IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 19-11872-FF

RODDIE MELVIN,

Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, CASE NO: 1:17-CV-00789-CC

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL SUPPORTING APPELLEE FAVORING AFFIRMANCE

Respectfully submitted by,

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, pursuant to Fed. R. App. R. 26.1 and 11th Cir. R. 26.1-1, 26.1-2 and 26.13, hereby files its Certificate of Interested Persons and Corporate Disclosure Statement.

The following interested persons have been added since the Certificate of Interested Persons in the last brief filed, the Answer Brief of Federal Express Corporation.

1. International Association of Defense Counsel ("IADC") (Amicus Curiae)
2. Clarke Silverglate, P.A. (Counsel for Amicus Curiae IADC)
3. Spencer H. Silverglate (Counsel for Amicus Curiae IADC)
4. Shannon P. McKenna (Counsel for Amicus Curiae IADC)

The International Association of Defense Counsel has no parent corporation and has issued no stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys, including in-house counsel, from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. The IADC regularly advocates for the interests of its members in federal and state courts throughout the country.

The IADC maintains an abiding interest in the fair and efficient administration of employment discrimination actions. The IADC's Employment Law Committee represents corporate employers. The committee regularly publishes newsletters and journal articles and presents education seminars both internally and to the legal community at large.

[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties received notice and have provided consent to the IADC's filing of this amicus curiae brief.

The IADC respectfully seeks leave to file the accompanying amicus curiae brief, in support of Appellee Federal Express Corporation, to demonstrate that the district court granted summary judgment in accordance with United States Supreme Court and this Court's long-established and well-settled precedent.

STATEMENT OF THE ISSUES

I. THERE IS NO EMPLOYMENT DISCRIMINATION EXCEPTION TO SUMMARY JUDGMENT.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE MELVIN FAILED TO ADDUCE SUFFICIENT EVIDENCE FROM WHICH A JURY COULD REASONABLY INFER INTENTIONAL AGE DISCRIMINATION WAS THE BUT-FOR CAUSE OF HIS TERMINATION FROM FEDEX.

SUMMARY OF ARGUMENT[2]

This is a discrimination and retaliation case under the Age Discrimination in Employment Act of 1967 ("ADEA"). *See* 29 U.S.C. § 621 *et seq.* (Melvin's discrimination claim is the primary focus of this brief.[3])

Over the years, members of the plaintiff's workplace bar and others have endeavored to eliminate summary judgment in employment discrimination cases. These arguments range from the broad argument that summary judgment violates a plaintiff's Seventh Amendment right to a jury trial to the narrower argument that all, or at least a subset of, employment discrimination cases should be excepted from summary judgment because they involve issues of motive and intent. No matter the scope of the argument or the specific language used, this Court has consistently and repeatedly rejected all such arguments.

NELA Amici argue that workers are ***always*** entitled to have a jury trial (rather than a judge on summary judgment) determine whether an employer honestly believed the employment decision was lawful and whether a decision-maker's discriminatory remarks evidence discriminatory animus even if the

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[2] In this Amicus Brief, Appellant Roddie Melvin will be referred to as "Melvin;" Appellee Federal Express Corporation will be referred to as "FedEx;" and Amici Curiae in support of Melvin will be referred to as "NELA Amici." Unless otherwise noted, all emphasis is added.

[3] Because NELA Amici limited their argument to Melvin's discrimination claim, the IADC's primary focus in this brief will be the discrimination claim.

remarks are temporally remote or unrelated to the employment decision.

NELA Amici's proposed summary judgment exception would require a jury trial whenever an employee challenges an employer's proffered explanation for its employment decision as pretextual or whenever a decision-maker makes discriminatory remarks, no matter how remote in time or substance. This proposed standard would essentially insulate from summary judgment virtually all employment discrimination cases evaluated under the third-stage of the *McDonnell Douglas* framework. In line with its well-established precedent, this Court should reject NELA Amici's argument that this subset of employment discrimination cases should be excepted from summary judgment.

In addition to being contrary to well-settled law that summary judgment does not abrogate an individual's right to a jury trial, NELA Amici's argument is out-of-line with established employment discrimination law. As illustrated by a review of the standards applicable to an ADEA discrimination claim, NELA Amici's argument misconstrues binding precedent on the issue of pretext. It also fails to consider that the issue of intentional discrimination must be decided in the context of the entire summary judgment record. It further forsakes the "but-for causation" requirement in ADEA discrimination cases.

Related to an employer's "honest belief," NELA Amici incorrectly conclude that an employer's subjective belief that a workplace rule was violated comes

down to the decision-maker's credibility. An employer's "honest belief," like all questions of intent, is proven through both objective factors, such as comparator evidence, and subjective factors. Relating to a decision-maker's discriminatory remarks, NELA Amici ignore settled precedent examining whether the remarks were isolated, related to the challenged employment action, or temporally remote.

Moreover, applying these well-established employment discrimination standards, including the "honest belief" rule and "stray remarks" doctrine, to the facts in this case shows that the trial court properly granted summary judgment. There are simply no disputed material facts upon which a reasonable juror could find that FedEx intentionally discriminated against Melvin ***"because of his age."***

Finally, adopting NELA Amici's proposed bright-line summary judgment exception would upset the delicate balance of the *McDonnell Douglas* framework between an employee's right to be free from workplace discrimination and an employer's right to take action against an employee for non-discriminatory reasons. It would also eviscerate the very purpose of Rule 56 by skewing the balance against persons opposing claims and requiring factually insufficient claims to be tried. This result will strain judicial resources and it will impose unwarranted financial costs and undeserved reputational harm on employers.

This Court should reject NELA Amici's proposed summary judgment exception and affirm the district court's summary judgment in favor of FedEx.

ARGUMENT

I. THERE IS NO EMPLOYMENT DISCRIMINATION EXCEPTION TO SUMMARY JUDGMENT.

Members of the plaintiff's workplace bar and others have long assailed summary judgment under Rule 56 of the Federal Rules of Civil Procedure and its application to employment discrimination cases. As will be discussed below, some broadly argued that granting summary judgment ***in any case*** violates a plaintiff's constitutional right to a jury trial. Others argued that summary judgment should be eliminated in ***all employment discrimination*** cases because they involve issues of motive and intent. Others argued that summary judgment should be eliminated in ***one or more subsets of employment discrimination cases*** because its application is constitutionally problematic. Regardless of the scope of their argument or the specific language used, this Court has consistently and repeatedly rejected all arguments seeking to categorically eliminate summary judgment to all, or a subset of, employment discrimination cases.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is an "integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (noting that summary judgment had been authorized under the Federal Rules of Procedure for almost 50 years). Summary judgment serves as a principal tool to screen out cases that do not present

trialworthy issues. It is not a "disfavored procedural shortcut." *Id.* Summary judgment isolates and prevents factually insufficient claims and defenses "from going to trial with the attendant unwarranted consumption of public and private resources." *Id.*

Under Rule 56, a court must grant summary judgment if the record before it shows that there are no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The word "genuine" means that the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Zivojinovich v. Barner*, 525 F.3d 1059, 1066 (11th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Rule 56 balances the right to a jury trial, for plaintiffs who bring evidence-based claims, with the right to avoid a jury trial, for defendants opposing non-evidence-based claims.

Time and again the United States Supreme Court has made it clear that "summary judgment does not violate the Seventh Amendment." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 919-920 (11th Cir. 2018) (*en banc*) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (citing *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319 (1902)). This Court recently reaffirmed: "[i]t is ***beyond question*** that a district court may grant summary judgment where the material facts concerning a claim cannot reasonably be disputed." *Jefferson*, 891 F.3d at 919-920

(quoting *Garvie v. City of Fort Walton Beach*, 366 F.3d 1186, 1190 (11th Cir. 2004)). Under this long-established precedent, the constitutional right to a jury trial only arises if the non-movant sets forth relevant and probative evidence sufficient to support a jury verdict in his or her favor. *See Jefferson*, 891 F.3d at 920. As such, "[a] district court does not intrude on the constitutional role of the jury when it considers whether a complaint fails as a matter of law." *Id.*

It is equally entrenched that there is no employment discrimination exception to summary judgment. *See Jefferson*, 891 F.3d at 920 (summary judgment "applies with equal force to claims of employment discrimination"). *See also Chapman v. AI Transport*, 229 F.3d 1012, 1026 (11th Cir. 2000). Indeed, almost twenty years ago, the Supreme Court, in *Reeves v. Sanderson Plumbing Products, Inc.*, underscored that discrimination should not be treated "differently from other ultimate questions of fact." 530 U.S. 133, 148 (2000) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993)).

As this Court recently emphasized: "We have ***repeatedly rejected*** arguments that 'summary judgment is especially questionable and should seldom be used in employment discrimination cases because they involve examination of motivation and intent'[.]" *Jefferson*, 891 F.3d at 920 (quoting *Wilson B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004)). The same summary judgment standard applies universally across all types of cases, including employment discrimination cases;

"[n]o thumb is to be placed on either side of the scale." *Chapman*, 229 F.3d at 1026.

Indeed, in several recent employment discrimination cases, this Court expressly rejected employees' arguments that summary judgment violated their right to a jury trial. *See Langston v. Lookout Mountain Cmty. Serv.*, 775 Fed. Appx. 991 (11th Cir. 2019) (summarily rejecting argument in FMLA retaliation case); *Jones v. Aaron's Inc.*, 748 Fed. Appx. 907, 920 (11th Cir. 2018) (rejecting as meritless argument in FMLA interference and retaliation case); *Kelly v. Dun & Bradstreet, Inc.*, 641 Fed. Appx. 922, 924 (11th Cir. 2016) (rejecting argument in Title VII retaliation case); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 887 (11th Cir. 2016) (rejecting argument in Title VII discrimination case). And in at least one other recent discrimination and retaliation case, this Court, in *Connelly v. WellStar Health System, Inc.*, this Court expressly rejected the employee's argument that "summary judgment based on the 'honest, good faith belief' doctrine in employment cases violates the Seventh Amendment." 758 Fed. Appx. 825, 832 (11th Cir. 2019) (ADA and FMLA) (citing *Jefferson*, 891 F.3d at 919-920).

In this case, in line with previous arguments by members of the plaintiff's

workplace bar, in support of Melvin,[4] NELA Amici advocate for the adoption of a bright-line summary judgment exception to employment discrimination cases involving the "honest belief" rule and the "stray remarks" doctrine. NELA Amici argue that workers are ***always*** entitled to have jurors determine at trial (rather than a judge on summary judgment) whether an employer honestly believed its employment decision was lawful and whether a decision-maker's discriminatory remarks evidence discriminatory animus even if the remarks are temporally remote or unrelated to the employment decision. (NELA Amici's Brief at 5-12 and 12-18, respectively).

NELA Amici's proposed summary judgment exception would require a jury trial whenever an employee challenges an employer's proffered explanation for its employment decision as pretextual or whenever a decision-maker makes discriminatory remarks, no matter how remote in time or substance. This proposed standard would essentially insulate from summary judgment virtually all employment discrimination cases evaluated under the third-stage of the *McDonnell Douglas* framework. In line with its well-rooted precedent, this Court should reject NELA Amici's proposed summary judgment exception. Summary judgment does

[4] Below, Melvin argued that "the Eleventh Circuit has not yet ruled on whether the application of summary judgment to employment discrimination cases is being used unconstitutionally." (Plaintiff's Objections to Report and Recommendation, Doc. 99 at 59-63). On appeal, Melvin differently argues that "a jury could conclude," "a jury could find," and a "jury could infer."

not abrogate an individual's right to a jury trial in an employment discrimination case where (as here) there are no genuine disputed issues of material fact upon which a reasonable juror could find that FedEx intentionally discriminated against Melvin "because of his age."

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE MELVIN FAILED TO ADDUCE SUFFICIENT EVIDENCE FROM WHICH A JURY COULD REASONABLY INFER INTENTIONAL AGE DISCRIMINATION WAS THE BUT-FOR CAUSE OF HIS TERMINATION FROM FEDEX.

As noted above, NELA Amici argue that all employment discrimination cases involving the evaluation of an employer's "honest belief" or a decision-maker's "stray remarks" must be tried before a jury. Contrary to their arguments, this proposed summary judgment exception is unsupported and runs afoul of well-established employment discrimination law. The discrepancies between NELA Amici's arguments and employment discrimination law become apparent upon reviewing the standards applicable to an ADEA discrimination claim. The application of these well-established standards to the facts in this case further demonstrates that the trial court properly granted summary judgment because Melvin did not adduce sufficient evidence showing that intentional age discrimination was the "but for" cause of his termination.

In section A., *supra*, we will review the standards applicable to an ADEA discrimination claim. Then, in sections B. and C., *supra*, we will respectively

demonstrate that NELA Amici's proposed summary judgment exception to cases involving an employer's "honest belief" or a decision-maker's "stray remarks" is unsupported by and contrary to these standards. Next, in section D., *supra*, we will establish that the trial court properly granted summary judgment on Melvin's discrimination claim because there are no disputed material facts upon which a reasonable jury could find that FedEx intentionally discriminated against Melvin "because of his age." Finally, in section E., *supra*, we will show why the adoption of NELA Amici's proposed summary judgment exception would upset the balancing considerations of the *McDonnell Douglas* framework and eviscerate the purpose of Rule 56.

A. Standards Applicable to an ADEA Discrimination Claim

1. ADEA

The ADEA prohibits employers from discharging or retaliating against an employee who is at least 40 years of age "***because of*** such individual's age." 29 U.S.C. §§ 623(a)(1). The "because of" language means that a plaintiff must prove that discrimination was the "but-for" cause of the alleged adverse employment action. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1332 (11th Cir. 2013).

An ADEA claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process *and had a*

determinative influence on the outcome." *Sims*, 704 F.3d at 1332 (quoting *Gross*, 557 U.S. at 167) (citation omitted) (emphasis in original). Stated otherwise: "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Sims*, 704 F.3d at 1332 (quoting *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)).

2. Circumstantial Evidence of Intentional Discrimination

A plaintiff may establish an ADEA claim through either direct or circumstantial evidence. *See Mora v. Jackson Mem'l Foundation, Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010). Here, as with most plaintiffs, Melvin seeks to prove intentional discrimination through circumstantial evidence under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Melvin also argues that he demonstrated a convincing mosaic of circumstantial evidence. *Sims*, 704 F.3d at 1333. Melvin failed to set forth sufficient circumstantial evidence to create an issue of material fact that FedEx intentionally discriminated against him because of his age.

The Supreme Court created the *McDonnell Douglas* framework "as a delicate balance between an employee's right to work free from discrimination and an employer's right to take action against an employee for any nondiscriminatory reason." *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1231 (11th Cir. 2019) (Rosenbaum, J., concurring in part, dissenting in part). Under the *McDonnell*

Douglas framework, an employee must first establish a prima facie case, which creates a presumption of unlawful discrimination. *See, e.g.*, *Liebman v. Metropolitan Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015) (discussing requirements of prima facie case of age discrimination).[5]

In the second stage, the burden of production shifts to the employer who must articulate a legitimate, non-discriminatory reason for the adverse employment action. If the employer offers a legitimate, non-discriminatory reason, then, in the third stage, the employee must show that the stated reasons are pretextual. *See id.* At the third-stage, the inquiry turns "to the specific proofs and rebuttals of discriminatory motivation the parties have introduced." *St. Mary's*, 509 U.S. at 516. Throughout the three-stage process, the plaintiff retains the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff . . . ." *Sims*, 704 F.3d at 1333 (quoting *St. Mary's*, 509 U.S. at 506-507).

3. Third-Stage of McDonnell Douglas Framework

In the third stage, "the plaintiff's burden of showing pretext merge[s], with the ultimate burden of demonstrating unlawful discrimination." *Clark v. Huntsville*

[5] As described in *Liebman*, 808 F.3d at 1298: To establish a prima facie case of age discrimination, the employee must show: (1) he was a member of the protected group between the age of forty and seventy; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the position from which he was discharged; and (4) he was qualified to do the job from which he was discharged.

City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (quoting *Texas Dept. of Cmty. Aff. v. Burdine*, 450 U.S. 248, 256 (1981)). To meet this burden, "a plaintiff must demonstrate that the employer's proffered reason is not the true reason for the adverse employment decision." *Barsorian v. Grossman Roth, P.A.*, 572 Fed. Appx. 864, 868-869 (11th Cir. 2014) (internal quotation omitted). Stated differently, "a reason is not pretextual unless the employee shows both that the given reason was false and that discrimination was the real reason." *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 887 (11th Cir. 2016) (citing *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). Under the *McDonnell Douglas* framework, a plaintiff only survives summary judgment if he sets forth sufficient evidence showing that a reasonable juror could agree that the employer intentionally discriminated against the plaintiff. *See Reeves*, 530 U.S. at 146.

In evaluating pretext in the third stage, the court does not ask whether the employer made the right decision or whether the employer treated the plaintiff fairly. *See Barsorian*, 572 Fed. Appx. at 870. The court is "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) (citation omitted). Neither does the court "sit as a super-personnel department." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). "An employer may

fire an employee 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 discriminatory reason." *Barsorian*, 572 Fed. Appx. at 870 (quoting *Nix v. WLCY Radio/Rahall Comms*., 738 F.2d 1181, 1187 (11th Cir. 1984)).

As this Court explained in *Lewis*, the reason for the court's deference to an employer's business judgment is two-fold. *Lewis*, 918 F.3d at 1225-1226. Federal anti-discrimination statutes do "not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees . . . ." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361 (1995). "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

A plaintiff can show that a proffered reason is not believable by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the proffered non-discriminatory reason. *Barsorian*, 572 Fed. Appx. at 868-869 (quoting *Brooks*, 446 F.3d at 1163). Pretext, though, cannot be established by a plaintiff recasting the employer's proffered non-discriminatory reason or by substituting his own business judgment. *See Chapman*, 229 F.3d at 1030. If the employer's proffered reason is one that might motivate a reasonable employer,

such as Melvin's workplace misconduct, the plaintiff must "meet the reason head on and rebut it." *Id.* The plaintiff "cannot succeed by simply quarreling with the wisdom of that reason." *Id.*

When a plaintiff is fired for poor performance, "it is not enough for the plaintiff to show that his performance was satisfactory." *Menefee v. Sanders Lead Co., Inc.*, 19-10433, 2019 WL 4466857 *1, 2-3, --- Fed. Appx. --- (11th Cir. Sep. 18, 2019). Neither is it enough for a plaintiff to show that the employer made a mistake in assessing the employee's job performance or conduct. *See Brooks*, 446 F.3d at 1163. Nor can a plaintiff rely on speculation or his own subjective assertions of good performance. *See Holifiled v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997), *abrogated on other grounds by Lewis*, 918 F.3d at 1213.

Instead, to establish pretext, a plaintiff must show that "the employer did not believe that his performance was lacking, and merely used that claim as a cover for discriminating against him based on his age." *Menefee*, 2019 WL 4466857 at *3. The court's "inquiry is limited to whether the employer gave an honest explanation of its behavior." *Id.* (citing *Chapman*, 229 F.3d at 1030). As this Court instructed many years ago, an employer acting "under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct." *Damon*, 196 F.3d at 1363. This is so because the court is "not in a position to second-guess [the employer's] business judgment." *Kidd v. Mando Am. Corp.*,

731 F.3d 1196, 1206–07 (11th Cir. 2013). The application of this standard to the third-stage of *McDonnell Douglas* is often referred to as the "honest belief" or "good-faith belief" rule.

B. An Employee's Right to a Jury Trial is Not Abrogated When a Court Evaluates Pretext Based on a Decision-Maker's Alleged Mistaken But "Honest Belief."

NELA Amici incorrectly argue that any issue under the "honest belief" rule must be tried by a jury. Indeed, this Court, in *Connelly*, 785 Fed. Appx. at 832, recently rejected the employee's virtually identical argument that "summary judgment based on the 'honest, good faith belief' doctrine in employment cases violates the Seventh Amendment." *Id.* NELA Amici's argument is also based on faulty reasoning. Contrary to NELA Amici's contention, a district court can consider a decision-maker's testimony in determining whether a plaintiff has shown pretext and intentional discrimination. *See Kidd*, 731 F.3d at 1205 (quoting *Everett v. Cook Cnty.*, 655 F.3d 723, 729 n.2. (7th Cir. 2011) ("Even if testimony comes from interested employees, [w]e do not interpret [*Reeves*] so broadly as to require a court to ignore the uncontroverted testimony of company employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual.")).

There is no dispute that the "honest belief" rule is based on the employer's subjective belief that a workplace rule was violated. But, contrary to NELA

Amici's argument, this does not mean that the employer's "honest belief" is solely based on the employer's credibility. Rather, an employer's "honest belief" is proven—like all questions of intent—through both subjective and objective factors. Moreover, NELA Amici's argument considers only one of the two requirements of pretext: whether the employer's reason was false; it does not account for the employee's required showing that discrimination was the real reason. It also fails to account for the ADEA's requirement that the discrimination must be the "but-for" cause of the adverse employment decision.

Reeves debunked the idea that proof suggesting that the employer's proffered reason is false "will *always* be adequate to sustain a jury's finding of liability." *Reeves*, 530 U.S. at 138. As the Court explained:

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (citations omitted). To hold otherwise, the Court reasoned, would insulate an entire category of cases from review. *Id.* This would wrongly result in treating "discrimination differently from other ultimate questions of fact." *Id.* (citation omitted).

Additionally, as discussed above, to avoid summary judgment an employee must do more than proffer his own subjective perception and speculation that the employer is lying. *Menefee*, 2019 WL 446857 at *2-3 (pretext cannot be established by plaintiff's showing that his performance was satisfactory); *Chapman*, 229 F.3d at 1030 (pretext cannot be established by employee substituting his own business judgment or quarreling with the wisdom of the employer's reason). The adoption of NELA Amici's "honest belief" jury trial mandate would directly contravene this well-established law.

Every employment discrimination case that seeks to prove intentional discrimination with circumstantial evidence involves a determination as to whether the employer's proffered reasons are pretextual. *See Clark*, 717 F.2d at 529 (third stage of *McDonnell Douglas* requires a showing of pretext); *Lewis*, 934 F.3d at 1185 (finding convincing mosaic requires a showing that employer's justification is pretextual). As such, adopting NELA Amici's "honest belief" jury trial mandate would effectively insulate every employment discrimination case from summary judgment. As discussed in section E., *supra*, this result would eviscerate the very purpose of Rule 56 and it would upset the delicate balance of the *McDonnell Douglas* framework.

Based on the above, this Court should reject NELA Amici's proposed summary judgment exception for any employment discrimination case in which an

employee challenges the employer's non-discriminatory reason as being pretextual based on the employer's alleged mistaken "honest belief."

C. An Employee's Right to a Jury Trial is Not Abrogated When a District Court Determines that a Decision-Maker's Alleged Discriminatory Remarks Do Not Evidence Pretext or Discriminatory Intent Because They Are Isolated, Unrelated, and Temporally Remote.

A decision-maker's alleged discriminatory remarks can "*contribute* to a circumstantial case for pretext[,]" by shedding light on his or her state of mind at the time the challenged employment decision was made. *Rojas v. Florida*, 285 F.3d 1339, 1342-1343 (11th Cir. 2002). *See also Damon*, 196 F.3d at 1362; *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286 (11th Cir. 1998). Whether the remarks evince pretext depends on the substance, context, and timing of the remarks. *See Damon*, 196 F.3d at 1363; *Ross*, 146 F.3d at 1291. A supervisor's remarks must be "read in conjunction with the entire record" and "considered together with" the other evidence in the case. *Rojas*, 285 F.3d at 1343 (quoting *Ross*, 146 F.3d at 1291).

Remarks made close in time to the adverse decision, which evince a discriminatory preference, are circumstantial evidence of pretext. *See e.g. Damon*, 196 F.3d at 1363 (ageist remark closely related to and close in time to adverse employment decision probative of discrimination). Conversely, remarks made months before the adverse decision—like the more than five-month gap between

Melvin's supervisor's alleged remarks and Melvin's termination—do not demonstrate discriminatory intent. *See Short v. Mando Am. Corp.*, 601 Fed. Appx. 865, 874-75 (11th Cir. 2015) (six-month delay between a comment and an employment decision was too isolated to evidence discriminatory intent). *Cf. Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (in retaliation claim, three-month gap alone between protected activity and adverse employment action is insufficient to create jury issue on causation).

Similarly, remarks that are "isolated and unrelated to the challenged employment decision are insufficient to establish pretext." *Ritchie v. Indus. Steel, Inc.*, 426 Fed. Appx. 867, 872-873 (11th Cir. 2011) (internal quotation omitted). Courts often refer to such isolated, remote, and unrelated comments as "stray" remarks. *See id.* In *Ritchie*, the decision-makers referred to the employee as "old man" and made other comments about his age. This Court held that the remarks did not establish pretext because they were not linked to the termination decision, and there was no evidence that the decision-makers preferred younger employees or that the employee could not perform his job because of age. *See id.* at 874. Similarly, in *Menefee*, 2019 WL 4466857 at *4, this Court recently found that the decision-maker's question and comments about plaintiff-employee's age, the day before and the day of his termination, did not evidence pretext. The comments were random and not linked to the decision to terminate. *See id.*

Similar to their argument on the "honest belief" rule, NELA Amici argue that an employee's Seventh Amendment right is abrogated any time a decision-maker allegedly made discriminatory remarks, and the court grants summary judgment. This proposed bright-line jury-trial requirement discards any consideration of whether the remarks were isolated, related to the challenged employment action, or remote in time or whether there was any intervening misconduct by the employee. By focusing entirely on the single factor of whether a decision-maker made a discriminatory remark, this proposed bright-line jury-trial requirement disregards relevant evidence surrounding the adverse employment decision. For example, the single-factor analysis turns a blind eye to the lack of comparators, the employee's intervening misconduct, and the employer's internal review and approval of the decision-maker's adverse employment decision.

This result effectively obviates the pretext requirement under the third-stage of the *McDonnell Douglas* framework. And it obviates the ADEA's requirement that intentional discrimination be the "but-for" cause of the adverse employment decision.

NELA Amici's authorities do not support such an analysis. For example, as explained in *Ross*, 146 F.3d at 1291-1292, because the employee's case turned on circumstantial evidence, the proper inquiry is whether the alleged discriminatory remarks "when read in conjunction with the entire record are circumstantial

evidence of those decisionmakers' discriminatory attitude." And, if so, whether the remarks "along with other evidence . . . might lead a reasonable jury to disbelieve" the employer's proffered reason for the adverse employment decision. *Id.*

NELA Amici's position effectively eliminates summary judgment in any employment discrimination case involving alleged discriminatory remarks. But the abolishment of summary judgment violates a defendant's right to ***avoid*** a jury trial when there is no genuine issue of material fact. *See Celotex*, 417 U.S. at 327 (recognizing that Rule 56 is construed with regard to the rights of both person's asserting claims and those opposing claims).

NELA Amici's construct also attempts to elevate "stray" remarks from circumstantial evidence to direct evidence of discriminatory intent. But, as this Court held long ago, "[o]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of age, constitute direct evidence of discrimination." *Earley v. Champion Intern. Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) (internal citation and quotation omitted).

This Court should also reject NELA Amici's argument that a plaintiff is automatically entitled to a jury trial whenever a decision-maker makes discriminatory remarks.

D. The District Court Correctly Held that Melvin Failed to Adduce Sufficient Evidence from Which a Jury Reasonably Could Infer Discrimination or Retaliation.

FedEx terminated Melvin after he received three disciplinary letters in 12 months. These disciplinary letters detailed Melvin's multiple, continuing, and discrete acts of misconduct over five months. This wrongdoing was based on objective criteria about which Melvin had previously been warned verbally and in writing.

The final disciplinary letter was for insubordination and leadership failure. (Doc. 101 at 19). It was based on the following incidents: (1) Melvin ignored his supervisor's instructions regarding the demotion of an employee; (2) Melvin parked in a secured lot nine times in September and October 2016, despite being told not to do so; (3) Melvin failed to report a mishandled delivery unit; and (4) Melvin failed to discontinue use of the Time Discrepancy ("TD") delay code even though he was told to do so on October 11 and October 18, 2016. (Doc. 101 at 19).

Melvin argues that disputed issues of material fact on discriminatory animus exist based on his opinion that the above four incidents of misconduct were false. As explained in more detail in FedEx's Answer Brief, the district court correctly found that Melvin failed to show a genuine issue concerning pretext on the four incidents of misconduct in his final disciplinary letter. The district court found that the second ground, parking in a secured lot, was not pretextual because it was true.

The third ground, failing to report a mishandled delivery unit, was not pretextual because it was true and within the supervisor's business discretion. On the first ground, ignoring instructions not to demote an employee, and the fourth ground, failing to discontinue use of the TD delay code, the district court found that these reasons were not pretextual because Melvin failed to point to any evidence tending to show that the supervisor knew these reasons were false.

The district court's reasoning was correct. The first and fourth grounds were not pretextual because evidence of a "false factual predicate underlying the employer's proffered reason does not unequivocally prove that the employer did not rely on the reason in making the employment decision." *Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1564 (11th Cir. 1995). The *Walker* court explained a false factual predicate "may merely indicate that the employer, acting in good faith, made the disputed employment decision on the basis of erroneous information." *Id.* "It is obviously not a violation of federal employment discrimination laws for an employer to err in assessing the performance of an employee." *Id.* Rather, pretext is established only if the plaintiff demonstrates that the employer made a mistake, ***and*** "the employer did not give an honest account of its behavior." *Id.*

Moreover, Melvin's attempts to demonstrate pretext based on the fact that he is a good employee are insufficient. As this Court held in *Rojas*, a plaintiff cannot simply litigate the issue of whether they were a good employee. *See Rojas*, 285 F.3d

at 1342. This is so because the factual issue to be resolved is not the wisdom or accuracy of the employer's conclusion that the employee was unsatisfactory, but whether the employer's conclusion was honest. *See id.* Additionally, the court does not sit as a super-personnel department. *See Elrod*, 939 F.2d at 1470.

Melvin's circumstantial evidence "falls well short of painting a convincing mosaic of discrimination that would allow a reasonable jury to infer intentional discrimination." *Smith v. Vestavia Hills Bd. of Educ.*, 18-11626, 2019 WL 5700747 *1, *3, --- Fed. Appx. --- (11th Cir. Nov. 5, 2019) (citing *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). A "convincing mosaic" of circumstantial evidence may be shown by evidence that demonstrates: "(1) suspicious timing, ambiguous statements . . . and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) systematically better treatment of similarly situated employees; and (3) that the employer's justification is pretextual." *Lewis*, 934 F.3d at 1185 (internal quotations and citations omitted). Melvin demonstrated none of these elements.

Neither did Melvin adduce any other evidence from which an inference of discriminatory intent reasonably could be drawn. Melvin's supervisor's alleged remarks about Melvin's age more than five months before his termination were isolated, temporally remote, and unrelated to his termination decision. In analyzing the evidence in favor of Melvin, the district court below correctly held

that these remarks neither evidenced pretext nor proved that discrimination was the real reason for Melvin's termination. In so holding, the district court evaluated the remarks in the context of the entire record, including Melvin's intervening acts of misconduct and his failure to adduce evidence that comparators outside of his protected class were treated more favorably. *See Henderson v. FedEx Express*, 442 Fed. Appx. 502, 506 (11th Cir. 2011) (intervening acts of misconduct break any causal link between the protected conduct and the adverse employment action).

Based on the above and the arguments in FedEx's Answer Brief, the district court properly found that Melvin's supervisor's alleged isolated, unrelated, and remote remarks neither sufficiently evidenced pretext or discriminatory intent under the *McDonnell Douglas* framework nor presented a convincing mosaic of circumstantial evidence. Additionally, because there were no disputed issues of material fact upon which a reasonable juror could find that FedEx intentionally discriminated against Melvin "because of his age," Melvin's right to a jury trial was not abrogated. *See Jefferson*, 891 F.3d at 920

E. Adoption of NELA Amici's Proposed Summary Judgment Exception Would Eviscerate the Purpose of Rule 56 and it Would Upset the Delicate Balance of the *McDonnell Douglas* Framework.

Adopting NELA Amici's proposed summary judgment exception would upset the delicate balance of the *McDonnell Douglas* framework "between an employee's right to work free from discrimination and an employer's right to take

action against an employee for any nondiscriminatory reason." *Lewis*, 918 F.3d at 1231. Eliminating summary judgment in favor of employee-plaintiffs would also eviscerate the purpose of Rule 56 by skewing the balance against the rights of defendants opposing non-evidence based claims. It would require factually insufficient claims to be tried. These fact-intensive trials would impose significant financial costs on employers, and they would strain judicial resources.

In addition to the burdensome nature of litigation, forcing the trial of discrimination claims involving legitimate, non-discriminatory employment decisions may cause undeserved harm to the employer's reputation. Adopting NELA Amici's proposed summary judgment exception could also prevent those businesses seeking to avoid the risk of these possible harms, from fairly, and even-handedly, applying workplace standards. This is so because such risk-sensitive businesses may be reluctant to make adverse employment decisions when a member of a protected class is involved. The implementation of this rigid exception could also invite tenuous allegations of discrimination and incentivize the settlement of meritless claims in order to avoid litigation costs.

CONCLUSION

For these reasons, and those set forth in FedEx's Answer Brief, the IADC respectfully requests that the Court affirm the district court's decision granting summary judgment.

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Fed. R. App. P. 32(g)(1) that this motion for leave to file amicus curiae brief in support of Appellee complies with the type-volume requirements specified in Fed. R. App. P. 29(a)(5) and 32(a)(4)-(7); specifically, this motion was prepared using Times New Roman 14-point font and contains 6,170 words.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this motion for leave to file amicus curiae brief in support of Appellee has been served on the below counsel of record via CM/ECF on this 3rd day of December, 2019:

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