

**STATE OF FLORIDA
DISTRICT COURT OF APPEAL
FIRST DISTRICT**

**CASE NO. 1D23-1440
L.T. NO. 2020-CA-000599**

MICHAEL NAHOOM,

Plaintiff/Appellant,

v.

FLORIDA LEAGUE OF CITIES, INCORPORATED,

Defendant/Appellee.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

Plaintiff/Appellant, Michael Nahoom, filed his Complaint below on March 27, 2020, stating a claim for retaliation in violation of the Florida Whistleblower Act in violation of § 448.102, Fla. Stat. [R. 7-12]. Defendant/Appellee, the Florida League of Cities, Inc., answered the complaint on April 27, 2020. [R. 13-18]. Nahoom filed an Amended Complaint on May 6, 2020, which serves as the operative complaint. [R. 22-30].

Appellee filed a Motion for Summary Judgment on January 25, 2023, along with evidence in support of its Motion. [R. 79-543]. Nahoom responded in opposition on April 5, 2023. [R.622-1268]. The trial court granted Appellee's Motion on May 12, 2023. [R. 1269-1285]. Nahoom then timely appealed on June 12, 2023. [R. 1297-1318].

STATEMENT OF THE FACTS

Nahoom began his employment with Appellee in 2004 as Assistant Comptroller, the position he held at the time of his wrongful termination on December 7, 2019. [R. 744, 774, 781]. As Assistant Comptroller, Nahoom was responsible for advising Appellee on the tax code and IRS regulations, including TFBs, and Nahoom relayed TFB values to the payroll accountant

in order that the proper amount for the indicated TFB could be taxed to employees. [R. 651-652, 744, 793-795, 822-823].

During his employment with Appellee, Nahoom's immediate supervisor was Comptroller Scott Hamilton. [R. 744, 784]. Hamilton told Nahoom on multiple occasions that if executive management ordered Nahoom or other employees in the accounting department to perform an action contrary to the tax code or IRS regulations, that the instructions had to be in writing before Nahoom or other employees could comply. [R. 744-45, 835-836].

During his employment with Appellee, as a supervisor, Nahoom was aware that Appellee utilized progressive discipline. [R. 745, 797]. Nahoom's only discipline during his more than ten years of employment was one verbal reprimand. [R. 745, 799-800].

In October 2019, the accounting department received an invoice for the cost of t-shirts and tote bags purchased by Appellee to pass out to employees who attended the annual retreat. [R. 745, 829-830]. Nahoom reported the invoice to Hamilton and advised him that Appellee was required to report the items as a TFB because the items' value was calculable based on the invoice. [R. 657-658, 745, 828-834, 973-974].

Nahoom then asked Ann Hudgins, Human Resources Officer, for a list of employees who received the items, along with t-shirt sizes in order to

calculate the exact amount of TFB for each employee. [R. 745, 830-834, 843-844]. Nahoom also instructed the Payroll Accountant, Rebecca Garrett, to obtain the list from Hudgins in order to report the specific amounts on each employee's W-2. [R. 745, 833-845, 1055-1056].

After Nahoom requested the list from Garrett, Hudgins informed Patti Graganella, Appellee's Chief Administrative Officer, of Nahoom's request. [R. 745, 829-835, 1055-1056, 1095]. Graganella instructed Hudgins to tell Nahoom to hold off on reporting the items as TFBs. [Id.]. Nahoom explained to Hudgins that if executive management was instructing him not to report the TFB value to the IRS that he needed a written instruction, per Hamilton's order. [R. 745, 835-837].

Nahoom was ill during the retreat and did not personally attend. [R. 745, 844-845, 1056-1067]. On October 30, 2019, Hudgins left Nahoom a tote and t-shirt in his office. [R. 745, 844-845, 1056-1067]. Immediately after receiving the items, Nahoom emailed Garrett that she should report the value of the t-shirt and tote on Nahoom's income as a TFB valued at \$20, but that she should not report the value of items for other employees until Nahoom received additional information. [R. 668-671, 746, 849-853]. Nahoom copied Hudgins on the email to Garrett. [R. 668-671, 746, 849-853]. In addition, Nahoom verbally reported to Hamilton his intention to declare the value of

the items as a TFB on his own personal income. [R. 746, 853-854]. After receiving Nahoom's email to Garrett asking to report the value of the items as a TFB, Hudgins forwarded the email to Graganella. [R. 668-671, 1034-1036]. Critically, at no time did anyone instruct Nahoom not to report the twenty-dollar amount as a TFB on his own income. [R. 746, 858, 863, 905].

On December 7, 2019, Executive Director Mike Sittig instructed Hamilton to summon Nahoom to a meeting in Graganella's office where Sittig presented Nahoom with a highlighted copy of Nahoom's payroll entry including the twenty-dollar TFB. [R. 654-655, 746, 863-864, 964-965, 1152-1153]. Sittig asked Nahoom if he determined the amount to report, and when Nahoom answered affirmatively, Sittig told Nahoom that decision cost him his job. [R. 746, 863-864]. Nahoom then told Sittig that the matter could be corrected, but Sittig stormed out of the office. [R. 746, 863-864].

Nahoom then attempted to call his wife, but Graganella told Nahoom to put his phone up and presented Nahoom with a severance letter. [R. 719-742, 746, 864-865]. When Nahoom requested to have an attorney review the materials, Graganella refused. [Id.].

At no time during the termination meeting was Nahoom informed that he was terminated for insubordination, nor was he ever informed that

Appellee believed he was insubordinate during his employment. [R. 746, 867].

Nahoom interpreted the IRS regulations defining “de minimis TFBs” to be items with values that were not easily calculable such as a cake shared among many employees or the personal use of a copier. [R. 746-747, 819, 1207-1208, 1220-1221]. However, Nahoom believed that items of clothing with values that were known were not de minimis, but rather were items which had to be reported as TFBs. [R. 680-681, 747, 807, 820, 1207-1208, 1220-1221]. Importantly, it was up to the accounting department, including Nahoom, to determine whether items were required to be reported as TFBs. [R. 747, 822-823, 995-996, 1220-1221].

Hudgins testified that she acted as the liaison between Nahoom and Graganella, verbally relaying Graganella’s instructions to hold off on reporting the t-shirts and totes as TFBs to Nahoom. [R. 1030, 1037, 1039, 1101-1102, 1106-1108]. Hudgins also testified that part of her job duty as Human Resources Officer was to supply the accounting department, and specifically Nahoom, with lists of items given to employees as awards or prizes in order for Nahoom to report the value of the items as TFBs. [R. 673-674, 1023-1027]. Graganella never spoke with Nahoom directly regarding the TFB issue. [R. 1099-1100].

After Hudgins relayed to Graganella Nahoom's belief that the t-shirts and totes were TFBs, Graganella contacted Mark Shorstein, an independent CPA who performed annual audits of Appellee, for Shorstein's opinion as to whether the items were TFBs. [R. 673-674, 1097, 1248-1251]. Despite the publication cited by Shorstein stating specifically that there is no dollar amount threshold under which an item's value would be considered de minimis, Shorstein informed Graganella that the value of the t-shirts and totes would be de minimis, and that Appellee was not required to report the values as TFBs. [R. 660-666, 1097-1098, 1250-1251]. At no time did Graganella supply Nahoom with a copy of Shorstein's opinion that the t-shirts and totes were de minimis and that Appellee did not have to report the items as TFBs. [R. 1097-1099]. At no time did Graganella instruct Nahoom that he was not to report the value of the items as a TFB for his own income. [R. 1098]. Graganella also did not bother to relay Shorstein's opinion to Hamilton, although she and Hudgins both testified that Hudgins told Nahoom to consult Hamilton about whether the items' value had to be reported as TFBs. [R. 1037-1039, 1099-1100].

Hamilton testified that he told Nahoom to take the issue of reporting the items as TFBs to Human Resources. [R. 973]. Hamilton also testified that it was up to the accounting department, and up to Nahoom, to determine

whether items were TFBs. [R. 995-996]. Hamilton further stated that Appellee had no policy specifically prohibiting Nahoom from requesting that a TFB be included on his own W-2. [R. 967-968, 975-976].

Former Senior Accountant Juliacarol Love also testified that it was the responsibility of the accounting department to report values of items as TFBs, but that the accountants, and in particular, Nahoom, regularly experienced trouble with reporting TFBs obtained by executive management. [R. 1220-1222]. Love also testified that employees could ensure that values of items were reported as TFBs by requesting the values added to their W-2s either through payroll or through the Human Resources department. [R. 1218]. Nahoom did not violate any of Appellee's policies by requesting the value of the shirt and tote be added to his income as a TFB. [R. 1229].

Prior to Nahoom's termination, at no time did Sittig discuss the issue of reporting TFBs with Nahoom, and neither did Sittig issue Nahoom any order that he was not to report the value of the items as a TFB on his own income. [R. 1154-1156]. In fact, Sittig testified that someone told him that he or she told Nahoom not to report the value of the items as a TFB, but Sittig could not recall who provided him with the information or who issued the instruction to Nahoom. [R. 1154-1159]. Sittig testified that he decided to

terminate Nahoom because Nahoom was insubordinate when he reported the value of the t-shirt and tote as a TFB against his own income. [R. 1149, 1154]. No one ever issued a written instruction regarding the issue of Nahoom reporting the t-shirts and totes as TFBs, and Graganella testified that she did not deem the matter important enough to bother documenting in writing. [R. 1101-1103, 1159-1160].

Perhaps most important, as a CPA, Nahoom's license was subject to revocation if he violated the tax code or IRS regulations. [R. 747, 863, 880, 901, 990].

Nahoom was treated differently than other employees who engaged in misconduct, but not whistleblowing, who were not disciplined for their actions. [R. 747]. Willie Thompson was arrested after selling illicit narcotics from a vehicle issued to him by Appellee. [R. 747, 870-871, 1185]. After Thompson was released from prison, Appellee rehired him. [Id.].

Sean Kucala had an intimate relationship with a direct report, contrary to Appellee's policy, but was never issued discipline for this misconduct. [R. 747, 870-873, 1188-89]. Sittig testified that he did not issue Kucala discipline because he had no personal knowledge of the relationship. [R. 1188-1189]. Sittig also testified that he had no personal knowledge of any instructions

issued to Nahoom not to report the TFB against Nahoom's income. [R. 1154-1156, 1159].

Chip Morrison was involved in a motor vehicle accident while operating a vehicle issued to him by Appellee under the influence, but was not issued discipline. [R. 747, 870-871, 873]. Nahoom paid the deductible on the vehicle and was informed that Appellee would not issue Morrison another vehicle because Appellee would not pay the insurance for Morrison. [R. 747, 873].

Sittig himself sent inappropriate text messages to a female employee, Tara McMillian, but when McMillian reported the inappropriate messages, she was told that Sittig's cell phone must have been hacked. [R. 747, 870-871, 874-876]. McMillian relayed the information to Nahoom herself. [Id.].

STANDARD OF REVIEW

The applicable standard of review for a trial court's order granting summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

SUMMARY OF ARGUMENT

The trial court erred by granting summary judgment on Nahoom's Florida Whistleblower Act ("FWA") retaliation claim, finding that Nahoom did not establish that he is a protected whistleblower because he did not establish that the failure by Appellee to include the actual value of the t-shirt

and tote bag is an actual violation of any law, rule or request, that he did not proffer evidence to support an inference that objecting/refusing to participate in the illegal conduct was the “but for” cause of his termination, and that he cannot show that Defendant’s proffered reason for the termination is pretext.

First, the Court erred by concluding that Appellee’s failure to report the gifts as taxable income does not violate the law and/or by requiring an actual violation of the law, as opposed to a good faith belief by Nahoom that the conduct violated a law, rule or request. Second, the Court erred by finding that Nahoom did not establish that his protected conduct was the “but for” cause of his termination.

The trial court finally erred by finding that Nahoom did not proffer sufficient evidence to establish that Appellee’s proffered explanation for terminating Nahoom for insubordination was pretext. The record evidence established sufficient evidence that the Appellee’s reason was false and that retaliation was the actual motive to survive summary judgment.

Thus, for the reasons set forth fully herein, this Court should reverse the trial court’s order granting summary judgment.

ARGUMENT

To succeed on a motion for summary judgment, a defendant carries the heavy burden of proving the non-existence of any genuine issues. Holl

v. Talcott, 191 So. 2d 40, 45 (Fla. 1966), cert. denied, 232 So. 2d 181 (Fla. 1969); Fla. R. Civ. P. 1.510. In Feizi v. Department of Management Services, the First District Court of Appeals stated:

The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law...

If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.

988 So. 2d 1192, 1193 (Fla. 1st DCA 2008) (quoting Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985)). Trial courts are not to determine factual issues during the summary judgment phase, as these are resolved by the jury. See Parker v. Bryce, 96 So. 2d 154, 155 (Fla. 1957). At the summary judgment phase, all questions of fact, even those raising the “slightest doubt,” and favorable inferences therefrom are resolved in favor of the non-moving party. Pep Boys v. New World Communications of Tampa, 711 So. 2d 1325, 1328 (Fla. 2d DCA 1998); see also Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965). Further, matters such as credibility must not be

resolved on a motion for summary judgment. Williams v. Board of Public Instruction of Flagler County, 61 So. 2d 493 (Fla. 1952).

Importantly, this matter was decided following the May 1, 2021, adoption of the “federal standard” found in Fed. R. Civ. P. 56. In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020); In re Amendments to Florida Rule of Civil Procedure 1.510, 46 Fla. L. Weekly S95 (Fla. Apr. 29, 2021). As the Florida Supreme Court ordered, effective May 1, 2021, the amended rule 1.510, Fla. R. Civ. P., adopts the summary judgment standard articulated by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (together, the “federal summary judgment standard” or “Celotex trilogy”). In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020). However, this change to the rule does not present a dramatic shift in jurisprudence that would justify a grant of summary judgment on May 1 that was otherwise due to be denied on April 30. The standards are largely identical.

Critically, as a purely textual matter, the operative language of Florida’s former summary judgment rule and the federal summary judgment rule are materially indistinguishable. Florida’s Rule 1.510(c) requires summary

judgment where the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Federal Rule of Civil Procedure 56(a), in turn, requires summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020). At its core, the adoption of the federal standard should present no real change to the applicability and availability of summary judgment in Florida.

In its December 2020 opinion, the Florida Supreme Court explained that since its decision in Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), Florida courts have required the moving party conclusively “to disprove the nonmovant’s theory of the case in order to eliminate any issue of fact.” In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 193 (Fla. 2020) (citations omitted). In continued that, by contrast, the Supreme Court has held that there is “no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent’s claim.” Celotex, 477 U.S. at 323. Rather, “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325. The Supreme Court has

held that summary judgment should be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Id. at 322. In other words, under the federal summary judgment standard, “the extent of the moving party’s burden varies depending on who bears the burden of persuasion at trial.” Salo v. Tyler, 417 P. 3d 581, 587 (Utah 2018). While this understanding may shift the focus of the summary judgment analysis in some cases, it in no way eases the moving party’s burden. A defendant must still show that there is an absence of material facts upon which a reasonable jury could find for the plaintiff.

The Florida Supreme Court continued that over the last half century, Florida courts have adopted an “expansive” understanding what constitutes a genuine or triable issue of material fact. In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 193 (Fla. 2020). However, when read in conjunction, the two standards are quite similar, even if courts have applied them differently since Holl. The Court explained that the Florida standard could be summarized as “the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the ‘slightest doubt’ is raised.” Id. (citations omitted). By contrast, the Supreme Court has

described the federal test as whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248. “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” Id. at 249-50 (citations omitted). A party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. More recently, the Supreme Court explained that “[w]hen 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.” In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192, 193 (Fla. 2020) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)) (emphasis added). Respectfully, despite what is perhaps generally accepted Florida wisdom that it is somehow “easier” to survive summary judgment in a Florida courtroom, the federal threshold of “no reasonable jury could believe it” is quite high. Moreover, where there are material facts in dispute, as is the case here (and as this Court previously determined), summary judgment must still be denied.

To that end, the Florida Supreme Court held that by adopting the federal standard, it reaffirmed the “bedrock principle that summary judgment

is **not** a substitute for the trial of disputed fact issues.” In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 194 (Fla. 2020) (emphasis added). As the Supreme Court emphasized, the summary judgment rule must be implemented “with due regard ... for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury.” Celotex. 477 U.S. at 327. Thus, as noted in his dissent, because of its preclusive effect, a grant of summary judgment warrants great caution. Indeed, “[c]aution and discernment should go hand in hand where the power to enter summary judgment or decree is exercised, for such a power wields a dangerous potential which could have the effect of trespass against fundamental and traditional processes for determining the rights of litigants.” In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 195 (Fla. 2020) (Labarga, J., dissenting) (citing Humphrys v. Jarrell, 104 So. 2d 404, 408 (Fla. 2d DCA 1958)). Vital to carrying out these fundamental and traditional processes is the jury which, in its role as finder of fact, hears evidence presented at trial and decides questions of fact raised by a litigant’s claim. Id.

Finally, a plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the

employer's discriminatory intent. Smith v. Lockheed-Martin Corporation, 644 F.3d 1321, 1328 (11th Cir. 2011). The evidence in this matter shows that there remain genuine disputes of material facts, such that a reasonable jury could find in James' favor. Those facts are material to James' claims and are in no way "blatantly contradicted by the record." Further, and critically unchanged by the adoption of the federal summary judgment standard, the Florida Legislature has specifically declared that discrimination laws "shall be liberally construed to further the general purposes stated in this section." Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 894 (Fla. 2002) (quoting § 760.01(3), Fla. Stat.). In Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), the Supreme Court explained:

The statute's stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964. Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature. Section 760.01(2) outlines the general purposes of the Act which include securing freedom from discrimination for all individuals and preserving the general welfare of all.

Id. at 435 (citations omitted).

Under either standard, the trial court should have denied summary judgment. The record below contained disputed issues of material fact, that

under either standard, must be resolved by the jury. Summary judgment was granted in error, and this Court should reverse the trial court's order.

I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON NAHOOM'S WHISTLEBLOWER RETALIATION CLAIM, FINDING THAT HE WAS UNABLE TO ESTABLISH A PRIMA FACIE CASE.

At the outset, it bears repeating that the intent of the Florida Legislature in enacting the Whistleblower Act was to prevent the government from retaliating against employees who report any abuse or neglect of duty by a public employee. See Ujcic v. City of Apopka, 581 So. 2d 218, 219 (Fla. 5th DCA 1991). As noted above, the Florida Supreme Court made it clear that the Act should be interpreted liberally, holding that it is a "remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle' ... the statute should be construed liberally in favor of granting access to the remedy." Irven v. Dep't of Health and Rehab. Serv., 790 So. 2d 403, 405-06 (Fla. 2001) (quoting Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992)). In overturning the lower court's narrow interpretation of section 112.3187, the Court in *Irven* stated:

[T]he Act provides that an employee may bring an action when the whistleblowing concerns '[a]ny . . . suspected violation of any ... law, rule, or regulation committed by an employee or agent of an agency,' or with respect to '[a]ny ...suspected act of ... misfeasance ... or gross neglect of duty committed by an employee or agent of an agency.' If the plain

meaning of this section leaves any doubt as to the inclusiveness of this right of action and the broad protections afforded, the Legislature also provided that it is ‘the intent of the Legislature to prevent agencies... from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office ... or any other abuse ... on the part of an agency, public officer, or employee.’ **The statute could not have been more broadly worded.**

Irven, 790 So. 2d at 406 (emphasis added) (internal citations omitted).

To prevail on a retaliatory discharge claim under § 448.102, Fla. Stat., Nahoom must establish that: (1) he engaged in a statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to the employee's protected activity. See Ortega v. Engineering Systems Technology, Inc., 30 So. 3d 525, 528 (3d DCA 2010); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004); Drago v. Jenne, 453 F.3d 1301, 1307 (11th Cir. 2006). See also Aery v. Wallace Lincoln-Mercury, LLC, 118 So. 3d 904, 912-913 (Fla. 4th DCA 2013) (internal citations omitted) (explaining that retaliation claims under the FWA are analyzed in the same manner as Title VII retaliation claims). Once Plaintiff establishes a *prima facie* case by proving the protected activity and the negative employment action are not completely unrelated, the burden then shifts to the employer to proffer a legitimate reason for the adverse employment action. See Ortega, 30 So. 2d at 529.

A. Nahoom engaged in statutorily protected activity.

The trial court incorrectly determined that the gifts were not required to be reported to the IRS and compounded that error when it incorrectly held that proof of an actual violation of the law was required, rather than a good faith belief that Defendant's conduct violated the law. Section 448.102, states that an employer may not take any retaliatory personnel action against an employee who "[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.

Nahoom reported to his supervisor and to Human Resources that the annual retreat gifts were subject to a TFB. When he himself received the items, he refused to ignore tax code and IRS regulations, and asked that the value amount of the items be reported on his income as a TFB. Below, Nahoom proffered evidence that the annual retreat gifts were subject to a TFB and that the failure to include those gifts on his annual compensation violated the law. This was sufficient to show a violation of the law under the FWA. Contrary to Appellee's argument below, which the trial court accepted the assertion that the value of the items was de minimis is not supported by statute. The IRS reporting requirements do not carve out an exception for de

minimis gifts, thus Nahoom did, in fact, report an actual violation as the IRS publication shows. See 26 C.F.R. § 1.132-6; See R. 681].

Nonetheless, even if the annual retreat gifts were determined not to violate the IRS code, the applicable standard is not whether there was an actual violation a law, rule or regulation. Instead, Nahoom need only have had a good faith, objectively reasonable belief that Appellee's conduct violated the law. "In meeting this standard [448.102 of the FWA], however, all that is required is that the 'employee have a good faith, objectively reasonable belief that h[is] activity is protected by the statute.'" Aery v. Wallace, 118 So. 3d 904, 916 (Fla. 4th DCA 2013) (citing Luna v. Walgreen Co., 575 F.Supp.2d 1326, 1343 (S.D. Fla. 2008)); see also Odom v. Citigroup, 62 F. Supp. 3d 1330, 1335 (N.D. Fla. 2014).

The decisions in Aery and Odom, as well as Hernandez v. Publix Super Markets, 11 F.Supp. 3d 1177, 1182-83 (S.D. Fla. 2014), clearly establish that Nahoom needed to show only a good faith belief that he was opposing an illegal activity. See also Thomas v. Tyco Int'l Management Co., LLC, 262 F.Supp.3d 1328 (S.D. Fla. 2017); Bonnafant v. Chico's FAS, Inc., 17 F.Supp.3d 1196 (M.D. Fla. 2014). Nahoom met this burden below, and the trial court erred by finding otherwise.

Specifically, Nahoom reported to Human Resources that Appellee was required to report the value of the items on each employee's W-2 as a TFB, but Hudgins asked Nahoom to wait before reporting the value of the items. She then communicated with Graganella about the issue. Graganella got a second opinion from Mark Shorstein, who determined the items were de minimis, and therefore, the value did not have to be reported. However, Shorstein's opinion was based on the dollar amount of the items, i.e. the items were worth twenty-five dollars or less. The IRS publication makes clear that there is no minimum dollar amount that determines whether items are de minimis. Instead, de minimis is defined as an item not readily calculable. The t-shirts and totes were calculable, based on the invoices Nahoom received.

Regardless, no one, not Hudgins, Graganella, Hamilton, or Shorstein, bothered to inform Nahoom of any differing opinion. When Nahoom received the items, he did not want to risk his CPA license, and therefore, he asked that the value of the items be reported on his W-2 as a TFB. However, he continued to wait for additional information from Appellee as to how to report the items for the other employees, although he had originally stated that the employees needed to include the TFB in their income.

Below, Appellee and the trial court relied upon Kearns v. Farmer Acquisition, 157 So. 3d 458 (Fla. 2d DCA 2015), in which the Second District Court of Appeals noted its disagreement with the Fourth District decision in Aery, opining that “[b]ased on a plain reading of the FWA and the reasoning in White v. Purdue Farmer, 369 F.Supp.2d 1335 (M.D. Fla. 2005), we agree with the Employer that under section 448.102(3) Kearns must prove that he objected to an actual violation of law.” Id., 157 So. 3d at 465. But Kearns makes reference to Aery only in dicta, and it provides no reasonable explanation for inferring legislative intent requires an actual violation. See Ritenour v. AmeriGas Propane, Inc., 2019 WL 2008675, at *7 (S.D. Fla. Mar. 15, 2019), reconsideration denied, 18-CV-80574, 2019 WL 5225247 (S.D. Fla. May 15, 2019); Rivera v. Spirit Airlines, Inc., 2020 WL 491454, at *2 (S.D. Fla. Jan. 30, 2020).

The Second District Court of Appeals made clear that its reversal of the trial court was based on the fact that “Kearns presented a prima facie case of an actual violation to withstand the motion for directed verdict,” and unequivocally recognized that its opinion on the actual versus good faith violation issue was not necessary to such reversal. Kearns, 157 So. 3d at 465. As such, its disagreement with Aery is dicta. See, e.g., Tyler v. Cain, 533 U.S. 656, 668 (2001) (noting that a decision not determinative of the

case before it is dictum); Hitchcock v. DOC, 745 F.3d 476, 490 fn. 6 (11th Cir. 2014) (“judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced”); Edwards v. Prime, 602 F.3d 1276, 1298 (11th Cir. 2010).

In considering whether § 448.102(3), Fla. Stat., protects from retaliation an employee’s errant objection to a violation based on his or her good faith objectively reasonable belief, Nahoom points out that neither Appellee in its papers, the Kearns court, nor any other court requiring an actual violation has articulated a sensible reason for the legislature to have determined that whistleblower objections to actual violations should be protected from retaliation, but that whistleblower objections to violations that the whistleblower reasonably believed in good faith were actual violations should not to be protected. In fact, even those who would vote against whistleblower protection in the first instance—believing that employees should object to their employers’ actions at their peril—are hard pressed to understand the suggested distinction between actual violations and violations reasonably believed in good faith.

Clearly, establishing such a line would substantially chill whistleblower reporting. Most employees are not lawyers trained to know or at least advocate for a finding that a particular practice is a violation of law, rule or

regulation. Employees would be forced to wager their careers on whether or not a court would subsequently agree that conduct which the employee reasonably and in good faith believed violated a law, rule or regulation did actually violate a law, rule or regulation. The trial court's interpretation of the statute would impose an undue and unnecessarily harsh burden on an employee simply trying to act in reasonable, good faith.

The balance of the equities and the purpose of the FWA does not support such a convoluted outcome. The risk of an employee ultimately being wrong that the reported conduct violates the law, rules, or a regulation is substantially less onerous to the purpose of the FWA than the risk that an employee sees workplace violations (e.g., a safety violation) that the employee reasonable believes in good faith are illegal but does not report those alleged violations because he does not have prior adjudication that the specific conduct at issue is actually illegal. No doubt, the purpose of the FWA is to encourage whistleblowing when an employee reasonably believes the employer's conduct violates a rule, law or regulation, not to be a "gotcha" in the event an employee is ultimately wrong about what may be a very dense, difficult to understand law, rule or regulation. This Court should reject any effort to add permutations to a statute that do not exist for the sole purpose of disincentivizing the very activity the FWA seeks to encourage.

Further supporting that Aery is the law, the Fourth District Court of Appeal reaffirmed Aery in Barone v. Palm Beach Hotel, 262 So. 3d 767 (Fla. 4th DCA 2018). The Fourth District again addressed the issue as follows:

Under our court’s interpretation of the Whistleblower Act, a plaintiff objecting to the employer’s conduct need only have a “good faith, objectively reasonable belief” that the employer’s activity was illegal... By contrast, the Second District has disagreed with Aery in dicta and interpreted the Whistleblower Act as requiring a plaintiff to prove “that he objected to an *actual* violation of law or that he refused to participate in activity that would have been in *actual* violation of law.” Kearns... In any event, the Association has not asked us to reconsider Aery in this appeal, and it remains the law in this district.

Id. at 769.

The Honorable Mark Walker, United States District Judge, Northern District of Florida, said it best on this topic:

The parties dispute whether the FWA requires Plaintiff to prove she reported an actual violation of law, or only that she had a good-faith belief she was reporting an actual violation of law irrespective of whether Defendant’s conduct was actually illegal. The Supreme Court of Florida has instructed courts to construe the FWA broadly and to favor access to its remedy. Irven v. Dep’t of Health and Rehab. Servs., 790 So. 2d 403, 406 (Fla. 2001); Martin Cty. v. City of Edenfield, 609 So. 2d 27, 29 (Fla. 1992). The Supreme Court of Florida has not, however, held either standard is the correct one to apply in FWA cases. Florida’s Fourth District Court of Appeal has held the “good faith” standard is correct. Aery v. Wallace Lincoln-Mercury, LLC, 118 So. 3d 904, 916

(Fla. 4th DCA 2013). Florida’s Second District Court of Appeal has disagreed in a dictum, Kearns v. Farmer Acquisition Co., 157 So. 3d 458, 465 (Fla. 2d DCA 2015), but this neither disturbs nor conflicts with the Fourth District’s decision. This Court’s duty is thus to follow Aery. See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1021 (11th Cir. 2014) (explaining federal courts must follow the decisions of a state’s intermediate appellate courts where the state supreme court has not ruled on the correct interpretation of the law).

O’Steen v. Fla. Sports Foundation, Inc., Case No. 4:19cv106-MW-MAF, Docket Number 48 (N.D. Fla., June 12, 2020).¹

Following that same sound logic, several other Florida district courts within the Eleventh Circuit have adopted the good faith, objectively reasonable belief standard announced in Aery. See, e.g., Valdez v. Colony Shiny Staff, LLC, 2021 WL 244061, at *11 (S. D. Fla. Jan. 25, 2021); Buzzell v. Florida Keys Ambulance Service, Inc., 2020 WL 2071956, at *4, n.2 (S.D. Fla. Apr. 29, 2020); Nardella v. Atlantic TNG, LLC, 2020 WL 2331179, at *11 (M.D. Fla. May 11, 2020); Ritenour v. AmeriGas Propane, Inc., 2019

¹ Nahoom acknowledges the Northern District’s contrary, but prior, discussion in Obukwelu v. Tallahassee Memorial Healthcare, Inc., 2015 WL 11110552, *3 (N.D. Fla. June 25, 2015), in which the Court held that a “protected expression” under § 448.102(3) required objection to an actual violation of the law. However, Aery has not been reconsidered, Kearns remains dicta (although cited as “law” by other courts), and the court’s 2020 analysis in O’Steen remains correct. It is notable that the Honorable Mark Walker was the Judge in the Obukwelu case and he reversed himself in O’Steen.

WL 2008675, at *6–7 (S.D. Fla. Mar. 15, 2019); Tillman v. Advanced Public Safety, Inc., 2016 WL 11501680, at *4 (S.D. Fla. Nov. 14, 2016); Thomas, 262 F.Supp. 3d at 1340 (S.D. Fla. 2017); Villaman v. United Parcel Serv., Inc., 2019 WL 922704, at *6, n.2 (S.D. Fla. Feb. 8, 2019); Canalejo v. ADG, 2015 WL 4992000 (M.D.Fla. 2000); Burns v. Medtronic, 2016 WL 3769369 (M.D.Fla. 2016).

Florida courts have consistently interpreted statutes on the basis that legislatures are presumed to have acted reasonably. See, e.g., City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950) (“courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred”); Opperman v. Nationwide Mutual, 515 So. 2d 263, 266 (Fla. 5th DCA 1987) (“It is true that literal interpretation of the language of the statute need not be adopted when to do so would achieve a result that is unreasonable”); (“the courts are not compelled to assume that the legislature acted unreasonably”); Kerlin’s Lessee v. Bull, 1 U.S. 175, 178 (1786) (“[w]here the intention of the Legislature, or the Law is doubtful, and not clear, the Judges ought to interpret the law to be, what is most consonant to equity and least inconvenient”).

Adding even more support to the holding in Aery, Courts in other states interpreting similarly worded statutes have likewise interpreted whistleblower laws to only require a good faith belief that a violation occurred. See e.g., Fox v. Bowling Green, 668 N.E.2d 898, 901 (Ohio 1996) (“To require that an actual violation must occur for a whistleblower to gain protection leads to nonsensical results which are unjust, unreasonable, and contrary to the spirit of the statute and public policy”); Sullivan v. Massachusetts Mutual, 802 F.Supp. 716, 725 (D.Conn. 1992) (“a standard of reasonable belief encourages a whistleblower to come forward, rather than remain silent out of fear that he might be wrong”); Allum v. Valley Bank, 970 P.2d 1062, 1068 (Nev. 1998) (“A claim for tortious discharge should be available to an employee who was terminated for refusing to engage in conduct that he, in good faith, reasonably believed to be illegal”). This court should likewise conclude that the only interpretation of the statute passed by the Florida Legislature that would suggest reasonableness rather than absurdity is the one made by the Fourth District in Aery.

However, regardless of the debate between Aery and Kearns, Nahoom did report an actual violation in which he refused to participate. Nahoom reported to Hamilton and Hudgins, among others, that the items’ value had to be reported as a TFB. Then, when Nahoom received the items himself, he

did report the value as a TFB against his own income. Thereafter, he was terminated for reporting that income, as he was required to do by 26 C.F.R. § 1.132-6, which specifically states that “the value of any fringe benefit that would not be unreasonable or administratively impracticable to account for is includible in the employee's gross income.” 26 C.F.R. §1.132-6(c).

Here, Nahoom had a good faith belief that Appellee was in violation of laws, rules, and regulations related to reporting taxable income, and Nahoom refused to participate in that violation, reporting the value as a TFB on his own income. No one provided Nahoom with an alternate opinion to his interpretation of the regulation defining de minimis. Instead, Nahoom was fired specifically for reporting the items’ value as TFB and including the TFB as income to him.

As such, Nahoom reported actual violations and/or had a good faith belief that Appellee was violating federal laws and/or federal and state regulations. He thus engaged in protected activity when he reported same and when he refused to participate in what he believed to be an actual violation of the tax code and IRS regulations. The trial court thus erred when it determined that Nahoom failed to create a genuine issue of material fact in support of his claim that he was a protected whistleblower under the FWA.

This Court should reverse the trial court's order granting summary judgment and remand for further proceedings.

B. Nahoom proffered sufficient evidence of a causal Connection.

The trial court then found that Nahoom failed to establish that whistleblower activity was the “but for” cause of his termination. However, the standard at summary judgment is a causal connection between the protected activity and the adverse action, of which causal connection Nahoom proffered more than sufficient evidence in this case to survive summary judgment, regardless of the applicability of the “but for” standard at summary judgment).

To establish a causal connection, a plaintiff must show that the protected activity and the adverse action “are not completely unrelated.” Wideman v. Wal-Mart Stores, Inc., 141 F. 3d 1453, 1457 (11th Cir. 1998). In determining whether a plaintiff has produced *prima facie* evidence of causation, the courts have generally focused on two indicia: timing and evidence of ongoing antagonism. See id. As the Third Circuit explained:

It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's *prima facie* case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When

there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997). The causal connection is not “the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action” that would “rise to the level of direct evidence of discrimination.” Simmons v. Camden County Bd. Of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985). Rather, the Eleventh Circuit “construe[s] the causal link element broadly so that ‘a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.’” Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1278 (11th Cir. 2008) (quoting Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998)). And, contrary to Defendant’s assertions, where the protected speech and adverse employment action are close in time, causation may be inferred. See Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (“burden of causation can be met by showing close temporal proximity”).

The bottom line is that the plaintiff must demonstrate a connection between his protected activity and adverse employment action that could “reasonably support [a] jury’s determination.” Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). But there is no bright line regarding

timing and inference. In Olmsted, the plaintiff initially complained of race discrimination to his human resource department in January 1993 and the first retaliatory action, a disciplinary action, was issued in June, 1993 – a time span of four to five months. See Olmsted, 141 F.3d at 1459. But other decisions of the Eleventh Circuit seem to point to a time frame of less than three months, without other intervening factors, as the outlier amount of time in which to demonstrate a nexus between protected conduct and adverse employment action. See e.g., Wideman v. Wal-Mart Stores, Inc., 141 F. 3d 1453, 1457 (11th Cir. 1998) (one month sufficient to establish nexus); Embry v. Callahan Eye Found. Hosp., 147 Fed.Appx. 819, 831 (11th Cir. 2005) (two months between filing charge of discrimination and suspension sufficient to satisfy nexus).

This Court must look at the totality of the collective and continuous adverse employment actions, or the “whole scenario” as opposed to isolate events in a vacuum. See Wideman, 141 F.3d at 1455-56; Hare v. Potter, 220 Fed.Appx. 120, 132 (3d Cir. 2007); Brown v. Walt Disney World Co., 805 F.Supp 1554, 1560 (M.D Fla. 1992). Those facts establish causation. Upon receiving an invoice for t-shirts and totes, Nahoom reported to his immediate supervisor, Hamilton, that the items were subject to taxes as TFBs because the amount of the items were easily calculable. Nahoom then requested a

list of employees who received the items from HR Officer Hudgins. Hudgins relayed the information to Graganella who did not speak with Nahoom or with Hamilton about the requirement to tax the value of the items, which was the job of the accounting department and specifically, part of Nahoom's job.

Graganella told Hudgins to tell Nahoom to wait before taxing the items, and Nahoom complied. Meanwhile, Graganella sought a second opinion from Mark Shorstein regarding whether the items were subject to taxation as TFBs. Graganella received Shorstein's opinion but never relayed the information to Nahoom or even to Hamilton.

On October 30, 2019, Hudgins gave Nahoom a t-shirt and a tote, and based on his understanding of IRS regulations, and per his job duties, Nahoom relayed the value of the items to payroll and asked the payroll accountant, Rebecca Garrett, to include the value as a TFB against his own income, as he did for any item which was subject to taxation as a TFB for any employee. Thereafter, on December 7, 2019, Sittig terminated Nahoom for reporting the value of the items as a TFB, without pursuing Appellee's progressive disciplinary process.

This time frame is well within the timing of this Circuit to infer a causal connection between Nahoom's protected speech and the adverse action. See e.g., Wideman, 141 F. 3d at 1457 (11th Cir. 1998) (one month sufficient

to establish nexus); Embry v. Callahan Eye Found. Hosp., 147 Fed.Appx. 819, 831 (11th Cir. 2005) (two months between filing charge of discrimination and suspension sufficient to satisfy nexus). Indeed, all the retaliatory acts are within the accepted time frames from Plaintiff's protected speech. The timing of the retaliatory action demonstrates a causal connection. Viewing these facts as a "big picture," it becomes clear that Nahoom was targeted from the time he first met with upper-level management, going over immediate supervisors' heads, until he was terminated – he suffered ongoing retaliation. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807 (11th Cir. 2010) (en banc) ("workplace conduct cannot be viewed in isolation, but rather is to be viewed cumulatively, and in its social context.").

There is no question that Appellee terminated Nahoom for his protected activity. Nahoom reported the value of the t-shirt and tote on his own income as a TFB, refusing to ignore his responsibilities as a CPA and refusing to ignore the tax code and IRS regulations, as he was instructed to do. When Sittig learned that Nahoom reported the items against his own income, Sittig told Nahoom the action cost him his job, and refused to discuss the matter with Nahoom further, walking out of the room. Nahoom was fired for following the law and for refusing to participate in Appellee's attempt to

violate the tax code and IRS regulations. Sittig admitted that Nahoom was being fired for the very thing that he blew the whistle on.

To the extent Appellee argued and the trial court accepted that Nahoom must show the ultimate, “but for” proof required to obtain a jury verdict (cause in fact) announced in University of Texas Southwestern Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013), that standard is not the standard on summary judgment. Nassar concerned the appeal of a jury verdict and the inquiry focused on the level of proof required to “prove retaliation,” or the “cause in fact” – not the burden of persuasion necessary to defeat summary judgment. Nassar at 2524-25, 2534. Nassar holds that “but-for causation...requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” Id. at 2533. “The term ‘because of’ appears frequently in antidiscrimination laws [and it] typically imports, at a minimum, the traditional standard of but-for causation.” EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2032 (2015). Simply put, “but for” means that the protected activity “was the factor that made a difference.” Leal v. McHugh, 731 F.3d 405, 415 (5th Cir. 2013). Justice Scalia explained that a variety of factors may be at play in a given scenario, but if the other factors standing alone would not have produced the same outcome, then it was “but for” the final or

determinative act – “the straw that broke the camel’s back.” Burrage v. United States, 134 S.Ct. 881, 888 (2014). Here, but for Nahoom’s refusal to participate in Appellee’s wrongdoing in refusing to report TFBs would he have been fired.

When looking at the facts as a whole, and viewing them in light most favorable to Nahoom, the trial court erred when it determined that Nahoom failed to create a genuine issue of material fact regarding causation. This Court should thus reverse the trial court’s order granting summary judgment.

II. THE TRIAL COURT ERRED BY FINDING THAT NAHOOM DID NOT PROFFER SUFFICIENT EVIDENCE TO ESTABLISH APPELLEE’S PRETEXTUAL MOTIVES.

Finally, the trial court determined that Nahoom failed to proffer evidence of pretext sufficient to overcome Appellee’s allegedly legitimate reason for his termination, subordination. To show pretext, a plaintiff must “demonstrate that the proffered reason was not the true reason for the employment decision... [Plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). In evaluating a summary judgment motion, the district court must evaluate whether the plaintiff has demonstrated “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." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir.1997).

"[A] plaintiff withstands summary adjudication by producing sufficient evidence to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable." Howard v. BP Oil Co., 32 F.3d 520, 526 (11th Cir.1994) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)); see also, Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004) (stating plaintiff must produce "sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer, which permits, but does not compel, the trier of fact to find illegal discrimination.").

Sittig claimed that he fired Nahoom because he was insubordinate and that "someone" told Nahoom not to report the value of the items as TFBs for any employee. However, Sittig had no idea who issued Nahoom this alleged order, and neither did Sittig know what order was even allegedly issued to Nahoom.

Graganella testified that she never spoke directly with Nahoom or with Hamilton about whether the items needed to be declared as TFBs. She used

Hudgins as a go-between with Nahoom, and Hudgins asked Nahoom to wait before reporting the value of the items as TFBs for all employees. Again, Graganella has no idea what Hudgins told Nahoom.

Hudgins did ask Nahoom to wait before reporting the value of the items as TFBs for all employees, and Plaintiff complied for every other employee besides himself. He had to wait because Hudgins did not provide the list of employees he needed to finalize the calculations.

Hamilton testified that he told Nahoom to talk to Human Resources about whether the items were subject to the TFB requirement, and Nahoom complied, speaking with Hudgins.

No one followed up with Nahoom about who received the items; no one followed up with him about Shorstein's opinion that the items were de minimis and therefore, not subject to taxation as TFBs. When Nahoom received his items, he could calculate the value and asked that the value be included in his own personal income as a TFB, per his job duties and per his understanding of the TFB regulation.

No one prohibited Nahoom from reporting TFBs on his own income. No policy said that he could not report taxable items on his own income; it was his job as Assistant Comptroller to relay TFBs to the payroll accountant,

which is what he did, because he did not want to participate in Appellee's violation of the applicable tax code.

When Nahoom emailed the payroll accountant about the TFB, no one stopped the process, and no one spoke to Nahoom about the issue at all until December 7, 2019, when Sittig fired him for doing his duty as Assistant Comptroller and as a licensed CPA.

The "decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision," E.E.O.C. v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 835 (6th Cir. 1997), and the fact that the action is "harsh or unreasonable" is certainly probative evidence that the asserted reason may not be the actual reason animating the employer's decision. See e.g. Burdine, 450 U.S. at 259 (1981) ("[T]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination."); Wichmann v. Bd. of Trs. of S. Ill. Univ., 180 F.3d 791, 805 (7th Cir. 1999) ("[A] defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext."). By granting even incredible explanations

presumptive validity, the “business judgment rule” short-circuits this well-settled means of proving discrimination.

Here, Sittig claimed Nahoom was insubordinate, but he has no idea who said what to Nahoom about the TFB issue. Nahoom maintains that no one told him he could not do his job and report the value of the items on his own income as a TFB. This fact remains in dispute and must be resolved by the jury.

Here, Appellee’s “legitimate” reasons for terminating Nahoom are belied by the facts. Appellee claims that Nahoom was terminated because he was insubordinate, but Nahoom has provided testimony that he was never told not to report the value of the items against his own income as TFBs, and no one followed up with Nahoom to tell him that there was an opinion contradicting Nahoom’s understanding of the regulation that the value of the items was de minimis and were not subject to taxation as TFBs. Based on Nahoom’s version of the events, which are not “blatantly” contradicted by the record as not one single witness was able to identify what Nahoom was allegedly told and when, he was not insubordinate and was instead terminated for his protected disclosures.

In reality, at the time of Nahoom’s termination, he was not told that his termination was for insubordination. No one mentioned the word

“insubordination” during the termination meeting. Sittig made it very clear that he was terminating Nahoom specifically for reporting the TFBs on his W-2. Only after Nahoom filed suit did Appellee attempt to alter its reason for firing Nahoom in retaliation for his protected activity and fabricate a reason, insubordination, for his termination. This is an after the fact justification that is just not believable or true.

These inconsistencies smack of pretext. A change of position, in and of itself, constitutes evidence of pretext sufficient to avoid summary judgment. See Norris v. City and County of San Francisco, 900 F.2d 1326, 1331 (9th Cir. 1990) (“ . . . the fact that a defendant’s rationale has shifted over time would seem likely to generate serious adverse inferences as to the pretextual nature of its explanations”). See also Edwards v. U.S. Postal Service, 909 F.2d 320, 324 (8th Cir. 1990) (“In light of this record, filled with changing and inconsistent explanations, we can find no legitimate non-discriminatory basis for the challenged action that is not mere pretension”). When the parties quibble over whether the defendant has subsequently offered an additional reason for the termination, summary judgment is inappropriate. See Stallworth v. E-Z Serve Convenience Stores, 2001 WL 125304, *4 (M.D. Ala., Feb. 12, 2021). Employment law is not a game of “Gotcha!” See Id. (denying summary judgment where defendant did not

produce paperwork the plaintiff allegedly failed to complete and offered a complimentary reason to its previously-asserted reasons for firing plaintiff).

A reasonable jury could certainly find that the made-up reason for Nahoom's termination was crafted as pretext for Appellee's retaliatory conduct. See Tidwell v. Carter Products, 135 F.3d 1422, 1428 (11th Cir. 1998) (observing that identification of inconsistencies can be evidence of pretext); see also EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (where there were discrepancies in the defendant's explanations for the plaintiff's layoff, a reasonable juror could infer that the explanations were pretextual, *post hoc*, rationalizations to combat evidence of discrimination); Metzler v. Fed. Home Loan Bank of Topeka, 464 F. 3d 1164, 1177 (10th Cir. 2006) (citing cases for the proposition that "suspicious timing... of documentation - after the fact and in anticipation of litigation - reasonably gave rise to an inference of pretext").

Alternatively, although unnecessary given the disputed evidence in this retaliation matter, Nahoom's fellow employees are "comparable," in that they were all subject to the same policies and discipline but were not terminated for misconduct. It is well established that a plaintiff generally may show pretext by presenting evidence that a similarly situated employee outside the protected class was treated more favorably. See Berg v. Fla. Dep't of Labor

and Employment Sec., Div. of Vocational Rehab., 163 F. 3d 1251, 1255 (11th Cir. 1998) (inconsistent application of policies may be evidence of discrimination). The trier of fact is permitted to consider the evidence establishing a plaintiff's *prima facie* case and inferences drawn therefrom on the issue of whether the defendant's proffered reason is pretextual. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000).

Appellee's agents allowed other employees to engage in more serious misconduct than reporting \$20.00 as a TFB, including Willie Thompson selling illicit narcotics out of a company-issued vehicle. Thompson was rehired by Appellee after he was released from prison for his illegal activities. Sean Kucala had an intimate relationship with a subordinate against Appellee's policies, but he was never disciplined, allegedly because Sittig claimed he only learned about the relationship through hearsay. Chip Morrison wrecked Appellee's vehicle while under the influence of drugs or alcohol, but he was not disciplined for the misconduct. Sittig, himself, sent inappropriate emails to a female employee, but according to the female, Appellee claimed that Sittig's cell phone must have been hacked. Meanwhile, Sittig fired Nahoom because "someone" told him that "someone" told Nahoom not to report the items as TFBs for any employee, including Nahoom. That inconsistent application of policies serves as additional

evidence of pretext for retaliation. See Berg, 163 F. 3d at 1255 (11th Cir. 1998); see also, Robertson v. Jefferson County Rehabilitation and Health Center, 201 F. Supp.2d 1172, 1178 (N.D. Ala. 2002) (where employees were subject to the same disciplinary rules and the defendant repeatedly disciplined Plaintiff but not other employees for conduct that was very similar to or worse than that committed by the plaintiff, genuine issue of fact existed precluding summary judgment).

Nahoom performed his job duties and obligations as a CPA by reporting items as TFBs against his own income, although Appellee did not want to alert the IRS to the value of the items, possibly requiring additional taxation to other employees' income, including that of the executive staff that determined the value of the items would not be reported. Thereafter, Appellee fired Nahoom for reporting the \$20.00 on his own income in compliance with the tax code and regulations.

Genuine issues of fact remain as to whether Appellee's articulated non-retaliatory reason is actually an after-the-fact fabrication, summary judgment must be reversed.

CONCLUSION

The trial court weighed the evidence, ignored evidence, and viewed the evidence it did accept in a light most favorable to Appellee. As further set forth herein, the trial court erred by granting summary judgment on Nahoom's claim. This Court should reverse the trial court's order granting summary judgment.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic filing to all parties of record on this 20th day of September 2022.

/s/ Ashley N. Richardson
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