No. _____

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,
v.
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN A. HERSTOFF
Counsel of Record
FROMMER LAWRENCE & HAUG LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
JHerstoff@flhlaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

A district court may extend the time to file a notice of appeal in a civil case "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, . . . upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). Here, upon timely motion, the district court granted Petitioner Charmaine Hamer ("Ms. Hamer") a sixty-day extension of time to file a notice of appeal. Ms. Hamer filed a notice of appeal within the time set by the district court. The United States Court of Appeals for the Seventh Circuit nevertheless *sua sponte* dismissed the appeal for lack of jurisdiction. In doing so, the Seventh Circuit concluded that it was deprived of jurisdiction because Ms. Hamer's notice of appeal was filed outside the time permitted by the Federal Rules of Appellate Procedure, which provide that "[n]o extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Fed. R. App. P. 4(a)(5)(C).

The question presented is as follows:

Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the Second, Fourth, Seventh, and Tenth Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the Ninth and D.C. Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine.

PARTIES TO THE PROCEEDING

Petitioner is Charmaine Hamer. Ms. Hamer was plaintiff-appellant below.

Respondents are Neighborhood Housing Services of Chicago and Fannie Mae. Both were defendants-appellees below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Charmaine Hamer ("Ms. Hamer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (App. 1-4) is reported at 835 F.3d 761 (7th Cir. 2016). The district court's summary-judgment decision (App. 7-47) is reported at 2015 WL 5439362 (N.D. Ill. Sept. 10, 2015). The district court's entry of judgment is found at App. 48-49. The district court's order extending Ms. Hamer's time to file a notice of appeal is found at App. 60.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 31, 2016. App. 5-6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Appellate Procedure 4(a)[1] and 28 U.S.C. § 2107 are reproduced at App. 50-56.

---

[1] The appendix contains the version of Federal Rule of Appellate Procedure 4(a) that is in effect until December 1, 2016. The December 1, 2016 amendments to the Federal Rules of Appellate Procedure make no change to Rule 4(a)(5)(C)—the provision at issue in this case.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Ms. Hamer was terminated from her position as Intake Specialist for the Housing Services of Chicago and Fannie Mae's Mortgage Help Center (together "Respondents"), and filed suit in the United States District Court for the Northern District of Illinois against Respondents for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* App. 1-2. The district court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 626(b), and 42 U.S.C. § 2000e-5(f)(3). On September 10, 2015, the district court granted summary judgment in favor of Respondents and directed the entry of judgment accordingly. App. 7-47. Final judgment was entered on September 14, 2015.[2] App. 48-49. Accordingly, in the absence of an extension of time, a notice of appeal was due by October 14, 2015. Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from").

---

[2] Although the district court's summary-judgment decision and final judgment are dated September 10, 2015, neither was entered in the district court's docket until September 14, 2015. App. 7; App. 48. Therefore, the due date for filing a notice of appeal is calculated from September 14, 2015, the day that the judgment was entered. Fed. R. App. P. 4(a)(1)(A); *see also* Fed. R. Civ. P. 58(c)(2)(A) (providing that a judgment is deemed entered when a judgment, set out in a separate document, is entered in the civil docket under Federal Rule of Civil Procedure 79(a)).

After judgment was entered, Ms. Hamer and her counsel disagreed on an appellate strategy. Therefore, on October 8, 2015—before the deadline to file a notice of appeal—Ms. Hamer's counsel filed a motion seeking: (i) to withdraw as counsel, and (ii) a sixty-day extension of time for Ms. Hamer to file a notice of appeal. App. 57-59. In seeking the sixty-day extension of time, Ms. Hamer's counsel relied on 28 U.S.C. § 2107(c), which permits a district court, "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, [to] extend the time for appeal upon a showing of excusable neglect or good cause." App. 51; App. 57-58. In this motion, Ms. Hamer's counsel explained that Ms. Hamer needed additional time to secure appellate counsel and determine an appropriate appellate strategy. App. 58. That same day, the district court granted the motion, permitting Ms. Hamer's counsel to withdraw, and expressly stating that "[t]he Court will give [Ms. Hamer] until December 14, 2015 to file a Notice of Appeal." App. 60. From then on, Ms. Hamer proceeded *pro se* in the district court, as she was unable to retain appellate counsel that she could afford. At no time did Respondents oppose or otherwise object to the extension of time that the district court granted.

On December 11, 2015—within the time set by the district court—Ms. Hamer filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. App. 61.

II. Proceedings in the Seventh Circuit

After the docketing of Ms. Hamer's appeal, Respondents submitted a Joint Corrected Docketing Statement in which Respondents noted, among other

things, that "[o]n December 11, 2015, [Ms. Hamer] timely filed a Notice of Appeal[.]" App. 64; *see also* App. 63 ("The . . . Seventh Circuit has jurisdiction over this appeal . . . in that on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal."). Nevertheless, the Seventh Circuit *sua sponte* requested that Respondents file a memorandum addressing the timeliness of Ms. Hamer's appeal. App. 66-67. More specifically, the Seventh Circuit requested that Respondents address whether Federal Rule of Appellate Procedure 4(a)(5)(C) precluded consideration of Ms. Hamer's appeal. App. 67. In response to the Seventh Circuit's order, Respondents, although seeking dismissal on nonjurisdictional grounds, admitted that Rule 4(a)(5)(C) cannot divest the Seventh Circuit of jurisdiction because this Rule does not derive from a statute. App. 71-77. After Ms. Hamer responded to Respondents' memorandum, the Seventh Circuit deferred consideration of the issue until after merits briefing. App. 91-93.

After merits briefing and oral argument, the Seventh Circuit—contrary to the arguments of all parties—concluded that the timing of Ms. Hamer's notice of appeal divested the Seventh Circuit of jurisdiction to hear the case.[3] App. 1-4. Relying on this Court's decision in *Bowles v. Russell*, 551 U.S. 205

---

[3] The Seventh Circuit's decision incorrectly states that Respondents had "argu[ed] . . . that [the Seventh Circuit] lacks jurisdiction over [Ms. Hamer's] appeal." App. 2. To the contrary, Respondents, while seeking dismissal on nonjurisdictional grounds, argued extensively that noncompliance with Rule 4(a)(5)(C) could not deprive the Seventh Circuit of jurisdiction over the appeal. App. 71-77.

(2007), the Seventh Circuit concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) "limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days [from the original deadline to file a notice of appeal]," and that "[a]lthough . . . Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." App. 4. Because the Seventh Circuit concluded that it lacked jurisdiction, it never reached the merits of Ms. Hamer's appeal. Moreover, due to this jurisdictional determination, the Seventh Circuit did not address whether Respondents had forfeited or waived their right to rely on Rule 4(a)(5)(C), or whether the unique-circumstances doctrine excused Ms. Hamer's late filing.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided on Whether Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule

Since this Court's decision in *Bowles*, the courts of appeals have reached divergent conclusions on whether Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional rule, or whether the Rule is instead a nonjurisdictional claim-processing rule that can be forfeited upon a party's failure to timely assert a violation of the Rule. This Court's review is needed to resolve the circuit split on this important question.

A. This Court's Decision in *Bowles* Established that the Deadline in Federal Rule of Appellate Procedure 4(a)(6) Is Jurisdictional Because It Derives from a Statute, but Did Not Address Federal Rule of Appellate Procedure 4(a)(5)(C)

In *Bowles*, the appellant ("Bowles") missed his deadline to file a notice of appeal, and did not recognize the error until approximately sixty days after the expiration of the time to file a notice of appeal. *See Bowles*, 551 U.S. at 207. Accordingly, because he had not timely filed a motion to extend the time to appeal, Bowles was unable to avail himself of the first sentence of 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Instead, because no motion was filed within 30 days of the expiration of the time to bring an appeal, Bowles' only remedy lay in the second part of 28 U.S.C. § 2107(c), which permits the district court, under certain circumstances, to "reopen the time for appeal for a period of 14 days from the entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c)(2). Consistent with the second part of 28 U.S.C. § 2107(c), Federal Rule of Appellate Procedure 4(a)(6) also provides that a district court, under certain conditions, "may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered[.]" Fed. R. App. P. 4(a)(6).

Despite the clear statutory mandate that a district court may only reopen the time to appeal for a period of 14 days under those circumstances, the district court

"inexplicably gave Bowles 17 days . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207. Bowles filed his notice of appeal within the time set by the district court, "but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c)." *Id.*

This Court concluded that the Court of Appeals lacked jurisdiction over the appeal. Critical to this Court's analysis, however, is the fact that the 14-day time limit in Federal Rule of Appellate Procedure 4(a)(6) is also set forth in a statute. *See Bowles*, 551 U.S. at 210 (noting this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and "recogniz[ing] the jurisdictional significance of the fact that a time limitation is set forth in a statute"). In no way did the Court address Federal Rule of Appellate Procedure 4(a)(5)(C), which does not derive from a statute. Indeed, the Court distinguished the case from *Kontrick v. Ryan*, 540 U.S. 443 (2004) because the time limitation at issue in *Kontrick*—although set forth in the Federal Rules of Bankruptcy Procedure—did not implicate a court's jurisdiction because it did not appear in a statute. *Bowles*, 551 U.S. at 210-11. In fact, the Court recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[.]" *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452).

The Court further explained that equitable considerations could not excuse the tardy notice of appeal because the late filing deprived the Court of Appeals of jurisdiction. In particular, the Court concluded that "because Bowles' error [was] one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the

statute's time limitations." *Bowles*, 551 U.S. at 213. Moreover, the Court concluded that Bowles could not rely on the "'unique circumstances' doctrine" to excuse his late filing. *Id.* at 213-14. Under that doctrine—which stems from two of this Court's cases—the untimely filing of an appeal has been excused when the appellant relied on the district court's erroneous assurances about the timeliness of the appeal. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17 (1962) (excusing the late filing of a notice of appeal where the appellant had relied on the district court's erroneous extension of time to file a notice of appeal); *see also Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 385-86 (1964) (excusing the late filing of a notice of appeal where the district court had erroneously assured the appellant that post-trial motions were filed "in ample time"). Because Bowles' error deprived the Court of Appeals of jurisdiction, this Court concluded that "[it] has no authority to create equitable exceptions to jurisdictional requirements," and "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 213-14.

B. The Ninth and D.C. Circuits Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Does Not Implicate the Appellate Jurisdiction of a Court of Appeals Because It Does Not Derive from a Statute

Since this Court's decision in *Bowles*, the Ninth and D.C. Circuits have recognized that because Federal Rule of Appellate Procedure 4(a)(5)(C) does not derive

from a statute, this Rule does not limit the jurisdiction of the courts of appeals.

In a factual scenario strikingly similar to that in the present case, the D.C. Circuit in *Youkelsone v. Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011) held that it had jurisdiction over an appeal that was filed within the time set by the district court but outside the time period permitted by Federal Rule of Appellate Procedure 4(a)(5)(C). *Youkelsone*, 660 F.3d at 475-76. The D.C. Circuit found that the Rule does not implicate the jurisdiction of a court of appeals and concluded that "the Rule 4(a)(5)(C) time limit is a claim-processing rule, not a jurisdictional bar[.]" *Id.* at 475. Relying on *Kontrick*, the D.C. Circuit explained that because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction. . . . only timing rules that have a statutory basis are jurisdictional." *Youkelsone*, 660 F.3d at 475 (citations omitted). The D.C. Circuit therefore determined that "[a]lthough the authority to extend the time available to file an appeal is codified at 28 U.S.C. § 2107, Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code. Rule 4(a)(5)(C)'s thirty-day limit is thus a claim-processing rule." *Id.* The D.C. Circuit then concluded that because the appellee had not promptly challenged the timeliness of Youkelson's appeal, the appellee forfeited its right to seek dismissal of the appeal based on a violation of Rule 4(a)(5)(C). *Id.* at 476. The court then reached the merits of the appeal. *Id.*

The Ninth Circuit reached a similar conclusion in *Abel v. Sullivan*, 326 F. App'x 431 (9th Cir. 2009).

There, the Ninth Circuit concluded that an appellant's untimely notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(C), "does not deprive [a court of appeals] of jurisdiction because the Rule's time limitation is not derived from statute." *Abel*, 326 F. App'x at 432 (citing *Bowles*, 127 S. Ct. at 2364-65).[4]

C. The Second, Fourth, and Tenth Circuits—Like the Seventh Circuit in This Case—Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule

Contrary to the Ninth and D.C. Circuits, the Second, Fourth, and Tenth Circuits have concluded—as did the Seventh Circuit in this case—that Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional constraint on the courts of appeals. Rather than recognizing that *Bowles* applies only to statutory deadlines, these courts appear to view ***all*** time limits for filing a notice of appeal in a civil case as jurisdictional in nature.

For example, in *Freidzon v. OAO LUKOIL*, 644 F. App'x 52 (2d Cir. 2016), the Second Circuit found that the district court extended the time to file a notice of appeal beyond the time permitted by Rule 4(a)(5)(C), and therefore concluded that "as the Supreme Court made clear in *Bowles v. Russell*, the time limits for filing a notice of appeal are jurisdictional and not subject to judicially created equitable exceptions."

---

[4] As an additional ground for finding that it had jurisdiction over the appeal, the Ninth Circuit found that an earlier-filed motion for an extension of time qualified as the functional equivalent of a notice of appeal. *Abel*, 326 F. App'x at 432-33.

Freidzon, 644 F. App'x at 53. Accordingly, because the appellant had filed a notice of appeal within the deadline set by the district court—but outside the time period permitted by Rule 4(a)(5)(C) —the Second Circuit dismissed the appeal for lack of jurisdiction. *Id.* at 53-54.

Similarly, in *Peters v. Williams*, 353 F. App'x 136 (10th Cir. 2009), the Tenth Circuit concluded that under *Bowles*, Rule 4(a)(5)(C) is mandatory and jurisdictional, and that the district court's erroneous extension of time beyond the deadline in the Rule therefore could not excuse a late filing. *Peters*, 353 F. App'x at 137. The Tenth Circuit eventually found that it had jurisdiction over the case by determining that the appellant's timely Rule 4(a)(5) motion for an extension of time to file a notice of appeal was the functional equivalent of a notice of appeal. *Id.* at 137-138.

Finally, in *United States v. Hawkins*, 298 F. App'x 275 (4th Cir. 2008), the Fourth Circuit noted that Rule 4(a)(5)(C) is "mandatory and jurisdictional" and stated that "[e]xpiration of the time limits in Rule 4 deprives the court of jurisdiction over the case." *Hawkins*, 298 F. App'x at 275. The Fourth Circuit remanded the case for the district court to determine in the first instance whether the appellant's excusable neglect warranted an extension of time to appeal, as per the Federal Rules of Appellate Procedure. *Id.*

II. The Seventh Circuit's Decision Conflicts with This Court's Precedents

As the Seventh Circuit recognized, the relevant portion of 28 U.S.C. § 2107(c) provides that "the district

court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." App. 2-3. It is undisputed that Ms. Hamer's motion for an extension of time was filed well within the deadline set by section 2107(c), and that the statute does not limit the length of the extension that a district court can give. Nevertheless, the Seventh Circuit concluded that the time limitation in Rule 4(a)(5)(C) sets forth a limitation on appellate jurisdiction. App. 4. The Seventh Circuit's only reason for this conclusion was its statement—without further explanation—that "[l]ike Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." App. 4. The Seventh Circuit did not address the fact that unlike Rule 4(a)(6), no statute imposes the time limitation set forth in Rule 4(a)(5)(C).

The Seventh Circuit's decision is squarely at odds with this Court's precedents, which have repeatedly recognized that court-promulgated rules of procedure that lack a statutory basis do not constitute a limitation on a court's jurisdiction. For example, the Seventh Circuit's decision conflicts with *Kontrick*, wherein a creditor's objection to a debtor's discharge was untimely under the Federal Rules of Bankruptcy Procedure. At issue was whether the creditor's untimely objection deprived the bankruptcy court of jurisdiction to adjudicate the creditor's objection. *Kontrick*, 540 U.S. at 446-47. The Court stated that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge[,]" and

concluded that the tardy filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 448-52. In so concluding, this Court explained that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452 (citing U.S. Const., Art. III, § 1). The Court further recognized that "Court-prescribed rules of practice and procedure for cases in the federal district courts and courts of appeals . . . do not create or withdraw federal jurisdiction." *Id.* at 453 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) (internal quotation marks omitted).

Similarly, in *Eberhart v. United States*, 546 U.S. 12 (2005), this Court summarily reversed the Seventh Circuit's conclusion that an untimely motion for a new trial under the Federal Rules of Criminal Procedure deprived the district court of jurisdiction over the motion. *Eberhart*, 546 U.S. at 16-20. *See also Bowles*, 551 U.S. at 210-11 (distinguishing between deadlines set forth in statutes and deadlines set forth in rules); *Schacht v. United States*, 398 U.S. 58, 64 (1970) (providing that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute").

Contrary to these precedents, the Seventh Circuit's decision attaches jurisdictional significance to Federal Rule of Appellate Procedure 4(a)(5)(C)—a court-promulgated rule—despite the fact that the Rule has no statutory counterpart.

III. This Case Is the Proper Vehicle for the Court to Address This Critical Issue

This case is an ideal vehicle for the Court to address this issue. There is no question that the Seventh Circuit viewed Rule 4(a)(5)(C) as a jurisdictional requirement, as its judgment explicitly provided that the case was being dismissed for lack of jurisdiction (App. 6), and its decision referred to the Rule as "jurisdictional." App. 4. Moreover, the Seventh Circuit explicitly recognized that "Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal[.]" App. 4. Nevertheless, the Seventh Circuit did not permit any equitable considerations to factor into its analysis because it viewed the Rule as a jurisdictional requirement. App. 4. Accordingly, the question of Rule 4(a)(5)(C)'s jurisdictionality is cleanly presented here.

The question of Rule 4(a)(5)(C)'s jurisdictionality is important. As this Court has recognized, the question of whether a timing requirement is jurisdictional "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). This is because a jurisdictional rule can be raised at any time by any party, and can even be raised *sua sponte* by a court. *Id.* at 434-35. Moreover, jurisdictional requirements are not subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine. *Bowles*, 551 U.S. at 213-14. In sharp contrast, nonjurisdictional claim-processing rules can "be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456.

Additionally, the unique-circumstances doctrine may excuse noncompliance with a deadline "where a party acted belatedly in reliance on an erroneous district court ruling." *Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015). Although *Bowles* abrogated the unique-circumstances doctrine with respect to jurisdictional deadlines, the doctrine remains applicable to nonjurisdictional claim-processing rules. *Mobley*, 806 F.3d at 577 (noting that *Bowles* "left open the doctrine's continued vitality as an exception to a non-jurisdictional rule" and applying the doctrine); *see also* 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3950.1 (4th ed. 2008) (noting that the unique-circumstances doctrine remains viable for nonjurisdictional claim-processing rules).

Because the issue of jurisdictionality is important, this Court—both before and after *Bowles*—has repeatedly intervened to determine whether particular requirements are jurisdictional in nature. *See, e.g., Henderson*, 562 U.S. 428 (addressing jurisdictionality of the deadline to appeal from the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (considering jurisdictionality of registration requirement in copyright cases); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009) (determining jurisdictionality of procedural rules established by the National Railroad Adjustment Board); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (deciding jurisdictionality of employee numerosity requirement in Title VII of the Civil Rights Act of 1964); *Eberhart*, 546 U.S. 12 (reviewing jurisdictionality of deadline in Federal Rules of Criminal Procedure); *Scarborough v. Principi*, 541 U.S.

401 (2004) (evaluating jurisdictionality of timing requirement in Equal Access to Justice Act); *Kontrick*, 540 U.S. 443 (assessing jurisdictionality of deadline in Federal Rules of Bankruptcy Procedure). However, this Court has not yet addressed whether Federal Rule of Appellate Procedure 4(a)(5)(C) is jurisdictional in nature. This Court's clarification is needed to determine whether Rule 4(a)(5)(C) should be permitted to "alter[] the normal operation of our adversarial system" by being "[b]rand[ed] . . . as going to a court's subject-matter jurisdiction." *Henderson*, 562 U.S. at 434.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN A. HERSTOFF
Counsel of Record
FROMMER LAWRENCE & HAUG LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
JHerstoff@flhlaw.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-3764

[Filed August 31, 2016]

CHARMAINE HAMER, *Plaintiff-Appellant*,	)
v.	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE, *Defendants-Appellees*.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:12-cv-10150 — **Rubén Castillo**, *Chief Judge*.

ARGUED JUNE 2, 2016 — DECIDED AUGUST 31, 2016

Before POSNER and SYKES, *Circuit Judges* and YANDLE, *District Judge*.[*]

YANDLE, *District Judge*. Charmaine Hamer, a former Intake Specialist for the Housing Services of Chicago ("NHS") and Fannie Mae's Mortgage Help Center ("Fannie Mae") (together "Appellees"), filed suit against her former employers, alleging violations of the

[*] Of the Southern District of Illinois, sitting by designation.

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq*., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., as amended. The district court granted summary judgment in favor of NHS and Fannie Mae on September 14, 2015. As such, pursuant to Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. § 2107(a), the original deadline for Hamer to file her Notice of Appeal was October 14, 2015.

On October 8, 2015, Hamer's counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal" in which she requested an extension to December 14, 2015 for Hamer to file her Notice of Appeal. The district court granted the motion and extended the deadline to December 14, 2015.

Hamer filed her Notice of Appeal with this Court on December 11, 2015; within the timeframe permitted by the district court's Order, but exceeding the extension allowable under Fed. R. App. P. 4(a)(5)(C) which provides: "No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later."

On December 31, 2015, we, *sua sponte*, entered an Order instructing the Appellees to file a brief addressing the timeliness of this appeal. They did so, arguing that Hamer's Notice of Appeal is untimely under Rule 4(a)(5)(C) and, therefore, that this Court lacks jurisdiction over her appeal.

Hamer asserts that the district court extended the time to file her Notice of Appeal pursuant 28 U.S.C. § 2107(c), which states in relevant part: "[T]he district court may, upon motion filed not later than 30 days

after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." She contends that Rule 4(a)(5)(C) does not apply since the district court did not consider it when granting the extension. Hamer further argues that the Appellees waived their timeliness challenge by not initially raising it.

The Supreme Court has consistently held that the statutory requirement for filing a timely notice of appeal is "mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 207, 209, 127 S. Ct. 2360, 2362, 168 L. Ed. 2d 96 (2007). In *Bowles*, the Court explained the relationship between the statutory filing period set forth in § 2107(a) and the district court's authority to extend that period under § 2107(c) and Rule 4:

> According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period…Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days… *Id.* at 208. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). *Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than*

> *a simple 'claim–processing rule.*' (emphasis added). As we have long held, when an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.' *Id.* at 213. (internal citation omitted).

Like Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days. Thus, the district court was in error when it granted Ms. Hamer an extension that exceeded the Rule 4(a)(5)(C) time period by almost 30 days.

Although we recognize that Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements. *See Bowles* at 214. Therefore, Hamer's Notice is untimely.

Finally, Hamer's argument that the Appellees waived the issue of the timeliness of her appeal also fails. When a filing error is one of "jurisdictional magnitude", forfeiture or waiver cannot excuse the lack of compliance with the statute's time limitation." *See Bowles* at 213. Had the Appellees never challenged the timeliness of Hamer's Notice, they could not waive what this Court is bound by statute to uphold. Accordingly, because we have no jurisdiction to consider Hamer's appeal on the merits, it is dismissed.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-3764

[Filed August 31, 2016]

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

August 31, 2016

Before: RICHARD A. POSNER, Circuit Judge

DIANE S. SYKES, Circuit Judge

STACI M. YANDLE, District Court Judge*

CHARMAINE HAMER, Plaintiff - Appellant	)
v.	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et. al., Defendants - Appellees	)

* Of the Southern District of Illinois, sitting by designation.

Originating Case Information:

District Court No: 1:12-cv-10150
Northern District of Illinois, Eastern Division
District Judge Ruben Castillo

The appeal is DISMISSED, with costs, for lack of jurisdiction, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12 C 10150
Chief Judge Rubén Castillo

[Filed September 10, 2015,
Entered September 14, 2015]

CHARMAINE HAMER,
Plaintiff,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO and FANNIE MAE,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Charmaine Hamer brings this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, against Neighborhood Housing Services of Chicago ("NHS") and Fannie Mae (collectively, "Defendants"), alleging age discrimination, sex discrimination, and retaliation. Presently before the Court are Defendants' separate motions for summary judgment pursuant to

Federal Rule of Civil Procedure 56. For the reasons stated below, the Court grants Defendants' motions.

RELEVANT FACTS[1]

Plaintiff is a sixty-five-year-old female, (R. 98, NHS's Rule 56.1 Resp. ¶ 1; R. 46, Pl.'s Am. Compl. ¶ 3), who was employed by NHS, (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 2). NHS is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in affordable homes throughout the Chicagoland area. (*Id*. ¶ 1.) Fannie Mae, formally known as the Federal National Mortgage Association, is a federally chartered, shareholder-owned, private corporation that provides financial products and services to low-, moderate-, and middle-income families to help them buy homes. (R. 90, Pl.'s Rule 56.1 Resp. to FM ¶ 1.) During the relevant period, Fannie Mae in partnership with NHS operated the Fannie Mae Mortgage Help Center ("MHC") located at 1 S. Wacker Drive, Chicago, Illinois. (*Id*. ¶ 2.) NHS employed all staff personnel at MHC with the exception of the Fannie Mae Site Manager and Program Manager. (*Id*. ¶ 3.)

---

[1] The Court takes the facts from the parties' Local Rule 56.1 statements of material facts. (R. 83, NHS's Local Rule 56.1(a)(3) Statement of Material Facts ("NHS's Facts"); R. 88, Fannie Mae's Local Rule 56.1(a)(3) Statement of Material Facts ("FM's Facts"); R. 89, Pl.'s Local Rule 56.1(b)(3)(C) Statement of Material Facts ("Pl.'s Facts"); R. 90, Pl.'s Response to FM's Facts ("Pl.'s Rule 56.1 Resp. to FM"); R. 91, Pl.'s Response to NHS's Facts ("Pl.'s Rule 56.1 Resp. to NHS"); R. 98, NHS's Response to Pl.'s Facts ("NHS's Rule 56.1 Resp."); R. 99, FM's Response to Pl.'s Facts ("FM's Rule 56.1 Resp.").)

I. Plaintiff's Employment at MHC

Plaintiff began working for NHS as a temporary employee in 2009, and she was promoted to a full-time position as an Intake Specialist in June 2010. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 2.) As an Intake Specialist, Plaintiff was staffed at MHC. (*Id.* ¶ 5.) Upon her promotion, Plaintiff received an offer letter setting forth the terms and conditions of the position. (*Id*. ¶ 6.) The letter informed Plaintiff that the position of Intake Specialist was contingent on the renewal of a contract between NHS and Fannie Mae, and that Fannie Mae had the right to remove her from the position for any reason. (*Id*. ¶ 6.) As an Intake Specialist, Plaintiff was responsible for receiving initial calls from borrowers and obtaining the information necessary for a mortgage counselor to properly serve the borrower. (*Id.* ¶ 7.) Additionally, NHS expected Plaintiff to demonstrate regular attendance and punctuality, interpersonal skills, teamwork, professionalism, and oral communication. (*Id.* ¶¶ 9, 10.) Plaintiff understood that all of these competencies constituted NHS's expectation of her performance. (*Id*. ¶ 10.)

Plaintiff's direct supervisor at MHC was Toya Glenn, an NHS Counseling Manager/Senior Foreclosure Prevention Specialist. (*Id*. ¶ 11.) Glenn worked closely with the Fannie Mae Site Manager and Program Manager at MHC. (*Id.* ¶ 12) From approximately June 2010 through September 2011, Glenn worked with Site Manager Nicole Evans, and from approximately September 2011 through September 2012, Glenn worked with Site Manager Mark Green. (*Id.* ¶ 13.) During this entire period,

Glenn also worked with Program Manager Erich Ludwig. (*Id.*)

II. Plaintiff's Performance Issues

In December 2010, Plaintiff was tardy on several occasions. (*Id*. ¶ 14.) As a result, Site Manager Evans informed Plaintiff of the expectation that everyone get to work on time and the "need for everyone to put in a full eight-hour day." (*Id*.) In April 2011, NHS Counseling Manager Glenn met with Plaintiff because she had been tardy on seven different occasions between March and April 2011. (*Id*. ¶ 15.) Plaintiff explained to Glenn that her tardiness was a result of having to take two buses and a train to get to work. (*Id.*) Glenn suggested that Plaintiff take an earlier train or bus, and Plaintiff responded that she did not "have any more time to give Fannie Mae." (*Id*. ¶ 16.) Glenn reiterated to Plaintiff NHS's expectation that she arrive to work on time, and Plaintiff confirmed that she understood this expectation. (*Id.*) Shortly thereafter, Glenn and Linda Anderson, NHS's director of Human Resources at the time, met with Plaintiff to reiterate NHS's expectations regarding attendance. (*Id.* ¶ 17.)

Plaintiff continued to arrive late to work on numerous occasions, each time identifying a reason for her tardiness. (*Id*. ¶ 18.) Plaintiff was late to work on July 18, 2011, because she took the wrong train, and on July 19, 2011, because of a rainstorm or high winds. (*Id.*) Plaintiff was late again on August 4, 8, and 9, 2011, because out-of-town guests were staying in her home. (*Id*.) However, Plaintiff previously told Glenn that she would be late on those dates and Glenn indicated that her tardiness would not be a problem.

(R. 98, NHS's Rule 56.1 Resp. ¶ 5.) Plaintiff was also late on September 27 and 28, 2011, and on October 4, 2011, because of changes to the train schedule. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 18.) Glenn met with Plaintiff again on October 4, 2011, to discuss Plaintiff's tardiness. (*Id.* ¶ 19.) At that meeting, Glenn reminded Plaintiff of NHS's attendance policy and warned her that she would receive a written warning in the future if her attendance issues continued. (*Id*. ¶¶ 19-20.) Plaintiff promised that she would correct her attendance issues moving forward. (*Id*. ¶ 20.) Between October 4, 2011, and March 14, 2012, the date Plaintiff's employment with NHS ended, Plaintiff was not late to work. (R. 98, NHS's Rule 56.1 Resp. ¶ 7.)

NHS was also concerned with Plaintiff's communication and interaction with others at work. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶¶ 21-24.) In July 2011, Glenn met with Plaintiff to discuss four different occasions in which Glenn felt that Plaintiff had been disrespectful or inappropriate. (*Id*. ¶¶ 21-22.) Glenn provided Plaintiff with examples from December 2010, January 2011, February 2011, and June 2011. (*Id*. ¶ 22.)

At a meeting in December 2010, Plaintiff told Glenn that she "really didn't want to hear any more about that action plan [the topic of the meeting] until they figured out how to really do it." (*Id*.; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 66:18-22.) Plaintiff testified in her deposition that she intended this comment to be a joke, but she understood after her meeting with Glenn in July 2011 that Glenn found the comment to be disrespectful. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R.83-2, Ex. B Part 1, Pl.'s Dep. at 66:18-67:14.)

In January 2011, Evans expressed that she was anxious about the Counselors' production numbers for that month and told Plaintiff and her co-worker Javier Vasquez that they "really had to get on the ball . . . because . . . our numbers had been bad for December." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 73:03-06.) Plaintiff replied that she was "really not concerned" about the production goals for the Counselors because the Intake Specialists' production numbers were good. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.) Plaintiff also told Evans that she was not concerned about what their boss Ludwig thought of the production numbers because "[she] was doing [her] job" and "that's really ya'lls . . . concern." (*Id.*; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 76:03-04.)

In February 2011, Plaintiff had another exchange with Evans about deleting old client files. (R. 98, NHS's Rule 56.1 Resp. ¶ 9.) Evans told Plaintiff that she wanted to delete old files of clients who had been deactivated, and Plaintiff explained to Evans why she did not think that was a "good idea." (*Id.*) Evans did not agree with Plaintiff, and proceeded to ask her to shred the old files. (*Id.*) Plaintiff told Evans that she "would need that in writing before [she] shred a file." (*Id.*; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 89:13-17.) Evans suggested that they go talk to Glenn to see how she wanted the files handled. (R. 98, NHS's Rule 56.1 Resp. ¶ 11.) Evans proceeded to tell Glenn that Plaintiff was challenging her authority, which upset Plaintiff and made her cry. (*Id.*) Plaintiff admitted in her deposition that after this conversation, she understood that Evans believed that she had been insubordinate. (*Id.*)

Finally, in June 2011, when Glenn denied Plaintiff's time off request "because it was the end of the month and [they] needed to reach [their] [production] goals," Plaintiff replied, "my work doesn't have anything to do with production goals." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 80:18-81:20.) When Glenn reiterated that she needed Plaintiff to work, Plaintiff replied that "other people take off at the end of the month and it doesn't seem like production is a consideration." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R . 83-2, Ex. B Part 1, Pl.'s Dep. at 81:20-82:07.) Glenn told Plaintiff that her comments were inappropriate, and Plaintiff apologized. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.)

After discussing these four instances during the July 2011 meeting, Glenn informed Plaintiff that she did not feel respected as a supervisor. (*Id*. ¶ 23.) Glenn counseled Plaintiff on the need to manage her communication, suggesting some alternative ways to say things so that they would not be taken negatively. (*Id.*) Glenn also informed Plaintiff that Ludwig was aware of the conversation that had occurred between Plaintiff and Evans in February 2011 and thought that Plaintiff was disrespectful. (*Id*. ¶ 24.) Glenn explained to Plaintiff that Ludwig wanted to remove her from MHC, but that Glenn fought for Plaintiff to remain. (*Id*. ¶ 24.) Following this July 2011 meeting, Plaintiff understood that she should discuss any concerns she had regarding the policies or procedures at MHC directly with Glenn. (*Id*. ¶ 25.)

On December 20, 2011, Plaintiff received a performance review covering the employment period of June 25, 2010, through June 25, 2011. (R. 98, NHS's

Rule 56.1 Resp. ¶ 14.) In this review, Plaintiff received an overall "Manager Appraisal Score" of 3.9 out of a possible score of 5.0, and an overall rating of "Exceeds Expectations." (*Id.*; R. 89-1, Ex. 5, Performance Review at 77.) Plaintiff was assessed based on four groups of "Core Factors." (R. 89-1, Ex. 5, Performance Review at 77-81.) For the first group of Core Factors—Achievement, Productivity/Time Management, and Accountability—Plaintiff received an "Exceeds Performance Measures." (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) As to the Achievement factor, Glenn noted that Plaintiff "has played an [sic] significant role in our production relating to the number of files complete[d]" and that she "managed our intake files independently for the months of January and February." (*Id.*) Glenn also noted that from January 2011 to June 2011, Plaintiff's average number of completed files "exceeded her peers." (*Id.*) Under the "Manager Summary Comments," Glenn stated that "[w]hile [Plaintiff] has exceeded the expectations in certain areas as outlined above, [Plaintiff] needs to understand that attendance and being tactful in her communication is just as critical to her success as the other measures." (*Id.*)

III. The Counselor/Foreclosure Prevention Specialist Position at MHC

Plaintiff first applied for the position of Counselor/Foreclosure Prevention Specialist in October 2011, but was not selected for the position.[2] (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 26.) In early 2012, another

[2] Plaintiff is not alleging in this lawsuit that NHS's decision not to select her for this position was discriminatory. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 26.)

position for Counselor/Foreclosure Prevention Specialist ("the Counselor position") opened at MHC. (*Id*. ¶ 27.) Plaintiff learned about the Counselor position on February 3, 2012, while meeting with Glenn. (*Id.* ¶ 28.) Glenn advised Plaintiff that she would not be considered for the Counselor position because Ludwig was concerned about her performance. (*Id*. ¶ 28.) Despite Glenn's feedback, Plaintiff submitted her application for the Counselor position on February 4, 2012. (*Id*. ¶ 29.) The advertised salary for the Counselor position was $42,000. (*Id*.)

Glenn and Robin Coffey, NHS's Assistant Deputy Director who is sixty years old, were responsible for selecting a candidate for the Counselor position. (*Id*. ¶¶ 30-31.) Plaintiff was considered for the Counselor position, along with two other Intake Specialists at MHC: Kade Simmons (male) and Michae Hicks (female). (*Id*. ¶ 32.) In making the promotion decision, Glenn and Coffey considered the candidates' performance as Intake Specialists, as measured by their production numbers, as well as their attitude, demeanor, and ability to work well with team members. (*Id.* ¶¶ 33, 35.)

Glenn reviewed data from Fannie Mae showing the total number of phone calls handled by each Intake Specialist in 2011. (*Id*. ¶ 34.) The data revealed that Simmons handled a total of 5,732 calls as compared to Plaintiff who handled 3,982 calls, despite the fact that Simmons did not join MHC until May 2011. (*Id*.) Additionally, the 2011 Production Log demonstrates that Simmons completed a higher number of files in three of the four months that his production numbers were counted as compared to Plaintiff. (R. 98, NHS's

Rule 56.1 Resp. ¶ 16; R. 89-1, Ex. 3, 2011 Production Log at 18.) Specifically, Simmons completed more files than Plaintiff in September 2011 (39 files to Plaintiff's 30 files), October 2011 (50 files to Plaintiff's 43 files), and November 2011 (42 files to Plaintiff's 32 files); Plaintiff completed more files than Simmons in December 2011 (43 files to Simmons' 36 files). (R. 98, NHS's Rule 56.1 Resp. ¶ 16.)

Glenn and Coffey also considered Plaintiff's pattern of tardiness and communication issues. (*Id.* ¶ 36.) They did not believe that Plaintiff had sufficiently improved her communication skills in order to take on a role that required increased managerial responsibility. (*Id.*) Conversely, Glenn and Coffey found that Simmons was a consummate team player, had a positive attitude, and worked well with both his co-workers and supervisors. (*Id.* ¶ 37.)

In reaching a decision, Glenn also asked Site Manager Green for his feedback concerning the opening for the Counselor position. (R. 90, Pl.'s Rule 56.1 Resp. to FM ¶ 14.) Green advised Glenn that he believed that Simmons was best qualified for the position because "his performance metrics exceeded the other Intake Specialists." (*Id.*) Green further informed Glenn that Simmons' "collegial attitude best suited him for the customer-facing Counselor/Foreclosure Prevention Specialist position." (*Id.*) As a result of their own observations and the feedback from Green, Glenn and Coffey selected Simmons for the Counselor position. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 42.)

On February 7, 2012, Plaintiff e-mailed Fannie Mae's Program Manager Ludwig to request additional feedback as to what "[led him] to believe that [she]

would not be a good fit for the open counselor position." (*Id*. ¶ 43.) Plaintiff copied Glenn on this e-mail. (*Id.*) Ludwig forwarded Plaintiff's e-mail to Coffey that same day and expressed his desire that the NHS management team communicate to Plaintiff the reasons behind their decision with "clear transparency around [her] performance issues." (*Id.* ¶ 44.) On February 8, 2012, Plaintiff met with Glenn to discuss the e-mail she sent to Ludwig the day before. (R. 98, NHS's Rule 56.1 Resp. ¶ 19; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 137:17-138:09.) Plaintiff requested this meeting because she felt that she needed to explain to Glenn the reason she e-mailed Ludwig, specifically that she felt that Ludwig "had some misinformation on [her]." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 46; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 140:09-23.) At the meeting, Glenn reviewed Plaintiff's personnel file, including the attendance and communication issues previously discussed. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 47.) Glenn told Plaintiff that "she did not feel that [Plaintiff] had established enough of a track record in [her] attendance and communication skills" to qualify her for a promotion to the Counselor position. (*Id*.; R. 83-2, Ex. B. Part 1, Pl.'s Dep. at 143:05-10.) Glenn further informed Plaintiff that it was not appropriate for her to have sent the February 7, 2012 e-mail to Ludwig. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 48.) Glenn was concerned because she had specifically directed Plaintiff to bring any issues Plaintiff had regarding Fannie Mae processes or procedures directly to her, rather than raise them first to Fannie Mae personnel. (*Id*. ¶ 45.) Glenn felt that the e-mail was contrary to her instructions. (*Id*.)

On February 14, 2012, Glenn prepared a rough draft of a Career Progression Plan "to aid [Plaintiff] in her professional development." (R. 98, NHS's Rule 56.1 Resp. ¶ 21 ; R. 89-3, Ex. 3, Career Progression Plan at 2-3.) The finalized document was sent to NHS's Human Resources Director Anderson via e-mail on February 27, 2012. (R. 98, NHS's Rule 56.1 Resp. ¶ 22; R. 89-4, Ex. 4, Finalized Career Progression Plan at 2-4.) The Career Progression Plan outlined Plaintiff's current status regarding her areas for improvement and recommended a plan for her to apply to other counseling roles with the NHS office. (R. 98, NHS's Rule 56.1 Resp. ¶ 23; R. 89-4, Ex. 4, Finalized Career Progression Plan at 3.)

IV. Plaintiff's Internal Complaint

On February 24, 2012, Plaintiff scheduled a meeting with Anderson for February 27, 2012, to discuss her concerns regarding the hiring process for the Counselor position. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 49.) Plaintiff e-mailed Glenn on the day of the meeting to inform her that she was going to meet with Anderson. (*Id*. ¶ 50.) Plaintiff met with Anderson in Anderson's office at the NHS Central Office; only Plaintiff and Anderson were present at this meeting. (*Id.* ¶ 51.) Plaintiff told Anderson that she felt that she had been discriminated against based on her age and sex in not being selected for the Counselor position. (*Id*. ¶ 52.) Plaintiff also told Anderson that she believed that Simmons obtained the position because he spent time socially with Green. (*Id.* ¶ 53.) Plaintiff advised Anderson that she had scheduled an appointment with the Equal Employment Opportunity Commission ("EEOC") for later that week. (*Id*. ¶ 52.) Anderson told

Plaintiff that she would be leaving town that week to attend a meeting in California, but that she would investigate Plaintiff's complaint. (*Id*. ¶ 54) On February 28, 2012, Anderson had a telephone conversation with Glenn inquiring as to the reason why Plaintiff was not selected for the Counselor position. (*Id*. ¶ 55.) Glenn informed Anderson that Plaintiff's performance issues prevented her from being selected for the position. (*Id.*) Plaintiff did not overhear any part of the telephone conversation between Anderson and Glenn. (*Id.* ¶ 56.)

Anderson attests that she never informed Glenn, Coffey, or any other employee of NHS or Fannie Mae that Plaintiff had alleged that the promotion decision was discriminatory or that Plaintiff had an appointment with the EEOC; Glenn, Coffey, and Green all confirm that they had no knowledge of Plaintiff's internal complaint or EEOC appointment. (*Id.* ¶ 57.) Additionally, Plaintiff testified in her deposition that she had no personal knowledge that Anderson informed anyone at Fannie Mae about her complaint. (*Id*. ¶ 58.) Plaintiff further testified that she never complained to any supervisor or manager at NHS, aside from Anderson, that she believed that she had been discriminated against based on her age or sex in not being selected for the Counselor position. (*Id.* ¶ 59.) However, Plaintiff alleges that Anderson took notes during their meeting on February 27, 2012, and that Anderson created a file on her subsequent investigation of her discrimination complaint. (R. 98, NHS's Rule 56.1 Resp. ¶ 26.)

V. Plaintiff's "Voluntary Resignation" from NHS

Site Manager Green attests that after Simmons had been promoted to the Counselor position, he observed that Plaintiff's attitude continued to be confrontational. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 61.) He observed that Plaintiff "made inappropriate communications to coworkers and supervisors, resisted following her managers' instructions, and became increasingly disruptive to the work environment" at MHC. (*Id.*) Green attests that he was disappointed to learn about Plaintiff's e-mail to Ludwig because he was aware that Plaintiff had been counseled that she should raise any concerns to NHS personnel and not to Fannie Mae personnel. (*Id.* ¶ 62.) Green expressed his concerns about Plaintiff's demeanor, performance, and confrontational attitude to Glenn. (*Id*. ¶ 63.) Glenn and Coffey attest that based on the concerns raised by Green and other Fannie Mae personnel, and based on Glenn's own concerns about Plaintiff's demeanor, they determined that NHS could not continue to staff Plaintiff at MHC. (*Id.* ¶ 64.) In early March 2012, Coffey informed Anderson that Plaintiff would be removed from MHC. (*Id*. ¶ 65.) Anderson had no involvement in the decision to remove Plaintiff, nor did Coffey or Glenn seek her input before making the decision. (*Id*. ¶ 66.)

On March 5, 2012, Anderson contacted Plaintiff and asked her to report to the NHS Central Office the following day. (*Id*. ¶ 67.) Beginning on March 6, 2012, Plaintiff reported to Anderson at the NHS Central Office and was assigned temporary tasks to perform, including assisting the Development Department with

an upcoming dinner. (*Id.* ¶ 68.) Plaintiff continued to be paid at the same rate as an Intake Specialist. (*Id*.) On March 6, 2012, Plaintiff received a text message from Simmons saying how sorry he was to find out that she would not be working at MHC. (*Id*. ¶ 69; R. 98, NHS's Rule 56.1 Resp. ¶ 35.) The next day, Plaintiff asked Anderson about the message she received from Simmons, and Anderson confirmed that NHS had removed Plaintiff from the Fannie Mae contract. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 69.)

On March 12, 2012, Anderson informed Plaintiff that there were only two open positions at NHS: a Neighborhood Director position and an Administrative Assistant position. (*Id*. ¶ 71.) Anderson advised Plaintiff that she was not qualified for the Neighborhood Director position; nevertheless, Plaintiff applied for the position. (*Id.* ¶ 72.) On March 13, 2012, Anderson and Deborah Moore, NHS Associate Director of Neighborhood Strategy and Planning, interviewed Plaintiff for the Neighborhood Director position. (*Id.* ¶ 73.) The next day, Anderson informed Plaintiff that she had not been selected to interview further for the position,[3] and that the only remaining position was the Administrative Assistant position in NHS's West Humboldt Park office. (*Id*. ¶¶ 73,76.) Anderson further explained to Plaintiff that if she refused to accept the Administrative Assistant position, she would be considered to have voluntarily resigned her employment with NHS. (*Id*. ¶ 77.) Plaintiff declined the position because it paid $23,000 per year, which would

[3] Plaintiff is not alleging in this lawsuit that NHS's decision not to select her for the Neighborhood Director position was discriminatory. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 75.)

have resulted in a 25 percent pay reduction, and required additional travel expenses to commute to the job location. (R. 98, NHS's Rule 56.1 Resp. ¶¶ 36, 39.)

Sometime after her meeting with Anderson on March 14, 2012, Plaintiff looked on NHS's website to see if there were any other positions open at NHS. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 79.) At the time, a Homeownership or Account Housing Counselor position and a Customer Service Representative position were open; however, Plaintiff did not apply for either position. (*Id.* ¶ 79.) Eventually, Plaintiff received a letter from Anderson dated April 3, 2012, confirming her voluntary resignation from NHS. (*Id*. ¶ 80.)

PROCEDURAL HISTORY

Plaintiff initiated this action on December 19, 2012. (R. 1, Compl.) Plaintiff requested that counsel be appointed, (R. 4, Pl.'s Mot. for Counsel), and the Court granted her request on April 3, 2013, (R. 6, Min. Entry). Plaintiff's attorney later moved for relief from her appointment, (R. 29, Mot. for Relief), and the Court granted counsel's motion and appointed a second counsel to represent Plaintiff, (R. 32, Order; R. 35, Min. Entry). However, due to a conflict of interest, Plaintiff's second counsel subsequently sought to withdraw, (R. 37, Mot. to Withdraw), and the Court granted counsel's motion and appointed Douglas M. Werman of Werman Law Office to represent Plaintiff on October 1, 2013, (R. 39, Order). On November 27, 2013, Plaintiff filed a four-count amended complaint. (R. 46, Am. Compl.) In Count I, Plaintiff alleges discrimination on the basis of age in violation of the ADEA, (*id.* ¶¶ 56-60); in Count II, she alleges discrimination on the basis of sex in violation of Title VII, (*id*. ¶¶ 61-65);

in Count III, she alleges retaliation in violation of the ADEA, (*id.* ¶¶ 66-70); and in Count IV, she alleges retaliation in violation of Title VII, (*id.* ¶¶ 71-75). NHS answered Plaintiff's amended complaint on December 23, 2013, (R. 47, NHS's Ans.), and Fannie Mae answered the complaint on December 24, 2014, (R. 48, FM's Ans.). Defendants separately moved for summary judgment on February 25, 2015. (R. 80, NHS's Mot. Summ. J.; R. 84, FM's Mot. Summ. J.) Plaintiff responded to both of Defendants' motions for summary judgment on May 1, 2015. (R. 88, Pl.'s Mem.) Defendants separately replied to Plaintiff's memorandum in opposition to summary judgment on May 29, 2015. (R. 96, NHS's Reply; R. 97, FM's Reply.)

LEGAL STANDARD

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law." *Hampton v. Ford Motor Co.*, 561 F.3d 709, 713 (7th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In determining whether a genuine issue of material fact exists, the Court must view the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Id.* at 255; *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) ("[D]istrict courts are not required to draw every requested inference; they must only draw

reasonable ones that are supported by the record."). The moving party has the initial burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). The moving party "can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

Once the moving party has met this burden, the nonmoving party "must come forward with specific facts demonstrating that there is a genuine issue for trial." *Wheeler*, 539 F.3d at 634. "The existence of a mere scintilla of evidence, however, is insufficient to fulfill this requirement." *Id*. (citing *Anderson*, 477 U.S. at 251-52). The nonmoving party may not rely on "mere conclusions and allegations" to create a genuinely disputed issue of material fact. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 320 (7th Cir. 2003). Instead, the nonmoving party "must make a showing sufficient to establish any essential element of her cause of action for which she will bear the burden of persuasion at trial." *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 425 (7th Cir. 1997); *see also Celotex*, 477 U.S. at 322-23. Weighing evidence and making credibility decisions are jury functions, and it is not appropriate for a judge to assume those functions when ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255. Accordingly, the Court "appl[ies] the summary judgment standard with special scrutiny to employment discrimination cases, which often turn on issues of intent and credibility." *Krchnavy*

v. Limagrain Genetics Corp., 294 F.3d 871, 875 (7th Cir. 2002).

ANALYSIS

I. Plaintiff's Age and Sex Discrimination Claims (Counts I and II)

In Counts I and II, Plaintiff alleges that, in failing to promote her to the Counselor position in February 2012, Defendants discriminated against her based on her age and sex in violation of the ADEA and Title VII. (R. 46, Am. Compl. ¶¶ 58-59, 63-64.) The ADEA forbids employers from discriminating against their employees "with respect to [their] compensation, terms, conditions, or privileges of employment" on the basis of age. 29 U.S.C. § 623(a)(1). Similarly, Title VII makes it unlawful for employers to discriminate against their employees on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Discrimination claims under the ADEA and Title VII are analyzed in the same manner, and this Court will therefore analyze both claims together. *See Hutt v. AbbVie Products, L.L.C.*, 757 F.3d 687, 691 (7th Cir. 2014); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008).

A plaintiff may prove discrimination under the ADEA and Title VII through the direct or indirect methods of proof.[4] *Hutt*, 757 F.3d at 691 (citation

---

[4] The Supreme Court has held that to prevail under the ADEA, a plaintiff must show that age was the but-for cause of the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). Post-*Gross*, the Seventh Circuit continues to apply the direct and indirect methods when analyzing ADEA claims. *See Fleishman v. Continental Cas. Co.*, 698 F.3d 598, 604 (7th Cir.

omitted). A plaintiff may prevail under the direct method of proof either by presenting direct evidence of intentional discrimination or "by constructing a 'convincing mosaic' of circumstantial evidence that 'allows a jury to infer intentional discrimination by the decisionmaker.'" *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). If a plaintiff relies on circumstantial evidence, the evidence "must directly point to a discriminatory reason for the employer's action[.]" *Whitfield v. Int'l Truck & Engine Corp.*, 755 F.3d 438, 444 (7th Cir. 2014) (citation omitted). Circumstantial evidence that can form a convincing mosaic falls into three categories: (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence that similarly situated employees outside the protected class received better treatment; and (3) evidence that the employer offered a pretextual reason for an adverse employment action. *Hutt*, 757 F.3d at 691 (citation omitted). "Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the case) to support a

---

2012) ("we have continued to apply the *McDonnell Douglas* burden-shifting framework in summary judgment cases that proceed under the indirect method of proof, a question *Gross* explicitly left open"); *Hnizdor v. Pyramid Mouldings, Inc.*, 413 F. App'x 915, 917-18 (7th Cir. Mar. 1, 2011); *Mach v. Will Cnty. Sheriff*, 580 F.3d 495, 498-99 (7th Cir. 2009) (applying the direct method of proof); *see also Yee v. UBS O'Connor, L.L.C.*, No. 07 C 7150, 2010 WL 1640192, at *17 (N.D. Ill. April 22, 2010) ("*Gross* did not equate the burden of proof in an ADEA case with the method of presenting that proof.").

judgment for the plaintiff; or they can be used together." *Troupe*, 20 F.3d at 736.

A plaintiff that has failed to establish discriminatory intent under the direct method may nonetheless prevail under the indirect method of proof—the burden-shifting approach first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 915 (7th Cir. 2007). Under the indirect method of proof, a plaintiff must first establish a *prima facie* case of discrimination, showing that: (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she suffered an adverse employment action; and (4) the defendant treated similarly situated employees outside of the protected class more favorably. *Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 841 (7th Cir. 2014). Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason" for its actions. *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 979 (7th Cir. 2014) (citation omitted). If the defendant satisfies its burden, the burden returns to the plaintiff to show that the defendant's proffered reason is a pretext for discrimination. *Id.* (citation omitted).

The Seventh Circuit has found that the second and third categories of circumstantial evidence under the direct method (the similarly situated inquiry and pretext inquiry) are similar to the required elements under the indirect method, and thus the Court's "analyses overlap." *Coleman v. Donahoe*, 667 F.3d 835, 860 n.8 (7th Cir. 2012) (quoting *Egonmwan v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 845, 851 (7th Cir. 2010));

see also Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 490-91 (7th Cir. 2007) (explaining that the indirect method "involves a subset of circumstantial evidence (including the disparate treatment of similarly situated employees) that conforms to the prescription of [*McDonnell Douglas*]"); *Venturelli v. ARC Cmty. Servs., Inc.*, 350 F.3d 592, 601 (7th Cir. 2003) (explaining that the pretext category of circumstantial evidence under the direct method "is substantially the same as the evidence required under the indirect method" (internal quotation marks and citation omitted)). Ultimately, under either method, "the fundamental question at the summary judgment stage is simply whether a reasonable jury could find prohibited discrimination." *Bass*, 746 F.3d at 840; *see also Perez v. Thorntons, Inc.*, 731 F.3d 699, 703 (7th Cir. 2013).

Plaintiff seeks to avoid summary judgment on her discrimination claims via the direct method of proof by supplying circumstantial evidence. (R. 88, Pl.'s Mem. at 2-7.) Specifically, she argues that the facts give rise to an inference that Defendants' reasons for not promoting her are pretextual. (*Id.*) In order to successfully prove pretext, a plaintiff must put forth evidence demonstrating that "the employer's nondiscriminatory reason was dishonest" and that "the employer's true reason was based on a discriminatory intent." *Perez v. Illinois*, 488 F.3d 773, 777 (7th Cir. 2007) (citation omitted). A plaintiff "must show that the employer's reason is not credible or that the reason is factually baseless." *Id.*; *see also U.S. E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960 (7th Cir. 2006) (a plaintiff can establish pretext "by presenting evidence that the employer's explanation was contrary to the facts, insufficient to justify the action or not truly the

employer's motivation" (citation omitted)). A plaintiff fails to demonstrate pretext if the evidence shows that "the employer honestly believed the reasons it has offered[.]" *Coleman*, 667 F.3d at 852 (citation omitted). "It is not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on its employee. Rather, the only question is whether the employer's proferred reason was pretextual, meaning that it was a lie." *Id*. (citation omitted); *see also Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir. 1998) (the court's "job is to determine whether the employer gave an honest explanation of its behavior[,]" and not to "sit as a super-personnel department that reexamines an entity's business decisions" (citation and internal quotation marks omitted)).

NHS provides three reasons for not selecting Plaintiff for the promotion to the Counselor position: (1) Plaintiff's pattern of tardiness; (2) her disrespectful communication style; and (3) her lower production numbers in comparison to Simmons'. (R. 96, NHS's Reply at 5.) The Court will address whether each of NHS's reasons is pretextual in turn.

A. Whether Plaintiff's tardiness is a pretextual reason for not promoting her

NHS's first reason for not promoting Plaintiff is that she was consistently tardy. (*Id*. at 5-7.) Evans first met with Plaintiff in December 2010 to address Plaintiff's attendance issues after Plaintiff had been tardy to work on several occasions. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 14.) In April 2011, Glenn and Anderson met with Plaintiff after she had been tardy seven times in two months and reiterated NHS's

expectations regarding attendance. (*Id*. ¶¶15-17.) Plaintiff was then tardy eight more times between April 2011 and October 2011. (*Id.* ¶18.) Consequently, Glenn met with Plaintiff again in October 2011 to remind Plaintiff of NHS's attendance policy and inform her that she would receive a written warning if her attendance issues continued. (*Id.* ¶¶ 19-20.)

Plaintiff admits that she had an attendance problem until April 2011, and admits that excluding the three days she was late with Glenn's prior approval, she was tardy five days between April 2011 and February 2012. (R. 88, Pl.'s Mem. at 3.) Even though Plaintiff characterizes her pattern of tardiness as "relatively minimal," she concedes that her tardiness alone would have been a sufficient reason for NHS to deny her the promotion. (*Id.*) Plaintiff offers no evidence to suggest that NHS's concerns over her attendance were factually baseless or dishonest. Instead, Plaintiff argues that the pretextual nature of NHS's additional proffered reasons undermines the legitimacy of its argument regarding her attendance. (*Id*.) However, to defeat summary judgment, Plaintiff must show that all of NHS's proffered reasons are pretextual. *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 754 (7th Cir. 2006) (where the defendant offers several nondiscriminatory reasons, the plaintiff must "establish that each of the defendants' reasons is pretextual" (citation omitted)); *Mills v. Health Care Servs. Corp.*, 171 F.3d 450, 459 (7th Cir. 1999) ("Because the defendant offered multiple reasons for its decision, [plaintiff] must show that all were pretextual in order to reverse . . . summary judgment." (citation omitted)). Plaintiff has offered no evidence from which a reasonable fact finder could conclude that NHS's

decision not to promote her based on her attendance issues was pretextual. Accordingly, the Court finds that Plaintiff has failed to establish her discrimination claims under either method of proof. Therefore, Plaintiff's claims fail as a matter of law. For the sake of completeness, however, the Court will analyze whether Plaintiff has demonstrated that NHS's other two reasons for not promoting her are pretextual.

B. Whether Plaintiff's disrespectful communication style is a pretextual reason for not promoting her

NHS's second reason for not promoting Plaintiff is its concern with her communication skills. (R. 96, NHS's Reply at 5.) NHS provides four examples of instances where it believes that Plaintiff exhibited a confrontational attitude. (*Id*. at 7-8.) The first instance occurred during a December 2010 meeting, in which Plaintiff told Glenn that she "really didn't want to hear any more about the action plan [the topic of the meeting] until they figured out how to really do it." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.) The second instance occurred during a January 2011 meeting about their production goals, in which Plaintiff told Evans that she was not concerned about the production goals for the Counselors because the Intake Specialists' production numbers were good. (*Id*.) The third instance occurred during a February 2011 conversation between Plaintiff and Evans, in which they debated what to do with old client files. (*Id*.) The fourth instance occurred during a June 2011 conversation, in which Glenn denied Plaintiff her requested time off. (*Id*.)

Plaintiff does not dispute that all these instances occurred. (R. 88, Pl.'s Mem. at 3-5.) Rather, Plaintiff

disagrees with Defendants' characterization of her attitude in each of these instances as being disrespectful or confrontational. (*Id*.) As to the February 2011 instance in particular, Plaintiff argues that it was "a normal discussion between manager and employee over how something should be done" that got "blown up into a confrontation, perhaps because Evans realized she should not be deleting files." (*Id*. at 5.) However, the question is not whether Plaintiff's attitude was actually disrespectful or confrontational, but rather whether NHS honestly believed that she was disrespectful. *See Coleman*, 667 F.3d at 852; *Holshouser v. Abbott Labs.*, 31 F. Supp. 3d 964, 971-72 (N.D. Ill. 2014) ("It is well-settled in this Circuit and others that, where an employer honestly believes the reasons provided for a termination, a plaintiff cannot establish pretext, even if those reasons were wrongheaded in some manner."); *Strickert v. Wicker World Enters., Inc.*, No. 96 C 7955, 1998 WL 456546, at *7 (N.D. Ill. July 31, 1998) (key issue with regard to plaintiff's discrimination claim was "not simply whether [his] inappropriate behavior actually occurred, but whether [his employer] honestly believed that it occurred").

Plaintiff offers no evidence to demonstrate that Glenn and Evans did not honestly believe that Plaintiff was being disrespectful in these four instances. In fact, the evidence shows that Evans and Glenn did indeed think that Plaintiff acted inappropriately and communicated their concerns to Plaintiff. Immediately after the February 2011 incident, Evans and Plaintiff both met with Glenn, and Evans told Glenn that she believed that Plaintiff was challenging her authority. (R. 98, NHS's Rule 56.1 Resp. ¶ 11.) Plaintiff admits

that after this conversation, she understood that Evans believed that she had been insubordinate. (*Id*.) Glenn also met with Plaintiff in July 2011 to discuss all four instances. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 23.) At this meeting, Glenn informed Plaintiff that she did not feel that Plaintiff respected her as a supervisor and counseled Plaintiff on the need to improve her communication skills. (*Id*.) Glenn also warned Plaintiff of Ludwig's concern about her attitude. (*Id.* ¶ 24.) Glenn reiterated these concerns in Plaintiff's December 2011 performance review, reminding Plaintiff that she needed "to understand that attendance and being tactful in her communication is just as critical to her success as the other measures." (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) Glenn and Evans therefore communicated to Plaintiff their concems regarding her attitude well before Plaintiff applied for the Counselor position in February 2012. Plaintiff has presented no evidence from which a reasonable trier of fact could infer that NHS did not honestly believe that Plaintiff's communication issues made her unqualified for the Counselor position. Accordingly, the Court finds that Plaintiff is unable to demonstrate that NHS's decision not to promote Plaintiff because of her attitude was a pretext for age or sex discrimination. *See David v. Donahoe*, No. 11 C 3720, 2013 WL 676243, at *9-*10 (N.D. Ill. Feb. 25, 2013) (finding that plaintiff failed to establish pretext because she provided no evidence that defendant did not honestly believe that she falsified employee time entries or that demoting her for that belief was inappropriate); *Alexander v. Cit Tech. Fin. Servs., Inc*., 217 F. Supp. 2d 867, 890 (N.D. Ill. 2002) (finding that plaintiff failed to establish pretext because her "interpretations of incidents or her denials that they ever occurred do not address whether [her

employer] honestly believed that [she] was insubordinate and threatening").

C. Whether Simmons' superior performance as an Intake Specialist is a prextual reason for not promoting Plaintiff

NHS's third reason for not promoting Plaintiff is that it believed that Simmons was more qualified for the position based on his performance as an Intake Specialist. (R. 96, NHS's Reply at 11.) Simmons began working as an Intake Specialist at MHC in May 2011; his production numbers were recorded beginning September 2011. (R. 98, NHS's Rule 56.1 Resp. ¶ 16.) During the period of 2011 where both their production numbers were recorded, Simmons completed more files than Plaintiff in three of the four months. (*Id*.) Additionally, despite joining MHC in May, Simmons handled a total of 5,732 calls in 2011, whereas Plaintiff handled a total of 3,982 calls. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 34.)

Plaintiff argues that Defendants "cherry-picked production numbers in an effort to show that Simmons, during his relatively brief tenure, was better qualified." (R. 88, Pl.'s Mem. at 6.) Plaintiff asserts that she had the highest submission of completed files for the entire 2011 year, averaging 44 per month compared to Simmons' 41.75 per month. (*Id*.) However, as Fannie Mae points out, Plaintiff was the only Intake Specialist that worked the entire year. (R. 97, FM's Mem. at 4.) Comparing Plaintiff against Simmons for the period in 2011 that they both worked, Plaintiff averaged only 37 completed files per month against Simmons' 41.75. (*Id*.) Plaintiff also contends that Defendants' focus on phone

calls is "misplaced." (R. 88, Pl.'s Mem. at 7.) According to Plaintiff, from Simmons' initial hire in May 2011 through December 2011, he served half his time as an Administrative Assistant, answering incoming phone calls, and half his time as an Intake Specialist, reviewing documents and completing files for submission to Counselors. (R. 88, Pl.'s Mem. at 7.) Plaintiff asserts that this accounts for Simmons' high phone volume compared to herself and Hicks, who worked only as Intake Specialists and had limited receptionist responsibility. (*Id*.) However, Plaintiff provides no evidentiary support, other than her own affidavit, for the assertion that she and Simmons performed different duties. (R. 98, NHS' Rule 56.1 Resp. ¶ 18.)

Additionally, Plaintiff points to her December 2011 performance review to support her argument that she was qualified for the Counselor position. (R. 88, Pl.'s Mem. at 6.) In her review, Plaintiff received an overall Manager Appraisal Score of 3.9 out of a possible score of 5.0. (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) For the Core Factors of Achievement, Productivity/Time Management, and Accountability she received an Exceeds Performance Measure. (*Id*.) As to the Achievement factor, Glenn noted that Plaintiff "has played an [sic] significant role in our production relating to the number of files complete[d]" and that she "managed our intake files independently for the months of January and February." (*Id*.) Glenn also noted that from January 2011 to June 2011, Plaintiff's average number of completed files "exceeded her peers." (*Id*.)

Plaintiff argues that NHS's decision to promote Simmons based in part on his performance must be a lie because the evidence demonstrates that she was just as qualified for the position. (R. 88, Pl.'s Mem. at 7.) However, Plaintiff cannot establish pretext by simply arguing that NHS was mistaken about its assessment of her performance relative to Simmons' performance, or that NHS's decision was wrong. *See Coleman*, 667 F.3d at 852; *Green v. Nat'l Steel Corp., Midwest Div.*, 197 F.3d 894, 900 (7th Cir. 1999) ("It is 'a distraction' for [plaintiff] to argue about the accuracy of [defendant's] assessment of her involvement in the alleged behavior because that is not the determinative issue."). The Court "does not sit as a super personnel department to review an employer's business decisions." *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000). Plaintiff must prove that NHS's proffered reason "was a lie, and not merely a mistake," *id*., and Plaintiff has failed to meet her burden. She has offered no evidence to refute NHS's contention that Glenn and Coffey honestly believed after reviewing the production numbers that Simmons was more qualified for the position based on his performance. *See id*. ("[Plaintiff's] attack on the way [his employer] calculated his sales figures gets him nowhere as long as the company's reliance on those calculations was in good faith."). Therefore, Plaintiff has failed to provide sufficient evidence from which a reasonable fact finder can infer that NHS's decision to promote Simmons based on his performance was pretextual.

Accordingly, Plaintiff cannot establish that any of NHS's proffered reasons for not promoting her are pretext for age or sex discrimination. Plaintiff has thus

failed to prove her claims under either the direct or indirect method. The Court therefore concludes that Plaintiff's discrimination claims fail as a matter of law, and that Defendants are entitled to summary judgment on these claims.

II. Plaintiff's Retaliation Claims (Counts III and IV)

In Counts III and IV, Plaintiff alleges that Defendants retaliated against her in violation of the ADEA and Title VII for filing an internal complaint of discrimination with NHS's human resources department. (R. 46, Am. Compl. ¶¶ 66-70, 72-75.) As with discrimination claims, a plaintiff may establish retaliation claims by way of either the direct or indirect method. *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 657 (7th Cir. 2012) (citation omitted); *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 740 (7th Cir. 2011).[5] Here, Plaintiff seeks to prove her retaliation claims by way of the direct method. (R. 88, Pl.'s Mem. at 7.) To prevail using this method, Plaintiff must present evidence, direct or circumstantial, showing that: (1) she engaged in a statutorily protected activity; (2) she was subjected to an adverse employment action; and (3) a causal connection exists between the two. *Greengrass v. Int'l Monetary Sys.*

[5] The analysis for retaliation claims is the same under the ADEA and Title VII. *See Smith*, 674 F.3d at 657; *Silverman*, 637 F.3d at 740. The Court thus cites relevant case law interchangeably.

Ltd., 776 F.3d 481, 485 (7th Cir. 2015) (citation omitted).[6]

The parties do not dispute that Plaintiff engaged in a protected activity when she filed an internal complaint with Anderson on February 27, 2012. (R. 82, NHS's Mem. at 13; R. 88, Pl.'s Mem. at 8.) As to the second element, Plaintiff alleges that she suffered two adverse employment actions in retaliation for filing her internal complaint: (1) Defendants removed her from her position at MHC on March 6, 2012; and (2) NHS constructively discharged her. (R. 88, Pl.'s Mem. at 8, 14-15.) NHS concedes that Plaintiff's removal from her position at MHC was an adverse employment action. (R. 96, NHS's Reply at 15.) However, NHS disputes that Plaintiff was constructively discharged. (*Id.*) NHS argues that Plaintiff voluntarily resigned and that her voluntary resignation does not constitute an adverse employment action "separate and apart from NHS' decision to remove her from the MHC." (*Id.*)

"The term 'constructive discharge' refers to the situation in which an employer, without firing an employee, makes his working conditions so miserable that it drives him to quit." *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 655 (7th Cir. 2000). To prove constructive discharge, a plaintiff must show that her

---

[6] To establish a *prima facie* case of retaliation under the indirect method, Plaintiff must satisfy the first two elements of the direct method and further show that: (1) she was meeting the employer's legitimate expectations; and (2) she was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity. *Ripberger v. Corizon, Inc.*, 773 F.3d 871, 883 (7th Cir. 2014). Plaintiff does not offer any evidence to prove retaliation via the indirect method.

"working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would be forced into involuntary resignation." *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir. 2000). "Working conditions for constructive discharge must be even more egregious than the high standard for hostile work environment[.]" *Id*. "[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997).

Plaintiff argues that she was constructively discharged because the administrative position NHS offered her would have resulted in a 25 percent pay reduction that she could not afford and represented a "lack of further career advancement." (R. 88, Pl.'s Mem. at 15.) Plaintiff contends that her situation is similar to that of the plaintiff in *Hunt*. (*Id*.) In that case, a white male police officer claimed that he was constructively discharged because he was forced to resign after being told by the predominantly black municipal administration that he had no future in the police department. *Hunt*, 219 F.3d at 652. The Seventh Circuit reversed the district court's grant of summary judgment on this claim, holding that "[a] person who is told repeatedly that he is not wanted, has no future, and can't count on ever getting another raise would not be acting unreasonably if he decided that to remain with this employer would necessarily be inconsistent with even a minimal sense of self-respect, and therefore intolerable." *Id*. at 655. The Court finds the present case distinguishable from *Hunt*. Unlike the police officer in *Hunt*, Plaintiff was never told that she had no future at NHS. Plaintiff has presented no

evidence to suggest that if she accepted the available administrative position, she would not subsequently have the opportunity to move into a different, higher paying position at NHS. While the Court recognizes that accepting the administrative position was not preferable to Plaintiff because of the reduction in pay and the increased travel expenses, her situation does not rise to the level of being intolerable. *See Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 877 (7th Cir. 1999) (providing examples of intolerable working conditions, such as "a work environment where a subordinate's disputed sexual relationship with her supervisor led to a suicide attempt"). The Court therefore finds that Plaintiff has not proven that she was constructively discharged. Plaintiff understood that by declining NHS's offer of the administrative position, she was voluntarily resigning her employment with NHS. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 77.) "In the absence of circumstances suggesting a constructive discharge, an employee who voluntarily resigns cannot be said to have experienced an adverse employment action." *Andrews v. CBOCS W., Inc.*, 743 F.3d 230, 235 (7th Cir. 2014). Accordingly, the Court finds that the only adverse employment action Plaintiff suffered was her removal from MHC.

To satisfy the third element of the direct method, Plaintiff must show that there was a causal link between her internal complaint and her removal from MHC. *See Greengrass*, 776 F.3d at 485. To establish a causal link, a plaintiff must establish that her internal complaint was the "but-for cause" of an adverse employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013); *see also Greengrass*, 776 F.3d at 486 ("To demonstrate 'causal

link' between the protected activity and the adverse employment action, a plaintiff must show the defendant would not have taken the adverse action but for her protected activity." (citation and internal alterations and quotation marks omitted)). In other words, to survive summary judgment, a plaintiff needs to provide enough direct or circumstantial evidence to allow a jury to conclude that she suffered an adverse employment action because of her statutorily protected activity. *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 643 (7th Cir. 2013); *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709 (7th Cir. 2011).

As an initial matter, Defendants argue that Plaintiff cannot prove a causal connection because there is no evidence that the individuals who made the decision to remove Plaintiff from MHC—Coffey and Glenn—had knowledge of her internal discrimination complaint at the time of that decision. (R. 96, NHS's Reply at 12-14; R. 97, FM's Reply at 6-7.) Plaintiff argues that there are fact questions as to whether Anderson informed others at NHS and Fannie Mae about Plaintiff's discrimination complaint. (R. 88, Pl.'s Mem. at 10-13.) Plaintiff contends that Anderson took notes during their meeting on February 27, 2012, and that Anderson later told Plaintiff that she created a file on her subsequent investigation of Plaintiff's discrimination complaint. (*Id*. at 11) Anderson explained to Plaintiff that she left this file in her office when her employment with NHS was terminated. (*Id*.) According to Plaintiff, this file would have confirmed whether Anderson informed anyone at NHS or Fannie Mae of Plaintiff's complaint during the course of investigating that complaint. (*Id*.) However, NHS failed to produce Anderson's notes and investigation file in

response to Plaintiff's discovery requests. (*Id*.) Plaintiff thus argues that "the missing notes and file creates an adverse inference and a fact question" as to Defendants' claimed ignorance of the discrimination complaint. (*Id*.) NHS counters that after conducting an exhaustive search, it produced all documents responsive to Plaintiff's discovery requests. (R. 98, NHS's Rule 56.1. Resp. ¶ 28.) NHS also correctly asserts that Plaintiff's testimony that Anderson told her that she created a file regarding her complaint is inadmissible hearsay. (R. 96, NHS's Reply at 13.) *See Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) ("hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial" (citation omitted)).

Even if the Court assumes that Anderson created a file, Plaintiff has provided no evidence that the file would include proof that Anderson informed Glenn, Coffey, or Green of Plaintiff's complaint. Plaintiff testified that she never complained about discrimination to any supervisor or manager at NHS aside from Anderson, and that she had no personal knowledge that Anderson actually informed anyone about her complaint. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶¶ 58-59.) Anderson attests in her affidavit that she never informed Glenn, Coffey, or any other employee of NHS or Fannie Mae that Plaintiff had alleged that the promotion decision was discriminatory, or that Plaintiff had an appointment with the EEOC. (R. 83-5, Ex. D, Anderson Aff. ¶¶ 6-7.) Additionally, Glenn, Coffey, and Green all attest in their affidavits that they were not informed by anyone at any time during Plaintiff's employment that she had complained of discrimination and made an EEOC appointment.

(83-1, Ex. A, Coffey Aff. ¶ 13; R. 83-4, Ex. C, Glenn Aff. ¶¶ 15-16; R. 83-6, Ex. E, Green Aff. ¶ 12.) Plaintiff has not refuted this testimony with any evidence. Thus, Plaintiff's argument that Glenn and Coffey must have known about Plaintiff's internal complaint is based solely on speculation. While the Court construes the facts in favor of the nonmoving party on summary judgement, that favor "does not extend to drawing inferences that are supported by only speculation or conjecture." *Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012) (citation and internal alterations and quotation marks omitted). The Court therefore finds that Plaintiff has not provided sufficient evidence to create a genuine factual dispute as to Coffey's and Glenn's ignorance of Plaintiff's internal complaint. *See Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1108 (7th Cir. 2012) (affirming grant of summary judgment on plaintiffs' retaliation claim because "plaintiffs' argument for retaliatory animus relie[d] entirely on speculation" and "[n]o affirmative evidence suggest[ed] that the decision-makers were even *aware* of the plaintiffs' discrimination complaints before they denied the transfers, much less that they did so intending to retaliate against the plaintiffs"); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1121-22 (7th Cir. 2009) (finding that plaintiff's retaliation claim failed because he presented no evidence that his supervisor was aware of his EEOC charges at the time of his suspension and thus he could not establish a causal link).

Regardless, even if the Court assumes that Coffey and Glenn knew about Plaintiff's internal complaint, Plaintiff must still prove that they removed her from her position at MHC because she filed the internal

complaint. *See Hobgood*, 731 F.3d at 643; *Brown*, 700 F.3d at 1108 ("the plaintiffs must produce evidence that a retaliatory motive *actually* influenced the decision-maker, not merely that it *could* have"). Plaintiff attempts to establish this casual connection by providing circumstantial evidence of suspicious timing and pretext. (R. 88, Pl.'s Mem. at 7-10.) First, Plaintiff argues that because her removal from MHC came just eight days after she filed her internal complaint, the Court should infer a causal link between the two events. (R. 88, Pl.'s Mem. at 8.) "[T]emporal proximity between an employee's protected activity and an adverse employment action is rarely sufficient to show that the former caused the latter." *Coleman*, 667 F.3d at 860 (citation omitted). "When temporal proximity is one among several tiles in an evidentiary mosaic depicting retaliatory motive, however, suspicious timing can sometimes raise an inference of a causal connection." *Id*. (citation and internal alterations and quotation marks omitted); *see also Lang v. Ill. Dep't of Children and Family Servs.*, 361 F.3d 416, 419 (7th Cir. 2004) ("Close temporal proximity provides evidence of causation and may permit a plaintiff to survive summary judgment provided that there is also other evidence that supports the inference of a causal link." (internal citation omitted)).

Plaintiff also argues that there is evidence that NHS's purported reason for her removal is pretextual. (R. 88, Pl.'s Mem. at 8.) According to Plaintiff Coffey and Glenn removed her from MHC because of her February 7, 2012 e-mail to Ludwig. (*Id*.) Plaintiff contends that this purported reason is pretextual because she was never reprimanded for sending the e-mail and her Career Progression Plan did not include

the e-mail as a specific example of improper communication. (*Id*. at 8-9.) In Plaintiff's opinion, the e-mail was "a minor issue," and Coffey only "developed a renewed interest" in the e-mail after NHS had already decided to remove her from MHC. (*Id*. at 9-10.)

Plaintiff incorrectly assumes that NHS's purported reason for her removal from MHC was her e-mail to Ludwig. Both Coffey and Glenn attest in their affidavits that they removed Plaintiff because of concerns regarding her performance and attitude that were raised by Green, Glenn, and other Fannie Mae personnel. (R. 83-1, Ex. A, Coffey Aff. ¶ 10; R. 83-4, Ex. C, Glenn Aff. ¶ 12.) They include Plaintiff's e-mail as one specific example for why they were concerned about Plaintiff's attitude, but they do not state that her e-mail was the sole basis for their decision. (R. 83-1, Ex. A, Coffey Aff. ¶ 10; R. 83-4, Ex. C, Glenn Aff. ¶ 12.) As explained above, Plaintiff has provided no evidence to suggest that Coffey and Glenn did not honestly believe that Plaintiff had communication issues. Nor has Plaintiff provided evidence that Coffey and Glenn did not honestly believe that Plaintiff's performance and attitude necessitated her removal from MHC. Further, while Plaintiff may believe that her e-mail to Ludwig was only "a minor issue," the evidence shows that Glenn was concerned about the e-mail. Glenn attests that she was concerned about the e-mail because she had specifically directed Plaintiff to bring any issues she had regarding Fannie Mae processes or procedures directly to her, rather than to raise them with Fannie Mae personnel. (R. 83-4, Ex. C, Glenn Aff. ¶ 10.) Glenn also attests that she discussed with Plaintiff why she believed the e-mail was inappropriate at their February 8, 2012 meeting. (*Id*. ¶ 11.) Plaintiff

admitted in her deposition that during that meeting, Glenn appeared to be "unhappy" about the e-mail. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 48.)

Finally, the fact that Plaintiff's Career Progression Plan did not mention the e-mail is of no consequence. Glenn submitted the final draft of Plaintiff's Career Progression Plan to Anderson on the same day Plaintiff filed her internal complaint. (R. 98, NHS's Rule 56.1 Resp. ¶ 22.) The Career Progression Plan outlined Plaintiff's current status regarding her areas for improvement in attendance and communication. (R. 89-4, Ex. 4, Finalized Career Progression Plan at 2-4.) The Plan noted that Plaintiff struggled with her communication skills, providing her June 2011 encounter with Glenn regarding her requested time off as one example. (*Id*. at 3.) The Plan recommended that Plaintiff focus on "conflict management" and on approaching others "in a tactful manner." (*Id*. at 4.) The Plan thus further confirms that Glenn was concerned about Plaintiff's attitude before Plaintiff filed her internal complaint. The Court therefore cannot find that the Plan is evidence that Glenn's and Coffey's decision to remove her from MHC based on her attitude is pretextual.

Accordingly, Plaintiff has not provided sufficient circumstantial evidence to allow a reasonable jury to conclude that NHS removed her from her position at MHC because she filed an internal complaint. Because Plaintiff has not established the causation requirement, her retaliation claims fail as a matter of

law. Therefore, the Court finds that Defendants are entitled to summary judgment on these claims.[7]

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (R. 80; R. 84) are GRANTED. The Clerk of the Court is directed to enter a final judgment in favor of Defendants Neighborhood Housing Services of Chicago and Fannie Mae.

ENTERED: **/s/ Rubén Castillo**
Chief Judge Rubén Castillo
United States District Court

Dated: September 10, 2015

---

[7] Fannie Mae also argues that it had no involvement in NHS's decision to select Simmons for the Counselor position or NHS's decision to remove Plaintiff from MHC, and thus it cannot be held liable under the ADEA or Title VII. (R. 86, FM's Mem. at 10, 13-14) Because the Court has found that Plaintiff failed to establish her discrimination and retaliation claims, the Court need not address the extent of Fannie Mae's liability.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 12 C 10150
Judge Ruben Castillo

[Filed September 10, 2015,
Entered September 14, 2015]

Charmaine Hamer,	)
Plaintiff(s),	)
	)
v.	)
	)
Neighborhood Housing Services of Chicago	)
Defendants(s).	)
	)

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐includes pre-judgment interest.
☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) Neighborhood Housing Services of Chicago and Fannie Mae and against plaintiff(s) Charmaine Hamer

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Ruben Castillo on a motion for summary judgment

Thomas G. Bruton. Clerk of Court
/s/ Ruth O'Shea
Ruth O'Shea, Deputy Clerk

Date: 9/10/2015

APPENDIX C

28 U.S.C. § 2107

§ 2107. Time for appeal to court of appeals

Effective: December 1, 2011

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

Fed. R. App. P. 4

Appeal as of Right--When Taken

[Text of subdivision (a) effective until December 1, 2016, absent contrary Congressional action.]

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district

clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise

prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when

the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after

the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

NO: 12 C 10150
Judge Ruben Castillo

[Filed October 8, 2015]

CHARMAINE HAMER,	)
Plaintiff,	)
	)
v.	)
	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO and FANNIE MAE,	)
Defendants.	)
	)

MOTION TO WITHDRAW AND TO EXTEND DEADLINE FOR FILING NOTICE OF APPEAL

Kevin James Caplis, of QUERREY & HARROW, LTD., appointed counsel for the Plaintiff, Charmaine Hamer, together with Thomas P. Carney, Jr. and Jason Callicoat, his co-counsel herein, move this court pursuant to Local Rule 83.17 for leave to withdraw as counsel for Plaintiff, and to extend the deadline for filing a Notice of Appeal pursuant to 28 USC 2107(c), and in support, states as follows:

1. Movant Kevin James Caplis of Querrey & Harrow, Ltd. was appointed by this Court's Order of

May 28, 2014 to represent Plaintiff herein. Movants Thomas P. Carney, Jr. and Jason Callicoat entered appearances as his co-counsel.

2. Movants seek leave to withdraw as counsel for Charmaine Hamer because they disagree as to how to proceed regarding the filing of an appeal in the above captioned matter, making further representation impossible.

2. Judgment was entered in this matter on September 14, 2015, such that any Notice of Appeal must be filed on or before October 14, 2015.

3. Movants request that this court extend the deadline to file any Notice of Appeal to December 14, 2015, pursuant to 28 USC 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued.

4. Movants informed Charmaine Hamer of this motion via email correspondence on October 6, 2015. When filed, a copy of this motion will also be sent to Charmaine Hamer at her residence address, via certified mail, return receipt requested.

WHEREFORE, Kevin James Caplis, Thomas P. Carney, Jr. and Jason Callicoat, of Querrey & Harrow, Ltd., request this Court enter an order granting them leave to withdraw their appearances on behalf of Plaintiff Charmaine Hamer, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,
Kevin James Caplis, Thomas P. Carney, Jr. Jason Callicoat
Querrey & Harrow, Ltd.

By: /s/Kevin James Caplis
Kevin James Caplis
Querrey & Harrow, Ltd.
175 W. Jackson Blvd., Ste. 1600
Chicago, Il 60604
312-540-7000
Atty. I.D. # 0396125

Kevin Caplis
Thomas P. Carney, Jr.
Jason Callicoat
QUERREY & HARROW, LTD.
Attorneys for Plaintiff
175 West Jackson Boulevard, #1600
Chicago, Illinois 60604
(312) 540-7000

[*Proof of Service Omitted in Printing of this Appendix*.]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No: 12 C 10150
Chief Judge Ruben Castillo

[Filed October 8, 2015]

Charmaine Hamer	)
	)
v.	)
	)
Neighborhood Housing Services	)
of Chicago and Fannie Mae,	)
	)

ORDER

Plaintiff's motion to withdraw and to extend deadline for filing notice of appeal [103] is granted. The motion hearing set for 10/14/2015 is stricken. Kevin James Caplis, Thomas P. Carney, Jr., and Jason Callicoat of Querrey & Harrow, Ltd. are granted leave to withdraw their appearances on behalf of the plaintiff. The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal.

Date: October 8, 2015

/s/ Chief Judge Ruben Castillo

APPENDIX F

IN THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No: 12 CV 10150
Judge Ruben Castillo

[Filed December 11, 2015]

CHARMAINE HAMER,
Plaintiff

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Defendant

Notice of Appeal

Notice is hereby given that (Plaintiff/Defendant) in the above captioned case, appeals to the United States Court of Appeals for the Seventh Circuit from the District Court's entry of judgment in favor of (Plaintiff/Defendant) on (Date).

Signature Charmaine Hamer
Name Charmaine Hamer
Address 9546 S. FOREST AVE, CHICAGO IL
Phone number 273-468-2943

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 15-3764

[Filed December 30, 2015]

CHARMAINE HAMER, Plaintiff-Appellant,	)
v.	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et al. Defendants-Appellees.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 12-cv-10150

The Honorable Judge Ruben Castillo

APPELLEES NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE'S JOINT CORRECTED DOCKETING STATEMENT

Defendants-Appellees Neighborhood Housing Services of Chicago ("NHS") and Fannie Mae, formally known as the Federal National Mortgage Association ("Fannie Mae"), by their counsel, hereby submit their

Joint Corrected Docketing Statement pursuant to Seventh Circuit Court Rules 3(c)(1) and 28(a).

1. District Court Jurisdiction

Plaintiff-Appellant, Charmaine Hamer, brought this action for damages against Defendant-Appellees NHS and Fannie Mae alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., as amended. The district court had jurisdiction over the claims pursuant to 28 U.S.C. § 1331. Defendant-Appellee NHS is a not-for-profit organization incorporated in Illinois, with its principal place of business in Illinois. Defendant-Appellee Fannie Mae is a federally-chartered, shareholder-owned, private corporation incorporated in Delaware, with its principal place of business in the District of Columbia.

2. Appellate Court Jurisdiction

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, in that on December 11, 2015, Plaintiff-Appellant filed a timely Notice of Appeal from a final judgment of the United States District Court for the Northern District of Illinois that disposed of all of Plaintiff-Appellant's claims against the Defendants-Appellees.

3. The Date of Entry of the Judgment Sought to be Reviewed

i. On September 10, 2015, the district court entered an order granting summary judgment to Defendants-Appellees and disposing of all Plaintiff-Appellant's claims against the Defendants-Appellees.

R. 100, 101. On September 10, 2015, the district court also entered final judgment against Plaintiff-Appellant. R. 102.

ii. No motion for a new trial or alteration of the judgment was filed. However, on October 8, 2015, appointed counsel for Plaintiff-Appellee filed a motion for leave to withdraw as counsel and to extend the deadline for Plaintiff-Appellee to file a Notice of Appeal pursuant to 28 U.S.C. § 2107(c). R. 103.

iii. On October 8, 2015, the district court entered an order granting Plaintiff- Appellee's motion, granting appointed counsel for Plaintiff-Appellee leave to withdraw their appearances, and extending the deadline for Plaintiff-Appellee to file a Notice of Appeal to December 14, 2015. R. 105.

iv. On December 11, 2015, Plaintiff-Appellant timely filed a Notice of Appeal, as well as a motion for permission to appeal in forma pauperis. R. 106, 107. The district court granted Plaintiff-Appellant's motion for permission to appeal in forma pauperis on December 15, 2015. R. 111.

v. This case is not a direct appeal from the decision of a magistrate judge.

Respectfully submitted,

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO,

By: /s/ Jeff Nowak
One of Its Attorneys

Jeff Nowak
jn@franczek.com
Gwendolyn B. Morales
gbm@franczek.com
Franczek Radelet PC
300 South Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 986-0300

Respectfully submitted,

FANNIE MAE,

By: /s/Daniel J. Fazio
One of Its Attorneys

Daniel John Fazio
dfazio@winston.com
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

Damien Stewart
damien_g_stewart@
fanniemae.com
Fannie Mae
3900 Wisconsin Avenue
Washington, D.C. 20016

Dated: December 30, 2015

[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX H

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 15-3764

[Filed December 31, 2015]

CHARMAINE HAMER,
Plaintiff-Appellant,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, and FANNIE MAE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:12-cv-10150

Ruben Castillo, Chief Judge.

December 31, 2015

By the Court:

ORDER

On consideration of "APPELLEES NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE'S JOINT CORRECTED DOCKETING STATEMENT" filed on December 30, 2015,

IT IS ORDERED that appellees file, on or before January 8, 2016, a brief memorandum, addressing the timeliness of this appeal.

Specifically, Fed. R. App. P. 4(a)(5)(C) states that no extension of time to appeal "may exceed 30 days after the prescribed time [to appeal]." In this case, the time to appeal expired on October 14, 2015, permitting the district court to extend the time to appeal until November 13, 2015, but no later. As such, it appears that the district court lacked the authority to extend the time to appeal beyond November 13, 2015.

APPENDIX I

No. 15-3764

In the United States Court of Appeals
for the Seventh Circuit

[Filed January 8, 2016]

CHARMAINE HAMER,
PLAINTIFF-APPELLANT,
v.
NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, THE HONORABLE JUDGE RUBEN CASTILLO
CASE NO. 12-CV-10150

APPELLEES' MEMORANDUM ADDRESSING TIMELINESS OF APPEAL

JEFF NOWAK
GWENDOLYN B.MORALES
Franczek Radelet PC
300 South Wacker Drive
Suite 3400
Chicago, Illinois 60606
(312) 986-0300

Counsel for Defendant-Appellee Neighborhood Housing Services of Chicago

DANIEL J. FAZIO
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

DAMIEN STEWART
Fannie Mae
3900 Wisconsin Avenue
Washington, D.C. 20016
(202) 752-7000

Counsel for Defendant-Appellee Fannie Mae

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix*.]

Appellees, Neighborhood Housing Services of Chicago and Fannie Mae, by and through their undersigned respective counsel of record, and pursuant to this Court's December 31, 2015 Order, hereby submit this Memorandum Addressing Timeliness of Appeal in the above-captioned appeal. Until receipt of this Court's December 31, 2015 Order, Appellees had not been aware of the potential timeliness issue created by the district court's October 8, 2015 Order (and appellant's subsequent apparent reliance upon that Order), which granted appellant Charmaine Hamer until December 14, 2015 to file a Notice of Appeal in apparent violation of Fed. R. App. P. 4(a)(5)(C). Upon receipt of this Court's December 31 Order, Appellees have subsequently reviewed the issue raised by this Court and present their findings here.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The underlying action concerns Hamer's allegations of sex and age discrimination under the federal employment discrimination laws. Hamer filed her original complaint, *pro se*, on December 19, 2012. (Dkt. 1.) The district court subsequently granted Hamer's motion for appointment of counsel. (Dkt. 6.) Plaintiff had a total of four different law firms appointed to represent her at various stages of the district court litigation. (Dkts. 6, 35, 68.)

Following the close of discovery, appellees filed separate motions for summary judgment on February 25, 2015. (Dkts. 80, 84.) Hamer opposed the motions. (Dkt. 88.) On September 14, 2015, the district court granted summary judgment in appellees' favor. (Dkt. 102.) Thus, pursuant to Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, Hamer's original deadline to file her Notice of Appeal was October 14, 2015.

On October 8, 2015, Hamer's court-appointed counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal." (Dkt. 103.) The motion requested that the district court "extend the deadline to file any Notice of Appeal to December 14, 2015, pursuant to 28 USC 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." (*Id*.) The district court granted the motion that day. The Order granting the motion, which was entered October 9, 2015, stated, *inter alia*, "The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal." (Dkt. 105.) Pursuant to 28 U.S.C. § 2107(c)

and Fed. R. App. P. 4(a)(5), the district court was permitted to grant Hamer an extension of time to file the Notice of Appeal; however, as this Court noted in its December 31, 2015 Order, in light of Fed. R. App. P. 4(a)(5)(C), the district court lacked the authority to extend the time to appeal beyond November 13, 2015.

Nevertheless, and apparently in reliance upon the district court's October 9 Order, Hamer filed her Notice of Appeal on December 11, 2015, within the timeframe permitted by the district court's Order, but outside the timeframe allowed by Fed. R. App. P. 4(a)(5)(C).

On December 31, 2015, this Court entered an Order, instructing appellees to file a brief addressing the timeliness of this appeal. This was the first time that Appellees became aware of the potential timeliness issue created by the district court's October 9 Order.

DISCUSSION

A. The Issue of the Timeliness of Hamer's Appeal Does Not Appear to Be Jurisdictional[1] According to the Law of this Circuit.

In *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984), this Court described as a "judge-made rule, especially well established in this circuit," that "if

---

[1] Appellees here use the term "jurisdictional" in the strict sense of the word. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (lamenting that the word "jurisdiction" has been used to convey "many, too many, meanings," and cautioning litigants to limit its use to describe requirements that "can never be forfeited or waived").

before the time for filing the notice of appeal has expired the district judge grants an extension of time for filing the notice beyond the limits set in Rule 4(a)(5), and the appellant relies on the extension, the notice of appeal is timely if filed within the extended time." *Id*. at 182–83 (citing *Textor v. Bd. of Regents*, 711 F.2d 1387, 1390–91 (7th Cir. 1983)). In *Bernstein*, the appellant had filed a motion for extension of time to file the Notice of Appeal in the district court shortly after entry of the appealable order. *Id*. at 182. In granting the motion, the district court erroneously extended the deadline to file the Notice of Appeal to relate to the district court's later ruling on a Rule 60(b) motion, which did not occur until months later, resulting in a violation of Rule 4(a)(5). *Id*. In ruling that the appeal could proceed, the Court noted:

> We interpret the district judge's order . . . as intended to set a new filing deadline of 30 days after the judge acted on the motion for reconsideration under Rule 60(b); and while this deadline was way past the longest extension that the judge was authorized to give Bernstein, under our rule the appeal, which was filed before the new deadline, was timely.

Id. at 183.

Bernstein and its brethren were, if not overruled, at least largely abrogated by the Supreme Court in *Bowles v. Russell*, 551 U.S. 205 (2007).[2] In *Bowles*, the

---

[2] Appellees have located no Seventh Circuit decision since *Bowles* citing to *Bernstein* on the issues presented in this brief. Further, *Bernstein* relied upon *Textor v. Board of Regents*, 711 F.2d 1387 (7th Cir. 1983), which in turn relied on the "narrow exception" it

issue presented was "whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order." *Id*. at 206. There, following entry of final judgment and the expiration of the ordinary 30-day deadline to file a notice of appeal, Bowles moved the district court to reopen the period during which he could file his notice of appeal pursuant to Fed. R. App. P. 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. *Id*. at 207. The district court granted Bowles' motion, but rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the district court "inexplicably" gave Bowles 17 days to file his notice of appeal. *Id*. Bowles filed his notice of appeal within the 17 days allowed by the district court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). *Id*. The Supreme Court held that Bowles's untimely notice of appeal—though filed in reliance upon the district court's order—deprived the appellate court of jurisdiction. *Id*. at 209–13.

Central to the Court's holding that the deadline was jurisdictional, however, was the fact that it had a statutory basis:

> Like the initial 30–day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute,

---

found in *Thompson v. INS,* 375 U.S. 384 (1964) (per curiam). As discussed, *infra*, at Section C, the exception found in *Thompson* was, if not entirely, at least largely overruled in *Bowles*.

> 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations.

Id. at 213 (internal citations omitted).

In the instant appeal, as in *Bowles*, the district court entered an order granting appellant a longer extension of her deadline to file her notice of appeal than was allowed by 4(a). And, here, as in *Bowles*, appellant filed her notice of appeal within the timeframe allowed by the district court's order, but outside the deadline set forth in 4(a). However, and perhaps critically, here, unlike in *Bowles*, the underlying deadline at issue does not appear to derive from a statute. Rather, 28 U.S.C. § 2107(c), merely requires that a motion to extend the time for appeal be filed "not later than 30 days after the expiration of the time otherwise set for bringing appeal." That requirement was satisfied here, when Hamer's counsel filed the motion for extension of time on October 8, 2015. The requirement of Fed. R. App. P. 4(a)(5)(C)—

that "[n]o extension . . . may exceed 30 days after the prescribed time"—does not appear in 28 U.S.C. § 2107(c); rather it appears to be purely a creature of the Federal Rules of Appellate Procedure.[3] The deadlines contained in Rule 4(a)(5)(C) are thus likely not jurisdictional under the reasoning of *Bowles*.[4]

Consistent with this reasoning, the Seventh Circuit has repeatedly held, since *Bowles*, that while appellate deadline requirements derived from statute (*e.g.*, 28 U.S.C. § 2107(c)) are jurisdictional, those that are purely a creation of the federal rules are not. For example:

- In *Asher v. Baxter International Inc.*, 505 F.3d 736 (7th Cir. 2007), this Court noted that *Bowles* "holds that statutory deadlines for appeal are jurisdictional, but read in conjunction with decisions such as *Eberhart v. United States*, 546 U.S. 12 (2005), holds out the possibility that deadlines in the federal rules are just claim-processing norms." *Id*. at 741.

---

[3] In *Youkelsone v. FDIC*, 660 F.3d 473 (D.C. Cir. 2011), the D.C. Circuit commented that "Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code." *Id*. at 475.

[4] Wright and Miller, on the question of whether Rule 4(a)(5)'s 30-day and 10-day deadlines are jurisdictional within the meaning of *Bowles*, note that "[t]here is a plausible argument that they are not: Bowles relied heavily on the fact that Rule 4(a)(6)'s 14-day limit was also set by statute, and (interestingly) Section 2107 does not contain the 30-day and 14-day limits set by Rule 4(a)(5)(C)." 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Catherine T. Struve, Fed. Prac. & Proc. Juris. § 3950.3 (4th ed. 2008) (citing *Youkelsone*, 660 F.3d at 475–76).

- In *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), this Court was more definitive regarding the statutory/non-statutory dichotomy, noting, "Statutory time limits for appeal can be jurisdictional, [citing *Bowles*], but time limits in the Rules of Appellate Procedure are not." *Id*. at 746.

- In *United States v. Neff*, 598 F.3d 320 (7th Cir. 2010), this Court applied the statutory/non-statutory dichotomy, finding that because Fed. R. App. P. 4(b)—prescribing the deadline to file a notice of appeal in a criminal case—did not have a statutory basis—it was not jurisdictional and was merely a claim-processing rule that could be forfeited. *Id*. at 323.

- In *1756 W. Lake Street LLC v. American Chartered Bank*, the issue was whether the notice of appeal satisfied the notice requirements of Fed. R. App. P. 3(c)(1)(A). 787 F.3d 383, 385 (7th Cir. 2015). In holding that it was, this Court cited *Bowles* in *dicta* for the proposition that "deadlines established by the federal rules, as distinct from deadlines established by statutes (such as 28 U.S.C. § 2107(c)), are not jurisdictional." *Id*.[5]

---

[5] The closest authority factually, since *Bowles*, that Appellees have been able to locate is outside this Circuit, but is consistent with the statutory/non-statutory dichotomy applied in this Circuit. In *Youkelsone v. FDIC*, 660 F.3d 473 (D.C. Cir. 2011), the appellant sought an extension of time with the district court to file her notice of appeal, and, as here, the district court errantly extended the deadline past the limit set forth in Rule 4(a)(5)(C). *Id*. at 475. As here, the appellant then filed her Notice of Appeal in conformity

Thus, although Appellees have been able to locate no Seventh Circuit decision since *Bowles* squarely addressing the precise factual scenario at issue here, it appears to be the law in this Circuit that the time limits found Fed. R. App. P. 4(a)(5)(C) are not jurisdictional because they lack a statutory basis.[6]

B. Even if Not Jurisdictional, the Requirements of Fed. R. App. P. 4(a)(5)(C) Appear to Be Mandatory; If So, They Must be Enforced, Unless Forfeited or Waived.

If the time limits found in Rule 4(a)(5)(C) are not jurisdictional, then they are considered "claim-processing rules." *See Union Pac. R.R. Co.,* 558 U.S. at 81–82 (noting dichotomy between rules that are properly considered jurisdictional and "claim-processing rules," which, although they may be "unalterable on a party's application," are subject to forfeiture "if the party asserting the rule waits too long to raise the point"); *see also Neff*, 598 F.3d at 322–23 (same). This Court has noted in the context of appeal-related deadlines that "[a] mandatory, though non-

---

with the district court's order, but outside the time limit established by the Rules. *Id*. The D.C. Circuit held that Rule 4(a)(5)(C) was not jurisdictional, because it lacked a statutory basis, and was thus a claim-processing rule. *Id.* at 475–76.

[6] For the sake of completeness, Appellees note that the Fourth Circuit, in an unpublished opinion, noted without analysis that the requirement of Fed. R. App. P. 4(a)(5)(C) is "mandatory and jurisdictional." *United States v. Hawkins*, 298 F. App'x 275, 275 (4th Cir. 2008). Assuming, *arguendo*, this is a correct statement of the law of the Fourth Circuit, this does not appear to be the law of the Seventh Circuit.

jurisdictional, [claim-processing] rule must be enforced if a party invokes its protection." *Peterson,* 729 F.3d at 746; *see also Asher*, 505 F.3d at 741 ("But jurisdictional or not, the [10-day] time limit [in Fed. R. Civ. P. 23(f)] is mandatory— which means that it must be enforced if the litigant that receives its benefit so insists.").

Here, the language of Rule 4(a)(5)(C) appears mandatory, as there is nothing in the language of that rule that appears to grant the district court the discretion or the authority to extend the deadline past the time limits it sets forth. Thus, dismissal here appears mandatory, unless waived or forfeited by Appellees. Appellees submit that they have not committed forfeiture or waiver here. *See Trepanier v. City of Blue Island*, 364 F. App'x 260, 261 (7th Cir. 2010) (untimeliness argument preserved when asserted before addressing merits of appeal). In light of this (and for the sake of preserving the issue), Appellees request dismissal of the appeal on timeliness grounds.

C. The Unique Circumstances Doctrine May Still Exist, But is Likely Inapplicable Here.

Prior to *Bowles*, courts, including the Seventh Circuit, occasionally relied upon the judicially-created "unique-circumstances doctrine" to relieve appellants of dismissal where, for example, as here, their failure to meet a deadline was caused by reliance upon an official statement by a judicial officer. The state of the unique-circumstances doctrine in this Circuit, as it existed before *Bowles*, was recently summarized by this Court as follows:

> [The doctrine] operated as "[a]n apparent exception to th[e] otherwise strict application of

the 30–day appeal period." *Reinsurance Co. of Am.*, 808 F.2d [1249,] at 1252. The doctrine was based on a sort of estoppel theory:

> [A] petitioner's justifiable and ultimately detrimental reliance on a district court ruling granting the petitioner an extension of time in which to appeal amount[s] to "unique circumstances" when the court of appeals later reversed the district court, leaving petitioner without recourse to either the expired 30–day time period or the extension of time the district court had granted.

Id.

More generally, "unique circumstances" for an extension of time would be found to exist "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 179 (1989); *see also Thompson v. INS,* 375 U.S. 384, 385–89 (1964) (per curiam) (finding that an assurance by the district court that a posttrial motion had been timely and thus extended the time for appeal was a "unique circumstance" allowing appeal to be heard even if the motion in truth had been untimely and would not have extended time for appeal); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217 (1962) (per curiam) ("In view of the obvious great hardship to a party who relies upon the trial judge's finding of

> 'excusable neglect' prior to the expiration of the 30–day period and then suffers reversal of the finding, it should be given great deference by the reviewing court.").
>
> Our circuit took a "narrow view" of this doctrine; we said it was "available *only* when there is a genuine ambiguity in the rules to begin with, and the court resolves that ambiguity in the direction of permitting additional time to appeal." *Props. Unlimited, Inc. Realtors v. Cendant Mobility Servs.,* 384 F.3d 917, 922 (7th Cir. 2004) (emphasis added). In that limited situation, the party relying on the judicial pronouncement had the equities on his side.

Satkar Hospitality, Inc. v. Fox Television Holdings, 767 F.3d 701, 707–08 (7th Cir. 2014) (alterations and emphasis in original).

Bowles purported to overrule the unique-circumstances doctrine (and the cases that created it—*Harris Truck Lines* and *Thompson*).[7] *Bowles*, 551 U.S. at 213–14. Indeed, this Court has referred to the doctrine as "defunct" and held that "the Supreme Court brought an end to the unique-circumstances doctrine in *Bowles*." *Satkar,* 767 F.3d at 707–08.

Nevertheless, *Bowles* arguably at least leaves open the possibility that the unique-circumstances doctrine survives, if only for violations of non-jurisdictional, claim-processing rules. In bringing an end to the doctrine, the Supreme Court held, "[W]e reject Bowles' reliance on the doctrine, and we overrule *Harris Truck*

---

[7] *See* note 2, *supra*.

Lines and *Thompson to the extent they purport to authorize an exception to a jurisdictional rule*." 551 U.S. at 214 (emphasis added). In other words, *Harris* and *Thompson* may survive to the extent they would authorize an exception to a non-jurisdictional, claim-processing rule.

Wright and Miller have described the state of the unique-circumstances doctrine as follows:

> If the district court grants the extension, the extension can run only until the later of 30 days from the original appeal deadline or 14 days after entry of the order granting the extension. If the district court purports to grant more time than that, the appellant should nonetheless make sure to file the notice of appeal within the time allowed by Rule 4(a)(5)(C), not within the purported longer deadline.
>
> A litigant who ignores this principle might try to rely on the doctrine of "unique circumstances," which has been applied where a would-be appellant that could have acted has failed to do so because it was misled by something the court has done. Such a strategy has sometimes worked in the past. But the continued viability of the "unique circumstances" doctrine is in considerable doubt; as will shortly be discussed, the doctrine has been overruled to the extent that it offered relief from jurisdictional deadlines. Four Justices have characterized the "unique circumstances" doctrine as having been "repudiated" by later cases, and five Justices have stated that the doctrine's validity has been "rightly questioned." The courts of appeals,

> which often express skepticism about whether the doctrine even survives, construe it extremely narrowly. The "unique circumstances" doctrine is, at best, on life support. In addition, assuming that the doctrine survives to some extent, it is presently unclear whether the doctrine would be available at all to an appellant who filed its notice of appeal outside the latest time permitted by Rule 4(a)(5)(C). A somewhat analogous circumstance was presented in Bowles v. Russell, where the district court purported to reopen the time for appeal to a date later than that permitted by Rule 4(a)(6) and Section 2107. Bowles' notice—filed within the time set by the district court but outside the time permitted by the rule and statute—was held untimely, and because the Supreme Court viewed Rule 4(a)(6)'s 14-day limit as a jurisdictional limit, it held the unique circumstances doctrine inapplicable. The question, for present purposes, is whether Rule 4(a)(5)'s 30-day and 10-day deadlines are jurisdictional within the meaning of Bowles. There is a plausible argument that they are not: Bowles relied heavily on the fact that Rule 4(a)(6)'s 14-day time limit was also set by statute, and (interestingly) Section 2107 does not contain the 30-day and 14-day limits set by Rule 4(a)(5)(C).

Charles Alan Wright, et al., *supra*, n.4 (citations omitted).

Even if the unique-circumstances doctrine does survive, however, it is likely not applicable here. As

noted above, in this Circuit the doctrine has traditionally been "available *only* when there is a genuine ambiguity in the rules to begin with, and the court resolves that ambiguity in the direction of permitting additional time to appeal." *Props. Unlimited, Inc. Realtors,* 384 F.3d at 922 (emphasis added). Here, there is arguably no ambiguity in Rule 4(a)(5)(C). Nevertheless, it is plausible that the unique-circumstances doctrine could be applied here, if this Court finds both (1) that the deadlines in Rule 4(a)(5)(C) are not jurisdictional, and (2) that there was "a genuine ambiguity in the rules to begin with, and the [district] court resolve[d] that ambiguity in the direction of permitting additional time to appeal." *Id*.

D. Hamer May Have An Argument that the Motion for Extension of Time Filed in the District Court Itself Served as the Functional Equivalent of a Notice of Appeal.

The final possibly extant argument for allowing Hamer's appeal to proceed that Appellees have been able to locate is that her motion for extension of time (which was filed within 30 days of the entry of final judgment) could be treated as the "functional equivalent" of a Notice of Appeal. This possibility was described by Wright and Miller, as follows:

> As an alternative to the unique-circumstances doctrine, a litigant might also argue that the Rule 4(a)(5) motion itself served as the functional equivalent of a notice of appeal; courts have sometimes, though not always, accepted such arguments. (An analogous argument, if made, might have saved Mr.

> Bowles' appeal, but there is no indication that the argument was presented to the Court.) In any event, no litigant should wish to find themselves in the position of having to argue these interesting questions; rather, litigants should make sure to file a notice of appeal within Rule 4(a)(5)(C)'s time limits even if the district court's order purports to authorize a filing outside those limits.

Charles Alan Wright, et al., *supra*, n.4 (citations omitted).

This Court has historically utilized the functional equivalent standard in circumstances similar to the instant appeal. In *Listenbee v. City of Milwaukee*, 976 F.2d 348 (7th Cir. 1992), this Court accepted a timely filed motion for extension as the "functional equivalent" of notice of appeal where, similarly to here, the district court had granted a longer extension than was permissible under Rule 4(a) and the appellant acted in apparent reliance upon that order. *Id*. at 350 (citing *Smith v. Barry*, 502 U.S. 244 (1992) (holding that "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.")).[8]

---

[8] It is unclear from the *Listenbee* opinion whether, as here, appellant's attorney requested the impermissibly long extension, or whether, by contrast, the error was solely that of the district court. It is also unclear from the opinion what the contents of the motion for extension were, *i.e.*, whether the motion stated a definitive intention to appeal, or whether, by contrast, the motion was equivocal as to whether the appellant would in fact appeal, as Hamer's was.

More recently, this Court accepted a potentially late-filed appeal using the "functional equivalent" standard. *See Abrahamson v. Ill. Dep't of Fin. and Prof'l Regulation*, 594 F. App'x 307, 310 (7th Cir. 2014). It bears noting, however, that in *Abrahamson*, this Court noted that the appellant's motion for extension of time in the district court "convey[ed] Abrahamson's intent to appeal the dismissal of his lawsuit." *Id*. Indeed, that was the case, as the appellant's motion for extension of time stated, *inter alia*, "The Plaintiff intends to appeal this Court's denial of his Motion to Reconsider." (*See* Exhibit A.) Here, by contrast, Hamer's motion for extension contained no such definitive statement of intent to appeal; rather, the motion purported to seek more time so that "new counsel for Charmaine Hamer [could] evaluate this Court's judgment and determine whether an appeal should be pursued." (Dkt. 103.)

Likewise, in *Michener v. United States*, 499 F. App'x 574 (7th Cir. 2012), this Court construed a *pro se* litigant's letter to the district court labeled "notice of my intent to appeal" as the functional equivalent of a notice of appeal. *Id*. at 577. This Court noted that "[p]articularly for a litigant proceeding pro se . . . that information was sufficient . . . because it apprised the court and parties of Michener's desire to appeal." *Id*. It bears noting, however, that here not only was Hamer's motion not a definitive statement of her intention to appeal, but Hamer was not proceeding *pro se* at the time she moved for extension in the district court, a factor this Court appeared to rely heavily upon in *Michener* and the cases cited therein.

CONCLUSION

In light of the foregoing, Appellees request that this Court dismiss Hamer's appeal as untimely. In the alternative, Appellees request that this Court allow Appellees to preserve the issue for further briefing during merits briefing.

Respectfully submitted,

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO,

By: /s/ Gwendolyn B. Morales (by permission)
One of Its Attorneys

FRANCZEK RADELET PC
Jeff Nowak
jn@franczek.com
Gwendolyn B. Morales
gbm@franczek.com
300 South Wacker Drive
Suite 3400
Chicago, IL 60606
(312) 986-0300

FANNIE MAE,

By: /s/Daniel J. Fazio
One of Its Attorneys

WINSTON & STRAWN LLP
Daniel J. Fazio
dfazio@winston.com
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

FANNIE MAE
Damien Stewart
(admission forthcoming)
damien_g_stewart@fanniemae.com
3900 Wisconsin Avenue
Washington, D.C. 20016

Dated: January 8, 2016

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

11-CV-2038

Judge Lee

[Filed March 26, 2013]

BRUCE ABRAHAMSON, M.D. Plaintiff,	)
v.	)
ILLINOIS DEPARTMENT OF FINANCIAL & PROFESSIONAL REGULATION, et al. Defendant.	)

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 4(A)(5)

NOW COMES the Plaintiff, Bruce Abrahamson, M.D., by and through his attorneys Brown, Udell, Pomerantz & Delrahim, Ltd., and moving for an extension of time to file his Notice of Appeal, states as follows:

1. This Honorable Court granted the Defendants' Motion to Dismiss[1] the Plaintiffs' Complaint[2] pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure ("FRCP") on July 10, 2012[3].

2. The Plaintiff filed a timely Motion to Alter or Amend the Court's July 10, 2012 ruling (the "Motion to Reconsider") pursuant to FRCP 59(e) on August 7, 2012[4].

3. In an Order dated February 26, 2013[5] (the "February 26 Order"), the Court denied the Plaintiff the relief he sought in his Motion to Reconsider.

4. Per Federal Rule of Appellate Procedure ("FRAP") 4(A)(1)(a), "In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

5. The Plaintiff intends to appeal this Court's denial of his Motion to Reconsider.

6. Per F.R.A.P. 4(A)(4)(a)(iv)-(v), if a party timely files in the district court either a motion to alter

---

[1] Doc.# 18, 19

[2] Doc.# 1

[3] Doc.# 32, 33

[4] Doc.# 34

[5] Doc.# 40

or amend the judgment or for a new trial (both under FRCP 59), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.

7. The Plaintiff's appeal of the February 26 Order is therefore due on March 28, 2013.

8. Per F.R.A.P. 4(A)(5)(a)(i)-(ii), the district court may extend the time to file a notice of appeal if a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

9. The instant Motion is brought before this Court before the expiration of 30 days from the Court's February 26 Order.

10. The Plaintiff's mother has recently been ill and attending to her needs has taken much of the Plaintiff's time before and since the February 26 Order. The Plaintiff, accordingly, has not had adequate time to discuss a possible appeal with counsel.

11. In addition, Plaintiffs' counsel is investigating possible avenues for an appeal and requires additional time to complete its research.

12. Good cause, therefore, exists to extend the deadline for the Plaintiff to file his notice of appeal.

13. The Defendants will not be prejudiced by the granting of an extension.

WHEREFORE, the Plaintiff prays this Honorable Court enter an order granting the Plaintiffs' motion for

an extension of time to file his Notice of Appeal by 30 days.

Respectfully submitted,

BRUCE ABRAHAMSON, M.D.

By: /s/ Jeffery R. Beck
One of his attorneys

Jeffery R. Beck
Brown, Udell, Pomerantz & Delrahim, Ltd.
1332 N. Halsted St., Suite 100
Chicago, IL 60642
312-475-9900 phone

[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX J

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 15-3764

[Filed February 3, 2016]

CHARMAINE HAMER,
Plaintiff-Appellant,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, and FANNIE MAE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:12-cv-10150

Ruben Castillo, Chief Judge.

February 3, 2016

By the Court:

O R D E R

On consideration of "APPELLEES' MEMORANDUM ADDRESSING TIMELINESS OF APPEAL" filed on January 8, 2016, and "APPELLANT'S RESPONSE TO APPELLEES' MEMORANDUM ON TIMELINESS OF THIS APPEAL" filed on February 1, 2016,

IT IS ORDERED that the issue of appellate jurisdiction is taken with the case. This appeal shall proceed to briefing. The briefing schedule is as follows:

1. The plaintiff-appellant shall file her brief and required short appendix on or before March 14, 2016.

2. The defendants-appellees shall file their joint brief on or before April 13, 2016.

3. The plaintiff-appellant shall file her reply brief, if any, on or before April 27, 2016.

IT IS FURTHER ORDERED that the parties fully address in their respective briefs the issue of appellate jurisdiction raised in the court's order of December 31, 2015.

NOTE: Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to cover. The language in the rule that "[t]he disk contain nothing more than the text of the brief..." means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the

word count should be omitted. The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.