also Brady v. Off. of the Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008). Often, however, parties (and sometimes courts) miss this

fundamental point and wrongly treat the prima facie case as a substantive standard of liability.

To be fair, the *McDonnell Douglas* court's terminology likely bears some responsibility for the continuing confusion on this point. When the Supreme Court uses the term "prima facie case" in this context, it does so "in a special sense." *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1223 (10th Cir. 2003) (Hartz, J., writing separately). The Court itself has explained that although that phrase may sometimes "describe the plaintiffs burden of producing enough evidence to permit the trier of fact to infer the fact at issue," within the *McDonnell Douglas* framework the term "prima facie case" has a different meaning—it marks "the establishment of a legally mandatory, rebuttable presumption." *Burdine*, 450 U.S. at 254 n.7 (citing 9 J. Wigmore, Evidence § 2494 (3d ed. 1940)).

So, although in other contexts a prima facie case typically *does* mean enough evidence for a plaintiff to prevail on a particular claim, here the meaning is different. Under *McDonnell Douglas*, a plaintiff who establishes a prima facie case is entitled to a "legally mandatory, rebuttable presumption" that the employer intentionally discriminated against her. *Id.* What that means is that once a plaintiff satisfies her prima facie burden, the defendant "knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it." *Hicks*, 509 US. at 510 n.8. The presumption of discrimination introduced by the prima facie case thus helps narrow things down and "frame the factual issue" by drawing out an explanation that the plaintiff can then seek to demonstrate is pretextual. *Burdine*, 450 US. at 255. In this way, the prima facie showing exerts a sort of "practical

coercion" that forces the defendant to "come forward" with evidence explaining its actions. *Hicks*, 509 U.S. at 510 n.8, 511. It also offers a benefit for the defendant employer, who now has a better idea of what evidence needs to be rebutted. *See id*.

But once the prima facie case has "fulfilled its role of forcing the defendant to come forward with some response," it no longer has any work to do. *Id*. at 510-11. Where "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is *no longer relevant*." *Aikens*, 460 U.S. at 715 (emphasis added). This is so because the "district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff." *Id*. (quotation omitted). So when the defendant employer offers evidence of the reason for its actions toward the plaintiff, the presumption of discrimination created by the prima facie case "simply drops out of the picture." *Hicks*, 509 U.S. at 511; *see also Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1061 (11th Cir. 1994). That is a far cry from serving as a substitute standard necessary to survive summary judgment.

Another reason for the confusion? A failure in the prima facie case often also reflects a failure of the overall evidence. Even though we do not dwell on whether the technical requirements of the prima facie case are met once the defendant has met its burden of production, we keep in mind that the *questions* the plaintiff must answer to make a prima facie case are relevant to the ultimate question of discrimination. A plaintiff who fails to prove that she was a member of a protected class, for example, or that she suffered an

adverse employment action, will be unable to prove that she was unlawfully discriminated against. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1327-28 (11th Cir. 1998); *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1202-04 (11th Cir. 2013). We'll admit that we have at times framed that analysis in terms of whether the plaintiff has established a prima facie case, but the more fundamental problem with such a failure of evidence is that it means the plaintiff cannot prove a necessary element for his employment discrimination case. *See, e.g.*, *Kidd*, 731 F.3d at 1202-04.

This distinction is important because the components of a prima facie case are not necessarily coextensive with the evidence needed to prove an employment discrimination claim. That is why a plaintiff need not plead the elements of a prima facie case to survive a motion dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). And it explains why courts in this Circuit do not instruct juries on the prima facie case or the *McDonnell Douglas* framework. *See Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999).

It is also why "the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Smith*, 644 F.3d at 1328. Indeed, "the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* at 1328. That is because *McDonnell Douglas* is "only one method by which the plaintiff can prove discrimination by circumstantial evidence." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 n.3 (11th Cir. 2005). A plaintiff who cannot satisfy this framework may still be able to prove her case with what we have

sometimes called a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Smith*, 644 F.3d at 1327-28 (footnote and quotation omitted); *see also Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (*Lewis II*).

This rearticulation of the summary judgment standard arose in large part because of widespread misunderstandings about the limits of *McDonnell Douglas*—the same misunderstandings that persist today. A "convincing mosaic" of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action—the ultimate inquiry in a discrimination lawsuit.[2] *Jenkins*, 26 F.4th at 1250. This approach to analyzing the evidence treats an employment discrimination suit in same way we would treat any other case—jumping directly to the ultimate question of liability and deciding whether the moving party is entitled to judgment at that stage of the case.

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[2] A plaintiff proving her case through the convincing mosaic standard may point to any relevant and admissible evidence. As we have said, "no matter its form, so long as the circumstantial evidence raises a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper." *Smith*, 644 F.3d at 1328. Evidence that is likely to be probative is "evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) systematically better treatment of similarly situated employees, and (3) pretext." *Jenkins*, 26 FAth at 1250 (quotation omitted). Given the wide scope of available evidence, the convincing mosaic standard "can be of particular significance when the plaintiff cannot identify a similarly situated comparator," as the *McDonnell Douglas* framework requires. *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1273 n.1 (11th Cir. 2021).

It is no different than the standards we ordinarily apply in deciding summary judgment and post-trial motions. "If the plaintiff presents enough circumstantial evidence to raise a reasonable inference of intentional discrimination, her claim will survive summary judgment." *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1320 (2012).

All that to say, in deciding motions for summary judgment or judgment as a matter of law, parties already understand that, when we use what we have called the convincing mosaic standard, we look beyond the prima facie case to consider all relevant evidence in the record to decide the ultimate question of intentional discrimination. But parties do not always understand that we are answering that same question when using the *McDonnell Douglas* framework. Under *McDonnell Douglas*, the failure to establish a prima facie case is fatal only where it reflects a failure to put forward enough evidence for a jury to find for the plaintiff on the ultimate question of discrimination. This may mean that there was not enough evidence to infer discrimination. Or it may be that there was no adverse employment action. But the analysis turns on the substantive claims and evidence in the case, not the evidentiary framework.

For these reasons, we have repeatedly emphasized that after a trial we "should not revisit whether the plaintiff established a prima facie case." *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1194 (11th Cir. 2004); *see also, e.g., Holland v. Gee*, 677 F.3d 1047, 1056 (11th Cir. 2012); *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1150 (11th Cir. 2005); *Tidwell v. Carter Prods.*, 135 F.3d 1422, 1426 n.1 (11th Cir. 1998); *Richardson v. Leeds Police Dep't*, 71 F.3d 801,

806 (11th Cir. 1995); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1129 (11th Cir. 1984). Instead, we ask only one question: whether there is a sufficient evidentiary basis for the jury to find that the defendant intentionally discriminated against the plaintiff. *Cleveland*, 369 F.3d at 1194.

B

That analysis solves this case. The Department's only argument is that the comparator employees that Tynes offered were not adequate to establish a prima facie case of discrimination under *McDonnell Douglas*. That may be true; under our precedent a comparator employee must be "similarly situated in all material respects"—a high bar to meet. *Lewis*, 918 F.3d at 1218. But the jury's factual inquiry was whether the Department intentionally discriminated against Tynes, and its answer was "yes." The Department does not contend that the evidence, taken as a whole, could not support the jury's verdict. By focusing exclusively on Tynes's comparator evidence, the Department has forfeited any challenge to the ultimate finding of discrimination.

Of course, the strength of Tynes's comparator evidence is relevant to the ultimate question of intentional discrimination. *Holland*, 677 F.3d at 1056-57. But to the extent that there are material differences between Tynes and her comparators at this stage of the case, it is the jury's role—not ours—to determine how much weight the comparator evidence should be given. In other words, it is possible that her comparators were insufficient to establish a prima facie case yet still relevant to the ultimate question of intentional discrimination. *See Lewis II*, 934 F.3d at

1187-88. To win after trial, the Department would have needed to explain why the evidence, taken as a whole, was insufficient to support the jury's verdict. Because it failed to do so, we affirm the judgment of the district court denying the Department's renewed motion for judgment as a matter of law on the Title VII claims.

IV

The Department also challenges the jury's verdict on Tynes's § 1981 claim, arguing that her complaint did not adequately plead the § 1981 claim and that she did not prove that race was a "but-for" cause of her termination.[3] The Department, however, has forfeited both arguments.

The Department is right about one thing—Tynes's complaint may not have set out a separate claim under § 1981. *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1322-23 (11th Cir. 2015) (requiring a complaint to set out a different count for each cause of action or claim for relief).[4] Even so, the district court held that it had discretion to allow an amendment to the pleadings during the trial under Rule 15(b)(1).

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[3] In *Comcast*, the Supreme Court held that but-for causation was required to prove a § 1981 claim. 140 S. Ct. at 1019.

[4] In addition to the Title VII claims, the complaint says it brings "other causes of actions [sic] which can be inferred from the facts herein." But it does not set out a § 1981 claim in its own count; instead, it refers to § 1981 in the jurisdictional section of the complaint as a federal question presented in the case. What's more, each of Tynes's Title VII counts alleges that she "is a member of a protected class under § 1981," and the prayer for relief requests that the court "[a]djudge and decree that Defendant has violated 42 U.S.C. § 1981."

That rule permits the pleadings to be amended at trial when "a party objects that evidence is not within the issues raised in the pleadings" so long as "doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b)(1). The district court stated that it found that permitting amendment would not prejudice the Department.

The Department does not challenge the district court's authority under Rule 15. Indeed, at oral argument counsel expressed a lack of familiarity with that rule. And when "an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). So while it is not clear whether the district court properly invoked Rule 15(b)(1)—after all, Tynes did not actually move to amend her complaint—any challenge on that ground is forfeited. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1352 (11th Cir. 2011); *Green Country Food Mkt., Inc., v. Bottling Grp., LLC*, 371 F.3d 1275, 1281 (10th Cir. 2004).

The Department's second § 1981 argument—that Tynes did not prove that race was a but-for cause of her termination—is also forfeited. In its post-trial motion, the Department argued that because Tynes did not plead a § 1981 claim, her complaint did not *allege* that race was a but-for cause. But it did not argue that Tynes failed to *prove* that race was a but-

for cause.[5] "It is well-settled that we will generally refuse to consider arguments raised for the first time on appeal." *Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1249 (11th Cir. 2012). The Department cannot now repackage its pleading argument into a claim that Tynes did not prove an essential element at trial.

* * *

After a full trial on the merits, a defendant cannot successfully challenge the jury's verdict by arguing only that the plaintiff's comparators were inadequate or that the prima facie case was otherwise insufficient. Here, the Department was required to demonstrate why the record evidence could not support the jury's verdict and failed to do so. Because the Department also failed to adequately challenge the grounds upon which the district court denied its motion with respect to Tynes's § 1981 claim, the district court's order is AFFIRMED.

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[5] The clear intention of the Department's Rule 50 motions was to challenge the adequacy of the pleadings. The Department may contend (though it did not do so directly before this Court) that it preserved a proof-based argument with this statement: "Plaintiff offered no testimony or evidence at trial that her race was the `but-for' cause of her termination." In context, both we and the district court read this as support for the pleading-based argument, but in any event, such a statement is far too conclusory on its own to preserve the issue for appeal.

CONCURRING OPINION OF JUDGE NEWSOM

NEWSOM, Circuit Judge, concurring:

Today's majority opinion offers an important critique of the role that *McDonnell Douglas*'s burden-shifting analysis has come to play in deciding Title VII cases. In particular, the majority explains that *McDonnell Douglas* (1) provides only an "evidentiary framework" and (2) was never meant to establish "an independent standard of liability" or specify a "set of elements that the employee must prove—either to survive summary judgment or prevail at trial." Maj. Op. at 2, 9. Unfortunately, as the majority notes, "parties (and sometimes courts)" often "miss this fundamental point and wrongly treat" *McDonnell Douglas*, and in particular its initial prima-facie-case step, "as a substantive standard of liability." *Id*. at 9. And although this case doesn't arise on summary judgment, the majority correctly observes that the overreading of—and consequent overemphasis on—*McDonnell Douglas* has become particularly acute at the Rule 56 stage, where courts have increasingly taken to treating the test's prima-facie-evidence benchmark "as a substitute standard necessary to survive summary judgment." *Id*. at 11; *see also id*. at 9-12 (detailing the problems with courts' applications of *McDonnell Douglas* at summary judgment).

Yes, yes, and yes—I completely agree. I'll confess, though, that I've developed an even deeper skepticism of *McDonnell Douglas*. The majority opinion seeks to put courts back on the right path in their application of *McDonnell Douglas*; I tend to think we might be better off on an altogether different path. Here's what I mean: I'd long taken for granted that *McDonnell*

Douglas's three-step framework provided the presumptively proper means of deciding Title VII cases at summary judgment. I've changed my mind. *McDonnell Douglas*, it now seems to me, not only lacks any real footing in the text of Rule 56 but, worse, actually obscures the answer to the only question that matters at summary judgment: Has the plaintiff shown a "genuine dispute as to any material fact"—in the typical Title VII case, as to whether her employer engaged in discrimination based on a protected characteristic. Instead of *McDonnell Douglas*—which, to be clear, neither the Supreme Court nor we have ever said provides the sole mechanism for adjudicating summary judgment motions—courts should employ something like our oft-maligned "convincing mosaic" standard, which I had always viewed as something of a rogue but which, upon reflection, much more accurately captures and implements the summary judgment standard. For me, it's quite the turnabout, so I should explain myself.

I

Title VII of the landmark Civil Rights Act of 1964 broadly prohibits workplace discrimination. In relevant part, its operative provision states that—

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or 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 . . . .

42 U.S.C. § 2000e-2(a)(1). Title VII was (and is) an historic piece of legislation that tackled (and continues to tackle) one of the country's weightiest social problems. Legally speaking, though, it's just a statute, no different from hundreds of others. And so, as the Supreme Court has repeatedly reminded us, the "ordinary rules" of civil procedure apply to Title VII cases. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("[T]he ordinary rules for assessing the sufficiency of a complaint apply."); *see also, e.g., U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("[N]one of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

Many, if not most, Title VII cases are decided at summary judgment. The "ordinary rule[ ]" for evaluating the propriety of summary judgment, of course, is Federal Rule of Civil Procedure 56:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). In the mine-run discrimination case, the key issue is whether the employer engaged in some action, in the statute's words, "because of" an employee's race, sex, religion, or other protected characteristic. Accordingly, the fundamental question at summary judgment is—or should be—whether there is a genuine dispute of material fact about that all-important causation issue.

But not all analytical frameworks hew closely to that question. Briefly, we assess employment-discrimination cases at summary judgment using one or more of three approaches. First, a reviewing court might consider whether the plaintiff has pointed to *direct* evidence of discrimination. If the case instead turns on *circumstantial* evidence, the court might ask—second—whether the plaintiff can survive *McDonnell Douglas*'s burden-shifting analysis or—third—whether she can assemble what we have called a "convincing mosaic" of evidence suggesting discrimination, *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

In terms of consistency with Rule 56, the direct-evidence analysis, reserved for cases featuring particularly "blatant" and overtly discriminatory comments or conduct, *see Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1156 (11th Cir. 2020), performs well enough. But direct-evidence cases are increasingly rare, so most Title VII suits these days are turn on circumstantial evidence. Among those, *McDonnell Douglas* is clearly the dominant framework, with "convincing mosaic" trailing along as something of an afterthought.[1] And until recently, that seemed exactly right to me—I had marinated in *McDonnell Douglas* and its progeny for

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[1] So far as I can tell, we have considered the convincing-mosaic test in only five published Title VII decisions, three of which involved cursory single-paragraph rejections of a plaintiff s invocation of it. *See, e.g., Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011); *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1335 (11th Cir. 2015); *Trask v. Secretary, Dep't of Veterans Affs.*, 822 F.3d 1179, 1193 (11th Cir. 2016), abrogated on other grounds by *Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (on remand); *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1273 n.2 (11th Cir. 2021).

so long that I had come to view the convincing-mosaic test as an interloper, a hack contrived to save cases that might otherwise go out on summary judgment.

I've concluded that I was wrong about that—as in 180 degrees wrong. Upon reflection, it now seems to me that *McDonnell Douglas* is the interloper—*it* is the judge-concocted doctrine that obfuscates the critical inquiry. The convincing-mosaic standard, by contrast—despite its misleadingly florid label—is basically just Rule 56 in operation. Quite unlike *McDonnell Douglas*, it actually asks the key question: Does the "record, viewed in a light most favorable to the plaintiff, present[ ] a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker"? *Smith*, 644 F.3d at 1328 (internal quotations and footnote omitted). Strip away the grandiloquence—after all, "convincing mosaic of circumstantial evidence" just means "evidence"—and that is *exactly* Rule 56's summary judgment standard.

In the discussion that follows, I'll explain briefly why I've come to believe (1) that *McDonnell Douglas* is the wrong framework to apply in deciding Title VII cases at summary judgment and (2) that our convincing-mosaic standard—which I'd rebrand slightly—is the right one. I'll also try to anticipate and respond to a few objections.

II

To start, why the loss of faith in *McDonnell Douglas*? In short, I fear that it doesn't reliably get us to the result that Rule 56 requires. *See also* Maj. Op. at 11 (noting that "the components of a prima facie case are not necessarily coextensive with the evidence

needed to prove an employment discrimination claim"). And in retrospect, that shouldn't be particularly surprising, because *McDonnell Douglas*'s reticulated, multistep framework forces courts to ask and answer a series of questions that only peripherally relate to the one that Rule 56 poses: Has the plaintiff presented "a genuine issue as to any material fact"—in the typical Title VII case, about her employer's discriminatory intent? Let me unpack my concern, in three parts.

First, as a threshold matter, *McDonnell Douglas* seems (in retrospect) awfully made up. Here's how the Supreme Court has described its handiwork:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252-53 (1981) (internal citations and footnote omitted). There's certainly no textual warrant in Title VII or the Federal Rules for so elaborate a scheme, and so far as

I know, no one has ever even sought to justify it as rooted in either. Perhaps a product of its time, the whole thing is quite legislative, quite *Miranda*-esque —"set forth," to use the Supreme Court's own words. *See also* Maj. Op. at 7-8 (observing that *McDonnell Douglas* "set out" the burden-shifting framework). And for me, the framework's made-up-ed-ness is a flashing red light—prima facie evidence, if you will, that something is amiss. *Cf. Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring) ("[U]nelected, unaccountable federal judges shouldn't make stuff up.").

Second, whatever it was that the Supreme Court initially conjured, it seems to have taken on a life of its own. Perhaps most jarringly, *McDonnell Douglas*'s burden-shifting framework has become the presumptive means of resolving Title VII cases at summary judgment—despite the facts (1) that *McDonnell Douglas* itself arose not on summary judgment but out of a bench trial, *see Green v. McDonnell Douglas Corp.*, 299 F. Supp. 1100, 1102 (E.D. Mo. 1969), and (2) that, so far as I can tell, the Supreme Court has specifically addressed *McDonnell Douglas*'s application to Title VII cases at summary judgment only once, and in that decision held that it didn't apply, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 118-19 (1985).[2]

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[2] Ironically, resolving cases at summary judgment seems to be *McDonnell Douglas*'s sole remaining office. The Supreme Court has clarified that its burden-shifting analysis is inapplicable both at the pleading stage, *see Swierkiewicz*, 534 U.S. at 508, and in deciding post-trial motions, *see Aikens*, 460 U.S. at 715, and most courts of appeals have excised references to *McDonnell Douglas*'s framework from their pattern jury instructions, *see* Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503, 528 & nn. 189–91 (2008) (collecting cases).

Even beyond that, despite the Supreme Court's occasional reminders that *McDonnell Douglas*'s "procedural device" was intended "only to establish an order of proof and production," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993),[3] lower courts have become progressively obsessed with its minutiae, allowing it to drive substantive outcomes. The framework's constituent details have grown increasingly intricate and code-like, as courts have taken to forcing a holistic evidentiary question—whether all the evidence, viewed in the light most favorable to the plaintiff, creates a genuine factual dispute—into a collection of distinct doctrinal pigeonholes. For instance, we have explained—and we're hardly alone—that *McDonnell Douglas*'s first stage, the prima facie case, further entails a "four-step test," one step of which requires the plaintiff to show that she was treated differently from a similarly situated "comparator." *Lewis v. City of Union City*, 918 F.3d 1213, 1220-22 (11th Cir. 2019) (en banc). We've then treated these requirements as a series of standalone, case-dispositive elements—boxes to be checked—rather than simply asking the controlling question whether the facts give rise to a

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To be fair, the Court has utilized *McDonnell Douglas* to evaluate claims under *other* statutes at summary judgment. None of those decisions, though, has squarely addressed *McDonnell Douglas*'s consistency (or inconsistency) with Rule 56. *See, e.g., Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 231 (2015); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-52 (2003); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

[3] *See also Burdine*, 450 U.S. at 255 n.8 (observing that the *McDonnell Douglas* framework was designed merely to help the parties progressively "sharpen the inquiry into the elusive factual question of intentional discrimination").

triable issue of discrimination. In so doing, we've mistakenly allowed the tool to eclipse (and displace) the rule.[4]

Finally, and perhaps worst of all, it now strikes me that the *McDonnell Douglas* three-step—particularly as supplemented by the first step's constituent four-step—obscures the actual Title VII inquiry, especially at summary judgment. I'll readily confess that others have beaten me to this conclusion, but they make for pretty good company. For instance, while a judge on the D.C. Circuit, Justice Kavanaugh described the fixation on the plaintiffs prima facie case as "a largely unnecessary sideshow" that "has not benefited employees or employers," has not "simplified or expedited court proceedings," and, in fact, "has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Worse, he explained, the *McDonnell Douglas* framework isn't just wasteful, it is potentially misleading in that it entices reviewing courts to focus on non-core issues: At summary judgment, the prima facie case is "almost always irrelevant" and "usually [a] misplaced" inquiry—because once the defendant offers an explanation for its decision, "whether the plaintiff really" made

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[4] *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69, 71 (2011) ("[T]he key question in modern discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination."); *see also* Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 374-75 (2021) ("In practice, however, the causation standard employed is less important than whether a plaintiff can successfully squeeze the evidence into an arcane and complicated body of judge-made law . . . .).

out a prima facie case no longer matters. *Id*. at 493-94 (quoting *Aiken*, 460 U.S. at 715). Rather, then Judge Kavanaugh continued, once the defendant explains itself, "the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that . . . the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id*. at 494. That, of course, *is* the Rule 56 question—shorn of all its *McDonnell Douglas* prophylaxis.[5]

To be clear, Justice Kavanaugh is hardly alone. Justice Gorsuch made similar observations during his tenure on the Tenth Circuit. Using the very same descriptor that Justice Kavanaugh had, he explained that *McDonnell Douglas*'s staged inquiries "sometimes prove a sideshow," *Hinds v. Sprint/United Mgmt. Co*.,

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[5] One clarification: While the prima-facie-case question is undoubtedly "irrelevant" as a formal matter following an employer's summary judgment motion—at that point, the employer having explained itself, the focus turns to the ultimate question—that's not to say that the sort of proof that might inform a plaintiff s prima facie showing is irrelevant as an evidentiary matter. As the majority opinion observes, "the questions the plaintiff must answer to make a prima facie case are relevant to the ultimate question of discrimination"—whether she was a member of a protected class, whether she suffered an adverse employment decision, how her colleagues were treated, etc. Maj. Op. at 11. So it may well be that a plaintiff who lacks the evidence necessary to make out a prima facie case should lose at summary judgment. Importantly, though, she shouldn't lose because she has failed to dot her Is and cross her Ts under *McDonnell Douglas*, but rather because she has failed to proffer evidence that gives rise to a genuine issue of material fact concerning whether her employer engaged in unlawful discrimination. *Cf. also id*. at 11 ("A failure in the prima facie case often also reflects a failure of the overall evidence.").

523 F.3d 1187, 1202 n.12 (10th Cir. 2008), that the framework itself "has proven of limited value," *Walton v. Powell*, 821 F.3d 1204, 1210 (10th Cir. 2016), and that courts too often get bogged down "engag[ing] in the business of trying to police the often fine line between" when *McDonnell Douglas* does and doesn't apply, *id*. at 1211.[6]

* * *

So, what's my takeaway regarding *McDonnell Douglas*? From a case that didn't even arise on summary judgment has emerged a purported "procedural device" that, in day-to-day operation, disregards the duly promulgated rules of summary judgment procedure, that overrides the substance of Title VII, and whose multistep burden-shifting formula obscures the decisive question: Does the summary judgment record reveal a genuine dispute of material fact about whether

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[6] Others have voiced similar complaints. Judge Easterbrook has described Title VII summary judgment cases generally as implicating a "rat's nest of surplus `tests.'" *Ortiz v. Werner Enters., Inc*., 834 F.3d 760, 766 (7th Cir. 2016). Judge Hartz has observed that the *McDonnell Douglas* framework, in particular, "only creates confusion and distracts courts from `the ultimate question of discrimination.'" *Wells v. Colorado Dept of Transp*., 325 E3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring). Judge Wood has lamented the "snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike" and expressed her view that *McDonnell Douglas*'s successive inquiries have "lost their utility." *Coleman v. Donahoe*, 667 E3d 835, 863 (7th Cir. 2012) (Wood, J., concurring). And Judge Tymkovich, training his critique on *McDonnell Douglas*'s third step, has complained that the "focus on pretext has shifted the emphasis of an employment discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee." Tymkovich, *supra* note 2, at 505.

an employer discriminated against its employee "because of" a protected characteristic?

III

So, as it turns out, there's plenty not to like about *McDonnell Douglas* as a summary judgment tool. And what of the convincing-mosaic standard, which I've confessed to having long dismissed as secondary corollary of sorts or, worse, a manipulable workaround? Turns out there's a lot to like.

McDonnell Douglas, it now seems to me, leads us away from—or at the very least is orthogonal to—Rule 56's north star. By contrast, the convincing-mosaic standard points, even if a little clumsily, right at it. Here's what we said in *Smith*:

> [T]he plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.

644 F.3d at 1328 (internal quotation marks, citations, and footnote omitted). Stripped of the rhetorical flourish—the superfluous "convincing mosaic of" preface—that is, in essence, just a restatement of Rule 56's summary judgment standard. No bells, no whistles—just reasonable inferences and triable facts.

What accounts, then, for the convincing-mosaic standard's failure to launch? Well, inertia for starters. By the time the convincing-mosaic option came along,

at least as a stand-alone test, parties, courts, and commentators had been debating and applying *McDonnell Douglas* for decades. Separately, I think the convincing-mosaic framework suffers from a branding problem of sorts, of which its rhetoric is a big part. The informal moniker—"convincing mosaic"—just sounds contrived, and thus sends formalists like me into a dither. It's also a little misleading: Satisfying the test requires *neither* "convincing" a reviewing court *nor* presenting enough evidence to compose a "mosaic." Summary judgment turns on the existence of a genuine factual dispute; courts deciding summary judgment motions don't weigh evidence, and they don't decide (let alone announce) whether they're convinced. And a mosaic—in its truest sense a collection—isn't necessary to defeat summary judgment; a single item of evidence can at least theoretically suffice.

In any event, as between the two current contestants, it now strikes me that the convincing-mosaic standard—which I'd be inclined to re-brand as, perhaps, just the "Rule 56" standard, to denude it of its unnecessary ornamentation—comes much closer to capturing the essence of summary judgment than does *McDonnell Douglas*.

IV

Let me try, in closing, to anticipate and address a few likely objections.

A

First, does any of this really matter? I think it does. We shouldn't perpetuate the existing regime by dint of its sheer existence. We should strive to get the cases right according to the governing law. And for

present purposes, the "governing law" comprises (1) Title VII's prohibition on employment discrimination perpetrated "because of" an employee's protected characteristics, 42 U.S.C. § 2000e-2(a)(1), and (2) Rule 56's focus on the existence of a "genuine dispute" about that causation issue, *see* Fed. R. Civ. P. 56(a). For reasons I've tried to explain, *McDonnell Douglas* is at best only tangentially directed to those issues; the convincing-mosaic standard—or something like it—is much more immediately so.

Moreover, I fear that our increasingly rigid application of *McDonnell Douglas* may actually be causing us to get cases *wrong*—in particular, to reject cases at summary judgment that should, under a straightforward application of Rule 56, probably proceed to trial. A plaintiff who can marshal strong circumstantial evidence of discrimination but who, for whatever reason, can't check all of the *McDonnell-Douglas*-related doctrinal boxes—for instance, because she can't *quite* show that her proffered comparator is sufficiently "similarly situated," *see supra* at 9—may well lose at summary judgment, whereas a plaintiff who has a slightly better comparator but little other evidence of discrimination might survive. Especially in light of Rule 56's plain language—which focuses on the existence of a "genuine dispute as to any material fact," Fed. R. Civ. P. 56(a)— that seems a little topsy-turvy.

B

Second, wouldn't a wholehearted embrace of the convincing-mosaic framework result in more cases going to trial and thereby overburden already busy district courts? Well, maybe. To the extent that *McDonnell Douglas*'s judge-created elements and sub-

elements are currently causing courts to grant summary judgment in cases where, in Rule 56 terms, a genuine dispute exists, then yes, ditching them in favor of something that looks more like the convincing-mosaic standard would lead to more trials.[7] But inasmuch as that's a problem, courts shouldn't manufacture or jerry-rig doctrine to fix it. I've never thought that judges should decide cases in an effort to drive good outcomes or avoid bad ones, and now's not the time to start. For good or ill, the facts are (1) that Title VII gives plaintiffs a right to a jury trial in appropriate circumstances, *see* 42 U.S.C. § 1981a(c), and (2) that Rule 56 forestalls jury trials only where there is "no genuine dispute as to any material fact"—here, as to the employer's causal motivation. Some cases will warrant trial under Rule 56's standard, some won't. But neither Title VII nor the Federal Rules make an exception for claims that, while legally viable, might prove time- and labor-intensive.

C

Finally, isn't the idea of scrapping *McDonnell Douglas* in favor of something like the convincing-

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[7] Reasonable minds can differ about how many cases are wrongly decided because of *McDonnell Douglas*. Many of our early cases doubted whether an employer's motive is susceptible to summary judgment at all. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1025 (11th Cir. 2000) (en banc) (collecting cases). When we held that it is, we did so on the ground that "the summary judgment rule applies in job discrimination cases just as in other cases" and, thus, that "[n]o thumb is to be placed on either side of the scale." *Id.* at 1026. But the questions (1) whether the summary judgment procedure applies to Title VII cases—of course it does—and(2) how many cases it will weed out are, to my mind, different.

mosaic standard pretty radical? Not particularly. After all, we've been using (or at least incanting) the convincing-mosaic standard as an alternative to *McDonnell Douglas* for more than a decade now, and other courts have similarly renounced any slavish devotion to *McDonnell Douglas*'s rigid three-step analysis.

Interestingly, we borrowed the phrase "convincing mosaic" from the Seventh Circuit. *See Smith*, 644 E3d at 1328 (quoting *Silverman v. Board of Educ. of Chi.*, 637 F.3d 729, 734 (7th Cir. 2011)). That court has since (and wisely) jettisoned the "convincing mosaic" label, but not its substance. Instead, it has adopted what it calls a "direct method"—in effect, a merger of our direct-evidence and convincing-mosaic frameworks—which permits an employee to oppose her employer's summary judgment motion using any evidence, whether technically direct or circumstantial, so long as it creates a triable issue of discrimination. *See Sylvester v. SOS Child.'s Vills. Ill., Inc.*, 453 F.3d 900, 902-03 (7th Cir. 2006). The court has described its approach in the following terms, which, to me, sound pretty convincing-mosaic-ish:

> [The] legal standard . . . is simply whether the evidence would permit a reasonable fact-finder to conclude that the plaintiffs race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must

> be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."

Ortiz, 834 F.3d at 765.

For its part, the D.C. Circuit has likewise taken steps to reorient *McDonnell Douglas* toward the ultimate question whether the plaintiff has presented a genuine factual dispute about intentional discrimination. By the time the employer files a summary judgment motion, that court has explained, it "ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision" at step two of *McDonnell Douglas*'s three-step analysis. *Brady*, 520 F.3d at 493. At that point, the D.C. Circuit continued, "whether the employee actually made out a prima facie case is 'no longer relevant' and thus 'disappear[s]' and 'drops out of the picture.'" *Id.* (quoting *Hicks*, 509 U.S. at 510-11, and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)). Rather, the reviewing court then "has before it all the evidence it needs to decide" the ultimate question—namely, "whether the defendant intentionally discriminated against the plaintiff." *Id.* at 494 (quoting *Aikens*, 460 U.S. at 715). So, to avoid any "lingering uncertainty," the D.C. Circuit concluded by emphasizing that in the mine-run summary judgment case, where the employer has offered a non-discriminatory reason for its action, a reviewing court "*should not* . . . decide whether the plaintiff actually made out a prima facie case" under *McDonnell Douglas* but, rather, should resolve the "central question" whether the "employee [has] produced sufficient evidence for a reasonable jury to find" that "the employer intentionally discriminated against the

employee on the basis of race, color, religion, sex, or national origin?" *Id*.

All of which is simply to say: It's not quite as heretical as I once assumed to question whether *McDonnell Douglas* is *the*—or even *an*—appropriate means of deciding Title VII cases at summary judgment. And it wouldn't be quite as radical as it once seemed to shift the focus away from *McDonnell Douglas*'s judge-made formulation and toward Rule 56's plain language.[8]

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[8] Bulky footnote alert: At this point, inside baseballers may be asking, "What about the en banc decision in *Lewis*, which you wrote?" *See Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc). Fair question. To be clear, though, I needn't renounce *Lewis*. For what it set out to do—as we explained there, "to clarify the proper standard for comparator evidence in intentional-discrimination cases" brought under *McDonnell Douglas*'s burden-shifting regime, *id*. at 1220—I continue to believe that *Lewis* gave the right answer. It's just that I've come to doubt that *McDonnell Douglas*—and our downstream application of it asks the correct questions.

In *Lewis*, we noted that a Title VII plaintiff can respond to her employer's summary judgment motion in "a variety of ways"—"one of which," we said, "is by navigating the now-familiar three-part burden-shifting framework established by the Supreme Court in *McDonnell Douglas*," whose first part, of course, requires the plaintiff to make out a prima facie case of discrimination. *Id*. at 1217. We further noted the Supreme Court's repeated directive that one of the ways—seemingly, the presumptive way—that the plaintiff can demonstrate a prima facie case is by satisfying a constituent four-step test, one prong of which requires her to show "that she was treated differently from another 'similarly situated' individual—in court-speak, a 'comparator.'" *Id*. (quoting *Burdine*, 450 U.S. at 258-59). Faced with an entrenched intra-circuit split, we granted en banc rehearing to answer a discrete question about the proper implementation of that *McDonnell-Douglas*-related "comparator"

V

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). For a while now, I've uncritically accepted the *McDonnell Douglas* framework as the proper means of resolving Title VII cases on summary judgment, and I've long scorned the convincing-mosaic standard as a judge-made bypass. I repent. I had it backwards. Whereas *McDonnell Douglas* masks and muddles the critical Rule 56 inquiry, "convincing mosaic," for all intents and purposes, is the critical Rule 56 inquiry. On a going-forward basis, therefore, I would promote the convincing-mosaic

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element: "What standard does the phrase 'similarly situated' impose on the plaintiff: (1) 'same or similar,' (2) 'nearly identical,' or (3) some other standard?" *Id.* at 1218. Our response: A Title VII plaintiff must show that her proposed comparators are "similarly situated in all material respects." *Id.* at 1224-29.

I stand by *Lewis*'s answer to that operational question—one of the many such questions that lower courts, including ours, have taken to asking in the wake of *McDonnell Douglas*. I will confess, though, that the question that we confronted and answered in *Lewis* now strikes me as awfully weedsy—indicative, I worry, of an analysis that (to continue the botanical metaphor) risks missing the forest for the trees. Rather than getting tangled up in prima facie cases, four-step tests, similarly situated comparators, and the like, I've come to believe that we'd be better off cutting straight to the Rule 56 chase: Has the plaintiff presented evidence that gives rise to a genuine factual dispute about whether her employer engaged in intentional discrimination? To my surprise, the convincing-mosaic standard—shorn of its frills—does pretty much exactly that. (Interestingly, and perhaps tellingly, on remand from our en banc decision, Lewis *won*—*i.e.*, survived summary judgment—on convincing-mosaic grounds. *See Lewis*, 934 F.3d at 1186-90 (on remand)).

standard to primary status and, to the extent consistent with Supreme Court precedent, relegate *McDonnell Douglas* to the sidelines.

**AMENDED FINAL JUDGMENT,
U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
(SEPTEMBER 8, 2021)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No. 18-CV-62891-WPD

Before: William P. DIMITROULEAS,
United States District Judge.

AMENDED[1] FINAL JUDGMENT

THIS CAUSE is before the Court upon the conclusion of the trial in this matter and the Jury Verdict entered on July 26, 2021.

1 This Final Judgment is amended to reflect the Court's Order, separately entered this same day, granting in part the Renewed Motion to Alter Judgment.

Accordingly it is ORDERED AND ADJUDGED as follows:

1. Judgment is hereby entered on behalf of Plaintiff Lawanna Tynes and against Defendant Florida Department of Juvenile Justice for race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 in the amount of $924,600, for which let execution issue;
2. Plaintiff shall be reinstated at a similar position outside of detention with the same pay ($73,129.94) and benefits that would have accrued, but for the discrimination, and without supervision by Assistant Secretary Foster;
3. The Clerk shall CLOSE this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 8th day of September, 2021.

/s/ William P. Dimitrouleas
United States District Judge

Copies furnished to:
All Counsel of Record

**ORIGINAL FINAL JUDGMENT,
U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
(JULY 27, 2021)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No. 18-CV-62891-WPD

Before: William P. DIMITROULEAS,
United States District Judge.

FINAL JUDGMENT

THIS CAUSE is before the Court upon the conclusion of the trial in this matter and the Jury Verdict entered on July 26, 2021.

Accordingly it is ORDERED AND ADJUDGED as follows:

1. Judgment is hereby entered on behalf of Plaintiff Lawanna Tynes and against Defendant Florida Department of Juvenile Justice

for race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 in the amount of $924,600, for which let execution issue;

2. The Clerk shall CLOSE this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 27th day of July, 2021.

/s/ William P. Dimitrouleas
United States District Judge

Copies furnished to:
All Counsel of Record

ORDER ON MOTION FOR NEW TRIAL, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA (JULY 27, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No. 18-CV-62891-WPD

Before: William P. DIMITROULEAS, United States District Judge.

ORDER

This Cause is before the Court on Defendant's August 25, 2021 Renewed Motion for Judgement as a Matter of Law or Motion for New Trial [DE-141]. The Court has presided over this trial and will rule consistently as it did during the trial.

Insofar as Defendant is renewing its motion for judgment as a matter of law under Rule 50, the proper legal standard is as follows: "[A] court should render judgment as a matter of law when there is no legally

sufficient evidentiary basis for a reasonable jury to find for that party on that issue. . . . We review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party." *Gowski v. Peake*, 682 F.3d 1299, 1310 (11th Cir.2012) (citations omitted). "[I]f there is substantial conflict in the evidence, such that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion must be denied." *Id.* at 1311 (citing *Christopher v. Florida*, 449 F.3d 1360, 1364 (11th Cir. 2006)). Simply put, "judgment as a matter of law is appropriate only if the facts and inferences point so overwhelmingly in favor of one party that reasonable people could not arrive at a contrary verdict." *Brown v. Alabama Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010) (citation and internal marks omitted).

Although Defendant's Motion is cast in several alternatives, the bulk of its argument focuses on its request for new trial under Rule 59, Fed.R.Civ.P. district courts are empowered to grant a new trial in a civil case "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Rule 59(a)(1)(A), Fed.R.Civ.P. That said, the remedy of a new trial is "sparingly used." *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 375 (1st Cir. 2004); *see also Dean v. Specialized Sec. Response*, 876 F.Supp.2d 549, 553 (W.D. Pa. 2012) ("Requests for a new trial are disfavored by the law."). "Motions for new trial must establish a clear and obvious error of law or fact." *Evans v. Washington Metropolitan Area Transit Authority*, 816 F.Supp.2d 27, 31 (D.D.C. 2011) (citation omitted). "A trial court should not grant a new trial merely because the losing party could probably

present a better case on another trial." *Hannover Ins. Co. v. Dolly Trans Freight, Inc.*, 2007 WL 170788, *2 (M.D.Fla. Jan. 18, 2007). As a general matter, "[t]he court may order a new trial if it is required to prevent injustice or to correct a verdict that was contrary to the weight of the evidence. *Dean*, 876 F. Supp 2d at 553.

Here, Defendant makes several failed arguments.

First, the circumstantial evidence regarding the two comparators was sufficient to establish the discrimination claims [DE-137, pp. 122, 125]. Credibility was for the jury to decide.

Second, Defendant was clearly on notice in portions of the complaint and during opening statement that Plaintiff was also proceeding under § 1981. The Court had the discretion to allow an amendment during the trial Rule 15(b)(1), Fed R. Civ. Proc.; no prejudice was shown [DE-138, p, 47] *see, Harkness v. Sweeney Independent School District*, 554 F. 2d 1353, 1360 (5th Cir. 1977).

Third, the Court sustained the objection to Plaintiff's "send a message" closing argument [DE-138, pp. 82-83]. No curative instruction or mistrial was requested. Defendant cannot wait and see if the jury rules in his favor and then complain after an adverse verdict. *See, Bank of the South v. Ft. Lauderdale Tech.*, 425 F. 2d 1374 (5th Cir. 1970).

Wherefore, the Renewed Motion for Judgement as a Matter of Law and Motion for New Trial [DE-141] are Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 27th day of August, 2021.

/s/ William P. Dimitrouleas
United States District Judge

Copies furnished to:
Counsel of Record

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (MAY 29, 2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPT. OF JUVENILE JUSTICE,

Defendant.

Case No. 18-62891-CIV-DIMITROULEAS

Before: William P. DIMITROULEAS,
United States District Judge.

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant, the Florida Department of Juvenile Justice's ("FDJJ") Motion for Summary Judgment [DE 37] ("Motion"). The Court has reviewed the Motion, Plaintiff's Response [DE 49], Defendant's Reply [DE 51], and all Statements of Material Facts [DE 36, 50, 52] and is otherwise fully advised in the premises.

I. Background

On November 28, 2018, Plaintiff Lawanna Tynes filed the present action against her former employer, Defendant Florida Department of Juvenile Justice ("FDJJ"). (ECF No. 1). Plaintiff brings two counts against FDJJ based on her alleged employment discrimination. (ECF No. 1) ¶ 1. Count I of Plaintiff's Complaint state a claim for racial discrimination under Title VII of the Civil Rights Act of 1964, (ECF No. 1) p. 8, and Count II of Plaintiff's Complaint states a claim for sex discrimination under Title VII of the Civil Rights Act of 1964, (ECF No. 1) p. 11.

Plaintiff was first employed by Defendant in 1999. (ECF No. 36), at 1; (ECF No. 50), at 1. Plaintiff rose through the ranks and was promoted to Superintendent in 2007. (ECF No. 36), at 1; (ECF No. 50), at 1. Upon the recommendation of Plaintiff's immediate supervisor, Dr. Gladys Negron, Assistant Secretary of Detention Services Dixie Fosler transferred Plaintiff to the Broward Regional Juvenile Detention Center ("BRJDC"), a tier five facility,[1] in August 2015. (ECF No. 36), at 4; (ECF No. 50), at 3. In September 2015, Plaintiff was named superintendent of the year. (ECF No. 36), at 4; (ECF No. 50), at 3.[2]

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[1] Tiers denote the size of the facility, with tier one denoting a very small facility and tier five denoting a very large facility. (ECF No. 36), at 1.

[2] Plaintiff objects to the characterization of the title as an "award," noting that Plaintiff earned the title, but she does not dispute the fact that she was so recognized.

On November 15, 2015, fifteen "codes" were called at the BRJDC[3] and emergency personnel were twice called to respond. (ECF No. 36), at 4; (ECF No. 50), at 3. The Parties disagree as to whether codes are reserved for emergencies only, and whether fifteen codes is an unusually high number for one day. (ECF No. 36), at 4-5; (ECF No. 50), at 3. Plaintiff was on family medical leave that day and was not on site.[4] (ECF No. 36), at 5; (ECF No. 50), at 3. In response to the quantity of codes called that single day, Assistant Secretary Fosler sent a team of FDJJ professionals, commonly called a "technical assistance team" within the FDJJ, to the BRJDC to review operations there. (ECF No. 36), at 6; (ECF No. 50), at 5. It is disputed whether a technical assistance team is only called in when a facility is already in distress. (ECF No. 36), at 2; (ECF No. 50), at 1. The day the team arrived at the BRJDC there was an incident where several youths barricaded themselves into an unlocked cell. (ECF No. 36), at 6; (ECF No. 50), at 5.[5] The leader of the technical assistance team, Joseph Graham, noted several other operational issues at the BRJDC, including mistrust of the administration amongst the staff,

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[3] A "code" is a kind of alarm.

[4] Defendant states that Plaintiff only "claimed" to be on family medical leave that day, but it appears that the fact of Plaintiff's medical leave is not disputed, but rather whether she was really entitled to exercise such leave. (ECF No. 50-8).

[5] Plaintiff disputes whether the cell door was left unlocked for a legitimate purpose, but not that the event occurred.

staffing and hiring deficiencies, and failure to properly track worker's compensation. (ECF No. 36), at 6.[6]

On December 11, 2015, Assistant Secretary Fosler terminated Plaintiff. (ECF No. 36), at 8; (ECF No. 50), at 6.

II. Procedural History

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 16, 2015. (ECF No. 1), at ¶ 8. On April 27, 2017, the EEOC forwarded the case to the Department of Justice, having found in its own investigation that there was reasonable cause to believe that Defendant had discriminated against Plaintiff on the basis of her sex and race. *Id.* at 15,17. The EEOC issued a Notice of Right to Sue dated August 30, 2018, after the Department of Justice declined to file suit on Plaintiff's behalf. *Id.* at ¶ 11, 18. Plaintiff commenced this action shortly thereafter on November 28, 2018. (ECF No. 1), at 1.

Defendant filed the instant Motion and its accompanying Statement of Material Facts on January 10, 2020. (ECF No. 36, 37). Plaintiff's first responses to both items were stricken for failure to comply with Local Rule 56.1. Specifically, Plaintiff had not noted whether each asserted fact was disputed or undisputed using the same paragraph numbering scheme employed by Defendant, nor had she included a separate list of additional facts. (ECF No. 48). Plaintiff refiled her responses on February 13, 2020, and Defendant

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6 Plaintiff disputes these findings but does not cite to any evidence that refutes Mr. Graham's deposition. (ECF No. 50), at 5.

replied on February 20, 2020. The Motion is now ripe for review.

III. Summary Judgement Standard

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response,

comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

IV. Discussion

a. Procedural Arguments

As a preliminary matter, Defendant argues that Plaintiff's responsive filings should again be stricken for continued failure to comply with Local Rule 56.1. This time, Defendant says Plaintiff has failed to consistently cite to record evidence to support her assertions of fact and sometimes cites to evidence that either constitutes hearsay or was not produced during discovery.[7] In addition, Defendant contends that Plaintiff included an abundance of factual assertions in her Response that she neglected to include in her Statement of Material Facts, and that Defendant is prejudiced by these inclusions because it cannot possibly respond to each asserted fact.

The Court finds the latter concern overstated; Plaintiff does cite to numerous exhibits in her reply, but these are mostly relevant to the determination of appropriate comparators, not the undisputed chronology of the case. The Court agrees, however, that many of Plaintiff's asserted facts in both her Response and her Statement of Material Facts lack any citation at all, and where a citation is offered it sometimes

[7] In addition, Defendant asserts that several of the exhibits pertain to incidents which occurred outside the period for which discovery was authorized. All these exhibits, however, are also exhibits which were not produced during discovery and thus need not be dealt with separately.

does not support Plaintiff's assertion. In the interest of judicial efficiency, however, rather than strike the filings entirely, the Court shall simply consider any fact asserted by Defendant which Plaintiff fails to rebut with a supporting citation as undisputed and shall disregard any fact which Plaintiff sets forth without supporting record evidence. *See* Fed. R. Civ. Proc. 56(e)(2); L.R. 56.1(c).

Regarding hearsay evidence, Defendant specifically objects to Plaintiff's citation to several news articles covering alleged errors made by her asserted comparators. Defendant correctly states that news articles do not generally fit into any exception to or exclusion from Federal Rule of Evidence 802, which bars hearsay as admissible evidence. Hearsay, however, is an out-of-court statement offered for the truth of the matter asserted. Fed. R. Evid. 801. Plaintiff generally does not appear to cite to the news articles for any substance reported therein, but for the mere fact that the incidents garnered media coverage. The news articles are therefore not necessarily hearsay in this case, and the Court will consider them for non-hearsay purposes only.

Finally, most of the exhibits that were not properly disclosed during discovery are annual reports from the Office of the Inspector General that briefly describe dozens of incidents the Office investigated over the course of a year. The majority of those incidents are irrelevant here, and Plaintiff's citations to these reports are not sufficiently specific for the Court to locate the relevant parts. In any case, the reports do not describe any incident with sufficient detail to be useful to this analysis anyway. The Court shall therefore disregard citations to those exhibits.

b. Substantive Arguments

It is unlawful under Title VII for any employer "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." 42 U.S.C. § 2000(e)-2(a)(1). A Title VII plaintiff may offer direct evidence to support her claim or, as Plaintiff does here, she may introduce circumstantial evidence of discrimination. *Summers v. City of Dothan, Ala.*, 444 F. App'x 346, 347 (11th Cir. 2011). Where a Title VII claim is supported by circumstantial evidence, courts often apply the burden-shifting framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* Under the *McDonnell Douglas* framework, first, the plaintiff must establish a *prima facie* case by showing that: "(1) [s]he was a member of a protected class; (2) [s]he was qualified for the job; (3) [s]he suffered an adverse employment action; and (4) [s]he was replaced by someone outside the protected class or was treated less favorably than a similarly situated individual outside his protected class." *Ivey v. Paulson*, 222 F. App'x 815, 817 (11th Cir. 2007). Upon a plaintiff's establishment of the *prima facie* case, the burden shifts to the employer to articular a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Finally, the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the employer's proffered reason is pretextual. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001).

Here, Defendant does not dispute that Plaintiff is a member of a protected class, that she was qualified for the position of superintendent, or that she suffered

an adverse employment action. Defendant asserts, though, that Plaintiff has failed to state a *prima facie* case because she has not shown that others outside her protected classes were treated more favorably than she was. And even if she has stated a *prima facie* case, Defendant argues that it has articulated several legitimate reasons for Plaintiff's termination that she cannot show were pretextual. Plaintiff responds that she has adequately stated her *prima facie* case and that there remain outstanding disputes of material facts which preclude the Court from granting summary judgment.

i. Comparators

It is Plaintiff's initial burden in making her *prima facie* case to show that she was less favorably treated than other similarly-situated employees outside the protected classes. To carry that burden she has named six non-female and/or non-black employees whom she asserts received more lenient discipline following failures in their performance. Defendant counters that none of these employees are similarly situated such that they are proper comparators for Plaintiff.

In determining whether other employees are appropriate comparators in a Title VII action, courts must look at whether the comparator employees are "similarly situated in all material respects." *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1224 (11th Cir. 2019). This means that Plaintiff and her comparators must exhibit "substantive likenesses." *Id.* at 1229. While Plaintiff need not share an identical job title with her comparators, she and they must have similar employment responsibilities and must

have engaged in the same basic sort of misconduct. *Id.* at 1227-28. A proper comparator, in the present case, therefore, must be directly responsible for overseeing the operations of a juvenile detention facility and must have failed to follow FDJJ protocol such that administrative deficiencies and numerous serious incidents occurred under the comparator's leadership. With this in mind, the Court turns to Plaintiff's asserted comparators.

Plaintiff argues that Kevin Housel, a white male, is a valid comparator. Plaintiff stated in her deposition that while Mr. Housel was Central Region Chief, four youths escaped the Orange County Detention Center, but Mr. Housel was not disciplined for the incident. Defendant argues that Mr. Housel was not Superintendent of the facility at the time, so he was not directly responsible for what happened there. While Plaintiff asserts that Mr. Housel was the Acting Superintendent of the Orange County Detention Center, she has provided no record evidence showing as much. She cites to one news article and one report from the Office of the Inspector General ("OIG") describing the incident, but neither document states that Mr. Housel was superintending the facility at the time of the escape. He therefore cannot be used as a comparator.

Next, Plaintiff proffers Joseph Seeber, a white male, as a comparator. Plaintiff stated in her deposition that Mr. Seeber was superintendent of the BRJDC when escapes occurred, but rather than being disciplined he was transferred to Pinellas Juvenile Detention Center, where a youth under his supervision died while in custody. Again, Mr. Seeber was not disciplined but was transferred to a different facility. Defendant responds that the incident report

for the escapes indicated that Mr. Seeber was not involved in the incident and that neither incident was attributable to his management. Defendant further asserts that Mr. Seeber would have been terminated for failing to comply with several annual quality improvement reviews, but he resigned first. Plaintiff responds that as Superintendent, Mr. Seeber was directly responsible for his facilities, regardless of the outcome of the incident reports, but despite these incidents Assistant Secretary Fosler did not even send a technical assistance team to evaluate operations at his facilities, as she did with Plaintiff's.

The Court finds that Plaintiff has carried her burden with respect to Mr. Seeber. Mr. Seeber and Plaintiff were both Superintendents, both had serious incidents reflecting a failure to abide by FDJJ protocols during their tenures as Superintendents, and both had administrative deficiencies memorialized in operational reviews. They are therefore similarly situated in all material respects. Yet in response to Mr. Seeber's failures, he was simply transferred to different facilities, while Plaintiff was immediately subjected to review by a technical assistance team and terminated within a month. In addition, Mr. Seeber was apparently granted several opportunities to comply with the recommendations of the quality improvement reviews, but Plaintiff was allegedly never even presented with the technical assistance team's report.[8] It appears the report was not even finalized until after her termination. (ECF No. 50-18) (showing that Mr. Graham did not email the final report to Assistant Secretary Fosler

[8] It is disputed whether Mr. Graham discussed his conclusions with Plaintiff. (ECF No. 50), at 6.

until December 15, 2015). Although Defendant relies on Secretary Fosler's affidavit for the fact that the incidents were not attributable to Mr. Seeber, this merely begs the question: why was the poor performance of Mr. Seeber's staff not attributable to his management, but the poor performance of Plaintiff's staff was attributable to hers? Mr. Seeber is therefore an appropriate comparator.

In addition, Plaintiff proffers Douglas Kane, a white male, as a potential comparator. Plaintiff also stated that Douglas Kane was arrested for driving under the influence but was not terminated for the incident. Rather, he was suspended for five days without pay. Defendant argues that this incident had nothing to do with Mr. Kane's managerial responsibilities and therefore this misconduct is substantively dissimilar from Plaintiff's. Plaintiff responds that Mr. Kane was also formally reprimanded for maintaining unhygienic conditions in his facility, permitting contraband in a youth's room, insubordination, and improperly holding staff longer than they were scheduled to work.[9] The written reprimand indicates that Mr. Kane had been "repeatedly" instructed to have the facility cleaned daily. (ECF No. 49-21), at 4.

The Court agrees with Defendant that Mr. Kane is not a proper comparator. The DUI was not related to Mr. Kane's managerial responsibilities and though the repeated instructions to maintain sanitary condi-

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[9] Plaintiff also states that Mr. Kane was cited for using excessive force against a female resident, but she does not provide any supporting citation for the assertion and thus the Court will disregard it.

tions in his facility may indicate persistent administrative deficiencies, Plaintiff has not pointed to any serious incidents similar in nature to the multiple codes called on November 15, 2015. Mr. Kane is therefore not a suitable comparator.

Plaintiff also argue Steve Owens, a white/Hispanic[10] male, is a proper comparator. Mr. Owens was superintendent of the Miami Dade Regional Detention Center when a youth died as a result of injuries sustained from a beating at the hands of the facility's other residents.[11] He was not disciplined in relation to the incident. Defendant argues, and the Court agrees, that this single incident is not similar to Plaintiff's record. The infractions for which Plaintiff was allegedly terminated were persistent, not an isolated incident only allegedly resultant from a failure to act. Even the report of the Office of the Inspector General, which Plaintiff cites in support of her position, found that there was insufficient evidence to prove or disprove that Mr. Owens failed to perform his duties. (ECF No. 49-22), at 8. Mr. Owens is therefore not a proper comparator.

Plaintiff proffers Daryl Wolf, a white female, as a potential comparator. Ms. Wolf was superintendent of the Miami Regional Juvenile Detention Center when she failed to correct issues brought up in her annual quality assurance reviews. Plaintiff also stated in her

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[10] Defendant describes Mr. Owens as Hispanic, while Plaintiff describes him as white

[11] Plaintiff also asserts that Mr. Owens did not properly maintain the premises of the facility, but she cites no record evidence of this save a news article which, as stated previously, the Court will not accept as evidence of the matter asserted, but merely as evidence of media coverage.

deposition that Ms. Wolf physically "put her hands on" another employee. Defendant asserts that these incidents are entirely different from Plaintiff's misconduct, but Defendant neglects to address an incident for which Dr. Negron stated in her deposition that she wanted to take disciplinary action against Ms. Wolf: an incident where Ms. Wolf provided youths with spray paint and permitted them to paint one of the hallways of the Miami facility, which led to several staff members having asthma attacks and the youths painting gang symbols on the walls. (ECF No. 50-1), at 10. Instead of being disciplined however, Secretary Fosler transferred Ms. Wolf to a different facility. *Id.* Ms. Wolf also received reprimands for repeating a racial slur one of the residents had directed at her, mislaying a ring of facility keys, and using her state-issued computer for personal business.[12] (ECF 49-17). These infractions are sufficiently similar to those Plaintiff allegedly committed to qualify Ms. Wolf as a comparator. Ms. Wolf's failures indicate the same sort of broadscale mismanagement of which Plaintiff is accused, including mismanagement of facility logistics and several serious incidents. Ms. Wolf is therefore a proper comparator.

Finally, Plaintiff argues Vickie Alves, a white female, could be a comparator. Plaintiff asserted in her deposition that a youth died at the Brevard Regional Detention Center while Ms. Alves was superintendent there. Assistant Secretary Fosler stated in her affidavit that the Office of the Inspector General found that Ms.

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[12] Plaintiff also asserts that Ms. Wolf was superintended of a facility when fifty residents overpowered the staff and had to be brought back under control by local police, but she cites no record evidence for the assertion.

Alves had failed to train her staff ins a particular protocol and she was suspended for five days. She resigned shortly thereafter. Defendant argues that this conduct is different than Plaintiff's because Plaintiff's facility was deficient in multiple areas, not only one. Plaintiff only responds to confirm that the Office of the Inspector General did find Ms. Alves had failed to train her staff in a particular process. Because Plaintiff's response merely confirms Defendant's argument, the Court finds that Ms. Alves is not an appropriate comparator.

Mr. Seeber and Ms. Wolf are both appropriate comparators. Plaintiff has therefore made her *prima facie* case and is entitled to the presumption that her termination was the result of discrimination.

ii. Pretext

If plaintiff presents a *prima facie* case, the burden then shifts to Defendant to show a legitimate, non-discriminatory reason for the adverse employment action. *Summers v. City of Dothan, Ala.*, 444 F. App'x 346, 348 (11th Cir. 2011). Defendant carries this burden by asserting that the Plaintiff's poor performance, as evidenced by the high number of incidents reported at Plaintiff's facility and the report of the technical assistance team, was sufficient reason for her termination.

The burden therefore shifts back to Plaintiff to show that this reason is pretextual. In showing pretext, a plaintiff may either (1) rely upon the proffered comparators to show similar circumstances where the same misconduct resulted in more favorable treatment or (2) produce circumstantial evidence sufficient for a jury to find that the asserted legitimate reason

is pretextual. *Feise v. N. Broward Hosp. Dist.*, 683 F. App'x 746, 751 (11th Cir. 2017).

Plaintiff has carried that burden. As discussed above, Plaintiff has shown that in similar circumstances where other superintendents were found to run facilities with systemic failures resulting in serious incidents, they were simply transferred elsewhere, while Plaintiff was immediately subjected to a technical assistance review and promptly terminated. Moreover, she has also asserted sufficient circumstantial evidence from which a jury could find that the proffered non-discriminatory reason for her termination was pretextual. She had consistently received more than satisfactory ratings in her performance reviews and was recommended to the position at BRJDC based on her past performance. *See* (ECF No. 49-54); (ECF No. 36-7). She has put forth evidence that many of the issues for which she was blamed upon termination were inherited from her predecessor, and Dr. Negron asserted in her testimony that three months is insufficient time to see substantial operational gains at a place like BRJDC (ECF 49-58), at 16-18. Despite that, regular progress reports were showing that Plaintiff was making incremental improvements. (ECF No. 50-17), at 1. Plaintiff was on medical leave when her facility experienced a spike in codes, so she was not directly overseeing the BRJDC at that time. And Plaintiff asserts that the other incident which Defendant points to as evidence of her mismanagement, the twelve-hour period in which several youth barricaded themselves in a room, resulted from the necessity to keep certain rooms unlocked and the doors open because the air conditioning was malfunctioning and it was unsafe for anyone to sleep in some rooms until the

air conditioning was fixed. (ECF No. 50-10). A reasonable jury could determine, based on all this circumstantial evidence, that the reasons Defendant proffers for her termination are pretextual.

Defendant relies on Assistant Secretary Fosler's deposition and affidavit for the proposition that she believed Plaintiff was differently situated than the comparator employees. Dr. Negron stated in her affidavit, however, that she believes that Assistant Secretary Fosler decision to terminate Plaintiff was based on "personal feelings." (ECF No. 50-17), at 2. There are therefore clearly extant questions of material fact which must be determined by a jury.

iii. Punitive Damages

Defendant finally argues that it is entitled to summary judgment with respect to Plaintiff's prayer for punitive damages, as such damages are not available in a Title VII action against a government agency. Plaintiff does not respond to this argument. As Defendant has correctly stated the law, the Court agrees with it. *See* 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision). . . . ").

V. Conclusion

Viewing the evidence in the light most favorable to Plaintiff, the nonmoving party, the Court determines that Defendant is not entitled to summary judgment except insofar as Plaintiff seeks to recover punitive damages. Accordingly, it is

ORDERED AND ADJUDGED that Defendant the Florida Department of Juvenile Justice's Motion for Summary Judgment [DE 37] is hereby GRANTED in part as to Plaintiff's request for punitive damages only.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of May, 2020.

/s/ William P. Dimitrouleas
United States District Judge

Copies furnished to:
All Counsel of Record

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FEBRUARY 21, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAWANNA TYNES,

Plaintiff-Appellee,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Appellant.

No. 21-13245

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cv-62891-WPD

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

Before Jill PRYOR, NEWSOM, and
GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is

also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

COMPLAINT FILED BY PLAINTIFF LAWANNA TYNES (NOVEMBER 28, 2018)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

COMPLAINT
Plaintiff Demands a Trial by Jury

Plaintiff, LAWANNA TYNES, ("Tynes" or "Plaintiff") by and through her undersigned attorney, GLENN R. MILLER, ESQ. and the law firm of GLENN RICARDO MILLER, LLC, as and for her Complaint against Defendant, FLORIDA DEPARTMENT OF JUVENULE JUSTICE ("DJJ", "the Department" or "Defendant"), alleges upon personal knowledge and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. This is an action seeking declaratory, injunctive and equitable relief, as well as monetary damages, to redress Defendant's unlawful employment practices against Plaintiff, specifically Defendant's discrimination against Plaintiffs employment as a result of her race, Black and sex, female in violation of Title VII of the Civil Rights Act of 1946, as amended, 42 U.S.C. Section 200e et seq., and for other causes of actions which can be inferred from the facts herein.

2. Defendant's unlawful conduct was knowing, malicious, willful and wanton and/or showed a reckless disregard for Plaintiffs protected rights, which has caused and continues to cause Plaintiff to suffer substantial economic and non-economic damages, and severe mental anguish and emotional distress.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5 (f) (1) and (3) ("Title VII"), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. Section 1981 and 1983, as this action involves federal questions regarding the deprivation of Plaintiff's right under the ? .

4. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Southern District of Florida, Ft. Lauderdale Division.

PARTIES

5. Plaintiff, LAWANNA TYNES, is a Black female charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706 (f) (1) and (3) of Title VII, 42 U.S.C. Section 2000e-5 (f) (1) and 3.

6. At all relevant times, Defendant, FLORIDA DEPARTMENT OF JUVENILE JUSTICE is a state agency of Florida that operates juvenile detention centers throughout the State of Florida, which has been doing business in the State of Florida and in the City of Ft. Lauderdale and has continuously had at least 500 or more employees.

7. At all relevant times, Defendant, FLORIDA DEPARTMENT OF JUVENILE JUSTICE, has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701 (b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000(b), (g) and (h).

ADMINISTRATIVE PREREQUISITES

8. Prior to filing this action, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 16, 2015, alleging discrimination and violation of Title VII of the Civil Rights Act of 1964, as amended. Plaintiff's EEOC charge arises out of many of the same facts alleged herein.

9. On or about March 9, 2017, Plaintiff received a copy of a Letter of Determination dated March 6, 2017 issued by the EEOC in connection with her previously filed charge of discrimination. A copy of

EEOC's Letter of Determination is attached hereto as Exhibit A.

10. Thereafter, on or about May 1, 2017, Plaintiff received a copy of a Letter Forwarding Case to the Department of Justice ("DOJ") dated April 27, 2017 issued by the EEOC for further processing. A copy of the EEOC's Letter Forwarding Case to the Department of Justice ("DOJ") is attached hereto as Exhibit B.

11. On or about September 4, 2018, Plaintiff received a copy of the Notice of Right to Sue dated August 30, 2018 issued by the EEOC stating that it had been determined that the Department of Justice will not file suit (after holding the file for several months) on Plaintiff's charge of discrimination that was referred to the DOJ. A copy of the EEOC's Notice of Right to Sue is attached hereto as Exhibit C.

12. More than thirty days prior to the institution of this lawsuit, Plaintiff, LAWANNA TYNES, filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination due to sex and race against Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

FACTUAL ALLEGATIONS
COMMON TO ALL COUNTS

13. Since at least December 11, 2015, Defendant Employer has engaged in unlawful employment practices at its Broward Juvenile Justice Center facility, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). Ms. Tynes is a Black female and was employed by Defendant for sixteen (16) years. On or

about August 14, 2015, Plaintiff was transferred to the Broward Juvenile Justice Center as a Detention Superintendent. Thereafter, on or about December 11, 2015, Defendant terminated LAWANNA TYNES' employment for allegedly violating the Administrative Code 60L-36. Prior and/or subsequent to Plaintiffs termination, other similarly situated non-Black male and non-Black female employees and/or superintendents who committed similar or more egregious offenses were not terminated by Defendant. Plaintiff was terminated by Defendant because of her sex, female and her race, Black.

14. Plaintiff is a Black female having been employed by Defendant for sixteen (16) years. Ms. Tynes had been employed as a Superintendent since 2007 prior to being transferred to the Broward Juvenile Justice Center on August 14, 2015.

15. Plaintiff was a long term employee who rose through the ranks, with the Department, to the position of Detention Center Superintendent.

16. Prior to Plaintiff's termination, she had served in three detention centers as Superintendent with increasing responsibility, during her employment period.

17. Throughout her employment with Defendant, Plaintiff was encouraged by her supervisor(s) to accept greater responsibility based upon her demonstrated and well documented knowledge base, skills, abilities, and job performance. Ms. Tynes' work ethic, knowledge of the Department's policies and procedures, and dedication to her job responsibilities were consistently above average during her tenure with Defendant.

18. Plaintiff's work ethic and performance is clearly evidenced by the many performance evaluations completed on her by different supervisors, throughout her career.

20. In fact, at one period during her tenure, Plaintiff was the only Superintendent, in the South Region, trained and certified by the Department to train staff in several areas including: Juvenile Justice Information System (JJIS) Trainer, Instructor Techniques (IT) Certified, Suicide Prevention Trainer, Driving Instructor, Office of Health Services (OHS) Instructor, OHS Instructor for the Medical and Mental Health Modules, Field Training Officer (FTO), Quality Improvement (QI) Program Reviewer, and Protective Action Response (PAR) Instructor.

21. That as a result of having been certified in the numerous areas aforementioned Plaintiff was often utilized to assist with Region wide training. Plaintiff trained both Department and provider staff to gain access to the Defendant's Databases and meet requirements to perform their job duties.

22. Because of Plaintiff's willingness to assist her cohorts within the South Region, including with Prison Rape Elimination Act (PREA) Audits is primarily why Plaintiff was nominated and ultimately selected as the South Region's Detention Center Superintendent of the Year in 2015, just three (3) months prior to her abrupt termination by Defendant.

23. On December 9, 2015, Plaintiff's immediate supervisor, Dr. Gladys Negron, was verbally informed by the Dixie Fosler, Assistant Secretary (AS) for Detention Services, (Dr. Gladys Negron's immediate supervisor), that Assistant Secretary Dixie Fosler would

be preparing a disciplinary package on Plaintiff. One December 11, 2015, Dr. Gladys Negron received the allegations written by Assistant Secretary Dixie Fosler and/or her staff that were prepared without any input from Plaintiff's direct supervisor, Dr. Gladys Negron or her office. The document to support Plaintiff's termination contained several inaccuracies which Dr. Gladys Negron personally advised Assistant Secretary Dixie Fosler of.

24. According to Plaintiff's supervisor, Dr. Gladys Negron, there were several versions of the allegations written which continued to contain inaccurate and false information. In fact, the information that Plaintiff's supervisor, Dr. Gladys Negron and her office provided in the form of daily status reports, which showed Plaintiff's performance progress, were not referenced at all by Assistant Secretary Dixie Fosler.

25. According to Dr. Gladys Negron, Plaintiff's immediate supervisor, Plaintiff was never afforded a satisfactory length of time to rectify the issues she inherited upon assuming the Superintendent position and leadership of the Broward Regional Juvenile Detention Center. Plaintiff had only been at the said location four (4) months.

26. The false allegations were ultimately utilized to terminate Plaintiff's long term employment with the Department and her termination was not warranted or substantiated by Defendant.

27. Plaintiff's termination was not in accordance with the disciplinary practices and latitude afforded to other non-Black male and non-Black female Detention Center Superintendents and/or employees, (some

who have committed significantly more egregious offenses). Other non-Black male and non-Black female Superintendents/employees were either demoted, resigned, given 5 day suspensions, transferred or reassigned to a different position or facility, and shortly thereafter some were promoted. Plaintiff is the only Black female Superintendent/employee fired after four (4) months in this new facility.

28. This Court should note that Plaintiff was a long term employee of Defendant, with not one disciplinary action. All of Plaintiff's evaluations were above average and satisfactory during her many years of service, under several different supervisors. Defendant and Assistant Secretary Dixie Fosler afforded no other options for Plaintiff other than termination, despite Plaintiff's clearly documented training history and various job experiences with the Department.

29. However, other non-Black male and non-Black female Detention Center Superintendents and/or employees, (some who have committed significantly more egregious offenses) who were more fondly considered were afforded greater latitude and options by Defendant and Assistant Secretary Dixie Fosler, rather than termination.

30. The effect of the practices complained of in the Paragraphs herein have been to deprive LAWANNA TYNES of equal employment opportunities and otherwise adversely affect her status as an employee/Superintendent with Defendant, because of her sex, female and her race, Black

31. On December 11, 2015, Dr. Gladys Negron received an email from Assistant Secretary Dixie Fosler and/or her office which consisted of a Letter of

Dismissal dated December 11, 2015 (along with a list of allegations from November 11, 2015 to December 2, 2015 stating reasons for termination) informing Ms. Tynes that she would be terminated from employment effective immediately.

32. As a result of Defendant's actions terminating her employment, Plaintiff, LAWANNA TYNES, filed her charge of discrimination with the Equal Employees Opportunity Commission (EEOC) on December 16, 2015. A copy of Plaintiff's EEOC charge of discrimination is attached hereto as Exhibit D.

33. The unlawful employment practices complained of in the Paragraphs herein were intentional.

34. The unlawful employment practices complained of in the Paragraphs herein were done with malice or with reckless indifference to the federally protected rights of LAWANNA TYNES in violation of Title VII.

35. At all times material hereto, Plaintiff was a member of a protected class and it was well established that Ms. Tynes was well qualified for her job as Superintendent and was subsequently replaced by a non-Black male and/or non-Black female Superintendent/employee.

36. At all times material hereto, Plaintiff was a member of a protected group fired for misconduct shows that Ms. Tynes was qualified for the job as Superintendent and "that the misconduct for which she was discharged was identical (and/or less egregious) to that engaged in by non-Black male and non-Black female employees whom the Defendant Employer retained."

COUNT I
RACIAL DISCRIMINATION UNDER TITLE VII AGAINST FLORIDA DEPARTMENT OF JUVENILE JUSTICE

Plaintiff realleges each every allegation contained in paragraphs 1 through 36, as set forth herein.

37. Plaintiff is a member of a protected class under § 1981.

38. At all times material hereto, Plaintiff was a member of a protected class and it was well established that Ms. Tynes was well qualified for her job as Superintendent and was subsequently replaced by a non-Black male and/or non-Black female Superintendents/employees.

39. At all times material hereto, Plaintiff was a member of a protected group and it is clear that Ms. Tynes was fired while others (ie. non-Black male and non-Black female Superintendents/employees) not in Plaintiffs protected class, "having comparable or lesser qualifications," were retained.

40. At all times material hereto, Plaintiff was a member of a protected group fired for misconduct shows that Ms. Tynes was qualified for the job as Superintendent and "that the misconduct for which she was discharged was nearly identical (and/or less egregious) to that engaged in by non-Black male and non-Black female employees whom the Defendant Employer retained."

41. By the conduct described above, Defendant has engaged in discrimination against Plaintiff because of Plaintiff's race and subjected Plaintiff to race-based animosity.

42. Such discrimination was based upon the Plaintiff's race in that Plaintiff would not have been the object of discrimination for the fact that Plaintiff is Black.

43. Since at least August 2015, Defendant Employer has engaged in unlawful employment practices at its Broward Regional Detention Center facility, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a).

44. Defendant's conduct complained of herein was willful and in disregard of Plaintiff's protected rights. Defendant and its supervisory personnel were aware that discrimination on the basis of race was unlawful but acted in reckless disregard of the law. Many of Defendant's employees were afraid to jeopardize their careers and/or positions with the Department.

45. At all times material hereto, the employees exhibiting discriminatory conduct towards Plaintiff possessed the authority to affect the terms, conditions and privileges of Plaintiff s employment with the Defendant.

46. Plaintiff was replaced by a non-Black male Superintendent/employee with less qualifications, seniority and experience than Plaintiff.

47. Defendant retained all non-Black Superintendents/employees (who had a history of numerous violations) and some with more egregious violations than Plaintiff. The said non-Black Superintendents/employees were never terminated by Defendant but were either allowed to resign, demoted, issued 5 day suspensions, transferred to other facilities, and shortly thereafter promoted again.

48. The TA Report prepared by Defendant for the period of November 30 2015 through December 4, 2015, was done by all non-Black male Superintendents/ employees (including a non-Black male who at one time was under Plaintiff's supervision and who was also Plaintiff's subordinate while at the Monroe County Detention Center facility.)

49. Plaintiff never received the abovementioned TA Report prepared by Defendant prior to her termination, even though it had been released before she was terminated. Plaintiff was never given an opportunity to see, much less to correct any of the alleged violations, but non-Black Superintendents/ employees were given reports and allowed the time needed to correct violations

50. At least four (4) non-Black male Superintendents/employees as stated in Plaintiff's charging documents, and two (2) non-Black female Superintendents/ employees had committed more infractions and far more egregious violations than Plaintiff and none of the non-Black Superintendents/employees were terminated. All of the said non-Black Superintendents/ employees were either demoted, resigned, given 5 day suspensions, transferred and/or reassigned to a new facility. All of them shortly thereafter were promoted again as Superintendents.

51. Prior to being hired for Superintendent at the Broward Regional Detention Center (a Tier 5 Facility), Plaintiff was contacted by Assistant Secretary Dixie Fosler via email requesting that Plaintiff submit a statement to her via return email explaining why Plaintiff felt "she would be a good fit" at a Tier 5 Facility and to list Plaintiff's strengths and weaknesses." This type of request was never asked of any

non-Black male and non-Black female Superintendents/employees.

52. The unlawful employment practices complained of in the foregoing paragraphs were intentional.

53. The unlawful employment practices complained of in the foregoing paragraphs were done with malice or with reckless indifference to the federally protected rights of Plaintiff, LAWANNA TYNES.

COUNT II
SEX DISCRIMINATION UNDER TITLE VII AGAINST FLORIDA DEPARTMENT OF JUVENILE JUSTICE

Plaintiff realleges each every allegation contained in paragraphs 1 through 36, as set forth herein.

54. Plaintiff is a member of a protected class under § 1981.

55. At all times material hereto, Plaintiff was a member of a protected class and it was well established that Ms. Tynes was well qualified for her job as Superintendent and was subsequently replaced by a male Superintendent/employee.

56. At all times material hereto, Plaintiff was a member of a protected group and it is clear that Ms. Tynes was fired while others (ie. male Superintendents/employees) not in Plaintiff's protected class, "having comparable or lesser qualifications," were retained.

57. At all times material hereto, Plaintiff was a member of a protected group fired for misconduct shows that Ms. Tynes was qualified for the job as Superintendent and "that the misconduct for which she was discharged was nearly identical (and/or less

egregious) to that engaged in by male Superintendents/ employees whom the Defendant Employer retained."

58. By the conduct described above, Defendant has engaged in discrimination against Plaintiff because of Plaintiff's sex and subjected Plaintiff to sex-based animosity.

59. Such discrimination was based upon the Plaintiff's sex in that Plaintiff would not have been the object of discrimination for the fact that Plaintiff is Female.

60. Since at least August 2015, Defendant Employer has engaged in unlawful employment practices at its Broward Regional Detention Center facility, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a).

61. Defendant's conduct complained of herein was willful and in disregard of Plaintiff's protected rights. Defendant and its supervisory personnel were aware that discrimination on the basis of sex was unlawful but acted in reckless disregard of the law. Many were afraid to jeopardize their careers and/or positions with the Department.

62. At all times material hereto, the employees exhibiting discriminatory conduct towards Plaintiff possessed the authority to affect the terms, conditions and privileges of Plaintiff's employment with the Defendant.

63. Plaintiff was replaced by a male Superintendent/employee with less qualifications, seniority and experience than Plaintiff.

64. Defendant retained all male Superintendents/ employees (who had a history of numerous violations)

and some with more egregious violations than Plaintiff. The said male Superintendents/employees were never terminated by Defendant but were either allowed to resign, demoted, issued 5 day suspensions, transferred and/or reassigned to other facilities, and shortly thereafter many were promoted.

65. The TA Report prepared by Defendant for the period of November 30, 2015 through December 4, 2015, was done by all male Superintendents/employees (including a male under Plaintiff's supervision and who was also Plaintiff's subordinate while at the Monroe County Detention Center facility.)

66. Plaintiff never received the TA Report prepared by Defendant prior to her termination. The use of the TA Report was pretextual as Plaintiff never saw the report and was not given an opportunity to correct the alleged violations as non-Female Superintendents/employees were given.

67. At least four (4) male Superintendents/employees as stated in Plaintiff's charging documents had committed more infractions and far more egregious violations than Plaintiff and none of the male Superintendents/employees were terminated. All of the said male Superintendents/employees were either, reassigned, demoted, given 5 day suspensions, transferred to a new facility, and shortly thereafter many were promoted.

68. Prior to being hired for Superintendent at the Broward Regional Detention Center (a Tier 5 Facility), Plaintiff was contacted by Assistant Secretary Dixie Fosler via email requesting that Plaintiff submit a statement to her via return email explaining why Plaintiff felt "she would be a good fit" at a Tier 5

Facility and to list Plaintiff's strengths and weaknesses." This type of request was never asked of any male Superintendents/employees.

69. The unlawful employment practices complained of in the foregoing paragraphs were intentional.

70. The unlawful employment practices complained of in the foregoing paragraphs were done with malice or with reckless indifference to the federally protected rights of Plaintiff, LAWANNA TYNES.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for the following relief against Defendant:

a. Adjudge and decree that Defendant has violated 42 U.S.C. § 1981, and has done so willfully, intentionally, and with reckless disregard for Plaintiff's rights;

b. Enter a judgment requiring that Defendant pay Plaintiff appropriate back pay, retroactive seniority, benefits adjustment, and prejudgment interest at amounts to be proved at trial for the unlawful employment practices described herein;

c. Enter an award against Defendant and award Plaintiff compensatory damages for mental anguish, personal suffering, and loss of enjoyment of life;

d. Enter an award against Defendant and award Plaintiff punitive damages;

e. Require Defendant to reinstate Plaintiff to the position at the rate of pay and with the

full benefits Plaintiff would have had Plaintiff not been discriminated against by Defendant, or in lieu of reinstatement, award front pay;

f. Award Plaintiff the costs of this action, together with a reasonable attorney fees; and

g. Grant Plaintiff such additional relief as the Court deems just and proper under the circumstances.

JURY DEMAND

Plaintiff demands trial by jury of all issues triable as of right by jury.

Respectfully submitted,

/s/ Glenn R. Miller

GLENN R. MILLER, ESQ.
GLENN RICARDO MILLER, LLC
Attorney for Plaintiff
Fla. Bar No. 539376
67 N.E. 168th Street
North Miami Beach, FL 33162
(305) 651-5991
Email: grmpalaw@gmail.com

Dated: November 28, 2018

EXHIBIT A
LETTER OF DETERMINATION
(MARCH 7, 2017)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MIAMI DISTRICT OFFICE

EEOC No: 510-2016-01188

Charging Party

Lawanna Tunes
12601 N.W. 22nd Court
Miami, Florida 33167

And

Respondent

Florida Department of Juvenile Justice
222 N.W 22nd Court
Fort Lauderdale, Florida 33311

Letter of Determination

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above-cited charge, filed under Title VII of the Civil Rights Act of 1964, as amended. Timeliness, deferral, and all other jurisdictional requirements for coverage have been met.

Charging Party is a Black female. Charging Party was employed by Respondent for sixteen (16) years. On August 14, 2015, Charging Party was transferred to the Broward Juvenile Justice Center, as a Detention Superintendent. Charging Party alleged

she was terminated on December 11, 2015, for violating the administrative code 60L-36. Charging Party alleged that non-Black male Superintendents have violated company policies and committed more egregious violations; however, they were not terminated.

The Commission has determined that the evidence obtained in the investigation establishes reasonable cause to believe that discrimination on the basis of sex, (female), and race, (Black), occurred, in violation of Title VII as alleged. Evidentiary records show that similarly situated non-Black male superintendents who committed similar or more egregious offenses were not terminated.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. In this regard, conciliation of this matter has now begun. Please be advised that upon receipt of this Determination, the Commission will consider any reasonable offer to resolve this matter.

Please complete the enclosed Invitation to Conciliate, EEOC Form 153, and return it to the Commission at the above address on or before fifteen (15) days from the date of this letter. You may fax your response directly to (305) 808-1836, to the attention of Robby Cedon, EEOC Investigator. You may also contact us to schedule a Conciliation Conference to be held in our Miami office. Please be advised that the confidentiality provisions of Sections 706 and 709 of Title VII and the Commission's Regulations apply to information obtained during conciliation.

Failure to respond within fifteen (15) calendar days of the date of this letter will indicate that you are not interested in conciliating this matter and the Commission will determine that efforts to conciliate this charge as required by Title VII of the Civil Rights Act of 1964, as amended, have not been successful. Should you have any questions, please contact Investigator Robby Cedon at (305) 808-1881.

If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

You are reminded that federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission's investigations is also prohibited. These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission,

/s/ Nitza Santos Wright
for Michael J. Farrell
District Director

Date: Mar 07 2017

Enclosures: Invitation to Conciliate

cc: Respondent Representative

Florida Department of Juvenile Justice
c/o. Derrick Elias
Human. Resources
2737 Centerview Drive
Tallahassee, Florida 32339

Charging Party's Representative

Glenn R. Miller, P.A
67 N.E 168th Street
North Miami Beach, Florida 33162

EXHIBIT B
EEOC LETTER NOTIFICATION
THAT CONCILIATION EFFORTS
HAVE BEEN UNSUCCESSFUL
(APRIL 27, 2017)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MIAMI DISTRICT OFFICE

Lawanna Tynes
12601 N.W. 22nd Court
Miami, FL 33167

RE: *Lawanna Tynes vs. Florida Department of Juvenile Justice*
Charge #: 510-2016-01188

Dear Ms. Tynes:

The Equal Employment Opportunity Commission (EEOC) has determined that efforts to conciliate this charge as required by Title VII of the Civil Rights Act of 1964, as amended, have been unsuccessful.

This letter is to notify you that no further efforts to conciliate this case will be made by EEOC. Accordingly, we are forwarding this case to the Department of Justice for further processing.

On behalf of the Commission

/s/ Nitza Santos Wright
for Michael J. Farrell
District Director

Date: Apr 27 2017

cc: Charging Party's Representative

Glenn R. Miller, Esq.
Glenn Ricardo Miller, LLC
67 N.E 168th Street
North. Miami Beach, FL 33162

EXHIBIT C
U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, LETTER STATING IT WILL NOT FILE SUIT (AUGUST 30 2018)

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Employment Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530
www.usdoj.gov/crt/emp

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

CERTIFIED MAIL 7014 3490 0000 6312 0754
RETURN RECEIPT REQUESTED

Ms. Lawanna Tynes
do Glenn R. Miller, Esquire
Law Office of Glenn R. Miller
67 N. E. 168th Street
North Miami Beach, FL 33162

Re: *Lawanna Tynes v. Florida Dept. of Juvenile Justice*
EEOC Charge No. 510-2016-01188

Dear Ms. Tynes:

It has been determined that the Department of Justice will not file suit on the above-referenced charge of discrimination that was referred to us by the Equal Employment Opportunity Commission (EEOC). This should not be taken to mean that the Department of

Justice has made a judgment as to whether or not your charge is meritorious.

You are hereby notified that conciliation in this matter was unsuccessful by the EEOC. You are further notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq., against the above-named respondent. If you choose to commence a civil action, such suit must be filed in the appropriate court within 90 days of your receipt of this Notice.

We are returning the files in this matter to the EEOC's Miami District Office. If you or your attorney have any questions concerning this matter or wish to inspect the investigative file, please feel free to address your inquiry to: Michael J. Farrell, Director, EEOC, 100 S.E. 2nd Street, Ste. 1500, Miami, FL 33131.

Sincerely,

John M. Gore
Acting Assistant Attorney General
Civil Rights Division

By: /s/ Karen D. Woodard
Principal Deputy Chief
Employment Litigation Section

cc: Lawanna Tynes
Florida Dept. of Juvenile Justice
Derrick Elias, H.R.
EEOC, Miami District Office

EXHIBIT D
PLAINTIFF'S TYNES EEOC
CHARGE OF DISCRIMINATION
(DECEMBER 16, 2016)

CHARGE OF DISCRIMINATION
This form is affected by the Privacy Act of 1974.
See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: ☒ EEOC

Agency(ies) Charge No(s): 510-2016-01188

State or local Agency, if any

Florida Commission On Human Relations and EEOC

Name (*indicate Mr., Ms., Mrs.*)

Ms. Lawanna Tynes

Home Phone (*Incl. Area Code*)

(305) 748-7466

Date of Birth: 10-15-1970

Street Address (City State and ZIP Code)

12601 N.W. 22nd Court,
Miami, FL 33167

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name

FLORIDA DEPARTMENT OF JUVENILE JUSTICE

No. Employees. Members: 500 or More

Phone No. (*include Area Code*)

(954) 467-4503

Street Address (City, State and ZIP Code)

222 N.W. 22nd Court,
Fort Lauderdale, FL 33311

DISCRIMINATION BASED ON (*Check appropriate box(es).*)

☒ RACE

☒ SEX

DATE(S) DISCRIMINATION TOOK PLACE

Earliest: 12-11-2015
Latest: 12-11-2015

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s))*:

I am black female. I have been employed by the Florida Department of Juvenile Justice for 16 years: I have been a Superintendent since 2007. I have a clean record and have never been disciplined in my entire career. On August 14, 2015, I was transferred to the Broward Juvenile Justice Center. I report to Gladys Negron, Director and she reports to Dixie Foster, Assistant Secretary. During my tenure at the Broward Juvenile Center, the Technical Assistants Team came to my facility and performed random inspections. Subsequently, on December 11, 2015, I was informed that I

was terminated for violating the Administrative Code 60L-36. Non-Black Superintendents (Steven Owens, Douglas Kane, Joseph Seeber, Kevin Housel) have violated company polices and they were not terminated for egregious violations such as Juvenile escapes and Juvenile deaths.

I was terminated on December 11, 2015, by Gladys Negron who was following directions from the Assistant Secretary, Dixie Foster.

I believe I have been discriminated against because of my race, black, gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

/s/ Lawanna Tynes
Charging Party Signature

Date: Dec 16, 2016

DEFENDANT FLORIDA DEPARTMENT OF JUVENILE JUSTICE ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT (FEBRUARY 8, 2019)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No.: 18-CV-62891-WPD

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

COMES NOW, the Defendant, THE FLORIDA DEPARTMENT OF JUVENILE JUSTICE, by and through undersigned counsel, and hereby files its Answer and Affirmative Defenses to Plaintiff's Complaint. In support thereof Defendant states the following:

PRELIMINARY STATEMENT

1. Defendant admits this is a lawsuit seeking declaratory, injunctive, and equitable relief. Defendant denies all further allegations in Paragraph 1 of Plaintiff's Complaint and demands strict proof thereof.

2. Defendant denies the allegations contained in Paragraph 2 of Plaintiff's Complaint and demands strict proof thereof.

JURISDICTION AND VENUE

3. Admitted.

4. Admitted.

PARTIES

5. Defendant admits that Plaintiff is a black female. Defendant is without knowledge as to any further allegations contained in paragraph 5 of Plaintiff's Complaint and they are therefore denied and strict proof demanded thereof.

6. Admitted.

7. Admitted.

ADMINISTRATIVE PERQUISITES

8. Defendant admits that Plaintiff filed a charge of discrimination on December 16, 2015, alleging discrimination in violation of Title VII. Defendant denies all further allegations contained in paragraph 8 of Plaintiff's Complaint and demands strict proof thereof.

9. Defendant admits that a Letter of Determination was issued. Defendant is without knowledge as to all further allegations contained in paragraph 9 of

Plaintiff's Complaint and they are therefore denied and strict proof demanded thereof.

10. Defendant admits that a letter forwarding the case to the Department of Justice ("DOJ") was issued on April 27, 2017. Defendant is without knowledge as to all further allegations contained in paragraph 10 of Plaintiff's Complaint and they are therefore denied and strict proof demanded thereof.

11. Defendant admits that a Notice of Right to Sue letter was issued on August 30, 2018, which determined that the DOJ will not file suit. Defendant is without knowledge as to all further allegations contained in paragraph 11 of Plaintiff's Complaint and they are therefore denied and strict proof demanded thereof.

12. Defendant is without knowledge as to the allegations contained in paragraph 12 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

13. Defendant admits that Plaintiff is a black female who was employed with DJJ and that on or about August 14, 2015, she was transferred to the Broward Juvenile Justice Center as a Superintendent. Defendant admits that on or about on December 11, 2015, Plaintiff was terminated. Defendant denies all further allegations contained in paragraph 13 of Plaintiff's Complaint and demands strict proof thereof.

14. Defendant admits that Plaintiff is a black female, that she was previously employed as a superintendent, and that she began at the Broward Juvenile

Justice Center in August of 2015. Defendant denies all further allegations contained in paragraph 14 of Plaintiff's Complaint and demands strict proof thereof.

15. Denied as phrased.

16. Admitted.

17. Defendant is without knowledge as to the allegations contained in paragraph 17 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

18. Defendant denies the allegations contained in paragraph 18 of Plaintiff's Complaint and demands strict proof thereof.

19. Paragraph 19 was not included in Plaintiff's Complaint.

20. Defendant is without knowledge as to the allegations contained in paragraph 20 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

21. Defendant is without knowledge as to the allegations contained in paragraph 21 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

22. Defendant denies the allegations contained in paragraph 22 of Plaintiff's Complaint and demands strict proof thereof.

23. Defendant denies the allegations contained in paragraph 23 of Plaintiff's Amended Complaint and demands strict proof thereof.

24. Defendant denies the allegations contained in paragraph 24 of Plaintiff's Complaint and demands strict proof thereof.

25. Defendant denies the allegations contained in paragraph 25 of Plaintiff's Complaint and demands strict proof thereof.

26. Defendant denies the allegations contained in paragraph 26 of Plaintiff's Complaint and demands strict proof thereof.

27. Defendant denies the allegations contained in paragraph 27 of Plaintiff's Complaint and demands strict proof thereof.

28. Defendant denies the allegations contained in paragraph 28 of Plaintiff's Complaint and demands strict proof thereof.

29. Defendant denies the allegations contained in paragraph 29 of Plaintiff's Complaint and demands strict proof thereof.

30. Defendant denies the allegations contained in paragraph 30 of Plaintiff's Complaint and demands strict proof thereof.

31. Defendant admits a letter of dismissal terminating Plaintiff effective immediately was issued on December 11, 2015. Defendant is without knowledge as to any further allegations contained in paragraph 31 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

32. Admitted.

33. Defendant denies the allegations contained in paragraph 33 of Plaintiff's Complaint and demands strict proof thereof.

34. Defendant denies the allegations contained in paragraph 34 of Plaintiff's Complaint and demands strict proof thereof.

35. Defendant denies the allegations contained in paragraph 35 of Plaintiff's Complaint and demands strict proof thereof.

36. Defendant denies the allegations contained in paragraph 36 of Plaintiff's Complaint and demands strict proof thereof.

COUNT I
Racial Discrimination Under Title VII

Defendant repeats and realleges those allegations in paragraphs 1 through 36 above and incorporate and answer as if fully set forth herein.

37. Admitted.

38. Defendant denies the allegations contained in paragraph 38 of Plaintiff's Complaint and demands strict proof thereof.

39. Defendant denies the allegations contained in paragraph 39 of Plaintiff's Complaint and demands strict proof thereof.

40. Defendant denies the allegations contained in paragraph 40 of Plaintiff's Complaint and demands strict proof thereof.

41. Defendant denies the allegations contained in paragraph 41 of Plaintiff's Complaint and demands strict proof thereof.

42. Defendant denies the allegations contained in paragraph 42 of Plaintiff's Complaint and demands strict proof thereof.

43. Defendant denies the allegations contained in paragraph 43 of Plaintiff's Complaint and demands strict proof thereof.

44. Defendant denies the allegations contained in paragraph 44 of Plaintiff's Complaint and demands strict proof thereof.

45. Defendant denies the allegations contained in paragraph 45 of Plaintiff's Complaint and demands strict proof thereof.

46. Defendant denies the allegations contained in paragraph 46 of Plaintiff's Complaint and demands strict proof thereof.

47. Defendant denies the allegations contained in paragraph 47 of Plaintiff's Complaint and demands strict proof thereof.

48. Defendant denies the allegations contained in paragraph 48 of Plaintiff's Complaint and demands strict proof thereof.

49. Defendant is without knowledge as to the allegations contained in paragraph 49 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

50. Defendant denies the allegations contained in paragraph 50 of Plaintiff's Complaint and demands strict proof thereof.

51. Defendant is without knowledge as to the allegations contained in paragraph 51 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

52. Defendant denies the allegations contained in paragraph 52 of Plaintiff's Complaint and demands strict proof thereof.

53. Defendant denies the allegations contained in paragraph 53 of Plaintiff's Complaint and demands strict proof thereof.

COUNT II
Sex Discrimination Under Title VII

Defendant repeats and realleges those allegations in paragraphs 1 through 36 above and incorporate and answer as if fully set forth herein.

54. Admitted

55. Defendant denies the allegations contained in paragraph 55 of Plaintiff's Complaint and demands strict proof thereof.

56. Defendant denies the allegations contained in paragraph 56 of Plaintiff's Complaint and demands strict proof thereof.

57. Defendant denies the allegations contained in paragraph 57 of Plaintiff's Complaint and demands strict proof thereof.

58. Defendant denies the allegations contained in paragraph 58 of Plaintiff's Complaint and demands strict proof thereof.

59. Defendant denies the allegations contained in paragraph 59 of Plaintiff's Complaint and demands strict proof thereof.

60. Defendant denies the allegations contained in paragraph 60 of Plaintiff's Complaint and demands strict proof thereof.

61. Defendant denies the allegations contained in paragraph 61 of Plaintiff's Complaint and demands strict proof thereof.

62. Defendant denies the allegations contained in paragraph 62 of Plaintiff's Complaint and demands strict proof thereof.

63. Defendant denies the allegations contained in paragraph 63 of Plaintiff's Complaint and demands strict proof thereof.

64. Defendant denies the allegations contained in paragraph 64 of Plaintiff's Complaint and demands strict proof thereof.

65. Defendant admits that the TA report was prepared by all male superintendents or employees. Defendant is without knowledge as to any further allegations contained in paragraph 65 of Plaintiff's Complaint and they are therefore denied and strict proof demanded thereof.

66. Defendant is without knowledge as to whether Plaintiff received the TA Report prior to her termination and demands strict proof thereof. Defendant denies all further allegations contained in paragraph 66 of Plaintiff's Complaint and demands strict proof thereof.

67. Defendant denies the allegations contained in paragraph 67 of Plaintiff's Complaint and demands strict proof thereof.

68. Defendant is without knowledge as to the allegations in paragraph 68 of Plaintiff's Complaint they are therefore denied and strict proof demanded thereof.

69. Defendant denies the allegations contained in paragraph 69 of Plaintiff's Complaint and demands strict proof thereof.

70. Defendant denies the allegations contained in paragraph 70 of Plaintiff's Complaint and demands strict proof thereof.

AFFIRMATIVE DEFENSES

1. As and for a first affirmative defense, Defendant states that Plaintiff has been compensated by collateral sources and that any recovery herein should be reduced by the payments Plaintiff has received by all collateral sources.

2. As and for a second affirmative defense, Defendant is entitled to a set-off of medical bills that were written off by medical providers who examined and/or treated Plaintiffs pursuant to the medical providers contracts with health insurance/maintenance organizations, *Goble v. Fohman*, 901 So.2d 830 (Fla. 2005), and/or reduced upon the medical providers acceptance of payments from Medicare and/or Medicaid, *Thyssenkrup Elevator Corp. v. Lasky*, 868 so.2d 547 (Fla. 4th DCA 2003).

3. As and for a third affirmative defense, Defendant states that Plaintiff failed to mitigate damages, if any, and could have reduced her damages by making a reasonable effort to seek comparable employment, she is therefore not entitled to recovery of any damages which could have been mitigated.

4. As and for a fourth affirmative defense, Defendant states that the Plaintiff's claims are barred, in whole or in part, to the extent they were not presented to the FCHR and/or EEOC in a timely fashion as prescribed under law or identified in the Charge of discrimination.

5. As and for a fifth affirmative defense, Defendant states that Plaintiff's claims are barred as she failed to exhaust all administrative remedies as required under 42 U.S.C. § 2000e-5.

6. As and for a sixth affirmative defense, Defendant states that the Plaintiff's claims are barred, in whole or in part, to the extent there were not identified in the Charge of Discrimination filed with the FCHR and/or EEOC as prescribed by law.

7. As and for a seventh affirmative defense, Defendant states that Plaintiff's claims for damages are limited to the extent that after-acquired evidence demonstrate that the alleged adverse actions would have otherwise been taken against Plaintiff.

8. As and for an eighth affirmative defense the damages plead by Plaintiff are limited to the amounts authorized by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*.

9. As and for a ninth affirmative defense the Defendant has a legitimate, nondiscriminatory and non-retaliatory reason for all employment actions taken with respect to Plaintiff.

10. As and for a tenth affirmative defense Defendant states that Plaintiff's damages are limited according to the principles of sovereign immunity as set forth in § 768.28 Fla. Stat.

JURY TRIAL DEMAND

The Defendant demands trial by jury of all issues so triable

Respectfully Submitted,

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Dated: February 8, 2019

DEFENDANT FLORIDA DEPARTMENT OF JUVENILE JUSTICE MOTION FOR FINAL SUMMARY JUDGMENT (JANUARY 10, 2020)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No.: 18-CV-62891-WPD

DEFENDANT, THE FLORIDA DEPARTMENT OF JUVENILE JUSTICE'S MOTION FOR FINAL SUMMARY JUDGMENT

Defendant, THE FLORIDA DEPARTMENT OF JUVENILE JUSTICE (hereinafter "FDJJ"), by and through undersigned counsel, pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, hereby files this Motion for Final Summary Judgment. There are no genuine issues as to any material facts and Defendant is entitled to judgment as a matter of law.

INTRODUCTION

This action was filed by Plaintiff on November 28, 2018. Plaintiff alleges that FDJJ wrongfully terminated her employment. Plaintiff claims that she was terminated because she is a black female. Count I of Plaintiff's Complaint brings a claim for racial discrimination under Title VII of the Civil Rights Act of 1964. (DE 1, p. 8). Count II brings a claim for sex discrimination under Title VII of the Civil Rights Act of 1964 (DE 1, p. 11). Plaintiff was a facility superintendent at the Broward Regional Juvenile Detention Center (hereinafter "Broward facility)", one of FDJJ's largest secure detention facilities, at the time of her termination. Plaintiff claims that she was qualified for her position as detention superintendent and that the misconduct for which she was discharged was identical or less egregious than that of non-Black male and non-Black female employees within FDJJ. (DE 1, ¶¶ 35-36). The record evidence will demonstrate that these employees did not perform the same basic misconduct as the Plaintiff and therefore cannot be "substantially similar in all material respects", the comparator standard establish by the Eleventh Circuit in *Lewis v. City of Union City, Georgia*, 918 F. 3d 1213, 1220-21 (11th Cir. 2019).

FDJJ denies Plaintiff's claims of violation of Title VII and has asserted legitimate and non-discriminatory reasons for Plaintiff's termination. These reasons include Plaintiff's inability to manage facilities of an increased size; safety concerns; and personnel and staffing issues at two different FDJJ facilities. These issues are documented by both the decision-making employee, Assistant Secretary of Detention Services

Dixie Fosler, and her predecessor, Julia Strange. Plaintiff's inability to safely run a facility became apparent when a technical assistance team was assembled to visit the facility in November 2015. The team's visit revealed ongoing issues with the facility's management, many of which were attributable to the superintendent. These issues presented safety risks to facility youth inmates and staff.

MEMORANDUM OF LAW

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is authorized where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party has the burden to establish the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has established the absence of a genuine issue of material fact, to which the non-moving party bears the burden at trial, it is up to the non-moving party to go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). In order to survive summary judgment on a Title VII claim, a plaintiff alleging intentional discrimination must "present sufficient facts to permit a jury to rule in his (or her) favor." *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220 (11th Cir. 2019) (en banc).

II. FDJJ is entitled to Summary Judgment on Plaintiff's Claims for Violation of Title VII

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000(e)-2(a)(1). A Plaintiff bears the burden of proving discrimination by a preponderance of the evidence. *Jackson v. Blue Bird Corp.*, ___ F. A'ppx. ___ 2019WL6048916 at * 2 (11th Cir. Nov. 15, 2019). "To prove impermissible racial discrimination, an employee must show that an adverse employment action was related to an employer's discriminatory animus towards the employee's race (or sex)." *Smith v. Vestavia Hills Board of Education*, ___ F. App'x ___, 2019WL5700747 at * 2 (11th Cir. Nov 5, 2019).

Racial or sex discrimination may be established through direct evidence or circumstantial evidence. *Id.* Direct evidence is "evidence that, if believed, proves the existence of a fact without inference or presumption." *Jones v. Globe Specialty Metal, Inc.*, 2019-WL38-4246 at * 6 (S.D. Ala. August 13, 2019) (quoting *Burrell v. Bd. of Trs. Ga. Military Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997). Only blatant remarks, "whose intent could mean nothing other than to discriminate . . . " on the basis of race or gender could constitute direct evidence of discrimination. *Id.* In this case, there is no record evidence that Assistant Secretary Fosler ever made discriminatory comments regarding Plaintiff's race or gender (Exhibit A Plaintiff Depo 79:6-80:19; Exhibit D Graham Depo at 115:24-117:2).

The US Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973), established a burden

shifting framework in actions brought under Title VII of the Civil Rights Act of 1964 when a plaintiff relies on circumstantial evidence to prove discrimination. This framework is used to evaluate single-motive discrimination cases which rely on circumstantial evidence, such as this case. *Smith*, 2019WL5700747 at * 2. The Court in *McDonnell Douglas* opined that throughout the proof stages, the burden would shift between the two parties. Specifically, the Plaintiff would carry the initial burden of establishing, by the preponderance of the evidence, a prima facie case of discrimination. *Id.* at 802. Plaintiff must demonstrate the following:

> "(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;
>
> (4) that her employer treated "similarly situated" employees outside her class more favorably."

Lewis v. City of Union City, Georgia, 918 F. 3d 1213, 1220-21 (11th Cir. 2019). A meaningful comparator analysis must be conducted at the prima facie stage of the *McDonnell Douglas* burden shifting framework." *Id.* at 1218.

The burden would then shift to Defendant, the employer, to "articulate some legitimate, nondiscriminatory reason for the employer's action; not retaining Plaintiff". *McDonnell Douglas Corp.*, 411 US 792 at 802. "This burden is one of production, not persuasion and is exceedingly light." *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994) (emphasis added). Finally, the burden would shift once again back

to the Plaintiff to show, by a preponderance of the evidence, that Defendant's reasons for not retaining Plaintiff were in fact a pretext. *McDonnell Douglas Corp.*, 411 US 792 at 804. Despite the shifting of the burdens, the ultimate burden of proving intentional discrimination against a Plaintiff rests with the Plaintiff. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 US 248 (1981).

A. Plaintiff Cannot Establish A Prima Facie Case of Discrimination

Discrimination consists of "treating like cases differently." *Lewis v. City of Union City, Ga.*, 918 F. 3d 1213, 1222 (11th Cir. 2019). A plaintiff can allege intentional discrimination by showing disparate treatment or through a pattern or practice of discrimination. *Denney v. City of Albany*, 247 F. 3d 1172 (11th Cir. 2001). In this case, Plaintiff has not made any allegations in her Complaint that her action for discrimination against Defendant is due to a pattern or practice of discrimination. As such, Plaintiff is proceeding under a disparate treatment theory of discrimination by Defendant.

FDJJ does not dispute that Ms. Tynes belongs to a protected class or that she was terminated, which is an adverse employment action. Likewise, for the purposes of this motion, FDJJ does not dispute that Ms. Tynes was qualified to perform the job of superintendent as Ms. Tynes had served as superintendent of an FDJJ facility since 2007. At issue is only whether the Plaintiff was treated differently than other similarly situated employees outside of her class.

Plaintiff's comparators must be "similarly situated in all material respects." *Lewis*, 918 F. 3d at 1226-27.

In *Lewis v. City of Union City, Georgia*, the Eleventh Circuit went to great lengths to describe the standard for comparator employees. The Eleventh circuit emphasized that the comparator standard does not turn on labels given to their employees, but rather on their "substantive likenesses." *Id.* at 1228. Comparators must be sufficiently similar in the sense that "they cannot reasonably be distinguished." *Id.* The Eleventh Circuit set forth several factors for the court's consideration in determining whether a comparator is "similarly situated", including whether the employee:

> "will have engaged in the same basic conduct or misconduct as the plaintiff, *see e.g. Mitchell v. Toledo Hosp.*, 964 F.2d 577, 580, 583 (6th Cir. 1992) (holding that a plaintiff terminated for 'misused of [an employer's property" could not rely on comparators allegedly guilty of 'absenteeism or 'insubordination')." *Id* at 1227. (Emphasis added).

"In determining whether [other employees] are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Maynard v. Board of Regents*, 342 F. 3d 1281, 1289 (11th Cir. 2003) (emphasis added). The Eleventh Circuit considers the nature of the offense committed as "one of the most important factors in the disciplinary context." *Id.* (emphasis added); *Silvera v. Orange County School Board*, 244 F.3d 1253, 159 (11th Cir. 2001); *Jackson* 2019WL6048916 at * 4. ("We expect a similarly situated comparator to have engaged in the same basic conduct (or misconduct) as the plaintiff . . . ") "An 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 1227.

In *Jackson*, the Eleventh Circuit applied the comparator standard of "similarly situated in all material respects" as discussed in *Lewis*. In that case, a line shift supervisor in a school bus assembly plant was terminated after three employees under his control suffered health issues. *Jackson*, 2019WL6048916 at *1-2. Jackson filed a lawsuit under Title VII alleging racial discrimination. *Id.* at *2. In seeking to establish a prima facie case of discrimination, Jackson argued that another employee, Hill, was a comparator. Hill also had supervisory role with overlapping duties and had been involved in two of the incidents cited as the cause for Jackson's termination. *Id.* at *4. The Court declined to find that Hill was a valid comparator, even though he was involved in the *same incident* as Jackson. The Court cited to the fact that Hill only had passing involvement in the incidents where Jackson was more substantially involved. *Id*. In finding that Hill did not meet the "similarly situated in all material respects" standard the Court stated, "We cannot state that the conduct for which Jackson was held accountable appears to be the same basic conduct in which Hill is alleged to have engaged." *Id.* at * 5.

Plaintiff is unable to prove that any of the six comparators alleged[1] are similarly situated in "all material respects" because she was disciplined for conduct that was different than those of her alleged comparators. *See Jones*, 2019WL3804246 at *8 (finding

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[1] The alleged comparators are Kevin Housel, Joseph Seeber, Douglas Kane, Steve Owens, Daryl Wolf and Vickie Alves.

employees could not be comparators when plaintiff was disciplined for lying to a supervisor but comparators were disciplined for violations of safety rules); *Hartwll v. Spencer*, ___ F.App'x ___ 2019WL5957632 (11th Cir Nov. 13, 2019) (employee was not a valid comparator under substantially similar standard when he was late to work much less frequently than the plaintiff who was late almost every shift).

Most of the incidents discussed by Plaintiff in her deposition were isolated incidents such as an escape or death of a juvenile at a facility. The crux of Plaintiff's argument is that the "comparators" conduct was more egregious than her own. (DE 1, ¶¶ 29, 50, 67). This is not the appropriate criteria for evaluating if another employee is an appropriate comparator. This same argument was made in a case involving race and gender discrimination, *James v. City of Montgomery*, No. 2:17-cv-528-ALB, 2019WL3346530 at * 8 (N.D. Ala. July 25, 2019) (*appeal filed*). In response to this argument the court stated:

> "Needless to say, while both James and Det. Hogan may have engaged in misconduct, they did not engage in the same *type* of misconduct. James' argument "essentially boils down to quibbling about whether [Hogan's] alleged violations were worse than her own, not about whether they were sufficiently similar." *Flowers*, 800 F.3d at 1341. But "on-the-ground determinations of the severity of different types of workplace misconduct and how best to deal with them are exactly the sort of judgments about which we defer to employers."

Id. (*quoting Flowers v. Troup County, Ga., School Dist.*, 803 F.3d 1327 (11th Cir. 2015)). This incidents

described by Plaintiff involving the comparator employees are not the "same basic conduct" that occurred in this case as to qualify these individuals as "similarly situated" to the Plaintiff. We will address each "comparator".

- **Kevin Housel (White Male)**

In her deposition, Plaintiff refers to an escape that occurred at the Orange County Detention Center when Mr. Housel was Central Region Chief. (Exhibit A Plaintiff Depo at 85:20-86:14). Mr. Housel was not at the facility at the time of the incident and was not investigated for the incident, as he had no involvement. (Exhibit B Fosler Affidavit at Attachment 10). Mr. Housel, therefore was not disciplined for the incident. Regardless, a facility escape is entirely different conduct than the incidents that occurred at Plaintiff's detention center. Additionally, Mr. Housel was not in the same position as the Plaintiff at the time the escape occurred. Central Region Chief is a more senior position and does not involve ultimate responsibility for one facility, like a superintendent position. Central Region Chief has an entirely different set of responsibilities. (Exhibit B Fosler Affidavit at ¶ 31(I)). While not necessarily dispositive, courts have found that an employee is not similarly situated when the employees have different responsibilities, positions, or ranks. *Sykes v. Board of Trustees of University of Alabama*, No. 2:18-cv-713-GMB, 2019WL5309767 (N.D. Ala. Oct. 21, 2019).

- **Joseph Seeber (White Male)**

Plaintiff claims that Mr. Seeber was not disciplined for involvement in an escape that occurred he was the superintendent at the Broward Facility. (Exhibit A

Plaintiff Depo at 80:20-81:21; 86:13-23) The incident report reflects that Mr. Seeber was not involved in the incident and that the incident was not attributed to Mr. Seeber's management of the facility. (Exhibit B Fosler Affidavit at ¶ 31(II) and Attachment 11. Ms. Tynes also discussed an incident where Mr. Seeber was the superintendent at the Manatee Regional Detention Center. The incident was investigated and Mr. Seeber was not attributed to the incident or the subject of the investigation. (Exhibit B Fosler Affidavit at Attachment 12). These isolated incidents are a vastly different from the conduct involved in this case.

Eventually Mr. Seeber was under investigation for failure to comply with three annual quality improvement reviews. Mr. Seeber resigned before FDJJ could dismiss him. *Id.* at ¶ 31(II). Quality Improvement Reviews are routine annual reviews identifying standards for the facility as well as areas that need to be improved. (Exhibit D Graham Depo 50:23-51:4; 94:11-20) This is different than a technical assistance report, which would be written specifically when a facility was not performing well. The technical assistance reports also review different areas of concern. (*Id.* at 118:24-119:14; 173:18-175:19) This conduct is not the same basic conduct as the multiple incidents that occurred in Broward while Tynes was superintendent. Joseph Seeber does not meet the criteria required for a comparator.

- **Douglas Kane (White Male)**

Ms. Tynes testified regarding and incident where Mr. Kane was arrested for driving under the influence. (Exhibit A Plaintiff Depo p. 81:22-82:12) As a result, Mr. Kane was suspended for five working days without

pay. (Exhibit B Fosler Affidavit at 31(III)). The facts surrounding Mr. Kane's discipline are not the same basic facts which were considered in the termination of Plaintiff. Mr. Kane's arrest has nothing to do with the management of his facility and did not affect the safety and security of youth and staff within his facility. *Id*. Mr. Kane's disciplinary history also includes a written reprimand for maintenance issues which were discovered at the facility during a visit by headquarters. *Id*. These maintenance issues were also different from the circumstances at Broward because they did not jeopardize the safety and security of youth and staff.

- **Steve Owens (Hispanic Male)**

Plaintiff testified regarding the death of a youth at the Miami Dade Regional Detention Center while Mr. Owens was superintendent. (Exhibit A Plaintiff Depo 81:22-82:5) An investigation was conducted and no allegations against Mr. Owens were sustained. Exhibit B Fosler Affidavit at 31(IV). This was an isolated incident within the facility. The circumstances in Mr. Owen's case were different because he did not have numerous incidents and safety issues within his facility during a short time period. Mr. Owens is not a valid comparator.

- **Daryl Wolf (White Female)**

Ms. Wolf was superintendent of the Miami Regional Juvenile Detention Center until August 2015. Ms. Tynes claims that Ms. Wolf was transferred to the Orange County and given other positions such as region chief, despite issues with her annual quality assurance reviews as the facility. (Exhibit A Plaintiff

Depo at 82:22-84:10). Plaintiff also alleges that Ms. Wolf was involved in an incident where she physically placed her hands on another employee. *Id.* Even assuming this allegation as true for purposes of summary judgment, this action is entirely different from the issues that arose at the Broward Facility and Ms. Wolf does not meet this circuit's comparator requirements.

- **Vickie Alves (White Female)**

Plaintiff testified regarding an incident where a youth passed away at the Brevard Regional Detention Center while Ms. Alves was a superintendent. (Exhibit A Plaintiff Depo at 86:24-87:9). In that case a youth passed away due to bacterial meningitis. (Exhibit B Fosler Affidavit at 31(v)). When the Inspector General's Office investigated and sustained allegations against Ms. Alves for failure to train, she was suspended for five days and resigned shortly thereafter. *Id*. The circumstances of the Alves incident are also vastly different from the conduct in this case. The investigation found that Ms. Tynes did not sufficiently train her staff on a very specific area. *Id.* The issues at Broward facility were widespread and concerned multiple different areas of the facilities operations. Ms. Alves is not a valid comparator.

B. Defendant had many Legitimate and Non-Discriminatory Reasons for Plaintiff's Termination and Plaintiff cannot Prove Pretext.

Even if Plaintiff were to establish a prima facie case of discrimination, the concerns described by Assistant Secretary Fosler regarding Plaintiff's performance, the technical assistance reports, the daily

status reports,[2] and the observations of Joseph Graham and Assistant Secretary Fosler at the Broward Facility all describe dozens of legitimate and non-discriminatory reasons for Plaintiff's termination. Even if Plaintiff were to argue that the findings set forth in Assistant Secretary Fosler's Affidavit were not the reason for Plaintiff's termination, FDJJ is not required to "persuade the Court that the proffered reason was actually the reason for Plaintiff's termination." *Guyette v. Charter Commc'ns, Inc.*, 403 F. Supp 3d 1349, 1366 (N.D. Ga. 2019). Rather FDJJ, is only required to provide a "legally-sufficient explanation supported by admissable evidence." *Id.* "Employers are free to fire their employees for a good reason, bad reason, a reason based on erroneous facts, or for no reason at all, as long as the action is not for a discriminatory reason." *Nix*, 738 F. 2d at 1187.

Assistant Secretary Fosler's Affidavit alone is more than sufficient to meet this burden. FDJJ also presented evidence in the form of technical assistance reports which summarizes Mr. Graham's concerns with the state of the last two facilities run by Plaintiff. Both Assistant Secretary Fosler and Mr. Graham testified to their belief that the multiple issues at Broward presented a safety risk to youth in the facility and staff. (Exhibit D Graham Depo. at 148:16-151:12; 168:12-18; Exhibit B Fosler Affidavit at ¶¶ 14, 18, 21, 22, 23, 24, 27). Assistant Secretary Fosler testified to

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[2] There may be some additional daily status reports for this time period. Should FDJJ obtain any additional reports they will supplement this exhibit accordingly (See Exhibit B Fosler Affidavit at Attachment 4). Regardless, the evidence is sufficient to demonstrate a legitimate non-discriminatory reason for Ms. Tynes' termination.

her opinion that the issues within the facility directly correlated with Plaintiff's management style. At the end of the day FDJJ runs secure juvenile detention facilities, its first priority must be to ensure that the youth in its custody are safe. It is undisputed that the following events occurred in November-December 2015 while Plaintiff was the superintendent of the Broward Facility:

- November 15, 2015, fifteen codes were called. A major altercation broke out amongst the youth and youth were transported to the hospital. Fire rescue medical personnel, and law enforcement had to be called to the facility twice in one day (Exhibit A Plaintiff Depo at 129:2-7; Fosler Affidavit at ¶¶ 12, 13, 14)
- Five youth had barricaded themselves in an unlocked room on a twelve hour period from November 30, 2015 to December 1, 2015. (*Id.* at 40:2-21)
- During the two week period of November 15, 2015 to November 30, 2015, seventy-nine codes were called at the Broward Facility. These incidents involved anything from disruptive youth behavior, suicide attempts, youth involved in physical altercations, threats to staff, and youth inciting riots. (Exhibit B Fosler Affidavit at p. 9, ¶ 26 and Attachment 9; Exhibit A Plaintiff Depo at 128: 15-21).

Even if the Plaintiff believes that Assistant Secretary Fosler should not have terminated her for these events or the findings in the technical assistance report, Plaintiff cannot prove that these findings were pretextual.

In order to prove pretext, Plaintiff must demonstrate that the reason for termination was false and discrimination was the real reason for her termination. *Siddiqui v. Netjets Aviation, Inc.*, 773 F.App'x 562, 564 (11th Cir. 2019) (*petition for cert. docketed*). The pretext inquiry focuses on the beliefs of the employer and whether the employer was "dissatisfied with the employee for non-discriminatory reasons." *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000). This is true even if the employer dissatisfaction was mistaken or unfair. *Id.* The inquiry is not focused on whether the employee was guilty of misconduct but whether the employer in good faith believed so, and whether this belief was the reason for the termination. *Siddiqui*, 773 F.App'x at 564.

Additionally, Plaintiff cannot demonstrate pretext because she cannot put forth evidence which demonstrates that Assistant Secretary Fosler subjectively believed the comparators in question were similarly situated but that she still treated them differently. *Luke v. University Health Services*, 2019WL4670757 at *9 (S.D. Ga. Sept. 24, 2019) ((*petition for cert. docketed*). *see also Nix c. WLCVY Radio/Rhall Commc'ns*, 738 F.2d 1181, 1186 (11th Cir. 1984) ("if an employee applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown.)" Assistant Secretary Fosler articulated the reasons why Plaintiff's situation was distinct from that of the "comparator employees." (Exhibit B, Fosler Affidavit at ¶¶ 30-32). Specifically, Assistant Secretary Foster stated that, unlike the comparators, Plaintiff had numerous reportable incidents (79 to be exact) which occurred within a short time period. *Id.* at ¶ 31. Two facilities under Plaintiff's leadership suffered the

same systematic failures. *Id.* FDJJ has demonstrated numerous legitimate non-discriminatory reasons for Plaintiff's termination and Plaintiff cannot prove that these reasons are pretextual. Summary judgment must be granted in favor of FDJJ.

III. Alternatively, Judgment Must be Granted on Plaintiff's Claim for Punitive Damages

If the Court is inclined to deny FDJJ's motion, alternatively, summary judgment must be granted on Plaintiff's claims of punitive damages. Plaintiff includes a demand for punitive damages in her "prayer for relief." (DE 1, p. 14). Punitive damages are not available in a Title VII action against a government agency. *Alexander v. Fulton County, Ga.*, 207 F. 3d 1303, 1322 (11th Cir. 2000) (*overruled on other grounds*); *Healy v. Town of Pembroke Park*, 821 F.2d 989, 992 (11th Cir. 1987). The language of Title VII expressly precludes the recovery of punitive damages from governments, government agencies and political subdivisions. 42 U.S.C. § 1981 a (b).

It is undisputed that FDJJ is a state agency. Therefore, punitive damages are unavailable to Plaintiff as a matter of law. Should the Court permit the matter to proceed trial, the Court must strike any claim for punitive damages.

CONCLUSION

FDJJ has provided a myriad of legitimate non-discriminatory reasons for its termination of Plaintiff from her position as superintendent. While Assistant Secretary Fosler permitted Plaintiff the opportunity to serve as superintendent of one of FDJJ's largest detention facilities, it became abundantly clear during

her four month tenure that she could not handle the demands presented by such a facility. The Broward technical assistance report details the numerous violations of FDJJ policy and rule that created safety and security issues at Broward. These policies and rules are in place to ensure that the youth in FDJJ's care are safe. The material undisputed facts support that Assistant Secretary Fosler believed that Ms. Tynes continued role as superintendent presented a safety threat to youth and staff at the Broward Facility. The record evidence shows that fifteen of FDJJ's twenty detention centers, approximately 70%, are run by black males or females. There is no record evidence that Plaintiff's dismissal was based on the employer's discriminatory animus to Plaintiff's race or gender.

WHEREFORE, The Defendant, THE FLORIDA DEPARTMENT OF JUVENILE JUSTICE, Respectfully Requests the Court Grant its Motion for Final Summary Judgment and enter final judgment in favor of FDJJ, as there are no genuine issues of material fact. FDJJ is entitled to judgment as a matter of law.

Respectfully Submitted,

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Dated: January 10, 2020

DEFENDANT FLORIDA DEPARTMENT OF JUVENILE JUSTICE RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, MOTION FOR NEW TRIAL (AUGUST 24, 2021)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No.: 18-CV-62891-WPD

DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, MOTION FOR NEW TRIAL

COMES NOW, the Defendant, Florida Department of Juvenile Justice (hereinafter "FDJJ") by and through undersigned counsel and pursuant to Rule 50(b) requests the Court enter judgment as a matter of law in favor of FDJJ or, alternatively, pursuant to Rule 59(a) order a new trial. As grounds therefore, Defendant states:

1. This case was tried before a jury from July 19, 2021 to July 26, 2021. The jury found in favor of the Plaintiff.

2. Plaintiff claimed in this lawsuit that she had been discriminated against by FDJJ due to her sex (female) and race (black) [DE 1].

3. Plaintiff's Complaint contains only two counts: Count I for Racial Discrimination Under Title VII and Count II for Sex Discrimination Under Title VII.

4. There are no enumerated counts in Plaintiff's Complaint for a violation by FDJJ of 42 USC § 1981.[1]

5. On May 29, 2020, the parties filed their Joint Pretrial Stipulation which contains no reference to any issues of fact or law for the jury to determine as to whether FDJJ violated 42 USC § 1981. [DE 62]

6. Through pleadings and discovery, Plaintiff alleged that there were six comparators that would show through circumstantial evidence discrimination against her based on race and sex.

7. On May 29, 2020, the Court entered its Order granting in part Defendant's Motion for Summary Judgment finding that four of the six alleged comparators were not in fact comparators and only allowing Plaintiff to proceed as to two comparators: Joseph

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[1] Plaintiff does reference in a general sense § 1981 in paragraphs 3, 37, 54, and in (a) of the "PRAYER FOR RELIEF".

Seeber (hereinafter "Seeber") and Daryl Wolf (hereinafter "Wolf"). [DE 61]

8. At trial, evidence provided additional insight into the two remaining alleged comparators that Plaintiff described as forming the basis for her claims of discrimination based on race and sex.

9. On July 23, 2021, at the close of Plaintiff's evidence, Defendant moved for Judgment as a Matter of Law pursuant to Rule 50 covering the issues now raised once again in this Motion as to improper comparators and the failure of Plaintiff to plead and prove a cause of action under 42 USC § 1981. [DE 137: 114: 9-125: 3].

10. On July 24, 2021, Defendant renewed their Rule 50 motions and directed the Court to the supplement filed as it relates to the 42 USC § 1981 claim [DE 115] [DE 138: 44: 14-47: 25].

11. It is clear from the evidence and testimony introduced at trial that Seeber and Wolf are not similarly situated to Plaintiff "in all material respects" as required in the 11th Circuit (*See Lewis infra*); nor, was the conduct for which these alleged comparators were disciplined the "same or similar" to the conduct that led to the dismissal of Plaintiff.

12. Additionally, and in the alternative, the claim for race discrimination pursuant to 42 USC § 1981 was improperly submitted to the jury and led to further confusion and inflammation of the jury by virtue of Plaintiff's opening

statement discussing uncapped damages under 42 USC § 1981.

13. Finally, Plaintiff's incantation of the phrase "send a message" in closing argument encouraged the jury to deviate from the facts and the law and instead to render their verdict based on emotion, bias, and prejudice, in contravention of the instructions provided by the Court, which was improper and the basis for a new trial.

Memorandum of Law

A party is entitled to Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a) "if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof." *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994) (quoting *Smith v. U.S.*, 894 F.2d 1549, 1552 (11th Cir. 1990)). In other words, if no reasonable jury could find that the nonmoving party has carried his burden of proof on an essential element of his claim with respect to which he bears the burden of proof, the movant is entitled to judgment as a matter of law. *Washington v. Vogel*, 880 F. Supp. 1542, 1544 (M.D. Fla. 1995). *See also Smith*, 894 F.2d at 1554 ("Because no reasonable jury could find that Smith carried his burden of proof on the issue of willfulness, the Government was entitled to a directed verdict on that issue"). A party is entitled to renew the Motion for Judgment as a Matter of Law after the verdict is rendered and can include in such motion a joint request for new trial under Rule 59. *See* Fed. R. Civ. P. Rule 50(b).

Rule 59 of the Federal Rules of Civil Procedure provides the trial court with discretion to grant a new trial. Rule 59(a) authorizes the grant of a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in federal court." Fed. R. Civ. P. 59(a). Courts have recognized that a new trial may be warranted by a verdict that is against the weight of the evidence and for other reasons including improperly admitted prejudicial statements. *See Deas v. PACCAR, Inc.*, 775 F. 2d 1498, 1503-1504 (11th Cir. 1985); *citing O'Neil v. W.R. Grace & Co.*, 410 F. 2d 908 (5th Cir. 1969). The relevant question for the court to consider is not whether there was any evidence to support the jury verdict, but whether the verdict is against the weight of the evidence. *See Jacobs v. Gielow*, 640 Fed. Appx. 845, 847 (11th Cir. 2015).

I. Proof Necessary for Title VII claims for race and sex discrimination

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000(e)-2(a)(1). A Plaintiff bears the burden of proving discrimination by a preponderance of the evidence. *Jackson v. Blue Bird Corp.*, 792 F. Appx. 706 (11th Cir. 2019). "To prove impermissible racial discrimination, an employee must show that an adverse employment action was related to an employer's discriminatory animus towards the employee's race (or sex)." *Smith v. Vestavia Hills Board of Education*, 791 F. Appx. 127, 130 (11th Cir. 2019).

Racial or sex discrimination may be established through direct evidence or circumstantial evidence. *Id*. Direct evidence is "evidence that, if believed, proves the existence of a fact without inference or presumption." *Jones v. Globe Specialty Metal, Inc.*, 2019-WL3804246 at * 6 (S.D. Ala. August 13, 2019) (quoting *Burrell v. Bd. of Trs. Ga. Military Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997). Only blatant remarks, "whose intent could mean nothing other than to discriminate . . . " on the basis of race or gender could constitute direct evidence of discrimination. *Id*.

The US Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973), established a burden shifting framework in actions brought under Title VII of the Civil Rights Act of 1964 when a plaintiff relies on circumstantial evidence to prove discrimination. The Court in *McDonnell Douglas* opined that throughout the proof stages, the burden would shift between the two parties. Specifically, the Plaintiff would carry the initial burden of establishing, by the preponderance of the evidence, a prima facie case of discrimination. *Id*. at 802. Plaintiff must demonstrate the following: "(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; (4) that her employer treated "similarly situated" employees outside her class more favorably." *Lewis v. City of Union City, Georgia*, 918 F. 3d 1213, 1220-21 (11th Cir. 2019). At issue in trial was the fourth point outlined above as to whether FDJJ treated "similarly situated" employees outside of Plaintiff's class more favorably. However, still necessary is a meaningful analysis of the alleged comparators to determine if they were "similarly situated" to Plaintiff.

Id. at 1218. The ultimate burden of proving intentional discrimination still rests with the Plaintiff. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 US 248 (1981).

Defendant filed its Motion for Summary Judgment on January 10, 2020, primarily addressing the question of the lack of proper comparators [DE 37]. Plaintiff initially claimed six comparators. Pursuant to the Court's ruling on the Motion for Summary Judgment, Plaintiff proceeded at trial with only with two comparators: Seeber and Wolf [DE 61]. At trial, there was no testimony or evidence that Assistant Secretary Fosler ever made discriminatory comments regarding Plaintiff's race or sex. Consequently, Plaintiff was required to prove her case through circumstantial evidence. *See McDonnell Douglas Corp.*, 411 US 792 In a Title VII discrimination case, such proof must be accomplished through the appropriate use of "comparators". *Lewis*, 918 F. 3d 1213.

II. Seeber and Wolf were not proper comparators

Seeber and Wolf must be "similarly situated in all material respects" in order to be treated as comparators. *Id.* at 1226-27. In *Lewis v. City of Union City, Georgia*, the Eleventh Circuit went to great lengths to describe the standard for comparator employees. The comparator standard does not turn on labels given to their employees, but rather on their "substantive likenesses." *Id.* at 1228. Comparators must be sufficiently similar in the sense that "they cannot reasonably be distinguished." *Id.* The Eleventh Circuit set forth several factors for the court's consideration in determining whether a comparator is "similarly situated", including whether the employee:

> will have engaged in the same basic conduct or misconduct as the plaintiff, *see e.g. Mitchell v. Toledo Hosp.*, 964 F.2d 577, 580, 583 (6th Cir. 1992) (holding that a plaintiff terminated for 'misuse of [an employer's] property" could not rely on comparators allegedly guilty of 'absenteeism' and 'insubordination')." *Id* at 1227. (Emphasis added).

"In determining whether [other employees] are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Maynard v. Board of Regents*, 342 F. 3d 1281, 1289 (11th Cir. 2003) (emphasis added); *citing Jones v. Bessemer Carraway Med. Ctr.*, 137 F. 3d 1306, 1311 (11th Cir), *opinion modified by* 151 F. 3d 1321 (1998). The Eleventh Circuit considers the nature of the offense committed as "one of the most important factors in the disciplinary context." *Id.* (emphasis added); *Silvera v. Orange County School Board*, 244 F.3d 1253, 159 (11th Cir. 2001); *Jackson* 792 F. Appx. At 711. ("We expect a similarly situated comparator to have engaged in the same basic conduct (or misconduct) as the plaintiff . . . ") "An 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 1227.

In *Jackson*, the Eleventh Circuit applied the comparator standard of "similarly situated in all material respects" as discussed in *Lewis*. In that case, a line shift supervisor in a school bus assembly plant was terminated after three employees under his control

suffered health issues. *Jackson*, 792 F. Appx. 706. Jackson filed a lawsuit under Title VII alleging racial discrimination. *Id.* In seeking to establish a prima facie case of discrimination, Jackson argued that another employee, Hill, was a comparator. Hill also had supervisory role with overlapping duties and had been involved in two of the incidents cited as the cause for Jackson's termination. *Id*. The Court declined to find that Hill was a valid comparator, even though he was involved in the *same incident* as Jackson. The Court cited to the fact that Hill only had passing involvement in the incidents where Jackson was more substantially involved. *Id*. In finding that Hill did not meet the "similarly situated in all material respects" standard the Court stated, "We cannot say that the conduct for which Jackson was held accountable appears to be the same basic conduct in which Hill is alleged to have engaged." *Id.* at 711.

Plaintiff is unable to prove that Seeber and Wolf were similarly situated in "all material respects" because Plaintiff was disciplined for conduct that was far different than those of her alleged comparators. *See Jones*, 2019WL3804246 at *8 (finding employees could not be comparators when plaintiff was disciplined for lying to a supervisor but comparators were disciplined for violations of safety rules); *Hartwell v. Spencer*, 782 Fed. Appx. 687 (11th Cir. 2019) (employee was not a valid comparator under substantially similar standard when he was late to work much less frequently than the plaintiff who was late almost every shift). In *Quintero v. Boca Raton Community Hospital, Inc.*, this Court stated that "to meet the 'similarly situated' requirement, plaintiff must show that she and the [comparator] employees engaged in 'nearly

identical' conduct but were treated differently by defendant. 2010WL11602613, *5 (S.D. Fla. June 20, 2010). As this Court stated in its Order on Defendant's Motion for Summary Judgment in this case, "[a] proper comparator, in the present case, therefore, must be directly responsible for overseeing the operations of a juvenile detention facility and must have failed to follow FDJJ protocol such that administrative deficiencies and numerous serious incidents occurred under the comparator's leadership." [DE 61, p. 7]

It is not correct for Plaintiff to argue that the conduct of Seeber and Wolf was more egregious than her own conduct. This is not the appropriate criteria for evaluating if another employee is an appropriate comparator. This same argument was made in a case involving race and gender discrimination, *James v. City of Montgomery*, No. 2:17-cv-528-ALB, 2019WL-3346530 at *8 (N.D. Ala. July 25, 2019) (*appeal filed).* In response to this argument the court stated:

> Needless to say, while both James and Det. Hogan may have engaged in misconduct, they did not engage in the same *type* of misconduct. James' argument "essentially boils down to quibbling about whether [Hogan's] alleged violations were worse than her own, not about whether they were sufficiently similar." *Flowers*, 800 F.3d at 1341. But "on-the-ground determinations of the severity of different types of workplace misconduct and how best to deal with them are exactly the sort of judgments about which we defer to employers.

Id. (*quoting Flowers v. Troup County, Ga., School Dist.*, 803 F.3d 1327 (11th Cir. 2015)). The incidents described by Plaintiff involving Seeber and Wolf are

not the "same basic conduct" or "nearly identical" to Plaintiff's conduct so as to qualify these individuals as "similarly situated" to the Plaintiff. Plaintiff has not shown that Seeber and Wolf failed to follow FDJJ protocol such that administrative deficiencies and numerous serious incidents occurred under their leadership. The actions of Plaintiff that led to her dismissal were not of like kind to those of Seeber and Wolf as Plaintiff's actions included the following:

1. Youth taking control of a section of a facility, police being called and youth going the hospital;
2. Youth barricading themselves in a room for hours; and
3. Failure on the part of plaintiff to manage personnel and facilities based on surveys of staff and youth at Collier and Broward.

Plaintiff repeatedly argued at trial that she was not given a second chance. This is simply not true. Testimony at trial revealed that, after a poor Technical Assistance Report at Collier County, Plaintiff was allowed to transfer to Broward, clearly against the very same decision maker's instincts. Assistant Secretary Fosler testified at length regarding her concerns about Plaintiff's rapid transition from a tier 1 facility to a tier 5 facility [DE 136, 117: 11-19] [DE 138, 30: 18-31: 9]. Yet the transfer was allowed at Negron's urging. Even Negron admitted at trial that Fosler was resistant to Plaintiff's transfer to Broward [DE 137, 63: 17-23; 69: 2-70: 2; 71: 8-14].

Additionally, as argued by FDJJ in its Motion for Summary Judgment and now after all testimony and evidence has been presented at trial, neither Seeber

nor Wolf are proper comparators. Even if they were, FDJJ clearly met the "exceedingly light" burden of showing legitimate non-discriminatory reasons for its actions. *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994). These reasons were outlined by Ms. Fosler in her EEO memo (admitted as Defendants #235), and her Memo outlining reasons for termination (admitted as Defendants #195) and her testimony at trial. [DE 136, 71: 10-113: 5] [DE 138, 28: 16-30: 17, 31: 16-32: 17]]. Consequently, Defendant is entitled to judgment as a matter of law. *See Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F. 3d 1318, 1333 (11th Cir. 1994). Plaintiff produced no evidence and elicited no testimony at trial of pretext for the dismissal other than pure speculation which is insufficient.

A. Joseph Seeber

Plaintiff alleged at trial that Joseph Seeber (white male) was a comparator to her and was treated differently despite claims of conduct as egregious as Plaintiff. However, the issues that Seeber had during his employment with FDJJ were not the same or similar conduct as those of Plaintiff and should not be compared to Plaintiff's discipline. Testimony and evidence at trial clearly showed that the conduct of Seeber was in fact, not the same or similar to Plaintiff's conduct:

a. The "escapes" that Plaintiff claimed were attributed to Joseph Seeber's facility were in fact a single escape that occurred during transport from Broward Regional Juvenile Detention Center. Both Seeber and Assistant Secretary Fosler testified that the escape was investigated and found to be the result of a single employee's failure and was in fact

a one-time incident. [DE 137, 22: 23-23: 1; 28: 19-29: 12] [DE 138, 34: 16-23]

b. The death which occurred at the Manatee facility was not attributed to Seeber's management but, rather a failure of a contracted vendor to follow proper medical protocol. [DE 137, 7: 18-8: 8; 27: 25-28: 18] [DE 138, 34: 24-35: 8]

c. Seeber's transfer to Pinellas County was at his request to be close to his fiancé and had nothing to do with the escape or the death of an inmate. [DE 137, 29: 18-30: 1]

d. Seeber was in fact going to be terminated by Assistant Secretary Fosler because of later management problems but he tendered his resignation before the termination could be made effective. [DE 137, 11: 21 24; 30: 13-31: 11]

Some matters that were accepted as true by the Court in its Order granting in part the Defendant's Motion for Summary Judgment were proven to be incorrect at trial [DE 61, p. 8-14].

1. There was only one escape, not escapes (plural), and it was determined not to be the fault of Seeber.

2. No death occurred at the Pinellas facility, counter to Plaintiff's assertion in the motion for summary judgment.

3. The uncontroverted evidence at trial proved that the Quality Improvement Reports and Technical Assistance findings are not comparable. [DE 138, 4: 14-9: 4]

At trial, Ms. Fosler testified that she did not seek to terminate Mr. Seeber sooner as his tenure at Broward was fine, that Seeber himself asked to be moved to Pinellas to be closer to his fiancé. On the other hand, the Plaintiff's staff, and by extension she, lost control of part of the center leaving she and her staff completely unable to prevent youth from damaging property and hurting one another, while the staff was left to call law enforcement. [DE 138, 33: 22-34: 5]. Consequently, Plaintiff failed to prove at trial that Joseph Seeber is a valid comparator. As Mr. Seeber is not a valid comparator, Plaintiff may not rely on evidence of how he was treated as circumstantial proof of discrimination against her.

B. Daryl Wolf

Plaintiff also alleged at trial that Daryl Wolf (white female) was a comparator to her and was treated differently despite claims of conduct as egregious as Plaintiff. However, the conduct of Wolf was not the same conduct or misconduct as Plaintiff and should not be compared to Plaintiff's actions.

a. The spray-painting incident described by former Regional Director Negron was an isolated incident that in no way is similar to the incidents which took place in the Broward facility under the plaintiff's watch. [DE 137, 89: 15-21; 91: 9-12; 98: 13-99: 18]

b. The language used by Daryl Wolf that led to a verbal reprimand was an isolated incident of her repeating what a youth had told her. [DE 137, 90: 6-22]

c. The assault allegation against Wolf was unfounded and as a result there was no management failure on her part. [DE 137, 91: 21-92: 12] [DE 138, 43: 15-25]

d. The Quality Improvement Reports that plaintiff complains of regarding Daryl Wolf did not occur when Wolf was in charge of the facility. [DE 137, 92: 13-25, 97: 22-98: 12] [DE 138, 43: 7-14]

e. The testimony regarding Daryl Wolf's transfers to various facilities throughout the state was due to her frequently being transferred to assist troubled facilities because of her experience and background and was not because of any discipline problems or the need to remove her from a facility. [DE 137, 88: 6-89: 14, 89: 22-90: 5, 95: 6-96: 8]

f. There was no evidence produced at trial that any facility overseen by Wolf faced a loss of control over the facility, leaving youth to damage property and harm one another leading to police and paramedics responding to retake control and evacuate the injured similar to what happened at Plaintiff's facility.

Ms. Fosler also testified at trial as to the reasons why Wolf was not terminated indicating that Wolf did not have issues with running her facilities and only had some errors in judgment. [DE 138: 32: 19-33: 17]. None of the issues with Daryl Wolf were similar to the overall management concerns that Ms. Fosler and FDJJ had with Plaintiff. [DE 138, 33: 18-21].

Plaintiff did not establish or illicit any testimony as to Wolf being involved in any conduct related to a

ring of missing keys, using her state issued computer for personal reasons, or any escapes under her watch despite the contention in Plaintiff's Response to Defendant's Motion for Summary Judgment. [DE 41, p. 12-13]. Consequently, Plaintiff failed to prove at trial that Daryl Wolf is a valid comparator. The issues that Wolf had during her employment with FDJJ were so dissimilar to those of Plaintiff that Plaintiff cannot use evidence of how Wolf was treated as circumstantial proof of discrimination.

Without Seeber or Wolf as a valid comparator, Plaintiff cannot establish a prima facie case due to there being no comparators to show circumstantial evidence of discrimination and no direct evidence of discrimination.

III. Claims under 42 USC § 1981 were not properly pled by Plaintiff and abandoned in the Joint Pre-Trial Stipulation

Plaintiff failed to sufficiently allege in her Complaint a cause of action for race discrimination pursuant to 42 USC § 1981, and even if the Court finds that she did, she abandoned such cause of action when failing to make it an issue for the jury to determine in the Pretrial Stipulation. The fact that Plaintiff brought claims of discrimination against FDJJ for race and sex pursuant to Title VII prevents a separate claim for race discrimination under 42 USC § 1981 as race discrimination under 1981 requires Plaintiff to meet the "but for" standard. Defendant made a timely objection to the mention of a 1981 claim in opening as well as moving for a judgment as a matter of law at the close of Plaintiff's case and renewed at the close of all evidence. The submission of the claim for race discrimination

pursuant to 42 USC § 1981 was improper and poisoned the jury venire as a result of plaintiff's argument for "uncapped" damages in opening statement [DE 134, 29: 23-30: 11].

In a claim under Title VII of the Civil Rights Act of 1964 for discrimination based on race, Plaintiff must show that race was a "motivating factor" in her termination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989). This is the same for a claim of sex discrimination under Title VII. To state a claim of race discrimination under § 1981, plaintiff must allege facts establishing: (1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute. *Jackson v. BellSouth Telecommunications*, 372 F. 3d 1250, 1270 (11th Cir. 2004). While there is a liberal standard of notice pleading, a plaintiff must still provide the defendant with fair notice of the factual grounds on which the Complaint rests. *Id.* at 1271.

In *Cummings v. Palm Beach County*, a vague and conclusory Complaint was filed that failed to state a factual basis for claims of race and age discrimination required to give a defendant notice necessary to prepare a defense. 642 F. Supp. 248, 249-50, (S. D. Fla. 1986). Plaintiff must do more than merely state legal conclusions and must allege some specific factual basis for those conclusions or face dismissal of their claims. *Id.*

A claim under Section 1981 of the Civil Rights Act of 1866 requires proof that race was the "but-for" cause of termination. *Comcast Corporation v. National*

Association of African American-Owned Media, 140 S. Ct. 1009 (2020). In *Comcast*, a unanimous United State Supreme Court held that in order for a Plaintiff to prevail in a Section 1981 claim "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right". *Id.* at 1019.

In the present case, Plaintiff offered no testimony or evidence at trial that her race was the "but-for" cause of her termination. Further, in the operative Complaint she fails to allege that race was the "but-for" cause for Plaintiff's termination. Plaintiff cannot maintain separate claims for racial and sex discrimination while simultaneously asserting that "but-for" her race, she would not have been terminated. If Plaintiff was terminated for both race and sex discrimination as she claims in her Complaint, then neither could be the "but-for" cause of her termination as there would be two reasons for her termination. By asserting termination for both her race and her sex, Plaintiff forfeits any argument that either is a but for cause. By the fact that Plaintiff has brought separate counts for discrimination based on sex and race, her causes of action would have to be pursuant to Title VII and not Section 1981. As such, any claim Plaintiff makes under Section 1981 is fatally flawed and does not meet the required element of "but-for" causation.

When the parties filed their Joint Pre-Trial Stipulation on May 29, 2020, the agreed upon stipulations were devoid of any mention of a claim pursuant to 42 USC § 1981 or that the jury was to make the factual findings related to such a cause of action. The parties are bound by their voluntary agreement in the pretrial stipulation that was submitted to the Court. *See*

F.D.I.C. v. Stahl, 89 F. 3d 1510, 1521 (11th Cir. 1996); *citing Busby v. City of Orlando*, 931 F. 2d 764, 771 n.4 (11th Cir. 1991). Additionally, S.D. Fla. L. R. 16.1(g) states that after a pretrial conference, 'the pretrial stipulation as so modified will control the course of the trial" *See also Vital Pharmaceuticals, Inc. v. Monster Energy Co.*, 2021 WL 3371942, *29 (S.D. Fla. August 3, 2021). As such, Plaintiff is bound by the joint Pre-Trial Stipulation where there is no cause of action under 42 USC § 1981.

IV. Plaintiff's plea to "send a message" requires a new trial

Plaintiff argued in closing argument that the jury should "send a message" which was an improper and objectionable plea. [DE 138, 82: 24-83: 4]. Defendant made a contemporaneous objection to this plea. *Id.* Although sustained, the cat was out of the bag. Courts have held that a "send a message" argument forms the basis for a new trial.

The standard for granting a new trial based on improper conduct of counsel, including an improper closing argument, is "whether the conduct was such as to impair gravely the calm and dispassionate consideration of the case by the jury". *Bankatlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1474 (11th Cir. 1992). In *Neal v. Toyota Motor Corp.*, counsel made a "send a message" argument which did not lead to a new trial being granted solely because the argument was not objected to. 832 F. Supp. 939, 944 (N.D. Ga. 1993). Making a plea to "send a message" diverts a jury's duty to decide a case based on facts and the law to instead use emotion, personal interest, or bias to render their verdict. *Caudle v. Dist. of*

Columbia, 707 F. 3d 354, 361 (D.C. Cir. 2013). Additionally, in *R.J. Reynolds Tobacco Co. v. Gafney*, the Florida Fourth District Court of Appeal stated that "send a message arguments are clearly inappropriate when utilized in a way that links the 'sending of the message' to a compensatory damage award." 188 So. 3d 53, 57 (Fla. 4th DCA 2016). In the subject case, the use of the "send a message" language in closing argument by Plaintiff was improper, objectionable, and impaired the jury's ability to determine this case without using emotion, personal interest, or bias.

V. Conclusion

The two claimed comparators asserted by Plaintiff at trial, Seeber and Wolf, have been shown through testimony and evidence not to be similarly situated to Plaintiff "in all material respects"; nor, was the conduct for which these alleged comparators were disciplined, the "same or similar" to the conduct leading to dismissal of Plaintiff. Wolf and Seeber did not fail to follow FDJJ protocol such that there were administrative deficiencies and numerous serious incidents under their leadership. As they are not proper comparators, and Plaintiff has no proof of direct discrimination, thereby relying solely on circumstantial evidence to prove her case, no reasonable jury could find that the Plaintiff has carried her burden of proof. *McDonald Douglas, supra*

Additionally, the submission to the jury of a claim for race discrimination pursuant to 42 USC § 1981 was improper and led to further confusion and inflammation of the jury by virtue of Plaintiff's opening statement discussing uncapped damages. Plaintiff failed to properly plead a claim for race discrimination under

42 USC § 1981 and failed to preserve such a claim in the joint pre-trial stipulation agreed to by the parties.

Finally, Plaintiff's call for the jury to "send a message" in closing argument encouraged the jury to not use the facts and the law to render their verdict; rather, to use emotion, bias, and prejudice in contravention of the instructions by the Court. This was improper and the basis for a new trial. This improper argument compounded the improper opening remarks about uncapped damages.

WHEREFORE Defendant, Florida Department of Juvenile Justice requests that the Court grant their Renewed Motion for Judgment as a Matter of Law or, in the alternative, to grant a new trial, and for any further relief this Court deems appropriate.

Respectfully Submitted,

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Dated: August 24, 2021

JURY INSTRUCTIONS
(JULY 27, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No.: 18-CV-62891-WPD

JURY INSTRUCTIONS

3.1 Introduction

Members of the jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case.

When I have finished you will go to the jury room and begin your discussions, sometimes called deliberations.

Note Taking

You've been permitted to take notes during the trial. Most of you—perhaps all of you—have taken advantage of that opportunity. You must use your

notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

3.2.3 The Duty to Follow Instructions—Government Entity or Agency Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it — even if you do not agree with the law — and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may act only through people as its employees; and, in general, a governmental agency is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the governmental agency.

3.3 Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

3.4 Credibility of Witnesses

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that

testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

1. Did the witness impress you as one who was telling the truth?
2. Did the witness have any particular reason not to tell the truth?
3. Did the witness have a personal interest in the outcome of the case?
4. Did the witness seem to have a good memory?
5. Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
6. Did the witness appear to understand the questions clearly and answer them directly?
7. Did the witness's testimony differ from other testimony or other evidence?

3.5.1 Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she

remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

3.6.1 Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

3.7.1 Responsibility for Proof—Plaintiff's Claims —Preponderance of the Evidence

In this case it is the responsibility of the Plaintiff to prove every essential part of her claim by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that the Plaintiff's claim is more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the Plaintiff.

When more than one claim is involved, you should consider each claim separately.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff's claims by a preponderance of the evidence, you should find for the Defendant as to that claim.

3.7.2 Responsibility for Proof—Affirmative Defense Preponderance of the Evidence

In this case, the Defendant asserts the affirmative defenses that, first, Plaintiff's termination was due to a legitimate non-discriminatory reasons and, second that Plaintiff failed to mitigate her damages by finding comparable employment after she was terminated. Even if the Plaintiff proves her claims by a preponderance of the evidence, the Defendant, can prevail in this case if it proves an affirmative defense by a preponderance of the evidence.

You should consider each affirmative defense separately.

I caution you that the Defendant does not have to disprove the Plaintiff's claims, but if the Defendant raises an affirmative defense, the only way it can prevail on that specific defense is if it proves that defense by a preponderance of the evidence.

4.5 42 U.S.C. § 1981—Title VII—Civil Rights Act—Discrimination—Discharge—Including "Same Decision" Defense

In this case, Lawanna Tynes claims that Plaintiff violated the Federal Civil Rights statutes that prohibit employers from discriminating against employees in the terms and conditions of employment because of their race and sex.

Specifically, Lawanna Tynes claims that The Florida Department of Juvenile Justice discharged her because of her race and sex.

The Florida Department of Juvenile Justice denies Lawanna Tynes' claims and asserts that there were non-discriminatory reasons for Plaintiff's termination that were unrelated to Plaintiff's race or sex.

To succeed on her claim against The Florida Department of Juvenile Justice, Lawanna Tynes must prove each of the following facts by a preponderance of the evidence:

First:

The Florida Department of Juvenile Justice discharged Lawanna Tynes; and

Second:

Lawanna Tynes' race or sex was a motivating factor that prompted The Florida Department of Juvenile Justice to discharge Lawanna Tynes.

In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.

The Parties have agreed that The Florida Department of Juvenile Justice discharged Lawanna Tynes. The question you must decide is whether Lawanna Tynes' race or sex was a "motivating factor" in the decision.

To prove that race or sex was a motivating factor in The Florida Department of Juvenile Justice's decision, Lawanna Tynes does not have to prove that her race or sex was the only reason that the Florida Department of Juvenile Justice discharged her from employment. It is enough if Lawanna Tynes proves that race or sex influenced the decision. If Lawanna Tynes' race or sex made a difference in The Florida Department of Juvenile Justices' decision, you may find that it was a motivating factor in the decision.

The Florida Department of Juvenile Justice claims that Lawanna Tynes' race or sex was not a motivating factor in the decision and that it discharged Lawanna Tynes for other reasons. An employer may not discriminate against an employee because of the employee's race or sex but the employer may discharge an employee for any other reason, good or bad, fair or unfair. If you believe The Florida Department of Juvenile Justices' reasons for the decision to discharge Lawanna Tynes and you find that Florida Department of Juvenile Justices' decision was not motivated by Lawanna Tynes' race or sex, you must not second guess The Florida Department of Juvenile Justices' decision, and you must not substitute your own judgment for The Florida Department of Juvenile Justices' judgment—even if you disagree with it.

As I have explained, Lawanna Tynes has the burden to prove that her race or sex was a motivating factor in The Florida Department of Juvenile Justices'

decision to discharge Lawanna Tynes. I have explained to you that evidence can be direct or circumstantial. To decide whether Lawanna Tynes' race or sex was a motivating factor in The Florida Department of Juvenile Justices' decision to discharge Lawanna Tynes' you may consider the circumstances of The Florida Department of Juvenile Justices' decision. For example, you may consider whether you believe the reasons The Florida Department of Juvenile Justice gave for the decision. If you do not believe the reasons it gave for the decision, you may consider whether the reasons were so unbelievable that they were a cover-up to hide the true discriminatory reasons for the decision.

If you find in Lawanna Tynes' favor for each fact she must prove, you must decide whether The Florida Department of Juvenile Justice has shown by a preponderance of the evidence that The Florida Department of Juvenile Justice would have discharged Lawanna Tynes even if The Florida Department of Juvenile Justice had not taken Lawanna Tynes' race or sex into account. If you find that Lawanna Tynes would have been discharged for reasons other than her race or sex, you must make that finding in your verdict.

If you find for Lawanna Tynes and against The Florida Department of Juvenile Justice on this defense, you must consider Lawanna Tynes' compensatory damages.

When considering the issue of Lawanna Tynes' compensatory damages, you should determine what amount, if any, has been proven by Lawanna Tynes by a preponderance of the evidence as full, just and reasonable compensation for all of Lawanna Tynes' damages as a result of the discharge, no more and no less. Compensatory damages are not allowed as a

punishment and must not be imposed or increased to penalize The Florida Department of Juvenile Justice. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that Lawanna Tynes has proved them by a preponderance of the evidence, and no others:

(a) net lost wages and benefits from the date of discharge to the date of your verdict; and

(b) emotional pain and mental anguish.

To determine the amount of Lawanna Tynes' net lost wages and benefits, you should consider evidence of the actual wages she lost and the monetary value of any benefits she lost.

To determine whether and how much Lawanna Tynes' should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury—tangible and intangible. Lawanna Tynes does not have to introduce evidence of a monetary value for intangible things like mental anguish. You will determine what amount fairly compensates her for her claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires Lawanna Tynes to be reasonably diligent in seeking substantially equivalent employment to the position she held with The Florida

Department of Juvenile Justice. To prove that Lawanna Tynes' failed to mitigate damages, The Florida Department of Juvenile Justice must prove by a preponderance of the evidence that: (1) work comparable to the position Lawanna Tynes held with The Florida Department of Juvenile Justice was available, and (2) Lawanna Tynes' did not make reasonably diligent efforts to obtain it. If, however, The Florida Department of Juvenile Justice shows that Lawanna Tynes did not make reasonable efforts to obtain any work, then The Florida Department of Juvenile Justice does not have to prove that comparable work was available.

If you find that The Florida Department of Juvenile Justice proved by a preponderance of the evidence that Lawanna Tynes failed to mitigate damages, then you should reduce the amount of Lawanna Tynes' damages by the amount that could have been reasonably realized if Lawanna Tynes' had taken advantage of an opportunity for substantially equivalent employment.

If you find that race was a motivating factor in Lawanna Tynes' termination you must also determine if it was the "but-for" cause of the termination. This means that you must decide whether the Florida Department of Juvenile Justice took that action because of Lawanna Tynes' race. To determine that the Florida Department of Juvenile Justice terminated Lawanna Tynes because of her race, you must decide that the Florida Department of Juvenile Justice would not have terminated Lawanna Tynes if she had been white.

3.8.1 Duty to Deliberate When Only the Plaintiff Claims Damages

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Your verdict must be unanimous—in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges—judges of the facts.

Your only interest is to seek the truth from the evidence in the case.

3.9 Election of Foreperson Explanation of Verdict Form

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me and I'll respond as promptly as possible—either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

Submitted,

W.P. Dimitrouleas

7/26/21

JURY VERDICT
(JULY 26, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LAWANNA TYNES,

Plaintiff,

v.

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Defendant.

Case No.: 18-CV-62891-WPD

VERDICT FORM

Do you find from a preponderance of the evidence:

1. That Lawanna Tynes' race or sex was a motivating factor that prompted The Florida Department of Juvenile Justice to terminate her employment?

Answer Yes or No: Yes

If your answer 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.

2. That Florida Department of Juvenile Justice would have discharged Lawanna Tynes from employment even if the Florida Department of Juvenile Justice had not taken Lawanna Tynes' race or sex into account?

Answer Yes or No: No

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

3. That Lawanna Tynes' race was the but-for cause of the Florida Department of Juvenile Justice's decision to terminate her employment?

Answer Yes or No: Yes

4. That Lawanna Tynes 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?

$ 424,600.00

5. That Lawanna Tynes should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No: Yes

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

$ 500,000

SO SAY WE ALL.

Date: 7/26/21

APPELLANT FLORIDA DEPARTMENT OF JUVENILE JUSTICE INITIAL BRIEF FILED IN ELEVENTH CIRCUIT (FEBRUARY 10, 2022)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

v.

LAWANNA TYNES,

Appellee.

Case No.: 21-13245

On Appeal from the United States District Court
Southern District of Florida

BRIEF OF APPELLANT

Respectfully submitted,
Carri S. Leininger, Esq.
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Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, Appellant, Florida Department of Juvenile Justice, respectfully submits the following Certificate of Interested Persons and Corporate Disclosure Statement:

CERTIFICATE OF INTERESTED PERSONS

- Dimitrouleas, William,
  United States District Court Judge
- Florida Department of Juvenile Justice
  (Stock Ticker: none)
- Leininger, Carri S., Esq.
- Miller, Glenn, Esq.
- Sellards, Jayme, Esq.
- Snow, Lurana,
  United States District Court Magistrate Judge
- Tynes, Lawanna
- Williams, James, O., Jr., Esq.
- Wiseberg, Philip, Esq.
- Williams, Leininger & Cosby, P.A.

CORPORATE DISCLOSURE AND CERTIFICATION

Florida Department of Juvenile Justice is a state agency of Florida. As a result, no publicly traded company or corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument and submits it may be of assistance to the Court. The jury trial lasted six days and included numerous witnesses and exhibits spanning sixteen years of employment. Appellant believes it may be helpful to the court to have counsel available to address questions the court may have about the record and issues on appeal.

{ Tables of Contents and Authorities Omitted }

STATEMENT OF JURISDICTION

The basis for the District Court's subject-matter jurisdiction is federal question jurisdiction pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345, as Appellee, LAWANNA TYNES ("Tynes"), filed a civil action against the Appellant, FLORIDA DEPARTMENT OF JUVENILE JUSTICE ("FDJJ"), alleging race and sex discrimination under Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981. [DE 1, p. 2].

The Final Judgment was entered on July 27, 2021, and an Amended Final Judgment was entered on September 8, 2021. [DE 121, DE 147]. The District Court denied FDJJ's Renewed Motion for Judgment as a Matter of Law or Alternatively, Motion for New Trial on August 27, 2021. [DE 143]. FDJJ filed its Notice of Appeal on September 21, 2021. [DE 152].

The appeal is timely. *See* Fed. R. App. P. 4(a)(4)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as an appeal of a final decision of a district court of the United States. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1) Whether the District Court erred in denying FDJJ's Rule 50 Motion by holding that Tynes' two comparators were sufficient to establish her race and sex discrimination claims under Title VII of the 1964 Civil Rights Act.

2) Whether the District Court erred in denying FDJJ's Rule 50 Motion by holding that Tynes properly

plead and proved a claim for race discrimination under 42 U.S.C. § 1981.

PRELIMINARY STATEMENT

This appeal arises out of an employment discrimination case filed by the Appellee, Lawanna Tynes. The Appellant is the Florida Department of Juvenile

Justice (FDJJ). At the time of her termination, she was employed as a superintendent at the Broward Juvenile Detention Facility. FDJJ fired the Plaintiff after an unheard of fifteen (15) codes were called in a single day at the Broward Juvenile Detention Center. The Plaintiff claims the termination was discrimination.

FDJJ will be referred to as FDJJ or the Defendant.

The Appellee will be referred to as "Plaintiff" or Ms. Tynes.

References to the Record will be by Docket Entry number in the District Court followed by the page number, except the Trial Transcript.

The Trial Transcript is not numbered consecutively. The numbering starts at 1 at the beginning of each day. The trial lasted six (6) days. The references to the transcript will be by day and page number, i.e. [TT 3-121]

References to the Appendix will be by the DE number or PDF number [App.]

STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

"The custody and care of juveniles entrusted to the Department is paramount." [DE 122-24, p.4]. The proper management of staff and facilities is essential to FDJJ meeting its objectives. [DE 122-24, p.4]

Plaintiff's work history

The Plaintiff, Lawanna Tynes, was first employed by FDJJ in 1999. She is a black female. FDJJ promoted her numerous times and in 2007 FDJJ promoted her to the position of Superintendent. [TT 2: 68-71]. Upon the recommendation of her immediate supervisor and the Regional Director, Dr. Gladys Negron ("Director Negron"), the Assistant Secretary of Detention Services Dixie Fosler ("AS Fosler") transferred the Plaintiff to the Broward Regional Juvenile Detention Center ("Broward Facility") in August of 2015. [TT 2:75] The Broward Facility is a tier five facility (tiers denote the size of the facility with five being the largest). [DE 36 at 1] In 2015, there were 100 people on staff at the Broward Facility. [TT. 3-111]

15 codes called on November 15th

The Broward Facility is divided into three separate areas called "mods". [TT. 75] A mod consists of a large open dayroom surrounded by cells that can be locked. There are also bathroom and shower facilities in each mod. [TT 3:75]

On November 15, 2015, fifteen (15) codes were called throughout the day and throughout different sections of the facility. A code is called when an officer

needs assistance. [TT. 3-72] During cross-examination, the Plaintiff testified to the following timeline prepared by her Supervisor [TT. 3-80, 73-82]:

8:39 am – a code blue is called because of a physical altercation between youths.

9:02 – EMS arrives to transport one of the youths.

9:14 – The Ft. Lauderdale Police Department are called because of the altercation

10:00 – Guards concerned that the mod (a section of the facility) is still unstable.

10:15 – a code Green is called because staff was concerned about an escape.

11:38 – a "code white cutdown" indicating a possible suicide attempt.

11:42 – Another code blue is called because youth are being disruptive.

12:21 pm – A code blue is called

12:28 – a code blue is called

1:58 – A code blue is called due to an altercation involving multiple youths. Ft. Lauderdale Police are called again.

3:00 – Captain Burks arrives.

5:15 – another code blue is called

5:40 - a code blue is called in the dining hall due to a physical altercation between Youth.

8:14 – a code blue is called due to a fight in the girls mod. [TT 81]

8:17 – A code blue is called for youth involved with staff.

9:20 – code blue is called

9:40 – code blue is called

11:24pm – code blue is called

The Plaintiff admitted that from 8:30 in the morning until 11:30 at night the entire day consisted of a series of disruptive behaviors, fights, two separate calls to the police, and a call to fire rescue. [TT. 3-82] The Plaintiff admitted that this was "very off day" and "it was not a good day", but frequently claimed ignorance repeatedly saying "I was not there". [TT. 3-77].

November 15 was a Sunday [TT 3:5]. The Plaintiff was at home when she was notified about the ongoing codes. She did not come to the facility. The Plaintiff testified that Captain Burks usually handled weekend duty so Captain Burks went into the facility. [TT. 3:49] The Plaintiff testified at trial that she spoke to Captain Burks on November 15 while the facility was experiencing 15 codes but could not recall what they discussed. [TT. 3-50] The Plaintiff was not even aware that Captain Burks did not report to the facility on November 15 until 3:00 in the afternoon. [TT. 3-50]

The Plaintiff testified she did not come to the facility because she had high blood pressure and her doctor had signed paperwork on Friday, November 13 to be placed on FMLA. [TT 3:5, 46] The FMLA paperwork was emailed to FDJJ on November 17 after the November 15 incident. [DE 123-11, Defendant's Ex. 175]

FDJJ mandates that certain incidents require the facility call the Central Communications Center (CCC). The Plaintiff admitted during cross examination that there were several different incidents that occurred on November 15 that individually mandated

a call to the CCC, but no one called the CCC on November 15. [TT. 3-86-87]

The Plaintiff did not call the Central Communications Center ("CCC") on November 15. She did not call her Regional Director on November 15. She did not ensure that her staff called the CCC or the Regional Director about the on-going codes on November 15. [TT 3:86-89;5:74]

When the Plaintiff arrived at the Broward Facility on Monday, November 16, she did not take any steps to make sure the CCC had been called the day before. [TT. 3:89] Indeed, an email to the Plaintiff from Tallahassee at 3:39pm on November 16 and the Plaintiff's response sent at 5:43pm show that the Plaintiff had not taken any steps to make sure the CCC had been notified. Additionally, her responses on November 16 failed to disclose that the police had been called twice to the facility on the 15th (she reported only one incident of policy involvement). [TT. 3:93-94, DE 123-8, Ex.107]. The CCC was not called until after 5pm the following day. [DE 123-8]

The Plaintiff's Direct Supervisor and the Regional Director testified that she had never heard of a facility having fifteen (15) codes called in a single day. The Regional Director further testified that had she been notified she would have gone to the facility because fifteen (15) indicates that the staff had lost control of the facility. [TT. 5:74]

The events of November 15 raised concerns about the facility. FDJJ ordered someone from the Regional staff to be at the facility each day from November 15 through Thanksgiving. [TT 3-95] FDJJ also assembled a Tactical Assessment Team ("Team") of DJJ officers

to investigate and ensure that proper procedures were being followed to ensure the safety and security of the Youth and staff [Technical Assistance Report, DE 122-10; TT. 2:120] The Team arrived at the facility on November 30 and stayed until December 4. [DE 122-26, Plaintiff's exhibit 79; TT 3: 28] The Team generated its report detailing the numerous deficiencies. [DE 122-10]

Upon first arriving at the Facility on November 30, the Team was made aware of an on-going incident involving five youth that had barricaded themselves in a room for more than twelve (12) hours and would not come out. [Id. at 2; TT 2:82; 3- 119] This was due in part to the staff's failure to follow proper procedure. [Id.] The Team helped de-escalate the confrontation and coaxed the Youths safely out of the room. [DE 122-10, p.2; TT 3-120]

During their investigation, the Team learned the Youth's rooms were routinely not locked after bedtime, they were allowed to stay up and watch television after midnight, there was no set schedule during the day, and the youth were not receiving the required schooling. [DE 122-10, p.4] The Youths were not locked down during shift change (lockdown allows Youths to rest and be secure in their rooms while the staff is changing). Additionally, Staff were instructed not to use the confinement cells which contributed to the staff losing control. Instead the cells were used for storage. [DE 122-10, p.4] Furthermore, there was a spike in incidents where staff had to put their hands on the Youths. [Id. at p.1]

The Team's investigation also revealed on-going failure to manage staffing. The Plaintiff violated procedure by not having a Master Schedule. [DE 122-24,

p.2] She had no system for providing coverage when a supervisor called out. The use of overtime doubled during her tenure. [Id. at p.7] Staff satisfaction plummeted under the Plaintiff's watch from 4.0 before she arrived to 2.4 when she left in December. [DE 122-10, p.2]

The Plaintiff failed to have a system in place to track staff who were on alternate duty because of worker's compensation which contributed to the staffing issues. [ID. at p. 6] In December of 2015, the facility had ten (10) staff who were on alternate duty and the Plaintiff was not aware of their status because she did not properly track their status. [Id. at p.6] Once the Team arrived, they learned that two (2) of the staff had been cleared by their doctor to return to full duty back in October (two months earlier) but the Plaintiff failed to return them to full duty. (The Team immediately returned these two (2) staff members to regular duty). [Id.]

There were other indications that the Plaintiff repeatedly failed to follow FDJJ procedures. The Plaintiff did not document facility inspections. [TT. 3:117-118] Also, there was no Master Key list. When the Team arrived at the facility in November it learned that five sets were missing. The Team was able to locate two sets of keys in the maintenance office, but three sets were never found. [Id. at p.8]

The Team stayed at the facility from November 30 through December 4, 2015 and generated a report. [DE 122-10] FDJJ terminated the Plaintiff on December 11, 2015, for violation of numerous standards and codes. [DE 122-23]. A/S Fosler testified at length regarding the events of November 15 and the Plaintiff's violations of FDJJ codes and standards. [TT. 5:72-111]

The Plaintiff's Evidence at Trial

The Plaintiff presented no direct evidence of racial or sex discrimination. The Plaintiff offered no evidence of discriminatory comments or writings. [TT. 3:29] The Plaintiff offered no statistical evidence. Furthermore, the Plaintiff and her witnesses acknowledged that DJJ had promoted her numerous times starting from an entry level position as a transport officer in Key West to Superintendent at one of the largest facilities in the state.

The people who promoted her were a Hispanic female and a white female. The Plaintiff's Regional Supervisor testified that she had three black female superintendents (there were seven facilities in her region). [TT. 5:55]. The Plaintiff testified she felt discriminated against because of "her race *and* gender". [TT: 3-29, 30]

The vast majority of the Plaintiff's case did not focus on comparators but rather focused on her overall performance throughout her career. The Plaintiff's main witness, Ms. Negron, began by reading an affidavit she had signed which discussed the Plaintiff's long work history with DJJ, her certifications and awards, and her lack of prior disciplinary history. [TT 5:40-44] It was clear that Ms. Negron thought very highly of the Plaintiff having nominated her for Superintendent of the Year and inviting the Plaintiff to her home for a birthday party. [TT. 5:80] The Plaintiff also testified at length about her training certifications and awards. [TT. 2:90-106]

The Plaintiff presented evidence of Quality Improvement Reports (QI Reports). These reports are

based on routine, scheduled facility inspections conducted by Quality Improvement staff. They are done annually or semi-annually. [TT 2:70-71; 6:10-20] The Plaintiff testified at length that she never failed a QI and that she believed her comparators did. The Plaintiff also testified that she passed numerous other types of reviews, like the PREA audit. [TT 2:79-80]

The Plaintiff's comparator evidence was based solely on two (2) comparators: a white male and a white female. The Plaintiff did not offer any evidence that either comparator was a Superintendent at a facility that experienced fifteen (15) codes or numerous codes in a single twenty-four period. Rather, the Plaintiff's comparator evidence was limited to offering evidence of isolated incidents with the comparators.

Comparator Joseph Seeber

The Plaintiff designated Joseph Seeber, a white male, as one of the comparators. [TT. 5:29] He worked for DJJ from 2011 through 2018. [TT. 5:21]

Incident at Broward County Facility in 2015

Seeber served as the superintendent of the Broward facility from mid-2013 to mid-2015. [TT.5:21] On March 6, 2015, a female youth from the Broward facility escaped while she was at a hospital. [DE 122-8] Seeber was the superintendent at the time. The female youth was pregnant and therefore was handcuffed with her hands in front and was not shackled. [TT. 5:29] There were two officers with her at the time. She was captured less than 24 hours later.

By coincidence, the Plaintiff was the DJJ employee tasked with writing the report. [DE 122-8, IG Report;

TT. 5:23] The IG report does not reference any deficiencies by Superintendent Seeber. Furthermore, the report indicates timely notification by Seeber and the staff. Lastly, there are no findings that Seeber's management caused or contributed to this incident. Rather, the two officers admitted they knew the proper "touch protocol" but failed to follow it when escorting the juvenile. [Id. at p.4; TT. 5:29]

Incident at Manatee County Facility in 2018

Seeber served as the Superintendent at the Manatee County Facility when a juvenile committed suicide on June 10, 2018. [IG Report, DE 122-6] The incident occurred during the evening hours while Superintendent Seeber was home. The facility contacted him and he immediately reported to the facility and contacted the CCC. [Id. at pp. 1,11] The IG investigation did not find any concerns attributed to Seeber. There was no evidence of other codes or incidents that occurred during or near the same day as the suicide.

After a poor QI report in 2018, FDJJ decided to terminate Mr. Seeber, a white male and he chose to resign. [TT. 5:31]

Comparator Daryl Wolfe

The Plaintiff also designated Daryl Wolfe as a comparator. Daryl Wolfe worked in Juvenile Detention for more than thirty-eight (38) years. [TT. 5:99] The last fifteen (15) years of her career was spent working as a Superintendent in several DJJ facilities throughout the state. [TT. 5: 87, 99]

Comment at Dade Facility in 2013

In 2013, Ms. Wolfe was the Superintendent of the Dade facility. In April of that year a juvenile made a "rather inappropriate" comment. [TT 5:90] After resolving that incident, Ms. Wolfe went into to a quality review meeting and explained what the youth had said. Someone at the meeting took offense and reported Ms. Wolfe for repeating the offensive comment. She received a verbal reprimand. [TT.5: 90]

Spray Painting Incident at the Dade Facility

There are occasions when FDJJ staff encourage Youths to paint murals on the walls of the Dade detention facility. [TT. 5:98] By coincidence, the offices for the Regional Staff were on the same grounds as the Dade detention facility. While Superintendent at the Dade facility, Ms. Wolfe had some of the Youth paint a mural. [TT. 5:98] Ms. Negron was the Regional Director at the time and testified about the incident. Ms. Negron testified that she was angry about this incident because some Regional Staff apparently complained they had asthma attacks when they went home and the Youths' mural included gang signs. [TT. 5:46-47]

There was no testimony and no evidence of any codes being called or any other incidents on the same day. Also, there was no testimony of any complaints by the Youths or the staff at the detention facility. Ms. Wolfe had the mural painted over once her assistant pointed out the gang signs. [TT. 5:98]

STATEMENT OF THE CASE

On November 28, 2018, the Plaintiff filed her action against FDJJ bringing two counts for employment discrimination: Count I alleged racial discrimination under Title VII and Count II alleged sex discrimination under Title VII. [DE 1]. The Complaint does not present any counts under Section 1981. Neither Counts I or II allege violation of Section 1981. Section 1981 is only mentioned in the paragraph regarding federal jurisdiction and the prayer for relief. [DE 1, pp. 2,14]

On May 29, 2020, the trial Court granted, in part, the FDJJ's Motion for summary judgment as to four comparators but denied the motion as to two comparators. [DE 61] The case proceeded to a jury trial.

The parties jointly filed a Pretrial Stipulation. [DE 62] The Plaintiff's concise statement of facts references Title VII but does not reference Section 1981. The Issues of Fact section references Title VII but not 1981. The Issues of Law section again references Title VII but does not mention Section 1981. The only mention of Section 1981 is in the section regarding the basis for federal jurisdiction.

Over FDJJ's repeated objections, the Plaintiff was allowed to present a case of racial discrimination under Section 1981. FDJJ objected during opening to Plaintiff's reference to Section 1981 because it was not pled in the complaint or listed in the Pretrial Stipulation. [DE2:30] At the close of the Plaintiff's case FDJJ moved for Judgment as a matter of law under Rule 50 on both the Title VII and Section 1981 claim. [TT. 5:14] The judge denied the motion. During the charge conference FDJJ renewed its objection to the jury being charged on Section 1981. [TT. 6:51] FDJJ renewed the

Rule 50 motion at the end of case. [TT. 5:114; 6:44] The jury returned a verdict finding that the Plaintiff's race or sex was a motivating factor prompting her termination. [DE 119]. The jury also found that the Plaintiff's race was a but-for cause of the termination. [DE 119]. The jury awarded the Plaintiff back pay of $424,600 and $500,000 in pain and suffering damages. [DE 119] Post-trial, FDJJ filed a Renewed Motion for Judgement as a Matter of Law or Alternatively, Motion for New Trial. [DE 141]. The court denied the motion. [DE 143]

The trial court entered Final Judgment on July 27, 2021. [DE 121] The trial court entered its order denying post trial motion on August 24, 2021. [DE 141] Amended Final Judgment was entered on September 8, 2021. [DE 147] FDJJ filed its Notice of Appeal. [DE 152]

SUMMARY OF THE ARGUMENT

The District Court erred in failing to grant FDJJ's Rule 50 Motion for Judgment as a Matter of Law for two reasons. First, Tynes failed to show that her two proposed comparators were valid, which is required to prove a circumstantial case of race or sex discrimination under Title VII. In order for Tynes' comparators to be valid, they must have been "similarly situated in all material respects" to Tynes. One material respect in which Tynes and her comparators must have been similarly situated relates to their conduct. As such, any valid comparator must have engaged in the "same basic conduct" that led to Tynes' termination.

The conduct that led to Tynes' termination was a lack of oversight that resulted in 15 different emergency "codes" being called at her facility over a 24-hour

period, including 13 codes for fighting, one code for an attempted escape, and one code for an attempted suicide. The "same basic conduct" standard is strictly construed, and the undisputed evidence reflects that Tynes' proposed comparators did not even remotely engage in the same basic conduct as Tynes, and no reasonable jury could find otherwise. Thus, she failed to prove her Title VII claims due to a lack of valid comparators.

Second, Tynes failed to prove at trial that her race was the "but-for" cause of her termination, which is required to find liability under § 1981. While Title VII and § 1981 claims have some similarities, they are entirely separate and distinct causes of action with different standards of proof. In order to sustain a claim under § 1981, Tynes was required to initially plead and ultimately prove that "but for" her race, she would not have been terminated.

As an initial matter, Tynes failed to plead a cause of action under § 1981 in her Complaint and did not reference a § 1981 claim in the Joint Pretrial Stipulation. Indeed, the first mention that Tynes made of her intention to pursue a § 1981 claim came in her opening statement at trial. However, she merely mentioned § 1981, and did not discuss the "but-for" standard required to prove a § 1981 claim. Additionally, Tynes did not offer any testimony or other evidence to prove that race was the "but for" cause of her termination, nor did Tynes state in her closing argument that the "but-for" element had been proven at trial. Consequently, no reasonable jury could find that Tynes proved a claim for race discrimination under § 1981.

ARGUMENT

I. APPELLEE FAILED TO PROVE HER TITLE VII CLAIMS FOR RACE AND SEX DISCRIMINATION

A. Standard of Review

A Rule 50 motion for judgment as a matter of law is reviewed *de novo*, and the appellate court applies the same standards employed by the district court. *Abel v. Dubberly*, 210 F. 3d 1334, 1337 (11th Cir. 2000). As such, the appellate court is to consider "whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that that party is entitled to succeed in his or her position as a matter of law." *Id.* Additionally, a motion for judgment as a matter of law will be denied only if "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Id. See also Mendoza v. Borden, Inc.*, 195 F. 3d 1238, 1244 (11th Cir. 1999).

B. An Employer Can Fire an Employee for Almost Any Reason, But Cannot Discriminate

Title VII makes it unlawful for an employer to discriminate on the basis of an employee's race or sex. *See* 42 § U.S.C. 2000e-2. However, "federal courts do not sit as a super-personnel department that reexamines an entity's business decisions." *Chapman v. AI Transp.*, 229 F. 3d 1012, 1030 (11th Cir. 2000). The "sole concern" in a Title VII civil action is whether the employer engaged in unlawful discrimination – not whether the plaintiff is, in fact a good employee. *Ward v. Troup*

County School District, 856 Fed. Appx. 225, 227 (citing *Alvarez v. Royal Atl. Devs., Inc.*, 610 F. 3d 1253, 1266 (11th Cir. 2010)). In other words, "an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Id.*

In order to prove race or sex discrimination, a plaintiff may present direct evidence of discrimination. *Rollins v. TechSouth, Inc.*, 833 F. 2d 1525, 1528 (11th Cir. 1987). Direct evidence is "evidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption." *Id.* at 1532 n.6. Where no direct evidence of race or sex discrimination exists, plaintiffs may attempt to prove their case by presenting some form of circumstantial evidence. *Id.* at 1528. In the instant case, the Appellee was unable to present any direct evidence, so she attempted to use circumstantial evidence to prove her Title VII discrimination claims.

C. Discrimination Is Treating "Like" Persons "Differently," Not Treating "Different" Persons "Differently"

The Eleventh Circuit has stated "many times" that "discrimination consists of treating like cases differently." *Lewis v. City of Union City, Georgia*, 918 F. 3d 1213, 1222 (11th Cir. 2019). The converse is also true: Treating *different* cases differently is not discriminatory. *Id.* at 1222-23. By its very nature, therefore, discrimination is a comparative concept – it requires an assessment of whether "like" people or things are being treated "differently." *Id.* at 1223.

This comparative concept is memorialized in the elements necessary to prove a case for wrongful termination under Title VII based upon circumstantial evidence, which is the basis of the Appellee's claims. Specifically, "a plaintiff must show by a preponderance of the evidence that she: (1) is a member of a protected class; (2) was qualified for the position from which she was terminated; (3) was terminated; and (4) *was treated less favorably than similarly situated employees outside her protected class*." *Lewis*, 918 F. 3d at 1221 (citing, *e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). The last element, which is the focus of this appeal, is the heart of a wrongful discrimination claim.

Indeed, qualified employees of any protected class can be terminated from their positions for scores of reasons – or for no reason at all. *Ward*, 856 Fed. Appx. at 227. However, they cannot be terminated based solely upon their sex or race. *Id.* As such, if an employee in a protected class believes she was fired for discriminatory reasons, she must demonstrate that an employer treated "similarly situated" employees (i.e., "like" employees) outside of her class "differently" than herself. *Lewis*, 918 F. 3d at 1223. In other words, a plaintiff must supply the "missing link" between her firing and her minority status to prove unlawful discrimination. *Id.*

1. Comparators Are Used to Prove "Different" Treatment of "Like" Persons

The way a plaintiff demonstrates that her employer has engaged in unlawful discrimination – i.e., the employer has treated "like" employees "differently" – is through an assessment of comparators. *Lewis*, 918 F. 3d at 1218. These comparators must be sufficiently

"like" the plaintiff, save for plaintiff's minority status, so that the comparators' "different" treatment from the plaintiff clearly proves unlawful discrimination. *Id.* Thus, it is crucial for there to be a standard that comparators must meet to show they are "similarly situated" to the plaintiff, so that a valid comparison can be made.

S2. Comparators Are "Like" a Plaintiff if They Are "Similarly Situated in All Material Respects"

The importance of finding comparators who are "similarly situated" cannot be overstated. Again, federal courts are not to act as a "super-personnel department that reexamines an entity's business decisions" to hire, fire, or promote employees. *Ward*, 856 Fed. App'x. 227. The sole concern in a Title VII civil action is whether the employer engaged in unlawful discrimination. *Id.* Therefore, if there is too low a bar on finding comparators who are "similarly situated" to the plaintiff, employers will not be allowed to treat different situations differently, and courts will be "thrust . . . into staffing decisions that bear no meaningful indicia of unlawful discrimination." *Lewis*, 918 F. 3d at 1226.

Accordingly, this Court adopted a standard that would strike an appropriate balance between employee protection and employer discretion in examining a claim of unlawful discrimination. *Id.* at 1225. A plaintiff must show that she and her comparators are "*similarly situated in all material respect**s***." *Id.* at 1226 (emphasis added).

The question, then, is what exactly does "similarly situated in all material respects" mean? As stated in

Lewis, "doppelgangers are like unicorns – they don't exist." 918 F. 3d at 1225. Consequently, in practice, there will be no absolutely perfect comparator – someone who is *exactly* the same as the plaintiff in *all* respects. However, this Court strongly cautioned that it must not stray too far from exactness – from the "Platonic form" of perfect likeness – when analyzing a comparator. *Lewis*, 918 F. 3d at 1225.

If a comparator is not a close enough copy of the plaintiff, courts will allow different things to be treated differently, which is not unlawful discrimination. Thus, the "sameness" of a comparator and a plaintiff is intended to be a high bar. "[A]pples should be compared to apples," this Court said, not oranges. *Lewis*, 918 F. 3d at 1226.

D. Comparators Are Only "Similarly Situated in All Material Respects" if They "Engaged in the Same Basic Conduct as Plaintiff"

The *Lewis* Court opined that the sort of similarity required to meet the "in all material respects" standard must be analyzed on a case-by-case basis. *Lewis*, 918 F. 3d at 1227. However, it provided crucial – and relevant – guidelines to be followed on what the plaintiff and comparator must have in common. Significantly, this Court said that a similarly situated comparator:

> *Will have engaged in the same basic conduct (or misconduct) as the plaintiff*, *see, e.g.*, *Mitchell v. Toledo Hosp.*, 964 F. 2d 577, 580, 583 (6th Cir. 1992) (holding that a plaintiff terminated for "misuse of [an employer's] property" could not rely on comparators

> allegedly guilty of "absenteeism" and "insubordination") . . . ;

Lewis, 918 F. 3d at 1227 (emphasis added).

Therefore, a plaintiff and comparator do not have to be similarly situated in every way, but they must be the similarly situated in all *material* ways. Conduct, this court made clear in *Lewis*, is a material way in which a plaintiff and comparator must be similarly situated. *Id. See also Silvera v. Orange County School Board*, 244 F. 3d 1253, 1259 (11th Cir. 2001) (holding that the nature of the offense committed is "one of the most important factors in the disciplinary context"). As such, any valid comparator must have engaged in the "same basic conduct" as the plaintiff.

E. Appellee's Conduct

1. Frequency of "codes" in 24-hour period

Under *Lewis*, the Appellee was required to show at trial that show that she and her proposed comparators engaged in the "same basic conduct" as the Appellee. As the evidence at trial showed, the conduct that led to the Appellee's termination was a lack of oversight that led to a series of critical events that occurred during on November 15, 2015. This was not a sequence of two or three inconsequential events. Rather, the record indicated that an astounding 15 different "codes" or emergencies were called by staff at the Broward facility over a 24-hour period – codes that threatened not only the safety of the children, but the staff and the entire facility itself. Codes that were indicative of a possible loss of control at the facility under the direct supervision of Ms. Tynes.

2. Types of "codes" called in 24-hour period

These 15 codes that were called in that 24-hour period included 13 different "code blue" calls. Code blue calls are those that involve a detention officer calling for help. The record indicates that the 13 code blue calls made on November 15, 2015, were detention officers calling for assistance to stop fights and altercations between juveniles, and between juveniles and staff members. These fights led to the Fort Lauderdale Police Department being called twice that day to reestablish order at the facility, emergency medical services being called, and both youth and staff members being injured.

In addition to the blue codes, there was also one "code green" call, and one "code white" called on that day. Code green calls are those involving an escape attempt, and code white calls are those that indicate a mental health issue or suicide attempt. The record clarifies these codes and indicates there was an escape attempt in the boy's module on that day, and a "cutdown" scenario where a youth with sheets wrapped around him was threatening suicide and had to be cutdown from those sheets.

F. The Proposed Comparators' Conduct Was Not the "Same Basic Conduct" as Appellee

The trial court erred in denying Appellee's Rule 50 Motions for Judgment as a Matter of Law on the comparator issue. Indeed, in its rulings on both the original JMOL and the Renewed JMOL, the trial court did not even attempt to examine whether the evidence established that Appellee's comparators engaged in the same basic conduct as Appellee.

Rather, the trial judge simply stated that the credibility of the witnesses was for the jury to decide. However, this is an incorrect standard, as the credibility of the witnesses was not the issue. The issue was whether the evidence established that the comparators engaged in the same basic conduct as Appellee. The evidence in no way established the comparators' conduct was essentially the same as the Appellee, and no reasonable and fair-minded person could find that it was.

1. The Conduct of Daryl Wolfe

Daryl Wolfe did not even remotely engage in the same basic conduct as Ms. Tynes. The evidence showed that Wolf was involved in two separate, isolated incidents that in no way threatened the safety of the youth, staff, or facility that she supervised – or led to codes even being called. First, Ms. Wolfe repeated an inappropriate comment that she heard a youth say while she was in a staff meeting. Second, Ms. Wolfe allowed youth in her facility to spray paint murals in a facility a hallway, and had the mural painted over once her assistant pointed out some of the gang signs.

Wolfe's conduct was in no way similar in frequency. Tynes' facility had 15 codes called in a single day, as opposed to no codes being called at Wolfe's facility. Wolfe's conduct was also not similar in type. Thirteen of the codes called on that fateful day at Tynes' facility related to fights. These fights led to injuries to both staff and youth, EMS services being called, and outside law enforcement being dispatched to reestablish order at the facility. Additionally, codes for an escape attempt, and a threat of suicide were also called on that day. There is no evidence or, indeed, allegation, that such kind of conduct occurred at Wolfe's facility.

2. The Conduct of Joseph Seeber

Furthermore, Joseph Seeber did not engage in the same basic conduct as Ms. Tynes. With regard to Mr. Seeber, the evidence showed that two different incidents happened under his watch. First, a young lady who was being transported to the hospital escaped from the custody of two staff personnel during the transport process, and Seeber provided timely notice of the escape. It was an isolated incident that did not occur at the facility. Second, another isolated incident occurred where a youth with a history of problems committed suicide at Seeber's facility, and Seeber immediately reported to the facility and contacted the CCC regarding the incident. While these incidents are tragic, they are in no way the "same basic conduct" as that related to Tynes.

With regard frequency, there were two cited incidents that happened to Seeber over a period of time. With Tynes, 15 codes were called at her facility over a 24-hour period. Thus, the frequency of incidents is wildly different. The type of conduct involved also dissimilar. Thirteen of the codes called on November 15, 2015, at Ms. Tynes' facility dealt with fighting and required the intervention of an outside law enforcement agency to gain back control of her facility. With Seeber, there were no fights under his supervision mentioned at trial, and it was never alleged that control of his facility was threatened at any time. Again, there were only two isolated incidents.

The evidence at trial clearly established that 15 codes called in a day is not only unusual, but the regional director at the time testified that she had never experienced that many codes in that period of

time at any other facility. Furthermore, she testified that it was a sign of a serious concern.

G. "Same Basic Conduct" Is Strictly Construed

1. "Worse" Conduct Is Not "Same Basic Conduct"

a. The holding in *Blash v. City of Hawkinsville*

One instructive case is *Blash v. City of Hawkinsville*, 856 Fed. Appx. 259 (April 21, 2021), where this Court held that a valid comparator cannot have engaged in worse conduct than the plaintiff, as worse conduct is, by definition, different conduct. *Blash* involved a situation where a black deputy sheriff advised a personal acquaintance to "stay away" from a person the deputy thought was the target of a "sting" operation. 856 Fed. App'x. at 261. The deputy did not know that the target of the sting operation was actually a confidential informant providing information to law enforcement. *Id.* When his supervisors found out about the deputy's statement to his acquaintance, he was fired for interfering with an investigation. *Id.* at 262.

The deputy filed an employment discrimination lawsuit, alleging that he was actually fired due to his race. *Id.* His proposed comparators were two Caucasian deputies who were accused of using excessive force during the arrest of an African-American man. *Id.* at 264. According to the deputy, the sheriff postponed any disciplinary action against the Caucasian deputies until an investigation into the incident by an outside

agency was completed. *Id.* Ultimately, the Caucasian deputies were cleared of all charges. *Id.* The district court held that the proposed Caucasian comparators were not "similarly situated" and were, therefore not valid comparators. *Id.* The deputy appealed. *Id.* at 262.

The Court agreed that the comparators were not "similarly situated in all material respects," as they had not "engaged in the same basic conduct as the plaintiff." *Blash*, 856 Fed. Appx. at 264. The black deputy was accused of interfering with an ongoing federal investigation by warning a personal acquaintance to stay away from the subject of the investigation. *Id.* This conduct, the Court said, was not remotely similar to the Caucasian deputies' alleged use of excessive force against a civilian during the course of an arrest. *Id.* at 264-65.

The plaintiff argued that the Caucasian deputies were valid comparators because they received better treatment even though they were accused of a more serious offense. *Id.* at 265. Crucially, the Court noted that this, alone, showed that the proposed comparators' conduct was different. *Id.* The Court said: "[The plaintiff's] insistence that the Caucasian deputies' conduct was worse than his *merely highlights the fact that their conduct was different* – and 'treating different cases differently is not discriminatory, let alone intentionally so.'" *Id.* at 265 (emphasis added). Consequently, the Eleventh Circuit affirmed the district court's ruling that the Caucasian deputies were not valid comparators. *Id.*

2. Some Same Conduct Is Not "Same Basic Conduct"

a. The holding in *Luke v. University Health Services, Inc.*

Another case that underscores this Court's strict construction of "same basic conduct" standard is *Luke v. University Health Services, Inc.*, 842 Fed. Appx. 503 (11th Cir. 2021). Ramonica Luke was an African-American female who worked the night shift at hospital as a patient care assistant. *Id.* at 505. From 2006 to 2016, Luke accumulated a lengthy disciplinary record for tardiness and attendance problems. *Id.* She was given many written warnings and, in September of 2016, was given a final warning stating that the next occurrence of tardiness would result in her immediate termination. *Id.*

On December 31, 2016, Luke's supervisor received an email from Luke's co-worker stating that Luke was late. *Id.* The next day, the supervisor investigated various items to confirm Luke's tardiness, including security footage, employee badge history and a time adjustment sheet, which documented an employee's hours when an employee forgot to clock in. *Id.* at 505-06. During the investigation, the supervisor found what she believed were irregularities in Luke's time adjustment sheet on the date in question. *Id.* The supervisor believed the time had been falsified, but could not prove or disprove it. *Id.* Luke was terminated shortly thereafter based upon her attendance. *Id.*

Luke filed a Title VII lawsuit for racial discrimination. *Luke*, 842 Fed. App'x. at 506. The hospital moved for summary judgment, which was granted. *Id.* Luke appealed. *Id.*

In presenting her case for discrimination, Luke offered eight proposed comparators. *Luke*, 842 Fed. App'x. at 507-08. All of the proposed comparators were white, had a history of attendance problems, and worked for the same supervisor. *Id.* However, none had been fired for those attendance problems. *Id.*

This Court held that Luke's comparators were not "similarly situated in all material respects" to her. *Luke*, 842 Fed. App'x. at 507-08. Specifically, it noted that Luke's supervisor never suspected the comparators of falsifying time records. *Id.* The Court recognized that Luke was not ultimately fired because of her suspected falsification of the time adjustment sheet; however, her supervisor's perception that Luke falsified the time sheet is what led the supervisor to recommend termination. *Id.* Therefore, the district court's ruling was affirmed.

In *Luke*, the proposed comparators engaged in *some* of the same behavior as the plaintiff – they all had a history of tardiness. Indeed, Luke was even terminated for tardiness. However, none of the proposed comparators had been suspected of falsifying time records. In that regard, *Luke* stands for the proposition that even if a proposed comparator engages in some of the same conduct, this does not meet the standard of "the same basic conduct." If a plaintiff is fired for specific conduct, a comparator must have engaged all of the same basic conduct a plaintiff did, or they are not a valid comparator.

a. Holding in *Ward v. Troup County School District*

Another case that indicates just how close the conduct of a proposed comparator must be to that of a

Title VII plaintiff is *Ward v. Troup County School District*, 856 Fed. App'x. 225 (11th Cir. 2021). In *Ward*, a black male served as a principal at a middle school. *Id.* at 226. His supervisors received several complaints about his performance and lack of professionalism from teachers. *Id.* Thereafter, two specific incidents took place.

First, the principal completed annual teacher evaluations for six teachers without first performing a formal classroom observation, which was required under district procedures. *Ward*, 856 Fed. App'x. at 226. Second, he sent an email to faculty and staff in which he complained that some teachers were relying on him too heavily to maintain control of their classrooms. *Id.* The principal also told the recipients of the email to "decide if teaching is for you and what you need to be successful or find . . . another profession." *Id.*

In response to the email, the principal was placed on a professional development plan and, ultimately, was not re-employed as a principal. *Ward*, 856 Fed. App'x. at 226-27. Instead, he was reassigned to teach physical education at another elementary school. *Id.* at 227. Subsequently, the former principal filed a Title VII action against the school district alleging, *inter alia*, that his re-assignment was based upon race discrimination. *Id.* The district court granted the school district's motion for summary judgment, and the former principal appealed. *Id.*

In support of his claims for race discrimination, the plaintiff identified six white female principals as purported comparators. *Ward*, 856 Fed. App'x. at 228. However, the Court stated that these proposed comparators were not "similarly situated in all material

respects" to the plaintiff because none of them sent an unprofessional school-wide email, and none completed teacher evaluations without performing the required observations. *Id.* Thus, this Court affirmed the district court's decision. *Id.* at 230.

This Court did not outline the exact behavior that the plaintiff's six proposed comparators engaged in, but that is quite telling. The Court focused solely on the plaintiff's conduct and then determined that since the six proposed comparators did not engage in that same basic conduct, they were not proper comparators. As such, it is clear that this Court's interpretation of the "same basic conduct" standard is a strict standard, and not to be interpreted loosely.

The similarly situated standard required the Plaintiff to provide evidence of another Superintendent who was responsible for a facility that experienced numerous codes in a single day. Instead, the Plaintiff relied on evidence of isolated events, some of them trivial others tragic, but none of them similar to the events of November 15. Thus, the trial court should have granted the Rule 50 or 59 motion.

II. APPELLANT DID NOT PROVE AN ESSENTIAL ELEMENT OF A 42 U.S.C. § 1981 CLAIM

A. Burdens of Proof for Title VII and § 1981 Are Different

1. Title VII's "Motivating Factor" Test Means Race Is *a* Cause of Termination

In employment discrimination lawsuits, plaintiffs can assert claims of race discrimination under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C.

§ 1981 of the Civil Rights Act of 1866. Title VII is the federal employment statute prohibiting discrimination based on all protected classes, including race and sex. Section 1981, on the other hand, is not an employment statute, but it does encompass employment-based race discrimination claims. The reason plaintiffs often assert race discrimination claims under § 1981 in their complaint is that, unlike Title VII, Section 1981 has a longer statute of limitations and there are no caps on the plaintiff's damages.

It is crucial to note that while Title VII and § 1981 claims have some similarities, they are entirely separate and distinct causes of action. As such, they have very different burdens of proof. In a claim under Title VII of the Civil Rights Act of 1964 for race or sex discrimination, a plaintiff must show that race (or sex) was a "motivating factor" in her termination. 42 U.S.C. § 2000e-2(m). *See also Gross v. FBL Fin. Servs, Inc.*, 129 S. Ct. 2343, 2349 (2009). In other words, race must be a motivating factor in a plaintiff's termination, but there can be other motivating factors, as well. However, a claim under § 1981 requires a different, much higher showing.

2. Section 1981's "But-For" Test Means Race Is *the* Cause of Termination

The United States Supreme Court addressed a plaintiff's burden of proof under § 1981 in *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009 (2020). In *Comcast*, a unanimous court held that in order for a plaintiff to prevail in a § 1981 claim, the plaintiff bears the burden of showing that the plaintiff's race was the "but-for" cause of her injury. In other words, a plaintiff must demonstrate

that race was *the* reason for her termination, not simply *a* reason, which is the standard for Title VII. Significantly, the high court noted that in general tort law, the "essential elements" of a claim remain "constant through the life of a lawsuit." *Id.* at 1014. As such, with regard to a § 1981 claim, "a plaintiff must initially plead and ultimately prove that, *but for* race, it would not have suffered the loss of a legally protected right." *Id.* at 1019 (emphasis added).

B. Appellee Did Not Prove a § 1981 Claim at Trial

1. Appellee's First Mention of a § 1981 Claim Came at Trial

As an initial matter, the Appellee's Complaint does not stylistically or substantively allege a cause of action under § 1981. The Appellee's Complaint contains only two counts. Count I is titled: "Racial Discrimination Under Title VII Against Florida Department of Juvenile Justice." Count II is titled: "Sex Discrimination Under Title VII Against Florida Department of Juvenile Justice." Thus, no count or stylistic heading anywhere in the Complaint indicates that Appellee intended to pursue a cause of action against Appellant for a violation of § 1981. Additionally, the Appellee did not mention she was pursuing a § 1981 in any section of the Joint Pretrial Stipulation relating to trial-related matters.

The first mention Appellee made of her intention to pursue a § 1981 claim came in Appellee's opening statement, when her counsel stated: "[w]e also sued under a statute of 42 U.S.C. § 1981, which, in essence, says that there is no cap . . . " Appellant's counsel

immediately objected and, at a sidebar, stated that the grounds for the objection were that it was argumentative, "and that's not the cause of action." The court overruled the objection, stating: "I'll tell the jury what the law is at the end of the case. What the lawyers say isn't the law. You may continue, Mr. Miller." Thus, the court erred in permitting the jury to hear anything about a § 1981 claim, as it had not been pled and was not mentioned in the Joint Pretrial Stipulation.

2. Appellee Never Argued "But-For" Causation at Trial

Even if the jury did properly hear that Appellee was pursuing a § 1981 claim, the Appellee did not state she intended to prove the essential element of § 1981 claim – "but-for" causation. The purpose of an opening statement is to advise the jury of the facts of the case. *United States v. Adams*, 74 F. 3d 1093 (11th Cir. 1996). Nowhere in her opening statement did Appellee state that she was going to show that race was the "but-for" cause of her termination, as is required to be proven under *Comcast*. It is telling that Appellee only mentioned § 1981 in relation to an award of uncapped damages.

Despite referring to § 1981 once in her opening statement, Appellee offered no testimony or other evidence to prove the essential element that race was the "but for" cause of her termination which, again, is required under *Comcast*. Indeed, Appellee's own testimony indicated that she felt she was treated differently because of her "race and gender", which is consistent with Title VII claim, not a § 1981 claim, which is exclusively a race-based claim. [TT: 3-29, 30].

Quite simply, "but-for" causation was not a part of the evidence or testimony presented by Appellee at trial.

Highlighting this point, Appellee did not mention that the essential "but-for" element had been proven at trial either. "The sole purpose of closing argument is to assist the jury in analyzing the evidence." *United States v. Iglesias*, 915 F. 2d 1524, 1529 (11th Cir. 1990). In her closing argument, Appellee again mentioned § 1981 only once – to say that it provided for unlimited damages. Nowhere in her closing argument did Appellee state that the evidence showed that she proved race was the "but-for" causation of her termination.

When Appellee rested her case, Appellant immediately filed a Motion for Judgment as a Matter of Law regarding the § 1981 issue. Specifically, Appellant's Motion for Judgment as a Matter of Law argued that Appellee did not plead or prove a violation of § 1981. The trial court denied the Appellant's Motion.

C. No Reasonable Jury Could Find Appellee Proved a § 1981 Claim

As mentioned *supra*, Appellee did not plead the "but-for" causation in any pleading. Additionally, she did not mention "but-for" causation in her opening statement, did not prove "but-for" causation at trial, and did not even assert in her closing argument that "but-for" causation had been shown. Nevertheless, the jury specifically found that Appellee's race was the "but-for" cause of Appellee's termination by Appellant. Since no reasonable jury could have found "but-for" causation, Appellant moved for a Renewed Motion for Judgment as a Matter of Law Or, Alternatively, a Motion for New Trial.

In its Renewed Motion for Judgment as a Matter of Law, Appellant once again argued that Appellee failed to plead a cause of action under § 1981, that Appellee waived her ability to bring a § 1981 claim by not mentioning such a claim in the Joint Pretrial Stipulation, and that she failed to prove a § 1981 claim at trial arguing the verdict was inconsistent. As mentioned *supra*, the jury found that Appellee's race was the "but-for" cause of her termination. However, it also simultaneously found that she was fired due to her race *and* sex under Title VII.

D. Appellant Was Prejudiced by Not Knowing Appellee Intended to Pursue a § 1981 Claim Until Trial

The Appellant was prejudiced by the trial court allowing the Appellee to present a § 1981 claim at trial. By not knowing of the Appellee's § 1981 claim prior to trial, Appellant was unable to address the § 1981 claim in the pre-trial stage of litigation. For instance, Appellant was not able to file a motion for summary judgment, as it filed in relation to the Appellee's Title VII claims. Additionally, Appellant was unable to focus on "but-for" causation in discovery, including an inability to elicit deposition testimony specifically relating to "but-for" causation – which is a different standard of proof than a Title VII claim.

Additionally, Appellant did not have an opportunity to develop a different trial strategy – particularly since § 1981 claims have no cap on damages. The strategy used in a case where the highest potential loss is $300,000 in damages would differ significantly from the strategy used in a case where the potential loss is unlimited. Myriad details throughout all stages

of litigation would have been altered to address a case with a different damage threshold and a different standard of proof. In short, Appellant was prejudiced, as the case it prosecuted and prepared for was not the case it ended up trying.

CONCLUSION

FDJJ respectfully request that this Court reverse the trial court's denial of its Rule 50 motion and remand with instructions that judgment should be entered for FDJJ or, alternatively, that a new trial should be granted.

Respectfully submitted,

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APPELLANT FLORIDA DEPARTMENT OF JUVENILE JUSTICE PETITION FOR REHEARING EN BANC FILED IN ELEVENTH CIRCUIT (JANUARY 16, 2024)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLORIDA DEPARTMENT OF JUVENILE JUSTICE,

Appellant,

v.

LAWANA TYNES,

Appellee.

Case No.: 21-13245

On Appeal from the United States District Court
Southern District of Florida

APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Dimitrouleas, William,
United States District Court Judge

Florida Department of Juvenile Justice
(Stock Ticker: none)

Leininger, Carri S., Esq.

Miller, Glenn, Esq.

Snow, Lurana,
United States District Court Magistrate Judge

Tynes, Lawana

Williams, James, O., Jr., Esq.

Wiseberg, Philip, Esq.

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Florida Department of Juvenile Justice is a state agency of Florida. As a result, no publicly traded company or corporation has an interest in the outcome of the case or appeal.

RULE 35-5 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exception importance because the following issue involves one of which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue: in an employment discrimination claim, is the convincing mosaic standard the correct legal test to prove discrimination on summary judgment or at trial.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and precedents of this circuit that consideration of the full court is necessary to secure and maintain uniformity of decisions in this circuit: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Awaad v. Largo Med. Ctr., Inc.*, 564 Fed. Appx. 541 (11th Cir. 2014); *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) *McGinnis v. Ingram Equip. Co. Inc.*, 918 F.2d 1491 (11th Cir. 1990); *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1153 (11th Cir. 2005); *Tidwell v. Carter Prods.*, 135 F.3d 1422 (11th Cir. 1998); *Richardson v. Leeds Police Dep't*, 71 F.3d 801 (11th Cir. 1995); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678 (11th Cir. 2014); *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330 (11th Cir. 2011).

/s/ Carri S. Leininger
Attorney of Record for
Florida Department of Juvenile Justice

{ Tables of Contents and Authorities Omitted }

STATEMENT OF THE ISSUE ASSERTED TO MERIT EN BANC CONSIDERATION

The Opinion mistakenly adopts the "convincing mosaic" theory and relegates *McDonnell Douglas* to providing only a procedural framework. This ignores a plain reading of *McDonnell Douglas* and conflicts with the Seventh Circuits opinion in *Ortiz v. Werner*, 834 F.3d 760 (7th Cir. 2016). En Banc review is also warranted because the Opinion conflicts with decisions of this circuit in (1) allowing the Plaintiff to present a new theory for the first time on appeal; (2) the Opinion held that it would not review the jury's verdict, conflicting with *Collado* and *Tidwell*; and (3) the Rule 15(b)(1) argument is not forfeited.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On November 28, 2018, the Plaintiff, Lawanna Tynes (the "Plaintiff"), filed her action against the Defendant, the Florida Department of Juvenile Justice ("FDJJ"), bringing two counts for employment discrimination: Count I alleged racial discrimination under Title VII and Count II alleged sex discrimination under Title VII. [D.E. 1]. The Complaint did not present any counts under § 1981. [D.E. 1].

The trial court granted, in part, the FDJJ's Motion for Summary Judgment as to four comparators and denied the same Motion as to two comparators. [D.E. 61]. The case proceeded to a jury trial. Over FDJJ's repeated objections, the Plaintiff was allowed to present a case of racial discrimination under Section 1981. FDJJ objected during opening to Plaintiff's reference

to Section 1981 because it was not pled in the complaint or listed in the Pretrial Stipulation. [D.E. 2:30]

At the close of the Plaintiff's case FDJJ moved for Judgment as a matter of law under Rule 50 on both the Title VII and § 1981 claim. [TT. 5:14] The judge denied the motion. Post-trial, FDJJ filed a Renewed Motion for Judgement as a Matter of Law or Alternatively, Motion for New Trial. [D.E. 141]. The court denied the motion. [D.E. 143] In its order, the trial court, sua sponte, amended the pleadings to include a § 1981 claim. [D.E. 143] This demonstrates two critical points: (1) the complaint never included a § 1981 claim, and (2) the Plaintiff never moved to amend the pleadings.

An appeal was taken.

On December 12, 2023, this Court rendered its opinion in this matter, which it amended for typographical errors on December 27, 2023 (the "Opinion"), which is attached.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

The Plaintiff was the superintendent of the Broward Juvenile Detention Facility, one of the largest such facilities in Florida. On November 15, fifteen codes were called. A code is only called when an officer needs assistance. The codes were called on November 15 because of fights, attempted escapes, injury to a juvenile, possible suicide, and several more fights. Both police and paramedics were called to the Facility. *See* Initial Br. at pp. 5-7. The Plaintiff never disputed the facts of November 15 or that the codes were called. The Plaintiff admitted at trial that November 15 was

"a very off day." Initial Br. p. 6. The Plaintiff's direct supervisor and key witness admitted that the circumstances of November 15 indicated a lack of control. *See* Initial Br. at p. 5.

Of most importance to this Petition is the fact that the Plaintiff tried this case under a comparator theory. Throughout the litigation, the Plaintiff prosecuted this matter as a comparator case.

- In the Complaint, the Plaintiff first raised the comparator argument. *See* Compl. at ¶ 50, [D.E. 1].
- In defense of FDJJ's Motion for Summary Judgment below, the Plaintiff asserted six comparators. *See* Order on Summary Judgment at pp. 8-12, [D.E. 61].
- Presentation of evidence during trial regarding the comparators, [*see generally* D.E. 137, pp. 21-125], which the lower court found as follows: "First, the circumstantial evidence regarding the two comparators was sufficient to establish the discrimination claims [DE-137, pp. 122, 125]. Credibility was for the jury to decide." *See* Order at p. 2, [D.E. 143].
- During closing arguments, the Plaintiff argued the comparator theory. *See* [D.E. 138, pp. 52-58, 79-83].
- In accordance with the Plaintiff's arguments during trial, in the post-trial Motion for Judgment as a Matter of Law [D.E. 141], comparators were argued and relied on by FDJJ.

Indeed, at no point in time before this appeal did the Plaintiff rely on the "convincing mosaic" theory. Rather, the Plaintiff prosecuted this matter below as a comparator case for which the Appellant launched its best defense. In fact, a close review of the record reveals that the phrase "convincing mosaic" was not referenced in Plaintiff's opening statement [D.E. 134, pp. 24-30], in her closing argument [D.E. 138, pp. 52-58, 79-83], or at any other point during trial or in post-trial motions or responses. The only miniscule references to that phrase during the entirely of the case were in Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment [D.E. 49] and in the Joint Pre-Trial Stipulation [D.E. 62]. However, there were simply one-sentence references. Thus, the Plaintiff never actually argued or pursued the "convincing mosaic" theory at any stage of the case prior to appeal. Because the Plaintiff never argued or pursued this theory below, Plaintiff may not now argue it for the first time on appeal.

On appeal, the core of the Court's analysis and determination should have evolved around the comparator theory and not the "convincing mosaic" standard—as, again, that was raised for the first time on appeal and was improperly before the Court.

Furthermore, in the Initial Brief's "Statement of the Issues," FDJJ raises as Issue II: "Whether the District Court erred in denying FDJJ's Rule 50 Motion by holding that Tynes properly pled and proved a claim for race discrimination under 42 U.S.C. § 1981." [IB, P. 2] In her Answer Brief [Answer Br. at pp. 32-37], Plaintiff addressed Issue II and raised a Rule 15(b) argument, contending that the District Court properly amended the Complaint, sua sponte, to add a § 1981

claim. In response thereto, in the FDJJ's Reply Brief, it briefed the Rule 15(b) argument. [Reply Br. at pp. 16-18.] The Opinion failed to address Issue II.

ARGUMENT AND AUTHORITIES

I. En Banc Review is Warranted Because the Opinion Adopts the "Convincing Mosaic" Standard for Disparate Treatment Cases Conflicting With Decision of Other Circuits

A. The Opinion Conflicts with Other Circuits

In the Opinion, the Court ultimately held that a disparate treatment case, the plaintiff may rely on a "convincing mosaic" theory instead of the comparator theory discussed in *McDonnell Douglas*. This Court concluded that the *McDonnell Douglas* is nothing but a procedural framework that has little to no importance when evaluating the sufficiency of the evidence. Instead, the Opinion urges this Court to utilize the "convincing mosaic" standard which seems to have no standards at all. This standard has been expressly rejected by the Seventh Circuit.

Specifically, after a lengthy analysis of the applicability of the convincing mosaic standard and inapplicability of *McDonnell Douglas*, this Court ultimately held:

> All that to say, in deciding motions for summary judgment or judgment as a matter of law [i.e., what needs to be proved at trial], parties already understand that, when we use what we have called the convincing mosaic standard, we look beyond the prima facie case to consider all evidence in the

> record to decide the ultimate question of intentional discrimination.

[Opinion at pp. 13-14]

Based on undersigned's research and belief, no other Circuit Court has adopted the "convincing mosaic" standard as such a legal test. Indeed, the only other Circuit Court to mention the convincing mosaic standard as a legal test to prove discrimination is the U.S. Court of Appeals for the Seventh Circuit. That Court has unequivocally rejected it as such, holding:

> To make matters worse, this court has itself occasionally treated "convincing mosaic" as a legal requirement, even while cautioning in other opinions that it must not be so understood. Instead of simplifying analysis, the "mosaic" metaphor has produced a form of legal kudzu.
>
> Today we reiterate that "convincing mosaic" is not a legal test. . . .

Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 764-65 (7th Cir. 2016) (citations omitted).

While the Eleventh Circuit does seem inclined to generally embrace the convincing mosaic theory in employment discrimination cases, *see Berry v. Crestwood*, 84 F. 4th 1300 (11th Cir. 2023), it should carve out an exception in disparate treatment cases where the issue is treating "like cases differently." *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019). By definition, disparate treatment cases require a comparator analysis and the convincing mosaic theory is not an appropriate alternative.

This Court has gone to great lengths over the past two decades to explain the strict standards for cases that present a comparator theory such as the instant case. While embracing the convincing mosaic standard the Court makes no mention of the concerns for protecting the interests of the employer. *See Ward v. Troup County School District*, 856 Fed. Appx. 225, 227 (11th Cir. 2021) (stating that "an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason"). There is no caution against becoming a super-personnel department. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (stating that "federal courts do not sit as a super-personnel department that reexamines an entity's business decision"). Such concerns should be considered especially in a case like this where the proffered reason was serious and legitimate. *See McDonnell Douglas Corp.*, 411 U.S. at 803 ("Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.").

The Plaintiff was the superintendent of the second largest juvenile detention facility in the Florida. The FDJJ terminated the Plaintiff after her facility experienced fifteen codes in a single day reflecting a lack of institutional control that FDJJ could not ignore. When the reason is legitimate, a review of comparator evidence is critical (if the proffered reason is a fireable offense then a plaintiff needs to show that other employees outside the class who committed a similar offense were not fired). *See McDonnell Douglas* at 803-04.

Accordingly, this Court has conflicted with the other circuit court that has addressed the convincing mosaic standard by holding that the convincing mosaic standard is the proper legal test to determine discrimination on summary judgment or at trial. As a result, this Court should grant this Petition for Rehearing En Banc.

B. The Opinion Fails to Articulate Any Standard for "Convincing Mosaic" and Allows Courts to Sit as a Super Personnel Department

"[F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . It is not the role of the examining court to second guess the wisdom of the reasoning, the court must only determine if the reasons given were merely a cover for a discriminatory intent." *Awaad v. Largo Med. Ctr., Inc.*, 564 Fed. Appx. 541, 544 (11th Cir. 2014) (citations omitted).

The strict standards for comparator evidence prevents "second guessing." The Opinion does not hold the "convincing mosaic" theory to a similar standard. While embracing the convincing mosaic theory, the Court fails to provide any standards by which the Court will measure whether the mosaic is, in fact, "convincing." With no articulated standard for a "convincing" mosaic, the Opinion conflicts with prior Eleventh Circuit precedent that cautions against "second guessing" and becoming a super-personal department.

Thus, the Court, by disregarding the comparator analysis, invoking the "convincing mosaic" theory for the first time on appeal, and not holding the convincing

mosaic analysis to the same standard as a comparator analysis, inappropriately sat as a super personnel department and second guessed the FDJJ's decision to terminate the superintendent after her facility had system-wide failures. This was an inappropriate exercise of judicial authority, and the Court should correct the same on en banc review.

II. En Banc Review is Warranted Because the Opinion Conflicts With Decisions of This Circuit in Allowing the Plaintiff to Present a New Theory for the First Time on Appeal

"It is true as a general rule that appellate courts will not consider questions raised for the first time on appeal." *United States v. Levy*, 391 F.3d 1327, 1348 n.17 (11th Cir. 2004). That is because "an appellate court will not consider issues not presented to the trial court" because *"[j]udicial economy is served and prejudice avoided by binding the parties to the theories argued below*." *McGinnis v. Ingram Equip. Co. Inc.*, 918 F.2d 1491, 1495 (11th Cir. 1990)

This was an appeal by ambush. Why? Because at no point in time before this appeal did the Plaintiff rely on the "convincing mosaic" theory. Rather, as shown in the Facts Section, the Plaintiff prosecuted this matter below as a comparator case for which the FDJJ launched its best defense. Thus, the Plaintiff never actually argued or pursued the "convincing mosaic" theory in the trial court. Indeed, in denying the post-trial motions, the trial judge only references the sufficiency of the comparator evidence and makes no mention of convincing mosaic or other evidence. Because the Plaintiff never argued or pursued this theory below, Plaintiff may not now argue it for the

first time on appeal—and because the Court allowed otherwise, judicial economy was not served, prejudice was not avoided, and the FDJJ endured an appeal by ambush.

Accordingly, en banc review is necessitated to correct these errors in appellate review and this Court should, therefore, grant this Petition.

III. En Banc Review is Warranted Because the Opinion Held That It Would Not Review the Jury's Verdict, Conflicting With *Collado* and *Tidwell*

A. The Court Has a Duty to Review the Sufficiency of the Evidence

FDJJ challenged the sufficiency of all Plaintiff's evidence within the framework of the comparator theory presented at trial.

In the Opinion, the Court holds that it is not its providence to weigh the sufficiency of the comparator evidence after the jury has considered the evidence. The Court is simply incorrect in this holding. Rather, as held by this Court, "[a]ppellate review of the evidentiary sufficiency of a claim is something we have the duty to perform when a defendant, who has properly preserved the issue, brings us an appeal presenting it." *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1153 (11th Cir. 2005); *see also Tidwell v. Carter Prods.*, 135 F.3d 1422, 1426 (11th Cir. 1998); *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 805 (11th Cir. 1995).

B. The FDJJ Challenged the Sufficiency of the Evidence. The FDJJ Framed the Plaintiff's Challenge Based on the Comparator Theory Presented by the Plaintiff. The Opinion Incorrectly Assumes that a Challenge to Comparator Evidence Does Not Need to be Addressed

FDJJ challenged the sufficiency of the Plaintiffs evidence at every step of the trial at the close of the Plaintiffs case, close of evidence and again post trial. On appeal challenged the sufficiency of all the evidence. The attack on the evidence was framed and focused on the comparator theory because that it is what Plaintiff presented at trial. The opinion's holding that it could not and would not determine the sufficiency of the evidence merits en banc review.

In assessing the sufficiency of the evidence, under *McDonnell Douglas*, the Court is required to include in its analysis the sufficiency of the comparator evidence. Specifically, as held by the U.S. Supreme Court long ago in *McDonnell Douglas*, in assessing an employment discrimination claim, the "inquiry must not end" at whether a plaintiff "meet[s] the prima facie case." Instead, "[e]specially relevant" to a showing of discrimination beyond the prima face case is the comparable analysis, as the High Court held:

> *Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here* . . . On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection 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 Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

Here, as established in this Petition's Facts Section, the Plaintiff prosecuted this matter below as a comparator case for which the FDJJ launched its best defense—not under the "convincing mosaic" standard. It, therefore, logically follows that the FDJJ challenged the sufficiency of all the evidence within the framework of the comparator theory. [*See generally* Initial Br. at pp. 20-37.]

In the Reply Brief, FDJJ responded to the convincing mosaic theory and challenged the sufficiency of the evidence on that theory as well.

Thus, it was this court's duty to analyze the sufficiency of evidence as other courts in this circuit have done. *See, e.g.*, *Collado*, 419 F.3d at 1153-54. However, the opinion provides no analysis at all of all the evidence provided by the Plaintiff and challenged by FDJJ. Accordingly, en bane review is required to correct this error.

IV. En Banc Review is Warranted Because the Rule 15(b)(1) Argument Was Not Forfeited

In the Opinion, the Court holds that any challenge by the Appellant to whether the district court properly invoked Rule 15(b)(1) is forfeited. The Court held the Rule 15(b) issue was forfeited because "at oral argument counsel expressed a lack of familiarity with that rule." [Opinion at p. 17.]

However, the cases the Court relies on in the Opinion pertaining to forfeit of argument are distinguishable. For example, in *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678 (11th Cir. 2014), this Court held that a party forfeited a claim on appeal. In that case, however, the central reason why the parties forfeited a claim on appeal was due to an error in briefing, i.e., the parties did not properly brief an issue on appeal. In this case, however, in the Opinion, the Court held that the FDJJ forfeited its Rule 15(b)(1) argument because of a lack of familiarity with the rule during oral argument—not due to any briefing error.

The Court also relies on *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330 (11th Cir. 2011). That case does not pertain to forfeiting an argument on appeal during oral argument. Rather, it deals with waiver of an argument because it was raised in one sentence of a brief not support by facts or law.

In addition, the Court relies on *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275 (10th Cir. 2004). Respectfully, that case is also inapplicable to forfeiting an argument during oral argument. In fact, that case does not concern forfeiting an argument on appeal. Rather, it concerns whether the party properly amended its pleadings under Rule 15(b)(1) through the presentation of evidence.

The Rule 15(b)(1) argument coincides with the FDJJ's argument that the Plaintiff failed to properly plead a § 1981 claim, *infra.* The FDJJ addressed this argument in detail in its Initial Brief [*see* Initial Brief pp. 37-43], as well as in its Reply Brief mentioned above, [*see* Reply Br. pp. 15-18].

Moreover, "[i]t is true that appellants must ordinarily raise any issue ripe for our consideration for the first time in their opening brief." *Powers*, 885 F.3d at 732. However, "an appellant generally may, in a reply brief, respond to arguments raised for the first time in the appellee's brief." *Id.*

The Rule 15(b) issue was fully briefed by the parties. [*See* Answer Br. at pp. 32-38; Reply Br. at 15-18]. Specifically, in the Reply Brief, in response to the Answer Brief raising the Rule 15(b)(1) argument, the FDJJ argues:

> In her Answer Brief, the Plaintiff states that under Fed. R. Civ. P. 15(b), such amendments should be freely allowed. In support of her assertion, she cites an allegedly analogous Eight Circuit case, *Kim v. Nasa Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), ...

[Reply Br. at p. 16.]

The FDJJ then spends the next three pages of its Reply Brief debunking the Plaintiff's Rule 15(b) argument by repudiating the applicability of the *Kim* case. [*See* Reply Br. at pp. 16-18.]

Hence, the Court has incorrectly held that the FDJJ forfeited any challenge to the district court invoking Rule 15(b)(1) and improperly allowing amendment to the Complaint without a motion. The Court should, therefore, grant this Petition and correct this error.

CONCLUSION

For the aforementioned reasons, this Court should grant this Petition for Rehearing En Banc.

WHEREFORE, FDJJ respectfully requests this court (1) grant en banc review, (2) reject the "convincing mosaic" theory in disparate treatment cases, (3) reject theories raised for the first time on appeal, (4) hold that the court must review the evidence for sufficiency, and (5) hold that the Rule 15(b) issue was not forfeited.

Respectfully submitted,

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