UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIA McSWAIN,

Plaintiff,

v.

WORLD FUEL SERVICES CORPORATION,

Defendant.

CASE NO. 1:20-CV-21203-Cook/Goodman

MEMORANDUM IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION

I. INTRODUCTION

For nearly six years Maria McSwain worked in World Fuel Services' ("WFS") Human Resource ("HR") department. She also served as a senior enlisted Airman in the Air Force Reserves. The first two years of McSwain's career at WFS were relatively uneventful with her reserve duty generally confined to weekend obligations. SOF[1] ¶75. Yet even then her supervisor, Bernardo Buraglia, griped about the extra work and expenses McSwain's military related absences caused the company. SOF ¶75.

In the summer of 2016 McSwain applied for a promotion and pay raise. SOF ¶76 Buraglia agreed. SOF ¶76. In late-September 2016 McSwain learned she'd be deployed to Kuwait from January – August 2017. SOF ¶ 76. When McSwain told Buraglia this he flew into a rage. SOF ¶76. Buraglia then told McSwain that while her promotion (which should have (and could have) occurred on October 1, 2016) was approved it would not be effective until McSwain returned from deployment. SOF ¶77. This is discrimination. An employer cannot delay an employee's promotion on account of their military service obligation. 38 U.S.C. §4311(a). On November 16,

[1] SOF = Statement of Fact paragraphs on Ms. McSwain's LR 56.1(b) Statement of Facts.

2016, McSwain sent Buraglia a two page email calling him out for violating USERRA. SOF ¶77. And while Buraglia agrees that the information contained in the email is accurate, SOF ¶77, he does not recall (or disputes) screaming at McSwain over the next few days in retaliation for her having the nerve to accuse him of discriminating. SOF ¶78. WFS claims it investigated McSwain's 2016 USERRA complaint but it didn't. SOF ¶14, 28, 80. Ken Gavsie, WFS's in-house counsel, says Maria Palacio (much more on her below), investigated the 2016 allegation while Palacio claims Gavsie did. SOF ¶14, 28. But in the course of addressing McSwain's 2016 USERRA complaint Gavsie promised to make her promotion effective October 1, 2016 only to relent and have Palacio (who on one hand claims McSwain flat out lied about Buraglia claiming that McSwain's promotion was delayed because of the deployment in violation of USERRA but on the other hand claims not to have investigated McSwain's 2016 USERRA complaint) make the promotion effective January 1, 2017. SOF ¶15, 16, 96. WFS now claims that it could not have promoted McSwain in October (or November) 2016 because that was "not a promotional cycle" but that after the fact claim is demonstrably false: there is no "promotional cycle" as WFS can promote (and has promoted) employees whenever it wants including, to use the operative timeframe, various days throughout the October – November 2016 timeframe nor is it a requirement to have a "compensation and title review" complete before a promotion is effective. SOF ¶8, 11. Indeed, WFS later promoted of all of McSwain's peers on October 1, 2018, as part of a "urgent retention exercise" and did so without a "compensation and title" review. *Id.*

WFS then argues that McSwain's October 2018 failure to promote claim should be dismissed because the decision to make the promotion and pay increases was "made no later than September 11, 2018," i.e. before McSwain told WFS of another round of upcoming military duty. (Dkt. 72, pg. 6) Whether that is true is something for a jury to decide. The 11th Circuit and U.S. Supreme Court make clear that "[f]requently, acts of discrimination may be hidden or subtle; an

employer who intentionally discriminates is unlikely to leave a written record of his illegal motive, and may not tell anyone about it [as] there will seldom be 'eyewitness' testimony as to the employer's mental processes." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1537 (11th Cir. 1997)(*citing United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983)).[2] Such is the case here, for in deciding the truthfulness of WFS's "we made the decision in early-September" defense a jury will consider:

(a) upon McSwain's November 2018 return to work she asked Palacio why she did not get promoted and claimed that her non-promotion was discriminatory and in response Palacio did not object or provide any explanation for McSwain's non-promotion, SOF ¶41, 106;

(b) it was only after McSwain, in November 2019, filed another USERRA discrimination complaint that Palacio and Gavsie came up with the idea of calling the October 2018 promotions a "retention exercise" (a term heretofore never used at WFS) and based the existence of this "retention exercise" on a September 17, 2018, email that does not say "retention," state or imply the imminence of any promotions or pay raises, and does not mention Margie Tolego, Carmen Garcia, or Laura Fawley - - - three of Ms. McSwain's peers who got promoted on October 1, 2018 - - - and whose names don't come up until September 27, 2018 - - - four days *after* McSwain told Palacio of her October 2018 duty, SOF ¶29, 89;

(c) Palacio and Gavsie (the after-the-fact architects of this "retention exercise") can't even agree on what criteria was used to include or exclude workers from the "retention exercise" and Fernando Casadevall, WFS's Chief Human Resources Officer (named in McSwain's 2019 USERRA complaint (SOF ¶99) but who also investigated the 2019 USERRA complaint (which a juror could view as a conflict of interest)) doesn't know what criteria was used. SOF ¶90.

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[2] Ms. McSwain has moved for summary judgment adjudication of her 38 U.S.C. § 4312-4313 claim. (Dkt. 71) This analysis relates to Ms. McSwain's § 4311 claims.

(d) other made up after the fact criteria (none of this was documented at all in 2018) WFS uses in explaining why it did not promote McSwain in October 2018 is (i) that McSwain was not "functioning at a global level" or doing "director level work"; (ii) WFS's general practice is to only promote employees once each year; and, (iii) plaintiff had performance related issues; (Dkt.72, p. 6), however, a jury could reasonably conclude otherwise because (iv) McSwain did director/global level work (SOF ¶42, 43) (v) McSwain cites specific examples of other WFS employees getting promoted twice in the same year (SOF ¶38, 76) and (vi) McSwain was never told by Palacio (at the time she complained of discrimination in November 2018 regarding the October 2018 "retention exercise" or ever) that her work performance was lacking. SOF ¶41, 90. In fact, McSwain's performance reviews are positive. SOF ¶103.

Here the evidence could allow a jury to conclude that McSwain's military related absences cost the company money and more work, that the workload was especially high in September 2018 (SOF ¶92), and that McSwain's non-inclusion in this mid-2018 "retention exercise" was WFS's way of sending her a message of "we don't want you", SOF ¶91, for the word retain means "to keep in possession or use"[3] and WFS certainly can't possess or use McSwain when she is off serving in the military. Further, this case involves high level HR professionals from a Fortune 500 company who aren't dense enough to overtly admit to discriminating or retaliating. SOF ¶21. And while Palacio may have written an email or two supporting McSwain's military service her actions spoke otherwise as Palacio would express frustration at McSwain's reserve duty, try to convince McSwain to get out of it at times, and, most tellingly, told McSwain that she (Palacio) would meet with Casadevall to request a pay raise for McSwain but she never did do but, in other

[3] "Retain" Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/retain?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (*last visited* January 25, 2021)

contexts, had no problem advocating for significant pay raises so long as it benefitted the company. SOF ¶21, 87, 92, 102. Both the delayed 2016 promotion and the 2018 non-promotion have caused McSwain quantifiable financial harm ranging from $5,426 – $29,984 in lost wages for the October 1, 2016 – January 1, 2017, delay and $3,125/month following the October 1, 2018, non-selection. SOF ¶101.

Regarding Plaintiff's demotion claim, it's simple. Demote means "to relegate to a less important position"[4] and it (in the event the Court denies Plaintiff's pending summary judgment motion on this claim) it should be for a jury to decide whether taking away McSwain's Marine and Aviation duties - - acts that WFS employee Chad Naylor[5] said affected her reputation and career progression within WFS - - - constitutes a demotion. SOF ¶53.

Lastly, context is important. From 2015 to 2020 51 of the 71 veterans WFS hired either resigned or were fired. SOF ¶81. Its CHRO thinks veterans are only good for driving trucks. SOF ¶85. At least one other employee, Patricia Ojeda, filed an internal USERRA complaint against WFS that WFS didn't investigate. SOF ¶82. Other HR employees exchange emails about military reservists who are "constantly volunteering" for military duty. SOF ¶83. The company's code of conduct does not expressly include military reservists as a protected class but instead the company's policy calls outside employment a "conflict of interest" with no written exception for military reserve duty. SOF ¶85.[6] WFS's military leave policy itself violates USERRA by

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[4] "Demote" Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/demote?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (*last visited* January 25, 2021)

[5] WFS, which bears the burden of proof on its USERRA defenses, submits no testimony from Mr. Naylor rebutting this point.

[6] WFS may claim that its pay continuation policy is above and beyond what USERRA requires; however, in this context that is not true since WFS pays full wages for months of maternity leave USERRA requires payment of full wages for a similar period of military leave. *See e.g. Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 528 (E.D. Pa. 2019).

requiring workers to submit military orders to HR before going on leave when USERRA imposes no such requirement. (Dkt 73-18, pg. 16 *citing* 000190) These acts are not the "stray remarks" of random workers happening on a factory floor but conscious decisions made in highest levels of the Human Resources office of a Fortune 500 company. Against this backdrop Ms. McSwain left WFS as the lowest paid Senior HRBP in the country - - - a fact that WFS itself could not disprove as part of its "investigation" into her 2019 complaint. SOF ¶60.

Ms. McSwain's discrimination, retaliation, failure to employ, hostile work environment, and failure to promote claims should be tried before a jury.

II. ARGUMENT

A. SUMMARY JUDGMENT IS IMPROPER BECAUSE OF TRIABLE ISSUES OF FACT.

As a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial. *See Morissette v. United States*, 342 U.S. 246, 274 (1952); *United States v. Gregory*, 730 F.2d 692, 702 (11th Cir. 1984). The issue of discriminatory intent is a pure question of fact. *Larkin v. Pullman-Standard Div., Pullman*, 854 F.2d 1549, 1574 (11th Cir. 1988). This makes sense as it is rare for an employer, especially high-level HR professionals implicated in this case, to openly admit to discrimination or retaliation. SOF ¶67. To that end a "plaintiff may also defeat a summary judgment motion by presenting 'a convincing mosaic' of circumstantial evidence that 'raises a reasonable inference that the employer discriminated against [him].'" *Awaad v. Largo Med. Ctr., Inc*., 564 F. App'x 541, 544 (11th Cir. 2014) (*quoting Smith v. Lockheed-Martin Corp*., 644 F.3d 1321, 1328 (11th Cir. 2011)). "A 'convincing mosaic' may be shown by evidence that demonstrates, among other things, (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 v. City of Union City*,

934 F.3d 1169, 1185 (11th Cir. 2019) (quotation omitted); *Dees v. Hyundai Motor Mfg. Ala., LLC,* 368 F. App'x 49, 51 (11th Cir. 2010) (“Because "discrimination is seldom open or notorious," circumstantial evidence is critical, and "[t]he court can infer discriminatory motivation under the USERRA from a variety of considerations") (citation omitted). Summary judgment should be denied[7] because a convincing mosaic of circumstantial evidence exists in this case.

B. ISSUES OF FACT EXIST REGARDING WHETHER MS. MCSWAIN'S MILITARY SERVICE WAS A *MOTIVATING FACTOR* (NOT THE ONLY FACTOR) IN MS. MCSWAIN'S § 4311 DISCRIMINATION CLAIMS.

1. McSwain establishes prima facie USERRA discrimination claims.

For a *prima facie* USERRA discrimination claim the employee must prove: (a) membership in the armed services; (b) an adverse employment decision; and, (c) that the employee's military service was a "motivating factor" – not the sole factor – in the employer's adverse decision. 38 U.S.C. §4311(c)(1)-(2). "A motivating factor does not mean that it had to be the sole cause of the employment action, but it has to be one of the factors that the employer 'relied on, took into account, considered, or conditioned its decision on that consideration.'" *Coffman v. Chugach Support Servs., Inc*., 411 F.3d 1231, 1234 (11th Cir. 2005). A USERRA plaintiff can establish the “motivating factor” element through direct or circumstantial evidence. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

As to the ***direct evidence,*** Buraglia did not dispute the accuracy of McSwain’s November 16, 2016, email to him which, *inter alia,* accused Buraglia of delaying McSwain’s promotion said concluded **“[t]he decision of delaying the promotion until my return from deployment is not in compliance with the United States Employment and Reemployment Act**.” SOF ¶77. Buraglia complained about WFS incurring expenses because of McSwain’s military leave. SOF

[7] Ms. McSwain withdraws her 38 U.S.C. § 4318 pension claim.

¶76. Palacio's body language and mannerisms were negative when McSwain told Palacio of her need for military leave, especially during the busy September 2018 timeframe. SOF ¶21. The ***circumstantial evidence*** germane to the discrimination and retaliation claims in this case includes:

(a) ***Inconsistencies, unwritten criteria, and after the fact justifications***. *Howard v. BP Oil Co., Inc.,* 32 F.3d 520, 526-28 (11th Cir. 1994). Those abound here. Gavsie and Palacio can't agree on who investigated McSwain's 2016 complaint (SOF ¶14) Gavsie and Palacio can't agree on what criteria was used to exclude McSwain from the 2018 "retention exercise" (SOF ¶90) - - - a term never used in WFS until Gavsie made it up *after* McSwain accused WFS of violating USERRA by not promoting her in 2018. SOF ¶89. Gavsie and Palacio can't fully agree on who made the decision to exclude McSwain from the retention exercise. SOF ¶27(e). Palacio had no explanation for why McSwain wasn't promoted when McSwain asked her on November 8, 2018[8] (SOF ¶106) but by December 5, 2019, and only after McSwain complained did Palacio (with Gavsie's assistance but without the support of *any* contemporaneous documentation) advance a slew of reasons (*ranging* from alleged performance problems *to* non-written policies saying WFS can't promote people twice in the same where when the evidence shows that happens a lot *to* the decision was made before WFS knew McSwain was going on military leave *to* everyone but McSwain complained of being overworked in September 2018 so they got promoted even though McSwain also complained of being over worked) as after-the-fact justification for the October 2018 non-promotion. SOF ¶26, 27, 38, 66, 67, 90. WFS advances a variety of excuses (e.g. a "promotion cycle" or supposed need for a written job description and compensation review to be done) as to why McSwain was not promoted in October 2016 but none of these explanations were

[8] This fact distinguishes this case from *Landolfi v. City of Melbourne, Fla.*, 515 F. App'x 832, 836 (11th Cir. 2013). *Landolfi* held "[it] is also worth noting that the Fire Department informed Landolfi in May 2011—*before Landolfi filed his complaint*—that it passed him over for promotions due to some poor decisions" - - - which is not the case here.

documented at the time (an act expected of a senior level HR professional like Palacio or experienced employment lawyer like Gavsie) and all are disputed by WFS testimony and/or records. SOF ¶8, 79. Indeed, Palacio (and Gavsie) can't credibly claim to not have been able to promote McSwain in October of 2016 when Palacio (i) promoted five of McSwain's peers in October 2018 (as part of a "urgent" [9] retention exercise (SOF ¶8(e)) (ii) cites no documented intervening policy allowing such quick promotions in 2018 but not 2016, and (iii) when WFS promoted numerous individuals on random days throughout October and November 2016. SOF ¶8. Gavsie and Palacio can't agree on what criteria was used to promote McSwain's peers in 2018. SOF ¶90. Further Casadevall, who investigated McSwain's 2019 complaint along with Gavsie, had no clue what criteria was used for the October 2018 "retention exercise." SOF ¶90.

(b) ***A company's failure to follow its own policies.*** *Bass v. Board of County Com'rs, Orange County, Fla*., 256 F.3d 1095, 1108 (11th Cir. 2001) (departure from policies) *overruled in part on other grounds Crawford v. Carroll,* 529 F.3d 961 (11th Cir. 2008). WFS policy states that complaints are to be investigated. SOF ¶98. That did not happen to McSwain's 2016 complaint. SOF ¶14, 80, 104. WFS's policies promise confidentiality for those who complain of discrimination but Casadevall told McSwain's new supervisor of her 2019 USERRA complaint. SOF ¶98. Further, WFS's investigation into McSwain's 2019 complaint was not "full" because it was not impartial: McSwain's 2019 USERRA complaint named Casadevell (who was also Palacio's supervisor) as witnesses but Casadevall still investigated and when McSwain pointed out (to Gavsise (who was named in McSwain's 2016 complaint)) that Casadevall's involvement

[9] Indeed, a jury could also conclude WFS's selective application of "urgency" is evidence of unequal treatment and pretext: Gavsie claimed the "urgency" in 2018 was based on the "likelihood" of HR employees leaving WFS but could not name a single HR employee who actually intended to leave. (SOF ¶8(e)) WFS deemed promotions "urgent" in 2018 because of speculation that someone might leave the company and could have, but didn't, use "urgency" as a criteria to make McSwain's promotion effective October 1, 2016.

was a conflict of interest Gavsie described McSwain's comment as "disappointing but not surprising" in an email he forwarded to WFS's chief legal counsel Anthony Lake - - who would later authorize WFS's baseless "unjust enrichment" lawsuit against McSwain. SOF ¶84. The investigation was not "full" because it was conducted by a person who did not know what USERRA stood for or the elements of a USERRA discrimination claim. SOF ¶28, 99.

(c) ***Piling on or adding reasons for an adverse employment action which were not previously stated.*** *Jones v. Gulf Coast Health Care of Delaware, LLC*, 854 F.3d 1261, 1275 (11th Cir. 2017); *Mock v. Bell Helicopter Textron, Inc.*, 196 F. App'x 773, 774 (11th Cir. 2006). *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1496 (11th Cir. 1987) (noting that employer's decision to obtain evidence after the fact suggested pretext). *See supra.* Palacio claims McSwain was relieved of her Aviation and Marine duties because of communication difficulties but McSwain was never told of any of those alleged defects and WFS points to not specific complaint from any named human being regarding McSwain's performance defects. SOF ¶42, 103. In fact, evidence of pretext is raised if an employer allegedly bases its adverse action on the plaintiff's performance problems when the performance evaluations are positive. *Farley v. Nationwide Mut. Ins. Co*., 197 F.3d 1322, 1337 (11th Cir. 1999). Here McSwain's performance evaluations are positive. SOF ¶103.

(d) ***Lack of an investigation is evidence of pretext***. *Seals v. Lee Brass Foundry LLC*, 271 F. Supp. 3d 1302, 1326 (N.D. Ala. 2017). In analyzing facts analogous to this case *Seals* held:

> Finally, although [defendant] claims that he conducted an investigation into the circumstances surrounding the Plaintiff's termination, a reasonable jury could conclude that he conducted no investigation, in light of the fact that he had no documentation evidencing any investigation and could remember none of it, and at least two of the individuals he claimed to have spoken to … state that they were not part of any investigation. In light of these facts, the Court concludes that either the Defendant has failed to offer a clear legitimate non-discriminatory reason, or that the reasons which it gave are inconsistent and otherwise implausible, thereby establishing that, for summary judgment purposes at least, they are a mere pretext

for discrimination. *Seals v. Lee Brass Foundry LLC*, 271 F. Supp. 3d 1302, 1326 (N.D. Ala. 2017)

Similar evidence exists here. McSwain's 2016 complaint wasn't investigated. SOF ¶14, 80. Again there are no notes from it, no written reports of it, no emails documenting its existence. SOF ¶14, 80. Buraglia does not recall being asked any questions regarding McSwain's 2016 allegations. SOF ¶14, 80. Further evidence of a lack of a 2016 investigation is WFS's failing to admit or deny salient paragraphs of Ms. McSwain's complaint regarding Buraglia's treatment of her - - - treatment McSwain complained about to Gavsie and Palacio on November 27, 2016 and November 28, 2016 (Dkt. 73-6, Dkt. 73-7) but that WFS could not fully admit or deny (in 2020) when responding to Ms. McSwain's (Amended) Complaint. *Compare* Dkt 50, ¶21-23 *with* Dkt. 51, ¶21-23. Put differently: had WFS actually "fully investigated" (as its policy promises and as Gavsie/Palacio claim) McSwain's November 27, and 28, 2016 allegations at the time then WFS would have been able to admit or deny said allegations.

(e) ***Biased investigation or inadequate investigation is evidence of pretext.*** *Smothers v. Solvay Chemicals, Inc*., 740 F.3d 530, 542-43 (10th Cir. 2014); *Heaton v. The Weitz Co., Inc*., 534 F.3d 882, 890-91 (8th Cir. 2008) (reasonable jury could believe investigator was biased and investigation was "cursory and indifferent, failing to demonstrate a good-faith effort to comply with Title VII."); *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1160 (10th Cir. 2008) (although couple together served employer for 28 years, they were never given the benefit of the doubt; employer seemingly relied only on evidence to the detriment of ADA plaintiffs). Here Gavsie outright admitted to McSwain that he was working on WFS's behalf. SOF ¶28(a). Gavsie already had negative feelings about McSwain's taking of paid time off, of which military leave is a variant. SOF ¶84. While Gavsie passes this off as a joke a reasonable jury could conclude differently given the context. Gavsie always credited Palacio when her version of events conflicted with McSwain

even though Palacio had been implicated in other discrimination matters that cost WFS money. SOF ¶28(c). A jury could reasonably infer Gavsie's disdain for McSwain in Gavsie's December 5, 2019, email to WFS's chief legal counsel, Anthony Lake. SOF ¶84. Palacio believed Buraglia over McSwain even though Buraglia admitted to not being truthful to McSwain. SOF ¶96. WFS could have hired a third party to investigate McSwain's repeated allegations of illegal USERRA violations occurring at the company's HR office but chose not to. SOF ¶100. And while WFS may argue courts supposedly can't second guess HR decisions it is also true that when "there [is] sufficient other circumstantial evidence in the record" then "the quality of [defendant's] investigation may have some bearing on the truthfulness of [defendant's] proffered reasons" which, in essence, is "the sort of disputed factual issues that a jury should sort out." *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 407 (7th Cir. 2007), *aff'd* 553 U.S. 442 (2008).

(f) ***Failing to ask the employee her side of the story is probative of pretext***. *Smothers v. Solvay Chemicals, Inc.,* 740 F.3d 530, 542-43 (10th Cir. 2014); *Gorzynski v. JetBlue Airways Corp*., 596 F.3d 93, 108 (2d Cir. 2010) (ADEA); *Reed v. Cracker Barrel Old Country Store, Inc*., 133 F. Supp. 2d 1055, 1073 (M.D. Tenn. 2000); *Ion v. Chevron USA, Inc*., 731 F.3d 379, 394-95 (5th Cir. 2013). WFS did not ask McSwain her side of the story in 2016 or 2019. SOF ¶28, 59. For while McSwain put her allegations in writing, WFS then got Buraglia and Palacio's version of events but never circled back to get McSwain's side of the story. SOF ¶14, 28. It is HR 101, and WFS practice, to always interview the complaining party so you can get their side of the story. SOF ¶101, 104. That a sophisticated HR outfit from a Fortune 500 company would not interview McSwain (or hire an outside investigator) is evidence of willful misconduct and something that a reasonable jury could construe as the company not really wanting to get to the bottom of the issue. WFS also didn't interview Ms. Ojeda regarding her USERRA discrimination complaint. Dkt. 31-2, ¶10.

(g) ***Closeness in time between the protected activity and adverse action is evidence of pretext.*** *Terry v. Laurel Oaks Behavioral Health Ctr., Inc.*, 1 F. Supp. 3d 1250, 1279 (M.D. Ala. 2014). McSwain told Buraglia of her deployment in late September 2016 and two months later her promotion is delayed. SOF ¶76-77. McSwain tells Palacio that she's going on military orders on September 23, 2018 and Palacio does not include McSwain on that promotion list that is attached to a September 27, 2018 email. SOF ¶105. McSwain complains to Palacio on November 8, 2018 that her non-selection for promotion was because of military reasons and eight days later Palacio demotes her by removing her Marine and Aviation duties which causes McSwain reputational and career harm. SOF ¶44-45, 53. *See also infra* ¶C.1.2.

(h) ***Dishonesty from key decisionmaker is probative of pretext.*** *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000). Palacio claims to support McSwain's military obligations and promised to ask Mr. Casadevall to give McSwain a pay increase but Palacio never contacted Casadevall to do so. SOF ¶87. On December 5, 2019, Gavsie tells his boss (Lake) that "Fernando [Casadevall] is not the subject of her [2019 USERRA] complaint, so there would not be an issue had he been involved in the process anyway" but Casadevall is mentioned in that complaint three times, including as part of McSwain's allegation that she is not fairly compensated due to her "military affiliation." (*Compare* SOF ¶84 (*citing* Gavsie Dep. Ex. 17E) *with* Dkt. 73-14, p.1, 4 (McSwain's 2019 USERRA complaint))

(i) ***Defendant's "general policy and practice with respect to [protected class] employment" is probative of pretext.*** *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973). Of the 71 veterans hired by WFS from 2015 to 2020, 51 have either resigned or were fired. SOF ¶81. WFS's CHRO thinks veterans are only good for driving truck. SOF ¶85. Ms Ojeda, filed an internal USERRA complaint against WFS that WFS didn't investigate. SOF ¶82. Other HR employees are aware of complaints of military reservists who are "constantly volunteering" for

military duty but do nothing to address those complaints. SOF ¶83. The company's code of conduct does not expressly include military reservists as a protected class but instead the company's policy calls outside employment a "conflict of interest" with no written exception for military reserve duty. SOF ¶85.[10] WFS's military leave policy itself violates USERRA by requiring workers to submit military orders to HR before going on leave when USERRA imposes no such requirement. (Dkt 73-18, pg. 16 *citing* 000190)

Defendant cites cases for the proposition that a court should not second guess an employers' business decisions; however, in doing so, the Court "must determine, in view of all the evidence, whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons [for the challenged employment decision] to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct." *Saweress v. Ivey*, 354 F. Supp. 3d 1288, 1307 (M.D. Fla. 2019)(*citing Conner v. Lafarge N. Am., Inc.*, 343 F. App'x 537, 541 (11th Cir. 2009)). And Ms. McSwain has done so here. For "no matter its form, so long as the circumstantial evidence raises a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper." *Saweress*, 354 F. Supp. 3d at 1304. From the above-referenced mosaic of circumstantial evidence a jury could conclude that McSwain's military service was a motivating factor in WFS's 2016 decision to not promote McSwain on October 1, 2016 but, instead, wait until January 1, 2017, WFS's decision to not include McSwain in the October 1, 2018 "retention exercise," and WFS's decision to keep McSwain the lowest paid Senior HR BP in the United States following her 2019

[10] WFS may claim that its pay continuation policy is above and beyond what USERRA requires; however, in this context that is not true since WFS pays full wages for months of maternity leave USERRA requires payment of full wages for similar periods of military leave. *See e.g. Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 528 (E.D. Pa. 2019); SOF ¶97.

USERRA complaint. Now the burden shifts to WFS to prove its affirmative defense an undertaking that it simply cannot meet.

2. WFS cannot meet its affirmative defense as it needs to show <u>it would</u> (not could) have taken the same actions in absence of McSwain's military service.

"[T]o prevail on a USERRA affirmative defense, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext." *Brown v. Houser*, 129 F. Supp. 3d 1357, 1377 (N.D. Ga. 2015)(citations omitted). This "affirmative defense burden is a "high hurdle" and an "uphill climb." *Id.* (citations omitted). To prevail, "the employer must show that its defense is so strong that any reasonable jury must accept it." *Id.* (citations omitted). "Although the [employer] has the burden of proving that the adverse action would have been taken in any event," summary judgment is appropriate where the employer's evidence is "so compelling and so meagerly contested ... that a trial would be a waste of time." *Id.* (citations omitted). Importantly, it is not sufficient for the employer to show that it ***could*** have taken the same action against an employee: it must show that it ***would*** have taken the same action regardless of the employee's protected status as the Supreme Court has observed that "proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995).

Under this rule WFS must show that before McSwain told Buraglia of her military duty in September 2016 WFS was already planning on promoting McSwain on January 1, 2017; or, more practically speaking, had McSwain not told Buraglia of the September 2016 deployment or opposed Buraglia's discrimination in November 2016 nothing would have changed, meaning that McSwain still would have been promoted on January 1, 2017. This WFS simply cannot do. For it has provided no documents, declarations, or deposition testimony that its decision to promote McSwain on January 1, 2017 *had nothing to do* with her military service or opposition to

Buraglia's discrimination. Indeed, McSwain's unrebutted November 16, 2016, email to Buraglia proves the opposite, i.e. that her military mobilization *was the factor* that caused her promotion date to change. SOF ¶77.

The same holds true for the 2018 promotion claim. While WFS valiantly tries to claim that its decision to not include McSwain in the "retention exercise" was made before McSwain told WFS of the October 2018 mobilization, WFS's after the fact and ever changing reasons do not save it. SOF ¶26, 27, 89-91. It should be for a jury to decide whether Palacio's/Gavsie's version of events (i.e. that the decision was made before McSwain informed WFS of her October 2018 military leave) or McSwain's version of events are true. For both Palacio and Gavsie have expressed frustration with Plaintiff (Gavsie regarding Plaintiff's paid time off, of which military related pay continuation is one such type of PTO, and Palacio disbelieving McSwain's allegation about Buraglia and expressing frustration about McSwain's absences) and that, coupled with the strong and substantial mosaic of circumstantial evidence set out above show that Defendant's motion for summary judgment on these claims should be denied. Further, because both Buraglia and Palacio were hostile towards McSwain's military status, "their actions can be used to establish an inference" of "a discriminatory motive." *See Coffman*, 411 F.3d at 1238 (listing an employer's open hostility towards an employee's military status as circumstantial evidence of a discriminatory motive). SOF ¶21, 76 – 78.

C. ISSUES OF FACT EXIST REGARDING MS. MCSWAIN'S § 4311 RETALIATION CLAIMS.

1. WFS confuses the burden of proof on a USERRA retaliation claim and ignores Ms. McSwain's USERRA-protected activities.

Defendant (1) cites *Coffman* for the proposition that USERRA retaliation claims can only be proven via the "but for" test, then (2) argues that the only way of proving a retaliation claim is through timing, and (2) ignores Ms. McSwain's USERRA protected oppositional activity. (Dkt.

72, p. 12) As to point (1), *Coffman* is not a USERRA retaliation case; it is a USERRA discrimination case. And USERRA's text (along with 11th Circuit cases) makes clear the burden is "motivating factor" for retaliation claims. 38 U.S.C. § 4311(c)(2); *Brown*, 129 F. Supp. 3d at 1378–79 (*citing* 38 U.S.C. §4311(b) & (c)(2)); *Ward v. United Parcel Serv.*, 580 F. App'x 735, 739 (11th Cir. 2014). As to point (2), causation in a retaliation claim can be shown by more than just timing. *See Ward,* 580 Fed. Appx., at 739; *Brown,* 129 F. Supp. 3d at 1379-1382. As to point (3), WFS ignores the fact that USERRA's anti-retaliation scheme protects employees who take "action to enforce a protection provided under this chapter," or who take military leave as that is "exercising" a USERRA right, 38 U.S.C. §4311(c)(2)(A) & (B), and that's exactly what McSwain did when she called Buraglia out for violating USERRA on November 16, 2016 and accused WFS of doing the same on November 27 & 28, 2018, in opposing WFS's violation of Ojeda's USERRA rights on September 27, 2018, in telling Palacio, on November 6, 2018, that her non-selection for promotion in October 2018 was because of her military service, and on November 13, 2019, in complaining about WFS's continued USERRA violations, and, on December 5, 2019, telling Gavsie that she would file a USERRA complaint with the Department of Labor. SOF ¶77, 84 (*see* McSwain's 12/5/19 email to Gavsie), 105, 106, Dkt. 73-6; Dkt. 73-7. McSwain's going on military leave and informing WFS of the same is also protected activity. SOF ¶26, 76. Also, in a retaliation case the plaintiff must show that the complained of action would dissuade a reasonable person from pursuing a charge of discrimination and said retaliatory acts are legally actionable after the employer-employee relationship has ended. To wit:

> Plaintiff need not claim that UPS's actions impacted his employment status in order to properly allege an adverse employment action. In the context of a retaliation claim, "the type of employer conduct considered actionable has been broadened from that which adversely affects the plaintiff's conditions of employment or employment status to that which has a materially adverse effect on the plaintiff, irrespective of whether it is employment or workplace-related." *Lambert v. United Parcel Serv., Inc.*, 266 F. Supp. 3d 1369, 1372 (M.D. Fla. 2017)*(citing Crawford v.*

> *Carroll*, 529 F.3d 961, 973 (11th Cir. 2008). Under this "decidedly more relaxed" standard, a materially adverse action is one that "well might have dissuaded a reasonable worker from making...a charge of discrimination." *Id.* (*citing Crawford,* at 973–74 (*quoting Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)).

Clearly the 2016 delayed promotion, 2018 non-promotion, 2018 demotion/removal of job duties, and 2020 counterclaim would dissuade a reasonable person from making a charge of discrimination as would Gavsie's decision a la, "I suspect when Maria does not get what she wants this time (unlike the last time she filed an internal complaint in 2016)[11], she will proceed with filing her USERRA complaint," to not increase Ms. McSwain's pay on December 5, 2019, the day Ms. McSwain threatened to file a DOL complaint against WFS. SOF ¶84, 101.

2. Ms. McSwain makes prima facie USERRA retaliation claims, proves adverse actions, and incorporates, as causation, the evidence she uses in support of her § 4311 discrimination claims.

The protected activity giving rise to McSwain's actionable retaliation claims are (a) her November 16, 2016, email to Buraglia, (b) her November 27 & 28, 2016, communications to Gavsie and Palacio alleging the same, (c) her September 27, 2018, email to Ojeda's supervisors (which Palacio was aware of) claiming WFS was violating USERRA, (d) her November 6, 2018 meeting with Palacio where she accused WFS of not promoting her because of her military service, her November 2019 USERRA complaint with December 5, 2019 email to Gavsie telling him she would be making a Department of Labor complaint, (e) her taking of military leave in the January – August 2017 timeframe, (f[12]) her telling Buraglia (in September 2016) of her upcoming (Jan – August 2017 deployment), (g) her telling Palacio of her need to take military leave in the August

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[11] This is another misrepresentation: McSwain did not "get what she wanted in 2016."

[12] As it relates to points (e), (f), (g), and (h) telling one's employer of their need to go on military leave and taking that leave is also protected activity that falls under the ambit of USERRA's anti-retaliation statute, 38 U.S.C. § 4311(b)(4), because taking leave and telling one's employer of the need for leave are the exercise of a USERRA right.

and September 2018 timeframe (h) her October 1 – 31, 2018, military leave, and (i) this lawsuit. Following each protected activity the following adverse actions ensured: delayed promotion (2016); demotion (2018), affirmatively not raising her pay even though McSwain proved her work load was high but she was the lowest paid Senior HRBP in the US (2019) and WFS's counterclaim. SOF ¶60, 77, 84, 105, 106, Dkt. 73-6; Dkt. 73-7.

As it relates to the retaliatory counter claim, WFS, on pages 12 and 13 of its brief, argue McSwain's counter-claim related retaliation claim predicated on WFS's (baseless) lawsuit fails as a matter of law. WFS made similar arguments in opposing McSwain's motion to amend which the Court ostensibly rejected in granting McSwain's motion. Dkt. 40 & 46. Here both McSwain and Ojeda resigned from WFS, did not give two weeks-notice, but WFS sued McSwain to recoup pay continuation benefits but not Ojeda. Dkt. 31-2, ¶12-15. WFS has only ever sued three other employees and those employees violated non-competes and McSwain did not violate her non-compete. SOF ¶94. WFS won't disclose who decided to sue McSwain. SOF ¶95.

McSwain incorporates the direct and circumstantial evidence set out above regarding her USERRA discrimination claims but notes that there *is* temporal proximity involving many of her retaliation claims: in late-September 2016 McSwain tells Buraglia of her upcoming deployment and in mid-November 2016 learning that the promotion will be delayed because of the deployment. SOF ¶76-77. *Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1337 (11th Cir. 1999)(seven weeks constituted temporal proximity sufficient to demonstrate a causal nexus between protected activity and adverse employment action in an ADA case). On September 23, 2018 McSwain tells Palacio she is going on military orders and on September 27, 2018, McSwain does not show up on the HR promotion email whereas all of her co-workers do. SOF ¶26. On November 8, 2018, McSwain complains to Palacio that her non-selection is a USERRA violation and on November 16, 2018, Palacio demotes her. SOF ¶106.

D. MS. MCSWAIN'S § 4311 HOSTILE WORK ENVIRONMENT, § 4312-13, AND 4316 DEMOTION EMPLOYMENT CLAIMS.

Ms. McSwain incorporates her currently filed summary judgment motion as response to Defendant's summary judgment regarding her § 4312-13 and 4316 claims. Ms. McSwain incorporates the above analysis and evidence in support of her § 4311 hostile work environment claim.

E. SUMMARY JUDGMENT ON MS. MCSWAIN'S § 4302 CLAIM SHOULD BE DENIED AS WFS'S POLICY VIOLATES USERRA AND THE COURT HAS THE POWER TO ENJOIN WFS FROM IMPOSING SIMILAR REQUIREMENTS ON OTHER RESERVISTS IN THE FUTURE.

WFS's military leave of absence policy provides, in relevant part:

> You must notify the Human Resources Department of your need for military leave as soon as practicable after you become aware of the need for such leave. **You also need to bring your official military service orders to the Human Resources Department for review prior to commencement of the leave.** (Dkt. 73-18, pg. 16 *citing* 000190)

The same WFS handbook containing this policy also makes it a fire-able offense if an employee violates "any other rule, policy, or regulation promulgated by World Fuel Services." *Id. citing* 000203. However, this fire-able offense is based off of a requirement the law does not impose. The USERRA makes clear that an employee does not need to provide orders to his or her employer before leaving work to serve in the military. The USERRA regulations provide that the military leave "notice may be informal and does not need to follow any particular format." 20 C.F.R. §1002.85(c)&(d).

Accordingly, the Court should deny WFS's summary judgment motion on this point and, instead, utilize USERRA's remedy provision to "require the employer to comply with the provisions of" USERRA and strike that portion of the WFS handbook and, as requested in Plaintiff's complaint, "enjoin Defendant from imposing such conditions in the future." 38 U.S.C. § 4323(d)(1)(a).

III. CONCLUSION

Defendant's Motion for Summary Judgement should be denied.

Dated on January 29, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those who have appeared in this action.

Dated this January 29, 2021.

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