No. 23-6781

In The
Supreme Court of the United States

Stephanie Norman

Petitioner,

v.

H. Lee Moffitt Cancer Center and Research Institute, Inc., dba Moffitt Cancer Center

Respondent.

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED ON APPEAL

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion affirming the District Court's analysis of Petitioner's evidence does not (1) conflict with a decision of another court of appeals or a state court of last resort, or (2) implicate an important federal question that has not been, but should be, settled by this Court or that conflicts with relevant decisions of this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition where she failed to preserve, or alternatively waived, the issues she presents to this Court.

CORPORATE DISCLOSURE STATEMENT

H. Lee Moffitt Cancer Center & Research Institute, Inc. does not have a parent company, and no publicly held corporation owns 10% or more of its stock.

RELATED CASES[1]

Stephanie Norman v. H. Lee Moffitt Cancer Center and Research Institute, Inc. Eleventh Circuit Court of Appeals, No. 21-12095. Opinion of the Court dated February 22, 2023 [11th Cir. Doc. 54-1].

Stephanie Norman v. H. Lee Moffitt Cancer Center and Research Institute, Inc. Eleventh Circuit Court of Appeals, No. 21-11377. Dismissal dated August 23, 2003 [11th Cir. Doc. 20].

Stephanie Norman v. H. Lee Moffitt Cancer Center and Research Institute, Inc. Middle District of Florida, No. 8:19-cv-02430-WFJ-CPT. Judgment dated March 30, 2023 [Doc. 87].

[1] Petitioner erroneously includes "Ziccarello v. Dart, No. 19-3435, U.S. Court of Appeals for the Seventh District Circuit, Judgment entered 04 Jun 2022" as a related case.

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INTRODUCTION

Petitioner, Stephanie Norman ("Petitioner" or "Norman") has presented "no compelling reasons" for her Petition for Writ of Certiorari to be granted ("Petition"). See Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Eleventh Circuit's February 22, 2023 Opinion affirming the U.S. District Court for the Middle District of Florida's granting of summary judgment in favor of Moffitt (1) conflicts with a decision of another court of appeals, or (2) implicates an important federal question that has not been, but should be, settled by this Court. See Sup. Ct. R. 10(a) and (c). This Petition is nothing more than Petitioner's *third* attempt at re-litigating this case, and *second* attempt to have a court overturn the district court's decision with facts and arguments that Petitioner never raised or raised to the district court, and therefore, never preserved for this Court. Thus, the Petition should be denied.

Norman was afforded every opportunity to save her claims before the district court and to litigate her claims and present facts and evidence to oppose summary judgment, which relied almost exclusively on Norman's own deposition testimony. For example, after Moffitt filed its summary judgment motion, the district court entered an order specially notifying Norman that it would be "taking up" the summary judgment motion after a certain number of days—in what can only be seen as the district court ensuring, in an abundance of caution, that Norman, a *pro se* litigant, was aware of her obligations and deadline to oppose the motion. Norman did respond to the Court's notice but did not dispute any of Moffitt's

undisputed facts or raise any argument about Moffitt's evidence or its legal arguments. Norman simply filed a document with the district court, *without supporting evidence,* stating she opposed Moffitt's filings and had "factual evidence." Norman never produced any factual evidence or explained why she opposed Moffitt's request for summary judgment, nor did she point to any evidence on the record (let alone competent, substantial evidence) to overcome summary judgment.

Norman waited until after the district court granted summary judgment, and after she filed her appeal to the Eleventh Circuit Court of Appeals, to make arguments *for the first time* and identify alleged facts that she claims the appellate court should consider in reversing the district court's grant of summary judgment. She sought to supplement the record with facts that were not in the record or contained in any sworn statements and legal arguments that were not presented to the district court, which the appellate court rightly denied. The appellate court found that Norman's appeal was *frivolous* and affirmed the district court's decision.

Now Norman tries to make the same arguments before this Honorable Court. Notably missing from Norman's Petition, however, is any argument that would support a "compelling reason" for this Court to grant certiorari review. Indeed, Norman's Petition is void of any substantive argument related to a conflict with a decision of this Court or another court of appeals, or an important federal question that has not been settled by this Court. What Petitioner wants is for this Court to re-review evidence that was never presented and come to a different decision as a court of first review. Simply put, Petitioner has failed to carry her burden of

demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF CASE

Petitioner seeks review of the decision of the United States Court of Appeals of the Eleventh Circuit affirming the decision of the United States District Court for the Middle District of Florida, Tampa Division, granting summary judgment for Moffitt.

The undisputed facts relied on below have not been included in the Petition and are therefore set forth below:

I. Statement of Facts[2]

Moffitt is a nonprofit cancer treatment and research center located in Tampa, Florida. [Doc. 50-2 at ¶2]. Moffitt treats patients with cancer who are often immune compromised and generally very sick. [Doc. 51-2 at 64:21-65:4].

Norman applied to work as a fulltime Coder in Moffitt's Health Information Management ("HIM") department on May 11, 2015. [Doc. 51-2 at 129:23-130:23, Ex. 18]. Norman began working at Moffitt on June 16, 2015 as a FT Coder Trainee in the HIM Department (since she did not have the coder certification needed to be a Coder), and worked at Moffitt's campus. [Doc. 51-2 at 136:14-136:25, 137:18-23, Ex. 19; Doc. 50-4 at ¶3, 50-2 at ¶4]. Norman reported to Mary Mayer, Coding Manager, and her position was supported by Suzanne Bishoff, Coding Supervisor. [Doc. 50-4 at ¶2; Doc. 51-2 at 89:11-14; 137:1-6].

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[2] Citations to "Pet." refer to the Petition for a Writ of Certiorari filed by Norman; sections of the Petition are cited, as it lacks numbered pages. Citations to "Doc." refer to the docket and document numbers found in the electronic docket for the United States District Court for the Middle District of Florida (and in Respondent's Supplemental Appendix or electronic docket before the Eleventh Circuit Court of Appeals).

While Norman had difficulty meeting productivity standards as a Coder Trainee,[3] she completed her training program and passed her coding certification and, on or about October 9, 2016, she became a fulltime Coder. [Doc. 50-4 at ¶¶3 and 7]. She remained in this position through the end of her employment. [Doc. 51-2 at 62:1-2].

Coders are expected to meet certain productivity and quality standards in performing their work. [Doc. 51-2 at 147:10-149:20, Ex. 26; Doc. 50-4 at ¶4, Ex. 1]. Moffitt maintains a policy entitled Moffitt Cancer Center Coding Productivity Policy ("HIM Productivity Policy"). [Doc. 51-2 at 147:10-149:20, Ex. 26; Doc. 50-4 at ¶4, Ex. 1]. Coders are also expected to speak clearly and communicate on the phone and/or in person with others to discuss issues that may prevent the accurate and timely coding of accounts. [Doc. 51-2 at 67:19-21; Doc. 50-4 at ¶5]. Norman, like all other Coder Trainees who graduate to become a Coder, was given a three-month grace period to meet the standards outlined in the HIM Productivity Policy. [Doc. 50-4 at ¶6].

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[3] On September 22, 2015, Norman received an Introductory Period Appraisal Form for the introductory period as a Coder Trainee. [Doc. 51-2 at 149:21-151:14, Ex. 27; Doc. 50-2 at ¶6, Ex. 4]. Norman was advised that she needed to pay more attention to detail when coding, take more initiative to ensure that she is focused on the content of the [training] class and understands the work being presented, and work diligently to improve her coding skills. [Doc. 51-2 at 149:21-151:14, Ex. 27; Doc. 50-2 at ¶6, Ex. 4]. In her 2016 Moffitt Staff Annual Appraisal Form, Norman was advised, among other things, that she needed to work on her time management, improve coding knowledge, take initiative to refer to her coding guidelines, improve her organizational skills and ensure that she comes to work prepared with all tools needed for the day, and improve to reach productivity standards outlined in the HIM policy. [Doc. 50-2 at ¶6, Ex. 5]. Norman signed this review on May 9, 2016. [Doc. 50-2 at ¶6, Ex. 5].

In 2016 and 2017, Coders at Moffitt were eligible to work remotely if they met the requirements of Moffitt's Health Information Remote Working Policy ("Remote Working Policy"). [Doc. 50-4 at ¶6]. Norman signed the Remote Working Policy and agreed she read and accepted the terms of the policy. [Doc. 51-2 at 161:12-162:20, Ex. 30; Doc. 50-4 at ¶6, Ex. 2]. The Remote Working Policy provides that all employees, including Norman, would be required to work in the office if an employee was unable to meet the productivity and/or quality requirements in the HIM Productivity Policy. [Doc. 51-2 at Ex. 30]. The Remote Working Policy ensured employees who were not performing to Moffitt's expectations could be supervised and further trained. [Doc. 51-2 at Ex. 30; Doc. 50-4 at ¶6, Ex. 2].

Norman continued to have difficulty meeting productivity metrics as a Coder.[4] [Doc. 51-2 at 171:23-172:1, Ex. 28; Doc. 50-4 at ¶7, Ex. 3]. Bishoff sent Norman an email each month when she was struggling with productivity to advise

[4] After she became a Coder, Norman went through another introductory period and on January 10, 2017, she received an Introductory Period Appraisal Form for the introductory period as a Coder. [Doc. 50-2 at ¶6, Ex. 6]. In this review, Norman was advised she did not meet the required productivity standards for October 2016, November 2016, December 2016 and reminded her she needed to meet all productivity and quality/accuracy standards pursuant to the HIM Productivity Policy. [Doc. 50-2 at ¶6, Ex. 6]. Norman signed the review on January 10, 2017. [Doc. 51-2 at 165:20-24]. In her 2017 Moffitt Staff Annual Appraisal Form, Norman was advised, among other things, that she needed to improve and reach productivity standards outlined in the HIM Productivity Policy, and while she was expected to reach a minimum of 8 accounts coded for every hour worked, she was only averaging 6.15. She was advised she needed to take more initiative to increase her productivity. [Doc. 50-2 at ¶6, Ex. 7]. Norman signed her review on May 8, 2017 and included comments in which she blamed her poor productivity on the quality of the documentation she was given stating she did not have enough information to include the proper diagnoses code. [Doc. 50-2 at ¶6, Ex. 7]. Norman testified that she did not provide any other reason for her inability to meet productivity requirements. [Doc. 51-2 at 169:11-14, Ex. 32].

her of her productivity metrics. [Doc. 51-2 at 151:19-160:20, Ex. 28; Doc. 50-4 at ¶7, Ex. 3]. Norman did not meet her productivity metrics in any month from October 2016 to February 2017. [Doc. 51-2 at 157:14-160:20, Ex. 28]. Norman testified she has no reason to believe the metrics Bishoff used in her email were not accurate. [Doc. 51-2 at 158:20-22]. Norman also testified she never told Bishoff or Mayer that she was not meeting expectations because of a medical condition. [Doc. 51-2 at 160:9-12]. Norman testified that when she received emails from Bishoff which notified her she was not meeting performance expectations, Norman was *not* suffering from a disability. [Doc. 51-2 at 173:10-21].

On April 10, 2017, Moffitt notified Norman that pursuant to the Remote Working Policy and her continued poor performance in failing to meet her productivity in accordance with the HIM Productivity Policy, she was required to return to work onsite at Moffitt so Moffitt could help her improve her productivity metrics with supervision and training. [Doc. 51-2 at 166:1-14; Doc. 50-4 at ¶7, Ex. 4]. While working onsite, she worked in a cubicle around other coworkers. [Doc. 51-2 at 67:10-15; Doc. 50-4 at ¶3].

After Norman returned to work at Moffitt's campus, she continued to struggle with productivity and did not meet her required productivity metrics in April, May, or June 2017. [Doc. 50-4 at ¶7, Ex. 4]. On July 12, 2017, Moffitt placed Norman on a 60-day Employee Improvement Plan ("EIP"). [Doc. 51-2 at 170:16-171:5, Ex. 33; Doc. 50-4 at ¶7, Ex. 4]. Moffitt notified Norman she was required to improve her productivity by September 27, 2017 to maintain her employment. [Doc. 51-2 at

171:2-9, Ex. 33; Doc. 50-4 at Ex. 4]. Norman concedes she had difficulty meeting her productivity requirements when she received her EIP and that Moffitt coached her repeatedly. [Doc. 51-2 at 171:23-172:1].

Norman testified that at the time Moffitt placed her on the EIP, she *did not* suffer from asthma variant persistent chronic cough, the alleged disability on which she basis her Americans with Disabilities Act ("ADA") claims or any other medical condition. [Doc. 51-2 at 173:10-25]. Norman testified that around the time Moffitt gave her the EIP, she asked Moffitt if she could work remotely again. [Doc. 51-2 at 175:7-176:20]. Norman could not recall whether she asked to work remotely before or after being placed on the EIP, but she testified she was not ill when she asked to return to remote working and that she wanted to work remotely to increase the amount of overtime she received and because it was convenient. [Doc. 51-2 at 88:1-11, 173:10-25, 175:7-176:20]. She denied wanting to work remotely for any other reason—such as a medical reason or disability. [Doc. 51-2 at 175:7-176:20].

On August 23, 2017, over a month after receiving her EIP, Norman initiated a request for *intermittent* Family and Medical Leave Act ("FMLA") leave through Aetna, Moffitt's then third-party leave administrator. [Doc. 50-5 at ¶3]. Norman sent a fax to Aetna with a Certification of Health Care Provider for Employee's Serious Health Condition. [Doc. 51-2 at 176:21-177:14, Ex. 34]. Norman's healthcare provider reported Norman had "chronic allergies, sinusitis that results in blurred vision. Symptoms worsen at work." [Doc. 51-2 at 177:22-178:10, Ex. 34]. Norman's medical provider noted that Norman would need to attend intermittent doctor's

appointments ranging from 1-4 times per month. [Doc. 51-2 at Ex. 34]. Norman cannot recall when her medical conditions started. [Doc. 51-2 at 177:18-21]. The certification was dated August 16, 2017. [Doc. 51-2 at 178:24-179:8, Ex. 34].

By letter dated August 24, 2017, Aetna approved Norman's request for *intermittent* FMLA leave from August 23, 2017 to February 22, 2018. [Doc. 51-2 at 56:2-25, Ex. 6]. In late August, 2017 instead of using intermittent FMLA leave, Norman went out on a *continuous* leave. [Doc. 51-2 at 173:22-175:3].

On September 5, 2017, Norman visited Moffitt's Occupational Health ("OH") department to discuss her return to work. [Doc. 51-2 at 62:3-63:13; 66:17-67:15; Doc. 50-3 at ¶2]. She spoke to the Supervisor of OH, Marie Massaro, who is a nurse. [Doc. 50-3 at ¶2]. When Massaro tried to speak to Norman about her possible return, Norman was coughing so loudly and continuously that Norman could barely speak at all. [Doc. 51-2 at 65:7-11, 65:17-25, 66:4-10, 67:19-21; Doc. 50-3 at ¶2]. Massaro did not believe, based on her medical training and how Norman presented, that she was well enough to come back to work and was worried about her being in the hospital. [Doc. 50-3 at ¶2; Doc. 51-2 at 62:7-24]. Massaro asked Norman to step outside of the OH office while they continued to talk. [Doc. 51-2 at 62:7-24].

Massaro also noticed that although Norman submitted a note from a nurse practitioner that indicated she could return to work, the note was almost a week old. [Doc. 50-3 at ¶2]. The note contradicted what Massaro was viewing herself, as Norman presented to her with a loud and continuous cough that did not allow Norman to speak. [Doc. 51-2 at 62:7-24; 65:7-11, 65:17-25, 66:4-16, 67:19-21; Doc.

50-3 at ¶2]. Norman testified during her deposition that her cough was so severe she could not communicate. [Doc. 51-2 at 65:7-11, 65:17-25, 66:4-10, 67:19-21]. Massaro asked Norman to follow up with her doctor and to contact her about when the doctor thought Norman could return. [Doc. 51-2 at 62:3-63:13; Doc. 50-3 at ¶2]. On September 5, 2017, the same day she met with Massaro in the OH, Norman contacted Moffitt's Third-Party Administrator, Aetna, and applied for a *continuous* FMLA leave and for short term disability benefits. [Doc. 50-5 at ¶3].

Norman recalled she may have spoken to OH on one other occasion during her employment, but she was still coughing so badly she could not communicate. [Doc. 51-2 at 90:18-91:4]. Norman also recalled Moffitt asking her to see a Pulmonologist and to report back. [Doc. 51-2 at 90:18-91:15]. Norman testified she saw a Pulmonologist sometime in 2017, but as of the date of her deposition on March 25, 2021—*three and a half years after Norman sought continuous FMLA and STD with Moffitt*, her Pulmonologist had still not cleared her to return to work. [Doc. 51-2 at 91:13-16, 180:24-181:2; Doc. 51-3 at 220:6-12]. Norman does not recall ever contacting Moffitt to advise it that she had seen a Pulmonologist or whether a Pulmonologist thought she could return to work. [Doc. 51-2 at 180:24-181:8].

Norman remained out on leave. [Doc. 51-2 at 173:22-175:3]. On December 21, 2017, Aetna sent Norman a letter advising her that she had exhausted her FMLA leave entitlement. [Doc. 51-2 at 58:4-60:3, Ex. 7]. Norman admits she requested FMLA leave, was granted FMLA leave, and received *more* than twelve weeks of leave. [Doc. 51-2 at 146:4-11].

After Norman exhausted her FMLA leave, Moffitt granted Norman additional leave until February 5, 2018 as an accommodation under the ADA. [Doc. 51-2 at 60:18-61:7, Ex. 7; Doc. 50-5 at ¶3]. Norman testified she received over five months of continuous leave from August 2017 until her termination on February 5, 2018. [Doc. 51-2 at 173:22-175:3]. When she was terminated, Norman had not requested any additional leave under the ADA and has not been in contact with Moffitt about whether she could return to work or needed any other accommodations. [Doc. 50-5 at ¶¶ 3-5].

While Norman was on FMLA and her extended ADA leave, Norman also applied for Long Term Disability ("LTD") benefits through Aetna (which became The Hartford). [Doc. 51-2 at 26:24-27:1, 61:15-22; Doc. 50-5 at ¶3]. Aetna granted Norman's request for LTD benefits from December 4, 2017 to December 4, 2022. [Doc. 50-5 at ¶3]. To apply for LTD benefits, Norman submitted documentation from her physician that indicated she could not perform her job at Moffitt or any other job. [Doc. 51-2 at 61:20-62:7].

On January 22, 2018, Moffitt sent Norman a letter inquiring about her employment status. [Doc. 51-2 at 181:14-183:21, Ex. 35; Doc. 50-5 at ¶4, Ex. 1]. Norman testified that she did not receive the letter but admitted that she was receiving mail at the address on the letter and on file with Moffitt; she lived at that address during this time; and that the address on the letter was the same address she had on file with Moffitt. [Doc. 51-2 at 21:19-22, 181:14-183:21]. Norman could not explain why she received other letters that Moffitt and Aetna sent to her *at the*

same address but did not recall receiving this one. [Doc. 51-2 at 181:14-183:21].

Moffitt's January 22, 2018 letter included a timeline of Norman's leave. [Doc. 50-5 at ¶4, Ex. 1; Doc. 51-2 at Ex. 35]. The letter also indicated that she had been out of work since September 5, 2017; that her FMLA leave was exhausted and she was approved for extended leave until February 5, 2018; and that Moffitt had been notified on December 4, 2017 that her request for LTD had been approved. [Doc. 50-5 at ¶4, Ex. 1; Doc. 51-2 at Ex. 35]. Moffitt asked Norman in the letter to contact Moffitt by February 1, 2018 if she could not return to work on February 5, 2018, with or without restrictions. [Doc. 50-5 at ¶4, Ex. 1; Doc. 51-2 at Ex. 35]. Moffitt further advised Norman that if it did not hear from her by that date, it would assume she cannot return to work and her employment would be terminated effective February 6, 2018. [Doc. 50-5 at ¶4, Ex. 1; Doc. 51-2 at Ex. 35]. The letter provided Norman with the email address and phone number of Moffitt's Disability and Leave Administrator and invited her to contact the administrator with any questions. [Doc. 50-5 at ¶4, Ex. 1; Doc. 51-2 at Ex. 35].

Norman's extended ADA leave expired on February 5, 2018. [Doc. 50-5 at ¶5]. Norman never responded to Moffitt's letter and never contacted Moffitt to say she could return to work or when she could return with or without restrictions. [Doc. 50-5 at ¶5, Ex. 1-2; Doc. 51-2 at Ex. 35-36]. On February 14, 2018, Moffitt sent Norman a letter advising her that Moffitt had not received any communication from her and that due to her inability to provide information regarding when could return to work, her employment would end effective February 6, 2018. [Doc. 50-5 at

¶5, Ex. 2; Doc. 51-2 at Ex. 36]. Norman did not respond to the termination letter. [Doc. 51-2 at 184:17-185:8, 187:6-191:5]. Bishoff called Norman and left a voicemail message on Norman's phone asking her to return Moffitt's property that was in her possession. [Doc. 51-2 at 185:4-8, 188:2-25]. Norman believes she called Bishoff back and was told that Human Resources had sent her a termination letter. [Doc. 51-2 at 188:2-7]. She never contacted anyone in Human Resources to ask why she had been terminated. [Doc. 51-2 at 189:6-14, 191:2-5].

Norman claims that her disability is "asthma variant chronic cough," which prevents her from communicating, among other things. [Doc. 51-2 at 36:24-37:9, 74:21-75:2]. She testified that she has never been told by any medical professional that she can recover from her condition or that there is a cure for her condition. [Doc. 51-2 at 77:7-13]. Norman testified that her chronic cough keeps her from communicating, and that her cough is currently the same as it was in August 2017. [Doc. 51-2 at 37:7-9, 77:21-24]. Norman testified that no doctor has been able to help her. [Doc. 51-3 at 220:6-12].

Norman never asked anyone at Moffitt for an accommodation due to an alleged disability or how she might be able to accomplish her job duties with her alleged disability. [Doc. 51-2 at 88:7-91:16]. She did not communicate with Moffitt that she could return to work and never requested any other accommodation to accomplish her job duties with her alleged disability. [Doc. 51-2 at 88:7-91:16]. Norman still has issues communicating and must stop what she is doing when she experiences lengthy coughing fits. [Doc. 51-2 at 37:20-25].

Since Norman's last day at work in August 2017, Norman has continuously received compensation, short-term disability, LTD and/or Social Security Disability Insurance ("SSDI"). [Doc. 51-2 at 118:18-119:3]. To obtain SSDI, Norman provided medical documentation from her physician about her coughing condition to the Social Security Administration which stated that she could not work. [Doc. 51-2 at 86:8-22, Ex. 13]. She submitted the same information to her LTD insurer, and she also testified before a judge at a hearing that her coughing condition caused her *to not be able to work*. [Doc. 51-2 at 86:8-22, Ex. 13]. On May 21, 2019, more than a year after her termination, Norman produced a doctor's note from her Pulmonologist, Dr. Theron Ebel, to Aetna which said, "The patient reports she is not working and is on permanent disability." [Doc. 51-2 at 70:24-72:16, Ex. 9]. On or about November 14, 2019, Aetna sent Norman a letter regarding her LTD benefits, and was explicitly advised that she must meet the test of a disability to receive benefits. [Doc. 51-2 at 93:8-97:20, Ex. 11]. She was further advised she could receive benefits *if she could not perform the material duties of her own occupation solely because of an illness or injury*. [Doc. 51-2 at 93:8-97:20, Ex. 11]. Norman was awarded benefits and currently receives $1,101 in SSDI benefits and $2,244 in LTD benefits, for a total of $3,356 per month. [Doc. 51-2 at 26:19-23].

II. Course of Proceedings and Disposition Below

A. The District Court

On October 1, 2019, Norman filed a Complaint in the United States District Court for the Middle District of Florida, Tampa Division ("district court") against

Moffitt claiming six counts: (1) FMLA interference, (2) FMLA retaliation, (3) disability discrimination under the ADA (4) retaliation under the ADA, (5) disability discrimination under the Florida Civil Rights Act ("FCRA"), and (6) retaliation under the FCRA. [Doc. 1].

On April 30, 2021, Moffitt timely moved for summary judgment on all of Norman's claims. [Doc. 49]. In support of its summary judgment motion, Moffitt filed a statement of undisputed facts, four declarations, as well as the two-volume transcript of Norman's deposition, which was taken over the course of two days. [Doc. 50, 51, and 54].

On May 3, 2021, the district court issued an Order notifying the parties that it would take up the motion for summary judgment on the twenty-second (22nd) day after filing, and that any motion not responded to would be deemed unopposed under the Local Rules. [Doc. 56]. That day, Norman filed a response that indicated generally that she opposed Moffitt's filings, stating only that "Plaintiff has factual evidence that states otherwise." [Doc. at 57]. Norman did not dispute Moffitt's undisputed facts, present any sworn evidence to the district court, or provide any legal arguments against summary judgment.

On May 26, 2021, the district court entered summary judgment on all counts in favor of Moffitt. [Doc. 61]. In its Order, the district court noted that Norman filed a traverse or bare denial, stating without elaboration that "Plaintiff has factual evidence that states otherwise." [Doc. 61 at p. 1-2]. The district court also noted that Norman had not "provided any case proof or pointed to competent, substantial

evidence (or any evidence for that matter) in the record that would defeat the well-established grounds asserted by the Defendant[,]" and that the motion was "in effect, uncontested." [Doc. 61 at p. 2-3].

The district court then went through the background of the case, the uncontested facts, and discussed how the uncontested facts supported summary judgment in favor of Moffitt on each of Norman's claims. [Doc. 61]. The district court focused on three separate events – (1) Norman's EIP; (2) Norman's leave; and (3) Norman's termination. [Doc. 61].

With respect to the EIP, the district court found the record evidence showed Norman was placed on the EIP for performance *before* she got sick and began to allegedly suffer from a respiratory disability. [Doc. 61 at p. 3]. Accordingly, Moffitt's actions in addressing her work productivity problems had nothing to do with her alleged need for leave or her claimed disability. [Doc. 61 at p. 5]. With respect to Norman's leave, the district court found the record evidence showed that Norman received over five months of continuous leave starting in August 2017, and never returned to work. [Doc. 61 at p. 4]. Indeed, when Norman exhausted her FMLA, Moffitt extended to her additional leave. [Doc. 61 at p. 4]. The district court noted Norman could not squarely testify she had asked Moffitt for an accommodation. [Doc. 61 at p. 4]. It further noted while out on leave, Norman applied for, and received, long term disability benefits from December 2017 to December 2022 based on her physician's representations that she could not work and has continuously received some form of compensation since August 2017 including short-term

disability, long-term disability and SSDI. [Doc. 61 at p. 4].

Finally, with respect to Norman's termination, the district court found that the record evidence demonstrated Moffitt attempted to communicate with Norman about her return to work, Norman did not respond to Moffitt and Moffitt terminated Norman's employment only after she failed to respond to Moffitt's inquiries about whether she could return to work. [Doc. 61 at p. 4]. Moffitt sent several letters to Norman about returning to work, and while Norman claimed she did not receive the correspondence, the correspondence was sent to Norman's address on file with Moffitt and Norman did not attempt to contact Moffitt about returning to work or respond to her termination letter. [Doc. 61 at p. 4].

The district court concluded Norman had not shown a direct, or indirect, *prima facie* case for an FMLA violation or retaliation, or any similar actionable conduct under the ADA or any analogous Florida Statute. [Doc. 61 at p. 5]. In fact, the district court found Moffitt showed to the contrary. [Doc. 61 at p. 5]. The district court granted summary judgment on all counts. [Doc. 61 at p. 5].

B. The Court of Appeals

Norman appealed the district court's decision to the Eleventh Circuit Court of Appeals on June 16, 2021. [Doc. 65]. Norman requested to proceed *in forma pauperis*, which was denied by the appellate court on November 22, 2021, after finding that there were no "nonfrivolous issues" on appeal. [11th Cir. Doc. 10].

The appellate court found that the district court properly found Norman had failed to raise sufficient claims under the FMLA. [11th Cir. Doc. 10]. With respect to

her FMLA interference claim because, the appellate court found that based on the undisputed facts, Norman received more than the full 12 weeks of FMLA leave. [11th Cir. Doc. 10]. With respect to her FMLA retaliation claim, the appellate court found that Norman failed to point to any facts that show that the use of her FMLA leave, and her termination were causally related. [11th Cir. Doc. 10]. Finally, the appellate court agreed that the district court properly granted summary judgment in favor of Moffitt on Norman's ADA and FCRA disability discrimination claims because Norman failed to establish that she was a qualified individual who could perform the essential elements of her job, with or without an accommodation, or that she was terminated because she took leave. [11th Cir. Doc. 10]. Rather, the appellate court found that Norman could no longer perform the duties of her position. [11th Cir. Doc. 10].

On December 3, 2021, Norman filed a Motion for Reconsideration claiming that her appeal was not frivolous and that she had "evidence." [11th Cir. Doc. 11]. On December 10, 2021, the appellate court denied Norman's motion stating that Norman had not offered any new evidence or arguments of law to warrant relief. [11th Cir. Doc. 12]. Norman proceed with her appeal after paying her filing fee. [11th Cir. Doc. 15].

On May 24, 2022, Norman filed a Motion to Supplement the Record claiming that she "has evidence of documentation such as: messages, emails, pictures, letters, videos, etc." [11th Cir. Doc. 22]. Norman, however, provided no indication as to whether the purported evidence was omitted from or misstated in the Record of

Appeal by error or accident, and if so, how the Record should be correct or modified. [11th Cir. Doc. 22]. Moffitt responded in opposition stating that Norman had every opportunity at the district court level to litigate her claims and that throughout litigation, she had simply referenced unspecified "evidence." [11th Cir. Doc. 23]. Moffitt further argued that while the appellate rules did allow modification to correct errors to accurately reflect what occurred before the district court, it did not permit the creation of a new or different record. [11th Cir. Doc. 23]. On June 14, 2022, the appellate court denied Norman's Motion to Supplement the Record. [11th Cir. Doc. 26].

On August 8, 2022, Norman filed her initial brief. [11th Cir. Doc. 31]. In her brief, Norman presented unsupported facts and conclusory arguments against summary judgment that she never presented below and that were not in the record or presented to the district court. [11th Cir. Doc. 31]. Moffitt responded by filing an opposition brief on October 7, 2022. [11th Cir. Doc. 47]. Moffitt presented arguments against Norman's attempts to use facts not before the district court and made substantive arguments against Norman's claims under the FMLA, and FCRA. [11th Cir. Doc. 47]. Norman filed a reply brief on October 28, 2022 stating that she "continues to stand by her Opening brief and state [*sic*] Defendant discriminated against her due to her disability." [11th Cir. Doc. 52]. After the Parties fully briefed the issues, on February 22, 2023, the appellate court affirmed the district court's decision. [11th Cir. Doc. 54].

This Petition followed.

REASONS FOR DENYING THE PETITION

I. Certiorari Should Not Be Granted Because the Petitioner Cannot Meet the Requirements of Supreme Court Rule 10[5]

Review in this Court by means of a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved. Sup. Ct. R. 10. Petitioner provides no compelling reason for her Petition.

First, the Eleventh Circuit's February 22, 2023 decision affirming the U.S. District Court for the Middle District of Florida's granting of summary judgment in favor of Moffitt *does not* conflict with a decision of another court of appeals. Sup. Ct. R. 10(a). There is no conflict among the circuits that this Court need resolve. Sup. Ct. R. 10(a). Petitioner does not even allege that there is such a conflict or provide any coherent, or substantive, argument to support such a position. Second, the Petition does not involve a situation where the Eleventh Circuit decided an important federal question that has not been, but should be, settled by this Court, or that has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Again, the Petition lacks any support for such a position.

That said, Petitioner claims, *without support*, that the Eleventh Circuit erred

[5] Supreme Court Rule 10(b) is not applicable as this case does not involve a state court of last resort deciding an important federal question that conflicts with the decision of another state court of last resort of a United States court of appeals.

when it did not let her supplement the record with new "evidence" that was not before the district court. She then asserts in a conclusory manner that the Eleventh Circuit's actions are contrary to the decisions of this Court and other circuits and the Federal Rules of Civil Procedure. Petitioner, however, does not cite to any decision(s) relevant to her claim, but rather to the summary judgment standard. That is because it is well established that "[a] Rule 10(e) motion is designed to supplement the record to accurately reflect what occurred before the district court, not as a means by which parties can include additional evidence, no matter how relevant, before the court of appeals that was not before the district court." *Knight v. Florida*, 062007 U.S. Dist. LEXIS 115622 at *1 (S.D. Fla. Sept. 18, 2007) (citing *Liao v. TVA*, 867 F.2d 1366, 1370 (11th Cir. 1989). A "federal appellate court may examine only the evidence which was before the district court when the latter decided the motion for summary judgment." *Chapman v. Al Transp.,* 229 F.3d 1012, 1027 (11th Cir. 2000) (quoting *Welch v. Celotex Corp*., 951 F.2d 1235, 1237 n.3 (11th Cir. 1992). Petitioner's "claim" is nothing more than her attempt to supplement the record *again* to include "evidence" that she never presented before the district court in opposition to Moffitt's Motion for Summary Judgment.

Petitioner's grievances are not the result of errors made by any court, or due to unresolved issues in the courts, but by her own refusal to litigate her claims at the district court level. Norman had ample opportunity to produce or point to evidence *in the record* that she believed supported her claims, respond to and/or contest Moffitt's statement of material facts it filed in support of its motion for

summary judgment, or to advance arguments against summary judgment. *She did not and her claims were dismissed.* This is not a case where a *pro se* litigant was robbed of an opportunity to respond before her claims were dismissed. The district court took extra steps to ensure Norman knew her deadline to respond to Moffitt's motion. Norman's response to Moffitt's motion for summary judgment was wholly conclusory, deficient, and not compliant with the Federal Rules of Civil Procedure. This does not create an important question of federal law that should be settled by this Court.

The decision by the court of appeals is not to be disturbed unless plainly without support. *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). Certiorari should be denied when the decision of the court of appeals is a fair assessment of the record because the Supreme Court does not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Gen. Talking Pictures Corp. v. W. Electric Co.*, 304 U.S. 175, 58 S. Ct. 849 (1938) (the Supreme Court will not grant writ of certiorari merely to review evidence or inference drawn from it); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review … is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

This case does not meet the specific criteria set forth in Sup. Ct. R. 10. Norman's arguments are simply not compelling reasons for which a Petition for Certiorari should be granted. Accordingly, the Petition should be denied.

II. Certiorari Should Not Be Granted Because the Petitioner Failed to Preserve, or Alternatively Waived, the Issues She Presents to this Court

Petitioner does not even attempt to disguise the true purpose behind her Petition (to argue the facts to this Court). Indeed, the case law she uses aligns with the rationale used by the courts below in granting Moffitt's motion for summary judgment. She simply disagrees with the outcome of the case.

Petitioner had every opportunity to litigate her claims and properly oppose summary judgment, but as stated above, failed to do so. She then attempted to oppose summary judgment *for the first time* before the appellate court—including those arguments she raises to this Court, and the appellate court, rightfully, did not entertain her attempts to proffer new arguments and evidence that was never before the district court. Petitioner's time to litigate her claims were in the district court. Petitioner failed to preserve her arguments on appeal, and they should not be considered for the first time on appeal.

It is well established that issues "not raised in the district court and raised for the first time in an appeal will not be considered[.]" *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). *See also Denis v. Liberty Mut. Ins. Co.*, 791 F.2d 845, 849 (11th Cir. 1986) ("[F]actual assertions that defeat a summary judgment cannot be presented for the first time to an appellate court […], and only those matters properly before the district court for summary judgment consideration are subject to appellate review); *Bryant v. Jones,* 575 F.3d 1281, 1308 (11th Cir. 2009) ("It is well established that, absent extraordinary

circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal"); *Blue Kendall, LLC v. Miami Dade Cnty*, Florida, 816 F.3d 1343, 1349 (11th Cir. 2016) ("As a general rule, an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court") (internal quotation marks omitted).

Even if this Court were to review the Petition, Petitioner's arguments are not supported by the record on appeal. Indeed, the Eleventh Circuit reviewed the facts of the case due to Norman's request to proceed *in forma pauperis* and found that her appeal was frivolous. The Eleventh Circuit made factual findings in line with the district court, based on the evidence that was before the district court. [11th Cir. Doc. 10].

Respondent respectfully asks the Court to deny Petitioner's attempts to present new arguments and unsupported factual claims for the first time on appeal. The district court (and appellate court) considered the record evidence, Respondent's arguments (which were all fully supported by the record including Norman's testimony), and properly entered summary judgment. Respondent respectfully asks this Court to deny the Petition.

CONCLUSION

The Petition in this matter does not meet any of the criteria set forth in the Rules of this Court for granting a writ of certiorari. Petitioner has not presented any compelling reasons for this Court to deviate from its Rules. In addition, Petitioner failed to preserve any arguments she now attempts to raise before this

Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this ____ day of _____, 2024.

/S/
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