No. _____

In The
Supreme Court of the United States

LARRY BROOKS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether "similar" means "identical" in determining whether comparators are similarly situated in employment discrimination cases.

   Currently there is a wide split in the circuits as to how narrow or broad an interpretation is of the definition of "similar"- with the narrow interpretation weighing in on the "identical" which makes it almost impossible to make out a prima facie case, even requiring the exact same supervisor, instead of the same level supervisor. On the other end of the split, circuits are allowing a variety of ways to show termination, as long as material genuine issues of facts were raised regarding the termination.

2) When a case is transferred under *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) doesn't the District Court have to automatically review the entire Merit System Protection Board Record as a review of the MSPB adverse action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is unpublished, but available at the Eleventh Circuit at 16-12004, and at App 1. The District Court opinion is unpublished, but available at App 2.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 2017. The petition was timely filed within 90 days after judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved.

STATEMENT OF THE CASE

Larry Brooks began his civil service career on November 4, 1977. A veteran, Brooks was fired from his position as Sheet Metal Mechanic Supervisor at Robins Air Force Base on a charge of inappropriate conduct in 2011. Supervisor Larry Brooks allegedly told Sara Stringer, a subordinate employee that he was "going to get a chastity belt and handcuff her to her flap that way when all the guys come by gawking at her, that

would deter them." The airplane hangar and sheet metal mechanics were predominantly male. Sara Stringer had a lot of visitors in her work area. The evidence regarding the charge of inappropriate conduct was based on "she said, he said" testimony. The metal bond repair facility was a noisy airplane hangar building where it was hard to hear any comments unless one was in close proximity, much less the many feet away as was testified to at the hearing.

Larry Brooks denied the charges, but was fired after 33 years of service with Robins Air Force Base. The matter was initially at the Federal Circuit, where Larry Brooks was arguing that under the Personnel Rules that the penalty of firing was too harsh, and there were mitigating circumstances whereby the more appropriate discipline involved Brooks to be demoted, moved, sent to training, etc. Larry Brooks abandoned his discrimination claim to proceed in the Federal Circuit on the MSPB Claim only. Larry Brooks wanted his case outside of the local area where the local Robins Air Force Base was a popular and strong employer, even though he was waiving his discrimination claims to go directly to Washington, D.C.

The case was then transferred to the local district court after the Supreme Court decision in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). *Kloeckner* divested the Federal Circuit Court of Appeals of jurisdiction. Under that ruling, if there was an initial discrimination claim one could not abandon that claim to proceed in a different jurisdiction, but had to pursue all claims in the district court.

The original MSPB Claim was a de novo review on the record, so Brooks framed all arguments regarding discrimination at the district court summary judgment response for the discrimination claims. Brooks provided proof that white supervisors similarly situated as him, in the same organization of CMXG, were not treated the same as he was treated. Penalties for white supervisors who were charged with misconduct including having sex at work included being allowed early retirement versus termination, or reassignment.

Review of the MSPB decision should have been automatic, because Brooks first challenged that conclusion at the Federal Circuit only for that court to transfer the matter to district court.

Then the Eleventh Circuit panel opined that the quantity and quality of the comparator's misconduct must be "nearly identical." *Manniccia v. Brown*, 171 F.3d 1364, 1368-69 (11th Cir. 1999). The Eleventh Circuit's very narrow interpretation of "similar" to "identical" essentially divested Larry Brooks of any redress on his discrimination claims.

REASONS FOR GRANTING THE PETITION

Comparator evidence is used as an indicator of pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). Larry Brooks argued that other, white supervisors were treated differently than he was. Larry Brooks provided sworn affidavits articulating

that the white supervisors were the same level supervisors in the CMXG Organization as Larry Brooks. Many of those white supervisors committed more egregious acts, than an alleged comment about a chastity belt, yet the white supervisors were allowed to retire, and Larry Brooks was fired.

"Brooks failed to establish the Air Force treated him less favorably than a similarly situated individual outside his protected class," the panel said in the unsigned, or per curiam, decision. Comparators, the panel said, need to have been accused of virtually identical conduct, and for a successful discrimination case, they must have been disciplined differently than the person in the protected class. "Brooks' five proposed comparators were neither involved in, nor accused of, nearly identical misconduct. None were accused of making inappropriate comments and then attempting to dissuade the object of those comments from reporting to management," the panel said.

The Eleventh Circuit even tailored the review more narrowly by requiring the exact same supervisor to justify a similarly situated comparator. The opinion stated: "Moreover, a different person supervised Brooks' proposed comparators, and differences in treatment by different supervisors seldom support a viable claim of discrimination because different supervisors may employ different disciplinary measures." This is the insane reasoning we get from circuits that read these definitions too narrowly.

If Brooks' case had been in another circuit, his case would have been decided differently.

For example, the Seventh Circuit, has rejected the narrow interpretation, holding that "the other employees must have engaged in similar – not identical – conduct to qualify as similarly situated." *Ezell v. Potter*, 400 F.3d 1041, 1046 (7th Cir. 2005). The Tenth Circuit stated that a plaintiff could establish the fourth element of a prima facie case in a variety of ways, including in a termination case, by showing that the employer had not eliminated his position. *Perry v. Woodard*, 199 F.3d 1126, 1140 (10th Cir. 1999).

The similarly situated requirement frustrates the purposes of establishing the prima facie case. The inquiry established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) was never intended to be overly rigid, mechanized, or ritualistic – merely sensible. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

It is time for the Court to lay out some sensible guidelines, and resolve the split of authority in the circuits regarding whether "similar" means "identical" in determining whether comparators are similarly situated in employment discrimination cases.

Further, since there are few cases since the Supreme Court decision of *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), the Court needs to clarify the standard of automatic review of the entire Merit System Protection Board Record as a review of the MSPB adverse

action after the *Kloeckner* transfer. The paramount importance of the original pleading and original record that was sent to the Federal Circuit was incorrectly misconstrued as being abandoned, slighting the significance of an automatic jurisdictional transfer under *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).

CONCLUSION

Larry Brooks is aware that he has a better chance at getting struck by lightning than this petition being selected for briefing schedule and oral arguments. Only 6% of petitions are picked each year. His case is hardly glamorous or glitzy, and appears to only effect one person on a seemingly simple question of definitions. But it doesn't. Thousands of cases each year are decided at the lower courts based on the current split of authority on a seemingly innocuous and mundane high school definitions test – are the comparators in discrimination claims "similar" or "identical"?

The narrow view effectively stops all prima facie discrimination claims in these circuits because you probably have a better chance of getting struck by lightning or your petition chosen for certiorari than to find an identical comparator with an identical supervisor with identical conduct. Surely such an interpretation was never intended to have such a narrow misuse.

Similarly situated and the concept of similar supervisors, and similar comparators is the mainstay of

discrimination law. Because plaintiffs can show discriminatory intent in numerous ways, the Court can once and for all clear up the split of authority within the circuits. The discrimination discussion can revert back to evidence inferred after drawing all inferences in favor of the plaintiff, not whether the comparators are "similar" or "identical."

It is overly rigid, mechanized, ritualistic and certainly not sensible that veteran, Larry Brooks, is still unable to obtain his fully vested retirement benefits six years later. The conduct, comparators, and supervisors were "similar" but not "identical."

Surely that is not the sensible approach that was originally intended.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12004
Non-Argument Calendar

D.C. Docket No. 5:14-cv-00027-CAR

LARRY BROOKS,

Plaintiff-Appellant,

versus

U.S. DEPARTMENT OF THE AIR FORCE,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(April 14, 2017)

Before JORDAN, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

Larry Brooks appeals the district court's decision granting the Department of the Air Force's (the Air Force) motion for summary judgment in his employment discrimination suit. Brooks filed this suit in

federal court following an unsuccessful appeal to the Merit Systems Protection Board (MSPB or Board) of his removal from his job at Robins Air Base. Brooks contends the district court erred in granting summary judgment to the Air Force as to his race discrimination claim, and erred in concluding he abandoned any challenge to the MSPB's decision affirming his removal. After careful review,[1] we affirm.

I.

The district court did not err in granting summary judgment to the Air Force as to Brooks [sic] discrimination claim. First, Brooks failed to present a *prima facie* case of race discrimination. To make out a *prima facie* case, a plaintiff must demonstrate (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Brooks failed to establish the Air Force treated him less favorably than a similarly-situated individual outside his protected class. A comparator is similarly situated if "the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Burke-Fowler v. Orange*

[1] We review a summary judgment determination *de novo*, viewing all evidence in the light most favorable to the non-moving party. *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1270 (11th Cir. 2011).

County, 447 F.3d 1319, 1323 (11th Cir. 2006) (citations omitted). To prevent courts from "second-guessing employers' reasonable decisions," the quantity and quality of the comparator's misconduct must be "nearly identical." *Maniccia v. Brown*, 171 F.3d 1364, 1368-69 (11th Cir. 1999). Brooks' five proposed comparators were neither involved in, nor accused of, nearly identical misconduct. None were accused of making inappropriate comments and then attempting to dissuade the object of those comments from reporting to management. Moreover, a different person supervised Brooks' proposed comparators, and differences in treatment by different supervisors seldom support a viable claim of discrimination because different supervisors may employ different disciplinary measures. *Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1261 n.5 (11th Cir. 2001) (citing cases).

Second, even if Brooks presented a *prima facie* case of race discrimination, he failed to establish the Air Force's stated, non-discriminatory reason for terminating his employment was pretext for discrimination. Under Title VII, a plaintiff need not directly prove that race motivated the employer's challenged decision. Rather, a plaintiff may rely on circumstantial evidence to demonstrate the employer's discrimination. *See, e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 526 (1993) ("Because Title VII tolerates no racial discrimination, subtle or otherwise, we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination

revealed only through circumstantial evidence.") (citations and quotations omitted). To prove discriminatory treatment through circumstantial evidence: (1) a plaintiff must first make out a *prima facie* case, (2) then the burden shifts to the defendant to produce legitimate, nondiscriminatory reasons for the adverse employment action, and (3) then the burden shifts back to the plaintiff to establish that these reasons are pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Here, the record is devoid of direct or circumstantial evidence allowing a jury to find that the Air Force's stated reasons for firing him – his inappropriate comments to a subordinate employee and attempts to convince her to refrain from reporting – were pretext for racial discrimination.

Finally, we need not address Brooks' argument on appeal based on *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321 (11th Cir. 2011), because he did not raise it before the district court. *See Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) (courts need not address arguments that litigants raise for the first time on appeal). Accordingly, we affirm the district court's grant of summary judgment to the Air Force as to Brooks' race discrimination claim.

II.

The district court did not err in concluding Brooks abandoned any challenge to the MSPB's decision affirming the Air Force's removal decision. A district court reviews discrimination claims previously raised

before the MSPB *de novo, Kelliher v. Veneman*, 313 F.3d 1270, 1274 (11th Cir. 2002); however, parties waive arguments they fail to raise in the district court. *See Hurley*, 233 F.3d at 1297. Brooks, proceeding with the assistance of counsel, made no mention of the MSPB decision in his response to the Air Force's motion for summary judgment, other than to generally maintain he never made inappropriate comments toward a subordinate employee. Instead, he focused exclusively on his race discrimination claim. Brooks made no attempt to indicate why the Board's decision was arbitrary or capricious, made without regard to law, or unsupported by substantial evidence. *See Kelliher*, 313 F.3d 1270, 1274 (District courts only set aside a MSPB decision if "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence."). Accordingly, we affirm the district court's conclusion that Brooks abandoned any challenge to the MSPB's decision affirming his removal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

LARRY BROOKS,	:	
Plaintiff,	:	
v.	:	
DEBORAH LEE JAMES, Secretary of the Air Force,	:	**No. 5:14-cv-27(CAR)**
Defendant.	:	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 29, 2016)

This action arises from Defendant Secretary of the Air Force Deborah Lee James's termination of Plaintiff Larry Brooks's employment on October 22, 2011. Plaintiff seeks review by this Court of a Merit System Protection Board's Final Order,[1] claiming he was improperly terminated based on his race in violation of 42 U.SC. § 2000e-16.[2] Before the Court is Defendant's Motion for Summary Judgment, and after

[1] The present case was transferred to this Court from the Federal Circuit after that court found that according to *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), discriminatory and non-discriminatory action cases, like this one, must be brought in the district court.

[2] Plaintiff did not file a separate complaint in this Court, he relies on his petition to the Federal Circuit for his applicable pleadings.

fully considering the matter, the Court **GRANTS** Defendant's Motion [Doc. 16].

BACKGROUND

Plaintiff, an African-American male, worked for Defendant at Robins Air Force Base as a Sheet Metal Mechanic Supervisor for twenty-eight years until his termination on October 22, 2011. Defendant terminated Plaintiff after his subordinate Sara Stringer filed a charge against him for inappropriate conduct.

1. March Incident and Plaintiff's Termination

On March 9, 2011, Plaintiff claimed Sara Stringer had been standing in the hallway for about 20 to 30 minutes after her break time, and he told her she needed to return to her work site.[3] Plaintiff said Stringer was a "social butterfly," and he could see from his office she needed to return to work.[4] After he told Stringer to return to work, another employee told him Stringer was upset, so he brought her into his office.[5] While he was in his office, George Pierce, Plaintiff's supervisor, came to Plaintiff's office door and looked in. Plaintiff said he told Stringer at the time, if she wanted to talk to Pierce she could.[6] Stringer, however, reported a very different set of events to Plaintiff's supervisors;

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[3] Pl. Dep. [Doc. 18] at 12.

[4] *Id*. at 13.

[5] *Id*. at 65-67.

[6] *Id*.

she claimed Plaintiff said multiple inappropriate comments to her that day and again later that month.

In late March/early April, Ellen Griffith, Plaintiff's supervisor and director of the 402d Commodities Maintenance Group at Robins Air Force Base commenced an investigation regarding Stringer's allegations. In her allegations, Stringer claimed Plaintiff said 6 inappropriate comments to her:

1. He told Stringer he was going "to get a chastity belt and handcuff her to her flap, that way when all those guys come by gawking at her, that would deter them."

2. He told her he was "bringing that chastity belt in tomorrow."

3. While in his office he commented, "what is this about, you running around telling people what I said to you. If you have a problem with something that I say, you need to tell me."

4. He also commented that if she was going "to run upstairs and tell George Pierce what he had said, that if she did not go upstairs that [he] would never bother her again."

5. On or about the last week in March 2011, he commented on her new haircut that "she was trying to look sexy."

6. On or about the last week in March, he commented on her late arrival, telling her "that she must have had a good night and a good night makes for a good morning." He also said

> he needed a good morning and proceeded to look her up and down.[7]

After investigating the allegations, interviewing witnesses, and meeting with Plaintiff, Griffith notified Plaintiff on October 14, 2011, that he would be terminated effective October 22, 2011.

In his meeting with Griffith, Plaintiff claimed George Pierce had a "vendetta against him" and although Stringer told him everything was "okay between them," Pierce pursued further action. Plaintiff also asked that he be allowed to retire instead of being terminated. This request, however, was denied; Defendant told Plaintiff he was not eligible for retirement.[8]

Griffith said that in making her decision to terminate Plaintiff, she weighed his length of service, his record, and his past performance with the nature and seriousness of Stringer's allegations. She found that not only were Plaintiff's comments inappropriate, but that urging Stringer not to go to Pierce was a "vale [sic] threat as far as almost extortion."[9] In making her decision to terminate Plaintiff, she also considered Plaintiff's prior disciplinary record, which included a 10 day suspension for failure to properly request leave and an unauthorized absence.[10]

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[7] [Doc. 16-3] at 78-80.

[8] *Id*. at 81-82.

[9] *Id*.

[10] *Id*. at 73-77.

2. Plaintiff's Appeal Process

On November 18, 2011, Plaintiff appealed his removal to the Merit Systems Protection Board ("MSPB"), claiming his termination was disproportionately severe, and he was treated differently from similarly situated employees based on his age and race. After conducting a hearing on the matter, the administrative judge ("AJ") affirmed Plaintiff's termination, finding Plaintiff failed to prove race and age discrimination.

On April 18, 2012, Plaintiff filed a petition for review with the MSPB requesting reconsideration of the AJ's decision. Plaintiff alleged the agency failed to prove inappropriate conduct; the AJ's credibility determinations were improper; the AJ improperly denied certain witness requests; and the AJ erred in ruling against Plaintiff's affirmative defenses of race and age discrimination. On September 27, 2012, the MSPB denied Plaintiff's petition and affirmed the AJ's decision. The MSPB concluded Plaintiff's arguments were "mere disagreement" with the AJ's findings and credibility determinations. Additionally, the MSPB found no abuse of discretion in the AJ's denial of Plaintiff's witness requests and concurred with the AJ that Plaintiff failed to prove race and age discrimination.

On November 27, 2012, Plaintiff petitioned the Court of Appeals for the Federal Circuit to review the MSPB's decision, again alleging error in the AJ's credibility determinations and findings that Plaintiff's conduct supported termination. On December 13, 2012, Plaintiff agreed to abandon any claim of

discrimination by reason of race, sex, age, national origin, or handicapped condition in any court.

Originally, the Federal Circuit dismissed Plaintiff's petition on procedural grounds, but then the court reopened the case to determine jurisdiction. The court found that, in accordance with *Kloeckner v. Solis*,[11] a federal employee seeking judicial review of an MSPB adverse action case mixed with discrimination allegations must do so in district court, not in the Federal Circuit, even if the petitioner agrees to abandon the discrimination claims. As a result, the Federal Circuit transferred Plaintiff's petition to this Court.

STANDARD OF REVIEW

MSPB decisions are subject to judicial review under 5 U.S.C. § 7703.[12] Where a plaintiff, like this one, brings both a non-discriminatory and discriminatory claim, what is known as a "mixed" case, the district court has jurisdiction to review both claims.[13] The Court reviews an MSPB's decision only to "ensure that the determination was (1) not arbitrary or capricious, (2) made without regard to law, or (3) not based on

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[11] 133 S. Ct. 596 (2012).

[12] *See Kelliher v. Veneman*, 313 F.3d 1270, 1274 (11th Cir. 2002), *reh'g denied*, 57 F. App'x 416 (11th Cir. 2003).

[13] *Id.*

substantial evidence."[14] However, a plaintiff's discrimination claims in a mixed case are subject to *de novo* review.[15]

As an initial matter, the Court notes Plaintiff has failed to raise any cognizable arguments as to his age discrimination claim or review of the MSPB decision. Fundamentally, it is a litigant's duty to suitably frame an issue for judicial review, and a district court need not consider an argument that is "not fairly presented."[16] Here, Plaintiff asserts no reason in his brief as to why the MSPB's decision was either (1) arbitrary or capricious, (2) made without regard to law, or (3) not based on substantial evidence. Nor does he present any argument as to how he was discriminated against because of his age. Thus, the Court finds Plaintiff has abandoned his claims for age discrimination and request for review of the MSPB decision.[17] Accordingly, the Court

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[14] *Kelliher*, 313 F.3d at 1276.

[15] *Id.* at 1274-75.

[16] *Smith v. Secretary, Dept. of Corrections*, 572 F.3d 1327, 1352 (11th Cir. 2009); *see United States v. Massey,* 443 F.3d 814, 819 (11th Cir. 2006) (an issue was not adequately presented unless it was raised in a way that the district court could not misunderstand it); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); *cf. Flanigan's Enters. Inc. v. Fulton County*, 242 F.3d 976, 987 n. 16 (11th Cir. 2001) (holding that an argument was waived because the appellants "fail[ed] to elaborate or provide any citation of authority in support of" the argument in their brief).

[17] *See Resolution Trust Corp. v. Dunmar Corp*., 43 F.3d 587, 598-99 (11th Cir. 1995) (noting that "the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not

will only address Plaintiff's discrimination claim, applying the standards set forth under Federal Rule of Civil Procedure 56(c) and the applicable substantive law.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper if the movant "shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law."[18] Not all factual disputes render summary judgment inappropriate; only a genuine issue of material fact will defeat a properly supported motion for summary judgment.[19] This means that summary judgment may be granted if there is insufficient evidence for a reasonable jury to return a verdict for the nonmoving party or, in other words, if reasonable minds could not differ as to the verdict.[20]

On summary judgment, the Court must view the evidence and all justifiable inferences in the light most favorable to the nonmoving party; the Court may not

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relied upon in summary judgment are deemed abandoned"); *accord Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990) (rejecting the contention that "where a party includes information in declarations or affidavits related to a summary judgment motion which might form the basis of an argument or defense, but the party fails to articulate such an argument" the district court must consider the argument *sua sponte*).

[18] Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[19] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

[20] *See id.* at 249-52.

make credibility determinations or weigh the evidence.[21] The moving party "always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law.[22] If the moving party discharges this burden, the burden then shifts to the nonmoving party to respond by setting forth specific evidence in the record and articulating the precise manner in which that evidence creates a genuine issue of material fact or that the moving party is not entitled to a judgment as a matter of law.[23] This evidence must consist of more than mere conclusory allegations or legal conclusions.[24]

DISCUSSION

A. ***Prima Facie* Case**

To establish a *prima facie* case of discriminatory discharge, Plaintiff must produce circumstantial evidence showing he (1) is a member of a protected class;

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[21] *See id.* at 254-55; *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992).

[22] *Celotex*, 477 U.S. at 323 (internal quotation marks omitted).

[23] *See* Fed. R. Civ. P. 56(e); *see also Celotex*, 477 U.S. at 324-26.

[24] *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).

(2) was qualified for the position; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly situated individual outside his protected class or was replaced by a person outside of his protected class.[25]

Defendant concedes, for purposes of summary judgment, that Plaintiff satisfies the first three elements of his *prima facie* case. The dispute here centers on whether Plaintiff has presented similarly situated comparators who engaged in similar misconduct but were treated more favorably than Plaintiff. The Court finds Plaintiff has failed to present sufficiently similar comparators to maintain a *prima facie* case.

"When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, [the Court must] evaluate whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways."[26] In determining whether a comparator is similarly situated to the plaintiff, the Eleventh Circuit has stated that "[t]he relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies."[27] "If the same policies were applied differently to similarly

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[25] *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir. 2003).

[26] *Burke-Fowler v. Orange Cnty., Fla.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (quotation omitted).

[27] *Id*.

ranked employees, those employees may be compared."[28]

A proper comparator is an employee outside of the plaintiff's protected class who is similarly situated to the plaintiff "in all relevant respects."[29] If the comparator is not similarly situated in all relevant respects, "the different application of workplace rules does not constitute illegal discrimination."[30] Indeed, "the quantity and quality of the comparator's misconduct must be nearly identical [to the plaintiff's] to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges."[31] Moreover, "differences in treatment by different supervisors or decision makers can seldom be the basis for a viable claim of discrimination"[32] because different supervisors may employ different disciplinary measures.[33]

Here, Plaintiff presents five white employees as comparators: Brian McAnally; Louis L. Ragan, Paul R.

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[28] *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1326 (11th Cir. 2011).

[29] *Holifield*, 115 F.3d at 1562.

[30] *Lanthem v. Dep't of Children & Youth Servs.,* 172 F.3d 786, 793 (11th Cir. 1999).

[31] *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999); *see also Burke-Fowler*, 447 F.3d at 1323.

[32] *Silvera v. Orange Cnty. Sch. Bd.*, 244 F.3d 1253, 1261 n.5 (11th Cir. 2001); *see also Mack v. ST Mobile Aerospace Eng'g, Inc.* 195 F. App'x 829, 844 (11th Cir. 2006) (finding comparators not similarly situated to plaintiff because plaintiff reported to different supervisor).

[33] *See Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989).

Harrell, Joe Rick Vance, and H.S. Cash. Plaintiff claims all of these men held a similar position, were in the same division, were accused of the same or similar misconduct, but, unlike Plaintiff, were allowed to retire. Plaintiff's arguments are unpersuasive – these men are not sufficiently similar for Plaintiff to satisfy his *prima facie* case of discriminatory termination.

Defendant terminated Plaintiff because of his inappropriate comments to Stringer, his attempt to convince her not to report his inappropriate conduct, and his previous suspension. Plaintiff's proposed comparators were neither involved in nor accused of "nearly identical" misconduct as Plaintiff nor under the same decision maker.

Plaintiff presents Brian McAnally as a comparator. McAnally was accused of inappropriate conduct and falsification of records in 2006. Unlike Plaintiff, however, McAnally was allowed to voluntarily retire in lieu of termination. However, the Court finds McAnally is not sufficiently similar to be a proper comparator. Although McAnally held the same position as Plaintiff, a sheet metal mechanic supervisor, McAnally retired in 2006, five years before Plaintiff, and had a different decision maker than Plaintiff.[34] Because Plaintiff and McAnally were not under the same decision maker, Plaintiff is unable to show that McAnally is a proper comparator who is similarly situated to Plaintiff in all relevant respects.

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[34] [Doc. 21-3] at 3.

Plaintiff also presents Louis L. Ragan who was accused of failure to fulfill his management responsibilities by failing to record and affect details in accordance with established procedures, and who, unlike Plaintiff, was allowed to voluntarily retire in lieu of termination. However, the Court finds Ragan is not sufficiently similar to be a proper comparator. Unlike Plaintiff, Ragan was an industrial production manager, not a sheet metal mechanic supervisor; there is no evidence he had a previous disciplinary record; the action taken against him occurred in 2004, and he was under a different decision maker.[35] For these reasons, Plaintiff is unable to show that Ragan is a proper comparator who is similarly situated to Plaintiff in all relevant respects.

Plaintiff additionally proffers Paul R. Harrell, Joe Rick Vance, and H.S. Cash as comparators. Although Harrell and Vance had the same position as Plaintiff, they are not sufficiently similar to be proper comparators. Harrell was accused of "misuse of a government computer" in 2002 and retired ten years later in 2012.[36] Vance, was accused of "loafing on duty," "smoking in an unauthorized area," "unauthorized use of a credit card," failure to fulfill supervisory responsibilities and lack of candor.[37] These accusations are distinguishable from the reasons given for Plaintiff's termination. Moreover, both of these men had different decision

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[35] [Doc. 21-4] at 3.

[36] [Doc. 21-5] at 4.

[37] [Doc. 21-6] at 16-18.

makers than Plaintiff. Finally, it is unclear in reviewing the record what position Cash held, what he was accused of, whether he had a previous disciplinary record, or whether he had the same decision maker.[38] Therefore, because these men are not similarly situated to Plaintiff in all relevant respects, Plaintiff is unable to show that Harrell, Vance, and Cash are proper comparators.

Finally, Plaintiff argues that Cash, Ragan, Harrell, and Vance were accused of inappropriate conduct, like Plaintiff, despite the fact there is no reference to these accusations in their personnel records.[39] In making this assertion, Plaintiff relies on hearsay testimony; however, inadmissible hearsay cannot be considered on summary judgment.[40] Moreover, even if Plaintiff's proposed comparators were accused of inappropriate conduct, because of the various reasons outlined above, Plaintiff fails to show how they are similarly situated, let alone nearly identical, and thus proper comparators.

Therefore, because Plaintiff has failed to point to a similarly situated white comparator who was disciplined less harshly, Plaintiff cannot establish his

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[38] [Doc. 21-2].

[39] *See* [Doc. 21-7]-[Doc. 21-10].

[40] *Macuba v. DeBoer*, 193 F. 3d 1316, 1322 (11th Cir. 1999) (noting that "Rule 56(e) of the Federal Rules of Civil Procedure requires that 'affidavits' that support or oppose summary judgment motions 'shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence' ").

prima facie case of discrimination, and Defendant is entitled to summary judgment.

B. Pretext

Even if Plaintiff established his *prima facie* case of discrimination, Defendant is still entitled to summary judgment because Plaintiff cannot show Defendant's legitimate, nondiscriminatory reasons for Plaintiff's termination are merely pretext for race discrimination. Defendant's legitimate reasons for termination – Plaintiff's inappropriate conduct towards Ms. Stringer, his attempt to convince her not to report his conduct, and his previous suspension – are all reasons "that might motivate a reasonable employer,"[41] and therefore Defendant has satisfied its "exceedingly light" burden of producing a legitimate, non-discriminatory reason for Plaintiff's termination.[42]

Because Defendant has met its burden, Plaintiff must present sufficient evidence to create a genuine issue of material fact that Defendant's proffered legitimate reasons for termination are merely pretext for race discrimination. To establish pretext, a "plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. . . . [The

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[41] *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

[42] *See Vessels v. Atlanta Ind. Sch. Sys.*, 408 F.3d 763, 769-770 (11th Cir. 2005) (noting that employer's burden is exceedingly light and is satisfied as long as the employer articulates a clear and reasonable non-discriminatory basis for its actions).

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."[43] "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its actions."[44] Evidence establishing pretext may include the same evidence initially offered to establish the *prima facie* case of discrimination.[45] Ultimately, the Court's inquiry is limited to "whether the employer gave an honest explanation of its behavior."[46]

Plaintiff shows neither that Defendant's proffered reasons for termination are unworthy of credence nor that a discriminatory reason motivated his termination. The record reveals no "weaknesses, implausibilities, inconsistencies, or contradictions" in Defendants' rationale for Plaintiff's termination,[47] and Plaintiff

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[43] *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005) (emphasis added) (quotations and citation omitted).

[44] *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (quotations and citation omitted).

[45] *Wilson v. B/E Aerospace*, 376 F.3d 1079, 1088 (11th Cir. 2004).

[46] *Chapman*, 229 F.3d at 1030 (quotation omitted).

[47] *See Holland v. Gee*, 677 F.3d 1047, 1055-56 (11th Cir. 2012).

fails to establish that any discriminatory animus motivated Defendant's decision to terminate him.[48] A plaintiff may not establish pretext simply by questioning the wisdom of the employer's reason.[49] Instead, he must meet the employer's reason "head on" and rebut it.[50]

While Plaintiff may have felt his termination was unfair, this Court does not sit as a "super-personnel department," and it does not review the wisdom of an employer's business decisions, no matter how mistaken or unfair they may seem, as long as the action was not for a prohibited discriminatory reason.[51] Without a similarly situated comparator or any other sufficient evidence to support an inference of intentional discrimination, Plaintiff has failed to establish his claim of racial discrimination, and Defendant is entitled to judgment as a matter of law.

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[48] Plaintiff claims that his supervisor, George Pierce, held longstanding animus for him. However, outside of this conclusory allegation, Plaintiff points to no evidence of discriminatory animus or that Pierce had any role in the decision to terminate him.

[49] *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

[50] *Wilson*, 376 F.3d at 1088.

[51] *See Alvarez v. Royal Atlantic Dev., Inc.*, 610 F.3d 1253, 1266-67 (11th Cir. 2010).

CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment [Doc. 16] is hereby **GRANTED**.

SO ORDERED, this 29th day of March, 2016.

S/ C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES
DISTRICT COURT