CASE NO. 13-6186/6231

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARLA MONTELL
Plaintiff-Appellant Cross-Appellee

v.

DIVERSIFIED CLINICAL SERVICES and AUSTIN DAY
Defendants-Appellees Cross-Appellants

On Appeal from the United States District Court
For the Eastern District of Kentucky
Central Division at Frankfort

FIRST BRIEF OF PLAINTIFF-APPELLANT CROSS-APPELLEE

Respectfully submitted,

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ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-6186 Case Name: MONTELL V. DCS, INC., ET AL

Name of counsel: J. DALE GOLDEN

Pursuant to 6th Cir. R. 26.1, MARLA MONTELL
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on SEPTEMBER 18, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/J. DALE GOLDEN
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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I. Statement in Support of Oral Argument

The Appellant/Cross-Appellee requests that this Court schedule oral arguments concerning this appeal. The issues involved in this appeal are complex without case law directly on point with regard to each argument.

II. Jurisdictional Statement

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there was diversity of citizenship among the parties and the amount in controversy was greater than Seventy-Five Thousand Dollars ($75,000). Marla Montell is a citizen of Kentucky; Defendant DCS is a citizen of Delaware and Florida; and Austin Day is a citizen of North Carolina.

Due to the fact the District Court issued a final and appealable order, granting Defendant's Motion for Summary Judgment, this Court has jurisdiction over the appeal under 28 U.S.C. § 1291. (*See* Memorandum Opinion and Order, RE 60). In accordance with Rules 3 and 4 of the Federal Rules of Appellate Procedure, the Notice of Appeal was entered on September 9, 2013 and DCS's Notice of Cross-Appeal was entered on September 18, 2013. (Notice of Appeal, RE 62; Notice of Cross-Appeal, RE 70).

III. Statement of Issues

For the purposes of Appellant's First Brief, the issues are as follows: Did the District Court err in granting summary judgment based on Plaintiff's Retaliation

Claims under the Kentucky Civil Rights Act and other pendant state law claims?

IV. Statement of the Case

Plaintiff-Appellant, Marla Montell, filed this state court cause of action on May 2, 2012 in Franklin Circuit Court asserting claims of general harassment, intentional infliction of emotional distress, negligent hiring and training, and retaliation under the Kentucky Civil Rights Act. The case was removed to Federal Court by Defendants on diversity grounds and was docketed in the United States District Court for the Eastern District of Kentucky, Central Division. Defendants filed their Motion for Summary Judgment on April 1, 2013. After receiving the corresponding response and reply motions, Judge Reeves issued his Memorandum Order and Opinion on August 26, 2013. Judge Reeves granted Defendants' Motion for Summary Judgment on all of Plaintiff's claims and denied Defendants' Motion for Sanctions. (Memorandum Opinion and Order, RE 60). Plaintiff filed her Notice of Appeal on September 9, 2013, and Defendants filed their Notice of Cross-Appeal on September 18, 2013. (Notice of Appeal, RE 62; Notice of Cross-Appeal, RE 70).

V. Statement of Facts

This is a retaliation case in which the Plaintiff, Marla Montell, ("Montell") upon the encouragement of another DCS Director, reported her supervisor Austin Day ("Day") alleging sexual harassment. This report was made to HR

representative, Megan Lee ("Lee"). Minutes after the report was made, Lee informed Day of Montell's allegations. Less than one day later, Day called Montell and threatened her stating, "You will either resign or I am going to fire you." Day took his retaliation to the next level when he called employees at Frankfort Regional Medical Center (FRMC), who worked under Montell's supervision, telling the employees that Montell had resigned.

The protected report occurred on Thursday, May 19, 2011. Day's threats to Montell and phone calls to FRMC employees occurred on Friday, May 20, 2011. Due to Day's threats and acts of retaliation, Montell was constructively discharged Monday, May 23, 2011. These facts are supported by the evidence and remain unexplained by the Defendants.

A. Montell's Successful Employment with DCS

Montell was the Program Director at FRMC. She reported to and was supervised by Day. (Day depo. 58, RE 69). Day's title was Area Vice President or "AVP". The AVP oversees approximately fourteen (14) Program Directors in various states. (Day depo. 31-32, RE 69). Day reported to the Senior Vice President, Michael Tanner ("Tanner"). (Day depo. 58-60, RE 69).

DCS, like any large business, is focused on profit. The purpose of managing the wound care center is to gain revenue for the business. Revenue is derived differently at the various hospital locations operated by DCS, however, at FRMC,

income was derived three ways: 1) Payment of a yearly consulting and management fee by FRMC; 2) Income derived from HBO treatments or dives; and 3) Wound Care Revenue received from patient office visits. (Day depo. 45-46, RE 69; Tanner depo. 35-56, RE 68).

Despite the Defendants' attempts to portray Montell as a sub-par employee, the objective data and revenue numbers cannot be refuted. The undisputed financial figures prove that Montell was successfully operating the FRMC wound care center. It is undisputed that, compared to the prior Program Director's tenure, under Montell's first year as Director, **Net Revenue increased approximately $63,000, a 25% increase.** (Jt. depo. Ex. 47, RE 34). **Wound care revenue increased 23.81% compared to the previous year.** (Id.) **HBO revenue almost doubled.** (Id.)

From January-March, 2011 as compared to January-March, 2009, Net Revenue increased $22,000, or 50%. (Jt. depo. Ex. 48, RE 34). Even Day was forced to admit that Montell's wound care revenue was keeping the Center going. (Day depo. 99-100, RE 69; Jt. depo. Ex. 39, 40, 41, RE 34). In fact, as of March 30, 2011, Montell's performance warranted a 2% salary raise. (Jt. depo. Ex. 51, RE 34).

Equally important, the FRMC employees who worked under Montell were prepared to testify in direct contradiction to the Defendants' unsupported assertions

and confirm that Montell was a leader and did an excellent job managing the wound care center. (Affidavits of Elisa Price and Molly McGill, RE 37.1, Page ID #1219-1220). These FRMC team members would have testified that Montell's management of the wound care center allowed for more efficient operations and that Montell was a true leader. (Id.) Overall, the objective and unrefuted data disclosed in this case demonstrates Montell's successful operation of the wound care center at FRMC. It is undisputed that DCS enjoyed greater revenue while Montell was Program Director.

B. Day's Harassment and Sexual Harassment

Montell testified that from the beginning of her employment, Day would always comment on her appearance. At first, Montell took the comments as compliments. (Montell depo. 148, RE 66). But Day became increasingly more aggressive with his comments. When Montell was wearing a dress and heels, Day would tell Montell that her dress and heels sexually aroused him. (Montell depo. 146-149, RE 66). Day would specifically state, "nothing turns me on more than a woman in a red dress and heels," while Montell was wearing a red dress and heels. (Montell. depo. 146, RE 66). He would often preface the comments about his sexual arousal with "please don't tell HR on me," or "you could get me in trouble," or Day would attempt to entice Montell by stating, "I'm just a fat man, you would probably never go for a guy like me." (Id.) It was clear that Day wanted more than

just a working relationship with Montell.

As Montell's employment continued, Day's sexual advances became more obscene and intimidating. (Montell depo. 146-150, RE 66). Day's comments regarding his arousal severely intimidated Montell. (Montell depo. 149-150, RE 66). She would often attempt to avoid Day's presence when he would come to the facility. (Montell depo. 146-147, RE 66). At one point Montell even began to cry, in front of Day, following a comment he made about her appearance. (Montell depo. 142-147, RE 66). Not surprisingly, Day agreed that the above comments, if they were made, constitute sexual harassment. (Day depo. 231-232, RE 69). Lee's notes related to Montell's report demonstrate that Montell alleged that Day commented on Montell's appearance **"every time"** he would see her. (Lee depo. 39, RE 64; Jt. depo. Ex. 35, RE 34).

C. Day's Additional Violations of Company Policies

By February 2011, after Montell's first full year as Program Director, it became clear to Day that Montell would never succumb to his sexual advances. Also, just months prior, after an October DASH presentation, Belinda Blair ("Blair") alerted Day that Montell accused him of sexual harassment. (Jt. depo. Ex. 35, RE 34).[1] Day then began a mission to either fire Montell or force her

[1] According to Megan Lee's investigation report, Montell told Blair about Day's sexual harassment after the October DASH presentation. Day admitted Blair alerted him to Montell's allegations.

resignation.

A secret recorded phone conversation between Day and Patience McLaughlin ("McLaughlin") was discovered during litigation. During this recorded conversation, Day requested McLaughlin, a hospital employee under the supervision and management of Montell, to spy on Montell and send weekly emails reporting when Montell entered and exited the FRMC premises. (Jt. depo. Ex. 49, pg 11-13, RE 34). Day admits that Montell was unaware of his spying and that he had never undermined another program director in this fashion. (Day depo. 222-223, RE 69).

Megan Lee, the HR representative testified that Day's recorded conversation violated DCS company policy. (Lee depo. 63-64, RE 64). Admittedly, Day was not only violating company policy, he was treating Montell, a sexual harassment victim, differently from his other subordinates. (Day depo. 222-223, RE 69). While Day's violation of Company policy seriously undermines his credibility in this matter, the substance of the recorded statement is more disturbing. Day had requested McLaughlin to spy on Montell. (Jt. depo. Ex. 49, pg 11-13, RE 34). Day admits that he knew Montell had reported McLaughlin to FRMC management due to multiple reports of misconduct against McLaughlin. (Day depo. 217-218, RE 69). These reports were made by other FRMC employees under Montell's supervision. (Day depo. 217-218, RE 69). Admittedly, Day knew that there was a

strained relationship between Montell and McLaughlin because of Montell's report. (Day depo. 217-218, RE 69).

Day further violated company policy by refusing to follow the progressive disciplinary policy required and implemented by DCS. (Day depo. 163, 178, RE 69). Here, not only did Day admittedly skip a step in the progressive discipline process, the alleged discipline was for matters that were later found to be untrue. (Day depo. 178, 194, RE 69). DCS imposes a progressive discipline policy which requires an employee to receive oral counseling, a written warning, a final written warning and then termination. (Day depo. 163, RE 69). While the company may at any time move from one step directly to termination, HR personnel have acknowledged that the policy does not allow supervisors to skip the written warning step and move to final written warning. (Kendrick depo. 48-49, RE 65). Therefore, Day violated this policy when he issued oral counseling to Montell on March 7, 2011, and a "final written warning" on April 13, 2011. Moreover, the basis for this "final written warning" came from inaccurate information from Day's spy. (Day depo. 194, RE 69).

Specifically, Montell received a "final written warning" for allegedly coming into the center late, around 10:30 a.m. (Jt. depo. Ex. 28, RE 34). However, not only did Day receive this information from one of his unauthorized "spies," the information was incorrect. (Day depo. 194, RE 69). When Day checked the

written logs, he realized Montell had arrived on time. (Day depo. 194, RE 69). Day admits the information he relied upon in issuing the "final written warning" was inaccurate. (Day depo. 194, RE 69). Not surprisingly, Day testified that he did not know why he skipped the written warning step in the discipline process. (Day depo. 178, RE 69).

Defendants put great weight on the written warnings issued to Montell in support of their theory that Montell quit because she thought she may be fired. However, Defendants' assertions are in direct contradiction to the evidence. Defendants' entire argument that Montell was an unsuitable employee rests on emails written by Day to DCS management alleging that FRMC wanted Montell fired. **However, during his deposition, Day finally admitted that FRMC never really made these claims and that no one from FRMC management wanted Montell terminated.** (Day depo. 225-227, RE 69).

Despite Day's failed attempts to spy on Montell and to rely on false allegations that FRMC wanted Montell fired, he continued to increase his scrutiny of Montell, finally imposing a second final warning to Montell on May 3, 2011. (Jt. depo. Ex. 29, RE 34). As part of the corrective action, Montell was to meet three specific and seemingly arbitrary goals, including a demand that she increase HBO treatments by 10% (using March figures as a base line). (Day depo. 196-197, 200, RE 69). The evidence shows that Montell not only exceeded expectations but

significantly surpassed the required number by increasing HBO treatments by over 300%.[2] (Jt. depo. Ex. 33, RE 34).

While the final warning document references that "termination will be the next step," Day testified that prior to Montell's resignation on May 23, 2011, he had no plans to fire Montell and that the warnings issued to Montell **were not designed to fire her** but rather **motivate** Montell to perform better. (Day depo. 161-162, 204, RE 69). Montell agreed and testified that she never thought she would be fired and took the new numbers imposed by Day as motivation. (Montell depo. 171-173, 192-193, RE 66). Also, Montell was provided a raise, approved by Day and Tanner, shortly before her constructive discharge. (Jt. depo. Ex. 51, RE 34). All parties agree that between May 3, 2011, and Montell's constructive discharge on May 23, 2011, DCS received no complaints from FRMC and Montell received no additional reprimands. According to Day, Montell never indicated at anytime that she was going to resign. (Day depo. 229, RE 69).

Defendants attempt to justify Day's selective scrutiny of Montell with red herrings such as Montell's performance at an October DASH presentation and allegations of Montell's lack of knowledge of reimbursement issues. However, on May 2, 2011 Pat Wolfe, Manager of Medical Billing and Physician Services at DCS, had provided additional training to Montell for the coding and

[2] HBO increased from 16 to 56, over 300% increase.

reimbursements issues and advised Day, "I am comfortable with Montell's knowledge of the concepts." (Jt. depo. Ex. 52, RE 34). Further, despite Defendants' inaccurate representations, there is no evidence that the contract between DCS and FRMC was ever in jeopardy. In sum, until Montell's report of sexual harassment, there was no one who wanted Montell terminated, no plans to terminate Montell, and Montell had no plans to resign. (Day depo. 161-162, 225-227, 229, RE 69).

D. Montell's Report and Day's Retaliation

When the evidence is viewed in the light most favorable to Montell, the following evidence cannot be disputed:

i. Upon encouragement from a DCS colleague, Montell reported Day alleging sexual harassment (Montell depo. 145, RE 66);

ii. This report occurred on Thursday, May 19, 2011 (Montell depo. 145, RE 66);[3]

iii. Day was immediately notified of Montell's report (Lee depo. 45, RE 64);

[3] The report on May 19, 2011 was made from Montell's home telephone. (Montell depo. 203, RE 66). While Lee states that Montell's report occurred on Monday, May 23, 2011, Lee's records state that Montell was at home when she made the report. (Lee depo. 38, 56, RE 64). Lee covers 600-650 employees and has a high volume of calls. (Lee depo. 9, 43, RE 64). Despite Montell's cell phone records showing a call to Lee on May 20, Lee does not remember speaking to Montell on May 19 or May 20. (Lee depo. 43, RE 64). Montell states that she was at the office when she spoke to Lee on May 23 in order to inquire about paid time off. (Montell depo. 203, RE 66).

iv. Friday, May 20, 2011, Day called Montell threatening her and her job for reporting him (Montell depo. 161-162, RE 66);

v. Day called FRMC employees under Montell's supervision and told them Montell had resigned on Friday, May 20, 2011 (Montell depo. 162, RE 66); and

vi. Montell felt compelled to resign the next working day, May 23, 2011.

DCS employee and program director, Blair admitted that Montell had complained to her about Day's sexual harassment after the October 2010 DASH meeting. (Blair depo. 35, RE 63). Blair encouraged Montell to make a report to HR because the conduct Montell alleged was severe enough to warrant a report. (Blair depo. 35, RE 63). Montell took Blair's advice and reported Day's sexual harassment on May 19, 2011 to HR representative Megan Lee. (Montell depo. 145, 161-163, RE 66). While Lee denies the call occurred on May 19, she does admit that minutes after the report from Montell she called and notified Day of Montell's allegations. (Lee depo. 45, RE 64). Day knew what Lee was calling about, having been alerted previously by Blair that Montell had shared her allegations of sexual harassment. (Lee depo. 46, RE 64).

Less than one day later, Day called Montell in retaliation for the report, threatening her and stating "if you don't resign, I am going to fire you." (Montell depo. 161-162, RE 66). Shortly thereafter, Day called Barb Vanhoose ("Vanhoose") the hospital liaison at FRMC, stating that Montell had resigned her

employment with DCS. (Montell depo. 161, RE 66). At 3:37 p.m. Vanhoose called Montell to relay the information provided by Day and to determine whether Montell was unexpectedly leaving. (Phone records of Montell, Calls 269 and 270, RE 37.2, Page ID # 1233). This was a two (2) minute conversation, which ended at 3:29 p.m. (Id.). Montell told Vanhoose that she had not resigned her employment and that Day was lying. (Montell depo. 162, RE 66). After Montell's conversation with Vanhoose, at 3:40 p.m. Montell immediately emailed Day to request an explanation for his statements to Vanhoose. (Email from Montell to Day, RE 37.2, Page ID #1250). Day never responded.

Feeling threatened, Montell called Lee to again report Day and request a reprimand since Day had retaliated against her for making her report of sexual harassment. (Montell depo. 162, 217-218, RE 66). According to the phone records, this conversation took place at 4:42 pm and lasted for 23 minutes. (Phone records of Montell, Calls 275, RE 37.2, Page ID # 1233). Lee could not recall this conversation. (Lee depo. 67, RE 64).

The next working day, Monday, May 23, 2011, feeling intimidated by Day's threats and phone calls to FRMC, Montell felt compelled to resign her employment. (Jt. depo. Ex. 34, RE 34). She could no longer suffer the harassment and sexual harassment by Day. Because her grievances regarding Day were now public knowledge and Day had told her he was going to fire her, she felt compelled

to leave her employment.

It was not until after Montell's resignation that Lee finally began her incomplete investigation of Montell's report. Although Montell reported that there were multiple witnesses who were aware of Day's sexual harassment, Lee admits that she failed to interview these witnesses. (Lee depo. 53, RE 64). Lee only interviewed Day and Blair in an effort to confirm or deny Montell's accusations. (Lee depo. 52-53, RE 64). Of course, Day denied the comments and Blair confirmed that Montell had made the same accusations after the October DASH the previous year. (Jt. depo. Ex. 35, RE 34). Nevertheless, even though Montell had complained to Blair and listed other confirming witnesses, Lee felt that the accusations against Day did not warrant any further action. (Lee depo. 52-53, 64, RE 64). Significantly, Lee never issued a conclusion following her investigation. (Lee depo. 64, RE 69). However, when pressed during examination, Lee admitted that Montell's story about harassment did "line up". (Lee depo. 75-76, RE 64).

VI. Standard of Review and Summary Judgment Standard

On appeal, a district court's grant of summary judgment is reviewed de novo. ACLU of Ky. v. Grayson Cnty, 591 F.3d 837, 843 (6th Cir. 2010). A party is properly entitled to summary judgment when "the movant shows there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317 (U.S. 1986). A genuine

issue of material fact exists when a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (U.S. 1986).The burden rests with the moving party to demonstrate that there is no genuine issue of material fact. Celotex at 321. Once this burden has been satisfied, the nonmoving party must "put forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In turn, the Court must view the facts in a light most favorable to the nonmoving party, granting all reasonable inferences to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (U.S. 1986).

The District Court failed to view the facts in the record in a light most favorable to the Plaintiff, using disputed facts to negate the Plaintiff's prima facie case and ignoring probative evidence produced by the Plaintiff at each stage in the framework laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (U.S. 1973). As noted by the Supreme Court in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-151 (U.S. 2000):

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. **'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'** Thus, although the court should review the record as a whole, **it must disregard all evidence favorable to the moving party that the jury is not**

> **required to believe.** That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is **uncontradicted and unimpeached**, at least to the extent that that evidence comes from disinterested witnesses.'(*emphasis added*).

Here, the District Court relied on impeachable, contradictable evidence throughout its opinion without drawing all reasonable inferences in favor of the non-movant, speaking to reversible error. However, its reliance on such evidence to undermine the Plaintiff's prima facie case is particularly erroneous provided that this initial burden under McDonnell Douglas is meant to not be onerous.

VII. Summary of Argument

The District Court's decision disposing of Montell's retaliation claim is laden with erroneous applications of law, running afoul to clearly established law on both employment discrimination and summary judgment standards. First, the District Court misinterpreted Univ. of Texas Sw. Med. Ctr. v. Nassar, incorrectly applying its but-for causation requirement to Montell's prima facie burden. 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). Second, performance issues were improperly inserted into Montell's prima facie case, conflating the distinct stages in the McDonnell Douglas analysis. Third, the District Court failed to consider precedent from this Court holding that very close temporal proximity can establish prima facie causation. Fourth, in the pretext inquiry, the District Court invaded the province of the jury by weighing the credibility of evidence and disregarding

Montell's reasonable and permissible evidence showing that DCS's proffered reasons were pretextual. Finally, the District Court failed to consider the meaning of but-for causation under Kentucky law, which is measured by the substantial factor test and decided by the jury, instead substituting its own view of causation for that of the jury. Collectively, these errors form an overall view of a plaintiff's burdens under McDonnell Douglas that is overly strict and exacting.

VIII. Argument

A. Retaliation Under the Kentucky Civil Rights Act

The Kentucky Civil Rights Act (KCRA) has largely been interpreted in tandem with federal civil rights legislation. Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 804 (Ky. 2004). Accordingly, the District Court interpreted the KCRA retaliation provisions identically to §2000e-2(m), applying the Supreme Court's recent holding in Nassar to Montell's state law retaliation claims.[4] Under Nassar, a plaintiff claiming retaliation under Title VII cannot recover when the retaliation is merely a motivating factor, requiring but-for causation. Id at 2534. In arriving upon that conclusion, the Supreme Court found that neither Price Waterhouse nor the 1991 Amendments apply to the federal retaliation provisions under Title VII. Id at 2534. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (U.S. 1989). As such, it is reasonable to assume that all

[4] While it is not entirely clear that the Kentucky Supreme Court would adhere to the holding in Nassar, the two statutes share the "because" language

retaliation cases utilizing circumstantial evidence, whether mixed motive or otherwise, are again evaluated pursuant to the McDonnell Douglas framework. *See* Nassar at 2533.

Pursuant to Kentucky tort causation standards, improper motive only requires proof that the wrongful act was a **substantial factor** in the termination. *See* Lewis v. B&R Corp., 56 S.W.3d 432, 436-437 (Ky. Ct. App. 2001)(" In Kentucky, the cause-in-fact component has been redefined as a "substantial factor" element as expressed in Restatement (Second) of Torts § 431."); Pathways, Inc. v. Hammons, 113 S.W.3d 85, 89 (Ky. 2003) (the court must determine if reasonable jury could determine whether defendant's conduct was a substantial factor in causing the harm to the plaintiff.)

However, a plaintiff need not persuade the judge as to but-for causation in order to survive summary judgment. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (U.S. 2000)("the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence"). A plaintiff's prima facie case along with sufficient evidence to find that the employer's proffered justification is false is enough to survive summary judgment. Id. at 154. In viewing the sufficiency of the plaintiff's evidentiary proffer, the Court cannot weigh the credibility of the evidence: "Credibility determinations, the weighing of the evidence, and the drawing of

legitimate inferences from the facts are jury functions, not those of a judge." Id. at 150-151. Rather, "the relevant inquiry is whether there is sufficient evidence from which a reasonable trier of fact could find in favor of the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (U.S. 1986). As such, the plaintiff can survive summary judgment "if his evidence is sufficient to create a genuine dispute at each stage of the McDonnell Douglas inquiry." Jones v. Potter, 488 F.3d 397, 404 (6th Cir. Ohio 2007).

The prima facie burden at the summary judgment stage is not onerous and "requires less than a typical preponderance of the evidence showing." Jones v. Potter, 488 F.3d 397, 404 (6th Cir. Ohio 2007).When reviewing a motion for summary judgment rather than a bench trial, the district court should "determine if a plaintiff has put forth sufficient evidence for a reasonable jury to find her to have met the prima facie requirements." Id. (*citing* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 661 (6th Cir. 2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-10 (1993))

The plaintiff must then introduce "sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, non-discriminatory reason." Reeves at 146. Beyond the prima facie and pretext showings, the plaintiff need not introduce "additional, independent evidence" as long as a reasonable trier of fact could find for the Plaintiff. Reeves at 148-149. Once both parties have satisfied their

respective burdens of production, "the relevant inquiry is whether there is sufficient evidence from which a reasonable fact finder could find in favor of the plaintiff." Id.

Thus, a Plaintiff may survive summary judgment by "submitting two categories of evidence: first, evidence establishing a 'prima facie case,'…and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false." Reeves at 154. Montell has made both of these showings, producing enough evidence to create genuine issues of material fact and permitting a reasonable jury to find retaliatory discharge. In determining that the Plaintiff had not satisfied either showing, the District Court improperly weighed evidence and confused Plaintiff's intermediate burdens with her ultimate burden of persuasion.

B. The District Court Erred in Applying Nassar's "but for" Test to the Plaintiff's Initial Burden Under the McDonnell-Douglas framework.

The District Court correctly identified the four elements required for a plaintiff's prima facie retaliation case under Title VII and the KCRA.[5] However, immediately after reciting the elements, it incorrectly qualified causation with the Supreme Court's recent holding in Nassar, stating:

[5] The District Court found that only the "protected activity" and causation elements were contested. Appellants agree with the District Court's protected activity analysis. (Memorandum Opinion and Order, RE 60, Page ID #1713).

> To establish a prima facie case under either Title VII or the KCRA, a plaintiff alleging retaliation must show that: (1) she "engaged in an activity protected by Title VII;" (2) the "exercise of [her] civil rights was known by the defendant;" (3) "thereafter, the defendant took an employment action adverse to the plaintiff"; and (4) "there was a causal connection between the protected activity and the adverse employment action." As the Supreme Court has recently clarified, a plaintiff alleging a retaliation claim under Title VII "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." (Memorandum Opinion and Order, RE 60, Page ID # 1714)(*internal citations omitted*).

It is clear from the Court's discussion above that it believed a but-for standard was appropriate for the Plaintiff's initial burden, because it qualified the causation element of the prima facie case before even discussing the defendant's rebuttal evidence or pretext. This application of but-for causation is incorrect, because Nassar did not alter the intermediate and ultimate burdens under McDonnell Douglas.

Nassar held that neither the 1991 Amendments nor Price Waterhouse apply to retaliation claims. Nassar at 2534.Thus, the McDonnell Douglas burden shifting scheme applies to "mixed motive retaliation cases or those based on circumstantial evidence." (Memorandum Opinion and Order, RE 60 Page ID #1714). Beyond the implication that mixed motive retaliation cases will revert back to the pre-Price Waterhouse analysis, the Court makes no reference to McDonnell Douglas. It should not be presumed that the Court implicitly altered that forty year old

framework, which has always required a low burden on the plaintiff in making out the prima facie case. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (U.S. 1981)(*citing* McDonnell Douglas at 802).[6]

McDonnell Douglas only requires the plaintiff to create the inference that the protected activity was the reason for the adverse action, and this showing is not "onerous." Burdine at 253. Rather, it is "minimal" and "all the plaintiff must do is put forth some credible evidence that enables the court to deduce that there is a casual connection between the retaliatory action and the protected activity." Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 283 (6th Cir. Ky. 2012) (*citing* Dixon v. Gonzales, 481 F.3d 324, 333 (6th Cir. 2007)). The distinct nature of each stage in the inquiry is clear from the Supreme Court's belief that "while the plaintiff has the ultimate burden of persuasion, the division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question." Burdine at 253. This Court, in the company of several other Circuits, has similarly found that the stages within the McDonnell Douglas framework should not be conflated, advising that the prima facie case be

[6] The limitations of Nassar become clear when looking to the specific questions decided by the Court. Nassar was a mixed motive case whereby the Fifth Circuit was reversed in its determination that (1) the "motivating factor" test applies to retaliation, and (2) the adverse decision was motivated at least in part by retaliation for a protected activity.

distinguished from later showings. Cline v. Catholic Diocese, 206 F.3d 651, 664 (6th Cir. Ohio 1999)

The intermediate and ultimate burdens under the McDonnell Douglas regime serve functions of fairness, precision, and efficacy. *See* Burdine at 253. While some evidence within the three-step framework may be overlapping, the demands of each step are distinct. Requiring a plaintiff to eliminate all non-discriminatory reasons in her prima facie case would tangle the framework, muddying the conceptual waters and would operate to completely dismantle the McDonnell Douglas burden shifting regime. *See* Jones at 406.

Instructively, but-for causation has not been applied to the prima-facie burden under other single-motive statutes, such as the Age Discrimination Employment Act (ADEA) and the Rehabilitation Act. The Rehabilitation Act requires that discrimination be the sole reason for the adverse action, yet the prima facie burden of production under McDonnell-Douglas is still minimal. Jones at 404 (District Court erred in "overly strict understanding" of prima facie burden). Regarding the operation of "solely because of" with respect to the plaintiff's prima facie burden, this Court held that requiring a Plaintiff to show that a discriminatory rationale was the sole reason for termination as part of the prima facie case "imposes too great a burden on the plaintiff at this early stage of the McDonnell Douglas inquiry." Jones at 406 (*citing* Monette v. Electronic Data Sys. Corp., 90

F.3d 1173 (6th Cir. Mich. 1996). An inference that an adverse action occurred solely due to discriminatory animus is the result of the prima facie test and not an element of it. Id.

Likewise, under the ADEA: "The **burden of persuasion** is on the plaintiff to show that age was the 'but-for' cause of the employer's adverse action," but the prima facie burden has not changed. Blizzard v. Marion Tech. College, 698 F.3d 275 (6th Cir. Ohio 2012) (*citing* Gross v. FBL Fin. Servs., 557 U.S. 167 (U.S. 2009)). Despite the but-for causation requirement handed down in Gross, the prima facie case only requires that the plaintiff show "circumstances that support an **inference** of discrimination." Id at 283.

Nassar must only operate to alter the plaintiff's ultimate burden of persuasion, disallowing recovery for a "motivating factor." This is clear from (1) the narrow holding of Nassar itself; (2) the judicial interpretation of other statutes requiring but-for causation; and (3) the longstanding principle that the prima facie burden is not onerous. This view of Nassar is critical to the continuing adherence to McDonnell Douglas and its progeny, because the application of but-for causation in the prima facie stage would mean that "the McDonnell Douglas framework would serve virtually no purpose." Jones at 406.

C. The District Court Required That the Plaintiff Eliminate Non-discriminatory Causes as Part of her Initial Burden, Further Extending the Incorrect Application of "but-for" Causation to the Prima-facie Case

The District Court did not merely misconceive the application of Nassar to the Plaintiff's prima facie case in its survey of applicable law, it also placed an onerous burden on the Plaintiff in its prima facie causation analysis by accepting as true that DCS previously contemplated Montell's termination. These facts are highly disputed with Day himself stating that the warnings were designed to motivate and were not sincere warnings of termination. (Day depo. 204, RE 69) The District Court essentially required the Plaintiff to show that the discharge would not have occurred in the absence of the protected activity as part of her initial burden, which necessarily requires the elimination of Defendants' legitimate non-discriminatory reasons. See Cline at 664 (noting distinction between intermediate and ultimate burdens). *See also* Wilson v. Advance Mortgage Corp., 798 F.2d 1417, 1986 WL 17234 at *3) (plaintiff is not required to rebut the reasons for her demotion as part of her prima facie case because that would require her "to prove her entire case at the first stage" and because the company's justifications "are of the type generally considered in the second stage of the Title VII inquiry").

The burden to produce evidence rebutting the Defendants' proffered reasons for discharge is properly relegated to the pretext inquiry, and the elimination of

other causes by a preponderance of the evidence is more indicative of but-for causation under a plaintiff's ultimate burden of persuasion. *See* Cline at 664. As such, the District Court relocated all of the Plaintiff's burdens to the prima facie case, ignoring the McDonnell Douglas framework. In light of the important functions of the separate burdens under that scheme, the conceptual waters should not be muddied by shifting all requisite burdens to the Plaintiff in her prima facie case.

A plaintiff may prove prima face causality by showing: "(1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there was a close temporal proximity between the protected activity and the adverse action." Univ. of Louisville Ath. Ass'n v. Banker, 2013 Ky. App. LEXIS 19 (Ky. Ct. App. Feb. 1, 2013) (*citing* Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (U.S. 2001). As noted by the District Court, in limited instances, incongruence in the Plaintiff's timeline may negate or undermine the inference created from close temporal proximity. (Memorandum Opinion and Order, RE 60, Page ID# 1717). Applying this "previous contemplation" rule, the District Court found that Montell could not show causation, because of unflattering documents in her performance record, stating "no causal connection exists between a protected activity and an adverse employment action when an employer was already contemplating the adverse

employment action prior to the complaint." (Memorandum Opinion and Order, RE 60, Page ID# 1717).

However, the District Court misconceived the scope of this rule, because this "previous contemplation" exception has only been applied where there is uncontradicted evidence that the adverse action was contemplated before the employer had knowledge of the protected activity. *See* Banker at 16; Breeden at 272. In Banker, the employer had **documentary evidence** that demonstrated that the plaintiff's transfer was contemplated **before** the protected activity was known, and, thus, there was no triable issue to go to the jury. Banker at 16. Similarly, in Breeden, the plaintiff **conceded** that her transfer was discussed with the plaintiff's union representative **before** the employer was apprised of her lawsuit. Breeden at 272. The employer then proceeded with the transfer, i.e., the **same** adverse action that was previously discussed. Breeden at 272. In sum, there were no disputes regarding the existence, sequence, or significance of the previous contemplations.

On the other hand, in Mickey v. Zeidler, the employer claimed that its manager decided to terminate Mickey the weekend before it learned of the plaintiff's activity. 516 F.3d 516 (6th Cir. Mich. 2008). The fact of previous contemplation was in dispute, and the employer offered no incontrovertible evidence to support their assertion. Rather than favoring the movant and allowing for dismissal at the prima facie stage, this Court found that the plaintiff "presented

ample evidence to conclude that… [the employer's non-discriminatory] reasons and…[the manager's] claim to have made the decision over the weekend were merely a pretext." Mickey at 526. Thus, when there are **disputed** facts as to previous contemplation, the sufficiency of the opposing evidence is best considered in the second and third steps of McDonnell Douglas, and the credibility of that evidence is best decided by a jury. *See* Mickey at 528. *See also* Reeves at 150.

When the "previous contemplation" exception is expanded beyond the facts of Breeden and Banker, it requires the plaintiff to prove her entire case in the first step of the McDonnell Douglas inquiry. However, this Court found that conflation of the intermediate and ultimate burdens to be erroneous in Cline, stating:

> In addition to setting a burden far too high, it [the District Court] conflated the distinct stages of the McDonnell Douglas inquiry by using St. Paul's "nondiscriminatory reason" as a predicate for finding Cline to have failed to make a prima facie case. […] This analysis improperly imported the later stages of the McDonnell Douglas inquiry into the initial prima facie stage. […]Rather than resolve this debate at the prima facie stage, McDonnell Douglas requires that the district court consider this dispute at the inquiry's third stage, when its role is to decide the "ultimate question" of discrimination.

The above reasoning is directly analogous here. In an attempt to negate prima facie causality, the Defendants injected their nondiscriminatory reasons into the prima facie analysis, arguing that Montell was already on her way out due to performance

problems. The District Court granted summary judgment on those grounds despite the assertion being disputed, essentially merging all of the plaintiff's burdens to her initial evidentiary showing.

This Court again discussed the impropriety of addressing performance issues as part of the prima facie analysis in Hamilton v. GE, 556 F.3d 428 (6th Cir. Ky. 2009). There, plaintiff had been issued a 2-year last chance agreement. Hamilton at 431. Based on this agreement and the plaintiff's disciplinary history, the District Court found that Plaintiff's evidence of increased scrutiny and temporal proximity were insufficient to demonstrate prima facie causality. Id at 436. However, this Court found: "Though this case includes information about the pre-existing relationship between Hamilton and GE, we must decide what made GE fire Hamilton when it did." Id.

Here, like Hamilton, the pre-existing relationship between Montell and DCS does not tell us why the constructive discharge occurred when it did. There is no evidence whatsoever that Day had contemplated terminating Montell nor is there any evidence that he was going to ask her to resign. (Day Tr, 280, 286).While the policy behind the Breeden rule is prevent "underperforming or unqualified employee[s], who could see the writing on the wall" from abusing the protections available to them under civil rights statutes, that rationale is inapplicable here.

Banker at 19. There is a genuine issue of material fact as to whether Montell was underperforming and whether she "could see the writing on the wall."

In fact, Day himself stated that the warnings were designed to motivate Montell and that no one in DCS management had an intention of firing her, controverting any claim that the employment decision was made prior to the protected activity. (Day depo. 161, 204, RE 69). Michael Tanner, Senior Vice President of DCS and author of some unflattering emails about Montell, also testified that he had no intention of terminating her. (Tanner depo. 62, RE 68). The absence of an intention to terminate was further echoed in the testimony of Lee from human resources. (Lee depo. 68, RE 64).

Montell's performance figures further create a genuine issue of material fact as to whether the "writing" was on the wall. The increase in numbers for wound care and HBO treatments, the avenues by which DCS derives much of its income, are particularly telling: In Montell's first year, wound care increased 23.81% and HBO treatments almost doubled. (Jt. depo. Ex. 47, RE 34). From March 2011 to April 2011, after the institution of the corrective action plan, HBO treatments increased 300%. (Jt. depo. Ex. 33, RE 34). Day himself admitted that Montell's wound care revenue was keeping the center going (Day depo. 99-100, RE 69).[7]

[7] DCS stated that Montell had only met one of the goals in her Final Warning and Amended Final Warning when she ended her employment. Specifically, she increased HBO treatments, which produce the most revenue, but did not reach the

The Breeden "previous contemplation" rule should not be extended to cases where the employer did not **actually** contemplate the adverse action. If this were allowed, any employer could engage in the practice of littering an employee's personnel records with empty warnings to protect itself from liability. At most, these warnings were written counseling statements. If an employer contemplates motivation or performance counseling, it should not be insulated from liability when it takes a much more severe adverse action following the plaintiff's protected activity.

Like Mickey, there is conflicting evidence as to the existence of a previous contemplation. Montell has affirmatively produced unbiased testimonial evidence from Defendant's witness, no less, that there was no intention to terminate and that the previous corrective actions were not indicative of impending termination. Specifically, Day's acknowledgement that the warnings were designed as motivation, without intent to terminate, means that there was no contemplation **prior** to the protected activity. (Day depo. 161, 204, RE 69). The disputed nature

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targets for new patients and new wound care encounters. (Day depo. 196-197). First, this is largely immaterial with these figures being "motivation." (Day depo. 161, 204, RE 69). Further, DCS has never offered any empirical basis showing that these "goals" were even attainable. It appears that Day arbitrarily arrived at the percentage increases using March 2011 as a baseline. (Day depo. 196-197, RE 69). However, looking at the previous year's data, wound care encounters decreased dramatically from 344 in March 2010 to 284 in April 2010, continuing to fall to 250 in May 2010. (Jt. Depo. Ex. 32, RE 34). New patients also decreased between March and April 2010, going from 27 to 21. (Id.)

of the "previous contemplation" here makes it insufficient to negate prima facie causality and improper for consideration in the first stage of McDonnell Douglas.

The District Court's rigid interpretation of prima facie causation is at odds with the well-established nature of the prima-facie case and the scope of the "previous contemplation" exception. Prima facie causality does not require that the Plaintiff rule out legitimate, nondiscriminatory causes. Other reasons for an adverse action are only considered with respect to prima facie causality when there is clear, undisputed evidence that the sequence of events does not support the plaintiff's inference of causation. When the "previous contemplation" exception is applied on conflicting facts, it results in the conversion of McDonnell Douglas into a one-step scheme with a high burden on the plaintiff at the outset to demonstrate but-for causation through the elimination of other causes. This result is inconsistent with decades of precedent from the United States Supreme Court and this Circuit.

D. Plaintiff's Prima Facie Case: Plaintiff has satisfied prima facie causality, pointing to knowledge and temporal proximity.

The causal element of the prima facie case has never been interpreted as requiring definitive proof of causation. Burdine at 253 (*citing* McDonnell Douglas at 802). Causation in a prima facie case can be satisfied through circumstantial evidence, usually evidence that the employer was aware of the protected activity at the time and a close temporal relationship. Brooks at 804. The District Court, however, noted that the Sixth Circuit has "repeatedly cautioned against inferring

causation based on temporal proximity alone, "citing Reynolds v. Extendicare Health Servs., 257 Fed. Appx. 914 (6th Cir. Ohio 2007). However, that does not represent the entire treatment of the temporal proximity/ causation issue in this circuit. Mickey at 523. In fact, this Court has explicitly held that temporal proximity alone may be enough under certain circumstances. *See* DiCarlo v. Potter, 358 F.3d 408 (6th Cir. Ohio 2004). *See also* Mickey at 524 (citing several cases from this Circuit wherein knowledge of the protected activity and close temporal proximity were sufficient to satisfy prima facie causality).

The District Court's conclusions illustrate the unfortunate accretion of law based on precedential "one-liners" rather than applying the meaning of those statements in their original context. Nguyen v. City of Cleveland appears to be the starting point for this precedential accretion, because, there, this Court first explicitly announced the rule that temporal proximity may not be sufficient, stating "while there may be circumstances where evidence of temporal proximity alone would be sufficient to support that inference, we do not hesitate to say that they have not been presented in this case." 229 F.3d 559 (6th Cir. Ohio 2000). One year later, in Little v. BP Exploration & Oil Co., this court cited Nguyen stating that "while it is true that temporal proximity alone is insufficient to establish a causal connection for retaliation claim, there are certain circumstances where temporal proximity considered with other evidence of retaliatory conduct would be

sufficient to establish a causal connection." 265 F.3d 357, 364 (6th Cir. Ohio 2001). In 2006, this proposition was repeated in Randolph v. Ohio Dep't of Youth Servs., 453 F.3d 724 (6th Cir. Ohio 2006). This led to similar citations in 2007, including: Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584 (6th Cir. Tenn. 2007); Tuttle v. Metro. Gov't, 474 F.3d 307 (6th Cir. Tenn. 2007) and Reynolds v. Extendicare Health Servs., 257 Fed. Appx. 914 (6th Cir. Ohio 2007). It should be noted that Little, Randolph, Caterpillar, Tuttle, and Reynolds offered bare citations, not offering any analysis on the breadth of the "rule" on temporal proximity.

However, in the period between Nguyen in 2001 and Reynolds in 2007, this Court acknowledged in Dicarlo v. Potter that where "the temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise." 358 F.3d 408, 421 (6th Cir. Ohio 2004). There, the court found support from several cases within this circuit and noted similar treatment from other circuits. Id.

This confusion within the Circuit regarding temporal proximity has been addressed and both lines of cases are "fully reconcilable:"

> Where an adverse employment action occurs very close in time after employer learns the protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying the prima facie case of

> retaliation. But where some time elapses between when the employer learns of the protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality. Mickey at 525.

The rationale behind distinguishing swift retaliation and delayed retaliation arises from the apparent advantage that would be given to employers that act quickly after learning of the protected activity: "the employee would be unable to couple temporal proximity with any other evidence of retaliation because the two actions happen consecutively, and little other than the protected activity could motivate the retaliation." Mickey at 525. As such, there is a positive correlation between length of time and the amount of additional evidence required: "the more time that elapses between the protected activity and the adverse employment action, the more the plaintiff must supplement his claim with other evidence of retaliatory conduct to establish causality." Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392, 400 (6th Cir. Mich. 2010).

This case is more analogous to Mickey (where the act of retaliation occurred on the same day) than Reynolds (where the retaliatory acts against both plaintiffs occurred over three weeks later). Here, Montell has produced evidence of the sequence of phone calls supporting her timeline of protected activity and knowledge. The first acts of retaliation occurred on May 20, 2011, only one day after Montell's report of sexual harassment, consisting of calls from Day to

Montell and Vanhoose regarding resignation.[8] The final act of retaliation, the constructive discharge, occurred only two working days or four calendar days from the report.

Viewing all of the facts on the record and the reasonable inferences therefrom, a reasonable jury could determine that the constructive discharge was a direct result Montell's protected activity on Thursday, May 19, 2011, and Day's retaliatory actions on Friday, May 20, 2011. Based upon all of the produced evidence, a trier of fact could reasonably infer that Montell's official report to Lee on May 19, 2011 was the impetus for the flurry of phone calls and the email on

[8] To recover under the Title VII retaliation provisions, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 67-68 (U.S. 2006). Materially adverse actions are not limited to terminations and pay reductions. See White at 69 (the legal standard for material adversity is articulated in general terms because " an act that would be immaterial in some situations is material in others." *See also* Murphy v. Ohio State Univ., 2013 U.S. App. LEXIS 22478 (6th Cir. Ohio 2013). Here, the ultimatum to resign or be terminated would dissuade a reasonable worker from participating in a protected activity. This was not an unfulfilled or nebulous threat of future termination. The statements to Vanhoose that Montell had already resigned, however, made this ultimatum even more concrete and sincere in the mind of Montell. Thus, the ultimatum to resign or be terminated could be a materially adverse employment action, also leading to the constructive discharge on Monday May 23, 2011. *See* Barone v. United Airlines, Inc., 355 Fed. Appx. 169, 184 (10th Cir. Colo. 2009) (ultimatum from employer was itself an adverse employment action where both choices would have resulted a material change in the terms of the employment). Whether viewed as merely the catalyst for the constructive discharge or materially adverse actions, Day's phone calls occurred one working day after Montell's protected activity.

May 20th, 2011; that Day was made aware of the official report sometime between the 19th and 20th; that Day called Montell providing an ultimatum to resign on the May, 20th, 2011; and that Day contacted Vanhoose about the resignation on the 20th.

E. Plaintiff's Proof of Pretext

As shown above, Plaintiff has satisfied her prima facie burden. Thus, the burden of production shifts to the Defendants to provide legitimate non-discriminatory reasons. McDonnell Douglas at 804. The Defendants made this showing using highly rebuttable, contradictable, and impeachable evidence, nevertheless shifting the burden of production back to the Plaintiff to demonstrate pretext. In response, Plaintiff has made a strong showing that: (1) she suffered from increased scrutiny after her first report of sexual harassment to Blair; (2) she adequately performed and was well-qualified for her position; and (3) that her discharge was not previously contemplated. Nevertheless, the District Court stated:

> Even assuming Montell were able to establish a prima facie claim of retaliation, her Final and Amended Final Warnings, along with the financial data are all legitimate, non-retaliatory reasons for her termination of employment. Montell maintains that these reasons are "red herrings" and that she was not in danger of losing her job at DCS. Essentially, these assertions are an attempt to argue pretext. However, her retaliation claim would still fail because she is unable to prove that her protected activity was the "but-for cause" of the adverse employment action by her employer. Nassar, 133 S. Ct. at 2534. Put another way, Montell must demonstrate that

> "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Id. at 2533. (Memorandum Opinion and Order, RE 60, Page ID # 1719).

However, the pretext burden is one of production, not persuasion. Indeed, "weighing the litigants' evidence on the veracity and propriety of that nondiscriminatory explanation comprises the "ultimate issue" of the case." Cline at 663. After the plaintiff has produced evidence of pretext, a court's inquiry is limited to whether a reasonable trier of fact could find retaliation was the but-for cause based upon all evidence in the record. *See* Cline at 661. It is not the province of the judge to weigh the credibility of evidence, and "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves at 150-151. Thus, the District Court clearly erred by: (1) applying a but-for causation standard to the pretext burden of production; (2) disregarding Plaintiff's evidence of pretext based upon highly impeachable, contradictable evidence from the Defendants; and (3) invading the province of the jury by weighing the credibility rather the sufficiency of the parties' evidence.

In order to demonstrate pretext, a plaintiff must put forth proof that the employer's proffered reasons: (1) are factually untrue; (2) are factually true but did not actually motivate the termination; or (3) are factually true but were insufficient to motivate the discharge. Blizzard at 285. Montell's proof of pretext falls under

the third category. She admits the factual existence of the warnings (although not necessarily their factual basis as indicated by her written objections to them). However, she contends that those reasons were insufficient to motivate her discharge, producing both direct and circumstantial evidence to support that contention.[9]

Here, the District Court stated that the "Final and Amended Warnings, along with the financial data are all legitimate, non-discriminatory reasons for her termination of employment." Judge Reeves disregarded Montell's proof of pretext, focusing on the "speculative" nature of Montell's performance bonus and the apparently fortuitous increase in revenue at the FRMC wound care center. The testimony by Day was further viewed in a light extremely favorable to DCS:

> While Day testified that did not have any definite plans to terminate Montell's employment when she gave her notice of resignation, her failure to meet these goals would result in her termination, as was explicitly stated in both of the warnings. Therefore, the defendants have demonstrated that Montell was facing potential termination in response to her own conduct, not her sexual harassment complaint. (Memorandum Opinion and Order, RE 60, Page ID # 1721).

The District Court took clear statements from the record indicating there were absolutely no plans to terminate and translated that into "no definite plans."

[9] The insufficiency of her warnings emanates not from her disparate treatment compared to similarly situated employees, as in Jones, but rather statements from Defendants themselves stating that there were no plans to terminate Montell.

Most erroneously, however, the District Court improperly weighed the evidence, determining that the text of the written warnings was more powerful than testimony by Montell, Day, Tanner, and Lee stating that the object of those warnings was not termination. Day himself stated in deposition that his goal in the performance plan was to move Montell to the next level, stating that there was no termination date and "the thought process was never entered into that we're going to terminate Marla, I mean period." (Day depo. 161, RE 69) As to the object of the Final Written Warning and Amended Final Written Warning, Day further testified (Day depo. 204, RE 69):

> Q. No, she used these -- she testified yesterday that she used these written warnings as, essentially, motivation to do better.
> A. That was the intent, as a motivation to –
>
> Q. Okay. So in issuing these disciplinary actions, you were not doing that to put fear into Marla that she would be terminated, but rather, to motivate her to do better.
> A. Yes, sir.
>
> Q. So if Marla took that as motivation to do better, that was your intent, correct?
> A. Yes.

Lee also testified there were no plans to terminate Montell and that no reasons for termination were discovered after her resignation. (Lee depo. 68, 70, RE 64). Tanner further stated that there were no reports of any failure by Montell between April 19th, 2011, the date of the Written Final Warning and May 23, 2011, the date of constructive discharge. (Tanner depo. 55, RE 68). Finally, the omission

of a step in the progressive disciplinary plan is instructive, because Day stated that he had never skipped a step in the policy even though he had terminated an employee for misconduct in the past. (Day depo. 66-67, 166, RE 69). While the employee handbook contemplates a deviation from the policy, Day stated this deviation would occur, for example, if someone was violent, and Montell's alleged performance issues are clearly not analogous to violence. (Day depo. 165, RE 69).

This testimony by Defendants demonstrates that it was incorrect for the District Court to find that Montell would have been terminated due to performance issues. The "Final and Amended Warnings, along with the financial data" are not items of evidence that the jury is required to believe. Montell has pointed to evidence showing that the financial data are actually indicative of her successful performance. Under Montell, FRMC net revenue, wound care revenue, and HBO revenue increased. (Jt. depo. Ex. 47, RE 34). Furthermore, despite Day's performance plan having no empirical foundation, Montell increased HBO treatments by 300% between March and April 2011while wound care encounters and new patient encounters predictably decreased, just as they had in the previous year. (Jt. depo. Ex. 32, 33, RE 34). Based upon the financial data along with the plethora of statements in the record that neither Plaintiff nor Defendants understood the warnings as a sincere precursor to termination, the Plaintiff has produced more than enough evidence to support her claim of pretext.

However, a plaintiff can also rely upon the same circumstantial evidence put forth in the prima facie case. Reeves at 148. Thus, the close temporal proximity between the protected activity and the constructive discharge again allows an inference of an impermissible motive. Compare that close temporal proximity with the much greater time span between any of the warnings and Montell's resignation: Montell's resignation was not closely preceded by any corrective action that would cause Montell to see the "writing on the wall." *See* Banker at 19. Based upon Defendants' proffered sequence of events, Montell would have seemingly spontaneously resigned at 1:16 PM on May 23, 2011 and only later that afternoon would she have engaged in her protected activity. That narrative fails to explain the lengthy phone calls between Montell and Human Resources on May 20, 2011 (Phone records of Montell, Calls 275, RE 37.2, Page ID # 1233); it fails to explain the email from Montell to Day on May 20, 2011 (Email from Montell to Day, RE 37.2, Page ID #1250); and it also fails to address the phone calls from Day to Montell and Vanhoose on May 20, 2011 (Phone records of Montell, Calls 269 and 270, RE 37.2, Page ID # 1233), the content of which the Court must accept as true for the purposes of summary judgment.

Finally, the appropriate inquiry is not whether the plaintiff's failure in her performance goals **could** have resulted in her termination. Rather, the judicial inquiry is focused on what caused the employer to terminate when it did. Hamilton

at 436. Her satisfaction of the goals within the Final Written Warning and Amended Final Written Warning had not been evaluated between their issuance and her constructive discharge. (Day depo. 196, RE 69; Tanner depo. 55, RE 68). Thus, the District Court made a huge leap from **"arguably could"** to **"would."** The speculative "coulds" or "woulds" based on the pre-existing relationship are insufficient to win summary judgment unless the employer can demonstrate that those reasons caused the termination through unimpeached, uncontradicted evidence that the jury is required to accept as true. DCS has failed to present any such evidence here. Rather, its proffered reasons for discharge are directly rebutted by definitive evidence in the record.

Montell's evidence of pretext need not be conclusive, but must only "provide an evidentiary basis for what the Supreme Court has termed a reasonable suspicion of mendacity." Jones at 406 (*citing* Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. Ky. 1994)). Montell has done so by pointing to: (1) increased scrutiny by Day after he learned of her first report to Blair;[10] (2) her successful management of the FRMC wound care facility; (3)

[10] This Court has allowed for other circumstantial evidence to demonstrate improper motive, including actions taken by the employer before the plaintiff's protected activity. Mickey at 526 (evidence of salary and benefit reduction and inquiry into retirement plans demonstrate underlying bias that may be coupled with close temporal proximity). Testimony from Montell, Blair, Day, and Lee shows that Blair reported Montell's accusation of sexual harassment prior to the official report. There was clear increased scrutiny following Blair's report to Day,

Defendants' own statements regarding the lack of intent or plans to terminate; and (4) a reasonable timeline of protected activity and retaliation, supported by phone and email records. As such, she has met her final burden of production, allowing her to defeat summary judgment and entitling her to an opportunity to carry her ultimate burden of persuasion before a jury. *See* Cline at 668.

F. But-for Causation, Measured by the Substantial Factor Test, is a Question of Fact for the Jury.

Montell has met her burden of production as to her prima facie case and has produced concrete evidence as to why DCS's asserted justification is false through evidence that is neither unreasonable nor impermissible. *See* Reeves at 154. Satisfaction of those burdens, in the absence of unrebuttable evidence from DCS, would allow her to meet her burden of persuasion before a reasonable trier of fact. Reeves at 148.

Nassar has not altered this longstanding treatment of summary judgment. The Court's duty is not to apply a but-for causation standard to Plaintiff's evidentiary burdens, requiring her to persuasively eliminate all alternative causes throughout the McDonnell Douglas framework. *See* Blizzard at 283 (but-for causation goes to burden of persuasion). At the summary judgment stage, the District Court should only determine whether the plaintiff has put forth sufficient

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including the spying, performance plan, and disciplinary action based upon erroneous information.

evidence such that a reasonable trier of fact could find retaliation was the but-for cause. *See* Pathways at 92 (question for court at summary judgment is "whether reasonable minds could differ" as to the fact of causation). *See also* Cline at 668. In doing so, the court is not permitted to substitute "its judgment concerning the weight of the evidence for the jury's." Reeves at 153.

To the extent that the Court must consider whether reasonable minds could differ on causation, the definition of but-for causation could become important:

> Title VII retaliation claims must be proved according to **traditional principles of but-for causation**, not the lessened causation test stated in §2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. Nassar at 2533 (*emphasis added*).

In holding that traditional tort law principles of causation apply to retaliation, the Court did not alter the meaning of those traditional tort principles themselves. It began its discussion of causation principles noting §§9 and 431 of the Restatement (Second) of Torts, even citing the exception to but-for causation when there are multiple, independently sufficient causes.[11] The Restatement views

[11] As a practical matter, Nassar's holding has no effect on single motive retaliation claims or retaliation claims with multiple, independently sufficient factual causes. Plaintiffs pursuing these types of cases may still recover under traditional tort law principles. Nassar's only bars cases with multiple factual causes where the retaliatory animus was independently insufficient to motivate the discharge i.e., claims where retaliation was merely a motivating factor. Montell claims that the

legal cause with respect to all torts through the substantial factor test, noting: "the act or omission must be a **substantial factor** in bringing about the harm, and there must be no principle or rule of law which restricts the actor's liability…" Restat 2d of Torts, § 9. *See also* Restat 2d of Torts, § 431.

Indeed, Kentucky has adopted the Restatement (Second) approach, under which "the cause-in-fact component has been redefined as a 'substantial factor' element." Lewis v. B&R Corp., 56 S.W.3d 432, 436-437 (Ky. Ct. App. 2001) While "substantial" is difficult to quantify, the authors of the Restatement stated: "The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility." Pathways at 92 (*citing* Restat 2d of Torts, § 431).

But-for causation is synonymous with substantial factor causation. The KCRA does not require any greater showing of legal causation than Kentucky's substantial factor test. Further, under Kentucky law, the causation inquiry is a mixed question of law and fact and is one for the jury. Pathways at 92. *See also* Deutsch v. Shein, Ky., 597 S.W.2d 141, 145 (1980). It only becomes a question of law when "there is no dispute about the essential facts and only one conclusion may be reasonably drawn from the evidence." Pathways at 92.

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retaliation was the single motive and, alternatively, that it was independently sufficient to motivate her discharge.

In evaluating causation in relation to summary judgment, the court need only address whether reasonable minds could differ as to whether the retaliation was a substantial factor in causing the discharge. *See* Pathways at 92 ("With this in mind, we turn to the question of whether reasonable minds could differ as to whether Pathways' placement of Hammons at Moore's was a substantial factor in causing the injuries that resulted from Stacy's assault on her."). Here, the District Court did not limit its inquiry to that question. Instead, the District Court weighed the credibility of the evidence and itself decided that the Plaintiff had not shown that her discharge would not have occurred in the absence of the protected activity.

In order to show that the adverse action would not have occurred in the absence of the retaliatory motive, it is reasonable that a Plaintiff would need to eliminate other reasonable explanations. Under McDonnel Douglas, those other reasonable explanations are provided by the employer in the step 2, and the plaintiff is given the opportunity to produce evidence rebutting those reasons in step 3. If the plaintiff can produce sufficient evidence, the question of causation requires the weighing of credibility of evidence and is properly relegated to the jury. *See* Cline at 668 (noting that dispute over material fact is to be decided by the jury and the court cannot favor the defendant's explanation in granting summary judgment).

As long as there is genuinely opposing factual evidence, it is improper for the judge to substitute his view of causation for that of the jury. Reeves at 153. Here, the District Court did not ask whether reasonable minds could differ as to whether the retaliatory motive was a substantial factor in causing Montell's constructive discharge. Rather, it applied its own view of but-for causation to both of the Plaintiff's evidentiary burdens.

G. Montell's Accompanying State Law Causes of Action Must Survive Summary Judgment

The District Court erred by finding that the general harassment, intentional infliction of emotional distress, and negligent hiring/training claims fail as a matter of law. First, Day's behavior fits within the plain text of KRS 525.070(1)(e) in that he intentionally harassed Montell, engaging in conduct which seriously annoyed Montell and which served no legitimate purpose. Second, Montell presented an adequate factual basis for her intentional infliction of emotional distress claim and the question of whether those acts were sufficiently outrageous should have been a question for the trier of fact. Finally, the District Court's agreement with Defendants that negligent hiring and training claims are limited to third parties is misguided. Even assuming there are no cases offering direct support for a claim of negligent hiring or training where the injury occurred between two coworkers, the logical underpinnings of the negligent hiring and training causes of action apply equally. For example, it would be absurd to find no negligent hiring liability

where: (1) Employer engages in business where employees have access to weapons; (2) Employee A seriously injured Employee B with employer's weapon; and (3) Employer hired Employee A knowing he had a well-documented history of violence. However, even if this Court finds the factual record supports summary judgment for these attendant state law claims, Montell has presented robust factual support for her retaliation claim, which should have allowed her to present her case to a trier of fact.

IX. Conclusion

The District Court erred in granting summary judgment to Defendants, making several errors of law in its Memorandum Opinion and Order. The overall theme of these errors is an overly rigid approach to the Plaintiff's burdens under McDonnell Douglas. First, the District Court misinterpreted Nassar, incorrectly using it to qualify prima facie causation. Second, performance issues were inappropriately inserted into the Plaintiff's initial burden, effectively requiring her to satisfy her evidentiary and ultimate burdens in the first step of the McDonnell Douglas framework. Third, the District Court failed to consider important precedent in its treatment of temporal proximity, ignoring the fact that it may be impossible to point to other indicia of retaliatory animus when the discharge or termination is swift.

Fourth, the Court invaded the province of the jury by weighing the credibility of evidence throughout the McDonnell Douglas/summary judgment inquiry. Most notably, in the pretext inquiry, it assigned great weight to the text of the Final Written Warning and Amended Written Final Warning, disregarding Defendants' own testimony that those documents were not indicative of termination.

Finally, the District Court misconceived the stringency of but-for causation, failing to acknowledge the meaning for the traditional tort causation principles as cited by Nassar. As long as the retaliatory motive was a substantial factor and not merely a motivating factor, Montell can recover.

Montell produced sufficient evidence in both the prima facie and pretext stages; evidence would allow a reasonable jury to find in her favor. The summary judgment inquiry should have been limited to purely measuring that sufficiency, without the judge himself weighing evidence and witness credibility. Montell asks this Court review each stage of the McDonnell Douglas inquiry using the proper legal principles, praying for reversal and remand on the summary judgment of her retaliation claims.

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Date: January 3, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 3, 2014, I electronically filed this document through the ECF system, which will send a notice of electronic filing to:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	DESCRIPTION	PAGE ID range
34	Joint Depositions[12]	Exhibits 28, 29, 32, 33, 34, 35, 39, 40, 41, 47, 48, 49, 51, and 52
37.1	Affidavits of Elisa Price and Molly McGill	1219-1220
37.2	Phone records of Montell Email from Montell to Day	1233 1250
60	Memorandum Opinion and Order	1713, 1714, 1717, 1719, 1721
62	Notice of Appeal	1730
63	Blair deposition	Exhibit 35
64	Lee deposition	9, 38, 39, 43, 45, 46, 52, 53, 63, 64, 67, 68, 70, 75, 76
65	Kendrick deposition	48, 49
66	Montell deposition	142-150, 161-163, 171-173, 192, 193, 203, 217, 218
68	Tanner deposition	35-56, 62
69	Day deposition	31, 32, 45, 46, 58, 59, 60, 66, 67, 99, 100, 161, 162, 163, 165, 178, 194, 196, 197, 204, 217, 218, 222, 223, 225, 226, 227, 229, 231, 232,
72	Notice of Cross-Appeal	2467

[12] Depositions designated are all under seal and therefore no page ID # has been generated. The referenced page/exhibit numbers of the depositions are listed.