No. 20-6087

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TREVA BACY,

Plaintiff-Appellant,

v.

CHICKASAW NATION INDUSTRIES, INC., and
CNI FEDERAL SERVICES, LLC,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
THE HONORABLE CHARLES GOODWIN
DISTRICT COURT JUDGE
NO. 19-CV-00512-G

APPELLANT TREVA BACY'S OPENING BRIEF (CORRECTED)

ORAL ARGUMENT IS REQUESTED

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October 1, 2020 ***SCANNED PDF ATTACHMENTS INCLUDED***
DIGITAL SUBMISSIONS SENT VIA EMAIL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: **Page:**

Federal Statutes

Federal Rules

Treatises and Publications

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was pursuant to 28 U.S.C. §1331 in that this action arose under the laws of the United States, namely 42 U.S.C. §2000(e), for violation of Plaintiff's federally protected rights

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1292(a), in that this appeal is from a final decision of the District Court regarding all of Appellant's federal claims. 28 U.S.C. § 1291; Collateral Order Doctrine.

The final judgment was entered on the docket on May 7, 2020 and disposed of all Appellant's federal claims. This appeal was commenced on June 8, 2020.

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that no material facts were in dispute precluding summary judgment.

2. Whether the district court erred by not considering the relevant facts and circumstances to allow proper evaluation of the evidence in the most favorable light for Ms. Bacy.

3. The district court erred by rejecting evaluation of racially based "enmities" as being insufficient to be presented to the triers of fact.

4. Whether the district court erred by misinterpreting Ms. Bacy's factual materials being presented in their entirety to provide the atmosphere and constraints regarding defendants' conduct

5. Whether the district court erred by shifting the burden to Ms. Bacy to conclusively prove that her termination was pretextual.

6. Whether the district court erred by determining the admissibility of hearsay evidence or potential theories of admissibility of statements presented and argued by Appellees treated as sworn statements of fact can be relied upon to defeat Appellant's challenges as being a question to the trier of fact.

STATEMENT OF THE CASE

Appellant, Ms. Treva Bacy, an older African American female, a well-respected and long-time employee, in the FAA Remote Pilot Operator (RPO) program. Ms Bacy maintained stellar employee performance for approximately thirty (30) years. having been continually retained by multiple entities awarded the FAA government contract for the administration of the training of air traffic controllers. Ms. Bacy had previously not suffered any disciplinary action during her years of service. At the time of her termination, the FAA contract was administered by Appellees, who agreed and continued to maintained Ms. Bacy as an experienced Remote Pilot Operator ("RPO") Lead Air Traffic Control Academy in Oklahoma City. The RPO program trains pilots with interactive computer simulations.

Ms. Bacy maintains she was falsely accused of raising her voice at a white oppressive and demeaning supervisor who was not her direct supervisor. Ms. Bacy was immediately terminated at her instance and or resulted from a predetermined outcome. Just prior to her termination, Ms. Bacy was attempting to protect a new African American female RPO trainee from the unnecessary and discriminatory wrath of this white supervisor. As a result of Ms. Bacy's intervention, the supervisor falsely targeted Ms. Bacy claiming that she was insubordinate. The supervisor immediately took her ID access badge and indicated she was terminated

before any investigation or discussions took place.

Appellees demanded her termination even though in the 30 years, Ms. Bacy had not been disciplined. Appellees were aware Ms. Bacy had previously suffered the loss of her long-term spouse and was currently dealing with and caring for her aging mother who had Alzheimer's. Ms. Bacy was the main financial support source for her family.

STATEMENT OF FACTS

Appellant's Material Factual Submissions

Exhibit A:

Ms. Bacy's Affidavit: Indicated her testimony needed to be clarified regarding the proper consideration of her view of her employment being subject to various constraints requiring Appellees to comply. (Vol II. Aplt. App. 259-264)

Exhibit B:

SAIC is the FAA contractor. Appellees solely are employed, administered and answer manly to SAIC and some collaterally to the FAA. SAIC is the main contractor not as represented by Appellees. Supports Appellant's view about having a meeting with SAIC employees who ensured her she was simply not an employee at will. (Vol II. Aplt. App. 266).

Exhibit C:

SAIC Fiscal 10-K Report for 2016 filed with the SEC as required by federal law. In support of Ms. Bacy's testimony at Deposition regarding her hiring that she was not simply an at will employee. The policies of SAIC as stated to Ms. Bacy are confirmed in the 10-K submission. The policy of SAIC states:

> "A failure to attract, train, retain and utilize skilled employees and our senior management team would adversely affect our ability to execute our strategy and may disrupt operations." (Vol II. Aplt. App. 271).

Exhibit D:

SAIC maintains high ethical standards and commitments to its employees. SAIC prohibits the conduct that Appellees were allowing to be committed by Appellees. Appellees were subject to the Code. (Vol II. Aplt. App. 273-274; 276).

Exhibit E:

The importance of SAIC Code of Conduct is outlined by a publication message statement from the CEO, Nazzic Keene. The emphasis is on integrity as well as providing a positive work environment. (Vol II. Aplt. App. 279-281). The misconduct Ms. Bacy identified committed by Appellees is prohibits retaliation. (Vol II. Aplt. App. 283; 284; 285-6).

Exhibit F:

Appellees have published a Compliance Handbook regarding treatment of its employees. (Vol II. Aplt. App. 288-291). It prohibits retaliatory conduct and all discriminatory actions. Appellees are subject to action and or discipline and or loss of contact if conducting the type of conduct. (Vol II. Aplt. App. 290-291).

Exhibit G:

Collective Bargaining Agreement. (Vol II. Aplt. App. 293-302). Ms. Bacy had not been a member of the union; however various provisions applied to Ms. Bacy's employment with Appellees. (Vol II. Aplt. App. 295-297; 300; 301).

Exhibit H:

Appellees were bound to follow the provision of their own Employee Handbook. (Vol II. Aplt. App. 303-309). Appellees were bound to follow the intent of the provisions not just lip-service based upon duties owed to SAIC. Ms. Bacy was intitled to workplace free from harassment and inappropriate retaliation behaviors. (Vol II. Aplt. App. 304-5). Lamineck did not follow these policies. (Vol II. Aplt. App. 303-305). The CNI dispute resolution policy was violated by Appellees as there was no good faith executed by Appellees' termination of an otherwise long-time stellar employee without ever talking to her about her side of the story. (Vol II. Aplt. App. 305-306). Appellees breached its collective duty to all employee by taking and supporting the intentional demeaning treatment of Ms. Bacy.

Exhibit I:

Ms. Bacy's under oath discovery responses were relevant but ignored by the district court. (Vol II. Aplt. App. 311-317) (the highlighted portions indicate a factual dispute existed.)

Exhibit J:

Ms. Bacy included her sworn excerpts from her deposition. (Vol II. Aplt. App. 319-354) which by Appellees argument indicated material facts were in dispute. No independence between or privacy for Ms. Bacy. (Vol II. Aplt. App. 326 - Depo p 74-76). Conrad, a black male was higher in seniority than Lamineck.

Depo pp. 79-80. Prior to her termination, Ms. Bacy confronted the supervisor Laiminek about her discriminatory conduct. Depo p 105-107. The claims about Ms. Bacy screaming are contested and not factually supported. Depo p 111-116. The investigation was not conducted properly. Depo p. 118; 119; 121-123.

Ms. Bacy identified instances of harassment and fabrication of wrongdoing. as well as intentional conduct to emotionally harm Ms. Bacy. Depo p 125-136; 141-142. The shooting incident out of North Carolina ignited a loud hostile offensive. As well as harassing offensive conduct. (Vol II. Aplt. App. 340-344).

Ms. Bacy attempted to make a hotline report regarding the problems. (Vol II. Aplt. App. 345-346); including the overzealous action of Lamineck. (Vol II. Aplt. App. 346-348). A clear indication was that Laminek was allowed to do what she pleased. (Vol II. Aplt. App. 350-354).

SUMMARY OF ARGUMENTS

PROPOSITION I:

THE DISTRICT COURT ERRED IN FINDING THAT NO MATERIAL FACTS WERE IN DISPUTE PRECLUDING SUMMARY JUDGMENT.

Under the Supreme Court decision in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) The Supreme Court determined "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."); *see also Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1416-17 (10th Cir. 1987). The Supreme Court held that the employer violated Title VII by maintaining "one hiring policy for women and another for men—each having pre-school-age children." *Id.* at 544. Even though Title VII does not prohibit discrimination against people with preschool-age children as a class, the Court recognized that discrimination against only women, not men, with preschool-age children is a form of sex discrimination cognizable under the statute.

This theory applied to Ms. Bacy has it was circumstantially presented she became a target for her supervisor and singled out as were a disproportionate number of other African American employees. The district court failed to consider that after over 30 years of faithful employment the Appellees decided to demote black employees claiming a restructure and promoted an abusive white employee to take charge even when such was not in her job duties.

PROPOSITION II:

WHETHER THE DISTRICT COURT ERRED BY NOT CONSIDERING THE RELEVANT FACTS AND CIRCUMSTANCES TO ALLOW PROPER EVALUATION OF THE EVIDENCE IN THE MOST FAVORABLE LIGHT FOR APPELLANT.

The Court must always examine the affidavits or other information submitted in the light most favorable to the party opposing the motion. In this case, the Ms. Bacy was entitled to the most favorable light regarding her view of the evidence. The district court must not resolve factual disputes by weighing conflicting evidence. *Tippens v Celotex Corp.,* 805 F. 2d 949, 953 (11th Cir. 1986). The district court did not consider the existence of all the evidence apparently focusing only on certain assumptions that Appellees claimed were relevant. The district court ignored and did not consider the interrelationship of the various viewpoints, influences and history.

PROPOSITION III:

THE DISTRICT COURT ERRED BY REJECTING EVALUATION OF RACIALLY BASED "ENMITIES" AS BEING INSUFFICIENT TO BE PRESENTED TO THE TRIERS OF FACT.

"[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" so "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020) Title VII also provides that a plaintiff may show discrimination by showing

that his or her membership in a protected class was a "motivating factor" for the challenged employment practice. § 2000e-2(m). "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Bostock,* 140 S. Ct. at 1741. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that **Congress never intended to give an employer license to discriminate against some employees** on the basis of race or sex merely because he favorably treats other members of the employees' group."); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987).

The district court did correctly point out Ms. Bacy's employment atmosphere as generating an "enmity" which **suggests true hatred, either overt or concealed**. Hostility implies strong, open enmity that shows itself in attacks or aggression. Animosity carries the sense of anger, vindictiveness, and sometimes the desire to destroy what one hates. *See; https://www.merriam-webster.com/dictionary/enmity.* This atmosphere is exactly what Ms. Bacy tried to describe and explain. No other white younger employees were treated as harsh as those in a minority status. The unlawful practices of 42 U.S.C. § 2000e-2(a) are "not limited to 'economic' or 'tangible' discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Rather, the statute is "broad enough to protect individuals from working in a discriminatorily hostile or abusive environment." *Bird v. W. Valley City*, 832 F.3d 1188, 1205 (10th Cir. 2016).

PROPOSITION IV:

THE DISTRICT COURT ERRED BY MISINTERPRETING APPELLANT'S FACTUAL MATERIALS BEING PRESENTED IN THEIR ENTIRETY TO PROVIDE THE ATMOSPHERE AND CONSTRAINTS REGARDING DEFENDANTS' CONDUCT.

No affidavit was submitted by Appellee's based upon independent expert opinion that would be admissible as it was not based upon facts only hearsay conclusions. The admissible facts offered by Appellees were contested and or explained in the context that was overlooked. All exhibits are simply offered and may not admissible. *Sehll Rocky Mountain Prod., LLC v. Ultra Res., Inc*., 415 F.3d 1158, 1169 n.6 (10th Cir. 2005). Again, any witness must have personal knowledge and be competent to testify in court. Suppositions and beliefs were subject to cross examination to be judged by the trier of fact. The district court made presumptions that removed the best light requirement provided Ms. Bacy.

PROPOSITION V:

THE DISTRICT COURT ERRED BY SHIFTING THE BURDEN TO APPELLANT TO CONCLUSIVELY PROVE THAT HER TERMINATION WAS PRETEXTUAL.

Ms. Bacy's abrupt termination from employment after over thirty years of an unblemished work record was sufficient to show pretext coupled the disparities. Ms. Bacy is only allowed one opportunity to file a response to cover the issues.

A determination of Ms. Bacy's believability can only be provided at a trial not a from a cold record which by the district court's opinions indicated if the employer said it was it was to be believed. Ms. Bacy was not provided the same opportunity to show the purposes of a perceived "conflation" that was intended to address the distinctions between the narrow concepts offered by Appellees to limit use of the overall scheme of evidence. Any perceived conflation was only for the desirable sake of conciseness and recall.

This Court in *Christine Frappied et al., v. Affinity Gaming Black Hawk, LLC,* No. 19-1063; (D.C. No. 1:17-CV-01294-RM-NYW); Decided July 21, 2020 indicated the importance of evaluation of stereotypes and relationships of the various factors. In this instance, Ms. Bacy, a black older woman, the importance of the Appellees' immediate termination against the stated policies of SAIC, Appellees employer, were not followed and Ms. Bacy after thirty years was caste aside. The only reason was due to demands of her supervisor. This Court indicated that:

> ". . . no circuit court has yet addressed whether Title VII prohibits sex-plus-age discrimination. Several district courts, however, have accepted the viability of sex-plus-age claims under the statute. The Equal Employment Opportunity Commission has also recognized the validity of such claims. See 2 EEOC Compliance Manual § IIA, 2009 WL 2966754 (Aug. 6, 2009) ("The EEO statutes prohibit discrimination against an individual based on his/her membership in two or more protected classes [I]ntersectional discrimination can involve more than one EEO statute, e.g., discrimination based on age and disability, or based on sex and age.").(Footnotes and Citations omitted)

PROPOSITION VI:

THE DISTRICT COURT ERRED BY DETERMINING THE ADMISSIBILITY OF HEARSAY EVIDENCE OR POTENTIAL THEORIES OF ADMISSIBILITY OF STATEMENTS PRESENTED AND ARGUED BY APPELLEES TREATED AS SWORN STATEMENTS OF FACT CAN BE RELIED UPON TO DEFEAT APPELLANT'S CHALLENGES AS BEING A QUESTION TO THE TRIER OF FACT.

The court must not resolve factual disputes by weighing conflicting evidence. *Tippens v Celotex Corp.,* 805 F2d 949, 953 (11th Cir. 1986). An order granting summary judgment is not discretionary and will be upheld only if everything in the record indicates that there is no genuine dispute over the material facts and that the moving party is entitled to judgment as a matter of law Id at 952 (citing *Keiser v. Coliseum Properties, Inc*., 614 F 2d 406 (5th Cir. 1980).

The district court erred by evaluating statements or notes and or suppositions as facts when Mrs. Bacy objected to such consideration. As such, **no admissible facts are offered** that could defeat Mrs. Bacy's affidavit when the other information was simply based upon "information and belief" and would not be admissible. *See Sehll Rocky Mountain Prod., LLC v. Ultra Res., Inc.*, 415 F.3d 1158, 1169 n.6 (10th Cir. 2005). Again, the witness must have personal knowledge and be competent to testify, just like in court. Conclusions or guessing are not allowed in moving for summary judgment. **The witness's statements must include sufficient factual information to establish that the conclusion is actually based on personal knowledge and that the witness is competent to testify**, even if the affidavit or

declaration recites that it is based on personal knowledge. The information relied upon by the district could was incompetent to refute the sworn testimony of Mrs. Bacy to the facts and circumstances at issue.

ARGUMENT AND AUTHORITY

PROPOSITION I:

THE DISTRICT COURT ERRED IN FINDING THAT NO MATERIAL FACTS WERE IN DISPUTE PRECLUDING SUMMARY JUDGMENT.

1. **Standard of Review:**

This Court reviews cases determined by the district court at Summary Judgment de novo, applying the same standard as the district court. *Osborne v. Baxter Health Care*, 798 F.3d 1260, 1266 (10th Cir. 2015). The facts are reviewed in the light most favorable to the non-moving party and all reasonable inferences are drawn in her favor. *Id*. Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "In this inquiry, the nonmovant is give wide berth to prove a factual controversy exists. *Id.*

In *Campbell v. Wal-Mart Stores, Inc*., 272 F. Supp. 2d 1276, 1283 (N.D. OK., 2003) the district court stated:

> "A summary judgment motion does not empower a court to act as the jury and determine witness credibility, weigh the evidence, or choose between competing inferences." *Id.* at 1283

See also; Nat. Aviation Underwriters, Inc. v. Altus Flying Serv., Inc., 555 F.2d 778, 784 (10th Cir. 1977). Summary Judgments are to be used sparingly in employment discrimination cases as most claims often turn on the employer's intent as well as self-interest. *See Campbell*, 272 F. Supp.2d at 1283 (citing *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994).

The district court in Mrs. Bacy's matter erred in the application of the summary judgment standard by resolving factual disputes and drawing inferences in the light most favorable to the movant. This coupled with not considering the background information provided by Mrs. Bacy.

2. <u>Argument and Authority:</u>

Under the Supreme Court decision in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) The Supreme Court determined

> "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex[age] merely because he favorably treats other members of the employees' group."

see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416-17 (10th Cir. 1987). The Supreme Court held that the employer violated Title VII by maintaining "one hiring policy for women and another for men—each having pre- school-age children." *Id.* at 544.

Even though Title VII does not prohibit discrimination against people with preschool-age children as a class, the Court recognized that discrimination against

only women, not men, with preschool-age children is a form of sex discrimination cognizable under the statute. Under this framework, comparison of such factors as age and race would satisfy the necessity to simply take the employer's claim of non-discrimination intent as superfluous.

This theory applied to Mrs. Bacy has it was circumstantially presented to the district, she became a target for her supervisor and singled out when trying to assist other younger trainees, as there were a disproportionate number of other African American employees being treated more harshly.

The district court failed to consider that after over 30 years of faithful employment rising to a heighten training position the Appellees immediately decided to demote or provide lessor job duties immediately upon taking over the new contract for long term black employees. Appellees provided promises of continued employment while claiming a restructure was needed. Appellees promoted an abusive white employee to take charge even when such was not in her job duties.

Recently, Justice Ginsberg delivered the opinion of the Supreme Court in *Fort Bend County, Texas v. Lois Davis*, 587 U.S. __ (2019); No. 18-525; decided: June 3, 2019. The Supreme Court pointed out:

> "Title VII of the Civil Rights Act of 1964 proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin. 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). The Act also prohibits retaliation against persons who assert rights under the statute. §2000e–3(a). As a precondition to the commencement of a

> Title VII action in court, a complainant must first file a charge with the Equal Employment Opportunity Commission (EEOC or Commission). §2000e–5(e)(1), (f)(1).". . .
>
> . . . Title VII directs that a "charge . . . shall be filed" with the EEOC "by or on behalf of a person claiming to be aggrieved" within 180 days "after the alleged unlawful employment practice occur[s]." 42 U. S. C. §2000e–5(b), (e)(1). For complaints concerning a practice occurring in a State or political subdivision that has a fair employment agency of its own empowered "to grant or seek relief," Title VII instructs the complainant to file her charge first with the state or local agency. §2000e–5(c)."

The importance of this discussion is contained within the evidence presented regarding Ms. Bacy's filing of an EEOC complaint regarding her discharge. The dismissal of the EEOC involvement was a determination that Appellees "were not subject to Title VII" even though they employee more than 300 employees and are subject to federal law under federal contracts.

PROPOSITION II:

WHETHER THE DISTRICT COURT ERRED BY NOT CONSIDERING THE RELEVANT FACTS AND CIRCUMSTANCES TO ALLOW PROPER EVALUATION OF THE EVIDENCE IN THE MOST FAVORABLE LIGHT FOR APPELLANT.

This Court under a *de novo* review views the evidence in the light most favorable to the nonmoving party. *Blehm v. Jacobs*, 702 F.3d 1193, 1199 (10th Cir. 2012). This Court will determine whether the Appellees have shown the lack of a genuine dispute of material facts and they are entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a).

"[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" so "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). Title VII also provides that a plaintiff may show discrimination by showing that his or her membership in a protected class was a "motivating factor" for the challenged employment practice. 42 U.S.C. § 2000e-2(m). "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Bostock,* 140 S. Ct. at 1741. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987).

The district court did correctly point out Ms. Bacy's employment atmosphere as generating an "enmity" which suggests true hatred, either overt or concealed. Hostility implies strong, open enmity that shows itself in attacks or aggression. Animosity carries the sense of anger, vindictiveness, and sometimes the desire to destroy what one hates. *See;* https://www.merriam-webster.com/dictionary/enmity. This atmosphere is exactly what Ms. Bacy tried to describe and explain. No other white younger employees were treated as harsh as those in a minority status. The unlawful practices of 42 U.S.C. § 2000e-2(a) are "not limited to 'economic' or 'tangible' discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477

U.S. 57, 64 (1986). Rather, the statute is "broad enough to protect individuals from working in a discriminatorily hostile or abusive environment." *Bird v. W. Valley City*, 832 F.3d 1188, 1205 (10th Cir. 2016).

PROPOSITION III:

DISTRICT COURT ERRED BY REJECTING EVALUATION OF RACIALLY BASED "ENMITIES" ARE INSUFFICIENT TO BE DETERMINED BY THE TRIERS OF FACT

"[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" so "Title VII's 'because of' test incorporates the simple and traditional standard of but-for causation." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). Title VII also provides that a plaintiff may show discrimination by showing that his or her membership in a protected class was a "motivating factor" for the challenged employment practice. § 2000e-2(m). "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Bostock,* 140 S. Ct. at 1741. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that **Congress never intended to give an employer license to discriminate against some employees** on the basis of race or sex merely because he favorably treats other members of the employees' group."); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987).

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aggression. Animosity carries the sense of anger, vindictiveness, and sometimes the desire to destroy what one hates. *See; https://www.merriam-webster.com/dictionary/enmity.* This atmosphere is exactly what Ms. Bacy tried to describe and explain. No other white younger employees were treated as harsh as those in a minority status. The unlawful practices of § 2000e-2(a) are "not limited to 'economic' or 'tangible' discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Rather, the statute is "broad enough to protect individuals from working in a discriminatorily hostile or abusive environment." *Bird v. W. Valley City*, 832 F.3d 1188, 1205 (10th Cir. 2016).

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discharge any individual … because of such individual's … race" 42 U.S.C. § 2000e-2(a)(1). The Supreme Court and courts of appeals have long recognized, however, that Title VII's protections are not limited to discrimination that affects *all races* within a particular workplace. As the Supreme Court explained in *Connecticut v. Teal*, "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." 457 U.S. 440, 455 (1982) (citations omitted). Rather, Title VII's protections extend equally to defined subgroups of employees whom the employer treats differently. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); *Coleman v. B-G Maint. Mgmt.*, 108 F.3d 1199, 1203 (10th Cir. 1997) Title VII not

only forbids racial discrimination in general, but also discrimination against subclasses of protected employees. (citing, *inter alia*, *Phillips*, 400 U.S. at 544).

This is true regardless of whether the trait that defines the subgroup has separate statutory protection. In *Phillips*, for example, the Supreme Court reinstated a plaintiff's claim that her employer discriminated against women with pre-school-age children as compared to its treatment of men with pre-school-age children. Although various subgroup-defining traits may not itself statutorily protected, the Court stated that Title VII does not "permit one hiring policy for women and another for men—each having pre-school-age children.

In *Hicks v. Gates Rubber Company*, this Court allowed a plaintiff to proceed with a Title VII claim for sexual harassment based on the combination of her sex and her race. 833 F.2d 1406, 1416-17 (10th Cir. 1987). Noting that "Title VII prohibits an employer from discriminating … because of race *or* because of sex," this Court stated: "'The use of the word "or" evidences Congress' intent to prohibit employment discrimination based on any *or all* of the listed characteristics.'" *Id.* at 1416. (quoting *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025,1032 (5th Cir. 1980)).

"The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class." *Franchina v. City of Providence,* 881 F.3d 32, 53 (1st Cir. 2018). Ms. Bacy being a much older black woman had indicated the various alternatives or combination of reasons behind

Appellees' decision to immediately terminate her without any investigation as to the real facts and circumstances. Appellees attitude and summary disposition with a nuclear impact upon Ms. Bacy's live strongly indicated an implicit discriminatory bias with predetermined result.

The implicit bias being generated was not in accord to Appellees agreement with SAIC regarding the conduct of their agreement with the FAA. As this Court explained in *Perry*, "[t]he firing of a qualified minority employee raises the inference of discrimination because it is facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement." 199 F.3d at 1140. Consequently, this Court held that "[e]vidence of the seeking or hiring of a replacement to fill the position vacated by a discharged plaintiff who [belongs to a statutorily-protected group] is, by itself, sufficient to satisfy the fourth element of the plaintiff's *McDonnell Douglas* prima facie case." *Id.*; *see also English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1008 (10th Cir. 2001).

PROPOSITION IV:

DISTRICT COURT ERRED BY MISINTERPRETING APPELLANT'S FACTUAL MATERIALS THAT WERE PRESENTED IN THEIR ENTIRETY TO PROVIDE THE ATMOSPHERE AND CONSTRAINTS REGARDING DEFENDANTS CONDUCT.

No affidavit was submitted by Appellee's based upon independent expert opinion that would be admissible as it was not based upon facts only hearsay conclusions. The

admissible facts offered by Appellees were contested and or explained in the context that was overlooked. All exhibits are simply offered and may not admissible. *Sehll Rocky Mountain Prod., LLC v. Ultra Res., Inc*., 415 F.3d 1158, 1169 n.6 (10th Cir. 2005). Again, any witness must have personal knowledge and be competent to testify in court. Suppositions and beliefs were subject to cross examination to be judged by the trier of fact. The district court made presumptions that removed the best light requirement provided Ms. Bacy. See Statement of Facts.

Appellant properly objected to the exhibits offered by Appellees as not being capable of being introduced at trial or as useable for the purpose intended. Similarly, in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), the Supreme Court set forth a standard that is too often ignored or misunderstood:

> "T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . . "**Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge**." *Liberty Lobby, supra,* at 255, 106 S.Ct. 2505. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.,* at 300.

The Supreme Court long ago cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Pollar v. Columbia Broadcasting Sys., Inc.*, 368 U.S.

464, 473, 82 S.Ct. 486, 491 (1962). The opportunity to try a civil case before a jury should be a low bar and should focus on whether the evidence *allows* a jury to find for the non-movant.

In *Rasmy v Marriott Intl. Inc.*, No.18-3260-cv, 2020 U.S. App. LEXIS 7023 (2nd Cir. Mar. 6, 2020). The decision discusses key issues concerning summary judgment in employment cases, including the following:

> "In a claim of a hostile work environment, the emphasis is on the hostility of the work environment as a whole, not the motivation of one decisionmaker, and liability is "determined only by looking at all the circumstances." A plaintiff must show merely that discriminatory incidents were "sufficiently continuous and concerted to have altered the conditions of [the employee's] working environment." Accordingly, conduct not directly targeted at or spoken to an individual [so-called "stray remarks"] but purposefully taking place in his presence can nevertheless transform his work environment into a hostile or abusive one, and summary judgment . . . this basis was unwarranted."
>
> and;
>
> "[T]he question of what motivated an employer's desire to fire a worker is a quintessential jury function."
>
> and;
>
> "[P]roof is seldom available with respect to an employer's mental processes. Instead, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence, since an employer who discriminates against its employee is unlikely to leave a well-marked trail, such as making a notation to that effect in the employee's personnel file. Ordinarily, plaintiff's evidence establishing a *prima facie* case and defendant's production of a nondiscriminatory reason for the employment action raise a question of fact to be resolved by the factfinder after a trial. Summary judgment is appropriate at this point only if the employer's nondiscriminatory reason is dispositive and forecloses any issue of material fact."

Rasmy v Marriott Intl. Inc., No.18-3260-cv, 2020 U.S. App. LEXIS 7023 (2nd Cir. Mar. 6, 2020).

PROPOSITION V:

DISTRICT COURT ERRED BY SHIFTING THE BURDEN TO APPELLANT TO CONCLUSIVELY PROVE THAT HER TERMINATION WAS PRETEXTUAL

The district court correctly pointed out that Mrs. Bacy had made out a *prima facia* case. (Vol. II Aplt. Appx. 397); *quoting, DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017). The district court also correctly stated under the burden shifting analysis "Establishing the prima facie case "**creates a presumption that the employer unlawfully discriminated against the employee**." *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1223 (10th Cir. 2003). (Emphasis Added) Appellees did not contest this presumption.

(Vol. II Aplt. App. 397)

Proof that an employer's explanation is unworthy of credence is a form of circumstantial evidence "that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000). See also *Metzler v. Fed. Home Loan Bank*, 464 F.3d 1164, 1177 (10th Cir. 2006 ("pretext may be established with evidence that 'nondiscriminatory reasons were after-the-fact justifications.'") Pretext is also demonstrated by showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence." *Morgan v. Hilti, Inc*., 108 F.3d 1319, 1323 (10th Cir. 1997).

"[P]retext may be established with evidence that 'nondiscriminatory reasons were after-the-fact justifications.'" *Metzler v. Fed. Home Loan Bank*, 464 F.3d 1164, 1177 (10th Cir. 2006). The divergence in the district court's resolution simply provided an absolute credence to Appellees analysis. The explanation by Ms. Bacy and circumstantial evidence of pretext and or discriminatory animus was ignored and or discounted was not being factual. Any presumption provided by determination of a prima facia case was then lost by a lessor standard of Appellees only having to state a non-discriminatory reason.

The district court pointed out that the CNI Employee Handbook identified a potential act of insubordination as a potential reason for discharge but did not evaluate the policies against such conduct. However, the district court ignored the factual backdrop of the circumstantial evidence which amounts to the consideration of the same as proof of pretext. (Vol II. Aplt. App. 390-392)

The district court did not consider the importance of Conrad Ennis owed a duty as a supervisor to avoid continuation of discriminatory animus. As pointed out, he did not want to stick his neck out to address any claims of racial disparity or mistreatment. The atmosphere by circumstantial evidence was not given any consideration in the factual analysis. (Vol II. Aplt. App. 261-262).

PROPOSITION VI:

WHETHER THE DISTRICT COURT ERRED BY DETERMINING THE ADMISSIBILITY OF HEARSAY EVIDENCE OR POTENTIAL THEORIES OF ADMISSIBILITY OF STATEMENTS PRESENTED AND ARGUED BY APPELLEES AS SWORN STATEMENTS OF FACT CAN BE RELIED UPON TO DEFEAT APPELLANT'S CHALLENGE OF ADMISSIBILITY.

The district court made a presumption of an independent investigation which then by self-serving claims Appellees were essentially able to remove the presumption of discriminatory animus. (Vol. II Aplt. App. 398 (fn. 3)). This is where the district court ignored the objections made by Mrs. Bacy about the factual inaccuracies claimed by Appellees. The evidence was material and contested and not worthy of summary judgment. (Aplt. App. 259-354). *See for example*; *United States v. Abel,* 469 U.S. 45, 56 (1984) ("It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."). See also; *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008); cf. *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum . . . ."); *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 980 n.6 (5th Cir. 1995) (affirming admission of evidence that "define[d] and `elucidate[d] the nature of the transaction'").

Any ability for Mrs. Bacy to challenge the evidence appears to be lost at the summary judgment analysis performed by the district court. *See* Sandra Sperino, *Retaliation and the Reasonable Person*, 67 Fla. L. Rev. 2031, pp. 2033- 2039 (2016) Florida Law Review, March 2016. ("The Court held that the anti-retaliation provisions cover those employer actions that 'would have been materially averse to a reasonable employee or job applicant.' The Court further indicated that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.") (footnotes and citations omitted).

The district court erred by de minimizing the workplace animus that had developed mainly through the promotion of Lamineck. This animus was allowed to be swept under the rug by Appellees simply claiming they were not biased. The allowance such self-serving statements then requiring Mrs. Bacy to anticipate the district court would evaluate such conflaboration as being valid was not expected. (Vol. II Aplt. App. 229-241; 258-354)

CONCLUSION

The allegations and facts taken in light most favorable to Ms. Bacy was sufficient to provide sufficient material disputes about the self- serving claims perpetuated as being bias-neutral. The entire factual presentation by Appellees is not believable or supported by the policies and factual instances claimed by Appellees as valid. The district court appears to have given Appellees an undeserved cloak of believability over Ms. Bacy.

Respectfully Submitted,

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RULE 28.2(c)(4) STATEMENT REGARDING ORAL ARGUMENT

Appellant, Treva Bacy, requests oral argument due to the complex factual and legal issues involved governing the evaluation of this matter involved with Appellant's claims.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains **6,428** words, excluding the parts exempted by Fed.R.App.P. 32(a)(7)(B)(iii) and this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size fourteen Times New Roman font.

/s/ David J. Batton
David J. Batton

CERTIFICATES FOR DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Avast Premium Security 20.7.2425; and according to the program are free of viruses.

/s/ David J. Batton
David J. Batton

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2020, I caused the foregoing Appellants Opening Brief to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service is consistent with the Service Method Report:

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TREVA BACY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-19-512-G**
	)	
CHICKASAW NATION INDUSTRIES, INC. et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

Now before the Court is the Motion for Summary Judgment (Doc. No. 18) filed by Defendants Chickasaw Nation Industries, Inc. ("CNI") and CNI Federal Services, LLC ("CNIFS"). Plaintiff Treva Bacy has responded in opposition (Doc. No. 33), and Defendants have replied (Doc. No. 34).

Plaintiff initiated this action in November 2018, raising claims against Defendants CNI and CNIFS of race discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq., and the Oklahoma Anti-Discrimination Act ("OADA"), Okla. Stat. Ann. tit. 25, §§ 1101 et seq., age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and negligence. *See* Compl. (Doc. No. 1-2). Plaintiff additionally raised a claim of intentional infliction of emotional distress against supervisor Sandy Laminack but voluntarily dismissed Laminack from the action on September 29, 2019. *See* Doc. No. 17. Defendants CNI and CNIFS now seek summary judgment on Plaintiff's remaining claims. For the reasons outlined below, Defendants' Motion shall be granted in part.

I. Federal Rule of Civil Procedure 56

Summary judgment is a means of testing in advance of trial whether the available evidence would permit a reasonable jury to find in favor of the party asserting a claim. The Court must grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party that moves for summary judgment has the burden of showing that the undisputed material facts require judgment as a matter of law in its favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat summary judgment, the nonmovant need not convince the Court that it will prevail at trial, but it must cite sufficient evidence admissible at trial to allow a reasonable jury to find in the nonmovant's favor—i.e., to show that there is a question of material fact that must be resolved by the jury. *See Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). The Court must then determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Parties may establish the existence or nonexistence of a material disputed fact by:

- citing to "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" in the record; or

- demonstrating "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Fed. R. Civ. P. 56(c)(1)(A), (B). While the Court views the evidence and the inferences drawn from the record in the light most favorable to the nonmoving party, *see Pepsi-Cola*

Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc., 431 F.3d 1241, 1255 (10th Cir. 2005), "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252.

II. Relevant Facts

At the time relevant to this litigation, Plaintiff was employed by Defendant CNIFS, a subsidiary of Defendant CNI. Compl. ¶ 7; Defs.' Mot. at 8. CNIFS provides aviation-related professional services to the Federal Aviation Administration's ("FAA") facilities in Oklahoma City, including the employment and management of a workforce of Remote Pilot Operators ("RPOs") at the FAA's Air Traffic Control Academy. Compl. ¶ 7; Def.'s Mot. at 8; Pl.'s Resp. at 8; Groce Aff. (Doc. No. 18-2) ¶ 2. In her capacity as an RPO Lead at the Academy, Plaintiff supervised individuals training to become RPOs as they performed computer simulation training activities. Compl. ¶ 11; *see* Groce Aff. ¶ 4.

Sometime in 2017, Plaintiff was conversing with an RPO, an RPO supervisor, and an RPO trainee about a white police officer killing an African American motorist during a traffic stop in North Carolina. RPO supervisor Laminack interjected the following comment: "If the police ask me to throw my hands up, I would throw my hands up, because I'm not a drug dealer or a gang banger." Defs.' Mot. at 13; Pl.'s Resp. at 13; Bacy Dep. (Doc. No. 18-3) 146:18-21; Compl. ¶ 20.

On October 9, 2017, Plaintiff called the CNI Ethics Hotline to complain about Laminack's behavior toward a white male RPO. Defs.' Mot. at 13; Pl.'s Resp. at 13; Bacy

Dep. 200:7-25, 232:1-15. The complaint did not concern race or age. Bacy Dep. 232:1-15.

On October 11, 2017, Plaintiff was training an RPO trainee, Camille Wade. An instructor issued a Feedback Form pertaining to Wade's performance during the training. Defs.' Mot. at 14-15; Bacy Dep. 84:19-85:6, 86:13-87:3. Feedback Forms are issued at the instructor's discretion and contain constructive feedback regarding the performance of the RPO. Hutton Aff. (Doc. No. 18-6) ¶ 6. The instructor did not know whom he was evaluating, only that the individual was working in a particular computer lab. Defs.' Mot. at 14; Pl.'s Resp. at 33. Plaintiff reviewed the Feedback Form and disagreed with the instructor's negative evaluation of Wade's performance. Plaintiff walked into Laminack's office and handed her the Feedback Form, believing Laminack disliked Wade and was, in some manner, responsible for Wade being written up. Bacy Dep. 97:20-98:13, 102:4-17, 106:6-14. Laminack was on the phone at the time with RPO supervisor Sean Wise, who overheard their conversation. Bacy Dep. 113:17-19; Wise Statement (Doc. No. 18-8) at 2. The parties dispute the content and tone of the conversation but agree that the conversation culminated in Laminack directing Plaintiff to hand in her badge and headset and that Plaintiff left the room without complying. Bacy Dep. 116:3-7.

Later that day, RPO supervisors Nathan Jones and Conrad Ennis notified Plaintiff that she was being suspended pending an investigation. Bacy Dep. 116:20-117:20. HR Generalist Wendy Hutton conducted the investigation, during which she spoke separately to Plaintiff, Laminack, Wise, and Ennis regarding the incident. Hutton Aff. ¶ 5. In a written statement, Wise wrote that he had heard Plaintiff yell at Laminack regarding the

Feedback Form. Defs.' Mot. at 15; Pl.'s Resp. at 15; Wise Statement at 2; Hutton Investigation Notes (Doc. No. 18-9) at 2.[1] Based upon the information she obtained, Hutton determined that Plaintiff had yelled at Laminack and then directly disobeyed Laminack's instruction to hand in her badge and headset. Hutton Aff. ¶ 7.

Hutton advised Project Manager Ryan Groce that she believed Plaintiff had acted in an insubordinate manner toward Laminack and recommended to Groce that Plaintiff be terminated for insubordination. *Id.* ¶ 8; Hutton Investigation Notes at 2. Based upon the information and recommendation provided by Hutton, Groce requested permission to terminate Plaintiff for unprofessional behavior and insubordination. Groce Email of Oct. 13, 2017 (Doc. No. 18-10) at 2. Plaintiff was then notified by phone and by letter that she was being terminated for unprofessional and insubordinate behavior. Termination Letter (Doc. No. 18-11) at 2 ("Following a thorough review, your behavior was found to be unprofessional and insubordinate, which is in violation of CNI's Core Values and Anti-Harassment Policy."); Bacy Dep. 119:15-22. Plaintiff, who is African American, was 59 years old at the time. Compl. ¶¶ 6, 11.

III. Plaintiff's Title VII Claims

Under Title VII, it is "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect

[1] Plaintiff contends that Wise's written statement regarding the incident and Hutton's investigation notes, Doc. Nos. 18-8, 18-9, are inadmissible hearsay. *See* Pl.'s Resp. at 15, 17; *see also* Fed. R. Civ. P. 56(c)(2). The Tenth Circuit has recognized, however, that out-of-court statements do not constitute hearsay if they are "offered to show [the employer's] state of mind in making its employment decisions," rather than "to prove the truth of the matter asserted." *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1435 (10th Cir. 1993).

to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . race." 42 U.S.C. § 2000e-2(a)(1). As an initial matter, there appears to be confusion among the parties regarding which theory or theories of Title VII liability were properly raised in the Complaint. Defendants interpreted the claim as arising solely under a hostile work environment theory. *See* Defs.' Mot. at 7, 19-21. Plaintiff's Response, however, reflects conflation of that theory and theories of disparate treatment and retaliation.

Plaintiff does not reference retaliation in the portion of her Complaint devoted to her Title VII claim. Instead, she alleges that the "terms and conditions of [her] employment were adversely affected, and a hostile work environment was created, due to the on-going racial discrimination directed towards her." Compl. ¶ 32. "In particular," Plaintiff adds, this included "hostile work environment discrimination due to her race and discipline meted out to the Plaintiff as opposed to similarly situated white employees." *Id.* ¶ 33. The Court finds that the allegations in the Complaint plausibly implicate Title VII under both hostile work environment and disparate-treatment theories, but not a retaliation theory, and evaluates Plaintiff's claims on that basis.[2]

a. Hostile Work Environment

The unlawful practices of § 2000e-2(a) are "not limited to 'economic' or 'tangible' discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Rather, the statute is "broad enough to protect individuals from working in a discriminatorily hostile

[2] There is no prejudice to Plaintiff in this approach, as Defendants' Motion addresses Title VII disparate treatment, albeit in the context of Plaintiff's OADA claim. *See* Defs.' Mot. at 22-24. And, as noted, Plaintiff addresses Title VII disparate treatment in her Response.

or abusive environment." *Bird v. W. Valley City*, 832 F.3d 1188, 1205 (10th Cir. 2016) (alteration and internal quotation marks omitted). To prevail on her hostile work environment claim under Title VII, Plaintiff must establish that "(1) [s]he is a member of a protected group; (2) [s]he was subject to unwelcome harassment; (3) the harassment was based on race; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term, condition, or privilege of [Plaintiff's] employment and created an abusive working environment." *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1170 (10th Cir. 2018) (alterations and internal quotation marks omitted). In evaluating the fourth element of a hostile work environment claim, courts consider "all the circumstances including[:] 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Trujillo v. Univ. of Colo. Health Scis. Ctr.*, 157 F.3d 1211, 1214 (10th Cir. 1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). "[A] few isolated incidents of racial enmity are insufficient to survive summary judgment." *Id.*

To demonstrate racial hostility in her workplace, Plaintiff primarily relies on Laminack's comment regarding the North Carolina police shooting. Defendants argue that Plaintiff's claim fails because it is based solely on one arguably racial comment, rather than pervasive racial harassment. The Court agrees that, while a reasonable factfinder could conclude that Laminack's comment was offensive, this "offensive utterance" does not demonstrate "physically threatening or humiliating" conduct or the level of severity indicative of a Title VII violation. *Id.* (internal quotation marks omitted).

Plaintiff additionally argues that Laminack harassed her by refusing to allow her to attend her daughter's wedding rehearsal dinner and by "selectively enforcing purported workplace rules against her." Pl.'s Resp. at 23. Plaintiff also broadly asserts that Laminack imposed harsher discipline on African-American personnel and "constant[ly] and consistent[ly]" treated Plaintiff as an "inferior human being[]." *Id.* at 13. Plaintiff wholly failed, however, to support these contentions by "citing to particular parts of materials in the record," as required by Federal Rule of Civil Procedure 56(c) and the Court's local rules. Fed. R. Civ. P. 56(c)(1)(A); *see* LCvR 56.1(d), (e) (prescribing that "[e]ach individual statement by the . . . nonmovant . . . shall be followed by citation, *with particularity*, to any evidentiary material that the party presents in support of its position" and that the movant's material facts "may be deemed admitted" if not "specifically controverted" in this manner (emphasis added)); *see* Pl.'s Resp. at 13 (Plaintiff purporting to support her assertion by citing to eight of her ten exhibits in their entirety).

In addition to failing to produce evidence of frequent or severe discriminatory conduct in her workplace, Plaintiff failed to demonstrate a genuine dispute as to whether the terms, conditions, or privileges of Plaintiff's employment were altered by the alleged harassment. *See Payan*, 905 F.3d at 1170. Indeed, Plaintiff failed to cite to any evidence suggesting that Laminack's comment, or any other racially motivated conduct, "unreasonably interfere[d] with [her] work performance." *Trujillo*, 157 F.3d at 1214 (internal quotation marks omitted).

In sum, a reasonable jury could not conclude that Plaintiff's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently

severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 680 (10th Cir. 2007) (internal quotation marks omitted); *see Morris v. City of Colo. Springs*, 666 F.3d 654, 666 (10th Cir. 2012) ("A plaintiff does not make a sufficient showing of a pervasively hostile work environment by demonstrating a few isolated incidents of . . . sporadic . . . slurs . . . . Instead, there must be a steady barrage of opprobrious . . . comments." (omissions in original) (internal quotation marks omitted)).

b. Disparate Treatment

A plaintiff may establish disparate treatment under Title VII "either by direct evidence of discrimination . . . or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, [411 U.S. 792 (1973)]." *Conroy v. Vilsack*, 707 F.3d 1163, 1171 (10th Cir. 2013). Here, Plaintiff has presented no "evidence from which the trier of fact may conclude, without inference," that Plaintiff's termination "was undertaken because of [her race]." *Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 883 n.4 (10th Cir. 2015) (internal quotation marks omitted); *see, e.g., Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013) ("[A]n explicit, mandatory age requirement was direct evidence of age discrimination."). Accordingly, the *McDonnell Douglas* framework governs this claim. Under the *McDonnell Douglas* framework, the plaintiff first bears the burden of establishing a prima facie case of discrimination. The burden then "shifts to the defendant to produce a legitimate, non-discriminatory reason for the adverse employment action." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). "If the defendant does so, the burden then shifts back to the plaintiff to show that the plaintiff's protected status

was a determinative factor in the employment decision or that the employer's explanation is pretext." *Id.*

To establish a prima facie case of wrongful termination, Plaintiff must demonstrate that: "(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017) (internal quotation marks omitted). Establishing the prima facie case "creates a presumption that the employer unlawfully discriminated against the employee." *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1223 (10th Cir. 2003) (internal quotation marks omitted). Defendants do not contest, for purposes of their Motion, that Plaintiff has satisfied her burden of establishing a prima facie case. *See* Defs.' Mot at 24.

The burden therefore shifts to Defendants to articulate a legitimate, nondiscriminatory reason for Plaintiff's termination. *Conroy*, 707 F.3d at 1171. At this stage, Defendants are required only to "explain [their] actions against [Plaintiff] in terms that are not facially prohibited by Title VII." *EEOC. v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992). Defendants need not persuade the Court "that [they were] actually motivated by the proffered reasons." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). To this end, Defendants state that Plaintiff was discharged for unprofessional behavior and insubordination. *See* Defs.' Mot. at 16, 25; Hutton Aff. ¶¶ 4-8; Hutton Investigation Notes at 2; Groce Email of Oct. 13, 2017, at 2; Termination Letter at 2. Because Defendants' explanation is not "facially prohibited by Title VII," the Court concludes that Defendants have satisfied their burden of articulating a legitimate,

nondiscriminatory reason for terminating Plaintiff's employment. *Flasher*, 986 F.2d at 1317; *see Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000) (finding that insubordination was "a facially nondiscriminatory reason for firing" the plaintiff); CNI Employee Handbook (Doc. No. 18-5) at 6 (identifying insubordination as misconduct warranting dismissal).

At the third step of the *McDonnell Douglas* framework, the plaintiff is required to "meet [her] ultimate burden of persuading the court by demonstrating the proffered reason is not the true reason," but pretext for race discrimination. *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 922 (10th Cir. 2001). Here, Plaintiff fails to articulate any cognizable argument of pretext[3] or present evidence that casts doubt on Defendants' proffered explanation for Plaintiff's dismissal. In fact, Plaintiff's arguments are devoid of reference to pretext, save for one conclusory, unsupported statement that she has "produced sufficient evidence of pretext by showing the weaknesses, implausibility, inconsistences, incoherencies, or contradictions of CNI's position." Pl.'s Resp. at 27.

"[T]his Court is not required to make arguments on behalf of a party to litigation, especially a represented party." *Buckingham v. Am. Med. Response Ambulance Serv., Inc.*,

[3] Though unclear, Plaintiff's Response appears to contemplate that Defendants' rationale for her termination was pretext for retaliation. Pl.'s Resp. at 18, 23-24. As noted, however, Plaintiff did not raise a Title VII retaliation claim in her Complaint. Even assuming she had raised this claim, it would fail for substantially the same reasons as her disparate-treatment claim. Specifically, the independent investigation performed by Hutton and reviewed by Groce is sufficient to break the causal chain between Laminack's purported retaliatory animus and Plaintiff's termination. *See Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 516 (10th Cir. 2015) (applying the subordinate bias doctrine to a Title VII retaliation claim and explaining that, under the doctrine, "an employer can 'break the causal chain' between the biased subordinate's unlawful actions and the adverse employment action by independently investigating the allegations against the employee").

12-cv-02606-CMA-KMT, 2014 WL 349109, at *3 (D. Colo. Jan. 31, 2014) (citing *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1265 n.3 (10th Cir. 2008)). Nonetheless, the Court has reviewed the evidence in the record and finds it insufficient to establish a genuine dispute as to whether Defendants' rationale was pretextual.

Pretext can generally be established by showing that "the defendant's proffered non-discriminatory explanations for its actions are so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude they are unworthy of belief." *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1039 (10th Cir. 2011) (alteration and internal quotation marks omitted). Because Plaintiff's claim is predicated on the alleged racial bias of Laminack, rather than that of the final decisionmaker who terminated her employment, the subordinate bias theory of liability applies to Plaintiff's claim. Under this theory, Plaintiff must "demonstrate a causal relationship between the subordinate's actions and the employment decision." *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 488 (10th Cir. 2006). A plaintiff cannot recover under this theory unless she "show[s] that the decisionmaker followed the biased recommendation of a subordinate without independently investigating the complaint against the employee." *Id.* at 458 (alteration and internal quotation marks omitted); *see also id.* at 487 ("[T]he issue is whether the biased subordinate's discriminatory . . . actions caused the adverse employment action.").

Plaintiff has presented no evidence that Laminack recommended her discharge. *See* Bacy Dep. 159:2-19. Rather, the evidence reflects that the recommendation to terminate Plaintiff was made by HR Generalist Wendy Hutton after an investigation and that Project Manager Ryan Groce effectuated the termination only after his review of the investigation.

See Hutton Investigation Notes at 2; Groce Email of Oct. 13, 2017, at 2; Groce Aff. ¶ 3 (explaining that Groce "was responsible for hiring, firing, and supervising the RPO workforce"); *see also* Bacy Dep. 157:23-158:25 (Plaintiff testifying that she did not know whether the recommendations of Hutton and Groce to discharge Plaintiff were based on race). Further, the undisputed facts reflect that as part of her investigation, Hutton spoke directly with Plaintiff regarding the incident, in additional to three supervisors with knowledge of the incident. Hutton Aff. ¶¶ 5, 7; Bacy Dep. 118:7-120:7, 283:4-10.

These facts are determinative under Tenth Circuit precedent.

> [B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. Indeed, under [Tenth Circuit] precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.

BCI Coca-Cola Bottling Co., 450 F.3d at 488 (citation omitted); *see also Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 947 (10th Cir. 2011) ("Our relevant inquiry for determining pretext is whether the employer's stated reasons were held in good faith at the time of the discharge, even if they later prove to be untrue . . . ." (internal quotation marks omitted)).

Thus, the Court finds that Plaintiff has failed to establish a genuine issue of material fact that would preclude summary judgment on Plaintiff's disparate-treatment claim.

IV. Plaintiff's Remaining Claims

Defendants additionally seek summary judgment on Plaintiff's ADEA, OADA, and negligence claims. Plaintiff's Response, however, failed to address these claims or to counter Defendants' arguments and evidence with specific facts demonstrating a genuine

issue of material fact. Nevertheless, the Court "may not grant the motion" as to these claims "without first examining the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law." *Murray v. City of Tahlequah*, 312 F.3d 1196, 1200 (10th Cir. 2002).

a. ADEA Claim

As with a Title VII disparate-treatment claim, an ADEA claim may be established by either direct or circumstantial evidence. An ADEA claim based upon circumstantial evidence follows the burden-shifting framework outlined in *McDonnell Douglas*. *See Rivera v. City & Cty. of Denver*, 365 F.3d 912, 920 (10th Cir. 2004). To establish a prima facie case of age discrimination under this framework, Plaintiff must show that "1) she is a member of the class protected by the ADEA; 2) she suffered an adverse employment action; 3) she was qualified for the position at issue; and 4) she was treated less favorably than others not in the protected class." *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1279 (10th Cir. 2010) (alteration and internal quotation marks omitted).

Defendants argue that Plaintiff's ADEA claim fails for lack of direct evidence of age discrimination and lack of circumstantial evidence that age discrimination was "a 'but for' cause of her termination" or that the stated reason was pretext. *Simmons*, 647 F.3d at 949; *see* Defs.' Mot. at 32-34. As Defendants note, there is no direct evidence of age discrimination. Insofar as circumstantial proof, Defendants have produced evidence that the stated reason for discharging Plaintiff was unrelated to age, *see* Termination Letter at 2, and that her claim of age bias is undermined by her admissions that "many young . . .

employees [had] been similarly mistreated by Laminack" and that Plaintiff has no reason to believe that Hutton is biased against older employees, Defs.' Mot. at 17 (citing Bacy Dep. 157:23-158-3, 210:19-211:5, 215:17-216:3, 216:17-218:2, 219:5-10, 230:4-14).

In any event, the subordinate bias doctrine that defeats Plaintiff's Title VII disparate-treatment claim on the basis of causation, *see supra* Section III.b, applies equally to her ADEA claim. *See Simmons*, 647 F.3d at 949 (noting that the Tenth Circuit "has applied the subordinate bias doctrine to cases arising under both Title VII and the ADEA" (citations omitted)). Accordingly, even if Plaintiff had demonstrated a genuine dispute as to whether Laminack discriminated against Plaintiff based upon her age, which she has not, the independent investigation preceding Plaintiff's termination would break the causal chain necessary for imputation of liability to CNI and CNIFS.

Accordingly, Defendants are entitled to summary judgment on Plaintiff's ADEA claim.

b. OADA Claim

The OADA makes it a discriminatory practice for an employer "to discharge . . . or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race." Okla. Stat. Ann. tit. 25, § 1302(A)(1). This Court has held that "claims under the OADA are evaluated using the same standards as claims under Title VII, and a claim that fails under Title VII will also fail under the OADA." *Cunningham v. Skilled Trade Servs., Inc.*, No. CIV-15-803-D, 2015 WL 6442826, at *3 (W.D. Okla. Oct. 23, 2015). The OADA allows a defending party to "allege any defense that is available under Title VII." *Bennett v.*

Windstream Commc'ns, Inc., 792 F.3d 1261, 1269 (10th Cir. 2015) (internal quotation marks omitted). Accordingly, Plaintiff's OADA claim for race discrimination fails for the reasons that her Title VII race-discrimination claim fails. *See supra* Section III and note 3.

c. Negligence Theory

Plaintiff has alleged that Defendants CNI and CNIFS acted negligently by failing "to properly set guidelines, provide supervision, or in any reasonable manner assure that the supervisors they employ will act properly, pursuant to the laws regarding racial discrimination and harassment." Compl. ¶ 59.

In their Motion, Defendants cite decisional law addressing negligence as one of "three alternative bases drawn from agency principles for holding an employer liable for [a] hostile work environment." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998); Defs.' Mot. at 34-35. Under the negligence theory, an employer "may be held liable [under Title VII] for the racially harassing conduct of employees" if "the employer fails to remedy a hostile work environment it knew or should have known about." *See Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1139 (10th Cir. 2008) (internal quotation marks omitted).

The Court notes that Plaintiff identified negligence in her Complaint as a separate claim for relief and that Defendants have moved for summary judgment on "Plaintiff's negligence claim." Defs.' Mot. at 35; *see* Compl. ¶¶ 57-60. In the context referenced above, however, negligence is not a separate claim for relief, but merely a theory of agency that supports employer liability for hostile-work-environment claims. To the extent that

Plaintiff has asserted a state-law negligence claim, the Court declines to exercise supplemental jurisdiction over it. *See* 28 U.S.C. § 1367(c)(3); *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.").

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment (Doc. No. 18) is GRANTED IN PART. Summary judgment is granted in favor of Defendants on Plaintiff's Title VII, ADEA, and OADA claims. The Court declines to exercise supplemental jurisdiction over Plaintiff's state-law negligence claim. A separate judgment shall be entered.

IT IS SO ORDERED this 7th day of May, 2020.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TREVA BACY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-19-512-G**
	)	
CHICKASAW NATION INDUSTRIES, INC. et al.,	)	
	)	
	)	
Defendants.	)	

JUDGMENT

Pursuant to the Opinion and Order issued this date, judgment is hereby entered in favor of Defendants on Plaintiff's Title VII, ADEA, and OADA claims. The Court declines to exercise supplemental jurisdiction over Plaintiff's state-law negligence claim.

ENTERED this 7th day of May, 2020.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

TREVA BACY,	)	
Plaintiff(s)	)	
vs.	)	**CASE NO. CIV-19-512 - G**
CHICKASAW NATION INDUSTRIES, INC., and, CNI FEDERAL SERVICES, LLC	)	

NOTICE OF APPEAL

Notice is hereby given that **TREVA BACY**

X **Plaintiff**(s) Defendant(s) in the above-named case hereby appeal to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on **June 8, 2020**.

Respectfully submitted,

/s/ David J. Batton

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Attorney for Plaintiff

CERTIFICATE OF DELIVERY

This is to certify that on this 8th day of June, 2020, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the District Court using the CM/ECF system as well as electronic mail, which completed service on the interested parties registered with the system in this matter.

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Kim Tran
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/s/ David J. Batton
David J. Batton