No. _____

IN THE

Supreme Court of the United States

THE GOLUB CORPORATION,

Petitioner,

—v.—

ELAINE BART,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ROBERT RHODES
Counsel of Record
THOMAS LAMBERT
JOSHUA AUXIER
FLB LAW, PLLC
315 Post Road West
Westport, Connecticut 06880
(203) 635-2200
rhodes@flb.law
lambert@flb.law
auxier@flb.law

Counsel for Petitioner

QUESTIONS PRESENTED

This petition implicates both the Court's employment discrimination framework announced over fifty years ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 791 (1973) as well as two provisions at the heart of the 1991 amendments to Title VII. The first provision, addressing "mixed motive" liability, provides that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The second–codifying the "same action" defense–provides that where a plaintiff proves a mixed motive violation and the employer demonstrates that it would have taken the same action in the absence of the impermissible motiving factor, the court may grant declaratory relief, injunctive relief and attorney's fees and costs but not an award of damages, admission, reinstatement, hiring, promotion, or payment. *Id*. § 2000e-5(g)(2)(B).

Against this backdrop, the Second Circuit–under the auspices of "demystifying" the mixed motive analysis in the context of the *McDonnell Douglas* framework on summary judgment–held that a plaintiff on summary judgment may, but need not, show at the third stage of the *McDonnell Douglas* analysis that the employer's justification was pretextual. Alternatively, the plaintiff can satisfy her burden by demonstrating that even if the employer had a mixed motive (i.e., the justification was not pretextual), impermissible discrimination was at least a motivating factor in the employer's adverse decision.

The questions presented are:

1. Is the *McDonnell Douglas* framework applicable to mixed motive discrimination cases, and if so, how are the three stages of that framework to be formulated?

2. In a mixed motive case, may an employer prevail on summary judgment by showing that there is no genuine issue of material fact that it would have taken the same adverse action regardless of discriminatory intent, and if so, how does the burden of production and persuasion shift between plaintiff and defendant under *McDonnell Douglas*?

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is The Golub Corporation d/b/a The Price Chopper, Inc.

Respondent (plaintiff-appellant below) is Elaine Bart.

CORPORATE DISCLOSURE STATEMENT

The Golub Corporation states that it is a privately held corporation. Its parent company is Northeast Grocery, Inc. No publicly-held corporation owns ten percent or more of The Golub Corporation's stock.

OPINIONS BELOW

The Second Circuit's opinion is reported at 96 F.4th 566 and reproduced at Appx. 1a-28a. The district court's opinion is not reported but is reproduced at Appx. 29a-40a.

JURISDICTION

The Second Circuit issued its opinion on March 26, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e), et seq. ("Title VII"), are involved in this petition:

1. 42 U.S.C. § 2000e-2(m), which provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

2. 42 U.S.C. § 2000e-5(g)(2)(B), which provides: "On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any

admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."

STATEMENT OF THE CASE

The interplay amongst Title VII, the 1991 Amendments thereto, and the *McDonnell Douglas* framework has been addressed by the Circuit Courts of Appeal in a series of fits and starts over the past thirty years and, even then, only inconsistently. The Second Circuit's decision in this case serves to compound the confusion. The time has come for this Court to truly demystify this important area of the law, namely, whether the *McDonnell Douglas* analysis is still viable in the context of a mixed motive case, how such a case must be pled and proved, and whether an employer may prevail on summary judgment on the "same action" defense.

The plaintiff, Elaine Bart, was fired from her employment with The Golub Corporation ("Golub") because she falsified food records in violation of company policy. She admitted to doing so. Nevertheless, and relying upon comments allegedly made by her manager that were derogatory towards women, she sued Golub under Title VII alleging sex discrimination. The district court granted Golub's summary judgment because there was no genuine issue of fact that Golub had a legitimate reason to fire her that was not pretextual, i.e., her admitted violation of company policy. The Second Circuit on appeal vacated the district court's decision and treated the case as one based upon mixed motive liability, despite the fact that Bart herself had not alleged such liability under section 2000e-2(m). In doing so, the Second Circuit presumed the *McDonnell Douglas* analysis applied to mixed motive cases and

applied a "modified" version of that framework to Bart's case.

Notwithstanding its laudable aim to demystify this important facet of employment discrimination law, the Second Circuit's decision engenders confusion. It did not address whether the *McDonnell Douglas* framework as a whole is viable in mixed motive cases, whether its "modified" version of that framework affects the first "*prima facie*" stage, or how an employer's "same action" defense is to be adjudicated on summary judgment. Some courts (like the Second and Fifth) apply a "modified" version of *McDonnell Douglas*, the Eighth Circuit applies the framework as originally formulated, while still others (the Sixth and Eleventh) have abandoned it. The Second Circuit itself acknowledged that the third stage burden under *McDonnell Douglas* "has admittedly not always been articulated in our case law with the utmost clarity[.]"

This case presents the ideal opportunity for this Court to bring clarity, consistency, and certainty to these important issues affecting scores of employees and employers alike across the nation. The petition for a writ of certiorari should be granted.

A. Background

Golub operates the Price Chopper chain of grocery stores, including one located in Oxford, Connecticut. Bart worked for Price Chopper as the food service team lead in Oxford. In August 2018, Golub fired Bart for "violation of company policies and procedures (#6 – Dishonesty, theft, fraud, or falsification of records and #7 – Non-compliance with safety and/or sanitation policies or procedures)".

Bart's supervisor, Damon Pappas, had sought her out as a department leader in another store and asked that she transfer to his store in the summer of 2017. Less than a year later, Golub first disciplined her for maintaining improper food logbooks on April 17, 2018. Temporary co-manager, Lizmary Diaz, signed the disciplinary note at that time.

On August 26, Pappas discovered that Bart falsified hot food records. Bart's shift ended at 2:45 p.m., and Pappas found logbooks with her initials next to time checks for time entries when she was not present in the store. Two days later, Pappas documented more violations in her department. He then sent an email to Golub's human resources representative, Tammie Sullivan. Pappas also found that Bart had not properly logged roaster chicken temperatures, which Bart admitted. On that same date, Pappas found other issues with the food records in this department. Pappas did not terminate her employment, but did report the violations to Golub's human resources department, which decided to terminate Bart's employment when it had collected all his information, which included the logs, photographs, and review of prior company policy violations.

Bart admitted that food logs are important because "you don't want anybody to get sick." Moreover, she agreed that if Golub discovered that any employee intentionally failed to fill out the food logbooks, such failure constituted a violation of company policies and procedures concerning dishonesty, theft, fraud, and falsification of records. She also testified that *any* person would be terminated for intentionally falsifying logbook records and named a male manager who suffered the same fate prior to Bart's termination. Golub has a strict food safety policy

regarding the correct use of food logs and has litigated this issue on a previous occasion. See *Bjorklund v. Golub Corp.*, 832 F. App'x 97 (2d Cir. 2021).

When Bart filed her lawsuit, Golub defended the case based on the violation of its policies and that such violations result in termination of employment for any employee who is found to have willfully violated the food logs policy. Bart did not contest that Golub had such a policy and that it so enforced its policy. Nevertheless, Bart alleged that her manager, Pappas, made comments about women as managers that she alleged to demonstrate bias.

After the close of discovery, Golub moved for summary judgment and the district court granted the motion on the basis that Golub had a legitimate business purpose for terminating Bart's employment that she could not show was pretextual. Again, Bart did not dispute the existence of Golub's food safety policy or the consequences for intentionally violating the policy.

On appeal, the Second Circuit vacated the district court decision. It applied what it coined as a "modified" *McDonnell Douglas* analysis because it found that Bart had demonstrated that there was a mixed motive behind Golub's employment termination. It did so without addressing the first stage of the *McDonnell Douglas* analysis in mixed motive cases and without addressing Golub's same action defense. Indeed, neither Bart nor Golub had treated the case as one involving a mixed motive claim, neither addressed it on summary judgment or on appeal, and Bart never pled mixed motive liability in her complaint.

B. The 1991 Title VII Amendments and the *McDonnell Douglas* Framework

Since 1973, the courts have applied the test set forth by this Court in *McDonnell Douglas* to decide motions for summary judgment in cases alleging violations of Title VII. In 1989, this Court discussed the *McDonnell Douglas* framework when applied to mixed motive cases. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse*, however, resulted in a plurality decision.

In 1991, Congress enacted significant amendments to Title VII, including the two at issue here. First, Congress provided the following language regarding mixed motive liability under Title VII: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Second, Congress codified the "same action" defense by adding 42 U.S.C. § 2000e-5(g)(2)(B). In pertinent part, the statute now provides that where an employer prevails on the same action defense, the court may award declaratory and injunctive relief and attorneys' fees and costs but not monetary damages or reinstatement.

This Court has not addressed whether or to what extent the *McDonnell Douglas* framework applies to the claims and defenses codified by these amendments. Courts accordingly have had no guidance on whether or how to apply *McDonnell Douglas* to mixed motive cases. While this Court in 2003 had an "opportunity to consider the effects of the 1991 Act on jury instructions in mixed motive cases," its decision was concerned solely with whether

a plaintiff must present direct or circumstantial evidence to obtain a jury instruction on mixed motive. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). The Court did not even cite *McDonnell Douglas* in *Desert Palace*, which ultimately eliminated any distinction between direct and indirect evidence in Title VII cases for jury instruction purposes.

Since *Desert Palace*, the circuits have been grappling with how to apply, or not apply, the *McDonnell Douglas* test in mixed motive cases. In the process, a split of authority has developed that this Court should, respectfully, address to bring clarity to the law.

In its opinion below, the Second Circuit cited a Fifth Circuit decision as the basis of its modified test in mixed motive cases: *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). The Fifth Circuit continues to employ its modified *McDonnell Douglas* test in Title VII cases. See, *e.g.*, *Vasquez-Duran v. Driscoll Children's Hosp.*, No. 20-40837, 2021 WL 3775350, at *4 (5th Cir. Aug. 25, 2021) (*per curiam*); *Price v. Wheeler*, 834 F. App'x 849, 855 (5th Cir. 2020).

The Fifth Circuit articulates its modified *McDonnell Douglas* framework as follows:

> the plaintiff must still demonstrate a *prima facie* case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's

> reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed motive[s] alternative). . . . If a plaintiff demonstrates that [discrimination] was a motivating factor in the employment decision, it then falls to the defendant to prove that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.

Rachid, *supra*,, 312. (citations and internal quotation marks omitted). Having itself adopted this modified framework, the Second Circuit nevertheless did not quote or address that portion of the *Rachid* decision providing that an employer-defendant could invoke the same action defense in order to prevail on summary judgment. Thus, the Second Circuit's decision appears to suggest a same action defense can only be adjudicated by the factfinder.

Shortly after, the Eighth Circuit issued one of the first post-*Desert Palace* decisions on mixed motive cases. See *Griffith v. Des Moines*, 387 F.3d 733 (8th Cir. 2004). On appeal, the *Griffith* plaintiff argued that *Desert Palace* "implicitly directed [the courts] to modify . . . use of the familiar framework established in *McDonnell Douglas Corp. v. Green*. . . ." *Id.*, 735. But the Eighth Circuit observed that the *Desert Palace* "decision did not even cite *McDonnell Douglas*, much less discuss how those statutes impact our prior summary judgment decisions." *Id.* For that reason, the Eighth Circuit applied the framework without any change.

In 2008, the Third Circuit found that "[t]he *McDonnell Douglas* burden-shifting framework does not apply in a mixed motive case in the way it does in a pretext case because the issue in a mixed motive case is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision." *Makky v. Chertoff*, 541 F.3d 205, 214 (3rd Cir. 2008). The *Makky* court also found it telling that *Desert Palace* failed to mention *McDonnell Douglas*. Nevertheless, the Third Circuit found *Desert Palace*'s silence to mean that *McDonnell Douglas* did not apply to mixed motive cases without modification. *Id.*, 214-15. But the court side-stepped whether the *prima facie* elements at the first stage of the framework were the same in a mixed motive case, as the plaintiff failed on either theory.

One other circuit has alluded to a modified application of *McDonnell Douglas* in mixed motive cases. See *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009). *Chadwick* failed to decide the issue by holding that the plaintiff failed to prove the case under any potential theory.

Finally, at least two Circuits have abandoned the *McDonnell Douglas* framework in mixed motive cases, though they allow plaintiffs to choose the burden-shifting framework at their discretion. In *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008), the court held that *McDonnell Douglas* was not required in mixed motive cases. See, *id.*, 400-01. See also *Quigg v. Thomas County School Dist.*, 814 F.3d 1227 (11th Cir. 2016). *White* produces yet another permutation which allows a plaintiff to choose the *McDonnell Douglas* burden-shifting analysis or reject it at some point in time. *Id.*, at 401.

The Second Circuit decision noted the underlying confusion in its own courts, stating, that it was taking "this opportunity to demystify the third-stage burden under *McDonnell Douglas*, which has admittedly not always been articulated in our case law with the utmost clarity. . . . This understandable confusion is only compounded by the consistency with which courts continue to refer to this step for convenience simply as the 'pretext' stage, even in mixed motives cases." *Bart v. Golub Corp.*, 96 F.4th 566, 575 (2d Cir. 2024). Thus, the Second Circuit articulated a modified *McDonnell Douglas* analysis for mixed motive cases similar to that of the Fifth Circuit: "To satisfy the third-stage burden under *McDonnell Douglas* and survive summary judgment in a Title VII disparate treatment case, a plaintiff may, but need not, show that the employer's stated reason was false, and merely a pretext for discrimination; a plaintiff may also satisfy this burden by producing other evidence indicating that the employer's adverse action was motivated at least in part by the plaintiff's membership in a protected class." *Id.*, 576. The Second Circuit did not discuss the first stage, *prima facie* elements at all.

Indeed, the Second Circuit's modified test as applied nullifies the third stage of *McDonnell Douglas* in mixed motive cases and allows the plaintiff to claim a mixed motive in the third stage of the framework without resort to any type of new or different evidence. Despite stating that the plaintiff may produce "other evidence" that the decision was motivated in part by plaintiff's membership in a protected class, the evidence that the court used to find a genuine issue of material fact was the very same evidence that plaintiff had used to demonstrate her *prima facie* case. By allowing the plaintiff to use

the same evidence for the first and third prongs of the *McDonnell Douglas* framework, the Second Circuit's modified framework effectively allows the plaintiff to defeat summary judgment simply by stating her *prima facie* case and later labeling it a "mixed motive". This holding allows the plaintiff to ambush the defendant by only claiming a mixed motive to defeat summary judgment. Such gamesmanship is fundamentally unfair for purposes of pleading and discovery.

As demonstrated by the foregoing discussion, the Circuits have not consistently applied *McDonnell Douglas* in mixed motive cases. The instant case presents the ideal opportunity to bring clarity on a clean record, allowing this Court to clarify whether and how *McDonnell Douglas* applies when the plaintiff makes a mixed motive claim when the undisputed facts demonstrate that the defendant should prevail on a same action defense.

C. A Workable Application.

Without guidance, the courts are left to attempt to harmonize the 1991 amendments, *Desert Palace*, and *McDonnell Douglas*. In short, the results thus far have produced a split of authority among at least three circuits. In the Eighth Circuit, *McDonnell Douglas* remains untouched. In the Second Circuit the court modifies only the third prong of *McDonnell Douglas* without addressing the same action defense. In the Fifth Circuit, *McDonnell Douglas* is similarly modified but allows the defendant to raise and prevail on that defense on summary judgment. Other circuits have provided ambiguous guidance.

Leaving *McDonnell Douglas* entirely untouched would ignore the 1991 mixed motive amendments. By

applying the usual pretext analysis, a court would likely impose upon employment discrimination plaintiffs a burden inconsistent with the mixed motive statutory language. At the same time, *McDonnell Douglas* also fails to account for the application of the same action defense, as the defense is not applied in the same way as the "legitimate non-discriminatory purpose" standard in the second stage of the *McDonnell Douglas* framework. On the other hand, the Second Circuit's solution effectively nullifies a prong of *McDonnell Douglas* in mixed motive cases and permits plaintiffs to pursue discrimination claims through surprise and ambush in derogation of this Court's admonition that pleadings must allege a plausible set for facts supporting their claims and require more than "blanket" notice. See, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The present case illustrates both deficiencies.

As to the element of surprise, the undersigned notes the very first time that the term "mixed motive" was used in this case was in the Second Circuit's decision. Bart did not plead nor did she argue a mixed motive theory in her complaint or at summary judgment. And while she did allude to a perceived inadequacy of the *McDonnell Douglas* analysis on appeal, she never articulated any reasoning or provided any law on the subject, nor did she ever clarify that her Title VII case relied upon a mixed motive theory of liability. The Title VII mixed motive analysis was introduced to this case *sua sponte* by the Second Circuit. As to the third stage of the *McDonnell Douglas* framework, the Second Circuit's modification of *McDonnell Douglas* essentially makes it irrelevant in a mixed motive case. Assuming that the defendant can demonstrate a legitimate business

reason for making an adverse employment decision, the modified analysis permits the plaintiff to simply change gears and claim that the employer had a mixed motive and, what's worse, permits her to do so by relying upon the very same evidence that she used in demonstrating her *prima facie* case. Here, the Second Circuit held that Bart satisfied the third prong of *McDonnell Douglas* with the same alleged comments she used to demonstrate the first prong of the framework. The court's decision seems to suggest that discrimination "in the air," so to speak, is sufficient for a plaintiff to survive summary judgment. By virtue of this approach, the *McDonnell Douglas* framework collapses under its own weight.

The Sixth Circuit's decision in *White v. Baxter Healthcare Corp.* deliberately allows a plaintiff to wait until the last moment to inform the defendant of his theory of liability. *White*, *supra*, 533 F.3d 381. In *White*, the Sixth Circuit firmly held that "[a]lthough the employee need not establish a *McDonnell Douglas prima facie* case to defeat a motion for summary judgment on a mixed motive claim, setting forth a *prima facie* case of discrimination under *McDonnell Douglas* can aid the employee. . . ." *Id.*, 401. The Court then explicitly stated that "we emphasize that compliance with the *McDonnell Douglas/Burdine* shifting burdens of production is *not* required. . . ." *Id.*, 401 (emphasis in original). Thus, Golub would request that this Court reject the Sixth Circuit's test that would produce wasted litigation costs and would encourage the plaintiff to play a game of "blind man's bluff."

Going forward, the Second Circuit's decision will encourage plaintiffs to never clarify their theory of liability until summary judgment is filed, which usually occurs after discovery has closed. Plaintiffs

will not need to develop a mixed motive theory unless and until they are faced with summary judgment or trial. At that point, because the same evidence can be used to establish the *prima facie* case and to defeat a legitimate non-discriminatory reason for termination, the plaintiff will obtain an automatic win as long as she testifies to some comment made by a manager. This situation is especially acute on summary judgment because the defendant-employer may be able to prove the same action defense, but the Second Circuit's holding would force a trial simply because the plaintiff claims mixed motive liability after receiving the summary judgment motion.

Finally, the Second Circuit's modified analysis takes no account of the same action defense. Employers should be able to raise and adjudicate this defense on summary judgment if the evidence supports it.

There is a better approach, which the petitioner would urge this Court to adopt, and which would preserve the broad strokes of *McDonnell Douglas* while also giving effect to Congress' intent in the 1991 Amendments. First, plaintiff should not be able to articulate her theory of discrimination "on the fly." Rather, if she is going to pursue a mixed motive claim, that claim should be pled and proven as part of the plaintiff's *prima facie* case and subjected to the Federal Rules of Civil Procedure regarding pleading, discovery, and summary judgment.

Second, where an employer is on proper notice that the plaintiff is claiming mixed motive liability and the employer raises a same action defense, the employer would be required to show both a legitimate business reason for the adverse employment action *and* that it would have taken the same action even if

there was a partially illegitimate motive. Allowing the employer to raise and prevail on the defense on summary judgment has significant benefits to litigants when successful. First, it significantly narrows the issues under consideration and likely leads to more efficient resolution whether through adjudication or settlement. Parties may resolve the case if the issue of monetary damages and reinstatement are eliminated as remedies. Second, attorneys' fees would be reduced by eliminating issues for trial.

Golub contends that in the third prong of its proposed test, in cases where the same action defense is raised, the plaintiff has the burden of persuasion to establish that there is a genuine issue of material fact concerning the same action defense. For example, in this case Golub demonstrated that it always terminates employees who falsified food logs. If, hypothetically, the plaintiff had conducted discovery and found that there were a number of male managers who were merely "written up" for intentionally falsifying food logs, her case would survive summary judgment as that evidence could constitute pretext.

At least one Circuit Court has applied the same action defense on summary judgment. See *Quigg v. Thomas County School Dist.*, *supra*, 814 F.3d 1227. In that case, the court decided whether and to what extent the same action defense applied. *Id.*, 1242-44. *Quigg* clearly demonstrates that courts may apply the same action defense, as they do for a myriad of other matters on summary judgment.

Respectfully, this Court should clarify the correct approach to these cases. Notwithstanding the Second Circuit's pronouncements, the work of demystifying

mixed motive liability under Title VII remains unfinished. There are at least two different approaches and courts and litigants continue to struggle with the approach to these cases on summary judgment. The *McDonnell Douglas* analysis is not viable in the context of a mixed motive case, mixed motive cases must be pled and proved, and an employer should be able to prevail on summary judgment on the "same action" defense. The Petitioner, therefore, seeks a writ of certiorari to present its case to this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully Submitted

ROBERT A. RHODES
Counsel of Record
THOMAS P. LAMBERT
JOSHUA M. AUXIE
FLB LAW, PLLC
315 Post Road West
Westport, Connecticut 06880
(203) 635-220
rhodes@flb.law
lambert@flb.law
auxier@flb.law

Counsel for Petitioner

APPENDIX

Appendix A

In the
United States Court of Appeals
for the Second Circuit

August Term, 2023
No. 23-238

ELAINE BART,
Plaintiff-Appellant,

—v.—

GOLUB CORPORATION,
Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the District of Connecticut.

SUBMITTED: JANUARY 10, 2024
DECIDED: MARCH 26, 2024

Before: KEARSE, LYNCH, and NARDINI,
Circuit Judges.

Plaintiff-Appellant Elaine Bart sued her former employer, Defendant-Appellee Golub Corporation ("Golub"), for discrimination under Title VII and state law after she was fired from her job as a supermarket

manager. Golub asserted that it fired Bart because she violated store policy by falsifying food logs. Bart admits the violation, but she also claims that Golub fired her because of her gender. She testified that her direct supervisor, who was involved in her termination, had made numerous remarks to her as recently as two months before her termination indicating that women were unsuited to be managers. The United States District Court for the District of Connecticut (Kari A. Dooley, *District Judge*) granted summary judgment to Golub, reasoning that Bart's admission that Golub's stated reason for her termination was legitimate and non-discriminatory was dispositive of the pretext inquiry, defeating her claims. We disagree, and reaffirm our Court's precedent that to survive summary judgment on a Title VII disparate treatment claim, a plaintiff may, but need not, show at the third stage of the *McDonnell Douglas* burden-shifting test that the employer's stated justification for its adverse action was a pretext for discrimination; a plaintiff may also satisfy this burden by adducing evidence that even if the employer had mixed motives, the plaintiff's membership in a protected class was at least one motivating factor in the employer's adverse action. We therefore VACATE the district court's judgment and REMAND for proceedings consistent with this opinion.

James V. Sabatini, Sabatini and Associates, LLC, Newington, CT, *for Plaintiff-Appellant*.

Joshua Auxier, FLB Law, PLLC, Westport, CT, *for Defendant-Appellee.*

WILLIAM J. NARDINI, *Circuit Judge*:

In this opinion, we clarify and reaffirm foundational principles governing pretext and causation in Title VII disparate treatment claims. Plaintiff-Appellant Elaine Bart, a female manager at Price Chopper, a supermarket chain operated by Defendant-Appellee Golub Corporation ("Golub"), was fired two days after she was disciplined for falsifying food logs that are maintained for health and safety purposes. Golub's stated reason for firing Bart was her violation of store policy. Bart admits that she violated Golub's food log policy, but nevertheless claims that she was fired because of her gender. Bart then testified in a deposition for this action that her direct supervisor, who the parties agree was involved in the termination decision, had made numerous remarks to her as recently as two months earlier indicating that he believed that women were unsuited to be managers.

The United States District Court for the District of Connecticut (Kari A. Dooley, *District Judge*) awarded summary judgment to Golub, reasoning that even assuming that Bart had established a prima facie case, her "acknowledgement that the reason provided for her termination was factually accurate and valid under [Golub]'s policies and procedures[] is dispositive of the pretext issue." *Bart v. Golub Corp.*, No. 3:20-CV-00404 (KAD), 2023 WL 348102, at *5 (D. Conn. Jan. 20, 2023). We disagree. To survive summary judgment on a Title VII disparate treatment claim, a plaintiff may, but need not, show at the third stage of the *McDonnell Douglas* burden-shifting test that the employer's stated justification for its adverse action was nothing but a pretext for discrimination; however, a plaintiff may also satisfy this burden by adducing evidence that, even if the employer had

mixed motives, the plaintiff's membership in a protected class was at least one motivating factor in the employer's adverse action. Bart's testimony about her supervisor's remarks indicating gender bias satisfied her burden in this case, precluding summary judgment.

We therefore VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

I. Background

The following facts are taken from the summary judgment record, which includes depositions. Because this appeal arises from a grant of summary judgment, we view the evidence in the light most favorable to Bart as the non-moving party and draw all reasonable inferences in her favor. *Reese v. Triborough Bridge & Tunnel Auth.*, 91 F.4th 582, 589 (2d Cir. 2024).

Bart worked as a team leader managing the food service and deli departments at Price Chopper supermarkets operated by Golub from 2011 to 2018. Her duties included overseeing the store's hot food stations to ensure quality and presentation standards and compliance with sanitation procedures and regulations, which entailed keeping food logs.

In August 2016, Bart was admonished for failure to maintain food logs, for which she admitted responsibility. She received another formal warning the same day for falsification of cooling logs, which she denies.

In the summer of 2017, Bart was transferred to the Price Chopper in Oxford, Connecticut at the request of that location's manager, Damon Pappas, who

became Bart's immediate supervisor there. Bart claims that Pappas treated her and her colleagues poorly. He commented to Bart that one of her female coworkers was a "ding dong" and "shouldn't have a job," and called another female coworker an "idiot." J.A. 199. Pappas also stated in front of other employees that "he should have fired [Bart] years ago," and that "ten-year-olds could do [Bart's job] better [than Bart]." *Id.* 201–02.

In addition to these generally rude comments, Bart alleges that Pappas made several remarks to her expressly indicating gender bias. Specifically, Bart testified that Pappas remarked directly to her on at least three occasions that "he didn't think women should be managers." *Id.* 209–11. She also testified that he stated in her presence that being a manager was "too stressful" for women and that women were "too sensitive to be managers." *Id.* 217. The most recent gender-based remark was in June 2018.

After her transfer to the Oxford Price Chopper, Bart was disciplined on multiple occasions. In April 2018, she was cited again (as she had been at a prior location) for "failing to keep the logbooks properly." J.A. 173. A few months later, on August 16, 2018, "Pappas formally admonished her for several deficiencies in her departments." *Id.* That same day, Bart raised concerns to Karen Bowers, a Golub HR employee, about Pappas's poor treatment of Bart and other employees, "which consisted of disrespectful speech and discussing [Bart's] job performance with other employees." *Id.*

Ten days later, on August 26, Bart was disciplined a third time in Oxford, this time for falsifying food logs, for which she admitted responsibility. Bart requested a job transfer that same day, citing

Pappas's allegedly poor treatment of her. Two days later, on August 28, Pappas documented the circumstances surrounding the August 26 incident, as well as more issues with Bart's performance, in emails to an HR employee. He stated that "there have been numerous missing entries on the food service logs, out of code products in the walk-in cooler not discarded, product put out for sale not logged on the service logs, and product left out for sale after the allowable selling times," *id.* 178–79—errors that Bart admits. Bart was fired that day. The parties agree that Pappas was involved in Golub's decision to terminate Bart's employment.

On September 7, 2018, Bart sought internal review of her termination. She requested less severe discipline, noting that her department had recently been understaffed, but she did not allege gender discrimination at that time. When asked in her deposition why she believed she was fired, Bart speculated it was because Pappas had learned that she requested a transfer and because he "had issues with . . . [her] as a woman." J.A. 100–01.

Bart filed this lawsuit in March 2020, claiming that Golub discriminated against her by firing her because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, and the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60. Golub moved for summary judgment, arguing that Bart could not raise a genuine dispute of material fact as to either an inference of discrimination by Golub as required to establish a prima facie case, or that Golub's stated reason for her termination—her violations of Golub's food log policy—was pretextual.

The district court granted the motion, reasoning that even if Bart had established a prima facie case of discrimination, her "acknowledgement that the reason provided for her termination was factually accurate and valid under Defendant's policies and procedures[] is dispositive of the pretext issue" as to both causes of action. *Bart*, 2023 WL 348102, *5. Bart now appeals.

II. Discussion

The sole issue on appeal is whether Bart has adduced sufficient evidence to satisfy her third-stage burden under *McDonnell Douglas Corp. v. Green* after her employer proffered a legitimate, nondiscriminatory reason for her termination, 411 U.S. 792, 804 (1973). For the reasons that follow, we conclude that she has.

We review the district court's grant of summary judgment *de novo*. *Reese*, 91 F.4th at 589. We "may affirm only if the record reveals no genuine issue of material fact for trial. Summary judgment is improper if the evidence is such that a reasonable jury could return a verdict for a nonmoving party." *Banks v. Gen. Motors, LLC*, 81 F.4th 242, 258 (2d Cir. 2023) (internal quotation marks and citations omitted).

A. Causation and Pretext Under Title VII

Title VII makes it unlawful for an 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. § 2000e-2(a)(1). The CFEPA prohibits the same, *see* Conn. Gen. Stat. § 46a-60(b)(1), and employs the same

standards as Title VII, *see Rossova v. Charter Commc'ns, LLC*, 211 Conn. App. 676, 684–85 (2022). We accordingly analyze these claims together under the relevant Title VII standards.

To succeed on a Title VII disparate treatment claim, a plaintiff must prove "discrimination either by direct evidence of intent to discriminate" or, more commonly, by "'indirectly showing circumstances giving rise to an inference of discrimination.'" *Banks*, 81 F.4th at 270 (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015)). As is well documented in this Court's case law, "[w]here an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008); *see also Vega*, 801 F.3d at 86 ("[T]he court must be mindful of the 'elusive' nature of intentional discrimination."). Circumstantial evidence is often the sole avenue available to most plaintiffs to prove discrimination.

When only circumstantial evidence of discriminatory intent is available, courts use the *McDonnell Douglas* burden-shifting framework to assess whether the plaintiff has shown sufficient evidence of discrimination to survive summary judgment. *Banks*, 81 F.4th at 270; *Porter v. Dartmouth-Hitchcock Med. Ctr.*, 92 F.4th 129, 149 (2d Cir. 2024) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has her] day in court *despite the unavailability* of *direct* evidence." (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (emphases added in *Porter*)).

A plaintiff's first step under *McDonnell Douglas* is to establish a prima facie case of discrimination by showing that "(1) she is a member of a protected

class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." *Banks*, 81 F.4th at 270 (quoting *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000)). The burden at this stage "is not onerous." *Id.* (quoting *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981)). Once the plaintiff has established a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its adverse action. *Vega*, 801 F.3d at 83 (quoting *McDonnell Douglas*, 411 U.S. at 802). Upon that showing, the burden then shifts back to the plaintiff to prove that the employer's stated reason was pretext for discrimination. *Id.*; *Banks*, 81 F.4th at 270–71.

However—as is crucial in this case—while a plaintiff *may* satisfy the third-stage burden under *McDonnell Douglas* by showing that the employer's stated reason was false and just a pretext, or cover, for a discriminatory intent, a plaintiff is not *required* to demonstrate the falsity of the employer's proffered reason. *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 156 (2d Cir. 2010) ("A plaintiff has no obligation to prove that the employer's innocent explanation is dishonest, in the sense of intentionally furnishing a justification known to be false."). Instead, "a Title VII plaintiff can prevail by proving that an impermissible factor was a *motivating factor*, without proving that the employer's proffered explanation was not some part of the employer's motivation." *Fields v. N.Y. State Off. of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 120 (2d Cir. 1997) (emphasis added) (internal quotation marks omitted); *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995) ("[T]he plaintiff is not required to show

that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the *only* reasons and that the prohibited factor was at least one of the motivating factors." (emphasis added) (internal quotation marks omitted)). A plaintiff may rely on other evidence that an impermissible criterion was a motivating factor in the employer's decision to take the adverse action.

To understand why, it is helpful to trace the development of the plaintiff's causal burden in Title VII disparate treatment cases. In 1964, Congress enacted Title VII, which prohibits discrimination "because of" a plaintiff's membership in a protected class. 42 U.S.C. § 2000e-2(a)(1). As the Supreme Court has observed, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)). Such language suggests a "but-for" standard of causation. *See Gross*, 557 U.S. at 176. But-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020).

In 1973, the Supreme Court developed the now-familiar three-stage burden-shifting framework under *McDonnell Douglas* to govern the allocation of proof between the parties at summary judgment in a Title VII disparate treatment claim where the plaintiff does not possess direct evidence of intentional discrimination by the employer. *See* 411 U.S. at 800–07. This framework was used by courts in all Title VII disparate treatment cases until 1989, when the Supreme Court decided *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse*, a plurality of the Court clarified the causal burden under Title VII: "[an employee's membership in a protected class] must be irrelevant to employment decisions. To construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them." *Id.* at 240. The plurality reasoned that "the words 'because of' do not mean '*solely* because of'" and "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241 (footnote omitted). Accordingly, "[w]hen . . . an employer considers both [an impermissible factor] and legitimate factors at the time of making a decision, that decision was 'because of' [the impermissible factor] and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if [the impermissible factor] had not been taken into account." *Id.*

To implement this new understanding of causation under Title VII, the plurality articulated a new allocation of proof to be applied in so-called "mixed motives" cases, as compared to so-called "single-motive" or "pretext" cases analyzed under the preexisting *McDonnell Douglas* framework: "once a plaintiff in a Title VII case shows that [an impermissible factor] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the impermissible factor] to play such a role." *Id.* at 244–45. This new test effectively shifted the ultimate burden of persuasion to the employer once the plaintiff produced evidence that an impermissible consideration was a motivating factor in the adverse action. The plurality justified this new proof regime

by acknowledging that "[w]here a decision was the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was *the* true reason" for the decision, which was essentially the inquiry at the third stage of the original formulation of the *McDonnell Douglas* test. *Id.* at 247 (internal quotation marks omitted). Courts accordingly began to treat single-motive and mixed-motives cases differently, analyzing the former under *McDonnell Douglas* and the latter under *Price Waterhouse*. *See* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 657 (2000).

But the *Price Waterhouse* regime was not long for this world, as in 1991, Congress supplanted it by amending Title VII to include a motivating-factor causation standard. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250–51 (1994). As relevant here, the 1991 amendments added the following provision to § 2000e-2: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).[1] That provision statutorily codified the *Price Waterhouse* plurality's broader reading of "because of" as corresponding to a less onerous motivating-factor causation standard. *See Bostock*, 590 U.S. at 657 ("Congress . . . supplement[ed] Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait

[1] The CFEPA also requires only that an impermissible consideration was a motivating factor of the adverse action. *Wallace v. Caring Sols., LLC*, 213 Conn. App. 605, 626 (2022).

. . . was a 'motivating factor' in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if [the impermissible consideration] *wasn't* a but-for cause of the employer's challenged decision." (internal citations omitted)). Congress also defined the term "demonstrate" to encompass both the burden of production *and* the burden of persuasion, 42 U.S.C. § 2000e(m), effectively overturning *Price Waterhouse* insofar as it held that the defendant-employer ever carries the burden of persuasion in a Title VII disparate treatment case. It also abrogated *Price Waterhouse* to the extent that the case allowed a defendant-employer to evade liability if it established the "same-decision" defense (that it would have taken the same adverse action even if it had not accounted for the impermissible factor); Congress instead limited only the scope of remedies available to a plaintiff proceeding under a mixed-motives theory if the defendant-employer establishes such an affirmative defense after the liability phase:

> [o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission,

> reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Id. § 2000e-5(g)(2)(B).

After the 1991 amendments, it became unclear whether mixed-motives cases should be analyzed under the *McDonnell Douglas* framework, a modified *Price Waterhouse* framework, or something else. *See* William R. Corbett, McDonnell Douglas*, 1973–2003: May You Rest in Peace?*, 6 U. Pa. J. Labor & Employment Law 199, 204–05 (2003). As identified in *Price Waterhouse*, it makes little sense to analyze a mixed-motives case under the original formulation of *McDonnell Douglas*, given that its third step was worded in a way that presupposed that employers had only a single motive for their employment decisions. *See Price Waterhouse*, 490 U.S. at 247. Although *Price Waterhouse* suggested that mixed-motives cases should be analyzed under a different framework, nothing in the 1991 amendments blessed this distinction between single-motive and mixed-motives cases.

Nevertheless, the chasm between mixed-motives and single-motive cases persisted, primarily due to Justice O'Connor's arguably controlling concurrence in *Price Waterhouse*, which was often followed even after the 1991 amendments. In her concurrence, Justice O'Connor opined that in mixed-motives cases, "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by *direct* evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse*, 490 U.S. at 276 (O'Connor, *J.*, concurring in the judgment) (emphasis added). Amidst the confusion created by the interaction between *Price Waterhouse* and *McDonnell*

Douglas after the 1991 amendments, courts clung to this easy-to-apply distinction, primarily differentiating single-motive and mixed-motives cases based on whether the plaintiff possessed direct or circumstantial evidence of discrimination, applying *Price Waterhouse* to the former and *McDonnell Douglas* to the latter. *See* Corbett, *supra*, at 204–05 ("Courts seized upon the distinction made by Justice O'Connor in her concurrence: cases involving direct evidence were analyzed under mixed-motives, and cases involving circumstantial evidence were analyzed under the pretext framework."); Belton, *supra*, at 657–58.

This Court also seemingly adhered to this rigid distinction by applying different standards in mixed-motives and single-motive cases early in the wake of *Price Waterhouse* and the 1991 amendments. *See, e.g.*, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180–81 (2d Cir. 1992) ("Employment discrimination cases . . . brought under [T]itle VII . . . are frequently said to fall within one of two categories: 'pretext' cases and 'mixed-motives' cases."); *de la Cruz v. N.Y. City Hum. Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 20, 23 (2d Cir. 1996) ("Appellant asserts both a 'pretext' claim and a 'mixed motives' claim. . . . In a 'mixed motives' case, a plaintiff must initially proffer evidence that an impermissible criterion was *in fact* a 'motivating' or 'substantial' factor in the employment decision," as opposed to using the *McDonnell Douglas* framework); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) ("In mixed-motive cases, we use the different analysis set out in *Price Waterhouse*. . . ."); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 445 (2d Cir. 1999), *as amended on denial of reh'g* (Dec. 22, 1999) ("Title VII suits fall into two basic categories: 'single issue motivation' and 'dual issue motivation' cases.").

But over time, this distinction seemed to fall away, precipitously so after the Supreme Court decided *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). There, the Court held that direct evidence is not required to obtain a mixed-motives jury instruction under Title VII, *id.* at 92; *see Holcomb*, 521 F.3d at 141 n.3, removing any fissure between single-motive and mixed-motives cases based on direct versus circumstantial evidence. Since *Desert Palace*, this Court has consistently applied *McDonnell Douglas* at the summary judgment stage in both single-motive and mixed-motives cases. As we explained in 2015,

> once a Title VII claimant raises a prima facie case of discrimination and the employer offers a legitimate explanation, the court considers whether a reasonable jury could conclude that the employer's decision was motivated, in whole or in part, by discrimination. The plaintiff can survive summary judgment by showing that the employer's stated reason for the adverse employment action is entirely pretextual, *or* that the employer had mixed motives, one of which was the desire to discriminate.

Ya-Chen Chen v. City Univ. of N.Y., 805 F.3d 59, 76 n.13 (2d Cir. 2015) (emphasis added) (internal quotation marks omitted); *see also, e.g.*, *Holcomb*, 521 F.3d at 141–42 (utilizing the general contours of the *McDonnell Douglas* framework to analyze a mixed-motives claim).

In other words, when confronting mixed-motives and single-motive cases, our solution has been to offer two slightly different descriptions of how each type fits with the plaintiff's burden at the third stage of *McDonnell Douglas*. We have explained that a

plaintiff may make *either* a traditional showing of "pretext"—*i.e.*, that the employer's stated reason was false, and that the sole actual reason was discrimination—*or* a showing that even if the employer's reason is true, discrimination was still a motivating factor in the employment decision. Thus, in *Holcomb v. Iona College*, we utilized the *McDonnell Douglas* framework to analyze a mixed-motives claim, but "stress[ed] . . . that a plaintiff who . . . claims that the employer acted with mixed motives is not *required* to prove that the employer's stated reason was a pretext." 521 F.3d at 141–42. Instead, at the last step of *McDonnell Douglas*, we held that "[a] plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the 'impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.'" *Id.* at 142 (quoting *Fields*, 115 F.3d at 120). Likewise, in *Naumovski v. Norris*, we distinguished between the causal burdens in a Title VII disparate treatment claim versus a claim under 42 U.S.C. § 1983, which applies a but-for causation standard:

> at the third step of the *McDonnell Douglas* analysis, a plaintiff asserting a § 1983 claim bears a higher burden in establishing that the employer's alternative, nondiscriminatory reason for the adverse employment action is "pretextual." To establish "pretext" under Title VII, a plaintiff need only establish that discrimination played a role in an adverse employment decision. In other words, a Title VII plaintiff need only prove that the employer's stated non-discriminatory reason

> was *not the exclusive* reason for the adverse employment action.

934 F.3d 200, 214 (2d Cir. 2019) (internal quotation marks and footnotes omitted). In *Henry v. Wyeth Pharmaceuticals, Inc.*, we recognized that a plaintiff satisfies the "pretext" requirement of *McDonnell Douglas* when he or she "prove[s] that discrimination played a role in motivating the adverse action taken against the plaintiff." 616 F.3d at 157. And in *Walsh v. New York City Housing Authority*, we analyzed a plaintiff's disparate treatment claim under *McDonnell Douglas* where she admitted that she lacked experience in the role to which she applied, which the employer identified as its legitimate, nondiscriminatory reason for not hiring her, but nevertheless claimed that her gender was also a motivating factor in that decision. 828 F.3d 70, 74–80 (2d Cir. 2016).

These cases suggest that instead of applying different tests to mixed-motives and single-motive disparate treatment cases, we apply *McDonnell Douglas* to both types of cases, with the inquiry being articulated slightly differently in mixed-motives cases only at the third step, and even then, only to distinguish clearly between the factual theories of liability offered by the plaintiff.[2] The Fifth Circuit seems to follow a similar approach:

---

[2] This is not to say that every distinction between single-motive and mixed- motives cases has fallen away. The difference is still relevant to jury instructions, *see Desert Palace*, 539 U.S. at 98–101, and, of course, an employer in a mixed-motives case has the same-decision defense available to it to limit the plaintiff's remedies, *see Holcomb*, 521 F.3d at 142 n.4. Our point is only that the differences between those types of cases are irrelevant at the summary judgment stage.

> [o]ur holding today . . . represents a merging of the *McDonnell Douglas* and *Price Waterhouse* approaches. Under this integrated approach, called, for simplicity, the modified *McDonnell Douglas* approach: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motives alternative).

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (internal quotation marks and alteration marks omitted).[3]

---

[3] Other courts of appeals have also acknowledged the viability of a so-called "modified" or "integrated" *McDonnell Douglas* approach for mixed-motives cases. *See Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 577–78 (6th Cir. 2006) ("*Desert Palace* . . . does not purport to alter application of the *McDonnell Douglas* framework to pretrial analysis of discrimination claims based on circumstantial evidence at the summary judgment stage [in mixed-motives cases]. . . . [W]hether the evidence is evaluated in terms of *prima facie* case elements, pretext requirements, or a mixed motive analysis apart from the *McDonnell Douglas* framework, it is abundantly clear, in any event, that [the] plaintiff . . . bears the ultimate burden of demonstrating by a preponderance of the evidence that . . . discrimination was at least *a motivating* factor in the

That long canvass of legal history brings us to present day. We take this opportunity to demystify the third-stage burden under *McDonnell Douglas*, which has admittedly not always been articulated in our case law with the utmost clarity, as demonstrated above. This understandable confusion is only compounded by the consistency with which courts continue to refer to this step for convenience simply as the "pretext" stage, even in mixed-motives cases. Indeed, as we have previously recognized,

> courts often speak of the obligation on the plaintiff to prove that the employer's explanation is a "pretext for discrimination."

[adverse employment] decision. . . ."); *see also Makky v. Chertoff*, 541 F.3d 205, 214–15 (3d Cir. 2008) (acknowledging that "[t]he *McDonnell Douglas* burden-shifting framework does not apply in a mixed-motive case in the way it does in a pretext case because the issue in a mixed-motive case is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision," but nevertheless "hold[ing] . . . that a mixed-motive plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain," a requirement under the first step of *McDonnell Douglas*); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) ("[The plaintiff] presses her claim under two separate, though related, theories. She puts forth a 'mixed motives' claim . . . . and a traditional discrimination claim under the familiar *McDonnell Douglas* burden shifting scheme. Our decision here, however, is not dependent on analyzing [the plaintiff's] claim under each of these theories, because under both approaches, plaintiffs must present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias." (internal quotation marks and footnotes omitted)).

> We believe this is . . . a shorthand for the more complex concept that, regardless of whether the employer's explanation also furnished part of the reason for the adverse action, the adverse action was motivated in part by discrimination . . . .

Henry, 616 F.3d at 156. It becomes clear through analysis of our case law that referring to this third step as the "pretext" stage in mixed-motives cases is only a partial description of the proper inquiry, as a Title VII plaintiff need not prove that the employer's stated reason was *false*. A plaintiff instead need only show that the employer's stated reason—even if true or factually accurate—was not the "real reason," in the sense that it was not the *entire* reason due to a coexisting impermissible consideration. *See id.* at 157 (observing that "inaccuracy or incompleteness resulting from the [employer's] failure to include the fact of the discriminatory motivation" in its stated reason is "pretext"). While we use "pretext" as shorthand, we have explained that a more complete characterization of a plaintiff's third-stage burden in mixed-motives cases is to produce "admissible evidence . . . show[ing] circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination." *Walsh*, 828 F.3d at 75 (quoting *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004)).

Relatedly, we have recognized that "[t]hough the plaintiff's ultimate burden may be carried by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, it may often be carried by reliance on the evidence comprising the prima facie case, without

more," if that evidence is independently sufficient under step three of *McDonnell Douglas*. *Cronin*, 46 F.3d at 203 (internal quotation marks and citations omitted). In such cases, "the conflict between the plaintiff's evidence establishing a prima facie case and the employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by the factfinder after trial," *id.*, precluding summary judgment.

In sum, we reaffirm: To satisfy the third-stage burden under *McDonnell Douglas* and survive summary judgment in a Title VII disparate treatment case, a plaintiff may, but need not, show that the employer's stated reason was false, and merely a pretext for discrimination; a plaintiff may also satisfy this burden by producing other evidence indicating that the employer's adverse action was motivated at least in part by the plaintiff's membership in a protected class.

B. Application to Bart's Case

Bart's case presents a relatively straightforward and instructional application of these principles. It is undisputed that Bart is a member of a protected class (women), is qualified for her position, and suffered an adverse employment action (termination). *See Bart*, 2023 WL 348102, at *4. And Bart's testimony about the remarks Pappas allegedly made to her indicating gender-based stereotypes (the most recent of which was two months before her termination)—that "he didn't think women should be managers," J.A. 209–11, that being a manager was "too stressful" for women, and that women were "too sensitive to be managers," *id.* 217—is more than sufficient to meet her minimal first-stage burden of showing

"circumstances [that] give rise to an inference of discrimination," *Vega*, 801 F.3d at 83 (internal quotation marks omitted). It is also undisputed that Golub has met its burden of articulating a legitimate, non-discriminatory reason for firing Bart: that she created inaccurate food logs on several occasions while under Pappas's management, most recently two days before her termination. The burden therefore shifts back to Bart to establish that Golub fired her due, at least in part, to her gender.

At this stage, the district court misapprehended our precedent by concluding as a matter of law that because Bart admitted to the behavior underlying Golub's stated reason for terminating her, she failed to meet her third-stage burden. The district court noted that "although Plaintiff argues that Pappas'[s] alleged discriminatory attitudes may be 'sufficiently probative' as to the existence of gender-based discrimination, this argument does not address the Defendant's demonstration that Plaintiff was terminated for violating company policy regarding the handling and logging of food products." *Bart*, 2023 WL 348102, at *5. But Bart did not need to "address" Golub's showing that she took accountability for the conduct for which it claims it fired her, where she also produced sufficient evidence (which we credit at the summary judgment stage) to show that Golub fired her in part due to Pappas's gender bias. Those can both be true without absolving Golub of unlawful discrimination. It was therefore error to reason that Bart's "acknowledgement that the reason provided for her termination was factually accurate and valid under [Golub]'s policies and procedures[] is dispositive of the pretext issue." *Id.*

We therefore disagree with the district court's articulation of the legal standard because, as

explained above, undisputed evidence that substantiates the legitimate, nondiscriminatory reason proffered by the employer at the second stage of *McDonnell Douglas* is not necessarily dispositive of the third-stage inquiry. That is because a plaintiff can satisfy that third-stage burden either by showing (1) that the employer's stated reason is false and merely a pretext for discrimination, or (2) that the employer's stated reason, although factually accurate, is not the only reason, because the employer's decision was also attributable to an impermissible consideration. *See Aulicino v. N.Y. City Dep't of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009) ("If the defendant meets this second burden, to defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based *in whole or in part* on discrimination." (emphasis added) (internal quotation marks omitted)); *see also Bentley v. AutoZoners, LLC*, 935 F.3d 76, 89–90 (2d Cir. 2019) (considering independent evidence of discrimination as cognizable to meet the pretext burden despite the employer having fired the plaintiff for a legitimate, non-discriminatory reason).

Here, Bart has adduced competent evidence, drawing reasonable inferences in her favor, that Pappas—"the actor most involved with [her] termination," J.A. 38—harbored gender-based bias against her.[4] Bart testified that Pappas made several

---

[4] On appeal, Golub attempts to minimize Pappas's role in Bart's termination by arguing that its "HR department fired [Bart]" and that Pappas "did not have authority to fire [her]." Appellee's Br. 13. Even putting aside Golub's failure to cite any record evidence regarding the extent of Pappas's authority to

remarks to her, including close in time to the firing, insinuating that he believed that a man would perform better in Bart's role than a woman would. Pappas's comments are therefore not "stray remarks" insufficiently tied to the adverse action as to lack probative value. Instead, "[t]he comments alleged were (1) made repeatedly, (2) drew a direct link between gender stereotypes and the conclusion that [Bart is ill-suited for her position as a manager], and (3) were made by [a] supervisor[] who played a substantial role in the decision to terminate [Bart]. As such, they are sufficient to support a finding of

---

hire and fire, his lack of unilateral authority to terminate Bart's employment would not in itself defeat Golub's potential liability. "A Title VII plaintiff can succeed on a discrimination claim against an employer even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the decision-making process." *Naumovski*, 934 F.3d at 220 (internal quotation marks and alteration marks omitted); *see also Bickerstaff*, 196 F.3d at 450 ("We recognize that the impermissible bias of a single individual at *any stage* of the [decision-making] process may taint the ultimate employment decision in violation of Title VII." (emphasis added)). Here, Pappas repeatedly complained to HR about Bart's alleged shortcomings, and prepared Bart's termination documentation. Moreover, Golub expressly admitted before the district court that it was "undisputed that [Pappas was] the actor most involved with [Bart's] termination." J.A. 38; *see also id.* 224, 237 (admitting in its answer to the complaint in state agency proceedings that Pappas was involved in the decision-making process to fire Bart); Answer at 4, *Bart v. Golub Corp.*, No. 20-cv-404-KAD (D. Conn. Apr. 23, 2020), ECF No. 11 (admitting the same in its answer to the complaint in the federal court proceedings). Thus, reading the evidence in the light most favorable to Bart on Golub's summary judgment motion, a reasonable jury could determine that Pappas was meaningfully involved in the decision to terminate Bart's employment, even if Golub's HR department ultimately executed that decision.

discriminatory motive." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 124 n.12 (2d Cir. 2004); *see Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001).

Further, situations such as this where there was more than one decision-maker involved in the adverse action are often particularly suited for a motivating-factor analysis at the third stage of *McDonnell Douglas*. The alleged discriminatory intent harbored by Pappas, who the parties agree was involved in the decision to terminate Bart, might have infected the decision to terminate Bart even if Golub's stated reasons were accurate and sincerely held by others involved in the decision-making process. As we have previously explained,

> there are many circumstances in which a jury may justifiably find a prohibited discriminatory motivation notwithstanding a different explanation given by the employer in good faith without intent to deceive. One such circumstance exists where the adverse decision is made by two or more persons, some of whom are motivated by discrimination, while others are motivated by other reasons, and the employer's innocent explanation emanates from those who had no discriminatory motivation and were unaware of their colleagues' discriminatory motivation.

Henry, 616 F.3d at 157.

Therefore, Bart has met her burden at the summary judgment stage of producing competent evidence that Golub, through Pappas's involvement, terminated her employment in part based on her gender.

III. Conclusion

Our holding today is not new. But it bears repeating due to the frequency of Title VII litigation, the infrequency of direct evidence of discrimination, and the history of Title VII's evolving causation standard. We hope today's decision erases any doubt about the appropriate standard for the third step of *McDonnell Douglas* in a Title VII case alleging disparate-treatment discrimination.

In sum, we hold as follows:

(1) To survive summary judgment on a Title VII disparate treatment claim, a plaintiff may, but need not, show at the third stage of the *McDonnell Douglas* burden-shifting test that the employer's stated justification for its adverse action was nothing but a pretext for discrimination; a plaintiff may alternatively satisfy this burden by adducing evidence that, even if the employer had mixed motives, the plaintiff's membership in a protected class was at least one motivating factor in the employer's adverse action.

(2) Here, Bart has adduced sufficient evidence of discriminatory intent by a supervisor involved in her termination—namely, her testimony that her supervisor made several remarks to her as recently as two months before her termination indicating that women were unsuited to be managers—to defeat Golub's motion for summary judgment and submit the ultimate issue of intentional discrimination to a fact finder.

We therefore VACATE the district court's judgment and REMAND for proceedings consistent with this opinion.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:20-CV-00404 (KAD)

JANUARY 20, 2023

ELAINE BART,

Plaintiff,

—v.—

GOLUB CORPORATION,

Defendant.

MEMORANDUM OF DECISION
RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 17)

Kari A. Dooley, United States District Judge:

This action arises out of the Plaintiff Elaine Bart's ("Plaintiff") termination from her employment with the Defendant, the Golub Corporation ("Defendant"). Plaintiff alleges discrimination on the basis of sex in violation of Title VII, 42 U.S.C. § 2000e-2, and the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60(a)(1). Pending before the Court is Defendant's motion for summary judgment. *See* ECF No. 17. Previously, on December 7, 2021, this Court granted Defendant's motion for summary judgment as unopposed. *See* ECF No. 18.

On December 8, 2021, judgment entered in favor of Defendant against Plaintiff. *See* ECF No. 19. On January 5, 2022, however, Plaintiff filed an objection to the motion for summary judgment as well as a motion for reconsideration pursuant to Federal Rule of Civil Procedure Rule ("Fed. R. Civ. P.") 59(e) and a motion for relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b)(1). *See* ECF Nos. 20 & 21.[1] On June 28, 2022, the Court granted in part Plaintiff's motion for reconsideration and relief from judgment and allowed Defendant to file a reply to Plaintiff's opposition. *See* ECF No. 25. Defendant did so on July 19, 2022. *See* ECF No. 27. The Court has reviewed all the parties' submissions. For the following reasons, the motion for summary judgment is GRANTED.

Relevant Facts

The following facts are taken from Defendant's Local Rule 56(a)(1) Statement of Material Facts ("Def. LRS," ECF No. 17-2), the Plaintiff's response thereto ("Pl. LRS," ECF No. 20-2), and the parties' exhibits. The facts set forth by Defendant are admitted by Plaintiff unless otherwise indicated.[2]

Plaintiff was employed by Defendant as a food service team lead at the Price Chopper[3] grocery store in Oxford, Connecticut. Def. LRS at 1 ¶ 2. As a food service team lead, Plaintiff managed the food service

---

[1] Plaintiff's counsel represented that the motion for summary judgment was never entered in his firm's calendaring system and so he never responded to it.

[2] Plaintiff admits all facts as stated by Defendant, except for Paragraph 40 of Defendant's Local Rule 56(a)(1), as discussed *infra*.

[3] Defendant operates grocery stores under the Price Chopper name. Def. LRS at 1 ¶ 1.

and deli departments, which included tasks such as managing other staff, checking food stations, and putting products out for sale. *Id.* at 1–2 ¶¶ 3, 4. Plaintiff acknowledged that her job required her to maintain product quality and presentation standards, as well as to comply with all corporate and state sanitation procedures and regulations. *Id.* at 2 ¶ 4. Additionally, she was to maintain all hot food logs, consistent with Price Chopper policy. *Id.* Plaintiff testified during her deposition that hot food logs are used for the sale of cooked foods because "If you're putting food out that's undercooked and somebody gets sick, the company is at fault." *Id.* at 4 ¶ 17; Plaintiff's Deposition ("Pl. Dep"), ECF No. 17-2, at 31. Plaintiff further testified that failure to pass health department inspections causes business problems, and that she knew of at least one employee—a male—who had previously been terminated for falsification of food logs. *Id.* at 4 ¶¶ 20–21.

Plaintiff's immediate supervisor at the Oxford store was Damon Pappas, who had requested in the summer of 2017 that Plaintiff be transferred to Oxford from Southington. *Id.* at 2 ¶¶ 5, 6. Although the Oxford store was a higher volume store than the Southington store, and gave Plaintiff an opportunity for more responsibility, she did not want to work for Pappas. *Id.* at ¶¶ 7, 8. Plaintiff did not approve of how Pappas treated people in the department and thought he did not show respect to others. *Id.* at ¶ 8.

On August 28, 2016, while working at the Southington store, Plaintiff received two separate written warnings for violations of work performance standards pertaining to the maintenance of food logs. *Id.* at 5 ¶¶ 23, 24. She took responsibility for one of

the violations. *Id.* at ¶ 23.[4] For the other warning, Plaintiff denied its substance, but later admitted during an ensuing internal review process (called "Addressing Concerns Together" or "ACT") that she had allowed expired product to be placed out for sale. *Id.* at ¶¶ 24, 25. On September 5, 2016, Pappas notified Human Resources ("HR") via email of these errors in food logs as well as the possible use of out-of-code product. *Id.* at ¶ 25.

Plaintiff's first discipline at the Oxford store occurred on April 17, 2018 for failure to keep proper logbooks.[5] *Id.* at 3 ¶ 10. Plaintiff received additional discipline on or around August 16, 2018 for several deficiencies in her department, for which Pappas formally admonished her. *Id.* ¶ 11. At that time, Pappas provided Plaintiff with a written job description, which stressed that maintaining food logs was part of her job duties. *Id.* at 5–6 ¶ 27. Following the admonishment, Plaintiff spoke to a member of Defendant's HR department, Karen Bowers, raising concerns about Pappas' treatment of her and others.[6] *Id.* at 3-4 ¶¶ 12, 13. She told Bowers that "everyone feels the same way about Damon" and that the people in her department had voiced to her that Pappas did not treat them properly. *Id.* at 3 ¶ 13

---

[4] Although Plaintiff was not physically at the store at the time of this violation, she took responsibility because the violation occurred within her department. *Id.* at 5 ¶ 23.

[5] Plaintiff's department failed an audit for failure to keep cooling logs. *Id.* at 3 ¶ 10. Defendant used a third-party vendor to "spot check" temperature logs in order to maintain logging accuracy. *Id.* at 5 ¶ 22.

[6] Specific allegations include that Pappas told Plaintiff that a ten-year-old could do a better job than her and that he should have fired her years ago, and that he called other team members an idiot and a "ding dong." Pl. Dep. at 84.

(quoting Pl. Dep. at 91). There were both male and female employees in the department at that time. *Id.* at 4 ¶ 14. Bowers encouraged Plaintiff to write a complaint so that an investigation could ensue. *Id.* at 4 ¶ 15.

Defendant ultimately terminated Plaintiff's employment on August 28, 2018. *Id.* at 6 ¶ 28. The termination of employment form, to which a copy of the August 26, 2018 food log was attached, indicated:

> "Elaine worked on Sunday, August 26, 2018, 5:30am to 2:45pm. Upon her leaving for the day it was discovered that the food service smoked food log times for the 6 hour checks were already completed by Elaine . . . despite the fact they were not due until between the hours of 3:30pm-4:54pm, hence falsifying this log. Additionally, there have been numerous missing entries on food service logs, out of code products in the walk in cooler, not discarded, product put out for sale not logged on food service logs, and product left out for sale after the allowable selling times. These are the same or similar serious violations that Elaine has been previously documented for in store #203 (August of 2016) and can no longer be tolerated for the food safety of our guests." ECF No. 17-14, at 1.

Plaintiff refused to sign off on her termination on August 30, 2018. *See* Def. LRS at 6 ¶ 28. During her deposition, however, Plaintiff agreed that intentionally[7]

---

[7] Plaintiff differentiates acts taken on purpose and those that qualify as "if you make a mistake, you make a mistake." Pl. Dep. at 172.

failing to maintain logbooks would constitute a violation of company policies (related to dishonesty, theft, fraud or falsification of records) as well as non-compliance with safety and sanitation procedures. *Id.* at ¶ 29. Plaintiff further agreed that she worked a shift from 5:30am to 2:45pm on August 26, 2018 and that her initials were recorded at the six-hour mark. *Id.* at ¶ 30. Plaintiff admitted that if the foods were first temped at 10:00am, the six-hour monitoring would occur at 4:00pm.[8] *Id.* at ¶ 31. Thus, proper initialing for that log could only have been completed at 4:00pm, after Plaintiff's shift ended.[9] *Id.* Pappas documented more issues with food logs in various emails sent to HR on August 28, 2018. *Id.* at ¶¶ 34–39. Plaintiff testified that "some of those logs" were "never [] filled out," that someone in her department should have written in the logbook, and that "[s]tuff happens." Pl. Dep. at 184, 192, 196.

On September 7, 2018, Plaintiff sought ACT review of her termination. Def. LRS at 9 ¶ 41. On the initial issue review process form, Plaintiff indicated that she had been working in a "hostile environment," and that she had been "singled out, bullied, and harassed by…Damon Pappas." ECF No. 17-20, at 1. In the ACT meeting, the contents of which were summarized in a memorandum, Plaintiff indicated the logs were always a problem. *Id.*, ECF No. 17-21, at 1. Plaintiff further testified at her deposition that "because there were so many logs and so many things going on to

---

[8] The log from August 26, 2018 shows various foods first temped at times spanning 9:30am to 10:00am. *Id.* at ¶ 31.

[9] Plaintiff noted that no one could "prove . . . that that log is from that day" because she "did not put that date on there." Pl. Dep. at 175.

keep track of, you would miss something sometimes because nobody is perfect . . .” Pl. Dep. at 216.

Defendant claims Plaintiff’s “[o]verall” testimony at the deposition was that Pappas wanted to fire her because she had asked for a transfer and that she had confronted him about his belittling, derogatory comments made to associates. *Id.* at 8 ¶ 40. Plaintiff, however, refutes the characterization that her request for a transfer was the sole reason for her termination. Pl. LRS at 12 ¶ 40. Rather, she attests the transfer request “had some bearing on it.” Pl. Dep. at 140–41. In her opposition memorandum to the motion for summary judgment, Plaintiff also relies upon her deposition testimony wherein she stated that Pappas repeatedly stated that men should be in charge of the department and that women were too sensitive to be managers and/or the work was too stressful for a female manager. Plaintiff’s Opposition, ECF No. 20, at 2, 3.

Standard of Review

The standard under which courts review motions for summary judgment is well-established. “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). A fact is “material” if it “might affect the outcome of the suit under the governing law,” while a dispute about a material fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party satisfies his burden under Rule 56 “by showing . . . that there is an absence of evidence to support the nonmoving

party's case" at trial. *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (per curiam) (internal quotation marks omitted). Once the movant meets his burden, the nonmoving party "must set forth 'specific facts' demonstrating that there is 'a genuine issue for trial.'" *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(e)).

Discussion

Plaintiff brings employment discrimination claims alleging that she was terminated from her employment due to her gender. In seeking summary judgment, the Defendant argues that Plaintiff has failed to demonstrate even a *prima facie* case of gender discrimination under Title VII or CFEPA, and that in any event, the Defendant has established a legitimate, non-discriminatory reason for her termination.

"Title VII makes it 'an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.'" *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017) (quoting 42 U.S.C. § 2000e-2(a)(1)). "In 1973, the Supreme Court adopted a three-stage, burden-shifting framework for analyzing employment discrimination cases under Title VII where a plaintiff alleges disparate treatment but does not have direct evidence of discrimination." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82 (2d Cir. 2015) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden to

establish a prima facie case of discrimination. *See McDonnell Douglas,* 411 U.S. at 802. To establish a prima facie case of discrimination under Title VII and CFEPA, a plaintiff must show that (1) she was within the protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Russell v. Aid to Developmentally Disabled, Inc.,* 753 Fed. App'x 9, 14 (2d Cir. 2018) (internal quotation marks omitted). The Plaintiff's burden at this stage is "*de minimis.*" *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 204 (2d Cir. 1995) (internal quotations omitted). If a plaintiff sets forth a *prima facie* case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Russell*, 753 Fed. App'x at 14. If the employer does so, the plaintiff then must demonstrate that the employer's stated reason for the adverse action was pretext for unlawful discrimination. *See McDonnell Douglas,* 411 U.S. at 804.

Here, there is no dispute that Plaintiff is within a protected class and that she suffered an adverse employment action—termination.[10] To demonstrate an inference of gender discrimination, Plaintiff relies upon comments Pappas made to her or others about female managers.[11] She argues that his comments,

---

[10] Defendant does not advance any argument regarding Plaintiff's qualification for her position, although this question is clearly intertwined with the legitimacy of the reasons articulated for her termination.

[11] Pappas' commentary about female managers aside, Plaintiff's effort to rely upon his general surly demeanor and his belittling conduct directed at her entire department does not support her claims. Plaintiff alleged that Pappas treated *everyone*—men and women—in the department equally badly.

coupled with his role as her supervisor, necessarily defeat summary judgment. Defendant asserts that Plaintiff has not demonstrated any circumstance that gives rise to an inference of discrimination in the decision to terminate her because the HR department made the decision to terminate her and, in any event, Pappas' statements were mere "stray remarks," which do not rise to the level of establishing discriminatory animus. Defendant therefore argues that Plaintiff cannot establish a *prima facie* case of gender discrimination. Further, Defendant asserts that even if Plaintiff could make a *prima facie* case, there is no genuine issue of material fact as to the reasons for her termination and the legitimacy of those reasons. Assuming for purposes of this decision that Plaintiff has identified a genuine issue of material fact as to whether she has made out a *prima facie* case of gender discrimination, the Court agrees that there is no genuine issue of material fact on the issue of pretext.

The record is unequivocal. Plaintiff was fired for poor job performance. She failed to keep accurate food logs, mishandled food product, and, specifically, falsified a food log on August 26, 2018 by signing off

---

See supra, Def. LRS at 3–4 ¶ 13, 14. A supervisor treating an employee poorly, although unfortunate if true, is not evidence of gender-based animus that allows for an inference of gender-based discrimination under Title VII or CFEPA. *See Ya-Chen Chen v. City University of New York*, 805 F.3d 59, 75 (2d Cir. 2015) ("Quite simply, even if severely held, a plaintiff's feelings and perceptions of being discriminated against do not provide a basis on which a reasonable jury can ground a verdict." (internal quotations and citation omitted)); *see also Redd v. New York Div. of Parole*, 678 F.3d 166, 176 (2d Cir. 2012) ("Title VII protects against status-based discrimination and is not otherwise a general civility code for the American workplace." (internal quotations and citation omitted)).

on a temperature check that would have occurred well after her shift ended. Indeed, Plaintiff has admitted that there were multiple occasions on which she failed to perform her job duties, primarily keeping accurate food logs. She too has admitted that an intentional failure to do so was a violation of the Defendant's policies because of the importance of keeping proper food logs. Furthermore, she has admitted that she knew at least one other male employee who had been terminated for the same types of violations.

Defendant has offered more than enough evidence to establish that the termination was for a legitimate, nondiscriminatory reason. And although Plaintiff argues that Pappas' alleged discriminatory attitudes may be "sufficiently probative" as to the existence of gender-based discrimination, this argument does not address the Defendant's demonstration that Plaintiff was terminated for violating company policy regarding the handling and logging of food products. To the contrary, Plaintiff's acknowledgement that the reason provided for her termination was factually accurate and valid under Defendant's policies and procedures, is dispositive of the pretext issue. *See Bjorklund v. Golub Corp.*, 832 Fed. App'x 87, 98 (2d Cir. 2021) (Where plaintiff admitted that she failed to maintain food logs, in violation of the defendant's policy, and therefore did not do enough to show that the decision to fire her for failing to follow company policy was pretextual.). *See also, Shumway v. United Parcel Service, Inc.* 118 F.3d 60, 65 (2d Cir. 1997) (It is well-established that a "violation of a company policy is a legitimate, nondiscriminatory reason for an employee's termination."); *Coltin v. Corp. for Justice Mgmt. Inc.*, 542 F. Supp. 2d 197 (D. Conn 2008) (Employer articulated a legitimate, non-

discriminatory reason for an employee's termination where employee violated the employer's policies.).

Conclusion

For the foregoing reasons, the motion for summary judgment (ECF NO. 17) is GRANTED. The Clerk of Court is directed to enter judgment for Defendant and close this case.

SO ORDERED at Bridgeport, Connecticut, this 20th day of January 2023.

/s/ Kari A. Dooley
KARI A. DOOLEY
UNITED STATES DISTRICT JUDGE