DOCKET NO. 14-14596-E

United States Court of Appeals

for the

Eleventh Circuit

JENNIFER CHAVEZ,

Plaintiff/Appellant,

v.

CREDIT NATION AUTO SALES LLC, f/k/a SYNERGY MOTOR COMPANY,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
IN CIVIL DOCKET FOR CASE #: 1:13-cv-00312-WSD/JCF
(Hon. William S. Duffey, Jr.)

BRIEF OF APPELLEE

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CREDIT NATION AUTO SALES, LLC'S CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed.R.App.P. 26.1 and 11th Cir. R. 26.1-1, Credit Nation Auto Sales, LLC ("Credit Nation") hereby files its *Corporate Disclosure Statement and Certificate of Interested Persons:*

Credit Nation states that there is no parent corporation or publicly traded company that owns 10% or more of its stock.

Credit Nation further states that the following persons have an interest in the outcome of this appeal:

Judges:

Duffy, Jr., William S. (District Court Judge)

Fuller, Clay J. (Magistrate Judge)

Plaintiff/Appellant:

Chavez, Jennifer

Attorneys and Law Firms Representing Plaintiff/Appellant:

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Richards, Jacob

Organizations Filing Amicus Briefs Below

U.S. Equal Employment Opportunity Commission

Lambda Legal Defense and Education Fund

Transgender Legal Defense & Education Fund, Inc.

Transgender Law Center

National Center for Transgender Equality

Freedom to Work

PFLAG National

Gay & Lesbian Advocates and Defenders

Defendant/Appellee:

Credit Nation Auto Sales, LLC

Torchia, James, Member of Credit Nation Auto Sales, LLC

Celello, Marc A., as Member, Officer or Incorporator of Credit Nation Auto Sales, LLC

Attorneys and Law Firms Representing Defendant/Appellee:

Celello Law Group, LLC

Celello, Marc A.

Attorneys and Law Firms Representing Amici on Appeal

Ryan Ryan Deluca LLP

Fineman, Beck S.

Organizations That Applied for Leave to File Amicus Briefs on Appeal

Lambda Legal

Transgender Law Center

STATEMENT REGARDING ORAL ARGUMENT

Credit Nation Auto Sales, LLC states that no oral argument is needed in the instant meritless appeal. The law of the Circuit is well-settled regarding the burden-shifting analysis set forth in *McDonnell Douglas*. The parties' briefs amply address all of Jennifer Chavez's other arguments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Statutes, and Other Authorities

JENNIFER CHAVEZ V. CREDIT NATION AUTO SALES, LLC
Court of Appeals No: 14-14596-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER CHAVEZ, Plaintiff-Appellant,	)	
	)	Court of Appeals
	)	Case No.: 14-14596-E
v.	)	On Appeal from the U.S. District
	)	Court for the Northern District
CREDIT NATION AUTO SALES LLC, f/k/a SYNERGY MOTOR COMPANY, Defendant-Appellee.	)	of Georgia Case No.: 1:13-cv-00312-WSD/JCF

STATEMENT OF THE CASE

This case is about whether an employer may fire a transgender employee for sleeping on the clock, or whether the employer must give the employee unmitigated latitude to violate workplace rules to avoid running afoul of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-1, *et seq*.).

On January 11, 2012, Appellant/Plaintiff Jennifer Chavez ("Chavez") punched in at her job as an auto mechanic for Credit Nation Auto Sales, LLC ("Credit Nation"), got into the back of a vehicle in her service bay, and slept for forty minutes. (Doc. 48-2, *Statement of Material Facts to Which Credit Nation Contends There Is No Issue to Be Tried* ("*DSMF*"), ¶¶ 1-2; Doc. 56 "Nuhibian Dep."53-55). As a result, Credit Nation fired her. (*DSMF* ¶ 1). Since that time,

Chavez has woven tales of conspiracy, discrimination, pretext, and now mixed-motive, in forums from the Georgia Department of Labor (*DSMF* ¶ 28) to the Equal Opportunity Employment Commission ("EEOC"). (*DSMF* ¶ 8). Chavez' latest filing brings us to this Honorable Court from the Northern District of Georgia. (*Brief for Appellant Jennifer Chavez* ("*Chavez Brf*.") at 3-4).

The Georgia Department of Labor saw through Chavez's ruse (Doc. 6, *Mot. To Dismiss*), the EEOC dismissed her charge as meritless (*DSOMF* ¶¶ 14-15), Magistrate Judge J. Clay Fuller reported and recommended granting summary judgment to Credit Nation (Doc. 76), and Judge William S. Duffey, Jr. granted summary judgment (Doc. 80). For reasons that follow, Credit Nation respectfully requests that this Honorable Court affirm Judge Duffey's order granting summary judgment.

SUMMARY OF ARGUMENT

The district court correctly granted Credit Nation's motion for summary judgment for the following reasons: The district court properly applied the *McDonnell Douglas*[1] burden-shifting analysis to the instant case because 1) Chavez failed to provide any direct evidence, which is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption, 2) *McDonnell Douglas* is the law of the Circuit, and 3)

[1] *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)

Chavez failed to present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that her transgender status played a role in Credit Nation's decision to fire her for sleeping on the clock.

The district court correctly decided the issue of pretext and correctly applied the *McDonnell Douglas* burden-shifting analysis in the context of Rule 56. To establish pretext, the plaintiff must present concrete evidence in the form of specific facts showing that the defendant's proffered reasons were pretextual. The plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence. Chavez failed to present such evidence.

Chavez argues that she did cite additional evidence in support of her claim of pretext. Even if that were the case, Chavez did not put forth sufficient evidence to support her claim that Credit Nation's did not really fire her for sleeping on the clock. The district court made proper findings regarding comparators who had been found sleeping on the clock and whom Credit Nation terminated. Further, the district court correctly decided the issue of the credence of Credit Nation's proffered rationale as well as the wisdom of Credit Nation's decision.

In the instant case, there is no conflict between *McDonnell Douglas* and Rule 56. Because Chavez failed to produce sufficient evidence to permit a

reasonable factfinder to conclude that sleeping on the job was not the real reason that Credit Nation fired her, the district court did not err by granting summary judgment to Credit Nation. Finally, the district court's granting of summary judgment did not run afoul of plaintiff's Seventh Amendment right to a jury trial.

ARGUMENT

I. The District Court Correctly Granted Credit Nation's Motion for Summary Judgment.

In October 2009, as part of her gender transformation, Chavez, who then presented as a male and who was known as Louie, approached her supervisor, Phil Weston, and Vice President Cindy Weston to inform Mr. and Ms. Weston that Chavez intended to undergo gender transformation and gender reassignment surgery. (Doc 76, *Report and Recommendation* "*R&R*" at 4-5). Ms. Weston informed Chavez that, as long as Chavez continued to do her job, what Chavez did with her personal life was her business. (Doc. 64 "Weston Dep." at 29). Ms. Weston then informed Credit Nation's CEO, James Torchia, of Chavez' intent to begin her transition from male to female. (Doc. 57 "Torchia Dep." at 19-20). In Mr. Torchia's words, it "[d]idn't move the needle for me." (*Id.*). According to Ms. Weston, "he didn't have any particular reaction … that [she could] tell." (Weston Dep. at 36, 10 – 12).

Chavez was so enamored with the response she received from Credit Nation, that she took it upon herself to send an email to an Atlanta Journal Constitution

reporter. (Doc. 49-6). The point of Chavez' email was to contrast her favorable experience at Credit Nation with Vandy Beth Glenn's unfavorable experience at the Georgia Legislative Counsel's office. (Doc. 49 at 1-2).[2] Chavez claims that, after she sent the email, things changed at Credit Nation. (Doc. 49, "Chavez Dep." at 47). Chavez provides no evidence to corroborate her self-serving belief. (Chavez Dep. at 85-86, 127-28, 130). Meanwhile, Ms. Weston and Mr. Torchia granted Chavez un-accrued vacation time so she could undergo her gender reassignment surgery, in order to "be accommodating." (Torchia Dep. at 19-20; Chavez Dep. at 64-65). They allowed her time off for electrolysis and doctor's appointments. (Chavez Dep. at 61). In fact Ms. Weston and Mr. Torchia were so accommodating, and Chavez was so flagrant about the accommodations, that other service technicians become upset. (Weston Dep. 148). As if that wasn't enough, Chavez instigated a dispute with Richard Randall ("Randall"), another service technician, by accusing him of being dishonest about a car repair. (Chavez Dep. at 48). Worse yet, Chavez antagonized a co-worker by saying, "I have Cindy's personal cell phone number, and no one can fuck with me." (Chavez Dep. at 209; Weston Dep. at 146).

In an attempt to push things over the top, Chavez insisted on using a unisex bathroom that neither she nor any of the other technicians were allowed to use, not

[2] That unfavorable experience formed the basis of the lawsuit styled *Glenn v. Brumby*, heard by this Court, and reported at 663 F.3d 1312 (11th Cir. 2011).

because of a particular sex or gender, but because it was a clean restroom for customer use. (*R&R* at 12-13). Four employees, two male and two female, none of whom were service technicians, were also allowed to use this restroom. (Chavez Dep. at 74-75). Credit Nation mandated that Chavez use the unisex technician's restroom, which had special soap to remove grease from technician's hands, and which tended to collect grease on the sink, floor, and walls. (*Id.*). Chavez insisted on turning the restroom issue into a gender discrimination issue. (*Id.*). Apparently, use of a particular restroom is a benchmark for transgender discrimination claims. *See Macy v. Holder*, EEOC Doc. No. 0120120821, 12 (E.E.O.C. April 20, 2012); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *The Cross-Dressing Case for Bathroom Equality*, 34 Seattle U.L.Rev. 133, 138-39 (2010).)

On January 11, 2010, Chavez finally got what she had been angling for since late November 2009. (*DSMF* ¶ 1). Credit Nation terminated her from employment. While Chavez claims that her termination for sleeping was a pretext to terminate her for her transgender status, her bad behavior (acting flagrantly about her excessive absences, accusing another technician of dishonesty, telling a technician that "no one could fuck with [her]," insisting on using the customer restroom under the pretext of gender, and finally sleeping on the clock), was a pretext to sue Credit Nation for gender discrimination. Credit Nation did not have

a problem with Chavez' gender transition. (Chavez Dep. at 44-45; Nuhibian Dep. at 27, 29, 30, 69, 108-09; Weston Dep. at 28-29, 30, 33, 35-36; Torchia Dep. at 18-19, 31). Credit Nation had a problem with Chavez violating work place rules, especially sleeping on the clock (Weston Dep. at 60, 102), and wielding her transgender status and Title VII like a shield and sword.

How much bad employee behavior must an employer endure to avoid running afoul of Title VII? Does Title VII require an employer to allow a person of transgender status to make her own workplace rules? Does Title VII require an employer to allow a transgender person to sleep on the clock? Or does Title VII simply operate to prohibit an employer from discriminating on the basis of sex?

A. The District Court Correctly Applied the *McDonnell Douglas* Burden-Shifting Analysis to the Instant Case for two reasons: 1. *McDonnell Douglas* is the law of the Circuit; and 2. Chavez failed to present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that her transgender status played a role in Credit Nation's decision to fire her for sleeping on the clock.

1. *McDonnell Douglas* is the law of the Circuit.

In *Burstein v. Emtel, Inc.*, the plaintiff/appellant "contend[ed] that the district court erred in failing to modify the *McDonnell Douglas* analysis with the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed.2d 84 (2003)." *Burstein v. Emtel, Inc.*, 137 Fed. Appx. 205, n. 8

(11th Cir. 2005). This Court held that "we recently reasserted the applicability of *McDonnell Douglas*. *See Cooper*, 390 F.3d at 725 n. 17." *Id.*

> In *Cooper v. Southern Co.*, this Court stated:
>
> > [t]he plaintiffs argue[d], however, that the *McDonnell Douglas* burden-shifting analysis applied to claims of employment discrimination was radically revised by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed.2d 84 (2003). According to the plaintiffs, *Desert Palace* overruled *McDonnell Douglas* and its progeny, so that "once a plaintiff establishes a prima facie case of discrimination, a defendant may no longer simply articulate a legitimate, non-discriminatory reason for the adverse employment action, but rather must prove that it would have taken the same action absent the alleged discrimination."
>
> *Cooper v. Southern Co.*, 390 F.3d 695, 725 (11th Cir. 2004).
>
> This Court found that,
>
> > [t]he plaintiffs read *Desert Palace* too broadly. While it is true that some courts have suggested that *Desert Palace* may spell the end of the *McDonnell Douglas* burden-shifting analysis, *see, e.g.*, *Dare v. Wal–Mart Stores, Inc.*, 267 F. Supp.2d 987, 990–91 (D. Minn. 2003), the *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e–2(m). Indeed, the Court explained that it did not decide whether its analysis applied in other contexts. *Desert Palace*, 539 U.S. at 94 n. 1, 123 S. Ct. at 2151 n. 1. Moreover, the fact that the Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us even more reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent. Finally, after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases. *See, e.g., Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289–90 (11th Cir.2003).

Id. Accordingly, based on the law of the Circuit, the district court correctly decided this case under *McDonnell Douglas*' burden-shifting framework.

2. Chavez failed to present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that her transgender status played a role in Credit Nation's decision to fire her for sleeping on the clock.

Even if this Circuit employed *Desert Palace* instead of *McDonnell Douglas*, Chavez still failed to present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that her transgender status played a role in Credit Nation's decision to fire her for sleeping on the clock. "A mixed-motive analysis is appropriate if the plaintiff 'present[s] sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Ekokotu v. Boyle*, 294 Fed. Appx. 523, 526 (11th Cir. 2008) (quoting *Desert Palace*, 539 U.S. at 101-02, 123 S. Ct. at 2155, 156 L. Ed.2d 84).

"Title VII also provides for liability in mixed-motive cases, in which a plaintiff alleges an employment decision was motivated by both legitimate and discriminatory reasons." *Lewis v. Metropolitan Atlanta Rapid Transit Authority*, 343 Fed. Appx. 450, 455, (11th Cir. 2009) (citing 42 U.S.C. § 2000e-2(m)). "In these cases, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed.2d 84 (2003), requires the plaintiff first to establish an unlawful employment practice occurred, by demonstrating that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.'" *Lewis*, 343 Fed. Appx. at 455 (quoting

Desert Palace, 123 S.Ct. at 2151). In *Lewis*, "the record shows Lewis was terminated because of his disciplinary history. Lewis has presented no evidence that suggests the decision to fire him because of his disciplinary history would have been different if he were African-American." *Id*. at 455. In the instant case, the record shows that Chavez was terminated for sleeping on the clock. And like Lewis, Chavez has presented no evidence that suggests the decision to fire her because of her sleeping on the clock would have been different if she were not transgender.

Chavez argues that she has put forth evidence to reject Credit Nation's explanation. Assuming for the sake of argument that she has, "[a] plaintiff does not always defeat a motion for summary judgment by putting forth evidence to reject the defendant's explanation." *Ekokotu v. Boyle*, 294 Fed. Appx. 523, 526 (11th Cir. 2008), citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed.2d 105 (2000). "An employer is entitled to summary judgment 'if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.'" *Id.* The record in the instant case contains "abundant and uncontroverted independent evidence that no discrimination occurred." Specifically, the record contains the uncontroverted testimony of Nuhibian, Weston, and Torchia that Chavez was fired

for sleeping on the clock. (Nuhibian Dep. at 34, 132-33; Torchia Dep. at 29; Weston Dep. at 65, 103, 122).

In *Ekokotu*, the Court concluded that Ekokotu "has not produced direct evidence of discrimination or retaliation [because] Hartsfield's alleged statement that she would get Ekokotu back requires an inference and is subject to more than one interpretation." *Ekokotu*, 294 Fed. Appx. at 526. Chavez states that "[t]here are a number of inferences that Plaintiff may reasonably draw from [Mr. Torchia's] statements." *(Chavez Brf. at 16)*. She then goes on to draw far-flung inferences, not reasonable, but form-fitted to her case. As correctly stated by the district court, "Mr. Torcia's (sic) comments here are not evidence of discriminatory animus. He only mentioned that Plaintiff's transition—for which he expressed unreserved support so long as Plaintiff performed her duties—might impact his business." (*Order* at 23, n. 3 (Doc. 80)). Mr. Torchia demonstrated his unreserved support by granting Chavez un-accrued vacation time and allowing her time off for electrolysis. (Chavez Dep. at 6).

Chavez would have this Court believe that stray remarks by Mr. Torchia a-month-and-half before Chavez was terminated for sleeping on the clock were evidence of animus which amounts to a Title VII violation. (*Chavez Brf.* at 21). Chavez would also erroneously have the Court believe that Mr. Torchia was not responsible for her time off. (Chavez Brf. at 20) ("Mr. Torchia never gave Ms.

Chavez time off – that was done by Vice-President Cindy Weston. Doc. 64-2 (sic, 64-D-2), Memorandum of Understanding."). However, Mr. Torchia was responsible for Chavez' time off. (Torchia Dep. at 59; Chavez Dep. at 64-65). Thus, Chavez failed to present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that her transgender status played a role in Credit Nation's decision to fire her for sleeping on the clock.

B. The District Court Correctly Applied the *McDonnell Douglas* Burden-Shifting Analysis to the Instant Case of Circumstantial Evidence.

The Magistrate correctly decided the issue of direct evidence (*R&R* at 37 – 40 (Doc. 76), and the district court adopted the correctly decided issue (Doc. 80). "Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998). "[R]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not evidence of discrimination." *Id*.

Chavez relies on *Wright v. Southland Corp.*, for her definition of "direct evidence[,]" *to wit* "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." 187 F.3d 1287, 1298 (11th Cir. 1999). Chavez then strangely relies on *East v. Clayton County, Georgia*, 436 Fed. Appx. 904

(11th Cir. 2011) and *Cobb v. City of Roswell*, 533 Fed. Appx. 888 (11th Cir. 2013), to buttress her position. But discussing the *Wright* definition, the *East* court states, "[n]o published opinion has overruled this definition, nor has a published opinion directly applied this standard since the *Wright* decision was issued in 1999." More troubling for Chavez, the *Cobb* Court uses the *Standard* definition of direct evidence, *to wit* "[d]irect evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." *Cobb*, 533 Fed. Appx. at 893 (quoting *Standard*, 161 F.3d at 1330). The *Cobb* Court goes on to state, "[e]ven if we apply the preponderance standard in *Wright*, Cobb has failed to submit evidence that, more probable than not, establishes the causal link between the adverse employment action and his age. Accordingly, we conclude that the district court correctly applied the burden-shifting framework set out in *McDonnell Douglas*." *Cobb*, 533 Fed. Appx. at 893.

Likewise, even if this Court were to apply the preponderance standard set forth in *Wright*, Chavez "has failed to submit evidence to establish a causal link that, more probable than not, establishes the causal link between the adverse employment action" and her transgender status. *Id*. No reasonable jury could find that Chavez was terminated for being transgender when the undisputed evidence proves that she was asleep on the clock for forty minutes. (Chavez Dep. at 78; Weston Dep. at 7; Nuhibian Dep. at 53-55). Thus, the district court correctly

applied the *McDonnell Douglas* burden-shifting analysis to the instant case of circumstantial evidence.

C. The District Court Correctly Decided the Issue of Pretext.

"To establish pretext, [the plaintiff] must present concrete evidence in the form of specific facts showing that [defendant's] proffered reason[s were] pretextual." *Owens v. Omni Hotel Management Corp.*, 2012 WL 1454082, 10 (N.D. Ga. 2012) (*quoting Bryant v. Averitt Express, Inc.*, 375 Fed. Appx. 942, 943 (11th Cir.2010). The plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered legitimate reasons for its action that "a reasonable factfinder could find them unworthy of credence." *Owens*, 2012 WL 1454082, 10 (*quoting Cooper v. Southern. Co.*, 390 F.3d 695, 725 (11th Cir.2004), *overruling on other grounds recognized by Andrews–Willmann v. Paulson*, 287 Fed. Appx. 741 (11th Cir.2008) (per curiam) (unpublished)). "[Co]nclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered … extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young v. General Foods Corp.*, 840 F.2d 825, 830 (11th Cir. 1988) (quoting *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987)).

1. The District Court Correctly Applied the *McDonnell Douglas* Burden-Shifting Analysis in the Context of Rule 56.

> The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relative rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000).

In the instant case, the relative rules of substantive law required Chavez to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Credit Nation's proffered legitimate reason for terminating Chavez—sleeping on the clock—that a reasonable jury could find it unworthy of credence. *Owens*, 2012 WL 1454082, 10. She failed to do so. Thus, the district court correctly applied the *McDonnell Douglas* burden-shifting analysis in the context of Rule 56.

a. *McDonnell Douglas* Framework.

Under the *McDonnell Douglas* framework, "the plaintiff must first establish a prima facie case of discrimination." *Chapman*, 229 F.3d at 1024. "If the plaintiff establishes a prima facie case of discrimination, the defendant employer must articulate a legitimate nondiscriminatory reason for the challenged employment action. *Id*.

> If the defendant articulates one or more such reasons, the presumption of discrimination is eliminated and "the plaintiff has the opportunity

> to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." (*Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255, 101 S. Ct. 1089, 1094 (1981)). If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim. *See id.* at 1529 (holding that there must be "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action").

Chapman, 229 F.3d at 1024-1025.

b. *McDonnell Douglas's* Requirements.

Once the defendant proffers a legitimate non-discriminatory reason for the adverse employment action, *McDonnell Douglas* requires the Plaintiff "to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255, 101 S. Ct. 1089, 1094 (1981). Chavez claims she has done so. It is plain that she has not.

c. Chavez' Alleged Additional Circumstantial Evidence of Pretext.

Chavez argues that she "did cite additional evidence in support of her claim of pretext." (*Chavez Brf.* at 28). However as this court has stated,

> even if the plaintiff does proffer sufficient evidence that the defendant's stated reasons are pretextual, the plaintiff still may not be entitled to take his case to a jury. … 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. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred....

Chapman, 229 F.3d at 1025, n.11.

Chavez can try to spin the facts any way she would like, but at the end of the day, she did not put forth sufficient evidence to support her claim that Credit Nation did not really fire her for sleeping on the clock.

i. Ms. Weston's Statement.

As the Magistrate Court correctly determined, Plaintiff's own testimony on this point is conflicting. (*R&R* at 53 (Doc. 76)). In her *Rule 72 Objections to Magistrate's Final Report and Recommendation Dated July 18, 2014* (Doc. 78), Chavez attempts to mitigate the inconsistencies, but the fact remains that Chavez'

testimony about what Ms. Weston may or may not have said is hazy at best and no reasonable jury could find for Chavez based on this weak evidence.

ii. Chavez Was Not Subjected to Additional Scrutiny.

The argument that "Chavez was subjected to additional scrutiny of her work and personal situation shortly thereafter, which had never before occurred[,]"(Chavez Brf. at 33) fits neatly into the laundry list of discriminatory conduct by employers. Too bad for Chavez that it's simply not true. To the extent that Chavez was disciplined more after she announced her transition, the discipline was due to Chavez' bad behavior. It is clear from the record that Chavez' sought to sue Credit Nation, and she manufactured illusory discriminatory employer conduct in an effort to fleece the Court and win her case.

The following are statements by Chavez at or around the time of her termination, and, strikingly, some of the statements about suing Credit Nation occurred well before Chavez was terminated for sleeping on the clock:

"Are we done? Is this over? I mean for now because it won't be over for years." (Phil Weston Aff. at 4.J. (Doc. 59-2 at 4) Steve Duda Aff. at 3.J. (Doc. 59-2 at 8), Cindy Weston Aff. at 4.H. (Doc. 59-2 at 25), Kelly Bourgeois Aff. at 3.J. (Doc. 59-2 at 32)).

> On several occasions, Jennifer (Louie) told me she that she (sic) was planning to sue Credit Nation Auto Sales. She said she had been taking notes with all the dates, times, and occurrences of everything

> that happened here. She also stated that she had won two lawsuits against previous employers for discrimination.

(Jennifer Battibulli Statement (Doc. 59-2 at 12); see also Battibulli Aff. at 3.a. – c. (Doc. 59-2 at 10), Ariel Yarborough Aff. at 3.a. –c. (Doc. 59-2 at 14)).

> Jen/Louie had made several direct comments to me about suing Credit Nation Isuzu for discriminating against her. She also said she has done it before so she knows she will win. She won the other lawsuits. Jen thinks because of her race & sexuality was powerful enough to make a case (sic). These comments were made in the past month & longer ago.

(Yarborough Statement dated January 11, 2010 (Doc. 59-4 at 7); see also Yarborough Aff. at 3.a. –c. (Doc. 59-2 at 14)).

> [Chavez] told me that Credit Nation, "started the war and in about two (2) weeks they [Credit Nation] will be getting something from [her] lawyer," or words to that effect, and that [Chavez] "was going to give the dealership some really bad publicity and ruin them," or words to that effect, and "that it may take two or three years but [Chavez] would win the lawsuit," or words to that effect.

(Yarborough Aff. at 3.e. (Doc. 59-2 at 15)).

Both the Magistrate and district courts saw through Chavez's illusory argument that she was terminated for a discriminatory reason.

iii. Emails Between Ms. Weston and Mr. McManus.

The bathroom situation that led to the email exchange between Ms. Weston and John McManus is simply a continuation of Chavez's previous argument. Chavez was attempting to create yet another illusory situation of discrimination by

insisting on using the unisex customer restroom instead of the unisex technician restroom. Chavez' scam was transparent to Mr. McManus and, seeing the writing on courthouse wall, he simply counseled Ms. Weston to document Chavez's bad behavior for the inevitable lawsuit. If Chavez didn't manage to get herself fired so that she could race[3] to the EEOC and claim pretext, she would have quit and claimed hostile workplace. Chavez would ensure that Credit Nation would be a private employer transgender test case defendant one way or another.

iv. Mr. Nuhibian's Statement.

By misrepresenting the record, Chavez tries to create something out of nothing. Magistrate Judge Fuller correctly reported as follows:

> Plaintiff also asserts that Mr. Nuhibian "testified at deposition that he believed that his actions were intended to 'run [Ms. Chavez] out of [C]redit [N]ation.'" (Doc. 58 at 17 n.8 (citing Pl. SMF at ¶ 30). But this is a misrepresentation of the record. Mr. Nuhibian never made such a statement on deposition; instead, he told Plaintiff that he "kn[ew] for a fact [she was] run out of credit nation" via an internet message on the website findashemalelover.com weeks after he was terminated from Credit Nation. (Doc. 60-13 at 2-3). Even assuming that such a statement is admissible, it does not provide evidence of pretext. Mr. Nuhibian testified at his deposition that he never felt Credit Nation was looking for a way to terminate Plaintiff; that no one at Credit Nation ever said anything to him about terminating Plaintiff; and that his statement – "[I] know for a fact you were run out of credit nation" – simply referred to the fact that he was the one who took Plaintiff's picture and ultimately got her fired and that it had nothing to do with whether Credit Nation set Plaintiff up or looked for ways to terminate her.

[3] According to Chavez, she appeared at the EEOC the very next day after she was terminated. (Chavez Dep. at Exh. 30).

R and R at 63, n.13 (Doc. 76).

v. The Photo of Ms. Chavez Sleeping on the Clock.

This section is clever. To deal with the most damning piece of evidence against her—the picture taken by Mr. Nuhibian—Chavez pulls a red herring across the courthouse steps. She argues that if Mr. Nuhibian and Mr. Weston really believed that sleeping on the clock was a serious violation that warranted termination, they would neither have taken a picture of Chavez nor let her sleep for forty minutes, but would have woken her up immediately without having taken a picture. (*Chavez Brf*. at 37-38). Chavez then makes the logical leap that, by taking a picture of Chavez sleeping on the clock, and not waking her up, Messrs. Nuhibian and Weston knew that they were engaging in a pretext under the *McDonnell Douglas* burden shifting framework. It is all but certain that Mr. Nuhibian, an auto shop foreman, and Mr. Weston, an auto shop manager, know nothing about *McDonnell Douglas* or its burden shifting framework.

vi. Credit Nation's Rulebook Allows Termination for Egregious Acts, such as sleeping on the clock.

Chavez continues to argue that Credit Nation's rules require it to use progressive discipline in every case. This is simply not true. Credit Nation *may* use progressive discipline, and it *may* bypass one or more steps, such as when an

employee is found sleeping on the clock. Rule 716 of Credit Nation's handbook states as follows:

> Disciplinary action **may** call for any of four steps – verbal warning, suspension with or without pay, or termination of employment – depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed.

(Emphasis added.)

vii. Credit Nation Did Not Fabricate A *Post Hoc* "Zero-Tolerance Policy.

Mr. Torchia, who made the decision to terminate Chavez with Ms. Weston terminated Chavez on the basis of "having a picture that was time stamped. [H]e thought that was enough." (Torchia Dep. at 28). He made no mention whatsoever of a zero-tolerance policy.

viii. Credit Nation Did Not Change Its Rationale For Terminating Chavez—She Was Fired For Sleeping on the Clock.

As Credit Nation has stated at every stage, from the day that Chavez was fired and given her separation notice (*DSMF* ¶6; Doc. 60, *Plaintiff's Statement of Material Facts That Present A Genuine Issue for Trial* ("*PSMF*") ¶40), to her unemployment hearing (*PSMF* ¶42), to her EEOC proceeding (*PSMF* ¶44), and the instant lawsuit (*passim*), Chavez was fired for sleeping on the clock. While it's true that Credit Nation's counsel has added additional detail throughout Chavez's dispute with Credit Nation, the core reason has remained the same. Chavez was

fired for sleeping on the clock. Chavez's argument reveals this simple fact. Chavez cites five separate documents to support her changing rationales argument, yet each one states that Chavez was terminated for "sleeping." (*Chavez Brf*. at 42).

ix. Credit Nation Never Disciplined Chavez Based On Her Gender.

Credit Nation disciplined Chavez for acting flagrantly about her excessive absences, accusing Randall of dishonesty, telling a technician that "no one could fuck with [her]," insisting on using the customer restroom under the pretext of gender, and finally sleeping on the clock. Chavez is an instigator.[4] Her *modus operandi* is to bait people to get a reaction and then cry foul when no foul really occurred.

No rational factfinder could conclude that it was discriminatory for Credit Nation to fire Chavez for sleeping on the clock. Accordingly, it was appropriate for the district court to grant summary judgment to Credit Nation.

d. Proper Findings.

The district court found that "Mrs. Weston also testified that another employee, who did not have previous write-ups in his file, had been terminated for sleeping on the clock." (*Opinion and Order* "*Op*." at 9 (Doc. 80), citing Weston Dep. at 112). Based on the record, the district court made a proper finding.

[4] For example, in her deposition, Chavez refers to counsel for Credit Nation as "ma'am." (Chavez Dep. at 204).

The district court also found that Mr. Torchia was "unreservedly supportive" of Chavez. (Op. at 23, n.3). Chavez may claim to dispute this, but as the district court properly found, Chavez did not put forth sufficient evidence to create an actual dispute.

e. There Is No Conflict Between *McDonnell Douglas* and Rule 56.

In the instant case, there is no conflict between *McDonnell Douglas* and Rule 56. Because Chavez failed to produce sufficient evidence "to permit a reasonable factfinder to conclude" that sleeping on the job was not the real reasons that Credit Nation fired her, the district court did not err by granting summary judgment to Credit Nation. *Combs*, 106 F.3d at 1528 (quoting *Burdine*, 450 U.S. at 254-255, 101 S. Ct. at 1094). Thus no conflict exists between *McDonnell Douglas* and Rule 56.

2. The District Court Correctly Decided the Issue of the Credence of Credit Nation's Proffered Rationale as Well as the Wisdom of Credit Nation's Decision.

Chavez argues that "the question here is not whether Credit Nation has the right to terminate an employee for sleeping on the clock. The question before the Court is whether Credit Nation's decision maker, James Torchia, actually believed that Ms. Chavez' [sic] offense merited termination." (*Chavez Brf*. at 49).

> A plaintiff is not allowed to recast as employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might

> motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Chapman, 229 F.3d at 1030 (citing *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1341 (11th Cir. 2000))." "Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. … Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.'" *Chapman*, 229 F.3d at 1030 (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)). If the "proffered reason clearly meets the test of being one that might motivate a reasonable employer[]," the employer is entitled to summary judgment. *Chapman*, 229 F.3d at 1031. It is axiomatic that sleeping on the job is a terminable offense. Thus, Credit Nation's decision to terminate Chavez for sleeping on the clock was credible, as the district court determined.

II. The District Court's Granting of Summary Judgment Did Not Run Afoul of Plaintiff's Seventh Amendment Right to a Jury Trial.

Chavez's claim that her Seventh Amendment right to a jury trial was violated is also devoid of merit. "The true focus of the plaintiffs' argument should not be on whether their Seventh Amendment right was violated, but instead on whether the district court erred in granting summary judgment because a material fact … was in dispute." *Garvie v. City of Ft. Walton Beach, Fla.*, 366 F.3d 1186, 1190 (11th Cir. 2004). Chavez did not provide sufficient evidence for a reasonable factfinder to find in her favor. Accordingly, the district court did not err in

granting summary judgment because a material fact was not in dispute. Thus, the district court did not deprive Chavez of her Constitutional rights.

CONCLUSION

For all of the foregoing reasons, Credit Nation respectfully requests that this Honorable Court affirm Judge Duffey's order granting summary judgment in favor of Credit Nation, together with such other and further relief to Credit Nation as this Court deems just and proper.

Dated: December 17, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,236 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).
2. 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 2010 in size-14 Times New Roman.

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