**IN THE DISTRICT COURT OF APPEAL**
**FOR THE SIXTH DISTRICT**
**STATE OF FLORIDA**

**JENNIFER BARROW,**

Appellant,

CASE NO. 6D24-429
L.T. NO. 2021-CA-1280

**v.**

**LAKE WALES CHARTER SCHOOLS, INC.,**
**a Florida Not for Profit Corporation,**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

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# APPELLEE'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Citations to the Record on Appeal from the Circuit Court of Polk County, Florida, are made by reference as "[R. p.]" (e.g., record reference [R. 1] would reference page 1 of the record).

## STATEMENT OF THE CASE

The Circuit Court properly entered summary judgment for Defendant-Appellee, the Lake Wales Charter Schools ("LWCS") on the Plaintiff-Appellant, Ms. Barrow's claims under Florida's private and public whistleblower's acts. Barrow did not establish she engaged in any protected whistleblowing activity as her complaints, gripes about differences with her supervisor, did not concern actual violations of the law or any violation that presented a substantial and specific danger to the public's health, safety, or welfare, or that the decision to reassign her to a different position where she enjoyed the same salary and benefits, had anything to do with her alleged whistleblowing. Barrow cannot even establish her Private Whistleblower's Act claim is properly lodged against LWCS, which is not a private employer, or that her Public Whistleblower's Act claim can be remedied.

Barrow filed her complaint on April 30, 2021, pleading two counts, the first under the Florida Private Whistleblower's Act, section 448.101, *et seq.*, and the second, pled in alternative, under the Florida Public Whistleblower's Act, section 112.3187, *et seq.*, claiming entitlement to non-economic compensatory damages, and reinstatement to her past position. [R. 13-27]. She later testified she was not seeking reinstatement. [R 1233-1234].

After discovery, LWCS moved for summary judgment and Barrow responded. [R. 397-439, 2844-2878]. The Circuit Court entered summary judgment for LWCS. [R. 2657-2700]. The Circuit Court found Barrow could not establish LWCS is a private employer for the purposes of the Private Whistleblower's Act, that she did not engage in protected activity or suffer an adverse employment action, that she could not show a causal connection between any adverse action and protected activity, and that she could not show the actions challenged were not taken for legitimate non-retaliatory reasons. [R. 2667-2671, 2688-2694]. The Circuit Court also found that Barrow's claims under the Public Whistleblower's Act were not capable of being remedied because she was only seeking non-economic compensatory damages for emotional distress, which are unavailable under the statute. [R. 2694-2699].

Barrow appealed. [R. 2736, 2781]. She did not file a motion for rehearing.

## STATEMENT OF FACTS

LWCS does not agree with the statement of facts in Barrow's brief, which contains numerous assertions that do not even have record citations. Therefore, LWCS provides its own factual recitation.

## *I. LWCS – A Public Employer*

LWCS is a public charter school system. [R. 445]. It is overseen by a Board of Trustees and organized as a non-profit entity pursuant to state law. [*Id.*]. The purpose of LWCS is "to provide the governance for this system of public charter schools located in the greater Lake Wales, Florida area." [R. 456]. As delineated in the bylaws "[t]he system is designed to improve student learning and academic achievement with the use of innovative learning methods in compliance with Section 1002.33, Florida Statute … known as the Florida Charter School Law." [*Id.*].

LWCS' Articles of Incorporation state it "is organized exclusively for charitable, religious, educational, and scientific purposes, within the meaning of Section 501(c)(3)." [R. 451]. However, LWCS' bylaws provide that its operations shall be nonsectarian. [R. 456].

The Articles of Incorporation further provide that "[t]he educational purpose of [LWCS] is to govern a system of charter schools designed to provide an innovative education for students in the greater Lake Wales area ..." [R. 451]. They also provide that LWCS "has not been formed for profit or financial gain, and no part of the assets, income, or profits of the [LWCS] are distributable to, or inures to the benefit of, its directors or officers." [*Id.*].

LWCS' principal source of revenue is government funding. [R. 446]. It is organized as a Local Education Agency meaning it can directly obtain and manage federal educational funding, rather than having to obtain funding through a Florida school district. [*Id.*].

The various schools in the system maintain charters with the Polk County School Board which indicate the schools are public employers. [R. 511, 567, 618, 673, 728, 777, 827]. The Polk County School District is LWCS' "sponsor" as referred to in section 1002.33. [R. 446].

LWCS participates in the Florida Retirement system ("FRS"). [*Id.*]. Barrow is a member of FRS. [R. 1103].

### *II. Barrow's Employment with LWCS*

Barrow is currently employed by LWCS as its Director of Exceptional Student Education ("ESE"). [R. 1094]. She heads special education services for all schools in the system. [R. 1094-1098, 1201]. She was previously Principal of Hillcrest Elementary, a school in the system. [R. 1083]. In this position, she reported to Jesse Jackson, then Superintendent. [R. 1093].

### *III. A Supervisor's Guidance Letter*

On August 19, 2020, Jackson issued Barrow a letter containing two concerns. [R. 928, 1145-1146]. The first centered on Barrow's statement at

a LWCS board meeting that she was unaware of LWCS' COVID reopening plan, despite being involved with its development. [R. 928, 1148-1149]. The second centered on information Jackson received from LWCS Board member Andy Oguntola. [R. 928, 1319-1320]. He told Jackson he spoke with Candy Amato, the Director of Charter Schools for the Polk County School District, who told him Barrow contacted her and told her Hillcrest was ready to open and had everything in place to serve students. [R. 928, 1482-1483]. Jackson's concern was that this suggested Barrow was seeking permission to reopen her school outside of the system-wide plan which was disrespectful to her colleagues and undermined Jackson's authority. [R. 131, 928, 1316, 1322].

Barrow submitted a response. [R. 930-933]. In it, she admitted she did say she was not aware of the plan at the meeting even though she was involved in various aspects of its development, but she meant she felt isolated from the sitting down and writing of the plan and the plan went through some changes the night before the meeting. [R. 930-931]. With respect to the second concern, she indicated it was not true that she sought to reopen Hillcrest outside of the system-wide plan. [R. 933]. She submitted a letter from Amato to this effect. [R. 935-936].

### *IV. Barrow's Grievance*

On September 3, 2020, Barrow e-mailed Julio Acevedo, then LWCS Human Resources Director, Jackson, and Danny Gill, a member of LWCS' Board asking to file a grievance because she did not want the letter of concern in her file. [R. 938-939]. She indicated in this correspondence and her rebuttal that she believed the letter of concern was the product of a misunderstanding and acknowledged in her rebuttal Jackson had "information to base [his] concerns." [R. 930].

Barrow filed a grievance on September 4, 2020. [R. 941-943]. She complained about not receiving a formal evaluation from Jackson and that she had different guidelines to follow than a peer in hiring a School Resource Officer. [R. 941].[1] She also described an incident in which a former colleague slandered her, but it was not addressed by Jackson. [*Id.*]. She admitted it was addressed by her peer at Jackson's direction. [R. 1132]. Finally, she

[1] As Barrow described it, during the 2018-2019 school year, she requested to hire a school guardian at the same rate the Polk County School District was hiring guardians to be competitive, but that she was not permitted to. [R. 967, 1125-1126]. Years later, before the 2020-2021 school year, she learned that a principal of one of the high schools was able to hire a guardian at the rate. [R. 967, 1127]. Plaintiff testified she was always compliant with laws concerning school resource officers and guardians. [R. 1270].

indicates she was accused of not following procedures in connection with interviewing a new assistant principal. [R. 942]. The rest of the grievance centered on the letter of concern. [*Id.*]. Barrow said she believed what she stated at the Board meeting concerning the reopening plan was technically true and, and with respect to the second concern in the letter, that it "never occurred." [*Id.*].

In the grievance, Barrow complained of purported violations of portions of LWCS' employee handbook. [R. 849]. She also asserted that her grievance concerned the Code of Ethics of the Education Profession in Florida and specifically provisions 6B-1.01 and 6B-1.06 which provide:

> 6B-1.01 - Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.
>
> 6B-1.06: Shall not intentionally make false or malicious statements about a colleague
>
> Shall not submit fraudulent information on any document in connection with professional activities.

[R. 851].[2]

Barrow claimed her grievance implicated the Code of Ethics for

[2] These provisions are presently found at Florida Administrative Code 6A-10.081.

Education Professionals because she was complaining Jackson failed to do anything about a colleague making untruthful comments about her. [R. 1177]. She testified that her grievance did not concern the public's health or safety, but "maybe welfare of a climate of how a school feels supported by their leader, him not being there for things." [R. 1179]. The grievance has a remedy portion and Barrow asks in it for more feedback and for the guidance letter to be removed from her file. [R. 943].

Barrow's grievance was resolved on September 14, 2020, with Jackson agreeing not to place the letter in her file. [R. 945]. The letter resulted in no loss in pay or benefits and had no impact on her employment. [R. 1191-1192, 1325-1326].

### *V. Webb Investigation*

Months later, LWCS employee Dean Webb, reported to a co-worker, Linda Ray, that he overheard Barrow make a race-based remark at Hillcrest. [R. 896-900]. Ray told Jackson about this, and Jackson then told Webb to put this incident into writing, which he did in a letter dated December 10, 2020. [*Id.*]. Thereafter, Acevedo investigated the allegation. [R. 894-895]. Acevedo was unable to substantiate that Barrow made the remark, concluding his investigation by issuing a report dated January 6, 2021. [*Id.*].

Barrow suffered no loss of pay or benefits and her employment was not affected in any way because of the investigation. [R. 1225].

### *VI. Barrow's Reassignment*

On or about January 22, 2021, Jackson reassigned Barrow to the role of ESE Director. [R. 20, 965, 1357]. Jackson told Barrow he thought she would be a good fit for the position. [R. 1200, 1558-1559, 1755]. He felt Barrow could succeed in the position due to her particular interpersonal skills. [R. 1558-1559]. The position was going to be vacant due to the upcoming retirement of Barbara Jones, who then held the position. [R. 1093-1094, 1431].

Besides believing Barrow could succeed in position, Jackson made the decision to reassign Barrow because he had received an increasing number of concerns from staff members at Hillcrest, individuals in the community, and Barrow's fellow principals, concerning Barrow and her leadership at Hillcrest which had experienced unusually high staff turnover. [R. 993-997, 1357, 1360-1362, 1372, 1382-1385, 1765]. Jackson received continual feedback from staff at Hillcrest expressing concerns about Barrow's leadership including that they felt they were not supported, treated badly, and that Barrow played favorites. [R. 993-997, 1362, 1552].

These complaints began to mount in the year leading up to Barrow's reassignment. [R. 1420-1422]. Many of these complaints were not made directly to Jackson and many were anonymous as those complaining were unwilling to identify themselves. [R. 1422-1424]. Barrow does not dispute that complaints were made about her and has admitted that Jackson had communicated complaints to her. [R. 1239-1240]. She admitted Jackson shared at least one anonymous complaint letter with her and that she did not believe in the complaint's merits. [R. 1238]. Barrow attributed the complaints to people not liking that she was holding them accountable and said maybe those that complained were not doing what they were supposed to be doing. [R. 1238-1240].

The reassignment resulted in no change of pay, loss of benefits, or change in working hours and Barrow maintains significant responsibilities in her role. [R. 1098, 1102-1103, 1200]. When Barrow was reassigned, Jackson appointed Rebecca Thomas as the interim principal of Hillcrest. [R. 1544, 1551]. Months later, she was made permanent. [R. 1625]. The position for principal at Hillcrest was advertised, but Barrow did not apply for it. [R. 1227-1228, 1711-1712]. Jackson was not involved in the decision to make Thomas the permanent principal at Hillcrest. [R. 1551].

### *VII. Sheriff's Investigation into Complaints about Barrow*

Around the same time Barrow was reassigned, in January of 2021, Jackson had resigned as superintendent of LWCS, and Alricky Smith, LWCS' Chief Financial Officer, became interim superintendent. [R. 921, 1527-1528, 1578-1579]. Acevedo notified Smith about complaints by current and former employees regarding Barrow. [R. 924, 1613]. They centered on pressure or coercion of staff to write letters on Barrow's behalf in connection with the investigation into Webb's allegation. [R. 924, 1612-1613]. Multiple people submitted complaints to LWCS about feeling pressured or coerced into writing a letter on Barrow's behalf. [R. 840, 902-904, 949-951, 906-908, 1432-1433, 1613, 1690]. Current and former employees that reported to Barrow, as well as peer principals, also submitted letters detailing allegations of an oppressive working environment at Hillcrest under Barrow's leadership and negative interactions with her. [R. 910-919].

Due to these concerns, it was decided that the Polk County Sheriff's Office ("PCSO") would conduct an administrative investigation about the entirety of the circumstances. [R. 924, 1612-1613, 1777-1779]. As detailed in Smith's memorandum to LWCS' Board, the investigation was into whether there was an oppressive working environment at Hillcrest under Barrow. [R.

924]. Jackson was not involved in the decision to engage PCSO to conduct the investigation. [R. 922, 1353-1354, 1631].

The investigation's results indicated that several employees felt like they had to write a letter of support for Barrow during the Webb investigation and wrote one even though they did not want to because they did not want to be singled out. [R. 1007-1009]. The Investigation Summary also detailed that several individuals related instances where Barrow was angry and that they were uncomfortable that they would do something to cause this to happen again. [R. 1010].

After PCSO's investigation was completed, Smith sent a memo to LWCS' Board about it. [R. 926]. Smith decided Barrow's conduct did not warrant termination, but that she should undergo professional development for conflict management. [*Id.*]. She suffered no loss of pay or benefits because of the investigation. [R. 1229].

## STANDARD OF REVIEW

De novo. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Florida Rule of Civil Procedure 1.510, the summary judgment rule is aligned with the federal court standard. *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 194

(Fla. 2020). The test for the existence of a genuine factual dispute precluding summary judgment is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). The burden on the non-moving party that bears the ultimate burden of proof at trial is to make a showing sufficient to establish the existence of each element essential to their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There can be "no genuine issue as to any material fact" if there is "a complete failure of proof concerning [any] essential element of the non[-]moving party's case." *Id.* at 323. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

A party must cite to particular materials in the record to support factual positions. Fla. R. Civ. P. 1.510(c)(1)(a).

## SUMMARY OF THE ARGUMENT

Initially, Barrow did not preserve the issues she argues because she did not file a motion for rehearing. Florida Rule of Civil Procedure 1.530(a) requires parties to file a motion for rehearing to preserve challenges to the sufficiency of the evidence, what Barrow challenges here.

Even if she did, her claims still fail. First, she fails to show she engaged in protected activity under the Private or Public Whistleblower's Acts. The Circuit Court got it right in finding that her complaints merely concerned interpersonal differences with her supervisor. Barrow's attempts to elevate her complaints to one asserting an actual violation of the law or a violation of the law that presents a substantial and specific danger to public's health, safety, and welfare, necessary to establish protected whistleblowing activity, are not supported by the record. And Barrow continues to reference an alleged protected activity, in a zoom Board meeting to discuss COVID reopening, which has no record support, was not pled or disclosed in discovery, and which she disavowed ever making at her deposition.

Barrow's argument she suffered an adverse employment action also fails because she did not preserve the argument she makes on appeal. She relies entirely on an intervening US Supreme Court decision, issued after the

Circuit Court's summary judgment order, in arguing the Circuit Court applied the wrong standard to evaluate whether she suffered an adverse employment action. The problem is she never argued below that a standard different than the one the Circuit Court applied should govern.

Barrow also cannot establish that her alleged protected activity, her grievance, had anything to do with any adverse employment action. Barrow's reassignment did not occur until nearly five months after she filed her grievance. She suggests there was a chain of retaliatory events that show causation, but the nearest of those alleged events, the investigation into Webb's allegation she made a racist remark, to the grievance, is more than three months, the well-established time period at which points courts find that a plaintiff needs to show something more than just timing to establish an initial inference of causation.

And Barrow has no evidence of causation or that the legitimate reasons for her reassignment were pretextual. She relies on her own conspiracy theories about the reassignment, but presents no evidence that the reasons for it, the turnover at her school, the complaints about her leadership, and her failure to respond to her supervisor's coaching efforts, were pretextual. Barrow even admitted that complaints were made about her

which her supervisor shared with her. Barrow essentially questions the wisdom of the decision to reassign her, but courts do not sit as super-personnel departments, second-guessing employers' non-retaliatory decisions.

Barrow's Private Whistleblower's Act claim also fails because she cannot show that LWCS is an "employer" under the statute. She does not rebut the record evidence demonstrating LWCS is a public employer and does not address the precedent cited by the Circuit Court distinguishing public and private corporations, nor does she seriously address the Circuit Court's reasoning finding that a jury could not find LWCS is an employer subject to the Private Whistleblower's Act.

Finally, the Circuit Court correctly found Barrow's claims under the Public Whistleblower's Act could not be remedied. Barrow does not dispute that the only remedy she seeks is non-economic damages for emotional distress. The Whistleblower statute's plain language does not provide for these damages and to find otherwise would require this Court to read words into the statute.

## ARGUMENT

### I. Barrow Failed to Preserve the Issues She Argues on Appeal

Barrow did not preserve the issues she argues on appeal because she did not file a motion for rehearing under Florida Rule of Civil Procedure 1.530(a). Rule 1.530(a) permits parties to file a motion for rehearing to final judgments, including summary judgments. Rule 1.530(a) was recently amended to provide that "[t]o preserve for appeal a challenge to the failure of the trial court to make required findings of fact in the final judgment, a party must raise that issue in a motion for rehearing under this rule." As the supreme court observed, this amendment to Rule 1.530 was "necessary to clarify that filing a motion for rehearing is required to preserve an objection to insufficient trial court findings in a final judgment order." *In re Amends. to Fla. Rule of Civil Proc. 1.530*, 346 So. 3d 1161, 1162 (Fla. 2022).

A court must enter summary judgment when a party meets its burden in support of such motions and must state its reasons for granting the motion on the record. Fla. R. Civ. P. 1.510(a). The summary judgment rule requires courts to find facts, and specifically the undisputed material facts, based on the record presented to it. While the inadequacy of those findings may be attacked on appeal, Rule 1.530 requires a party move for rehearing to

preserve that challenge for appeal.

Barrow's arguments are essentially that the Circuit Court's findings of fact are insufficient to support judgment or that it should have made certain findings of fact that created a dispute. If Barrow took issue with the findings of fact made by the Circuit Court, she should have raised this below.

For example, and perhaps most glaringly, Barrow continues to assert that she engaged in protected whistleblowing activity at LWCS Board's August zoom meeting, claiming she said at the meeting that Jackson had not created or disclosed a COVID reopening plan forcing her to reach out to the Polk County School District to create her own plan. Initial Br., 2, 33. As will be explained further, the trial court was right to reject the assertion that the purported statement constituted protected activity as well as Barrow's reliance on it because she did not cite to any record evidence supporting the assertion and because she did not disclose it in discovery or plead it in her complaint. [R. 2679-2680]. Barrow still does not provide any support for this assertion, but if she believed the trial court erred in this regard, she needed to have brought it forward in a motion for rehearing.

To make the challenges Barrow makes, she was required by Rule 1.530 to move for rehearing. She did not and therefore her arguments that

the Circuit Court erred were not preserved and should be rejected.

## II. Barrow's Claims Under Whistleblower's Acts Are Without Merit

Barrow's claims under the Private and Public Whistleblower's Acts are analyzed slightly differently at different stages, but courts still use the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) framework, to evaluate both claims, where, like here, there is no direct evidence of retaliatory intent. *Chaudhry v. Adventist Health System Sunbelt, Inc.,* 305 So. 3d 809, 814 (Fla. 5th DCA 2020); *Griffin v. Deloach,* 259 So. 3d 929, 931 (Fla. 5th DCA 2018).

The *McDonnell Douglas* framework requires Barrow to first establish a *prima facie* case of retaliation. "To establish a *prima facie* claim for retaliation under [the Whistle Blower's Act], ... a plaintiff must demonstrate: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events." *Chaudhry*, 305 So. 3d at 813-14; *DCF v. Shapiro*, 68 So. 3d 298, 305-306 (Fla. 4th DCA 2011).

If she does the "exceedingly light burden" shifts to LWCS to produce a legitimate nonretaliatory reason for its decision. *Valenzuela v. GlobeGround North America, LLC,* 18 So. 3d 17, 24 (Fla. 3d DCA 2009). The burden is

one of production, not persuasion. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253–55 (1981).

Once such evidence is proffered, Barrow must show it is a pretext. To show pretext, she 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." *Gogel v. Kia Motors Mfg. of Ga., Inc.,* 967 F.3d 1121, 1136 (11th Cir. 2020). Barrow may not "recast" LWCS' proffered reason or substitute her own judgment. Instead, she "must meet that reason head on and rebut it, and … cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000). An employer may take an employment action, "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, [just] not for a [retaliatory] reason." *Nix v. WLCY Radio/Rahall Comms.*, 738 F.2d 1181, 1187 (11th Cir. 1984), *overruled on other grounds by, Lewis v. City of Union City*, 918 F.3d 1213, 1218 (11th Cir. 2019).

To show pretext, Barrow must show that "but-for" her protected activity, LWCS would not have taken the challenged adverse actions. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (establishing "but for"

causation standard for Title VII retaliation claims); *Chaudhry*, 305 So. 3d at 817; *O'Neill v. St. Johns River Water Management Dist.*, 341 F. Supp. 3d 1292, 1302-1303 (M.D. Fla. 2018) (applying "but for" causation to Public Whistleblower's Act claim).

**a. <u>Barrow Did not Engage in Protected Whistleblowing Activity</u>**

In pertinent part, the Private Whistleblower's Act protects individuals from retaliation that have "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." § 448.102(3), *Fla. Stat.* A plaintiff proceeding under the Private Whistleblower's Act must show that she complained of an actual violation of a law, rule, or regulation. *Gessner v. Southern Company,* 2024 WL 4830575, at *4 (Fla. 1st DCA 2024). "Law, rule, or regulation" includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business. §448.101(3), *Fla. Stat.*

As for the Public Whistleblower's Act, Barrow contends she engaged in protected activity under section 112.3187(5)(a), which protects disclosures of "[a]ny violation or suspected violation of any federal, state, or local law,

rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare"

Barrow did not establish she engaged in protected activity under either statute. Barrow's assertion that the Circuit Court erred in finding that her complaints did not meet the statutory requirements and were something more than interpersonal differences with her supervisor (Initial Br., 33), are simply not supported by the record. The Circuit Court did examine Barrow's complaints and saw them for what they were.

Barrow asserts that she engaged in protected activity at the August 14, 2020, emergency meeting of LWCS' Board of Trustees, claiming at that meeting that she said "she was not aware that [LWCS] had a plan in place for the COVID reopening, and that she had to come up with her own plan." *Id*. This assertion is also in the facts section which provides that "[o]n or about August 14, 2020, Barrow made a statement at a public school board meeting questioning the Charter System's COVID reopening readiness. Specifically, Barrow stated that Dr. Jackson had not created or disclosed a Covid re-opening plan, forcing Barrow, as Principal of Hillcrest Elementary School, to confer with the Polk County School Board to create a plan." Initial Br., 2.

Barrow though does not explain why the trial court erred in finding this newly disclosed instance of alleged protected activity was not supported by record evidence and could not be relied upon because it was not pled in the complaint or disclosed in discovery, and, if anything, contradicted by the record. [R. 2679-2680]. Therefore, she has waived any arguments that this instance of alleged protected activity should be considered by this court at all. *Tillery v. Florida Dep't. of Juvenile Justice*, 104 So. 3d 1253, 1255–56 (Fla. 1st DCA 2013) ("an argument not raised in an initial brief is waived").

And the Circuit Court did not err in rejecting Barrow's attempt to rely on this instance of purported protected activity. She still provides no citation to the record to support this allegation. This was enough to disregard her allegation because she did not properly support it as required by the rules of civil procedure. Furthermore, as the Circuit Court correctly found, Barrow did not plead it as an instance of protected activity in the Complaint and she did not list it as an instance of protected activity in her answers to LWCS' interrogatories. Barrow is not permitted to amend her complaint in response to summary judgment, which is exactly what she attempts to do here. *See Gilmour v. Gates, McDonald and Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004) (rules of pleading do not allow plaintiff to assert new claim in response to

motion for summary judgment); *Mitchell v. Pilgrim's Pride Corp.*, 817 F. App'x 701, 708 (11th Cir. 2020) (plaintiffs are not permitted to assert new factual bases for claims in response to motions for summary judgment); *Thampi v. Manatee Cnty. Bd. of Comm'rs*, 384 F. App'x 983, 988 (11th Cir. 2010) (plaintiff's assertion of additional protected activity in summary judgment response not pled in complaint rejected).[3]

In fact, Barrow said she did the exact opposite of what she contends she did in her summary judgment papers and her brief. She testified at her deposition that she never went to Polk County Schools to do a separate reopening plan and called that notion "the most ridiculous thing [she] had ever heard." [R. 1149-1150; *see also id.* ("And then on the other thing he accused me of going to have Hillcrest do a separate reopening plan which I never did.") and at 1168 (Barrow testifying "that I reached out [to Polk County Schools] in isolation to do a Hillcrest reopening plan which I never in a million years would do that." And "I absolutely was not going to have a reopening plan for Hillcrest in isolation."); and 1224 ("but I told him that I was going to

[3] While these are federal court cases, both Federal Rule of Civil Procedure 8(a), interpreted in *Gilmour,* and Florida Rule of Civil Procedure 1.180 require plaintiffs to plead a short, plain statement of the facts showing that the pleader is entitled to relief.

do our own reopening plan, which is the most farfetched thing that I've heard in my life.")].

Barrow's deposition is filled with similar statements undercutting her new purported protected activity. She testified that when asked by Amato at Polk County Schools about the COVID reopening plan that she said LWCS was working on it. [R. 1148, 1168]. And Barrow knew about the COVID reopening plan because she herself worked on it. She testified that she participated in numerous conversations about the reopening plan and that she attended at least one meeting where she was involved in writing the plan. [R. 1148-1149]. She clarified that when she said she was not aware of the plan at the Board meeting, leading to Jackson's guidance letter because she was involved in the creation of that very plan, that she meant she was not aware of the latest iteration of the plan that had changed overnight and that she wished she had more involvement in sitting down and writing the plan. [R. 1147-1149, 1151, 1157]. Barrow even testified that no Board Members had a concern about LWCS' readiness to reopen. [R. 1247-1248].

Even if this Court did consider this newly disclosed, unsupported, unpled, and unpreserved argument, it is still without merit because Barrow's purported complaint that a COVID reopening plan had not been disclosed or

created forcing her to create her own plan does not qualify as protected activity under either statute. It is not protected under the Public Whistleblower's Act because it was not in writing. *See* §112.3187(7), *Fla. Stat.* (protecting written complaints).

It is not protected under the Private Whistleblower's Act because it does not constitute a complaint of an actual violation of any law, rule, or regulation. While Barrow might be right that a plaintiff need not provide statutory citations to engage in protected activity, *see Aery v. Wallace Lincoln-Mercury, LLC,* 118 So. 3d 904, 916 (Fla. 4th DCA 2013), her counsel should be able to show which statute, law, rule, or regulation her complaint implicated. Barrow's brief references section 1002.33(16)(a)(5) of the Charter School statute. Initial Br., 33. All that provision says is LWCS is not exempt from statutes in the Education code that pertain to "student health, safety, and welfare." Barrow has not identified what statute in the education code concerning student health, safety, or welfare her purported complaint even touched on let alone violated. She certainly cannot show that she complained of an actual violation of the law, nor can she show that she complained of a violation of the law that presented a substantial and specific danger to the public's health, safety, and welfare. The truth is there was a

plan in place.

Next, Barrow says that she submitted a response to the letter of concern that Jackson issued, supposedly complaining that it was a "violation of various Florida laws, including the whistleblower statute." Initial Br., 34. But in that response Barrow does not make any allegations that Jackson or anyone else violated any law, and in no portion of it does she even suggest that the letter of concern Jackson issued was a violation of any whistleblower's statute. [R. 930-33]. This supposed instance of protected activity was again not alleged in the complaint. And to the point, Barrow conceded in the rebuttal letter that Jackson had information upon which to base his concerns and that she felt it was a misunderstanding. This is hardly a whistleblowing complaint.

Finally, Barrow mentions her grievance, the only instances of alleged protected activity pled in the complaint and that she disclosed in discovery. She claims that a jury could find her reference to being given different guidelines to follow than a peer in obtaining funding for a school safety officer violated Section 1002.33(16). Initial Br., 34. But again, Section 1002.33(16) merely says that laws related to student health, safety and welfare also apply to charter schools. Barrow has not pointed out any specific law that she

asserts LWCS violated.

In fact, Barrow testified this incident concerned her efforts to advertise for a school guardian at a certain rate that Polk County Schools was paying. Her request was denied, and purportedly, years later, a principal of another school in the system was able to advertise at this rate. Barrow herself said that she was always in compliance with the law.[4] Obviously too Barrow's stale reference to a denial of a requested funding amount for a school guardian occurring years earlier did not present any specific or substantial threat to the public's health, safety or welfare. Barrow did not even ask for funding for school guardians as part of the resolution of her grievance.

Barrow next says that her grievance implicated two rules of the Code of Professional Ethics for Educators; Rules 6B-1.01, (an educator must be "aware of the importance of maintaining the respect and confidence of one's

[4] For this reason, Barrow's reference to section 1006.12, *Fla. Stat.* is unavailing. Barrow claims in her facts section, without any citation to the record, that she complained Jackson denied her request for a school resource officer in violation of section 1006.12, which according to Barrow "mandated that every school have a school resource officer." Initial Br., 3, 5. Barrow never complained that she was denied a school resource officer and testified that she was always in compliance with the law. She only complained that she was given different guidelines for the hiring of a school resource officer, which she revealed to be that she was not permitted to advertise at a certain rate for a school guardian, but another principal was.

colleagues, of students, of parents and of other members of the community, [and] the educator strives to achieve and sustain the highest degree of ethical conduct") and 6B-1.06 (educator "shall not intentionally make false or malicious statements about a colleague" and "shall not submit fraudulent information on any document in connection with professional activities"). Barrow does not say how her grievance asserts anyone at LWCS made false or malicious statements or submitted fraudulent information on any document in connection with professional activities. Barrow herself stated that Jackson had information on which to base his concerns in the guidance letter.

Barrow says her grievance implicates Rule 6B-1.01 because showing favoritism to her peer in funding for a school guardian is "destructive to the respect and confidence of ones' colleagues as superintendent." Initial Br., 35-36. She also claims that providing her a reprimand for making accurate statements at the Board meeting "is destructive to the respect and confidence of one's colleagues as the superintendent." *Id.* at 36. As to the latter of these allegations, Barrow herself admitted Jackson had information on which to base his concerns. As to the former, Barrow cannot establish that providing different guidelines for the hiring of a school guardian even

implicated this standard. Barrow did not even establish why there were different guidelines, let alone that Jackson's decision showed that he was not "aware" of the importance of maintaining respect and confidence of his colleagues and did not strive to achieve and sustain the highest degree of ethical conduct.

In this regard, these are aspirational standards. Nothing in the grievance establishes Jackson was not "aware" of the importance of maintaining the respect and confidence of one's colleagues and did not "strive" to achieve the highest degree of ethical conduct. As the Florida Division of Administrative Hearings has noted in analyzing this provision, because it is aspirational, it is not easily applied as a disciplinary standard as it is clearly exhortatory in nature encouraging educators to "strive" for the "highest" and "best." *Palm Beach County School Board v. Paul Loud*, 2022 WL 1559997, at *5 (Fla. DOAH April 11, 2022). Indeed, these standards are practically useless as a means of measuring conduct for which professional discipline is appropriate. *Miami-Dade Cnty. Sch. Bd.*, Case No. 06-1758 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007) ("The precepts set forth in the Ethics Code ... are so general and so obviously aspirational as to be of little practical use in defining normative behavior.").

Not only has Barrow failed to establish an actual violation of this standard sufficient to show that she engaged in protected activity under the Private Whistleblower's Act, she failed to show that her complaint of a violation of this standard "creates and presents a substantial and specific danger to the public's health, safety and welfare" to show she engaged in protected activity under the Public Whistleblower's Act. Barrow does not explain at all how her complaints meet this standard. Indeed, Barrow testified that her grievance did not implicate the public health or safety, "but maybe welfare of a climate of how a school feels supported by their leader, him not being there for things." This is not a substantial and specific danger to the public's health, safety, and welfare, and to find otherwise would be to afford whistleblower protection to an employee any time she has a gripe with her supervisor.

**b. Barrow's Arguments that the Circuit Court Erred in Finding She Did not Establish an Adverse Employment Action Are Unavailing and Unpreserved**

Barrow argues the trial court erred in finding she did not suffer an adverse personnel action. She points to the United States Supreme Court decision issued after the Circuit Court issued its order, *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024) in support of her argument. And while it is true

*Muldrow* clarified the standard for adverse employment actions for Title VII discrimination claims, and assuming this standard applies to Barrow's claims, *Muldrow*'s reach is not as wide as she suggests, and even if it was, she did not preserve any argument the standard articulated in *Muldrow* should apply.

The Supreme Court held in *Muldrow* that in a Title VII anti-discrimination case, a plaintiff does not need to show a "significant" or "serious" adverse employment action. 601 U.S. at 350, 353. However, the plaintiff must establish that the employer's actions "brought about some 'disadvantageous' change in an employment term or condition." *Id.* at 354 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

Barrow mentions two alleged adverse personnel actions in her brief; her reassignment and the letter of concern issued by Jackson. Initial Br., 38. As to the letter of concern, Barrow fails to show how this had any impact on her at all, let alone a disadvantageous one. *See Austin v. City of Montgomery,* 196 Fed. Appx. 747, 753 (11th Cir. 2006) (counseling memos not adverse employment actions). This is especially so given that Jackson agreed that the letter of concern would not be placed in Barrow's file. That the letter of concern was essentially rescinded means that it could not

possibly constitute an adverse employment action. *See Martin v. Eli Lilly & Co.,* 702 F.App'x 952, 957 (11th Cir. 2017) ("An employment action is not adverse if the employer rescinds it before the employee suffers any tangible harm.").

Barrow's claim related to whether the letter of concern constituted an adverse personnel action under the standard articulated in *Muldrow* also fails for the same reason her claim that her reassignment constituted an adverse employment action fails; she failed to preserve this argument. Barrow never argued below that something other than the serious and material change standard from *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001) should have applied. She did not argue that the standard, or anything akin to the standard announced by the Supreme Court in *Muldrow*, should govern.

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (*quoting Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)). Barrow essentially makes a "pipeline decision" argument but

she does not benefit from a standard annunciated in another decision unless she preserved an argument that the rule of law announced in the intervening decision was the one that should apply to her case. Because she failed to do that, she failed to preserve her "pipeline decision" argument. *See Clay v. Prudential Ins. Co.*, 670 So. 2d 1153, 1155 (Fla. 4th DCA 1996) (insurer failed to preserve objection to existing legal standard that was modified by Supreme Court following trial; nor was there fundamental error that could excuse the lack of objection).

**c. <u>Barrow Cannot Show a Causal Connection Between the Challenged Action and her Alleged Protected Activity</u>**

To establish a causal connection sufficient to support a prima facie case of retaliation, Barrow must show the protected activity, and the adverse action were not wholly unrelated. *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1354 (11th Cir. 1999). Close temporal proximity between the protected activity and the adverse action can show the two events were not wholly unrelated. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). A gap of more than 3 months between the alleged whistleblowing activity and the challenged adverse action is too lengthy to support an inference of a causal connection at the *prima facie* stage. *Walker v. Sec'y,*

*U.S. Dep't of Air Force*, 518 F. App'x 626, 628 (11th Cir. 2013) (holding a three month interval between the plaintiff's protected activity and adverse employment action was insufficient to establish a prima facie case); *Buade v. Terra Grp., LLC*, 259 So. 3d 219, 223 (Fla. 3d DCA 2018) (citing to federal cases finding that a six-month gap, three-month gap, and four-month gap between protected activity and adverse employment action precludes finding of temporal proximity).

Barrow filed her grievance, which she pled to be her protected activity, on September 4, 2020. She was not reassigned until January 22, 2021, nearly 5 months later. The Circuit Court found that she lacks other evidence of causation such that a lack of close temporal proximity is fatal to her ability to establish a causal connection. Barrow makes two arguments for why she believes the Circuit Court erred in this regard.

First, she says she was retaliated against shortly after she engaged in protected activity. That is, when Jackson issued her the letter of concern. Initial Br., 38. But, the letter of concern predates the grievance, so it could not possibly have been caused by any retaliatory animus.[5] To the extent

[5] LWCS already explained why Barrow's contention she engaged in some other protected activity prior to the grievance is meritless.

Barrow contends LWCS' investigation into allegations made by Webb about her constituted some type of link in a chain of retaliatory animus, that investigation did not occur until more than three months after Barrow filed her grievance.[6]

Second, Barrow asserts that the three-month time period is not a bright-line rule, but the cases she relies on do not support her arguments. First, Barrow cites *Rustowicz v. North Broward Hosp. Dist.*, 174 So. 3d 414 (Fla. 4th DCA 2015), claiming that this case stands for the proposition that "[e]ven ten months in certain contexts between protected activity and an adverse action is not too long." Initial Br., 39. Barrow misreads this case. The basis of the *Rustowicz* decision was that there was evidence the decisionmaker only became aware of the protected activity one month before taking the adverse action. 174 So. 3d at 426-427. Barrow also relies on *Baker v. Kijakazi*, 2022 WL 22288492, *3 (N.D.Ga., 2022) arguing this case involved a scenario where a six-eight month delay between the protected activity and adverse action sufficient, but that case was decided on a motion to dismiss with the court noting that the plaintiff was entitled to engage in

[6] Barrow does not contend LWCS should not have investigated Webb's allegation. [R. 1225].

discovery to establish other evidence of causation besides temporal proximity and that the delay between when the decisionmaker actually became aware of the protected activity and the time the adverse action was taken were not as lengthy.

Barrow has no evidence her alleged protected activity had anything to do with her alleged adverse actions. The Circuit Court was right to grant summary judgment on this basis.

**d. Barrow Cannot Show the Charter School's Legitimate Non-Retaliatory Reasons were Pretextual**

The legitimate reasons for reassigning Barrow to the ESE Director position are well-supported. Jackson received complaints for years from Barrow's subordinates and others about her conduct as principal at Hillcrest. Those complaints, which included that she was not supportive, treated employees badly, and played favorites, mounted leading up to her reassignment. There was high turnover at her school. Jackson decided based on these increasing complaints, history of turnover, and Barrow's failure to respond to his efforts to work with her to address these complaints, that the best thing for Barrow was to reassign her to the ESE Director position which was going to be vacant due to the incumbent ESE Director's

retirement. Jackson felt that Barrow would be a good fit for that position given her particular skills.[7]

These reasons are sufficient for LWCS to carry its burden of articulating a legitimate non-retaliatory reason for the decision. Barrow is wrong that there was a fact issue showing pretext. She argues the case is akin to *Chaudhry, supra,* where the District Court found there was sufficient evidence from which a jury could find that the reasons for the plaintiff's termination were a pretext to engage in whistleblower retaliation. Initial Br., 42. But *Chaudhry* is distinguishable.

In *Chaudhry,* the plaintiff, a doctor, had disagreements with his hospital-employer's heart-lung transplant institute's director including about which patients were appropriate candidates for transplants, surgical techniques, and overall performance, complaining multiple times to hospital administration and requesting a review of the director's performance. 305 So. 3d at 812. He later complained directly to the chief of medical staff

[7] As the Circuit Court found written complaints lodged with LWCS' Board in the wake of Barrow's reassignment confirm that teachers felt that she created a toxic or hostile environment at Hillcrest, that she had a temper, that she got angry and that teachers feared making her angry and that she played favorites. [R. 2690].

earning him the badge of “troublemaker” and “not a team player” among certain members of hospital administration. *Id.* The institute needed to be inspected and approved by the United Network for Organ Sharing, to be financially successful and without approval the hospital could lose millions of dollars in revenue. *Id.* at 812-813. Just prior to an onsite visit from this organization, Chaudhry again complained about the director’s surgical techniques and practices and that he was endangering patient safety threatening to air these complaints to the organization representatives when they visited. *Id.* at 813. Chaudhry was swiftly terminated before the visit and the hospital took numerous steps to ensure he would not be present when the organization representatives were. *Id.* It was this evidence the District Court found could support a finding of pretext, notwithstanding the hospital’s articulated legitimate reason for the termination.

That is not the type of evidence at play here. Importantly, Barrow must show a fact issue not only as to whether the legitimate reasons proffered by LWCS for the reassignment was legitimate, but also that the real reason was to retaliate against her for her grievance. *See Orange Cnty. v. McLean,* 308 So.3d 1058, 1064 (Fla. 5th DCA 2020) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)); *see also Faircloth v. Herkel Investments Inc.,* 514

Fed.Appx. 848, 851 (11th Cir. 2013) (plaintiff must adduce evidence reason was false and real reason was discrimination); *Flowers v. Troup Cnty., Ga., School Dist.*, 803 F.3d 1327, 1337–38 (11th Cir. 2015) (same).

Barrow focuses on PCSO's investigation into complaints about her that occurred after she was reassigned. She says the Circuit Court did not address or consider the outcome of the investigation or that a jury might find the investigation itself was retaliatory. Initial Br., 41. Not so. The Circuit Court found there was no evidence the investigation was retaliatory or even that it was an adverse action.[8] [R. 2681, 2690, 2693-2694]. Barrow does not argue the Circuit Court erred in finding the investigation was not an adverse action, and thus waived any argument in this regard. *Tillery, supra.* It is also undisputed complaints about her were made, leading to the investigation.

Barrow surmises that a jury could find the investigation was an effort to terminate her and that when LWCS could not find a reason to terminate her, it transferred her instead. Initial Br., 41. But this ignores the fact the investigation occurred after the reassignment decision was made. Moreover, Smith, then serving as the interim superintendent was responsible for the

[8] The Circuit Court was right to hold the investigation was not adverse as there is no evidence it harmed Barrow in any way.

employment decisions related to Barrow coming out of PCSO's investigation and Barrow does not allege that he had any retaliatory animus against her. [R. 1194].

But importantly, there were complaints made against Barrow for years by staff, peers, and others. Barrow attempts to discount complaints lodged against her over the years by claiming that Jackson testified he acted in response to the recent complaints. Initial Br., 43. But Barrow misconstrues this portion of the record. Jackson testified repeatedly, as well as relayed to PCSO during the investigation, that his decision was based on several things, including high turnover at Hillcrest, repeated and continuing complaints about her conduct, and her failure to respond to his efforts to coach her. These complaints concerned her playing favorites, treating others badly, and not supporting employees. Even if more recent complaints led to the reassignment decision, and Jackson did testify that the complaints mounted leading up to the reassignment decision, does not mean that the older complaints do not "constitute a sufficient legitimate reason for the transfer."

And it is Barrow's burden under the caselaw to rebut every reason for the reassignment as pretextual. *Gogel*, 967 F.3d at 1136. Far from rebutting

the existence of complaints, she admitted that complaints about her were made, and that Jackson shared them with her. She admitted that the complaints were that she was sensitive and defensive. [R. 1240]. Her response was that she disagreed with them.

Barrow though cannot show pretext by quarrelling with the wisdom of the decision to reassign her. This would essentially place the Court in the position of acting as a super-personnel department, second-guessing employment decisions, which is not the province of a court interpreting employment laws. *See Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Barrow's attempts to utilize the report from the PCSO's investigation to show pretext underscores this fact. Barrow says that the PCSO investigation's conclusion that "[n]o witnesses provided information with regard to recent, repeated and pervasive specific actions that were discriminatory in nature" means that the reassignment was not justified and that LWCS should have placed Barrow back in the principal's position at Hillcrest when the investigation was completed. Initial Br., 43-44. Barrow misconstrues the nature of PCSO's investigation and its relationship to the reassignment and the pretext question.

The PSCO investigation was to determine, based on the number of

complaints that LWCS was receiving, whether Barrow engaged in conduct that violated Florida Administrative Code 6A-10.081(2)(c)(4), which provides that educators:

> Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

[R. 924]. And that is what PCSO investigated. [R. 999 (defining key terms and explaining it was exploring whether Barrow created a hostile or intimidating environment that is pervasive and makes doing one's job impossible by altering the terms, condition, and/or reasonable expectations of a comfortable working environment for employees)]. So, PCSO did find that Barrow did not violate this standard, but it also found that employees reported that they feared making Ms. Barrow angry after having experienced it in the past. [R. 1010].[9]

Smith thus determined that termination of Barrow was unwarranted.

[9] To be sure, the PCSO also found that employees wrote letters of support for Barrow during the Webb investigation, even if they did not want to, because they did not want to be singled out. [R. 1007-1009].

[R. 926]. He determined though, based on findings in the report, that Barrow had leadership issues and issues with conflict management, recommending that she undergo professional development. [R. 926]. Critically, these findings from the PCSO support Jackson's reassignment decision, not undercut it. Jackson never testified that the reason he reassigned Barrow was because she engaged in harassment or discriminatory conduct that created a hostile, intimidating, abusive, offensive, or oppressive environment. Rather, he testified that he received complaints about Barrow for years and despite his efforts to work with her to address those complaints, they kept coming.

So, PCSO's investigation does not exonerate Barrow like she thinks. Contrary to her assertions, the investigation's results did not reveal that the complaints about her conduct that Jackson received for years were "fabrications." Initial Br., 44. Barrow herself admitted such complaints had been made.

Regardless, even if the complaints were fabrications, Barrow has offered no evidence that Jackson did not reasonably believe that complaints he received about her were true and thus cannot establish pretext. *See Elrod*, 939 F.2d at 1470 (in evaluating pretext, the court must focus on

whether the decisionmakers believed that the employee was guilty of the act and whether that belief was the reason for the adverse action). The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs or "reality as it exists outside of the decision maker's head." *Alvarez v. Royal Atl. Developers, Inc.,* 610 F.3d 1253, 1266 (11th Cir. 2010). Accordingly, when assessing whether an employer has properly imposed an adverse action on an employee based on that employee's conduct, the question is not whether the employee engaged in the conduct, but instead whether the employer in good faith believed that the employee had. *Gogel*, 967 F.3d at 1148.

This is because courts are "not in the business of adjudging whether employment decisions are prudent or fair." *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). Decisions made on mistaken beliefs or bad information, but that are not otherwise retaliatory are not actionable. *See e.g., Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1261 (11th Cir. 2001) (pretext means more than a mistake by the employer; actions taken based on a mistaken, non-discriminatory belief do not violate

Title VII).[10]

Curiously, Barrow suggests Jackson reassigned her because he believed she made the racist remark Webb reported, basing this allegation in part on what she deems Jackson invalidating the results of the investigation. Initial Br., 50-51. Factually, Jackson did not invalidate the investigation's results, but merely expressed he felt the disclosure of information related to the allegations to Barrow at a certain point during the investigation was not appropriate. [R. 1448-1450, 3951-3953]. But even if Jackson did believe Barrow made the statement and reassigned her based on this belief, which there is no evidence of, it still has nothing to do with her grievance.

At bottom, Barrow has not offered anything other than her mere conclusory assertions that the reason for the reassignment was pretextual, which is insufficient to avoid summary judgment. *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) (a plaintiff cannot merely make conclusory

[10] Barrow seems to concede as much by arguing that "even if Dr. Jackson were allowed to rely on those complaints, a reasonable jury could find that this purported legitimate reason became pretextual upon comprehensive proof of its falsity and the abject failure to remedy it." Initial Br., 44. But the investigation's results and how the Charter School responded to it do not somehow retroactively make the decision Jackson made unlawful.

allegations and assertions but must present concrete evidence in the form of specific facts showing that the employer's reason for the materially adverse action was pretextual). Barrow's counterevidence can best be described as her mere suspicion that her grievance caused the reassignment, which is not enough to establish pretext. *Tamba v. Publix Super Markets, Inc.*, 836 F. App'x 765, 772 (11th Cir. 2020). And what Barrow really does is ask the Court, through her reliance on her interpretation investigation's results, to second-guess non-retaliatory business judgments made by LWCS. But this Court should not act as a "super-personnel department" assessing the prudence of routine employment decisions, "no matter how medieval," "high-handed," or "mistaken." *Alvarez,* 610 F.3d at 1266 (quotation marks, citations, and alterations omitted). Employers may take an employment action for "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a [retaliatory] reason." *Nix,* 738 F.2d at 1187. And there is no evidence the reason for any challenged action was impermissible retaliatory animus.

## III. Barrow's Private Whistleblower's Act Claim Fails because LWCS is not a Private Employer

The Private Whistleblower's Act only applies to an "Employer" which is

any private individual, firm, partnership, institution, corporation, or association. § 448.101(2) & (3), *Fla. Stat.* Barrow makes a mishmash of misplaced arguments for why she believes the Circuit Court erred in finding LWCS is not an employer under the statute.

First, she states in a conclusory fashion that LWCS is a private corporation and employs ten or more persons and therefore falls under the statute's definition of employer. Initial Br., 45. Nevertheless, she ignores the Circuit Court's extensive discussion of the differences between public and private corporations. Barrow also does not cite any caselaw for the proposition that just because an entity is organized as a corporation, here a non-profit, it is "private" corporation. Such a conclusion is inconsistent with the Fifth District's decision heavily relied on by the Circuit Court, *Dennison v. Halifax Staffing, Inc.*, 336 So. 3d 345 (Fla. 5th DCA 2022). It is also inconsistent with Florida Supreme Court precedent holding that public entities may be organized and incorporated as a nonprofit. *O'Malley v. Fla. Ins. Guar. Assoc.*, 257 So. 2d 9, 11 (Fla. 1971) (explaining the differences between a public corporation and a private corporation and noting that numerous public entities like housing authorities, are organized as nonprofit corporations).

Next, Barrow argues the reference in the Articles of Incorporation that LWCS is incorporated for "religious" purposes precludes a finding that it is exclusively a public employer. *See* Initial Br., 45. Again, Barrow offers no support for this position, and her isolated reading of the Articles of Incorporation to suggest LWCS operates for religious reasons is not borne out by the record. [R. 451 (Providing LWCS "is organized exclusively for charitable, religious, educational, and scientific purposes, within the meaning of Section 501(c)(3).")]. The fact is there is no evidence LWCS is organized and operated for a "religious" purpose. The opposite is true. The bylaws state that LWCS is "nonsectarian." The state charter school statute, under which LWCS indisputably operates, also requires charter schools to be nonsectarian. §1002.33(9)(a) *Fla. Stat.*

Next Barrow says section 1002.33(12)(i) shows LWCS is a "private" employer. That provision says:

> A charter school shall organize as, or be operated by, a nonprofit organization. A charter school may be operated by a municipality or other public entity as provided for by law. As such, the charter school may be either a private or a public employer. As a public employer, a charter school may participate in the Florida Retirement System upon application and approval as a "covered group" under s. 121.021(34). If a charter school participates in the Florida Retirement System, the charter school employees shall be compulsory members of the Florida Retirement System.

> As either a private or a public employer, a charter school may contract for services with an individual or group of individuals who are organized as a partnership or a cooperative. Individuals or groups of individuals who contract their services to the charter school are not public employees.

Barrow points to no language in this provision suggesting LWCS is a private employer. Presumably, she refers to the clause stating "[i]ndividuals or groups of individuals who contract their services to a charter school are not public employees." But any reliance on this language for the purpose of attempting to demonstrate private employer status ignores the statute's greater context. The statute says that "either a private or a public employer, a charter school may contract for services with an individual or group of individuals who are organized as a partnership or a cooperative." This is a reference to section 1002.33(12)(d) which provides that teachers may "may choose to be part of a professional group that subcontracts with the charter school to operate the instructional program under the auspices of a partnership or cooperative that they collectively own" but "[u]nder this arrangement, the teachers would not be public employees." Nothing in these provisions suggest LWCS is a private employer, and Barrow does not explain why the Circuit Court erred in interpreting these provisions.

Next, Barrow makes much of the control a charter school has under

the charter school statute to make employment decisions, including the freedom to make those decisions without involvement of its sponsor, here the Polk County School District. Initial Br., 46. But this makes no difference. All charter schools have this freedom, and Barrow does not disagree that the statute permits public and private employer charter schools. The actual charters for LWCS, wherein it must be designated if they will be a "public" or a "private" employer, state that they are public employers. For these reasons, the extent of the involvement of the Polk County School District in personnel decisions is immaterial. LWCS is not a private employer, irrespective of the level of involvement of the Polk County School District in personnel decisions.

Finally, Barrow argues that LWCS' Board is comprised of private individuals not required to report to any public official and not removable by any public official or entity. Initial Br., 47. Barrow does not explain the significance of this assertion though and ignores the fact the charter school statute imposes monitoring and oversight responsibilities on charter school sponsors. A sponsor can terminate a charter in its entirety if student performance or fiscal management concerns present. §1002.33(8), *Fla. Stat.* The whole Charter School system is subject to potential termination by its

sponsor.

Curiously, Barrow fails to address the reasoning of the Circuit Court in finding LWCS is not a private employer. The *Dennison* case cited by the Circuit Court is on point. That case involved a staffing agency organized as a corporation under Florida law that served a special taxing district. *Dennison,* 336 So. 3d at 346-347. The Fifth District examined Florida Supreme Court precedent interpreting whether an entity was a private corporation explaining:

> For example, in [*O'Malley v. Florida Insurance Guaranty Ass'n,* 257 So. 2d 9 (Fla. 1971)], the Florida Supreme Court defined "private corporations" as those "which have no official duties or concern with the affairs of government, are voluntarily organized and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument of its stockholders." Similarly, in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District,* the court defined a "private corporation" as one that is formed for the benefit of its stockholders exclusively. The *Pioneer Boat* court further observed that when a corporation is invested with certain powers of a public nature to permit it to discharge duties to the public, it loses its strictly private character and becomes quasi-public.

*Id.* at 348-349 (internal citations omitted). With this precedent as guidance, the court held that the staffing district was not a private employer under the Private Whistleblower's Act, noting it was created by a public entity for a

public purpose, was controlled and funded by a public entity, governed by a board of gubernatorial appointees and that its profits did not inure for the benefit of any private person. *Id.* at 349-350.

As explained, the *Dennison* case cited *O'Malley*, which delineated the differences between public and private corporations. *O'Malley* further explained that the purpose of a public corporation "ordinarily is stipulated by the Legislature to fill a public need without private profit to any organizers or stockholders. Their function is to promote public welfare and often they implement governmental regulations within the state's police power. In a word, they are organized for the benefit of the public." 257 So.2d at 11. *See also* 8A Fla. Jur. 2d Business Relationships § 2 ("Corporations may be classified generally as public or private, the distinction having reference to the powers of the particular corporation and the purpose of its creation... Private corporations are created for private purposes, as distinguished from purely private purposes; in other words, a private corporation is one formed for the benefit of its members or shareholders exclusively").

Under this law, LWCS is not a "private" employer. All charter schools are public schools under state law. §1002.33(1), *Fla. Stat*. They can be designated as a public or private employer. §1002.33(12)(i), *Fla. Stat*. LWCS

operates using public funds. It has a public purpose, and its governance documents delineate the purpose as serving the public by providing educational services. The governing documents do not provide that the Charters Schools' purpose is to achieve benefits that would inure to stockholders.

The Charter School statute sets forth the relationship between sponsors and charter schools and imposes oversight responsibilities on sponsors as to charter schools. The Polk County School District is LWCS' sponsor and under Florida statute has a duty to monitor and review the charter school in its progress towards goals under the charter, monitor their expenditures and revenues, and ensure that its innovative and consistent with state education goals and report shortcomings if a charter school falls short of performance measures to the Department of Education. *See* §1002.33(5)(b), *Fla. Stat.*

Most consequentially, the Charter School statute shows LWCS is not a private employer. Section 1002.33(12)(i) provides that "[a]s a public employer, a charter school may participate in the Florida Retirement System…" Of course, LWCS participates in the Florida Retirement System and the statute only permits public employers to do so. The statute also

requires that the charter document between the charter school and the school district specify the charter school's governance structure including whether the charter school will be a public or private employer. Section 1002.33(7)(a)(15), *Fla. Stat*. Those documents denote that LWCS is a "public" employer.

Accordingly, the Circuit Court correctly found Barrow failed to show LWCS is an "employer" under the statute.

## IV. Barrow's Claims under the Public Whistleblower's Act Cannot be Remedied

Barrow does not dispute that the only relief she seeks is noneconomic compensatory damages for emotional distress. She says the Circuit Court erred in finding such damages are unavailable under the Public Whistleblower's Act and that it was bound by the Third District's decision in *Iglesias v. City of Hialeah*, 305 So. 3d 20 (Fla. 3d. DCA 2019) which held such damages are available. Initial Br., 47-48 (citing *Pardo v. State*, 596 So.2d 665 (1992)). She is wrong.

Barrow says LWCS did not point to any cases saying that noneconomic damages are unavailable under the Public Whistleblower's Act. Initial Br., 47. She ignores the Circuit Court's finding that two cases

conflicted with the point of law announced in *Iglesias*, such that it was free to find differently. [R. 40-42 (citing *Dascott v. Palm Beach Cty.*, 988 So. 2d 47 (Fla. 4th DCA 2008) and *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403, 405 (Fla. 2001))]. "The point of an appellate brief is to present arguments in support of the points on appeal" and without sufficient elucidation of the arguments, this Court cannot engage in meaningful appellate review. *Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 672 (Fla. 1st DCA 2007) (citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)). An appellate court "will not make arguments for an appellant." *See Williams v. Skylink Jets, Inc.*, 229 So. 3d 1275, 1278 (Fla. 4th DCA 2017). Barrow does not argue in her initial brief why these cases do not conflict with *Iglesias* such that the Circuit Court was free to disregard it therefore she has waived any assertion of error as to the Circuit Court's reliance on them. *Tillery*, 104 So. 3d at 1255–56 (argument not raised in initial brief waived).

Barrow does not make any other argument or address the reasoning in the Circuit Court's order, other than saying it was bound by *Iglesias* pursuant to *Pardo v. State.* Of course, *Iglesias* does not bind this Court. *See Virginia Ins. Reciprocal v. Walker*, 765 So. 2d 229, 233 (Fla. 1st DCA 2000), approved, 842 So. 2d 804 (Fla. 2003). And the Circuit Court was right to rely

on *Dascott* and *Irven* as the more correct interpretation of how Florida courts should read damages provisions in statutes, especially those in derogation of the common law because they waive sovereign immunity.[11] Indeed, the Florida Supreme Court explained in *Irven,* that the statute, even though it is remedial, should not be construed so liberally as to afford a litigant rights of action not within the intent of the lawmakers as reflected by statute's plain language. *See* 790 So. 2d at 406 (citing *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d at 697).

The Circuit Court was also right to find that the point of law in *Iglesias* was also inconsistent with the point of law announced by the Fourth District in *Dascott v. Palm Beach Cty.*, which, in finding that monetary damages were unavailable under the Government in the Sunshine Act, Chapter 286,

[11] The points of law elucidated in these cases was enough for the Circuit Court to find a conflict and apply a point of law other than the one in *Iglesias*, on the question of whether the statute permitted noneconomic compensatory damages. "When a district court of appeal issues an opinion deciding a *point of law*, that opinion is binding on trial courts within that district and throughout the state where no other district court has issued a contrary opinion." *Link v. State*, 273 So. 3d 1115, 1116 (Fla. 3rd DCA 2019) emphasis added; *see also Bunkley v. State,* 882 So. 2d 890, 905 (Fla. 2004)(Wells, J. Concurring)("Thus, a decision of a Florida district court of appeal is the law throughout all of Florida on a particular point of law until there is a different rule by another district court or until this Court renders a different rule.").

explained that remedies sought in an action are generally limited to those specified in the statute. 988 So. 2d at 48. Because the Sunshine Act does not expressly mention or imply by its terms that monetary damages are available as a remedy, the Fourth District found they were unavailable. *Id.* at 48-49. As the court explained, the statute must be construed as limited to the remedies specifically enumerated therein. *Id.* at 49. Just as the Sunshine Act does not mention or imply the availability of monetary damages, the Public Whistleblower's Act does not mention or imply the availability of noneconomic compensatory damages.

Barrow does not engage with the statute's text and does not address the Circuit Court's reasoning beyond saying *Iglesias* got the issue right in her view. But the Circuit Court was right to reject *Iglesias*. Barrow's entitlement to noneconomic compensatory damages under §112.3187 is a question of statutory interpretation. "Legislative intent is the polestar that guides a court's statutory construction analysis." *Bautista v. State,* 863 So. 2d 1180, 1185 (Fla. 2003). The starting point for interpreting a statutory provision and determining legislative intent is the statute's plain meaning. *See Joshua v. City of Gainesville,* 768 So. 2d 432, 435 (Fla. 2000). Courts cannot "construe an unambiguous statute in a way which would extend, modify, or limit, its

express terms or its reasonable and obvious implications" as it would encroach on the Legislature's powers. *Am. Bankers Life Assur. Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

Unlike other employment laws, the Public Whistleblower's Act does not contain any provision for noneconomic damages. *Contra* §760.11(5), *Fla. Stat.* (the Florida Civil Rights Act includes a provision which expressly provides "damages for mental anguish, loss of dignity, and any other intangible injuries"). Instead, damages available under the statute are limited to "[c]ompensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action." §112.3187(9)(d), *Fla. Stat.*

The canon of statutory construction *expressio unius est exclusio alterius*, or that "the mention of one thing implies the exclusion of another" compels a finding that noneconomic damages are unavailable under the statute. *See Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000). Here, the statute delineates available remedies. Noneconomic compensatory damages for pain and suffering are not included, and thus, one can presume the Legislature purposefully intended to exclude them.

Comparing the Private Whistleblower's Act's with the Public Whistleblower's Act further supports the notion that noneconomic damages

are unavailable under the statute. Unlike the Public Act, the Private Act expressly provides for compensatory damages. *See* §448.103(2)(e), *Fla. Stat*. (providing that the "court may order relief as follows … Any other compensatory damages allowable at law.").

*Iglesias v. City of Hialeah* simply erred on this issue. In *Iglesias*, the Third District held that because the statute's relief provisions starts with the phrase the relief "must include" the following remedies, the remedies provided in the statute are a floor and not a ceiling, and that they could include noneconomic compensatory damages despite the statute not providing for them. 305 So. 3d at 21-22. The court rejected the City's plain language argument that it would require judicial engrafting to include noneconomic damages in cases under the Public Act, stating it would require such engrafting, in its view, to read the statute to say "must only include" the damages listed. *Id.*

The *Iglesias* court ignored the canons of statutory construction explained herein. In fact, *Iglesias*'s interpretation of the term "must include" in the remedies provision is undercut by another canon of statutory construction. It is generally accepted that if a Legislature uses one term in one part of the statute, but not in another, this is evidence the Legislature

acted intentionally in not using that phrase again and intended a different meaning. *See Maddox v. State*, 923 So. 2d 442, 446-47 (Fla. 2006) (citations omitted). Here, the Legislature created a non-exhaustive list in another provision of the Public Act, using the phrase "including, but not limited to" in Section 112.3187(6). The Legislature omitted that same clause in the remedies provision. This shows the Legislature did not intend for the phrase "including, but not limited to," which unambiguously creates a non-exhaustive list, to have the same meaning as "must include," as used in the remedies provision. Had the legislature wished to create a non-exhaustive list as to damages, it certainly could have.

The better view is that the statute does not provide for non-economic compensatory damages. The Circuit Court was right in finding as much and that Barrow's Public Whistleblower's Act claim could not be remedied.

## CONCLUSION

The summary judgment order should be affirmed.

Respectfully submitted this 2nd day of December 2024.

By: /s/ Jeffrey D. Slanker

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December 2024 a true and correct copy of the foregoing was furnished by electronic mail or through the Florida Courts E-portal to counsel of record for the Plaintiff-Appellant at:

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## CERTIFICATE OF FONT AND FORMATTING COMPLIANCE AND OF WORD COUNT

I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.045(e), that Appellee's Answer Brief complies with the font and formatting requirements set forth in Florida Rule of Appellate Procedure 9.045 and that this initial brief complies with the word limit requirements in 9.210(a)(2)(B) because it contains 12,937 words exclusive of the portions of the brief that the rules permit to be excluded.

/s/ Jeffrey D. Slanker
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