No. _____

In The
Supreme Court of the United States

RICHARD DUANE BARTELS,

Petitioner,

v.

402 EAST BROUGHTON STREET, INC.
d/b/a SOUTHERN MOTORS ACURA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts are correct to apply this Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), to cases brought under the Family and Medical Leave Act of 1993 and require plaintiffs asserting claims for interference and retaliation in violation of that statute to prove but-for causation rather than the motivating factor causation.

2. Whether the regulations of the United States Department of Labor providing for a mixed motive or motivating factor standard to apply to claims brought under the Family and Medical Leave Act of 1993 are entitled to controlling deference under this Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

3. Whether Petitioner Richard Duane Bartels was erroneously denied a jury trial on his claims for interference and retaliation in violation of the Family and Medical Leave Act of 1993 when the lower courts explicitly found that the Respondent gave one rationale for his termination at the time he was terminated and offered a different rationale later, and he presented other substantial evidence that his request for leave was a motivating factor in the termination decision.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Richard Duane Bartels, Plaintiff and Petitioner;
2. 402 East Broughton Street, Inc., d/b/a Southern Motors Acura, Defendant and Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on March 7, 2017. App. 1-15. The Eleventh Circuit affirmed the decision of the United States District Court for the Southern District of Georgia issued on March 28, 2016, document number 67 in the District Court's docketed matter number 4:14-CV-00075-JRH-BKE (S.D. Ga.). App. 16-42. That decision is reported at 173 F. Supp. 3d 1349 (S.D. Ga. 2016).

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued an Order Denying Petitioner's Petition for Rehearing and Rehearing En Banc on May 3, 2017. App. 43-45. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interference and retaliation provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615(a)-(b), one of the implementing regulations for that statute promulgated by the United States Department of Labor, 29 C.F.R. § 825.220(c), and this Court's interpretation of the retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3.

29 U.S.C. § 2615

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 C.F.R. § 825.220(c)

The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. [. . .] By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* § 825.215.

42 U.S.C. § 2000e-3(a)

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The lower courts in this case erroneously required Petitioner Richard Duane Bartels to show that his request for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. ("FMLA"), was a "but-for" cause of the decision to terminate his employment, rather than one "motivating factor" in that decision, in order to survive summary judgment on his claims for interference and retaliation in violation of that statute. The decisions of the lower courts to require Mr. Bartels to satisfy the but-for causation standard not only deprived him of the jury trial to which he is entitled, but also evince the burgeoning split among the Circuits as to whether the but-for or motivating factor standards apply to FMLA claims.

The Circuit split regarding the proper causation standard for FMLA claims is a result of confusion as to whether this Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), which held that a plaintiff alleging retaliation in violation of Title VII of the Civil Rights Act of 1964 must show that his statutorily protected activity was a but-for cause of the adverse employment action, also applies to FMLA claims. But the split also implicates another question of fundamental importance for this Court: whether the regulation promulgated by the United States Department of Labor to implement the FMLA, which provides for the motivating factor standard to be applied to these claims, should be accorded controlling deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837

(1984). This Court must grant certiorari in this case to clarify the law and confirm that *Nassar* does not require plaintiffs asserting FMLA claims to satisfy the but-for standard, the regulation promulgated by the Department of Labor is entitled to *Chevron* deference, and Petitioner Bartels must be permitted to present his claims for violation of the FMLA to a jury.

Petitioner Bartels, a husband and father of a child with a rare genetic disease requiring continuous medical treatment, alleges that his former employer, Respondent 402 East Broughton Street, Inc. d/b/a Southern Motors Acura ("SMA"), interfered with his right to take leave under the FMLA to care for his wife and child and retaliated against him for requesting the same. He asserts that, after he took FMLA leave for his wife's prenatal appointments and told SMA he needed more FMLA leave in the future because of his child's condition, SMA unlawfully terminated his employment on the pretext of a customer complaint. Mr. Bartels presented substantial evidence that the complaint could not have motivated SMA's decision to fire him because he had excellent job performance and because SMA offered shifting reasons, tolerated worse misconduct from other employees, terminated other employees because of their need for medical leave, and the decisionmakers made contradictory statements at the time Mr. Bartels was fired.

The evidence presented by Mr. Bartels already established a genuine issue of material fact as to pretext, but an intervening decision of the Eleventh Circuit in *Quigg v. Thomas County School District* relieved Mr. Bartels of the burden of proving pretext to show that his FMLA leave was a motivating factor in the decision to terminate his employment. 814 F.3d 1227, 1237-38 (11th Cir. 2016).[1] However, the Eleventh Circuit refused to apply *Quigg* to correct the error of the District Court and allow Mr. Bartels to proceed to trial. App. 1.

This Court must grant certiorari and reverse the decision of the Eleventh Circuit because, in requiring Mr. Bartels to prove pretext to survive summary judgment on his FMLA claims, the Eleventh Circuit joined in error the other Circuits which require plaintiffs asserting FMLA claims to satisfy the but-for causation standard. This error is a misapplication of this Court's decision in *Nassar* but also a failure to accord *Chevron* deference to the Department of Labor's regulation implementing the interference and retaliation provisions of the FMLA, which provide for the motivating factor standard. Under the correct standard, Mr. Bartels has established a genuine issue of material fact as to whether his request for FMLA leave was a motivating factor in the decision to terminate his employment.

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[1] The decision in *Quigg* was actually issued on February 22, 2016, 814 F.3d 1227, which was after the parties submitted their briefing in the District Court below, District Court Docs. 40, 54, 62, 66, but before the District Court issued its erroneous decision granting summary judgment for SMA, App. 16.

A. Factual Background

SMA is an automotive dealership in Savannah, Georgia. App. 16. It is one of three dealerships in the Kaminsky Automotive Group, which is owned and operated by members of the Kaminsky family, including Myron Kaminsky and his two sons Adam and Ross. *Id.* Petitioner Bartels became employed with SMA as a wholesale parts salesman in 2004 and worked his way up over the years, earning promotions to service manager and then to service and parts director. App. 16-17. In 2011, he was promoted to general manager of SMA. *Id.* Mr. Bartels always exhibited excellent job performance as the general manager and was never disciplined or told that his job performance was lacking. App. 23. He was even featured in a print and video interview representing SMA. *See* Lanie Lippincott Peterson, On the Job: Duane Bartles, Savannah Morning News, Ga., Aug. 29, 2011, *available at* http://savannahnow.com/exchange/2011-08-29/job-duane-bartels (last visited July 25, 2017).

After he was promoted to general manager, Mr. Bartels reported to Myron, Ross, and Adam. App. 17. During this time, and in the months just before his termination, Mr. Bartels received documented praise from both Adam and Ross. *Id.* at 17-18. In the nine months preceding his termination, he oversaw the sale of sixteen more new Acura vehicles than the same period the year before. *Id.* at 17.

On October 12, 2012, Mr. Bartels attended a prenatal doctor's appointment with his pregnant wife. App. 18. He learned at that appointment that his unborn daughter's bones were developed "less than five percent and heavily curved." *Id.*[2] After he left the appointment, he informed Myron Kaminsky of this and the fact that he would be attending another appointment that same day. *Id.* Mr. Bartels attended several appointments over the next few days and informed Myron and his son Ross of his status after each appointment. *Id.* After one update on October 16, 2012, Ross sent Mr. Bartels a text message saying, "we all wish u beat [sic] of luck with baby. She will be in our prayers." *Id.*

On October 17, 2012, Mr. Bartels returned to work, but before he arrived, Ross telephoned him and said, "life goes on, we have a business to run, you need to get back to work." *Id.* at 19. That evening, Mr. Bartels attended a meeting for managers in the Kaminsky Automotive Group and received the "Top Manager" award for the month of October 2012. (District Court Doc. 56-17, 93:15-19; Doc. 56-18, p. 5; Doc. 56-19, 123:14-17, Doc. 56-20, p. 8.) After the meeting ended, Mr. Bartels met privately with Myron, Adam, and Ross. App. 19.

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[2] The specific condition that the daughter of Mr. Bartels has is called osteogenesis imperfecta type III. District Court Doc. 56-3, ¶ 3. It is a rare genetic disorder characterized by extremely fragile bones that break or fracture easily, often without apparent cause, and bone curvatures and malformations. *Id*. It may also be characterized by facial disfiguration, a bell shaped torso that causes the lungs not to develop properly or expand, and significant care issues. *Id*.

He informed them that: (1) his daughter's bones were heavily bowed and curved; (2) he would need time off in the future as a result; and (3) he did not know exactly when he would need the time because the test results would not be back for six weeks. *Id.*

Mr. Bartels was fired six days later on October 23, 2012. App. 21. He was called to a meeting with Adam and Myron and Adam said, "you're going to think we're the biggest shitbags in the world." *Id.* Adam said that the family had gotten together over the weekend and decided that Tuesday would be his last day. *Id.* Adam also said that Mr. Bartels had done nothing wrong and it was "purely a business decision" to let him go. *Id.* Myron said he knew what Mr. Bartels was going through because Adam's wife had a miscarriage once. *Id.* at 21-22. Myron also said during the meeting that they were going to give Mr. Bartels three months of severance pay to help get him through the situation. *Id.* at 22.[3]

After Mr. Bartels was fired, Ross submitted to the Georgia Department of Labor a separation notice with a list of the reasons why he was purportedly fired in order to contest his claim for unemployment insurance benefits. App. 22-23. These purported reasons included a failure to work well with others, failure to meet minimum production requirements for new vehicle sales, unauthorized use of the company credit card, overall

[3] Myron denied at deposition that he ever offered Mr. Bartels a severance package, but Mr. Bartels produced the proposed severance agreement and release of claims that Myron did in fact send to him. District Court Doc. 56-1, 8; Doc. 56-2.

poor attitude which created a hostile work environment, failure to properly account for sales incentives, and uncontrolled spending throughout SMA. App. 22-23. But Mr. Bartels had never been written up or disciplined for any of these purported performance problems or any others, nor was he ever told he was in danger of losing his job for any reason. *Id.* at 23.

During discovery in this litigation, Mr. Bartels propounded an interrogatory to SMA asking who decided to fire him and why. District Court Doc. 56-20, pp. 16-17. SMA responded that Myron received a complaint from a volunteer at a charity event hosted by SMA that Mr. Bartels used profanity and offended her, and he "thereafter consulted with Adam Kaminsky and Ross Kamsinky who indicated prior difficulties with Plaintiff's job performance (including lack of increased sales growth, improper reporting/handling of an incentive program[.)]" District Court Doc. 56-19, 144:9-145:25, Ex. 52; Doc. 56-20, pp. 16-17.[4] However, Myron changed course at his deposition and claimed that Mr. Bartels was fired only because of a complaint by a volunteer from the Historic Savannah Foundation and no other reason. App. 21.[5]

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[4] Ross Kaminsky signed a verification of this interrogatory response under Fed. R. Civ. P. 33(b) as a Vice-President of SMA, and confirmed under oath at his deposition that the reasons he gave to the Georgia Department of Labor were an accurate description of all the reasons why Mr. Bartels was fired. *See* District Court Doc. 56-19, 128:15-131:16, Ex. 54, 145:20-25.

[5] This was after Mr. Bartels had disproved through the depositions of Myron's sons and other company witnesses all of the purported legitimate non-retaliatory reasons for terminating Mr.

Two days after Mr. Bartels told the Kaminsky family about his unborn daughter's condition, he had apparently used profanity and upset the volunteer, and the director of the Historic Savannah Foundation called Myron to complain. App. 21. However, it was undisputed that Mr. Bartels immediately called the volunteer and apologized, as was the customary practice at SMA – to "eat crow" and smooth over any complaints. App. 21, 34; District Court Doc. 56-15, 169:17-20; Doc. 56-6, 107:3-18, 112:18-113:14, 114:1-6. Before Mr. Bartels was fired, Myron was told that the apology was made and he reacted positively. App. 21, 34.

As contrasted with the complaint against Mr. Bartels for using profanity on one occasion, Myron and his sons tolerated significantly worse misconduct from their other managers and did not fire them. For example, a manager named Dennis Purcell got into a public fistfight with another employee on the car lot, but was not fired or demoted. App. 35. Another manager named Jarred Pratt was known to abuse drugs, was routinely under the influence while on the job, and even lost consciousness in front of customers because of his drug abuse. *Id.*; District Court Doc. 56-4, ¶¶ 5-6. Myron was told on at least six occasions by the previous general manager of SMA that Pratt was high on drugs *while dealing with customers seeking to purchase vehicles*, but Myron never fired or even disciplined Pratt. District Court Doc. 56-4, ¶ 6. Another general manager

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Bartels that Ross originally submitted to the Georgia Department of Labor. *See* District Court. Doc. 54, pp. 22-23 (citations omitted).

named Mickey Rhinehart was put on probation for failing a drug and alcohol test, caused an accident while test driving the car of a customer, was counseled for not meeting sales requirements and making unauthorized purchases on the company credit card, and was written up for misconduct in 2012 and 2013. App. 35; District Court Doc. 56-21, 26:3-27:19, Ex. 29; Doc. 56-20, p. 5; Doc. 56-21, 38:8-21, 52:22-24, 55:14-23, Exs. 30, 31; Doc. 56-22, pp. 3-5, Ex. 28; Doc. 56-2, ¶ 5. Yet, Rhinehart was never fired, but like other poor performers, only demoted. (Doc. 56-17, 160:5-25.) Myron even admitted he was demoted for poor performance. (Doc. 56-15, 53:5-18.)

Finally, Mr. Bartels presented "me too" evidence that other SMA employees were fired because of their need for medical leave. App. 36-39. Myron instructed Mr. Bartels to fire an employee named Michael Johnson, who had a heart attack, because SMA "couldn't have a guy with heart issues" working at the dealership. District Court Doc. 56-4, ¶ 8. Another employee named Doug Thompson was fired after he took emergency leave to care for his wife who had cancer. District Court Doc. 56-5, ¶ 4. After he returned from the hospital to care for her, Rhinehart told him that he had been directed to fire Thompson. *Id.*

B. The District Court's Erroneous Decision Granting Summary Judgment to SMA

Mr. Bartels filed this lawsuit on April 4, 2014, alleging that SMA violated his rights under the FMLA when it terminated his employment in October 2012. District Court Doc. 1, ¶¶ 29-46. Specifically, he alleged that the termination of his employment shortly after he took FMLA leave for his wife's prenatal testing appointments and requested future FMLA leave because of his daughter's serious health condition constituted both unlawful interference with his FMLA rights and retaliation against him for exercising those rights. *Id.* On June 15, 2015, SMA filed an untimely motion for summary judgment nearly two months after the close of discovery in violation of the Court's Scheduling Order and the Local Rules, but the District Court denied a motion to strike filed by Mr. Bartels and considered the motion anyway. District Court Docs. 40, 42, 51. On March 28, 2016, the District Court granted summary judgment to SMA on all claims. App. 16.

The District Court correctly found that Mr. Bartels established his entitlement to leave and engaged in statutorily protected activity under the FMLA. App. 26-29. However, it erroneously failed to apply the correct burden of proof to SMA's affirmative defense to the FMLA interference claim, mistakenly applied the but-for causation standard to both the interference and retaliation claims, incorrectly excluded admissible evidence, and erroneously concluded that Mr. Bartels

failed to establish genuine issues of material fact precluding summary judgment on both his claims. App. 29-41. The District Court's plainest error was its explicit finding SMA gave Mr. Bartels one reason for his discharge at the termination meeting but offered a different one in litigation. *Id.* at 40. The District Court noted that this ordinarily permits a jury to conclude that the employer unlawfully retaliated. *Id.* Yet, it erroneously drew in favor of SMA, the moving party, the inference that "the initial termination explanation was indisputably given to further the feelings of sympathy that both Myron and Adam carried." *Id.* at 41. This alone requires reversal because it is the epitome of judicial factfinding which the summary judgment standard forbids. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (noting that the court must "disregard all evidence favorable to the moving party that the jury is not required to believe").

C. The Eleventh Circuit's Erroneous Affirmance of Summary Judgment in Favor of SMA

On appeal, the Eleventh Circuit erroneously affirmed the District Court's analysis in its entirety. App. 1-15. Indeed, it expressly affirmed the District Court's erroneous drawing of the inference of "sympathy" on the part of SMA. *See* App. 8. (stating that "[w]e recognize that the Kaminskys made statements expressing sympathy for Bartels and his personal situation"). But the Eleventh Circuit also ignored the fact that *Quigg* was an intervening decision that changed the standard

of proof for motivating factor cases like this one. App. 6. The Eleventh Circuit also erroneously stated that Mr. Bartels improperly raised the mixed motive or motivating factor standard for the first time on appeal. App. 11-12. But this is simply untrue because the parties clearly understood this case to involve the mixed motive or motivating factor standard from the start as shown by SMA's Answer, in which it asserted the "same decision" defense (District Court Doc. 9, pp. 1-2) (Third Affirmative Defense).[6] The parties never specifically argued whether FMLA claims are governed by the but-for standard or the motivating factor standard because *Quigg* was decided after they submitted their briefing,[7] and before *Quigg*, Mr. Bartels was required to prove pretext regardless of which causation standard applied. *See* 814 F.3d at 1237-38 (joining eight other circuits to hold that a plaintiff asserting claims

[6] The same decision defense applies only in mixed motive cases. *See Mora v. Jackson Mem. Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (citing *Gross v. FPL Fin. Srvcs., Inc.*, 557 U.S. 167 (2009) and holding that the same decision defense is not available where the plaintiff must establish but-for causality). Regardless, this Court explained in *Price Waterhouse v. Hopkins* that a case need not "be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning in the District Court[.]" 490 U.S. 228, 247 n.12 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, 105 Stat. 1075, § 107(a).

[7] *See* note 1, *supra*. But Mr. Bartels asserted the error, including the question of whether the Department of Labor's implementing regulation should be accorded deference, at his first opportunity on appeal and again on petition for rehearing.

to which the mixed motive or motivating factor standard applies need not prove pretext to survive summary judgment).

Apparently recognizing the unfairness of refusing to consider the impact of its intervening decision in *Quigg*,[8] the Eleventh Circuit compounded its error by holding, "as an alternative ground," that Mr. Bartels could not survive summary judgment on his FMLA claims even under the motivating factor standard because "there is no genuine dispute of material fact with respect to SMA's same-decision defense." App. 12.[9] Specifically, the Eleventh Circuit said, "the only reasonable conclusion supported by the record is that SMA would have terminated Bartels because of the [charity volunteer's complaint] regardless of whether Bartels indicated a need for FMLA leave." *Id.* Such a holding is so absurd in light of the record evidence that it amounts to a refusal to apply the motivating factor

[8] The Eleventh Circuit has consistently held that new issues are properly raised for the first time on appeal when there is an intervening change in the law. *See Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666 (11th Cir. 1984) (holding that a new argument was properly raised where it was based on a decision issued after the briefs were filed in the district court). This Court too has clearly held that new arguments are properly heard on appeal when there is an "intervening, substantial change in controlling law[.]" *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984); *see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (same).

[9] The Eleventh Circuit thus recognized that in this case Mr. Bartels *did* espouse a mixed motive theory of FMLA retaliation to which SMA asserted the same decision defense in its Answer. *See supra*, p. 14.

standard. Mr. Bartels clearly established a genuine issue of material fact as to whether, even if SMA was motivated to fire him because of the complaint, that decision was also motivated by his use of and request for FMLA leave.

REASONS FOR GRANTING THE PETITION

I. This Court Must Resolve the Split Among the Circuits as to Whether its Decision in *University of Texas Southwestern Medical Center v. Nassar* Applies to Claims Brought Under the FMLA

By requiring Mr. Bartels to prove pretext in order to survive summary judgment on his claims for interference and retaliation in violation of the FMLA, the Eleventh Circuit held that the but-for causation standard, rather than the mixed motive or motivating factor standard, applies to these claims. *Compare* App. 6 (holding that the *McDonnell Douglas* pretext analysis applied to the FMLA retaliation claim asserted by Mr. Bartels) *with Quigg*, 814 F.3d at 1236-40 (rejecting *McDonnell Douglas* and the requirement that a plaintiff prove pretext to establish a genuine issue of material fact as to whether an illegal reason was a motivating factor for an adverse employment action).[10]

[10] As noted above, the Eleventh Circuit erroneously suggested that *Quigg* did not apply here because Mr. Bartels did not assert a mixed motive theory of FMLA interference and retaliation even though the pleadings and briefing show otherwise. *See supra*, p. 14. The Eleventh Circuit and the Southern District of

The Circuit Courts are currently split, with some expressly undecided, on this critical question of whether *Nassar*[11] requires a plaintiff asserting claims under the FMLA to satisfy the stricter but-for causation standard or the more lenient motivating factor standard. *See Egan v. Delaware River Port Auth.*, 851 F.3d 263, 269-74 (3d Cir. 2017) (holding that *Nassar* does not impose the but-for causation standard in FMLA cases and that the mixed motive or motivating factor standard applies instead); *Woods v. START Treatment*

Georgia thus erred in refusing to apply *Quigg*, which required them to determine if Mr. Bartels established a genuine issue of material fact as to whether his FMLA leave was a motivating factor in the decision to terminate him even if he did not prove pretext. 814 F.3d at 1236. But they also erroneously required Mr. Bartels to satisfy the but-for causation standard for his FMLA interference claim, *see* App. 12-14, 29-30, when the Eleventh Circuit's precedent makes clear that no showing of intent is required for this claim, *see Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1293-94 (11th Cir. 2006) (citation omitted).

[11] In *Nassar*, this Court considered the question of whether the plaintiff asserting a claim for retaliation under Title VII of the Civil Rights Act of 1964 must prove that his statutorily protected activity was a but-for cause of the challenged adverse employment action. 131 S. Ct. at 2525-34. The Court noted that in 1991, Congress amended Title VII to expressly provide that an employee could prevail on a Title VII discrimination claim with proof that a protected characteristic was a "motivating factor for any [challenged] employment practice, even though other factors also motivated the practice." *Id.* at 2526 (citing § 107(a), 105 Stat. 1075). However, given that the section of Title VII providing for retaliation claims still used different language – requiring a plaintiff to show he suffered an adverse action "because" he engaged in protected activity – the plain language of the statute and the Court's other precedents required that the but-for causation standard applies to Title VII retaliation claims. *Id.* at 2528-34

& Recovery Centers, Inc., No. 16-1318-CV, ___ F.3d ___, 2017 WL 3044628, *7-8 (2d Cir. July 19, 2017) (holding that, despite *Nassar*, the motivating factor standard applies to FMLA retaliation claims); *Sharp v. Profit*, 674 Fed. Appx. 440, 451 (6th Cir. 2016) (holding that *Nassar* requires a plaintiff asserting an FMLA retaliation claim to prove but-for causation); *Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n.3 (7th Cir. 2014) (holding that, while *Nassar* requires a plaintiff asserting a Title VII retaliation claim to show but-for causation, a plaintiff asserting an FMLA retaliation claim need only show motivating factor causation); *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013) (expressly declining to decide "whether *Nassar*'s analytical approach applies to FMLA-retaliation claims and, if so, whether it requires a plaintiff to prove but-for causation").

Not unexpectedly, the Circuit split has produced a cacophony of results throughout the district courts across the country. *Compare, e.g.*, *Gourdeau v. City of Newton*, No. 13-12832-WGY, ___ F. Supp. 3d ___, 2017 WL 830395, *12 (D. Mass. Mar. 2, 2017) (holding that the but-for standard of *Nassar* applies to FMLA retaliation claims and ordering the jury to be instructed accordingly); *Gable v. Mack Trucks, Inc.*, 185 F. Supp. 3d 1055, 1060 (N.D. Ill. 2015) (holding that the but-for causation standard applies to FMLA retaliation claims); *Williams v. Johnson & Johnson, Inc.*, No. 2:13-CV-304-RMG, 2014 WL 5106890, *13 (D.S.C. Oct. 10, 2014) (same); *Brown v. Atrium Windows & Doors, Inc.*, No. 3:13-CV-4819-G, 2015 WL 1736982, *6 (N.D. Tex.

Apr. 16, 2015) (same); *Woida v. Genesys Reg'l Med. Ctr.*, 4 F. Supp. 3d 880, 901-06 (E.D. Mich. 2014) (granting summary judgment for the employer after finding that the plaintiff failed to establish pretext or but-for causation) *and Carroll v. Sanderson Farms, Inc.*, No. CIV.A. H-10-3108, 2014 WL 549380, *13 n.8 (S.D. Tex. Feb. 11, 2014) (suggesting that the but-for standard applies to a jury's consideration of causation for an FMLA retaliation claim but not to the court's analysis of the claim for purposes of summary judgment), *with Stewart v. Wells Fargo Bank, Nat'l Ass'n*, No. 5:15-CV-00988-MHH, 2017 WL 977412, *5 (N.D. Ala. Mar. 14, 2017) (applying the motivating factor standard to the plaintiff's FMLA retaliation claim and denying summary judgment for the employer); *Yeger v. Inst. of Culinary Educ., Inc.*, No. 14CV8202-LTS, 2017 WL 377936, *19 (S.D.N.Y. Jan. 25, 2017) (holding that the motivating factor standard applies to FMLA retaliation claims and denying summary judgment for the employer); *Matye v. City of New York*, No. 12-CV-5534 NGG VVP, 2015 WL 1476839, *17-20 (E.D.N.Y. Mar. 31, 2015) (rejecting the argument that *Nassar* requires a plaintiff asserting an FMLA retaliation claim to establish but-for causation and holding that the plaintiff established a genuine issue of material fact for trial as to whether her exercise of rights under the FMLA was a motivating factor for her discharge); *Simmons v. Hampton Univ.*, No. 4:13CV67, 2014 WL 12570935, *7-8 n.3 (E.D. Va. Nov. 18, 2014) (rejecting the argument that *Nassar* requires but-for causation for FMLA retaliation claims and denying summary judgment);

Kendall v. Walgreen Co., No. A-12-CV-847-AWA, 2014 WL 1513960, *7-8 (W.D. Tex. Apr. 16, 2014).[12]

This question of whether *Nassar* requires plaintiffs asserting claims under the FMLA to prove but-for or motivating factor causation is urgent not only because of the identified post-*Nassar* split among the Circuits, but also because nine of the Circuits have expressly relieved plaintiffs in cases involving the motivating factor standard from proving pretext at all. *See Quigg*, 814 F.3d at 1239 (holding that a plaintiff is not required to prove pretext to survive summary judgment on claims to which the motivating factor standard applies); *Holcomb v. Iona Coll.*, 521 F.3d 130, 137-38, 141-42 (2d Cir. 2008) (holding that a plaintiff alleging discrimination in violation of Title VII after the 1991 amendments "is not required to prove that the employer's stated reason was a pretext"); *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008) (noting that "the *McDonnell Douglas* burden-shifting framework does not apply in a mixed-motive case in the way it does in a pretext case because the issue in a

[12] There are even conflicts within the same judicial districts. *Compare, e.g.*, *Gourdeau*, 2017 WL 830395, *with Chase v. U.S. Postal Serv.*, 149 F. Supp. 3d 195, 210-11 (D. Mass. 2016) (holding that *Nassar* does not apply to FMLA retaliation claims); *Woida*, 4 F. Supp. 3d 901-06, *with Chaney v. Eberspaecher N. Am.*, 955 F. Supp. 2d 811, 813 n.1 (E.D. Mich. 2013) (holding that *Nassar* did not change the causation standard applicable to FMLA retaliation claims); *Gable*, 185 F. Supp. 3d at 1060, *with McLaren v. Coll.*, 194 F. Supp. 3d 743, 751 (N.D. Ill. 2016) (holding that a plaintiff may prevail on his FMLA retaliation claim by showing only that his leave was one motivating factor in the employer's decision).

mixed-motive case is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision"); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1225 (10th Cir. 2008) (holding that the plaintiff need only show pretext under the *McDonnell Douglas* framework if she is unable to offer direct evidence of discrimination); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007) (holding that a plaintiff asserting a claim to which the mixed motive or motivating factor standard applies need not prove pretext); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 862 (7th Cir. 2007) (identifying pretext as only one of three types of "circumstantial evidence [each of which] is sufficient in and of itself to support a judgment for the plaintiff" in an employment discrimination case); *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (holding that a plaintiff may survive summary judgment either by raising a genuine issue of material fact as to whether an impermissible fact motivated the employer's adverse employment decision *or* by proving pretext); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (holding that the plaintiff is not required to use the *McDonnell Douglas* framework but may instead "simply produce direct or circumstantial evidence demonstrating a discriminatory reason more likely than not" motivated the employer); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (holding that a plaintiff asserting a mixed motive or motivating factor claim can survive summary judgment with proof of pretext or that "the defendant's reason, while true, is only one of the reasons for its

conduct, and another 'motivating factor' is the plaintiff's protected characteristic"). As a result, this Court must grant certiorari to clarify whether the motivating factor standard applies to FMLA claims for the practical reason that the lower courts need guidance as to whether plaintiffs in these cases should be required to prove pretext.

II. This Court Must Determine Whether the Second and Third Circuits are Correct that the FMLA Regulation Promulgated by the United States Department of Labor is Entitled to *Chevron* Deference and the Motivating Factor Standard Applies to FMLA Claims

The Court must also grant certiorari in this case because the Circuit split regarding the proper causation standard for FMLA claims involves the important question of whether the regulation promulgated by the United States Department of Labor to implement the interference and retaliation provisions of the FMLA should be accorded deference under *Chevron Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Egan*, 851 F.3d at 269-74; *Woods*, 2017 WL 3044628, *6-9. The decisions of the Second and Third Circuits concluding that the implementing regulation in question, 29 C.F.R. § 825.220(c), should be accorded such deference are well considered and correct. This Court must grant certiorari not only because the Eleventh Circuit refused to reach the same conclusion as the Second and Third Circuits and thereby erroneously

denied Mr. Bartels a trial on his FMLA claims, but because *Chevron* deference "raises serious separation-of-powers questions." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).[13]

As explained by the Second Circuit in *Egan*, the plain language of the FMLA provides that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter," including the right to seek or use FMLA leave, and also "for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. *See* 851 F.3d at 269 (citing 29 U.S.C. § 2615(a)(1) and § 2615(a)(2)). The lower courts and the United States Department of Labor have interpreted these provisions as creating causes of action for interference with FMLA leave and retaliation for exercising the right to the same. *See, e.g.*, *id.* at 270 n.3 (citations omitted); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206-07 (11th Cir. 2001).

Before *Nassar*, most courts held that the *McDonnell Douglas* analysis applied to FMLA retaliation claims and the plaintiff asserting such a claim must satisfy the motivating factor standard. *See, e.g.*, *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 995 (7th Cir. 2010); *Hunter v. Valley View Local Sch.*, 579 F.3d 688,

[13] And "[o]ur principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

692-93 (6th Cir. 2009); *Richardson v. Monitronics Intern., Inc.*, 434 F.3d 327, 333 (5th Cir. 2005); *Smith v. BellSouth Telecommunications, Inc.*, 273 F.3d 1303, 1313-14 (11th Cir. 2001). However, some courts have held or suggested that this Court's decision in *Nassar* changed the causation standard for FMLA retaliation claims as well as for Title VII retaliation claims. *See Sharp*, 674 Fed. Appx. at 451; *Wheat v. Florida Par. Juvenile Justice Comm'n*, 811 F.3d 702, 706 (5th Cir. 2016); *Nigh v. Sch. Dist. of Mellen*, 50 F. Supp. 3d 1034, 1054 (W.D. Wis. 2014) (collecting cases). Other courts, including the Second and Third Circuits, have held that *Nassar* does not change the motivating factor causation standard for FMLA claims because the Department of Labor's regulation implementing § 2615(a) is entitled to *Chevron* deference. *Woods*, 2017 WL 3044628, *6-8; *Egan*, 851 F.3d at 269-74. These courts are correct, and the motivating factor standard applies to FMLA claims for two other reasons as well.

The first reason why *Nassar* does not change the motivating factor standard for FMLA claims is the plain language of the statute itself. The FMLA prohibits discrimination against an employee "for" opposing unlawful practices or exercising rights such as requesting leave, not "because" she or he did so. *Compare* 29 U.S.C. § 2615(a)(2) *with* 42 U.S.C. § 2000e-3(a). This plain language is unambiguously different than the language in Title VII, and this Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174

(2009) (citing *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). The "because of" language which this Court found in *Gross* and *Nassar* to require a plaintiff to prove but-for causation for claims under the Age Discrimination in Employment Act and the retaliation provision of Title VII, respectively, does not appear in the FMLA, and when "engaged in the business of interpreting statutes [this Court] presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1578 (2016) (Thomas, J., concurring) (noting that when "Congress enacts a statute that uses different language from a prior statute, [this Court] normally presume[s] that Congress did so to convey a different meaning").

The second reason why *Nassar* does not change the motivating factor standard for FMLA claims is because that standard is enshrined in the Department of Labor's reasonable construction of the FMLA in the implementing regulation at 29 C.F.R. § 825.220(c), and that regulation is entitled to deference under *Chevron*. In *Chevron*, this Court set forth a two-step analysis for determining whether a federal administrative agency's interpretation of congressional legislation embodies a permissible and controlling construction of that legislation. *See* 467 U.S. at 842-83. First, the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If congressional intent is clear, the courts and the agency

must give effect to that unambiguously expressed intent. *Id.* But if this Court determines that Congress did not address the precise question at issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43.

As to *Chevron* step one, 29 U.S.C. § 2615(a)(1) and § 2615(a)(2) do not expressly provide a causation standard for the interference and retaliation claims they create. *Egan*, 851 F.3d at 272-74. As a result, the Court moves to *Chevron*'s step two and asks whether the implementing regulation "is based on a permissible construction of the statute." *Id.* at 271-72 (citing *Chevron*, 467 U.S. at 843). The FMLA regulation provides that "[t]he Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights," and "employer cannot use the taking of FMLA leave as a *negative factor* in employment actions[.]" *Id.* at 271 (emphasis supplied) (citing 29 C.F.R. § 825.220(c)). The use of the phrase "negative factor" reflects the choice Congress made in amending the discrimination provision of Title VII to outlaw adverse employment practices for which a protected class status was one motivating factor, even if not the sole one. *See Egan*, 851 F.3d at 273-74 (citations omitted); *see also Hunter v. Valley View Local Sch.*, 579 F.3d 688, 692 (6th Cir. 2009) (holding that the phrase "negative factor" in § 825.220(c) "envisions that the challenged employment decision might also rest on other, permissible

factors" and that a mixed motive or motivating factor standard applied to FMLA retaliation claims after *Gross*). The mixed motive or motivating factor standard is therefore a permissible and reasonable construction of the FMLA, and it should have been applied to the claims of Mr. Bartels here.

Finally, even if the FMLA should be construed in accordance with the Title VII retaliation provision, it must be construed in accordance with the motivating factor standard for that provision in effect when the FMLA was passed in 1993. *See, e.g.*, 2B Sutherland Statutory Construction § 51:7 (noting that when one statute specifically references a second statute by title or section, subsequent changes to the second statute are not included or incorporated into the first statute);[14] *New Hampshire Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 76 (1st Cir. 2006) (rejecting the argument that subsequent judicial construction of a similar but different statute could be applied to the Federal Aviation Administration statute), *aff'd*, 552 U.S. 364 (2008); *see also Negusie v. Holder*, 555 U.S. 511, 520 (2009).

The "'evaluation of congressional action must take into account its contemporary legal context,' rather than reading back in time subsequent Court interpretations of similar language in other statutes." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 203 (D. Mass. 1998) (citing *Cannon v.*

[14] The legislative history of the FMLA makes specific, not general, reference and citation to the retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), in effect at that time. *See* S. Rep. 103-3, *35.

Univ. of Chicago, 441 U.S. 677, 698 (1979)), *aff'd*, 170 F.3d 1 (1st Cir. 1999). When the FMLA was passed in 1993, Congress had recently amended Title VII to confirm that it intended the motivating factor standard to apply to Title VII discrimination claims. *Nassar*, 133 S. Ct. at 2526. It was not until 2009 in *Gross* that this Court decided that the phrase "because of" in the Age Discrimination in Employment Act created a but-for causation standard, 129 S. Ct. at 2350-51, and not until *Nassar* in 2013 that it extended this reasoning to the Title VII retaliation provision because Congress neglected to amend the latter in the 1991 Act, 133 S. Ct. at 2526-27. Thus, even if the FMLA retaliation provision should be construed in accordance with 42 U.S.C. § 2000e-3(a) – which it should not because the plain language is different and the contrary implementing regulation is entitled to *Chevron* deference – the FMLA cannot be read to require but-for causation because Title VII retaliation claims did not require it when the FMLA was passed.

III. This Court Must Correct a Grave Miscarriage of Injustice for the Petitioner and Permit him a Jury Trial on his Claims for Violation of the FMLA

The errors of the lower courts in refusing to apply the mixed motive or motivating factor standard to the FMLA claims asserted in this case constitute a grave miscarriage of justice for Petitioner Bartels, a loving husband and father of a child with a serious and incurable health condition. He is the person whom Congress

intended to protect when it passed the FMLA in 1993. This Court must act to clarify the law and correct the errors of the lower courts for all the reasons set forth above, but also to secure justice for Mr. Bartels, who has unfortunately been failed by our courts thus far.

Because they refused to apply the motivating factor standard to the FMLA claims asserted by Mr. Bartels, the District Court and the Eleventh Circuit erroneously concluded that he failed to establish any genuine issue of material fact for trial.[15] Had they applied the correct standard to the wealth of evidence presented by Mr. Bartels, they would have found that there is a genuine issue of material fact as to whether SMA was motivated to terminate Mr. Bartels because he took FMLA leave in October 2012 and requested more FMLA in the future.

Under the Eleventh Circuit's decision in *Quigg*, Mr. Bartels did not need to prove pretext under the *McDonnell Douglas* framework in order to survive summary judgment for his FMLA claims because the mixed motive or motivating factor standard applies to them. *Quigg*, 814 F.3d at 1237-38. This is so because, under the *McDonnell Douglas* framework, the plaintiff employee must show that the employer's proffered reason is pretext for unlawful discrimination or

[15] Mr. Bartels also maintains, as he argued in all of his briefing before the District Court and the Eleventh Circuit, that he established a genuine issue of material fact as to pretext even under the *McDonnell Douglas* analysis, and that the lower courts erroneously drew inferences and resolved doubts about the facts in favor of the moving party on summary judgment.

retaliation, but "this framework is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for an adverse action." *Id.* at 1237 (citation omitted). As a result,

> [I]f an employee cannot rebut her employer's proffered reasons for an adverse action but offers evidence demonstrating that the employer also relied on a forbidden consideration, she will not meet her burden. Yet, this is the exact type of employee that the mixed-motive theory of discrimination is designed to protect. In light of this clear incongruity between the McDonnell Douglas framework and mixed motive claims, it is improper to use that framework to evaluate such claims at summary judgment.

Id. (citations omitted). Instead, the appropriate framework for mixed motive or motivating factor claims is one that "does not call for the unnecessary burden-shifting required by *McDonnell Douglas*, [and does not] suffer from *McDonnell Douglas*'s pitfall of demanding that employees prove pretext." *Id.* at 1240.

Accordingly, because FMLA claims employ the motivating factor standard, Mr. Bartels could survive summary judgment with proof that: (1) SMA took an adverse employment action against him; and (2) his use of or request for FMLA leave was a motivating factor for the adverse employment action. *Id.* at 1232-33 (citation omitted). The District Court properly concluded that Mr. Bartels suffered an adverse

employment action when he was fired on October 23, 2012. App. 30. Thus, he only needed to establish a genuine issue of material fact as to whether his use of or request for future FMLA leave was a motivating factor in the decision to terminate his employment. *Quigg*, 814 F.3d at 1232-33. Mr. Bartels easily met this standard with proof that:

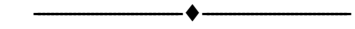
- He had excellent performance and was fired only six days after receiving a "Top Manager" award and giving notice of his need for future FMLA leave, District Court Doc. 56-6, 86:22-88:4, 88:9-15; Doc. 56-15, 161:5-20;
- Myron and Adam told him when he was fired that (a) he had done nothing wrong; (b) it was "purely a business decision" to let him go; (c) they were going to give him severance; and (d) they understood the situation because Adam and his wife had previously lost a child, App. 39; District Court Doc. 56-6, 104:6-105:4;
- SMA lied about offering Mr. Bartels a severance agreement with a release of claims, *compare* District Court Doc. 56-15, 166:1-19 *with* Docs. 56-1, 56-2;
- SMA then certified to the Georgia Department of Labor several reasons for firing Mr. Bartels, including supposed poor performance, but Mr. Bartels was never disciplined for any of those purported reasons or even told about them prior to his termination, and he produced evidence to

refute each and every one of them, *compare* District Court. Doc. 56-17, 53:11-19, Ex. 8, p. 2, Doc. 56-20, p. 2, *with* Doc. 54, pp. 3, 18-19, 22-23;

- SMA's reasons then shifted during litigation to rely only on the Historic Savannah Foundation complaint as the reason for terminating Mr. Bartels, District Court Doc. 56-15, 156:17-158:13, 170:2-10;
- But SMA routinely allowed employees to "eat crow" and smooth over complaints with customers, such as how it admits Mr. Bartels did with the charity volunteer's complaint prior to his termination, District Court Doc. 56-6, 112:18-113:14; Doc. 56-23, 46:17-47:4; Doc. 56-21, 77:2-22, 78:6-14;
- SMA countenanced several other managers engaging in misconduct similar to that which it alleges on the part of Mr. Bartels but has not fired them, including Pratt's intoxication in front of customers and Rhinehart's customer complaints and poor performance, District Court Docs. 56-1, 56-4, 56-5; and
- Other employees submitted "me too" declarations showing that SMA fired an employee who had a heart condition and another who needed leave to care for his wife as a result of her serious health condition, District Court Docs. 56-4, 56-5.

The evidence overwhelmingly establishes at least a genuine issue of material fact as to whether, even if the charity volunteer's complaint motivated SMA to terminate Mr. Bartels, that was also motivated by his request for continuing FMLA leave in the future to care for a child with an extremely serious genetic disorder.

Indeed, courts in the Eleventh Circuit have denied summary judgment for employers where the plaintiff presented less evidence. *See, e.g.*, *Bradley v. Army Fleet Support, LLC*, 54 F. Supp. 3d 1272, 1283-84 (M.D. Ala. 2014) (denying summary judgment for the employer where the employee showed a factual dispute over whether he complied with a call-in policy while on FMLA leave even though he did not call the employer every day he was out); *Connor v. SunTrust Bank*, 546 F. Supp. 2d 1360, 1371-72 (N.D. Ga. 2008) (denying summary judgment where the plaintiff was fired after FMLA leave because her subordinates were transferred and a new supervisor resigned and the dispute between the parties over who would have handled supervisory duties "alone [was] enough to survive summary judgment"); *Cross v. Sw. Recreational Indus., Inc.*, 17 F. Supp. 2d 1362, 1370 (N.D. Ga. 1998). For all these reasons and based upon the competent and admissible evidence of record, Mr. Bartels established a genuine issue of material fact as to whether his use of and request for future FMLA leave was one motivating factor in SMA's decision to terminate his employment. This Court must grant certiorari to preserve his constitutional right to present this to a jury.



CONCLUSION

This Honorable Court must grant certiorari in this case to resolve a serious split among the Circuits that rests both on the scope of this Court's guidance in *University of Texas Southwestern Medical Center v. Nassar*, as well as whether the regulations promulgated by the United States Department of Labor to implement the Family and Medical Leave Act of 1993 should be accorded controlling deference under *Chevron v. Natural Resources Defense Council*. Petitioner Richard Duane Bartels was erroneously denied a trial on his claims for violation of the Family and Medical Leave Act because the Eleventh Circuit joined in error those courts which hold that *Nassar* requires a plaintiff asserting such claims to prove that his exercise of rights under the Act was a but-for cause of the adverse employment action. This Court's precedents compel the conclusion that a plaintiff asserting these claims need only show that his use of or request for leave was one motivating factor for the adverse employment action. Petitioner easily established a genuine issue of material fact on this point, and the courts below erroneously refused to analyze his claims under the proper standard. Mr. Bartels has suffered a grave miscarriage of justice and prays the Court will correct the errors below and clarify the law for the benefit of himself and all employees and employers in the nation.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11958
Non-Argument Calendar

D.C. Docket No. 4:14-cv-00075-JRH-BKE

DUANE BARTELS,

Plaintiff-Appellant,

versus

SOUTHERN MOTORS OF
SAVANNAH, INC., a.k.a.
Southern Motors Acura,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(March 7, 2017)

Before HULL, MARCUS, and FAY, Circuit Judges.

PER CURIAM:

Plaintiff Duane Bartels appeals the district court's order granting summary judgment in favor of his former employer, defendant "402 East Broughton Street, Inc.," doing business as Southern Motors Acura ("SMA").

After review of the record and consideration of the parties' briefs, we affirm.

I. BACKGROUND

The district court recited at length the facts and procedural history of this case in its order granting defendant SMA's motion for summary judgment. Assuming the parties' familiarity with that order and with the record generally, we only briefly summarize the relevant background.

Defendant SMA is a car dealership owned and operated by the Kaminsky family, including Myron Kaminsky and his two sons, Adam Kaminsky and Ross Kaminsky. In 2004, plaintiff Bartels began working at defendant SMA as a wholesale parts salesman and was eventually promoted to general manager.

On October 12, 2012, plaintiff Bartels and his wife, who was pregnant, learned that their unborn child suffered from a serious bone disease. Bartels missed several days of work to attend medical appointments with his wife. Throughout this period, Bartels updated the Kaminskys with the details of his personal situation. On October 17, 2012, Bartels returned to work, but he indicated to the Kaminskys that he would need time off in the future to help his wife through the complicated pregnancy. Bartels did not request any specific days off.

On October 19, 2012, volunteers for the Historic Savannah Foundation ("HSF") were at defendant SMA's

dealership preparing for a charity benefit being held there. Plaintiff Bartels approached Katherine Albert, an HSF volunteer, and expressed his dissatisfaction with the fact that Albert had not consulted with him while planning the HSF charity event. According to Albert, during the course of this conversation, Bartels used profanity and said otherwise "demeaning and embarrassing" things.[1] Albert complained about this incident to HSF's director, Terri O'Neil, who in turn contacted Myron Kaminsky. Bartels admits that Myron Kaminsky called him and instructed him to apologize to O'Neil. Bartels eventually called O'Neil to apologize.

Four days later, on October 23, 2012, Myron and Adam Kaminsky met with Bartels and informed Bartels that he was being terminated. At the short meeting, the Kaminskys made several statements expressing sympathy for Bartels and his personal situation. According to Bartels, Myron and Adam Kaminsky stated

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[1] The district court described the Albert episode as follows:

> According to Albert . . . Plaintiff (1) used profanity when asking why he had not been given tickets to the event; (2) stated guests at his own social gatherings used flowerpots to relieve themselves; (3) used profanity when directing Albert not to move his desk for the event; and (4) complained to an assembled group of Defendant's employees about the need to coordinate within a short time frame.

SMA was entitled to rely on the good-faith belief that Bartels engaged in professional misconduct regardless of whether it knew every detail of the misconduct. *See EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000).

that Bartels did "nothing wrong" and that the termination was "purely a business decision." Myron Kaminsky said that he understood what Bartels was going through, and that they would give Bartels a three months' severance package. Adam and Ross Kaminsky had previously expressed their concern with Bartels's effectiveness as a general manager, and they agreed with their father's decision to terminate Bartels.

On November 13, 2012, Ross Kaminsky submitted a notice to the Georgia Department of Labor (the "DOL notice"), which listed the reasons for Bartels's termination. These reasons included "[c]ursing at and upsetting [a] member of [HSF] during fund raising event," failure to work well with others, failure to meet minimum production requirements, use of a company credit card for personal expenses, poor attitude, mistakes leading to lost revenue, and unapproved spending. Myron Kaminsky later confirmed that the termination decision was based solely on Bartels's inappropriate interaction with Albert.

In February 2013, after his daughter's birth, Bartels filed suit against SMA. In his complaint, Bartels asserted two claims pursuant to the Family and Medical Leave Act of 1993 ("FMLA") for retaliation and interference. SMA filed a motion for summary judgment, which the district court granted as to both claims.

On appeal, Bartels challenges the grant of summary judgment as to both FMLA claims.[2]

II. THE FMLA STATUTE

Under the FMLA, employees are entitled to leave for specified family and medical reasons. *See generally* 29 U.S.C. § 2612. As relevant here, the FMLA provides that an employee is entitled to up to twelve weeks of leave each year to care for a spouse or child who suffers from a serious health condition. *Id.* § 2612(a)(1)(C). When the employee returns from such a period of leave, the employer must reinstate the employee to his previous position with the same benefits, pay, and other terms and conditions of employment. *Id.* § 2614(a)(1).

It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" these FMLA rights. *Id.* § 2615(a)(1). It is also unlawful for an employer to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. *Id.* § 2615(a)(2). An employee seeking to enforce the

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[2] We review *de novo* the district court's grant of summary judgment, considering the evidence and the inferences therefrom in the light most favorable to the nonmoving party. *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005). Summary judgment is appropriate where the evidence shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a genuine dispute where the evidence would allow a reasonable jury to find in favor of the nonmoving party. *Ellis*, 432 F.3d at 1325-26.

FMLA's substantive provisions may bring a private action against his employer. *Id.* § 2617. This Court has recognized two types of FMLA claims: retaliation and interference. *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1293 (11th Cir. 2006).

III. RETALIATION CLAIM

In Count II of his complaint, Bartels asserted an FMLA retaliation claim, alleging that SMA terminated him in retaliation for his anticipated use of FMLA protected leave during his wife's pregnancy.

Where the plaintiff espouses a single-motive theory of FMLA retaliation and relies on indirect evidence of the employer's retaliatory intent,[3] we analyze his claim under the burden shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Hurlbert*, 439 F.3d at 1297; *see Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1238 (11th Cir. 2016) (holding that the *McDonnell Douglas* framework is appropriate for analyzing single-motive claims, but not mixed-motives claims). Under that approach, the plaintiff must first establish a prima facie case of retaliation by showing (1) that he engaged in statutorily protected activity, (2) that he experienced an adverse employment action, and (3) that there is a causal connection between the protected activity and the adverse employment action. *Hurlbert*, 439 F.3d at 1297. The burden then shifts to

[3] Bartels does not argue that he presented direct evidence of unlawful intent.

the employer to articulate a legitimate, non-retaliatory reason for the adverse action. *Id.* The plaintiff then bears the burden of showing that the employer's proffered reason is pretext for unlawful retaliation. *Id.*

We assume without deciding that plaintiff Bartels presented sufficient evidence to make out a prima facie case of FMLA retaliation. In turn, defendant SMA presented ample evidence that it terminated Bartels for a legitimate, non-retaliatory reason – to wit, Bartels's inappropriate behavior during the episode with Albert. The resolution of Bartels's retaliation claim thus turns on the issue of pretext.

To carry his burden on pretext, the employee must produce evidence from which a reasonable jury could find (1) that the employer's proffered reason was not the true reason for the adverse employment action and (2) that the decision was motivated by an illegal purpose. *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1348-49 (11th Cir. 2007). The employee can prove pretext by identifying "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered reason. *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006).

The district court did not err in determining that Bartels failed to establish that SMA's legitimate, non-retaliatory reason was pretextual. On this record, the evidence was insufficient to support a jury finding that the Albert incident was not the true reason for

Bartels's termination and that the decision was motivated by an illegal purpose.

The DOL notice did list reasons other than the Albert episode for terminating Bartels, but the notice also clearly identified Bartels's comments to Albert as one reason for termination. That the DOL notice included other motivations might indicate that there were supplemental reasons for Bartels's termination, but it does not indicate that SMA shifted its reasons.

We recognize that the Kaminskys made statements expressing sympathy for Bartels and his personal situation. *See Wascura v. City of South Miami*, 257 F.3d 1238, 1246 (11th Cir. 2001) (stating that expressions of sympathy associated with termination are "weak circumstantial evidence" of discriminatory intent and that statements designed to "save face" cannot overcome the employer's legitimate reasons for termination). Bartels, however, points to no evidence directly indicating that the Kaminskys chose to terminate Bartels because of his future need for FMLA leave. *See id.*

In addition, the fact that Bartels apologized for his behavior does not create a genuine dispute of material fact regarding pretext. The apology and any subsequent positive response from Myron Kaminsky does not rebut the evidence indicating that SMA terminated Bartels for a legitimate reason. *See Brooks*, 446 F.3d at 1163 (stating that the employee must meet the employer's legitimate reason "head on and rebut it"). It

merely shows that Bartels disagrees with SMA's resolution of the conflict, which is insufficient to create a genuine dispute of material fact. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004) ("[A] plaintiff cannot recast the reason but must meet it head on and rebut it. Quarreling with that [legitimate, non-retaliatory] reason is not sufficient.") (citation omitted).

Also, contrary to Bartels's contention, the district court did not ignore evidence of misconduct by other SMA managers. As the district court noted, the evidence pertaining to these other managers did not constitute effective comparator evidence because the other managers' conduct was not sufficiently similar to Bartels's conduct during the Albert episode. *See Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) ("In determining whether employees are similarly situated . . . it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.").

Two of the alleged comparators, Jarred Pratt and Dennis Purcell, did not engage in behavior that could be construed as direct mistreatment of a potential customer or third party. Evidence regarding their misconduct is thus not probative of pretext as to Bartels's termination. And manager Michael Rhinehart, another alleged comparator, merely had to "smooth things over" with customers who felt they had not gotten a favorable deal. This is not sufficiently similar to the offensive comments Bartels made to Albert. *See id.* The district

court did not err in determining that this purported comparator evidence failed to rebut SMA's legitimate reason for terminating Bartels.

The district court also did not fail to consider "me too" evidence regarding the terminations of SMA employees Doug Thomson and Michael Johnson. The district court determined that the evidence regarding Thomson's termination was insufficient to indicate whether SMA had terminated Thomson for any improper reason. Importantly, Thomson admitted that he failed to meet SMA's expectations for productivity, indicating that Thomson was fired for a legitimate, non-retaliatory reason. Thomson's termination did occur after he took time off to care for his ill wife, but the evidence did not indicate whether this time off could even constitute protected leave under the FMLA

As to Michael Johnson, SMA employee Fred Jacoby testified that he spoke to Bartels, who said that Myron Kaminsky told him to terminate Johnson because Johnson had heart problems. The district court did not err in determining that this statement was inadmissible hearsay. Myron Kaminsky's statement might have been admissible as an admission of a party opponent had it been introduced through the testimony of Bartels. *See* Fed. R. Evid. 801(d)(2). Because it was introduced through the testimony of Jacoby, however, who testified that Bartels told him what Myron Kaminsky said, the testimony constituted hearsay within hearsay. *See* Fed. R. Evid. 801, 805.

On appeal, Bartels does not argue that his statement to Jacoby falls within any established hearsay exception. *See id.* Rather, Bartels claims that this hearsay statement can be considered in passing on the motion for summary judgment "because it can be reduced to admissible form at trial." However, when Myron Kaminsky was asked whether he ever said that someone with heart issues could not work at SMA, he responded, "I don't believe I would ever say that." In light of Myron Kaminsky's testimony, Bartels has not shown that Myron Kaminsky would give testimony at trial corroborating Jacoby's statement. Thus, the district court did not err in refusing to consider the hearsay statement introduced by Jacoby's testimony about what Bartels said that Myron Kaminsky said. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012) (noting that hearsay statements cannot be considered in passing on a motion for summary judgment where the declarant has given sworn testimony contradicting the hearsay statement).

For the first time on appeal, Bartels argues that (1) his FMLA retaliation claim should be analyzed under the mixed-motives theory of discrimination and (2) he showed that unlawful discrimination was a "motivating factor" in the adverse employment action. *See Quigg*, 814 F.3d at 1235 (discussing the mixed-motives theory as it applies in the context of Title VII and § 1983 discrimination claims). If the employee can show that an unlawful reason was a motivating factor, then the burden shifts to the employer to show that it would have made the same decision in the absence of

the impermissible motivating factor. *Id.* at 1242 (articulating the "same decision" defense to a claim relying on the mixed-motives theory).

Even assuming *arguendo* that the mixed-motives approach is appropriate in the context of an FMLA retaliation claim, which we do not decide here, Bartels's claim fails for two reasons. First, because Bartels urges the application of the mixed-motives theory for the first time on appeal, we do not consider that issue here. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Second, as an alternative ground, we conclude that Bartels's FMLA claims fail under the mixed-motives theory because there is no genuine dispute of material fact with respect to SMA's same-decision defense. That is, the only reasonable conclusion supported by the record is that SMA would have terminated Bartels because of the Albert incident regardless of whether Bartels indicated a need for FMLA leave. *See Quigg*, 814 F.3d at 1242.

For either reason, the district court did not err in granting summary judgment to SMA on Bartels's FMLA retaliation claim.

IV. INTERFERENCE CLAIM

In Count I of his complaint, Bartels asserted an FMLA interference claim, principally alleging that SMA terminated him to avoid providing him with anticipated FMLA leave.

To prevail on a claim for FMLA interference, an employee must show that his employer denied him a benefit to which he was entitled under the FMLA. *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1191 (11th Cir. 2015). The employee need not show that the employer intended to deny an FMLA benefit – the employer's motives are irrelevant in the context of an interference claim. *Hurlbert*, 439 F.3d at 1293. Where the employer can show, however, that it would have dismissed the employee regardless of the employee's request for FMLA benefits, the employer is not liable for FMLA interference. *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010). Thus, the employer is only liable for FMLA interference where the employee's need for FMLA leave was the proximate cause of the termination. *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1242 (11th Cir. 2010).

Here, we cannot say that the district court erred in granting summary judgment to SMA on Bartels's FMLA interference claim. The district court did not err by relying on its retaliation pretext analysis to grant summary judgment to SMA on Bartels's interference claim. It is true, as Bartels notes, that SMA bears the burden of showing, in relation to the interference claim, that it would have terminated Bartels regardless of his need for FMLA leave. *Id.* at 1241. But it is not improper burden shifting for the district court to consider the employee's inability to show pretext in relation to his retaliation claim in determining, for purposes of the interference claim, that the employer still

would have terminated the employee for a reason unrelated to the FMLA

Our previous decisions support the district court's mode of analysis here. In *Wascura*, this Court first determined that the employee failed to present evidence from which a reasonable jury could conclude that an employer's proffered legitimate reasons for termination were pretextual with respect to the employee's ADA claim. 257 F.3d at 1247. The Court went on to analyze the employee's FMLA interference claim, expressly taking into consideration the employee's failure to show pretext with respect to the ADA claim. We affirmed the grant of summary judgment to the employer on the employee's FMLA interference claim, stating:

> For the same reasons that we concluded that [the employee] failed to present evidence from which a reasonable jury could find that the [employer's] proffered reasons for her termination were pretextual with respect to her ADA claim, we conclude that [the employee] failed to present evidence from which a reasonable jury could find any causal connection between [the employee's] . . . potential need to take time off . . . and her subsequent termination.

Id. at 1248. Similarly, the district court here did not err in relying on Bartels's inability to show pretext in relation to his retaliation claim in determining that SMA met its burden of showing that it would have made the

same decision anyway and thus was not liable for FMLA interference.

Separately, to the extent that Bartels contends that the district court erred in failing to consider his interference claim under the mixed-motives theory of causation, we summarily reject that argument. As stated in Part III, *supra*, Bartels did not raise this issue in the district court, and we thus do not consider it here. *See Access Now*, 385 F.3d at 1331.

Accordingly, there is no genuine dispute of material fact regarding SMA's non-FMLA reason for terminating Bartels. We affirm the district court's ruling on Bartels's interference claim.

V. CONCLUSION

In light of the foregoing, we affirm the district court's grant of summary judgment in favor of defendant SMA on plaintiff Bartels's FMLA retaliation and interference claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

DUANE BARTELS, Plaintiff, v. 402 EAST BROUGHTON STREET, INC., d/b/a SOUTHERN MOTORS ACURA, Defendant.	*	CV 414-075

ORDER

(Filed Mar. 28, 2016)

Presently before the Court is Defendant's motion for summary judgment (Doc. 40). For the reasons below, Defendant's motion is **GRANTED**.

I. BACKGROUND

The present dispute arises out of Plaintiff's employment with Defendant, the owner and operator of Southern Motors Acura, a car dealership in Savannah, Georgia. (Bartels Decl., Doc. 561, ¶ 2.) After Plaintiff worked in various capacities for Defendant since 2004, Defendant terminated his employment on October 23, 2012. In response, Plaintiff filed a complaint with this Court on April 14, 2014, alleging that Defendant had

interfered with his right to leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, and had retaliated against him for exercising this right. (Doc. 1.) The facts underlying Plaintiff's claims, viewed in the light most favorable to him, are as follows.

Originally hired by Defendant in 2004 as a wholesale parts salesman, Plaintiff was promoted to service manager and service parts director before becoming Defendant's general manager in late 2011. (Bartels Dep. I, Doc. 56-6, at 19, 44.) As general manager, Plaintiff reported to three of Defendant's six owners, Myron Kaminsky and his two sons, Adam and Ross. (Myron Dep., Doc. 56-15, at 23-24; Adam Dep., Doc. 56-17, at 51.)

In his capacity as general manager, Plaintiff made positive contributions to Defendant's business. During the months January 2012 through September 2012, Plaintiff oversaw the sale of sixteen more new Acura vehicles than Defendant had sold during the same months in 2011. (Myron Dep., Doc. 56-16, Ex. 71-72, at 18-25.) For his performance, Plaintiff, on multiple occasions, received positive reinforcement from the Kaminskys. For example, on July 1, 2012, Adam sent Plaintiff the following text message: "Great job this month. The report looks good!!" (Adam Dep., Doc. 56-17, at 152; Adam Dep., Doc. 56-18, Ex. 62, at 6.) Then, on July 2, 2012, in response to Plaintiff's statement that he had exceeded his sales goals and had moved over sixty units for the quarter, Ross sent Plaintiff the following text message: "Ok cool. Good job." (Bartels

Dep. II, Doc. 56-8, at 50-51; Bartels Dep. II, Doc. 56-11, Ex. 11, at 9-10.)

On October 12, 2012, well into his new position, Plaintiff attended a doctor's appointment with his pregnant wife. (Bartels Dep. I, Doc. 56-6, at 54-55.) At that appointment, Plaintiff learned that the bones of his unborn child were "less than five percent and heavily curved." (*Id*. at 55.) As he walked outside of the hospital, Plaintiff called Myron to inform him of this information and to relay that he would be attending a perinatologist appointment with his wife later that day. (*Id*. at 54-56.) Myron replied by telling Plaintiff to stay in touch and keep him informed. (*Id*.) Accordingly, Plaintiff left Myron a voicemail the next day, October 13, confirming the earlier results, informing him of their next appointment on October 15, and relaying that his wife and he were considering terminating the pregnancy. (*Id*. at 59-61.)

On October 14, a day on which the dealership was closed, Plaintiff did not communicate with anyone affiliated with Defendant. (*Id.* at 65.) However, following a doctor's appointment on October 15, Plaintiff sent a text message to Ross informing him that he would be in touch with an update. (Ross Dep., Doc. 56-19, at 113-14.) Then, on the sixteenth, Plaintiff sent a text message to Myron indicating that his wife and he would be attending an appointment with a specialist that day. (Myron Dep., Doc. 56-15, at 151; Ex. 49, Doc. 56-16, at 17.) Also on the sixteenth, Plaintiff received a text message from Ross saying the following: "We all wish u beat [sic] of luck with baby. She will be in our prayers."

(Ross Dep., Doc. 56-19, at 119; Ex. 38, Doc. 56-16, at 17.)

Ultimately, on October 17, 2012, Plaintiff returned to work. (Bartels Dep. I, Doc. 56-6, at 29.) However, before arriving that day, Plaintiff received a phone call from Ross during which Ross stated that "life goes on, we have a business to run, you need to get back to work." (*Id*. at 71.) That evening, Plaintiff attended a managers' meeting at the Exchange Tavern in Savannah.(*Id*. at 83.) At its conclusion, Plaintiff met with Myron, Ross, and Adam and informed them that (1) his unborn daughter's bones "were less than the five [sic] percentile and they were heavily bowed and curved"; (2) he would need time off in the future; and (3) he did not know exactly when he needed time off because the pertinent test results would not be back for six weeks. (*Id.* at 86-88.)

Meanwhile, two days later, on Friday, October 19, 2012, Katherine Albert and other Historic Savannah Foundation ("HSF") volunteers arrived at Defendant's dealership to make final preparations for the foundation's "After Glow" benefit to be held there the next night. (Albert Aff., Doc. 40-1, ¶¶ 3, 6.) In the preceding months, as she arranged for Defendant's dealership to hold the function she was chairing, Albert had been introduced to Plaintiff as she met with Myron or Mickey Rhinehart, Defendant's longtime employee. (*Id.* ¶¶ 3-5.) Yet, despite Albert's established relationship with Defendant, Plaintiff approached her on the nineteenth and relayed that he had a "bone to pick" with her. (Albert Dep., Doc. 40-2, at 39.) Plaintiff stated to Albert

that all of her planning should have been coordinated through him and not through Rhinehart. (Albert Aff. ¶ 5.) Considering the manner in which Plaintiff spoke to her to be "extremely unprofessional," Albert also alleges that Plaintiff demonstrated other behavior that she considered inappropriate and unprofessional. (*Id.* ¶ 6.) According to Albert, yet disputed by Plaintiff, Plaintiff (1) used profanity when asking why he had not been given tickets to the event; (2) stated guests at his own social gatherings used flowerpots to relieve themselves; (3) used profanity when directing Albert not to move his desk for the event; and (4) complained to an assembled group of Defendant's employees about the need to coordinate within a short time frame. (*Id.* ¶¶ 9-10; Albert Dep., Doc. 40-2, at 62-63, 66.)

Considering Plaintiff's behavior to be "so demeaning and embarrassing," Albert telephoned HSF's development director, Terri O'Neil, after she left the dealership on October 19. As part of that conversation, Albert informed O'Neil that she would not be returning to the dealership to fulfill her commitment as "After Glow" chair unless Plaintiff "was no longer on the premises." (Albert Aff. ¶ 13.) With this information, O'Neil then called Myron. According to Myron, O'Neil disclosed that Plaintiff told Albert that "he was the boss and she should be talking to him and 'F' word this and – and just started cursing at her and – [being] inappropriate." (Myron Dep., Doc. 56-15, at 167-68.) Never "as embarrassed or as disappointed or as angry" as he was then, Myron called Plaintiff soon after talking to O'Neil to inform him of the complaint and to

instruct him to contact the ladies and apologize. (*Id.* at 167.) Accordingly, Plaintiff later apologized to O'Neil for his behavior both by phone on October 19 and in person on October 20. (Bartels Dep. I, Doc. 56-6, at 107; O'Neil Dep., Doc. 56-23, at 43-46.) After receiving his phone call on the nineteenth, O'Neil relayed to Myron that Plaintiff had apologized. (O'Neil Dep. at 46.)

Allegedly based solely on the information he received from O'Neil regarding Plaintiff's conduct, Myron decided to terminate Plaintiff's employment. (Myron Dep., Doc. 56-15, at 158.) After reaching this decision, Myron informed Adam and Ross of his intentions. (*Id*. at 158-60.) Having previously expressed their concern over Plaintiff's effectiveness as general manager, Adam and Ross were content with their father's decision. (Adam Dep., Doc. 56-17, at 125-26; Ross Dep., Doc. 56-19, at 145-46.)

Therefore, on the morning of Tuesday, October 23, 2012, Myron and Adam met with Plaintiff in the dealership conference room. (Bartels Dep. I, Doc. 56-6, at 103-04.) Adam initiated the conversation by telling Plaintiff that he "was going to think [they were] the biggest shitbags in the world." (*Id*. at 104.) Then, Adam relayed to Plaintiff that the family had gotten together over the previous weekend, discussed matters, and decided that October 23 would be his last day of employment. (*Id.*) Adam further stated that Plaintiff "had done nothing wrong" and that their decision was "purely a business decision." (*Id.*) Myron then addressed Plaintiff stating that "he knew what [Plaintiff]

was going through because Adam had had a miscarriage." (*Id.*) Myron also told Plaintiff that they were going to give him a three months' severance package and a letter of reference. (*Id.*)

Weeks later, on November 13, 2012, Ross completed a separation notice regarding Plaintiff's termination that was submitted to the Georgia Department of Labor.(Ross Dep., Doc. 56-19, at 49.) Within that document, Ross indicated that Plaintiff had been discharged for the following reasons:

1. Failure to work well with others (both subordinates, community members, and superiors). For example:

   -Acura representative would not visit store due to poor relationship with [Plaintiff].

   -Productive salespersons resign because of [Plaintiff's] temper and abrasiveness.

   -Other current employees voiced numerous complaints.

   -Cursing at and upsetting member of [HSF] during fund raising event.

2. Failure to meet minimum production requirements (sales and finance agreed on by both parties at time of promotion from service department).

3. Use of company credit card for personal services. (i.e., meals)

4. Overall poor attitude which created hostile work environment.

5. Failure to properly account for incentive objectives which led to at least $160000 in lost funds.

6. Uncontrolled spending without approval throughout store.

(Ross Dep., Doc. 56-20, Ex. 8, at 1.) Despite these termination reasons, Plaintiff, during his time as general manager, was never disciplined, written up, or told that he was in jeopardy of losing his job. (Adam Dep., Doc. 56-17, at 135; Ross Dep., Doc. 56-19, at 66-69.)

Following the birth of his daughter in February 2013, Plaintiff filed his complaint seeking redress under the FMLA. (Desiree Decl., Doc. 56-3, ¶ 5.) After filing its answer (Doc. 9), Defendant filed the instant motion for summary judgment (Doc. 40). Thereafter, in compliance with *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam), the Clerk provided Plaintiff with notice of the summary judgment motion, the summary judgment rules, the right to file affidavits or other materials in opposition, and the consequences of default. (Doc. 41.) Subsequently, Plaintiff filed a response (Doc. 54), Defendant filed a reply (Doc. 62), and Plaintiff filed a sur-reply (Doc. 66). Consequently, Defendant's motion is now ripe for the Court's consideration.

II. DISCUSSION

Defendants' motion for summary judgment will be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this context, facts are "material" if they could affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating the contentions of the parties, the Court must view the facts in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in [its] favor," *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal punctuation and citations omitted).

Initially, the moving party bears the burden and must show the Court, by reference to materials on file, the basis for the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). How to carry this burden depends on who bears the burden of proof at trial. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993).When the non-movant has the burden of proof at trial, the movant may carry the initial burden in one of two ways – by negating an essential element of the nonmovant's case or by showing that there is no evidence to prove a fact necessary to the non-movant's case. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-08 (11th Cir. 1991) (explaining *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex*, 477 U.S. 317). Before evaluating the non-movant's response in

opposition, the Court must first consider whether the movant has met its initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Jones v. City of Columbus*, 120 F.3d 248, 254 (11th Cir. 1997) (per curiam). A mere conclusory statement that the non-movant cannot meet the burden at trial is insufficient. *Clark*, 929 F.2d at 608.

If – and only if – the movant carries its initial burden, the non-movant may avoid summary judgment by "demonstrat[ing] that there is indeed a material issue of fact that precludes summary judgment." *Id.* When the non-movant bears the burden of proof at trial, the non-movant must tailor its response to the method by which the movant carried its initial burden. If the movant presents evidence affirmatively negating a material fact, the non-movant "must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated." *Fitzpatrick*, 2 F.3d at 1116. If the movant shows an absence of evidence on a material fact, the non-movant must either show that the record contains evidence that was "overlooked or ignored" by the movant or "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." *Id.* at 1117. The non-movant cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. *See Morris v. Ross*, 663 F.2d 1032, 1033-34

(11th Cir. 1981). Instead, the non-movant must respond with affidavits or as otherwise provided by Federal Rule of Civil Procedure 56.

A. FMLA Interference

Under the FMLA, an interference claim "has two elements: (1) the employee was entitled to a benefit, and (2) [his] employer denied [him] that benefit." *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1191 (11th Cir. 2015).

1. Benefit Entitlement

To be entitled to an FMLA benefits, an employee must, *inter alia*, (1) "suffer from a serious health condition that makes [him] unable to perform the functions of [his] position" and (2) "give proper notice" to his employer. *Id*. at 1194-95.

a. Serious Health Condition

Under 29 C.F.R. § 825.120(a)(5), "[a] spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition." Similarly, "[b]oth parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met." *Id.* § 825.120(a)(6).

A "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves[ ] (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). However, in making a determination on this issue, the Court is not limited to the "evidence received by the employer." *White*, 789 F.3d at 1194. Rather, the Court should use "all available evidence" in its inquiry. *Id.* at 1194-95 ("It may first seem unfair to the employer . . . to make the serious-health-condition determination using evidence that the employer did not see until after it made the determination. But . . . other provisions in the FMLA protect employers from being sandbagged.").

Here, Plaintiff has provided enough evidence to produce a genuine dispute as to whether his wife and his daughter had a serious health condition for which he was entitled to FMLA leave. First, because she was hospitalized and thus unable to "perform other daily activities" due to her pregnancy, Plaintiff's wife had "a serious health condition involving continuing treatment by a health care provider." 29 C.F.R. § 825.115(b). (*See* Desiree Decl. ¶¶ 5-6.) Additionally, because Plaintiff's daughter remained in the neonatal intensive care unit of the hospital for two nights, she had a serious health condition involving inpatient care. 29 C.F.R. §§ 825.113-825.114.(*See* Desiree Decl. ¶¶ 5-6.)

b. Proper Notice

"An employee's notice of [his] need for FMLA leave must satisfy two criteria – notice and content." *White*, 789 F.3d at 1195. Regarding notice, when an employee's need for leave is foreseeable, as it is here, he must give his employer "at least 30 days' advance notice, unless giving 30 days' notice is impracticable, in which case the employee must give only 'such notice as is practicable.'" *Id.* (quoting 29 U.S.C. § 2612(e)(2)). By informing the Kaminskys on the evening of October 17, 2012, that he would need time off in the future as a result of his wife's pregnancy, Plaintiff has raised a genuine dispute as to whether the timing of his FMLA notice was sufficient. As for the sufficiency of the contents of his notice, that is a more difficult question. The FMLA requires that the contents of an employee's notice be "'sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and [of] the anticipated timing and duration of the leave.'" *Id.* at 1196 (quoting 29 C.F.R. § 825.302(c)). "From there, when the employee gives sufficient notice to [his] employer that potentially FMLA-qualifying leave is needed, the employer must then ascertain whether the employee's absence qualifies for FMLA protection." *Id.* (citing 29 C.F.R. § 825.303(b)) (internal quotation marks and other citations omitted).

In this case, the Court finds no evidence indicating that Plaintiff used the words "Family Medical Leave Act" or the acronym "FMLA" at any point in his conversations with the Kaminskys. However, Plaintiff has produced evidence indicating that he informed Myron

of the following: (1) his pregnant wife was experiencing problems with their unborn child; (2) he and his wife had seen multiple doctors, including at least one specialist; (3) he would need time off in the future as a result of this complicated pregnancy; and (4) he did not know exactly when he would need time off because important test results would not be back for six weeks. Additionally, the record reflects that, with respect to his communications with Defendant, Plaintiff was fully transparent and timely forthcoming "with as much information as [he] had available to [him]." *Wai v. Federal Express Corp.*, 461 F. App'x 876, 883 (11th Cir. 2012). Thus, given the information provided and Plaintiff's completeness and timeliness in providing it, the Court finds that a genuine dispute exists as to whether notice was adequately given. *See id.*

2. Benefit Denial

An employee's right to FMLA leave has been interfered with, quite clearly, when his employer terminates him "in order to avoid having to accommodate [him] with rightful FMLA leave rights once [he] becomes eligible." *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012). Yet, "an employee can be dismissed, preventing [him] from exercising [his[right to commence FMLA, without thereby violating the FMLA, if the employee would have been dismissed regardless of any request for FMLA leave." *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010). Consequently, the Court's inquiry as to whether an employee would have been

dismissed regardless of his FMLA request is essentially the same as the Court's query as to whether an employer's asserted reasons for termination are simply a pretext for retaliation. *See Hawkins v. BBVA Compass Bancshares, Inc.*, No. 2:12-cv-03922, 2014 WL 4715865, at *16 (N.D. Ala. Sept. 22, 2014). For this reason, the ability of Plaintiff's FMLA interference claim to withstand summary judgment will depend upon the outcome of the pretext determination below.

B. FMLA Retaliation

To establish a prima facie case of FMLA retaliation, Plaintiff "must show that: (1) he engaged in statutorily protected activity; (2) he experienced an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action." *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1297 (11th Cir. 2006). If Plaintiff makes this showing, "the burden then shifts to the defendant to articulate a legitimate reason for the adverse action." *Id*. "If the defendant does so, the plaintiff must then show that the defendant's proffered reason for the adverse action is pretextual." *Id*.

Based on the evidence submitted and the interference analysis above, Plaintiff has met his burden of establishing a genuine dispute as to whether he engaged in activity protected by the FMLA and suffered an adverse employment action. *See Pereda*, 666 F.3d at 1276 ("[A] pre-eligible request for post-eligible leave is protected activity."). Additionally, because Plaintiff was

terminated less than seven days after informing Defendant of his future need for leave, a genuine dispute exists regarding whether Plaintiff's invocation of his FMLA rights was the cause of his termination. *See Hurlbert*, 439 F.3d at 1298 ("Close temporal proximity between protected conduct and an adverse employment action is generally 'sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection.'" (quoting *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000))). Moreover, with evidence indicating that Plaintiff was terminated because of his behavior toward Albert, Defendant has provided a legitimate reason for its decision to terminate Plaintiff. Accordingly, in its remaining analysis, the Court need only determine whether Plaintiff has submitted sufficient evidence to withstand summary judgment on the issue of pretext.

"A plaintiff may show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Diaz v. Transatlantic Bank*, 367 F. App'x 93, 97 (11th Cir. 2010) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). To do so, "a plaintiff may point to 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in the employer's proffered reason." *Id.* (quoting *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). "However, a plaintiff cannot merely quarrel with the wisdom of the employer's reason, but must meet the reason head on and rebut

it." *Id.* (internal quotation marks and citation omitted). While close temporal proximity between the protected activity and an adverse employment action is evidence of pretext, it is "probably insufficient to establish pretext by itself." *Hurlbert*, 439 F.3d at 1298. Other evidence of pretext that courts have found significant includes "an employer's failure to articulate clearly and consistently the reason for an employee's discharge" and "an employer's deviation from its own standard procedures." *Id*. at 1298-99.

In addition to the close temporal proximity, Plaintiff argues that six other factors indicate that Defendant's termination rationale was pretext. Those factors and their significance are addressed below.

1. Separation Notice

As stated within the Kaminskys' depositions and as highlighted by Plaintiff's sur-reply, the decision to terminate Plaintiff was made by Myron. (Myron Dep., Doc. 56-15, at 157-59; Adam Dep., Doc. 56-17, at 55-56; Ross Dep., Doc. 56-19, at 147-48; Pl.'s Sur., Doc. 66, at 7.) However, almost a month after Plaintiff was informed of this decision, Ross completed a notice of separation providing at least six reasons for Plaintiff's termination.(Ross Dep., Doc. 56-19, at 49; Doc. 56-20, Ex. 8, at 1.) While acknowledging that Defendant has disavowed any reason other than Plaintiff's conduct toward Albert, Plaintiff contends that this list of reasons demonstrates an inconsistency sufficient to withstand summary judgment. (Pl.'s Resp., Doc. 54, at

21-22.) In support of his position, Plaintiff points to a number of cases highlighting the significance of "shifting reasons" in courts' pretext determinations. (*Id.* at 22.)

In each of the cases submitted by Plaintiff, the relevant court ruled for a dismissed employee after finding that an employer diverted from its proffered termination rationale.[1] Yet, in this case, Defendant, within its notice of separation, did not divert from the reason Myron terminated Plaintiff. While the notice listed no fewer than five additional reasons for Plaintiff's termination, it, importantly, also referenced Plaintiff's behavior toward Albert as a contributing reason. Thus, the additional reasons provided are not contradictory reasons, but rather supplementary ones offered by Ross – one who was not the ultimate decision maker on this issue.[2] As a result, Plaintiff's argument and the cases raised are unpersuasive.

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[1] *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1195 (11th Cir. 2004); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995); *Crabbe v. Am. Fid. Assurance Co.*, No. CIV-13-1358, 2015 WL 1977380, at *3 (W.D. Okla. Apr. 30, 2015); *Connelly v. Metro. Atlanta Rapid Transit Auth.*, No. 1:11-CV-02108, 2012 WL 6765579, at *10 (N.D. Ga. Dec. 7, 2012); *Stallworth v. E-Z Serve Convenience Stores*, No. A. 99-D-1503-N, 2001 WL 125304, at *4 (M.D. Ala. Feb. 12, 2001).

[2] Plaintiff disputes the validity of these supplemental reasons.

2. Myron's Knowledge

Plaintiff next contends that because Myron had insufficient knowledge regarding Plaintiff's behavior toward Albert, Defendant's proffered termination rationale is pretextual. (Pl.'s Resp. at 23.) The Court finds this argument unpersuasive. Plaintiff has not offered sufficient evidence to rebut the fact that O'Neil informed Myron of the following prior to his termination: (1) Plaintiff told Albert that "he was the boss and she should be talking to him"; (2) Plaintiff used the "F" word in speaking with Albert; and (3) Plaintiff was otherwise "cursing at her and – [being] inappropriate." (Myron Dep., Doc. 56-15, at 167-68; O'Neil Dep. at 40-42.)

3. Plaintiff's Apology

Plaintiff also argues that the following present a genuine dispute as to whether Myron's termination rationale was pretextual: (1) Myron's knowledge that Plaintiff had "apologized and made things right with O'Neil" and (2) Myron's "positive response" upon learning that Plaintiff had "apologized to [O'Neil] for any bad behavior." (Pl.'s Resp. at 24.) However, simply because Myron knew that Plaintiff had "made things right with O'Neil," it does not necessarily follow that Myron had moved beyond the incident. The Court finds Plaintiff's evidence indicating that Myron gave a "positive response" upon learning of Plaintiff's apology insufficient for it to conclude that Myron's termination rationale was not "an honest explanation for why he

fired [Plaintiff]." (*Id*.) Put another way, this evidence does not constitute a head-on rebuttal of Defendant's proffered reason for termination. *See Diaz*, 367 F. App'x at 97 ("However, a plaintiff cannot merely quarrel with the wisdom of the employer's reason, but must meet the reason head on and rebut it.") (internal quotation marks and citation omitted).

4. Defendant's Toleration of Misconduct

Plaintiff further asserts that because Myron has overlooked similar employee misconduct in the past, his failure to do so in this instance is evidence of pretext. Specifically, Plaintiff highlights that Myron did not terminate (1) Rhinehart when his clients have called with "[c]onfusion" and "complaints about their deal" half a dozen times over seventeen years; (2) Dennis Purcell when "he got into a fistfight with another salesman on the car lot"; or (3) Jarred Pratt when he was routinely "high on drugs in front of customers and slipping into unconsciousness."[3] (Rhinehart Dep., Doc. 56-21, at 77; Jacoby Decl., Doc. 56-4, ¶¶ 4-7.)

"A typical means of establishing pretext is through comparator evidence." *Moon v. Kappler, Inc.*, No. 4:13-CV-1992, 2015 WL 2381061, at *21 (M.D. Ala. May 19,

[3] The evidence regarding Purcell and Pratt comes to the Court through the declaration of Fred Jacoby. (Doc. 56-4.) Defendant objects to this evidence on the grounds that Jacoby lacks personal knowledge and that his statements are without probative value. (Doc. 61 at 13-14.) After reviewing Defendant's arguments, the Court overrules its objections. The Court is satisfied that Jacoby's statements are based on personal knowledge and are sufficiently probative.

2015) (analyzing employer pretext in FMLA suit) (citing *Silvera v. Orange Cnty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001)). A comparator is "a similarly-situated employee who committed the same violation of work rules, but who was disciplined less severely than [the plaintiff]." *Id.* (internal quotation marks and citation omitted). "While there has been some dispute as to what the phrase 'similarly situated' means in this context, it is clear that the burden is on the plaintiff to show that the employees were 'similarly situated' in all relevant respects." *Id*. (internal quotation marks and citation omitted).

After a review of this evidence, the Court cannot conclude that these prior instances of employee misconduct indicate a genuine dispute as to employer pretext. Unlike Plaintiff's actions, the behavior of Purcell and Pratt does not constitute mistreatment of a potential customer or third party. Though Rhinehart's conduct can be classified as such, his actions are hardly the same as Plaintiff's. At worst, Rhinehart led third parties to believe that they were getting a more favorable deal than they were. (Rhinehart Dep. at 77.) Conversely, Plaintiff is accused of intentionally directing profanity and otherwise inappropriate behavior at a third party.

5. Termination of Past Employees

Plaintiff also states that Defendant's termination of a past employee who "needed or requested leave" is evidence of pretext in his case. In particular, Plaintiff points to the fact that Rhinehart was "directed to fire

[Doug Thomson]" after Thompson's wife had been diagnosed with "serious respiratory problems and septic shock."[4] (Thomson Decl., Doc. 56-5, ¶ 4.) In Thomson's words:

> Shortly [after learning of my wife's diagnosis], I was told that I had to show up for a sales meeting on my day off. During the sales meeting, a sales consultant and I got into a debate about a sales technique and, at one point, I said I did not agree with him but in any event, my wife was ill and I should not even be there. A finance manager and a sales manager told me to go home and take some time off because of my wife, which I did. When I returned,

[4] For the same purpose, Plaintiff offers the following statement by Fred Jacoby: "I later heard from [Plaintiff] that Myron Kaminsky directed him to fire [Michael] Johnson because 'they couldn't have a guy with heart issues working' at the dealership." (Jacoby Decl. ¶ 8.) Myron's statement instructing Plaintiff to fire Johnson as a result of his heart issues would ordinarily be admissible as an opposing party's statement. *See* Fed. R. Evid. 801(2). However, because this statement comes to the Court only through Plaintiff's hearsay statement, it is not admissible unless Plaintiff's statement falls within an applicable exception. *See* Fed. R. Evid. 801, 805. Accordingly, because Plaintiff's statement does not fall within an exception, this statement, in its entirety, is inadmissible. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293 (11th Cir. 2012). Thus, Defendant's objections as to paragraph eight of Jacoby's declaration are sustained. (Doc. 61 at 14-15.)

> Mickey Rinehart [sic] brought me into a meeting and fired me. He told me that my recent sales were not high enough, and that he was directed to fire me.

(*Id.*)

While the Court views this evidence as admissible and relevant to its present inquiry, the Court questions its probative value.[5] Certainly, this evidence can be viewed in a way to suggest that Thomson was terminated because Defendant feared an imminent FMLA request. However, this conclusion is belied by Thomson's failure to indicate (1) whether the person responsible for his termination knew of his wife's condition; (2) whether his wife's condition would have constituted a "serious health condition" within the meaning of 29 U.S.C. § 2611(11); and (3) whether Thomson made, or even planned to make, an FMLA request. Yet, perhaps most significantly, this conclusion is belied by the fact that Thomson admitted to "fail[ing] to sell as many cars . . . as the Kaminskys had set for me as a goal" – the very reason that Thomson was given for his termination. Accordingly, the Court does not find the information within Thomson's declaration to be sufficiently probative to allow Plaintiff to survive summary judgment. *See Brooks*, 446 F.3d at 1163 ("[T]o avoid summary judgment [the plaintiff] must introduce

[5] To the extent out-of-court statements within the excerpt are offered for the truth of the matter asserted within, they are statements of an opposing party and are therefore admissible. *See* Fed. R. Evid. 801(d)(2). Consequently, Defendant's objection (Doc. 61 at 15) is overruled.

significantly probative evidence showing that the asserted reason is merely a pretext for discrimination.") (internal quotations and citation omitted).

6. Statements Made by Defendant on the Termination Date

At the termination meeting at which Adam, Myron, and Plaintiff were present, Adam told Plaintiff that he "had done nothing wrong" and that their decision was "purely a business decision." (Bartels Dep. I at 104.) Because Defendant contends that they terminated Plaintiff for his conduct toward Albert, Plaintiff argues that Defendant's rationale at the termination meeting is inconsistent and is thus evidence of pretext.

As Plaintiff maintains, the rationale given to Plaintiff at his termination meeting and the one now advocated by Defendant are inconsistent. As a result, Plaintiff has produced evidence that "may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). Yet, such a showing will not "*always* be adequate to sustain a jury's finding of liability." *Id.* "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* For instance, "'if the circumstances show that the defendant gave the false explanation to conceal something

other than discrimination, the inference of discrimination will be weak or nonexistent.'" *Id*. (citing *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1338 (2d Cir. 1997)).

Thus, in evaluating the inconsistency at hand, the Court must not limit its inquiry to simply the contents of Adam's statement. The Court must also consider evidence indicating that (1) Adam began the termination meeting by telling Plaintiff that he "was going to think [they were] the biggest shitbags in the world"; (2) Myron also told Plaintiff that "he knew what [Plaintiff] was going through because Adam . . . had had a miscarriage"; (3) Myron offered Plaintiff a three months' severance package and a letter of reference; (4) Plaintiff's statement that "Adam Kaminsky and Ross Kaminsky sent me text messages with prayers for my baby"; (5) Plaintiff's statement that, at his termination meeting, Adam and Myron expressed that they "felt bad for me"; and (6) Plaintiff's in-brief characterization of some of Myron's statements, on the day of Plaintiff's termination, as expressions of sympathy. (Bartels Dep. I at 104; Bartels Decl., Doc. 56-1, ¶¶ 6, 8; Pl.'s Resp. at 26.)

Evaluating this evidence in the context of all other evidence presented on the issue of Plaintiff's termination, the Court finds that no reasonable jury could find that Adam's initial termination rationale was given to conceal a discriminatory intent. Rather, the Court finds that the initial termination explanation was indisputably given to further the feelings of sympathy that both Myron and Adam carried. Consequently, the

Court is left only with the close temporal proximity between Plaintiff's FMLA notice and his termination on which to base its pretext determination. Without more, the Court cannot conclude that a genuine dispute exists as to whether Defendant's legitimate termination rationale was pretextual. For that reason, summary judgment is proper as to both Plaintiff's interference claim and his retaliation claim.

III. CONCLUSION

For the reasons above, the Court **GRANTS** Defendant's motion for summary judgment (Doc. 40) and accordingly **DENIES AS MOOT** Defendant's motion for protective order (Doc. 28) and Plaintiff's motion to compel (Doc. 30). The Clerk is directed to **ENTER JUDGMENT** in favor of Defendant 402 East Broughton Street, Inc., and is further directed to **TERMINATE** all motions and deadlines and **CLOSE** this case.

ORDER ENTERED at Augusta, Georgia, this 28th day of March, 2016.

/s/ J. Randal Hall
HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

United States District Court
Southern District of Georgia

DUANE BARTELS,

Plaintiff,

v.

402 EAST BROUGHTON STREET, INC., d/b/a SOUTHERN MOTORS ACURA,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV4:14-75

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with the Court's Order of March 28, 2016, Defendant's Motion for Summary Judgment is GRANTED. Judgment is entered in favor of Defendant 402 EAST BROUGHTON STREET, INC., and this civil action stands CLOSED.

03/28/2016
Date

Scott L. Poff
Clerk

/s/ Tara A. Burton
(By) Deputy Clerk

[SEAL]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11958-AA

DUANE BARTELS,

Plaintiff-Appellant,

versus

SOUTHERN MOTORS
OF SAVANNAH, INC., a.k.a.
Southern Motors Acura,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(Filed May 3, 2017)

BEFORE: HULL, MARCUS and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant Duane Bartels is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11958-AA

DUANE BARTELS,

Plaintiff-Appellant,

versus

SOUTHERN MOTORS
OF SAVANNAH, INC., a.k.a.
Southern Motors Acura,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

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

(Filed May 3, 2017)

BEFORE: HULL, MARCUS and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES
CIRCUIT JUDGE