Before the
Judicial Council of the Eleventh Circuit

Redacted General Order 2022-E

ON REQUEST FOR REVIEW OF DECISION FILED BY:

[redacted]

In Re: The Request for Review of Decision filed by [redacted] against the United States District Court for the [redacted] District of [redacted] under the [redacted] District of [redacted] Employment Dispute Resolution Plan.

ORDER

Before: WILLIAM PRYOR, Chief Judge, WILSON, JORDAN, ROSENBAUM, NEWSOM, BRANCH, LUCK, and LAGOA, Circuit Judges; and CORRIGAN, ALTONAGA, COOGLER, BATTEN, WALKER, MARKS, and BEAVERSTOCK, Chief District Judges.*

The non-disqualified members of the Judicial Council have considered the Request for Review of Decision filed by [redacted], dated July 23, 2021, in case number [redacted], under authority of the provisions of the United States District Court for the [redacted] District of [redacted] Employment Dispute Resolution Plan approved on [redacted].

In accordance with §V.C.4.–5. of that Plan, and for the reasons stated in its Memorandum Opinion, the Judicial Council hereby AFFIRMS the June 25, 2021, decision of Presiding Judicial Officer J. Randal Hall determining that [redacted] is entitled to no relief. All non-disqualified members concur.

FOR THE JUDICIAL COUNCIL:

Chief Judge

* Circuit Judges Jill Pryor and Britt Grant, and Chief District Judges J. Randal Hall and Marc T. Treadwell, took no part in this decision.

REDACTED MEMORANDUM OF MARCH 17, 2022

BEFORE THE ELEVENTH CIRCUIT JUDICIAL COUNCIL

IN RE [Complainant]

EDR Complaint No. [Redacted]

Memorandum Concerning Request for Review from the Final Written Decision of the Presiding Judicial Officer for the [_____ District Court]

Complainant [ ] requests review of the Presiding Judicial Officer's ("PJO") final written decision on [her] formal complaint against the [District Court] asserting claims of pregnancy discrimination, harassment based on pregnancy, abusive conduct, and retaliation under the [District Court's] Employment Dispute Resolution ("EDR") Plan. [*See generally* Vol. III, Tab 2 (Request for Review)][1] The PJO investigated [Complainant's] claims, during which investigation he interviewed [Complainant] and other witnesses and reviewed documents identified as relevant to [the] complaint. [*See* Vol. I, Tabs 20 (Witness Interviews) and 21 (Proposed Decision) at Exs. 1-17] Following the investigation, the PJO issued

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[1] Record cites are to the four-volume record, as finalized on appeal in an electronic and hard copy format. Cites include a reference to the volume, tab, and exhibit number (when available) where the record document can be found.

a final written decision concluding that none of [Complainant's] claims were meritorious. [Vol. I, Tab 28 (Final Decision)] After a careful review of the [District Court's] EDR Plan, the submissions of the parties, and the record—including the transcribed interviews conducted by the PJO, the relevant documents, the PJO's final written decision, and [Complainant's] objections to the decision—we **AFFIRM**.

BACKGROUND

[Complainant's] EDR claim stems from her employment as a term law clerk for [a judge in the District Court]. [*See generally* Vol. I, Tab 3 (Formal Complaint)] [Complainant] claims that [the judge] reduced her clerkship term and subsequently terminated her employment on account of her pregnancy, in violation of the [District Court's] EDR Plan. [*See id.* at 1-2] [Complainant] further claims that during her employment in [the judge's] chambers, she was harassed and subjected to abusive conduct on account of her pregnancy by [the judge's] career law clerk [ ]. [*See id.* at 1] Finally, [Complainant] claims that [the judge] retaliated against her because she complained about the above. [*See id.* at 18, 21]

I. [The judge] hires [Complainant], a former intern in his chambers

[Complainant] worked as an intern in [the judge's] chambers in August 2016, while she was in law school [ ]. [Vol. III, Tab 2 (Request for Review) at 2] As an intern, [Complainant] worked directly with [the judge's] career law clerk [ ] and his courtroom

deputy [ ]. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 7] In their interviews, [the career law clerk] and [the courtroom deputy] described [Complainant] as a personable intern who fit in well with chambers staff. [*See id.*; Vol. I, Tab 20 at [Courtroom Deputy] Interview, p. 4] In addition, [the courtroom deputy] recalled that [Complainant] had "impeccable paralegal skills" and that she was "fabulous" at tasks like "making notebooks." [Vol. I, Tab 20 at [Courtroom Deputy] Interview, p. 4] [The career law clerk] likewise thought [Complainant] did well with her intern assignments, which primarily were comprised of "discrete research" projects. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 7]

After she graduated from law school, [Complainant] worked in the general litigation section of a [ ] law firm for approximately a year and a half. [Vol. I, Tab 3, Ex. G ([Complainant] Resume)] In the fall of 2018, while [Complainant] was working at the law firm, [the judge] offered her a two-year term clerkship in his [ ] District [Court] chambers where she had previously interned. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 7] [Complainant] was pregnant with her first child when [the judge] offered her the clerkship. [*Id.*] [The judge] and his staff, including [the career law clerk] and [the courtroom deputy], were thrilled when [Complainant] accepted the offer and excited that [Complainant] would be working in chambers again. [Vol. III, Tab 2 (Request for Review) at 2] [Complainant] left her law firm in January 2019, and she began her two-year term clerkship with [the judge] six months later, on July 5, 2019. [Vol. I, Tab 3, Ex. G ([Complainant] Resume)]

[The judge] hired [Complainant] to replace his [departing] two-year term law clerk []. [Vol. I, Tab 20 at [Judge] Interview, p. 4] Normally, [the judge's] term law clerks begin their clerkship at the end of August, after graduating from law school and then taking the July bar exam. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 8] Because [Complainant] was hired from a law firm rather than directly out of law school,[2] however, she was able to start her clerkship earlier than most term law clerks. [*Id.*] That earlier availability made it possible for [the departing term clerk] to leave her clerkship a couple of months early and travel. [*Id.*] Notwithstanding her early departure, [the judge's departing term clerk] cleared her six-month motions report[3] that was due in September 2019, as was customary for [the judge's] departing term clerks. [Vol. I, Tab 20 at [Judge] Interview, p. 4]

When [Complainant] began her clerkship with [the judge] in July 2019, it was understood that she—like all other term law clerks

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2 To be precise, [Complainant] was not employed by a law firm immediately prior to assuming the clerkship. As [Complainant] was pregnant when [the judge] hired her in the fall of 2018 and as she left her law firm in January 2019, prior to beginning her clerkship in July 2019, we assume that starting in January 2019 she was taking time off from work following the birth of her first child.

3 Federal district judges are subject to a six-month motion reporting system. Per the system, motions that have been pending for six or more months are reported on a list that is released at the end of March and September of each year. District judges generally try to rule on pending motions in a timely manner, so that no motions appear on the six-month list.

in [the judge's] chambers—would be working under the tutelage of [the career law clerk]. [*See* Vol. III, Tab 2 (Request for Review) at 2] Having served as [the judge's] career clerk for nearly fifteen years[4] when [Complainant] was hired, [the career law clerk] had assumed a quality control role in chambers by training, mentoring, and reviewing and editing the work completed by term law clerks before it was submitted to [the judge]. [*See id.*; Vol. I, Tab 20 at [Judge] Interview, p. 10] This protocol created an efficient operation for [the judge's] chambers because [the career law clerk] was familiar with [the judge's] work standards and she knew what he expected in terms of a written work product. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 10, 41; Vol. I, Tab 20 at [Courtroom Deputy] Interview, pp. 27-28; Vol. I, Tab 20 at [Career Clerk] Interview, p. 5]

II. [Complainant] works with [the career law clerk], without incident, in the beginning of her clerkship

[Complainant] and [the career law clerk] had a good working relationship for the first few months of [Complainant's] clerkship. [*See* Vol. I, Tab 20 at [Complainant] Interview, pp. 12-13; Vol. I, Tab 20 at [Career Clerk] Interview, p. 10] [The career law clerk] emphasized in her interview how much she liked [Complainant] on a personal level, and how happy she was to have [Complainant] back in chambers as a term law clerk. [*See* Vol. I, Tab 20 at [Career

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4 [The judge] hired [the career law clerk] in 2005. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 4]

Clerk] Interview, pp. 7, 10] [The career law clerk] recalled that there were no apparent issues with [Complainant's] work in the beginning of her clerkship, albeit [Complainant] worked on what [the career clerk] described as "smaller"[5] motions during this time period—for example, a consent motion to amend a complaint, an *in forma pauperis* ("IFP") motion, and a motion to substitute a party name—rather than larger, more substantive motions, such as summary judgment motions or motions to dismiss. [*See id.* at 11-12] This was presumably due to the fact that [the judge's] previous law clerk [ ] had cleared her motions list before [Complainant] started her clerkship at the beginning of July 2019. [Vol. I, Tab 20 at [Complainant] Interview, pp. 9-10]

III. [The judge] extends [Complainant's] clerkship term from two to four years immediately after chambers staff returns from a November 2019 sitting with the Eleventh Circuit in Jacksonville, Florida

[The judge] was scheduled to sit as a visiting judge with the Eleventh Circuit in Jacksonville, Florida on November 5 and 7, 2019 [Vol. I, Tab 21 (Proposed Decision), Ex. 3 at p. 1], and his chambers began preparing for the sitting in September 2019, about two months after [Complainant] began her clerkship. [Vol. I, Tab

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5 In her objections to the PJO's proposed order, [Complainant] denies that she wrote only "form" orders and alleges that she also wrote "several medium-sized proposed orders which were not 'form.'" [Vol. I, Tab 25 ([Complainant's] Objection to Proposed Decision) at 12] We will assume this to be true.

20 at [Career Clerk] Interview, p. 12] [The judge] was assigned six cases for the sitting, which were divided evenly between [the career law clerk] and [Complainant]. [*See id.*] To help [the judge] get ready for the sitting, [the career law clerk] and [Complainant] prepared written bench memos summarizing the facts and legal issues in each case. [*See id.*; Vol. I, Tab 20 at [Complainant] Interview, p. 15; Vol. I, Tab 20 at [Judge] Interview, p. 17] [The career law clerk] and [Complainant] spent most of September and October 2019 preparing their assigned bench memos. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 12] [Complainant] submitted her bench memos on time, and there were no apparent issues with the memos. [*See id.*] During this time, [Complainant] also continued to work on "smaller . . . administrative" district court motions. [Vol. I, Tab 20 at [Complainant] Interview, p. 14]

[The career law clerk] and [Complainant] traveled to Jacksonville with [the judge] for oral arguments during the first week of November 2019. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 12] According to [the career law clerk], chambers staff had a great time in Jacksonville, and enjoyed [Complainant] being there. [*See id.* at p. 13] On November 15, 2019, shortly after they returned from Jacksonville, [the judge] offered to extend [Complainant's] term clerkship for an additional two years, meaning that her clerkship would last a total of four years, which is the maximum amount of time a term law clerk can work for a district court judge under the governing rules. [*See id.*; Vol. III, Tab 2 (Request for Review) at 2] [The judge] stated that, although he did not believe

[Complainant] had worked on any significant district court orders at that point in time, he offered her the extension because everyone in chambers "liked her so much." [Vol. I, Tab 20 at [Judge] Interview, p. 38] [Complainant] accepted the extension, and she planned to work as a term clerk in [the judge's] chambers for the full four years. [*See* Vol. I, Tab 1 (Request for Assisted Resolution) at 1]

IV. [Complainant] is assigned to draft an opinion in [a case heard during the judge's Eleventh Circuit sitting]

At the Jacksonville sitting, [the judge] was assigned responsibility for writing an opinion in [ ] a criminal case for which [Complainant] had written the bench memo. [Vol. I, Tab 20 at [Career Clerk] Interview, pp. 12-13] The opinion was to be unpublished, and [the judge] believed it would be an uncomplicated opinion for [Complainant] to draft. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 18-19] He had already directed [Complainant], in her bench memo, to "get the law that fits the facts" in a case that [the judge] felt should result in an obvious affirmance. [*Id.* at 18] So, upon return to chambers after the oral argument, he assigned her the task of drafting the opinion for the panel, informing [Complainant] that "all you have to do is dot the I's and cross the T's." [*Id.*] [The judge] saw no reason why [Complainant] couldn't accomplish this task within 45 days, and so he directed her to submit a draft by the end of December. [*Id.*] In late November, however, he worried that this deadline might require [Complainant] to work over the Christmas holidays. [*Id.* at 18–19] Not wanting her to feel that

pressure, [the judge] told [Complainant] that it would be "okay" for her to finish the draft in January. [*Id.* at 19] In short, he extended her original deadline by 30 days.

V. [Complainant] receives a raise when her status changes from JSP 12 to JSP 13

On January 9, 2020, [the District Court's] Human Resources specialist [ ] informed [the judge] that [Complainant] was eligible to have her position elevated from a JSP 12, step 1 to JSP 13, step 1, which would result in a salary increase. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 4] The status change to JSP 13 is based on bar membership and the time a term law clerk has worked for the courts. [Vol. I, Tab 20 at [Clerk of Court] Interview, pp. 9-10] Although the judge for whom a clerk works must sign off on the status change, the witnesses interviewed by the PJO agreed that the raise essentially was an automatic pay adjustment given to every term law clerk after passage of the bar and a certain length of time in the position. [*See id.*] [The judge] stated in his interview that he always approves these types of raises. [Vol. I, Tab 20 at [Judge] Interview, p. 12] And [ ] the Clerk of Court for the [ ] District [Court] confirmed that no judge had ever denied such a raise during his seven years as Clerk. [Vol. I, Tab 20 at [Clerk of Court] Interview, p. 10] Consistent with his usual practice, [the judge] approved the raise for [Complainant]. [Vol. I, Tab 20 at [Judge] Interview, p. 12]

VI. [Complainant] announces her pregnancy

On January 23, 2020, [Complainant] announced to [the judge's] chambers that she was pregnant. [Vol. III, Tab 2 (Request for Review) at 2] Having later learned that [the career law clerk] had commented to [the courtroom deputy] that [Complainant] would "never get the work done now," [Complainant] notes that [the career law clerk] was not pleased with the news. [*Id.* at 3] [The career law clerk] admitted that she was not "overly excited" about [Complainant's] announcement because, by this time, she had already expressed concerns to [the courtroom deputy] about [Complainant's] work. [*See* Vol. I, Tab 20 at [Career Clerk] Interview, pp. 17-18] [The career clerk] explained that [the judge's] deadline for [Complainant's] proposed opinion in [the assigned Eleventh Circuit case] was a week away, and that when she had inquired—prior to this announcement—as to the draft's status, [Complainant] had responded that it was coming along slowly. [*Id.* at 18] Further, according to [the career law clerk], [Complainant] had done "nothing of substance" in the way of district court orders. [*Id.* at 16-18] In addition, [the judge] had upcoming panel duties with the Ninth Circuit, which [the career law clerk] knew would increase the workload on both law clerks in chambers. [*Id.* at 24]

[Complainant's] pregnancy subsequently was discussed during a chambers staff meeting to plan for an upcoming trip to San Francisco for [the judge's] June 2020 sitting with the Ninth Circuit. During the meeting, a question was raised—either by [the career law clerk] or [the courtroom deputy]—about whether

[Complainant] would be able to fly to San Francisco in June to attend the sitting because she would at that point be in the third trimester of her pregnancy. [*See* Vol. I, Tab 20 at [Career Clerk] Interview, p. 25] [The judge] asked [Complainant] to check with her doctor to make sure traveling at that point in her pregnancy would be safe for her. [Vol. I, Tab 20 at [Judge] Interview, pp. 34-35] [The complainant] subsequently advised [the judge] that she would be able to travel to San Francisco as planned, and the issue did not come up again.[6] [Vol. I, Tab 20 at [Complainant] Interview, pp. 20-21]

VII. [Complainant's] draft in [the assigned Eleventh Circuit case] arrives two months late, and the draft requires heavy editing by [the career law clerk]

By the end of January, [Complainant] had still not turned in a draft in the [assigned Eleventh Circuit] case. Nervous that the Ninth Circuit work was about to arrive, [the judge] "walked down the hall" and said [to Complainant], "[ ]when are you going to get me something on the [Eleventh Circuit] opinion?" [Complainant] responded, "I'll have it by Friday." [Vol. I, Tab 20 at [Judge] Interview, p. 19] The next Friday rolled around, and there was no draft. [*Id.* at 20] A second Friday, now two weeks past the extended deadline, arrived, and still nothing. [The judge] returned to [Complainant's] office and asked, "When are you going to get something for

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6 As it turns out, the Ninth Circuit sitting was held virtually because of the Covid-19 pandemic, so no travel was required.

me on the [opinion from the Eleventh Circuit sitting]?" [Complainant's] response: "I'll have it for you by Friday." [*Id.*]

Notwithstanding [the judge's] repeated inquiries, [Complainant] produced no draft in February, finally providing a first draft of her proposed opinion [ ] on March 20, 2020, to [the career law clerk], whose job it was to review the draft before submitting it to [the judge]. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 5] [Complainant] made the submission via email because [she, the career law clerk, and the courtroom deputy] had begun teleworking from home in March 2020 due to the COVID-19 pandemic. [*See id.*] [The career law clerk] stated in her interview that [Complainant's] first draft [ ] "needed a lot of work" because it was confusing, and it was not clear from the draft that [Complainant] had understood the issues in the case. [Vol. I, Tab 20 at [Career Clerk] Interview, p. 28] Yet, because she knew the [ ] opinion was a top priority for [the judge] at that point, [the career law clerk] worked through her planned spring break vacation to edit [Complainant's] draft. [*Id.*] Between March 20 and April 9, 2020, [the career law clerk] and [Complainant] completed several rounds of edits and exchanged numerous drafts of the [ ] opinion. [*Id.*] [Complainant] finally was able to submit a final draft of the [ ] opinion to [the judge] for his review on April 9, 2020: five months after having been assigned the task and over two months after the deadline for its completion. [Vol. I, Tab 21 (Proposed Decision), Ex. 8]

[Complainant] makes several claims in her Formal Complaint and in her Request for Review that relate to her submission

of the [ ] draft and the edits to the draft made by [the career law clerk] between March 20 and April 9, 2020. As discussed below, because the PJO did not hold a formal hearing prior to issuing his final decision, we have construed all factual disputes in the record in favor of [Complainant]. But several of [Complainant's] claims about her submission of the [ ] draft and its revision are conclusively disproven by documents in the record, and where that is the case, we consider the facts to be undisputed. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

First, [Complainant] does not dispute the fact that she was extremely tardy in completing her draft in [the case]. As noted, she submitted her initial draft to [the career law clerk] almost two months beyond an already extended two-month deadline. Nor has she disputed [the judge's] assertion that once she had missed her deadline, the judge "began asking [Complainant] for updates on its status" and [Complainant] "continuously told him throughout February and March she would 'turn it in by Friday,' but he did not receive the proposal until the beginning of April." [Vol. I, Tab 21 (Proposed Decision) at 5–6]

As for providing an explanation for this delay, in her interview [Complainant] placed much of the blame on [the career law clerk], whom [Complainant] said held onto the initial draft for a

substantial period of time before approving its submission to [the judge]. [*See* Vol. I, Tab 20 at [Complainant] Interview, pp. 16–17, 44, 47] In addition, she asserts that the [ ] opinion was complicated and required a long period of time to complete. We will address at greater length the alleged complexity of the [ ] assignment in our discussion of pretext below. As a factual matter, however, [Complainant's] effort to blame [the career law clerk] for the delay in submitting [Complainant's] draft is contradicted by the documentary evidence. As the PJO noted, [Complainant] falsely suggested in her interview that [the career law clerk] was to blame for the tardiness of the [ ] draft when she stated, incorrectly, that [the career law clerk] had "held on to [her submitted draft] all of February." [*See* Vol. I, Tab 28 (Final Decision) at 7] The documentary evidence shows instead that [Complainant] did not send [the career law clerk] a first draft [ ] until March 20, 2020. [Vol. I, Tab 21 (Proposed Decision), Ex. 6][7]

In her Request for Review, [Complainant] takes issue with the PJO's determination that she was untruthful in her interview about the date she submitted the [ ] draft. [*See* Vol. III, Tab 2 (Request for Review) at 8] [Complainant] suggests that if she had been able to access her emails and other work product while she worked

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[7] Also commented upon by the PJO, [Complainant] implied that the length and complexity of the [ ] opinion justified the delay when she stated in her interview that her draft was 40 pages long. [*See* Vol. I, Tab 28 (Final Decision) at 8] In fact, [Complainant's] first draft [ ]—a copy of which is in the record—was only 26 pages long. [Vol. I, Tab 21 (Proposed Decision), Ex. 6]

for [the judge], she could have refreshed her memory as to that fact. [*See id.*] We share the PJO's skepticism that the absence of discovery can be blamed for [Complainant's] misstatement. [Complainant's] clerkship lasted 14 months, and for five of those months she was purportedly working on [this Eleventh Circuit] opinion. She missed the original January deadline, after which [the judge] regularly inquired when the draft would be finished, and she regularly responded that it would be finished by the end of the week. Yet, [Complainant] did not complete her draft and deliver it to [the career law clerk] until March 20, almost two months after the deadline.

[Complainant's] inability to complete the [ ] draft was a source of great tension and consternation in chambers. [*See* Vol. I, Tab 20 at [Courtroom Deputy] Interview, pp. 6, 11–12, 16; Vol. I, Tab 20 at [Career Clerk] Interview, pp. 16, 24, 27–28, 29] Whether or not [Complainant] remembered the exact date she transmitted the draft to [the career law clerk], it is hard to understand how she could fail to remember that it was her delay—not [the career law clerk's]—that represented the bulk of time it took to get the opinion to the judge.

As to [Complainant's] suggestion that [the career law clerk] "held onto" the draft, that characterization is belied by the record. [Complainant] emailed the draft to [the career law clerk] on Friday, March 20. [The career law clerk] obviously spent the weekend working on the draft as, by the next Monday, March 23, [she] had turned around a heavily-edited draft for [Complainant] to use in

her revisions. It took [Complainant] five days—until Friday, March 27—to make those suggested revisions. By Tuesday, March 31, [the career law clerk] had made further revisions on that draft. Two days later, on April 2, [Complainant] further revised the draft and [the career law clerk] edited that draft the same day. [Complainant] turned that draft around on Saturday, April 4. More revisions went back and forth between the two between April 4 and April 9, and on April 9 [Complainant] transmitted her draft opinion in [the case] to [the judge]. [Vol. I, Tab 21 (Proposed Decision), Exs. 5-6, 8] Thus, one cannot infer that [the career law clerk] dragged her feet in trying to help [Complainant] finalize the draft.

[Complainant] also questions the need for [the career law clerk's] revisions, calling [the] suggested edits "unreasonable" and "busy-work" and accusing [the career law clerk] of adding to [Complainant's] workload unnecessarily by having her delete and add back material to the draft. [Vol. I, Tab 3 (Formal Complaint) at 4] Based on our review of the relevant documents—specifically, the successive versions of the [ ] draft that are in the record, along with [the career law clerk's] inked revisions—[Complainant's] characterization could not be further from the truth. [*See* Vol. I, Tab 21 (Proposed Decision), Exs. 5-6] The PJO determined that [the career law clerk's] edits [to the draft] were "thoughtful and constructive" and he noted that [Complainant] had emailed [the career law clerk] at the end of the editing process to thank her for her help with the draft, stating in the email that [the career law clerk's] work was "Extremely Clear!" and further commenting, "I wish I could do this

like you do!" [Vol. I, Tab 28 (Final Decision) at 20] We agree with the PJO's assessment of [the career law clerk's] edits, and we add that in some instances the edits were not only constructive, but necessary.

Finally, [Complainant] suggests in her Formal Complaint that [the career law clerk's] communications—about the revisions [to the Eleventh Circuit draft opinion] and about [Complainant's] other written work—were "[c]ombative" and "insulting." [Vol. I, Tab 3 (Formal Complaint) at 4] At least with regard to the [Eleventh Circuit opinion] drafts that [the career law clerk] and [Complainant] exchanged between March 20 and April 9, 2020, [Complainant's] characterization of [the career law clerk's] communications is again belied by the documents in the record. [*See* Vol. I, Tab 21 (Proposed Decision), Exs. 5-6] Because of the unusual circumstances created by the COVID-19 pandemic—namely, the teleworking triggered by the pandemic and the fact that [the career law clerk] and [Complainant] were required to communicate during the relevant time period via email messaging—there is a written record of [their] communications regarding the [Eleventh Circuit draft opinion] revisions, which includes inked revisions by [the career law clerk] and contemporaneous email messages about the successive drafts [ ] that emerged from the revision process. [*See id.*] Like the PJO, we have reviewed all the drafts and messages [the career law clerk] and [Complainant] exchanged between March 20 and April 9, 2020, while the [ ] revisions were circulating, and we have not found a single message [ ] that corroborates

[Complainant's] characterization of those communications as combative or insulting.

On the contrary, [the career law clerk's] written communications to [Complainant] concerning the [ ] case during the relevant time period were—without exception—respectful and encouraging. [*See id.*] [Complainant] attached her first draft [ ] to an email in which she stated, "Please see attached. Thank you [ ]!!" [*Id.*] [The career law clerk] responded three days later with a heavily edited version of the draft and an email stating, "Call me when you get this and can talk!" [*Id.*] About a week later, and after another round of edits, [the career law clerk] sent [Complainant] an email stating, "Hey [ ]! I think this draft is SO MUCH better!!! I'm done for today (I'm BEAT!) but email me tomorrow and we'll find a time to talk and go through it! Hope you have a great evening!" [*Id.*] [The career law clerk's] email messages continued in the same vein throughout another week of edits, concluding with two messages to [Complainant] on April 9, 2020, the first of which stated, "We're almost done! Just a few very minor things to look at. Yay! We can talk whenever!" and the second of which stated, "Congrats [ ]!!!! Woo Hoo!!!!" [*Id.*]

VIII. [The judge] requests funding from the Clerk of Court to assist with his workload

By the time [Complainant] submitted the final draft of her proposed [Eleventh Circuit] opinion on April 9, 2020, [the judge] had already informed the Clerk of Court [ ] that one of his law clerks was struggling with her workload, that the work in

chambers was "piling up," and that he "needed some help." [Vol. I, Tab 20 at [Clerk of Court] Interview, p. 3] In late March 2020, [the judge] sought [the Clerk's] advice as to options for him to get additional help. [*Id.*]

[The judge] explained that by March he was becoming "desperate," given [Complainant's] apparent inability to generate a draft opinion in [the Eleventh Circuit case] and given the upcoming Ninth Circuit sitting. He felt that he was facing a "crisis" because [Complainant] "c[ould]n't do her work." [Vol. I, Tab 20 at [Judge] Interview, pp. 5, 20] [The Clerk of Court] suggested that [the judge] apply to the Eleventh Circuit Judicial Council for temporary emergency funding to hire immediately a third law clerk. [Vol. I, Tab 20 at [Clerk of Court] Interview at 3-4] Even though [the judge's] workload met the threshold for him to have three law clerks, he had not required more than two law clerks after taking senior status and had not requested a third clerk for the year [Complainant] served. [*See id.*; Vol. I, Tab 20 at [Judge] Interview, p. 51]

Although he had "never done anything like this before," [Vol. I, Tab 20 at [Judge] Interview, p. 5] [the judge] authorized [the Clerk of Court] to send a request to the Circuit Executive of the Eleventh Circuit for approval of temporary emergency funding for a third law clerk, as well as a request for a permanent third law clerk position for the next fiscal year. [Vol. I, Tab 21 (Proposed Decision), Ex. 7] [The Clerk] did so on April 8, 2020. [*Id.*] In an accompanying letter, [the judge] stated that the reason for the request was "unanticipated additional workload." [*Id.*] During his

interview, [the judge] explained that "the unanticipated additional workload was not that we had more work; it was that [Complainant] wasn't getting the work done." [Vol. I, Tab 20 at [Judge] Interview, pp. 5–6] [The judge] also called the chief judge of the Eleventh Circuit, Judge Ed Carnes, to ask that his request be expedited so that he could immediately obtain some help. [*Id.* at 21]

[The judge's] request for additional help was granted on April 14, and he hired a prior law clerk [ ] as a temporary clerk to help get the work done. [*Id.* at 20-21] [This prior law clerk] was able to work "half-time," and [the judge] planned for her to help him with Ninth Circuit work. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 3 at p. 3] [The prior law clerk] was pregnant when [the judge] hired her, and she worked for him from mid-April until September, when her baby was born. [*Id.*; Vol. I, Tab 20 at [Judge] Interview, pp. 20-21]

IX. [The judge] meets with [Complainant] on April 14, 2020 to discuss her work performance

On April 13, 2020, [the judge] reviewed the final version of the [Eleventh Circuit opinion] draft with [Complainant] and [the career law clerk], and he then sent the proposed opinion to the [two] Eleventh Circuit judges who were on the panel. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 9] On the next day, April 14, [the judge] invited [Complainant] and [the courtroom deputy] to his house to discuss his concerns about [Complainant's] work and to advise her about the addition of [the prior law clerk] to chambers staff. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 23-24] [The

judge] stated in his interview that he "made it very clear" during the April 14 meeting that [Complainant] "was in big trouble." [*Id.* at 25] More specifically, [the judge] told [Complainant] that he was unhappy about her delay in [the Eleventh Circuit case] and about the backlog of motions accumulating on her list. [*See id.* at 23-25] [The judge] explained to [Complainant] that lawyers "hate waiting on motions" and that his chambers had to get the work out in a timely manner. [*See id.*] In addition, [the judge] told [Complainant] that he had eighteen years of experience with law clerks and knew what law clerks were supposed to do, and that [Complainant] was not meeting that standard. [*Id.* at 23] [Complainant] does not dispute that the judge made clear how dissatisfied he was with her work, and she even told the [career law clerk] in a contemporaneous email that she had never "got[ten] such a bad performance review" as she received in her discussion with [the judge] on April 14, 2020. [*See* Vol. I, Tab 21, Ex. 12]

X. After [Complainant's] meeting with [the judge] on April 14, 2020, [Complainant] and [the career law clerk] have a phone conversation during which [the career law clerk] loses her temper and expresses frustration with [Complainant]

Later in the day on April 14, 2020, after [Complainant's] meeting with [the judge] and [the courtroom deputy] at [the judge's] house, [the career law clerk] emailed [Complainant] about an order ruling on an IFP motion that [Complainant] had drafted. [Vol. I, Tab 21 (Proposed Decision), Ex. 10] In reviewing the draft order, [the career law clerk] had gone to the docket and noticed

that [Complainant] had failed to address two additional motions in the case, as well as a motion to amend the complaint. [*See id.*] [Complainant] responded that she had seen the motions but had ignored them because she "wasn't sure what to do with them." [*See id.*] Obviously frustrated, [the career law clerk] responded that [Complainant] "can't just leave motions hanging on because you don't know what to do with them," and she indicated that [Complainant] should contact her about such matters. [*See id.*] [Complainant] apologized and the email exchange concluded so that the two could talk on the telephone about the case. [*See id.*]

[Complainant] alleges that during the follow-up phone call that occurred later that same day, [the career law clerk] stated that she was "infuriate[ed]" that [Complainant] was pregnant and that she believed [Complainant's] baby was going to get in the way of her son's senior year of high school and require her to travel to [court in another town in the district] the following year, which [the career law clerk] did not want to do. [Vol. III, Tab 2 (Request for Review) at 3-4] [The career law clerk] admitted during her interview that she lost her temper during the phone call, and that she expressed frustration with [Complainant] about her increasing workload amidst an approaching maternity leave. [*See* Vol. I, Tab 20 at [Career Clerk] Interview, pp. 36-39] We assume that [the career law clerk] made the other statements alleged by [Complainant] as well.

After her phone conversation with [Complainant] on April 14, [the career law clerk] called [the judge], reported what she had

said to [Complainant], and apologized for losing her temper. [Vol. I, Tab 20 at [Judge] Interview, pp. 26-27] [The career law clerk] told [the judge] that she had also apologized to [Complainant]. [*Id.*] [Complainant] also attempted to contact [the judge] after the April 14 phone conversation by sending him a text message asking if she could return to his house to talk. [Vol. I, Tab 3 (Formal Complaint) at 7] [The judge] told [Complainant] he would call her the next day. [*Id.*] During their follow-up conversation on April 15, [Complainant] summarized to [the judge] the phone conversation she had with [the career law clerk] the previous day. [*Id.* at 8] Knowing that [the career law clerk] had already apologized to [Complainant], [the judge] did not believe any further action was necessary. [Vol. I, Tab 20 at [Judge] Interview, pp. 26-27]

XI. After he receives [ ] suggested corrections to the [proposed Eleventh Circuit] opinion [from an Eleventh Circuit panel member], [the judge] contacts a [law school] professor seeking a recommendation for a term law clerk to begin in September, and he hires [the recommended individual]

On April 15, 2020, [the judge] received a redlined version of the [proposed Eleventh Circuit] opinion from [one of the] Eleventh Circuit [judges on the panel] in which [the Eleventh Circuit judge] suggested some revisions. [Vol. I, Tab 21 (Proposed Decision), Ex. 11] [The Eleventh Circuit judge] stated in an email accompanying her redlined version of the [ ] opinion that she had proposed substantive edits to two sections of the draft. [*Id.*] One edit was made because [the Eleventh Circuit judge] believed that the proposed

opinion had not fully captured a nuance of the defendant's argument on a suppression issue raised in the case. [*See id.*] The other substantive edit was to the prosecutorial misconduct section of the opinion, in which the defendant had argued that by urging the jury to put itself in the defendant's position, the prosecutor had made an improper statement. [*See id.*] The proposed opinion had concluded that this statement was improper, but not prejudicial enough to affect the outcome of the trial. The suggested edit noted the distinction between asking the jury to put itself in the position of a defendant as opposed to a victim, but concluded that, even with an assumption that the remark was improper, it was harmless. [*See id.*] [The Eleventh Circuit judge's] redlined suggestions also deleted the proposed opinion's citation to a case citing the standard for assessing an improper prosecutorial statement under habeas corpus review, which standard is different from that applicable to a case on direct appeal, as was [the case before the panel]. [*See id.*]

In addition to the substantive edits, [the Eleventh Circuit judge's] redlined version of the [ ] opinion corrected several citation errors in the draft, including one error that [the career law clerk] had pointed out to [Complainant] during the in-chambers revision process, but that [Complainant] had failed to correct.[8] [*Id.*]

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8 Specifically, [the career law clerk] indicated that [Complainant] should cite published authority for a legal proposition, instead of unpublished authority. [*See* Proposed Decision at Ex. 6, March 31 draft] Nevertheless, [Complainant] left her citations to unpublished authority in the final draft, and [the Eleventh Circuit judge] suggested deleting the citations. [*See id.* at Ex. 11]

Harkening back to an issue that had just arisen the day before concerning the IFP case, [the Eleventh Circuit judge] also added a line to the [ ] proposed opinion to rule on a motion that was pending in the case and that [Complainant] had failed to address in the opinion. [*Id.*] Other than these matters, [the Eleventh Circuit judge] indicated that she thought it was "a terrific draft opinion." [*Id.*]

[The judge] stated in his interview that he was "deeply embarrassed" by "all of the errors that had been made" in the [ ] draft. [Vol. I, Tab 20 at [Judge] Interview, p. 6] Although [the career law clerk] was responsible for editing the [ ] opinion to ensure that the writing met [the judge's] standards, [she] had no duty—and presumably no time—to check cites, search the record, or do the independent research that would have been necessary to catch all of the above errors identified by [the Eleventh Circuit judge]. [*See id.* at 10]

On April 16, 2020, the day after he received the redlined edits [ ], [the judge] contacted a [ ] [l]aw [s]chool professor to discuss potential candidates for an additional law clerk to work in his chambers starting in September. [Vol. I, Tab 21 (Proposed Decision), Ex. 3 at p. 3] A few days later, on April 22, [the judge] interviewed and hired [ ] the candidate recommended by the professor with whom [the judge] had spoken a few days prior. [Vol. III, Tab 2 (Request for Review) at 4] [The judge] stated in his interview that with his hiring of a third clerk, there would be three clerks when [Complainant] returned from maternity leave. [Vol. I, Tab 20 at [Judge] Interview, pp. 3, 15-16] [He] explained that he hired [the

third clerk] "to fill the gap because [Complainant] couldn't get the work done." [*Id.* at 2-3]

XII. The Eleventh Circuit reverses [the judge's] IFP ruling in [a § 1983] case on June 12 and [the judge] reduces [Complainant's] clerkship term from four to two years, but offers her twelve weeks of maternity leave

The next event noted in the record occurred on June 12, 2020, when the Eleventh Circuit issued a decision reversing [the judge's] order denying an IFP motion in [a civil case in which the plaintiff had asserted a § 1983 claim]. [Complainant] had drafted this Order. Pursuant to [Complainant's] recommendation, the order granted the *pro se* plaintiff's motion to proceed *in forma pauperis*, but sua sponte dismissed the plaintiff's § 1983 Fourth Amendment claims with prejudice under 28 U.S.C. § 1915(e)(2)(B)(ii), concluding that the plaintiff's complaint failed to assert a viable Fourth Amendment violation and that amending the complaint would be futile under the *Rooker-Feldman* doctrine. [Citation redacted] In relevant part, the Eleventh Circuit held that [the judge] had erred by dismissing the plaintiff's Fourth Amendment claim for unlawful seizure of his personal property during a traffic stop because the dismissal order had failed to "specifically address whether there was probable cause for the seizure." [Citation redacted] In addition, the Eleventh Circuit determined that [the judge] had erred by concluding that an amendment to the plaintiff's complaint would be futile pursuant to the *Rooker-Feldman* doctrine. [Citation redacted]

[Complainant] acknowledged in an email message she sent to [the career law clerk] that [the judge] was upset about the reversal in [this] case. In a message [Complainant] sent to [the career law clerk] on June 17, 2020, [Complainant] stated that [the judge] "was in a bad mood [a few days prior] because of [Complainant's] IFP that got reversed." [Vol. I, Tab 21 (Proposed Decision), Ex. 12] [Complainant] explained that [the judge] had said "it was particularly bad because [an Eleventh Circuit judge whose chambers are in the same courthouse as the judge's] was on the panel."[9] [*Id.*] Subsequently, on June 23, [the judge] met with [Complainant] and rescinded his offer of an additional two-year term to [her] clerkship. [Vol. III, Tab 2 (Request for Review) at 4] [The judge] stated in his interview that he reduced [Complainant's] clerkship back to the original two-year term because "she was doing a very poor job." [Vol. I, Tab 20 at [Judge] Interview, p. 29]

During this June 23 conversation with [the judge], [Complainant] raised the issue of her upcoming maternity leave. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 33] [Complainant] acknowledged to the judge that she was not eligible for leave under the FMLA (the acronym for the Family Medical Leave Act), but nonetheless requested six weeks of leave following delivery to get the baby on a schedule and enrolled in daycare. [*See id.*] [The judge] volunteered to give [Complainant] the full 12 weeks she would be entitled to if she were covered by the FMLA, but said that

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9 [Redacted]

the leave would be unpaid, as [Complainant] was not on the leave system and thus not eligible for paid leave. [*See id.*] Accepting [the judge's] offer, [Complainant] planned to take 12 weeks off after the birth of her child. [*See id.* at 33–34]

XIII. Between April and August of 2020, [the courtroom deputy] gave [the judge] three reports, each of which indicated that [Complainant] was accumulating a backlog of undecided motions on her list of pending work

While the above events were happening, and beginning in early April 2020, [the judge] received updates from [the courtroom deputy] regarding [Complainant's] progress clearing pending motions from her list of work that she was assigned to complete. On April 8, 2020, [the courtroom deputy] sent a report to [the judge] indicating that [Complainant] had 16 pending motions on the current six-month list, including four summary judgment motions and four motions to dismiss, while [the career law clerk] had seven pending motions, including three motions for summary judgment and one motion to dismiss. [*See* Vol. I, Tab 21 (Proposed Decision), Exs. 3, 13 and Vol. I, Tab 20 at [Courtroom Deputy] Interview, p. 13] On July 17, 2020, [the judge] learned from [the courtroom deputy] that [Complainant] had 22 pending motions on her list of uncompleted work, while [the career law clerk] had three such pending motions. [*See* Vol. I, Tab 21 at Exs. 3, 14 and Vol. I, Tab 20 at [Courtroom Deputy] Interview, p. 22] Finally, on August 12, 2020, [the courtroom deputy] reported to [the judge] that [Complainant] had 27 motions pending, while [the career law

clerk] had two. [*See* Vol. I, Tab 21 at Ex. 3 and [Courtroom Deputy] Interview, p. 22] Thus, via [the courtroom deputy's] reports, [the judge] became aware that [Complainant's] number of undecided motions kept mounting, despite the judge's warning to [Complainant] on April 14, 2020 that "the work has to get out" in a timely manner. [*See* Vol. I, Tab 20 at [Judge] Interview, p. 23]

XIV. [The judge] terminates [Complainant's] employment

On August 18, 2020, six days after receiving the August motions report from [the courtroom deputy], [the judge] had a meeting with [Complainant] and [the Clerk of Court], during which [the judge] informed [Complainant] that her clerkship would be terminated after she received twelve weeks of paid maternity leave. [Vol. III, Tab 2 (Request for Review) at 4] As noted above, [Complainant] was not entitled to paid leave. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 33] Nevertheless, having decided to terminate [Complainant's] employment, [the judge] wanted to ensure that [Complainant] had enough notice, remained covered by health insurance, and was able to be paid for a period of time following the birth of her child. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 14-15] Thus, [Complainant's] employment officially terminated on November 20, 2020, twelve weeks after she went out on maternity leave in late August. [Vol. III, Tab 2 (Request for Review) at 4] [The term law clerk who was interviewed and hired to be a third term law clerk by the judge in April] began his clerkship in September. [Vol. III, Tab 2 (Request for Review) at 4]

According to [the career law clerk's] records, four clerks handled pending substantive motions[10] that had been assigned to [Complainant]. [*See* Vol. I, Tab 20 at [Career Clerk] Interview, pp. 51-52 and "[Complainant] Work" attachment, p. 6] [A law clerk] for [a colleague of the judge's] volunteered her assistance and drafted the order in one case involving a summary judgment motion. [*See id.*] [T]he temporary third clerk hired by [the judge] in April had drafted the order for another summary judgment case. [*See id.*] [The term law clerk hired, also in April, to be a third term law clerk starting in September] wrote the order on a motion to dismiss in another case after he arrived. [*See id.*] [The career law clerk] was reassigned the summary judgment and dismissal motions in the remaining three cases. [*See id.*] According to [the judge], through the work of these four clerks, his chambers was able to clear the backlog of work left by [Complainant], and [the career law clerk] and [the term law clerk who began in September] were able to handle the work going forward. For that reason, it became unnecessary for him to hire [an additional] third law clerk, notwithstanding his authorization to do so. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 7-8, 51]

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10 From our review of the records provided, we understand the term "substantive motion" to generally refer to a dispositive motion, such as a motion for summary judgment, motion for judgment on the pleadings, or motion to dismiss.

XV. [Complainant] and [the career law clerk] regularly communicate by email messages throughout the relevant time period

The record shows that [the career law clerk] and [Complainant] regularly communicated by email throughout the relevant time period, and the email exchanges that have been attached to the record are consistently respectful and friendly. For example, on April 16, 2020, just a few days after the April 14 phone conversation discussed above, [the career law clerk] sent an email to [Complainant] stating, "If you need to discuss anything or want to talk any issues through, please know that I am available. Also, I am more than happy to talk about how to work through the appeal issue or how to do the memo, if you need it." [Vol. I, Tab 21 (Proposed Decision), Ex. 16] [Complainant] responded, "Thank you!" [*Id.*] [The career law clerk] and [Complainant's] communications continued in a similar vein throughout the last four months of [Complainant's] clerkship, with [the career law clerk] emailing to [Complainant] several times during this time period with offers of help and encouraging words about her work and [Complainant] responding by thanking [the career law clerk] for her assistance. [*Id.*] In her final message to [Complainant] on August 21, 2020, [the career law clerk] referenced a draft order [Complainant] had submitted and stated:

> "Hey [ ]! I thought you did a good job on this. Here are a few suggested edits. It feels weird not to say goodbye to you in person. I do wish you all the best [ ]. And I'm praying for

you to have a smooth delivery and healthy baby girl! Take care!!"

[*Id.*]

XVI. [Complainant] seeks relief under the [ ] District [Court's] EDR Plan

After starting her maternity leave, [Complainant] telephoned [the] Clerk of Court [ ] in early September 2020 and sought his assistance. During their conversation, [Complainant] told [the Clerk] that she wanted him to give her her job back. [Vol. I, Tab 20 at [Clerk of Court] Interview, p. 7] [The Clerk] advised [Complainant] that he had no authority to do that because term law clerks work at the will of their hiring judge. [*Id.*] But on September 14, 2020, within days of [Complainant's] conversation with [the Clerk], the [District Court] adopted the EDR Plan that is the basis for [Complainant's] [claims]. [Vol. III, Tab 2 (Request for Review) at 5] The newly adopted plan included term law clerks as employees within its protections. [*Id.*]

[Complainant] filed a Request for Assisted Resolution on December 3, 2020, in which she alleged that: (1) her clerkship term was reduced and she was terminated on account of her pregnancy, (2) she was harassed and subjected to abusive conduct in chambers due to her pregnancy, and (3) [the judge] retaliated against her for reporting the wrongful conduct. [*See generally* Vol. I, Tab 1 (Request for Assisted Resolution)] In her request, [Complainant] asked for a positive letter of recommendation and reinstatement to a

comparable position. [*Id.*] [The chief judge of the district court] recused himself and appointed [another judge in the district] to handle the matter. [*Id.*] After speaking with [the parties], [this judge] concluded that the matter could not be resolved by Assisted Resolution and he issued a report to that effect on December 14, 2020. [Vol. I, Tab 2 (Notice of Termination of Assisted Resolution)] In conjunction with [this] report, the [District Court's] EDR coordinator [ ] notified [Complainant] of her right to file a formal complaint under the EDR Plan. [*See id.*]

[Complainant] filed a Formal Complaint on February 11, 2021. [*See* Vol. I, Tab 3 (Formal Complaint)] Chief Judge William Pryor appointed Chief Judge J. Randal Hall of the Southern District of Georgia as the PJO to act on behalf of the Eleventh Circuit Judicial Council to resolve [Complainant's] claims. [*See* Vol. I, Tab 4 (Letter Appointing PJO)] Based on his review of [the] Complaint and the [ ] District [Court's] Response, the PJO determined that an investigation concerning [Complainant's] claims was necessary. [*See* Vol. I, Tab 28 (Final Decision) at 2-3] He scheduled interviews for [Complainant], [the career law clerk], [the courtroom deputy], [the Clerk of Court], and [the judge] over a two-day period in early April 2021 [ ], and he advised the interviewees to provide him with any documents relevant to the investigation. [*Id.* at 3] Per the PJO's request, [the career law clerk] produced copies of her email conversations with [Complainant] during the relevant time period and the successive versions of the [Eleventh Circuit draft opinion] discussed above, and [the judge] produced a timeline related to

[Complainant's] clerkship and notes regarding [the courtroom deputy's] reports as to [Complainant's] progress on her pending motions. [*See* Vol. I, Tab 21 (Proposed Decision), Exs. 3, 5-6, 8-17]

After conducting interviews and reviewing the relevant documents, the PJO issued a proposed decision in which he concluded that [Complainant] had no meritorious claim against the [ ] District [Court] for pregnancy discrimination, hostile work environment, abusive conduct, or retaliation, and that a formal hearing was not required to resolve the matter. [Vol. I, Tab 21 (Proposed Decision) at 1] The PJO notified the parties of the proposed decision, provided them with the exhibits and transcripts of the interviews on which he had relied in ruling on [the] claims, and gave them an opportunity to file objections. [*See* Vol. I, Tab 28 (Final Decision) at 3] [Complainant] submitted written objections, to which she attached her contemporaneous notes summarizing the telephone conversation she had with [the career law clerk] on April 14, 2020.[11] [*See* Vol. I, Tab 25 ([Complainant's] Objection to Proposed Decision)]

The PJO considered [Complainant's] objections and the newly produced document, and issued a final written decision, in which he again concluded that [Complainant's] claims lacked

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11 The notes were in the form of an email addressed to [the judge], but [Complainant] explained in her interview that she had not sent the email to [the judge], but rather had used it as talking points in the follow-up conversation she had with [the judge] on April 15, 2020. [Vol. I, Tab 20 at [Complainant] Interview, p. 30]

merit. [Vol. I, Tab 28 (Final Decision) at 3-4] [Complainant] has filed a Request for Review of the PJO's final decision by this Council, in which she argues that the PJO erred by: (1) concluding that she did not produce evidence that she was treated less favorably than or replaced by an employee who was not pregnant, (2) concluding that the [ ] District [Court] had articulated a legitimate, nondiscriminatory reason for terminating [Complainant], which [Complainant] failed to rebut with credible allegations showing pretext, and (3) finding that [Complainant] had failed to show the requisite causal link between [her] protected conduct and the adverse employment actions taken against her, for purposes of the retaliation claim. [Vol. III, Tab 2 (Request for Review) at 10-21] In addition, [Complainant] argues in her Request for Review that the PJO erred in his rulings on her hostile work environment and abusive conduct claims. [*Id.* at 22-29] Finally, [Complainant] claims that the PJO erred by denying her a formal hearing and an opportunity for discovery and cross-examination, and that he failed to act impartially in ruling on her claim. [*Id.* at 7-10]

DISCUSSION

I. Standard of Review

The PJO notes in his final decision that the standard of proof for all claims under the [ ] District [Court's] EDR Plan is preponderance of the evidence. [Vol. I, Tab 28 (Final Decision) at 4, n.6] That is the same standard that would apply to [a] pregnancy discrimination claim under Title VII. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, ___ , 135 S. Ct. 1338, 1345 (2015) (noting

that the preponderance of evidence standard applies to a disparate treatment pregnancy discrimination claim asserted under Title VII). However, because the PJO resolved [Complainant's] claims without a formal hearing or other procedures that would attend a trial such as the right to cross-examination, we apply a standard on review that is akin to a summary judgment standard. That is, we assume [Complainant's] well-founded allegations are true, and where there is a dispute of fact in the evidentiary record, we construe the record in favor of [Complainant].[12] We then consider whether there is "substantial evidence" to support the PJO's decision that [Complainant] failed to assert a meritorious claim against the [ ] District [Court] for wrongful discrimination, harassment, abusive conduct, or retaliation. *See* EDR Plan § V.A.

II. [Complainant's] Pregnancy Discrimination Claim

The [District Court's] EDR Plan prohibits "wrongful conduct" during an employee's period of employment, and it defines such wrongful conduct to include "[a] discriminatory adverse employment action against an employee based on that employee's . . . pregnancy[.]" [ ] Employment Dispute Resolution Plan ("EDR Plan") § II.A.1. The Plan further defines an adverse action as "an action that materially affects the terms, conditions, or privileges of

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12 *See* EDR Plan § IV.C.3.f.ii. Although the PJO used the term "findings of fact" in describing his recitation of the pertinent facts, [Vol. I, Tab 28 (Final Decision) at 4], the facts on which he relies appear to be largely undisputed. At any rate, we have applied the standard stated in text.

employment, such as hiring, firing, or a failure to promote." EDR Plan at App. 1. As relevant here, the language of the Plan tracks Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e(k) (prohibiting discrimination based on "sex" and defining sex to include "pregnancy, childbirth, or related medical conditions"); *see also Holland v. Gee*, 677 F.3d 1047, 1054 (11th Cir. 2012) (noting that Title VII "prohibits employment discrimination on the basis of sex" and that the "Pregnancy Discrimination Act amended Title VII to provide that discrimination on the basis of sex includes discrimination on the basis of pregnancy"). The Plan provides that, in reaching a decision on a formal complaint filed under its provisions, the PJO "should be guided by judicial and administrative decisions under relevant rules and statutes, as appropriate." EDR Plan § IV.C.3.e.vi. The relevant authority here is Title VII, as amended by the Pregnancy Discrimination Act, and the caselaw interpreting that statute.

[Complainant] claims the [ ] District [Court] discriminated against her based on her pregnancy when [the judge] reduced her clerkship from four years to two years on June 23, 2020, and when he terminated her employment on August 18, 2020, which termination became effective at the end of [Complainant's] paid maternity leave on November 20, 2020. [Vol. I, Tab 3 (Formal Complaint) at 13-15] We note at the outset that [Complainant's] discrimination claim based on the reduction of her clerkship term is time-barred. The EDR Plan requires a formal complaint to be

submitted to an EDR coordinator "within 180 days of the alleged wrongful conduct or within 180 days of the time the employee becomes aware or reasonably should have become aware of such wrongful conduct." EDR Plan § IV.C.3.a. [Complainant] alleges that her clerkship term was reduced from four to two years on June 23, 2020, but she did not submit her Formal Complaint to [the] EDR Coordinator [ ] until February 11, 2021, well beyond the 180-day deadline from the time of the alleged wrongful conduct. The Plan makes clear that [Complainant's] Request for Assisted Resolution, submitted on December 4, 2020, did not toll or extend the 180-day deadline. *See id.* Thus, while we will consider [the judge's] decision to reduce [Complainant's] clerkship term to the extent the decision is relevant to [Complainant's] discriminatory termination claim, we **AFFIRM** the PJO's denial of [Complainant's] claim based on the reduction of her clerkship term because any such claim is time-barred.[13]

As for her termination claim, none of [Complainant's] allegations amount to direct evidence that she was terminated based on her pregnancy. [Complainant] argues that her conversation with [the career law clerk] on April 14, 2020 is "direct evidence" that "cast[s] doubt on" what could otherwise be characterized as a

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13 Of course, that [the judge] had earlier reduced [Complainant]'s clerkship term to two years prior to firing her is irrelevant if her challenge to the termination decision is deemed unmeritorious. Because we conclude that [Complainant] failed to prove that she was terminated because she was pregnant, the earlier decision to reduce her clerkship term becomes a moot point.

legitimate reason by [the judge] for terminating her: her unsatisfactory work production. [*See* Vol. III, Tab 2 (Request for Review) at 19] Yet, [Complainant] does not appear to be arguing that her conversation with [the career law clerk] constitutes direct evidence of discrimination because her argument is framed in terms of the *McDonnell Douglas* analysis, which only applies when there is no direct evidence of discrimination. [*See id.*] But to the extent [Complainant] intends to make a direct evidence argument, we reject it. [The career law clerk's] statements cannot constitute direct evidence of discrimination because, as will be discussed in more detail below, [the career law clerk] was not the final decision-maker with respect to [Complainant's] termination. *See Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (explaining that direct evidence "must indicate that the complained-of employment decision was motivated by the decision-maker's" discriminatory animus) (emphasis added); *see also Holland*, 677 F.3d at 1055 (defining direct evidence as "evidence that, if believed, proves the existence of a fact without inference or presumption"). The PJO thus correctly applied the *McDonnell Douglas* burden-shifting framework to determine whether [Complainant] could prevail on her pregnancy discrimination claim against the [ ] District [Court] based on circumstantial evidence. *See Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220 (11th Cir. 2019) ("In order to survive summary judgment, a plaintiff alleging intentional discrimination must present sufficient facts to permit a jury to rule in her favor. One way that she can do so is by satisfying the burden-shifting framework set out in *McDonnell Douglas*.").

Pursuant to the *McDonnell Douglas* framework, [Complainant] has the initial burden to establish a prima facie case of discrimination by showing that (1) she belongs to a protected class, (2) she suffered an adverse employment action with respect to her position with the [ ] District [Court], (3) she was qualified for her position at the time of the adverse action, and (4) an employee outside of [Complainant's] protected class replaced or was treated more favorably than [Complainant].[14] *See id.* at 1220–21. The burden then shifts to the respondent [ ] District [Court] to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. *See id.* at 1221. Assuming the [ ] District [Court] satisfies that requirement, the burden shifts back to [Complainant] to show that the District [Court's] proffered reason was not the real basis for the decision, but a pretext for pregnancy discrimination. *See id.*

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14 We note that the elements of a prima facie case of pregnancy discrimination have been modified in situations where an employer has refused to provide a job accommodation requested by a pregnant employee that the employer provided to non-pregnant employees who were "similar [to the pregnant employee] in their ability or inability to work." *See Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1285 (11th Cir. 2020) (quoting *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015)). This case does not involve—and [Complainant] never requested—a pregnancy-related accommodation, such as the light duty requested by the plaintiff in *Durham* or the waiver of a lifting requirement requested by the plaintiff in *Young*. Thus, we apply the traditional elements of a prima facie case of discrimination under *McDonnell Douglas.*

A. [Complainant's] Prima Facie Case

The PJO determined that [Complainant] had established the first three elements of a prima facie case of pregnancy discrimination, but that her allegations did not support the final element because [Complainant] could not show that a comparator employee—that is, an employee who was not pregnant and who was thus outside [Complainant's] protected class—replaced or was treated more favorably than [Complainant]. [*See* Vol. I, Tab 28 (Final Decision) at 14-16] [Complainant] argues in her Request for Review that [the judge's] career law clerk [ ] as well as [the] term law clerk [hired in April 2020 to begin in September 2020] are valid comparators who were treated more favorably than [Complainant] with respect to her termination. [Vol. III, Tab 2 (Request for Review) at 11-15]

We will assume that [ ] the term law clerk hired just before [Complainant] was terminated can serve as a comparator.[15] As a

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15 Because of our conclusion that [the term law clerk] is a proper comparator, we need not make a ruling as to whether [the career law clerk] can also serve as a comparator. Nevertheless, we note that there is a strong basis for concluding that [the career law clerk] was not similarly situated to [Complainant] in "all material respects" relevant to her termination. *See Lewis*, 918 F.3d at 1228. [The career law clerk] held a permanent, career law clerk position with [the judge], and had worked for him for fifteen years when [Complainant] was terminated, during which time period [the career law clerk] had assumed responsibilities beyond the normal duties of a term law clerk. *See id.* (explaining that "differences in experience . . . can disqualify a plaintiff's proffered comparators"); *see also Crawford v. Carroll*, 529 F.3d 961, 975 (11th Cir. 2008) (holding that the plaintiff's co-worker, who had been employed by the defendant

male, [the term law clerk] was obviously not pregnant and was thus outside [Complainant's] protected class. The PJO concluded that [the term law clerk] was not a proper comparator because he did not replace [Complainant], but the evidence on that issue is in dispute. [*See* Vol. I, Tab 28 (Final Decision) at 15] [The term law clerk] began his clerkship in September 2020, shortly after [Complainant] left on maternity leave; he assumed [Complainant's] work duties;[16] and his one-year clerkship term coincided with what would have been the second year of [Complainant's] clerkship. [*See* Vol. III, Tab 2 (Request for Review) at 13-15] Once we assume that [the term law clerk] was a proper comparator, it is clear that he was treated more favorably than [Complainant] as he was not fired before the end of his clerkship term. Accordingly, we conclude that [Complainant] has properly alleged all the necessary elements of a prima facie case of pregnancy discrimination. *See Maynard v. Bd. of Regents of the Div. of Univ. of the Fla. Dep't of Ed.*, 342 F.3d 1281, 1289 (11th Cir. 2003) (noting that a plaintiff can make out a prima facie case of discrimination with evidence that he was "replaced by a person outside his protected class or was

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for several years longer than the plaintiff and had "specialized and highly valued expertise" related to the relevant position, was not a proper comparator).

16 As set out *supra* at 30, three other clerks [in addition to the new term law clerk] helped to clear [Complainant's] backlog of motions. [The new term law clerk] was presumably assigned all new work that would otherwise have been sent to [Complainant] had there been only two clerks in chambers.

treated less favorably than a similarly-situated individual outside his protected class").

B. Legitimate, Nondiscriminatory Rationale

At this stage of the analysis, the burden shifts to the [ ] District [Court] to articulate a legitimate, nondiscriminatory reason for [the judge's] decision to terminate [Complainant's] clerkship in August 2020. The PJO concluded that the [ ] District [Court] met its burden by citing evidence of [Complainant's] poor work performance, and we agree with that conclusion. [*See* Vol. I, Tab 28 (Final Decision) at 16]

To briefly recap the highlights as to [Complainant's] work performance: (1) [Complainant] submitted her draft in the [Eleventh Circuit] case on March 20, 2020, almost two months past the already extended two-month deadline, having been repeatedly reminded by [the judge] that she needed to complete the draft; (2) working with [the career law clerk], her draft required a lengthy period of edits before it could be circulated to the panel on April 13; (3) on April 8, [the] courtroom deputy [ ] sent a report to [the judge] showing that [Complainant] had 16 pending motions on her six-month motions list, while [the career law clerk] had seven; (4) on April 14, [the judge] met with [Complainant] and emphasized how upset he was with her extreme tardiness on the [the Eleventh Circuit] case, how important it was that she produce

timely work, and that he expected improvement from her;[17] (5) on April 15, [an Eleventh Circuit] member of the panel returned a red-lined version of the proposed [Eleventh Circuit] opinion, which [the judge] described as "deeply embarrassing" because of errors that [the Eleventh Circuit judge] had identified; (6) on June 12, 2020, the Eleventh Circuit reversed [the judge's] ruling [in a § 1983] case, which ruling was based on a recommendation and an order that [Complainant] had drafted; (7) on July 17, [the courtroom deputy] submitted an updated report showing that [Complainant] had 22 motions pending on her list of uncompleted work, while [the career law clerk] had three; (8) on August 12, [the courtroom deputy] submitted another updated report showing that [Complainant's] work backlog was increasing as she now had 27 motions pending, while [the career law clerk] had two; (9) on August 18, [the judge] terminated [Complainant's] employment.

These performance issues, which are well-documented in the record, easily satisfy the [ ] District [Court's] burden at the second stage of the *McDonnell Douglas* analysis. *See Alvarez v. Royal Atl. Dev., Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010) ("The defendant need not persuade the court that it was actually motivated by the proffered reason, but need only present evidence raising a genuine issue of fact as to whether it discriminated against the plaintiff."); *Chapman v. AI Transp.*, 229 F.3d 1012, 1028 (11th Cir. 2000)

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17 As noted above, [Complainant] told [the career law clerk] that it was the worst job review she had ever gotten.

(noting that the employer's burden at the second stage of *McDonnell Douglas* "is only a burden of production").

C. Pretext

The [ ] District [Court] having offered legitimate, nondiscriminatory reasons for the firing of [Complainant], she must come forward with credible allegations showing that the asserted reason for her termination—poor work performance—is merely a pretext for unlawful discrimination, and that the real reason she was terminated was that she was pregnant. A Title VII plaintiff can establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1136 (11th Cir. 2020) (en banc). And to prevail at the third stage of the *McDonnell Douglas* analysis, the plaintiff must show that "each of the . . . proffered nondiscriminatory reasons [for an adverse action] is pretextual." *Ring v. Boca Ciega Yacht Club Inc.*, 4 F.4th 1149, 1163 (11th Cir. 2021). "A plaintiff's failure to rebut even one nondiscriminatory reason is" fatal to her claim. *Id.* (alterations adopted).

We conclude that [Complainant] has failed to show weakness, implausibility, inconsistency, incoherence, or contradictions in [the judge's] explanation for why he fired [her]. Stated another way, she has failed to provide evidence from which a factfinder could reasonably conclude that the real reason [the judge] fired her was her pregnancy, not her unsatisfactory job performance. In

finding a lack of pretext, the PJO focused on [Complainant's] work on the draft in the [Eleventh Circuit] case.[18] [*See* Vol. I, Tab 28 (Final Decision) at 17-18] Specifically, the PJO determined that the "issues regarding the timeliness and quality" of the [ ] draft were sufficient to both explain and justify all of [the judge's] employment decisions with respect to [Complainant], including his decision to fire her. [*Id.*] The PJO concluded further that as to the seriously tardy [ ] draft, [Complainant] had not responded to the evidence with allegations that credibly suggest pretext. [*Id.*] We agree with the PJO on these points, but we also expand the analysis based on our review of the entire record.

Focusing first on the [Eleventh Circuit draft opinion] issue, [Complainant] does not—and cannot—dispute that [the judge] gave her a two and one-half month time period—from mid-November until the end of January[19]—within which she was directed to complete a proposed opinion in the case. She likewise cannot dispute that she was seriously tardy in completing that assignment, missing the deadline by almost two months. Further, she does not dispute that this project was a high priority for [the judge] and that

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18 Assuming [Complainant] had made a prima facie case, the PJO made an alternative finding on the second and third prongs of the *McDonnell Douglas* analysis. [*See* Vol. I, Tab 28 (Final Decision) at 16]

19 As noted, [the judge] initially gave [Complainant] an approximately 45-day deadline—from mid-November to the end of December to complete the draft. He extended that deadline to avoid [Complainant] having to work over the Christmas holidays, giving her until the end of January.

he was extremely upset with her continuing inability to get him a draft. Nevertheless, she seems to argue that [the judge] was nonetheless wrong to fault her for this tardiness.

During her interview, [Complainant's] primary explanation for her delay was to blame [the career law clerk], stating that [the career law clerk] had held onto the draft for the entire month of February. As set out above, that explanation is contradicted by the record. Contrary to what [Complainant] stated in her interview, she did not present [the career law clerk] with a draft in the case until March 20, almost two months after the expiration of her deadline. While [the career law clerk] and [Complainant] spent over three weeks editing, back-and-forth, the draft, the record also shows that [the career law clerk] did not drag her feet but was working intensely on [Complainant's] draft during this time period leading up to the presentation of the draft to [the judge] on April 9.

Second, [Complainant] suggests that [the judge's] deadline was unreasonable because the issues on appeal in the [Eleventh Circuit] case were too complex to permit completion of a draft in the two and one-half month time period allowed. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 26; Vol. III, Tab 2 (Request for Review) at 25] Yet, [the judge] was an experienced judge, having served on the bench for 18 years at the pertinent time, and his assessment was that this was a relatively straightforward assignment that should have been easily completed within the time frame he allowed, particularly since [Complainant] had prepared the bench memo on the case prior to oral argument.

We have reviewed [Complainant's] draft and concur with that assessment. [The defendant in the case on appeal] was convicted of conspiracy to obstruct justice, obstruction of justice, and making a false statement to federal law enforcement officers, based on his payment to a former cellmate to act as a cooperator with law enforcement so that [the defendant] could receive a reduction of his sentence. [Vol. I, Tab 21 (Proposed Decision), Ex. 5 (March 20, 2020 [Eleventh Circuit Opinion] Draft) at 2] In her March 20 draft, [Complainant] was able to address in three pages what appear to be uncomplicated facts. [*Id.* at 2–6] For the most part, the legal issues appear to be relatively straightforward. [Complainant] was able to deal with each of the six errors [the defendant] raised on appeal in relatively short fashion, with the parentheticals following each issue showing the number of pages [Complainant] spent addressing the issue: (1) the denial of [the defendant's] suppression motion (4 pages); (2) the denial of his motion for a mistrial based on three statements by the prosecutor (5 pages); (3) the district court's refusal to give requested jury instructions (2 ½ pages); (4) the denial of [the defendant's] motion for judgment of acquittal based not on the sufficiency of the evidence, but on a legal interpretation of the statute (4 pages); and (5) the district court's imposition of a sentencing enhancement based on the defendant's interference with the administration of justice (3 ½ pages) and an enhancement based on extensive planning (1 ½ pages). [*Id.* at 6–26]

Four months elapsed between the time [Complainant] was assigned the [ ] opinion to draft and the date on which she

submitted that draft to [the career law clerk]. It is difficult to understand how it could have taken so long to complete this assignment. Perhaps recognizing this fact, [Complainant] also indicated in her interview that she spent part of this four-month period working on district court motions and, in hindsight, realizes she should have better prioritized the [Eleventh Circuit] assignment. [Vol. I, Tab 20 at [Complainant] Interview, pp. 26-27] But that explanation is hard to understand, given that [the judge] had directed [Complainant] to finish the draft by the end of January and had made repeated inquiries about [her] progress. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 19-20]

And it was not just the problems surrounding the [Eleventh Circuit] draft; there were other issues with [Complainant's] work, which are likewise documented in the record. For example, [Complainant] accumulated a backlog of pending district court motions that grew steadily between April and August of 2020 despite [the judge's] warning in mid-April 2020 that the work "had to get out" in a timely manner. And in June, [Complainant's] work in the [§ 1983] case resulted in a reversal by the Eleventh Circuit that was based, in part, on the opinion's failure to address all the Fourth Amendment issues raised in the plaintiff's complaint.

[Complainant] acknowledged her performance issues in her interview and in her contemporaneous email exchanges with [the career law clerk]. For example, [Complainant] admitted in an email to [the career law clerk] that she had never gotten "such a bad performance review" as she received from [the judge] during

the conversation at his house on April 14, 2020 about [the Eleventh Circuit case] and her pending motions. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 12] [Complainant] likewise confirmed during her interview that she knew the [Eleventh Circuit draft opinion] was late and that she "had some control over" the delay, that she knew [the judge] was "definitely upset" about the delay, and that she told [the judge] during the April 14 meeting she "felt like [she] could do better, especially with . . . writing." [Vol. I, Tab 20 at [Complainant] Interview, pp. 24, 26, 44] In addition, [Complainant] sent an email to [the career law clerk] on June 17, 2020 in which she stated that [the judge] "was in a bad mood [a few days prior] because of [her] IFP that got reversed" [by the Eleventh Circuit]. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 12] Finally, in response to [the judge's] request in July 2020 for an update on [Complainant's] progress on her pending motions, [Complainant] stated in an email to [the career law clerk] on July 17, 2020 that the motions were "coming slowly." [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 15] [Complainant] stated that she had "struggled . . . trying to figure out how" she was going to write one motion and gone "down a rabbit hole" and that she had not been able to start writing the other motion yet. [*Id.*] She concluded her update by saying that she hoped [the judge] was "not disappointed." [*Id.*]

Notwithstanding all this, [Complainant] now argues that the work performance rationale for her termination was contrived and that she was in fact terminated on account of her pregnancy. [*See* Vol. III, Tab 2 (Request for Review) at 19-29] [Complainant]

attempts to show pretext by claiming that her work backlog has been "exaggerated." [*See id.* at 25-27] Yet, as noted above, [Complainant's] number of pending motions continued to grow until the end of her tenure, even though [the judge] had told her that she had to improve the timeliness of her work. [*See* Vol. I, Tab 21 (Proposed Decision), Exs. 3, 13-14] Finally, and significantly, that [the judge] felt it necessary to take the extraordinary step of telephoning the Chief Judge of the Eleventh Circuit and petitioning the Eleventh Circuit Judicial Council to allow the hiring of an additional law clerk during the middle of a fiscal year clearly indicates his genuine belief that [Complainant] was unable to get her work done.

[Complainant] also argues that the workload for [the judge's] law clerks was "more than two law clerks could reasonably handle." By taking two months longer on a single assignment than [the judge] thought was required, [Complainant] necessarily compressed the time period available for performing her other work, but her mounting list of uncompleted work suggested that her problems with timeliness were continuing. Yet, even assuming [the judge's] clerks had an unreasonably heavy workload, that fact in no way suggests that [Complainant] was terminated because of her pregnancy. On the contrary, it indicates that she was terminated for failing to meet her employer's expectations. *See Chapman*, 229 F.3d at 1030 ("A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the

proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.").

Nor do we think that [the judge's] request for [Complainant] to confirm with her doctor that it would be safe for her to travel to San Francisco for his Ninth Circuit sitting demonstrates pretext, as [Complainant] suggests.[20] [*See* Vol. III, Tab 2 (Request for Review) at 19] [The judge] made that request after a question was raised during a chambers staff meeting as to whether [Complainant] would be able to travel across the country during the third trimester of her pregnancy. [*See* Vol. I, Tab 20 at [Judge] Interview, pp. 33-35] [The judge] never indicated that he did not want [Complainant] to travel to San Francisco to attend the sitting on account of her pregnancy. [*See id.*; Vol. I, Tab 20 at [Complainant] Interview, pp. 19-21] On the contrary, [the judge] asked [Complainant] to confirm with her doctor that it was safe to travel at that point in her pregnancy so that she could attend the sitting: a request that suggested the judge was appropriately solicitous of [Complainant's] welfare. [*See* Vol. I, Tab 20 at [Judge] Interview, p. 35] [Complainant] concedes that she was prepared to travel to the sitting after she cleared the trip with her doctor, and she does not

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20 This request is presumably what [Complainant] is referring to when she says that her pregnancy was "improperly discussed as a hurdle and a hindrance to [her] work." [*See* Vol. III, Tab 2 (Request for Review) at 19]

allege that [the judge] ever raised the issue again. [*See* Vol. I, Tab 20 at [Complainant] Interview, pp. 20-21] As such, there simply is no plausible argument that the conversation surrounding [Complainant's] ability to travel to San Francisco for the Ninth Circuit sitting suggests that [the judge] terminated [Complainant] months later because of her pregnancy.

Most of [Complainant's] other allegations of pretext involve comments and conduct by [the career law clerk], rather than by [the judge]. [*See* Vol. III, Tab 2 (Request for Review) at 16-17, 19-22] Specifically, [Complainant] cites the following facts as evidence of pretext: (1) [the career law clerk] did not respond enthusiastically to [Complainant's] pregnancy announcement on January 23, 2020, (2) [the career law clerk] treated [Complainant] differently—her edits becoming unreasonable and her mentoring "abusive" in unspecified ways—after [Complainant] announced her pregnancy, and (3) [the career law clerk] stated during an April 14, 2020 phone conversation with [Complainant] that she was infuriated that [Complainant's] pregnancy was going to require [the career law clerk] to undertake [Complainant's] job duties in addition to her own. [*Id.* at 19-21] [Complainant] argues that her allegations show that [the career law clerk] did not want to work with [Complainant] "because of the inconveniences surrounding pregnancy and motherhood." [*Id.* at 16]

We note that [the career law clerk], herself a mother of three children, stated in her interview that she had been pregnant at every position she had held since graduating from law school,

including her career clerk position with [the judge]. [*See* Vol. I, Tab 20 at [Career Clerk] Interview, p. 15] In addition, our review of [the career law clerk's] email messages to [Complainant] during the relevant time period did not reveal a single communication that could be characterized as unreasonable or abusive. [*See* Vol. I, Tab 21 (Proposed Decision) at Exs. 5-6, 10, 12, 15-17] On the contrary, the messages from [the career law clerk] to [Complainant] between April and August of 2020 that are in the record are uniformly positive and cordial.

Nevertheless, we assume that the April 14, 2020, phone conversation between [the career law clerk] and [Complainant] happened exactly as [Complainant] describes, and we further assume that [the career law clerk's] comments during that conversation indicate that [she] was frustrated, at least in part, because of the extra work she believed would fall on her shoulders as a result of [Complainant's] impending childbirth. Even so, [Complainant's] allegations regarding [the career law clerk] do not establish pretext with respect to her termination because they do not show any discriminatory animus on the part of [the judge], the decisionmaker who terminated [Complainant's] employment. *See Damon*, 196 F.3d at 1361 (noting that a "pattern of firing and demoting *so many* older workers and replacing them with younger workers, *by the relevant decision-maker during the same time period*, constitutes probative circumstantial evidence of age discrimination" (emphasis in original)).

[Complainant] does not—nor could she—credibly allege that [the career law clerk], rather than [the judge], was the decisionmaker as to her termination. Law clerks working for the federal courts do not have hiring and firing authority over chambers staff. Indeed, as to [the judge's] motivation for [her] termination, [Complainant] does not allege that [the judge] personally had any pregnancy-related animus towards her. On the contrary, [Complainant] affirmatively stated in her interview that she did not believe [the judge] had an issue with her pregnancy. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 42] Certainly, none of the evidence in the record points to any animus by [the judge] against a pregnant employee. [The judge] had hired [Complainant] when she was pregnant, with her start date occurring when her new baby was six months old. When he became concerned that [Complainant] was unable to keep up with her workload and he sought out a third employee to help, [the judge] hired, as a temporary employee, a former clerk who was herself pregnant. Finally, [the judge] had hired as his career clerk [a person] who herself had had a child while working at each of her two prior places of employment and also while working for [the judge] as his clerk.

Further, at the June meeting, when requesting time off after the anticipated birth of her second child in late August, [Complainant] acknowledged to [the judge] that she was not subject to the FMLA and thus was not entitled to any leave pursuant to that statute. She nonetheless asked him to allow her six weeks off. In response, [the judge] offered to give her the full 12 weeks that an

employee subject to the FMLA would receive.[21] In addition, although [the judge] had thus far employed only two clerks since becoming a senior judge, his workload was sufficiently high to allow him three clerks. And in April he had used that authority to hire a third clerk [ ], who was to begin working in September. Thus, [the judge] was going to be covered by a second clerk during the time [Complainant] was to be gone on maternity leave, and he could have readily welcomed her back to chambers as a third clerk had he believed that she was capable of handling the tasks demanded of her as a law clerk.

Nor can [the career law clerk's] alleged discriminatory animus be attributed to [the judge] under a "cat's paw" theory, as [Complainant] argues. [*See* Vol. III, Tab 2 (Request for Review) at 16] The cat's paw theory has been applied to hold an employer liable for the discriminatory acts of a supervisor who is not a final decisionmaker if the supervisor "performs an act motivated by [a discriminatory animus] that is intended by the supervisor to cause an adverse employment action . . . if that act is a proximate cause of the ultimate employment action." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011). *See also Ziyadat v. Diamondrock Hospitality*

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21 After he terminated [Complainant's] employment, [the judge] honored his previous commitment to give her twelve weeks maternity leave and even made sure that this was paid leave, notwithstanding the fact that [Complainant] was not entitled to any paid leave. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 33]

Co., 3 F.4th 1291, 1298 (11th Cir. 2021) (explaining that the "cat's paw theory concerns the conditions under which a lower-level employee's animus can be imputed to a decisionmaker").

Again, we will assume that [the career law clerk] was unhappy that [Complainant] was pregnant and concerned about the burdens that would be shifted to her. [Complainant] speculates that, for this reason, [the career law clerk] devised a plan to undercut [Complainant] by providing negative reports to [the judge] about [Complainant's] work that undermined [the judge's] opinion of her. [*See id.*] Even assuming this is true, [Complainant] cannot prevail on a cat's paw theory because she does not credibly allege that it was negative reports by [the career law clerk] about her work that proximately caused her termination, as opposed to the unsatisfactory work itself. *See Staub*, 562 U.S. at 421 (noting that cat's paw liability arises only when the decisionmaker "relies on facts provided by the biased supervisor").

On the contrary, it is clear from the record that it was [Complainant's] work itself, rather than any negative reports allegedly made by [the career law clerk] about the work, that proximately caused [Complainant's] termination. Not to belabor the point, but [the judge] did not need a report from [the career law clerk] to know that [Complainant's] draft of the [Eleventh Circuit opinion] opinion was seriously tardy—he had first-hand knowledge of that fact. As noted, [the judge] repeatedly asked [Complainant] about [this] case once the deadline passed in January 2020. Nevertheless, [Complainant] did not submit a draft of the opinion to [the career

law clerk] for editing until late March 2020, despite [Complainant's] repeated assurances to [the judge] that she would get the draft to him "by Friday" or "by the end of the week." Nor did [the judge] learn about [the Eleventh Circuit judge's] redlined corrections to the [ ] draft—which he described as "deeply embarrassing" to him because of numerous citation errors—from [the career law clerk]. Instead, [the judge] received the redlined corrections directly from an Eleventh Circuit panel member.

As to [Complainant's] work backlog, [the judge] learned from his [courtroom] deputy [ ] rather than [the career law clerk] that [Complainant's] list of pending motions was growing between April and August of 2020. [Complainant] does not allege that [the courtroom deputy], who provided all the information to [the judge] about [her] work backlog, harbored any discriminatory animus against her, or that [the courtroom deputy] could have properly refused to provide [the judge] with the requested information. Further, and although [the judge] obtained the specific details about [Complainant's] work backlog from [the courtroom deputy], he explained in his interview that "it wasn't like there was some mystery about the fact that [Complainant] wasn't getting the work done." [Vol. I, Tab 20 at [Judge] Interview, p. 42]

For all the above reasons, we agree with the PJO that [Complainant's] claim of wrongful discrimination based on her pregnancy is without merit. Before leaving our discussion of [Complainant's] pregnancy discrimination claim, we do pause to make one final point. In addition to her specific allegations about pretext,

[Complainant] argues more generally in her Request for Review that we can infer that her termination was based on her pregnancy because all the complaints about her work arose after [Complainant] announced her pregnancy on January 23, 2020, before which date [the judge] and his staff were pleased to have [Complainant] working in chambers. [*See* Vol. III, Tab 2 (Request for Review) at 19-21] Of course, what [Complainant's] argument ignores is that, prior to announcing her pregnancy, she had not yet missed her deadline for submitting the [Eleventh Circuit] draft by two months, and [an Eleventh Circuit panel member] had not yet made redlined corrections to the [ ] draft. Moreover, [the judge] could not have foretold that [Complainant] would accumulate a long and growing list of pending substantive motions in the upcoming months. That those events had not yet occurred explains why "there were zero complaints regarding [Complainant's] writing or her work product" before she announced her pregnancy. [*See id.* at 21]

In short, the [ ] District [Court] has asserted legitimate, nondiscriminatory reasons for [Complainant's] termination. [Complainant] has failed to demonstrate that those reasons were a pretext and that the real reason for her firing was her pregnancy. We therefore **AFFIRM** the PJO's decision that [Complainant's] pregnancy discrimination claim is without merit.

III. [Complainant's] Hostile Work Environment Claim

To prevail on a Title VII hostile work environment claim, a plaintiff must show that she was subjected to severe or pervasive harassment that was motivated by a protected characteristic. *See*

Tonkyro v. Sec'y, Dep't of Veterans Affairs, 995 F.3d 828, 836–37 (11th Cir. 2021). Harassment is sufficiently severe or pervasive to be actionable under Title VII when it results in a work environment that an employee "subjectively perceive[s]" as hostile or abusive, and "that a reasonable person would find hostile or abusive" based on the frequency and severity of the conduct, and whether the conduct is "physically threatening" or "unreasonably interferes with the employee's job performance." *Id.* at 837 (quotation marks omitted). *See also Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020) ("A hostile work environment claim under Title VII requires proof that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (quotation marks omitted)). The severe or pervasive standard is intended to be "sufficiently demanding to ensure that Title VII does not become a general civility code." *Tonkyro*, 995 F.3d at 837 (quotation marks omitted).

[Complainant's] hostile work environment claim is based on: (1) [the career law clerk's] unenthusiastic reaction to [Complainant's] pregnancy announcement on January 23, 2020, followed by a statement to [the courtroom deputy]—not [Complainant]—that [the career law clerk] feared [Complainant] would "never get her work done" now; (2) a telephone conversation between [Complainant] and [the career law clerk] on April 6, 2020 concerning the [Eleventh Circuit opinion] revisions that

[Complainant] alleges "escalated into a barrage of insults and teardowns," but that she fails to describe in any further detail; (3) the telephone conversation between [Complainant] and [the career law clerk] on April 14, 2020, described above, in which [the career law clerk] lost her temper; (4) the conversation during a staff meeting as to whether [Complainant] would be able to travel to San Francisco to attend the Ninth Circuit sitting, described above, and (5) [Complainant's] general allegation that [the career law clerk's] "attitude and demeanor" changed after [Complainant] announced her pregnancy. [Vol. III, Tab 2 (Request for Review) at 22-29]

None of the specific comments or conduct alleged by [Complainant] in support of her harassment claim occurred within 180 days of when she filed her Formal Complaint on February 11, 2021. And [Complainant] does not allege that the unspecified "attitude and demeanor" change manifested in an objectively hostile or abusive way anytime within the applicable 180 days—that is, anytime on or after August 11, 2020. Indeed, it appears from the record that [Complainant] and [the career law clerk] had very little contact on or after August 11, 2020. [Complainant] and [the career law clerk] had a friendly email exchange on August 6, 2020, after [the career law clerk] sent a message stating, "Hey [ ]! Just checking in! Sorry I haven't checked in earlier—been a very busy morning! How are things coming?!" [Vol. I, Tab 21 (Proposed Decision), Ex. 16] [The career law clerk] subsequently sent [Complainant] a message on August 21, 2020, in which she referenced a draft order

[Complainant] had submitted and stated, "Hey [ ] ! I thought you did a good job on this. Here are a few suggested edits. It feels weird not to say . . . goodbye to you in person." [*Id.*] As discussed, the [ ] District [Court's] EDR Plan requires that a formal complaint be filed "within 180 days of the alleged wrongful conduct." EDR Plan § 4.C.3.a. Accordingly, [Complainant's] hostile work environment claim, which is based entirely on conduct that occurred outside the 180-day time frame, is barred.

Furthermore, even if [Complainant's] hostile work environment claim was timely, the conduct she alleges does not rise to the level of severe or pervasive harassment that is necessary to support a hostile work environment claim. First, [the career law clerk's] lack of enthusiasm when [Complainant] announced her pregnancy and [her] comment [ ] to [the courtroom deputy], not [Complainant], that [Complainant] would "never get her work done" clearly do not meet the standard for establishing a hostile work environment. *See Tonkyro*, 995 F.3d at 837. Likewise, the request that [Complainant] confirm with her doctor that it would be safe for her to travel by plane to San Francisco during the third trimester of her pregnancy to attend the Ninth Circuit sitting is not objectively hostile or abusive. *See id.* As to [Complainant's] general allegation that [the career law clerk's] attitude and demeanor changed after [Complainant] announced her pregnancy and that one of her telephone conversations with [the career law clerk] "escalated into a barrage of insults and teardowns," the governing legal standard requires us to determine whether a reasonable person would have

found the work environment to be "objectively hostile" based on the frequency or severity of the alleged misconduct, whether the conduct was physically threatening, and the extent to which the conduct interfered with the plaintiff's job. *See Fernandez*, 961 F.3d at 1153. [Complainant's] vague allegations about [the career law clerk's] bad attitude, unpleasant demeanor, and unspecified insults lack any of the details we would need to make that determination and are thus legally inadequate to support a hostile work environment claim.

That leaves [Complainant's] allegations about her telephone conversation with [the career law clerk] on April 14, 2020. Even assuming this conversation occurred exactly as [Complainant] describes,[22] it does not constitute sufficiently severe or pervasive harassment to support a hostile work environment claim, especially when it is considered in context. First, [the career law clerk] and [Complainant's] telephone conversation on April 14 cannot be considered pervasive harassment because it is merely one conversation among numerous other interactions, many of which are preserved

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22 In analyzing the conversation, we have considered [Complainant's] description contained in her contemporaneous written notes, which are attached to [her] objections to the PJO's proposed final decision. [*See* Vol. I, Tab 25 ([Complainant's] Objection to Proposed Decision) at April 15, 2020 Email attachment] [Complainant] states she inadvertently failed to provide the notes during her interview, as requested by the PJO. [*See id.* at 17] However, she submitted the notes in her response to the PJO's proposed written decision, and the PJO considered the notes before issuing his final written decision. [*See* Vol. I, Tab 28 (Final Decision) at 3, n. 3]

in email messages and attached to the record. As discussed above, we have reviewed the email exchanges between [the career law clerk] and [Complainant], all of which occurred after [Complainant] announced her pregnancy, and we have not found a single message from [the career law clerk] that can be characterized as rude or otherwise out of line. On the contrary, all [the career law clerk's] email messages to [Complainant] throughout the relevant time period were cordial and encouraging. For example, the day before the contentious April 14 conversation, [the career law clerk] had sent [Complainant] an email stating that a draft [Complainant] had submitted was "SO MUCH better!!! I still have some suggestions. Call if you need to talk. If not—just send your next draft!" [Vol. I, Tab 21 (Proposed Decision), Ex. 16]

To set the context for the April 14 telephone conversation, [the career law clerk] had discovered that [Complainant] had submitted a draft order that did not resolve all the pending motions on the docket of the relevant case. So, she sent [Complainant] an email message to inquire about the omission. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 10] [The career law clerk] was understandably frustrated by [Complainant's] response that she had not addressed the pending motions because she "wasn't sure what to do with them." [*See id.*] Nevertheless, [the career law clerk] responded appropriately, explaining to [Complainant] that "You can't just leave motions hanging on because you don't know what to do with them" and suggesting that [Complainant] "call or sametime" [her] "about these kinds of things." [*Id.*] The April 14

telephone call that is central to [Complainant's] hostile work environment claim occurred immediately thereafter. And again, we will assume the conversation during the call happened just as [Complainant] alleges. But the record shows that just a few days later, on April 16, 2020, [the career law clerk] resumed her cordial email messaging to [Complainant]. [*See* Vol. I, Tab 21 (Proposed Decision), Ex. 16]

Nor is the April 14, 2020 phone conversation objectively severe enough—in and of itself—to support a hostile work environment claim. [The career law clerk] admitted that she lost her temper and raised her voice to [Complainant], and we assume [the career law clerk] stated to [Complainant] that she was "infuriated" about [Complainant] getting pregnant so soon after starting her clerkship and worried about the impact it would have on [the career law clerk's] own workload and personal life. However, it is undisputed that [the career law clerk] later apologized for losing her temper. Further, and based on [Complainant's] own contemporaneous notes, the thrust of the conversation was [the career law clerk's] concern about work-related issues, including the fact that [Complainant] was "working too slow" and that [the career law clerk] was not [Complainant's] "boss" and could not do [Complainant's] work for her. [Vol. I, Tab 25 ([Complainant's] Objection to Proposed Decision) at April 15, 2020 Email] Again, [the career law clerk's] frustration with [Complainant's] work had been aroused because [Complainant] had knowingly submitted an incomplete order whose omissions had been discovered before issuance of the

order only because [the career law clerk] had happened to look at the docket. *Compare Fernandez*, 961 F.3d at 1153 (concluding that the plaintiff's work environment was objectively hostile based on "ample evidence that the harassment he faced was frequent" and that it included "derogatory remarks, including phrases such as 'shitty Cubans,' 'fucking Cubans,' and 'crying, whining Cubans' on a near-daily basis").

In sum, [Complainant's] hostile work environment claim is untimely and, even if timely, [Complainant] does not allege sufficiently severe or pervasive harassment to support the claim. For both reasons, we **AFFIRM** the PJO's decision that, as a matter of law, [Complainant's] hostile work environment claim fails.

IV. [Complainant's] Claim for Abusive Conduct

Abusive conduct is defined by the EDR Plan as "a pattern of demonstrably egregious and hostile conduct not based on a protected category that is so severe or pervasive as to alter the terms and conditions of employment and create an abusive working environment." EDR Plan, App. 1. The EDR Plan's definition of abusive conduct incorporates the same objective standard that applies to hostile work environment claims under Title VII, clarifying that abusive conduct under the Plan "is conduct that a reasonable person would consider to be threatening, oppressive, and intimidating." *Id.* In addition, the Plan specifically excludes from its definition of abusive conduct "communications and actions reasonably related to the supervision of an employee's performance and designed to ensure that employees live up to the high expectations of

their positions, including but not limited to: instruction, corrective criticism, and evaluation." *Id.*

Like her hostile work environment claim, [Complainant's] abusive conduct claim is time-barred because the last allegedly abusive conduct occurred well before August 11, 2021. In addition, [Complainant's] allegations in support of her abusive conduct claim—including the telephone conversation on April 14, 2020 during which [the career law clerk] allegedly "screamed her frustrations" about [Complainant's] pregnancy and inability to complete her work and other instances when [the career law clerk] was rude in unspecified ways or had a "negative attitude"—simply do not satisfy the definition of abusive conduct set out in the EDR Plan. Accordingly, we **AFFIRM** the PJO's conclusion that [Complainant's] abusive conduct claim is without merit.

V. [Complainant's] Retaliation Claim

In addition to discrimination, harassment, and abusive conduct, the EDR Plan prohibits retaliation, which the Plan defines as "an adverse employment action taken against an employee for opposing, reporting, or asserting a claim of wrongful conduct under this Plan." EDR Plan § 2.A.4. and App. 1. [Complainant] claims that [the judge] terminated her in August 2020 to retaliate against her for complaining on April 15 that [the career law clerk] had spoken rudely to her during the phone conversation between the two

on the prior day.[23] [*See* Vol. I, Tab 3 (Formal Complaint) at 17-19, 20] [Complainant] also speculates that [the judge] later retaliated against her by giving a negative reference about her to the Air Force Materiel Command, a potential employer with whom [Complainant] had interviewed on December 11, 2020, and by disparaging her to his colleagues in the [ ] District [Court]. [*See id.*; Vol. III, Tab 2 (Request for Review) at 18]

Like her pregnancy discrimination claim, [Complainant's] retaliation claim is based on circumstantial evidence and is thus analyzed under the *McDonnell Douglas* burden-shifting framework. *See Johnson v. Miami-Dade County*, 948 F.3d 1318, 1325 (11th Cir. 2020) ("When a Title VII retaliation claim . . . is based on circumstantial evidence, this Circuit utilizes the three-part *McDonnell Douglas* burden-shifting framework."). As that framework is applied in the retaliation context, [Complainant] must first establish a prima facie case of retaliation by showing that: (1) she engaged in protected conduct—that is, conduct protected by the EDR Plan, (2) she suffered an adverse employment action, and (3) "there is some causal relationship between the two events." *Id.* The burden

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[23] [Complainant] alleges in her complaint that she notified [the judge] on April 14, 2020 of [the career law clerk's] "discriminatory animus" but the undisputed facts show that the telephone conversation that is the subject of this allegation [occurred] on April 14, 2020, and that [Complainant] notified [the judge] about the conversation on April 15, 2020, the day after the conversation occurred. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 30 ("So I didn't talk to him until the next day, but I did write that email and I was going to send it but I did not.")]

then shifts to the [ ] District [Court] to articulate a legitimate, non-retaliatory reason for the adverse action. *Id.* Assuming the [ ] District [Court] makes the required showing, the burden shifts back to [Complainant] to prove that the proffered reason "was not the real basis for the decision, but a pretext" for retaliation. *Id.*

A. [Complainant's] Termination

As to [Complainant's] termination, we assume [Complainant] engaged in protected activity when she complained on April 15, 2020 to [the judge] about [the career law clerk's] comments regarding her pregnancy, and that [Complainant] suffered an adverse employment action when she was told on August 18 that her clerkship would end at the conclusion of her maternity leave in November 2020.[24] Even so, [Complainant] must still make a showing that her complaint caused her termination. To satisfy the causation requirement at the prima facie stage of the analysis, [Complainant] must show that her protected activity (her complaints to [the judge] about [the career law clerk's] comments on April 15, 2020) and the alleged adverse action (her termination in August 2020) were not "wholly unrelated." *See Tolar v. Bradley Arant Boult Commings, LLP*, 997 F.3d 1280, 1294 (11th Cir. 2021).

Although that is not a high bar, [Complainant's] allegations fail to meet it. Indeed, [Complainant] does not allege any causal

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[24] Again, the reduction of [Complainant's] clerkship from four to two years is not actionable, as it occurred outside the 180-day time period for asserting claims under the EDR.

link beyond the fact that her complaint about [the career law clerk's] comments on April 15, 2020 preceded her termination four months later. It is true that temporal proximity can establish prima facie causation if the protected conduct and the adverse action are "very close" in time. *See id.* But the four-month delay between [Complainant's] discussion with [the judge] in April 2020 and his decision in August 2020 to terminate her is too long to infer causation based on temporal proximity alone. *See Johnson*, 948 F.3d at 1328 ("A three-to-four-month disparity between protected conduct and an adverse employment action is insufficient to establish pretext[.]").

[Complainant] points out that [the judge] called a professor [ ] looking for [a recommendation for] another law clerk on April 16, 2020. [Vol. III, Tab 2 (Request for Review) at 17] This was one day after [Complainant] told [the judge] about her conversation with [the career law clerk]. [*Id.*] It was also one day after [the judge] received [the Eleventh Circuit judge's] edits to the [Eleventh Circuit] opinion. In any event, the relevant adverse action—[the judge's] decision to terminate her— did not occur until four months later in August 2020.

Even assuming [Complainant] could establish a prima facie case of causation in support of her termination-based retaliation claim, she has not presented any evidence of pretext to overcome the [ ] District [Court's] legitimate explanation for the termination—namely, performance issues with respect to both the quantity and the quality of [Complainant's] work. The [ ] District

[Court's] explanation meets its "exceedingly light" burden at the second stage of the *McDonnell Douglas* analysis. *See Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1312 (11th Cir. 2016). The burden thus shifts to [Complainant] to credibly allege that "the reasons given by [the [ ] District [Court]] were not the real reasons" for her termination, but rather a pretext for retaliation. *See id.* at 1313. For the reasons discussed above, [Complainant] has failed to make a showing of pretext. Accordingly, we **AFFIRM** the PJO's conclusion that [Complainant's] claim that she was terminated to retaliate against her for protected conduct is without merit.

B. Negative References

As another retaliation claim, [Complainant] alleges that [the judge] provided negative references to the Air Force Materiel Command and to his fellow colleagues in the [ ] District [Court] and that he did so in order to retaliate against [Complainant] for asserting the present claims under the EDR plan. Turning first to the allegation involving the Materiel Command application, [Complainant] filed her formal complaint on February 11, 2021, after having filed a request for assisted resolution on December 4, 2020. She alleged in her complaint that she interviewed for an attorney position with the Air Force Materiel Command at Robins Air Force Base on December 11, 2020, that she was one of five candidates interviewed, and that she was notified that she was not selected for the position on January 27, 2020. [Vol. I, Tab 3 (Formal Complaint) at 18-19; *see also* Vol. I, Tab 20 at [Complainant] Interview, p. 38]

From this, she speculates that [the judge] may have given her a negative reference, albeit she acknowledges that she does not know whether the Materiel Command checked her references. [The judge] and [the courtroom deputy], however, confirmed in their interviews that they never were contacted by the Materiel Command or otherwise asked to provide a reference for [Complainant]. [Vol. I, Tab 20 at [Judge] Interview, p. 32; Vol. I, Tab 20 at [Courtroom Deputy] Interview, pp. 26-27] Likewise, [ ] the Clerk of Court stated that he was never contacted. [Vol. I, Tab 20 at [Clerk of Court] Interview, p. 18] Moreover, the premise of [Complainant's] retaliation claim is that anything short of a good recommendation would constitute retaliation.[25] Yet, it is clear that any honest comments by [the judge] concerning [Complainant's] performance would not have been flattering. We do not read the [ ] District [Court's] prohibition of retaliation to give rise to a requirement that a federal judge provide false information.

As to [the judge's] district court colleagues, [Complainant] asserts in her Request for Review that [the judge] disparaged her to his colleagues, "preventing any future meaningful employment in the [ ] District." [*See* Vol. III, Tab 2 (Request for Review) at 18] It is true that [the judge] had shared with [two of] his colleagues the problems he was having with [Complainant]. [Vol. I, Tab 20 at

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25 One of [Complainant's] requested remedies is that the District [Court] provide her with a good recommendation for any future job applications. [Vol. I, Tab 3 (Formal Complaint) at 22]

[Judge] Interview, p. 6] As noted, [one of these colleagues] volunteered the services of his law clerk to handle one of the cases assigned to [Complainant]. [*See id.* at 3-4] Likewise, [the judge] shared this same information with [the] Clerk of Court [ ] when seeking the latter's advice and assistance in finding a means to shore up [Complainant's] deficient performance. [*See id.* at 5-6] That advice led to [the judge's] request to the Eleventh Circuit for authorization to hire a third clerk. The above interactions, however, had begun prior to [Complainant's] termination and the filing of her EDR complaint.[26]

Further, there is no indication in the record that [Complainant] had applied for a position with another colleague of [the judge's].[27] Had she so applied, it seems obvious that any such judge would seek out the input of a judge for whom she had recently

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26 Suggesting that [the judge's] disparagement to his colleagues may have been done to retaliate against [Complainant] for complaining about her contentious conversation with [the career law clerk] on April 14, [Complainant] cites [the judge's] statement in his interview that [Complainant] "wouldn't have gotten a good recommendation out of [him] after April 14th." [Vol. I, Tab 20 at [Judge] Interview, p. 31] As discussed, [Complainant] did not report [the career law clerk's] alleged discriminatory animus to [the judge] until April 15th. Thus, and contrary to [Complainant's] argument, [the judge's] statement indicates that the reason he would not have recommended [Complainant] to his colleagues in the [ ] District was not her protected conduct—which had not yet occurred on April 14th—but rather her work performance issues.

27 According to InfoWeb, in addition to [the two colleagues with whom the judge discussed Complainant's deficient performance], there is one other district judge in [his] federal courthouse—[ ]—and one magistrate judge—[ ].

clerked. Again, [Complainant] seems to imply that absent a dishonest response from [the judge] that [Complainant] had done a good job, [the judge] would be guilty of retaliation. We do not read the anti-retaliation provision so broadly. Accordingly, we **AFFIRM** the PJO's ruling that [Complainant] has not stated a viable retaliation claim against the [ ] District [Court] based on alleged negative employment references.

VI. Discovery, Cross-Examination, and Impartial Decision-making

Finally, [Complainant] argues that the PJO erred by dismissing her claims without giving her an opportunity for discovery and a formal hearing with cross-examination, and that the PJO failed to act impartially in ruling on her claims. [Vol. III, Tab 2 (Request for Review) at 7-10] We reject both arguments.

Regarding the first argument, the EDR Plan directs the PJO to "ensure that [a complainant's] allegations are thoroughly, impartially, and fairly investigated." EDR Plan § IV.C.3.e.v. To that end, the Plan gives the PJO the authority to "provide for such discovery to the parties as is necessary and appropriate." *Id.* The Plan does not require the PJO to conduct formal discovery, but rather empowers the PJO to "determine what evidence and written arguments . . . are necessary for a fair and complete assessment of the allegations." *Id.* Here, the PJO interviewed the parties and the witnesses identified by the parties to have information relevant to [Complainant's] claims, and he collected and reviewed the documents produced by the parties and witnesses, including

[Complainant's] contemporaneous notes of the April 14, 2020 telephone conversation that is central to her allegations. The PJO's conclusion that no additional discovery or procedures were warranted was within his discretion under the EDR Plan and, based on our own review of the interviews, the relevant documents, and [Complainant's] allegations, we find no abuse of that discretion.

In her Request for Review, [Complainant] specifically takes issue with the fact that the documents reviewed by the PJO reflect only her interactions with [the career law clerk] after she announced her pregnancy in January 2020, and that she should be permitted to locate and produce documents prior to the announcement. [Vol. III, Tab 2 (Request for Review) at 7] We disagree. The documents produced after [Complainant's] pregnancy announcement overwhelmingly show that [the career law clerk] treated [Complainant] respectfully, continuing to encourage [Complainant] in her work and to provide editing and other assistance as necessary, after [Complainant] announced her pregnancy. That [the career law clerk] might have treated [Complainant] even better prior to her pregnancy announcement does not help [Complainant's] claim so long as [the career law clerk] engaged in no wrongful conduct—that is, conduct prohibited by the EDR Plan—after the announcement.

[Complainant] also complains in her Request for Review that she needs an opportunity for cross-examination so that she can address "substantially damaging and untrue statements made against her in the interviews." [*See id.* at 8] But cross-examination

would add nothing to the analysis as to the most damaging—and undisputed—assessments of [Complainant's] work performance made in the interviews: that [Complainant] submitted her draft in the [Eleventh Circuit] case two months after an already extended deadline; that the [ ] draft submitted to the Eleventh Circuit panel required additional edits that were "deeply embarrassing" to [the judge]; and that between April and August 2020 [Complainant's] list of pending motions continued to grow, notwithstanding [the judge's] warning to her at their April meeting that she had to get more timely in the drafting of orders. Given these undisputed facts, it is implausible that an opportunity for discovery and cross-examination would have allowed [Complainant] to prove that her poor work product was not the actual motivation for her termination, as she suggests in her Request for Review. [*See id.*]

As to [Complainant's] second argument, we see no indication in the record of partiality by the PJO. [Complainant] claims the PJO "made it difficult for [her] to have representation in this matter" but that claim is demonstrably false. [*See id.* at 9] [Complainant's] attorney [ ] notified the PJO of her appearance in the EDR matter on March 31, 2021. [Vol. I, Tab 15 (Letter of Appearance)] After reviewing the notice of appearance, the PJO determined that [the attorney] was not admitted to the [ ] District [Court] or licensed by the State Bar [in which the Court is located]. [*Id.*] The PJO advised [the attorney] to review the [ ] District [Court's] local rules and determine her ability to appear in the matter, after which [the attorney] engaged local counsel to file a *Pro*

Hac Vice Petition as required by the local rules. [Vol. I, Tab 16 (Local Counsel's Letter)] Thereafter, [Complainant's attorney] appeared and submitted filings on behalf of [Complainant] in the EDR matter. The PJO's requirement that [the attorney] abide by the local rules cannot be construed as an attempt to "hinder" [Complainant's] ability to have legal representation, as [Complainant] suggests. [*See* Vol. III, Tab 2 (Request for Review) at 9]

[Complainant] also complains that the PJO required her to travel to [the PJO's courthouse] for the interviews in this matter "in the middle of a pandemic" and that the PJO's questioning of [the judge] was leading and consisted mostly of a "monologue" by [the judge]. [*See id.* at 9-10] The PJO explained during [Complainant's] interview that he [was] conduct[ing] the hearings in [his own courthouse] because it was a "neutral place" and he did not think it would be appropriate to require [Complainant] to come back to the courthouse [where she had worked]. [*See* Vol. I, Tab 20 at [Complainant] Interview, p. 4] Presumably due to his neutrality concerns, the PJO likewise denied [the judge's] request to conduct the interviews in [the courthouse where he and Complainant had worked together]. [*See* Vol. I, Tab 13 (Letter to [the Judge])] And ultimately all the parties and witnesses traveled to [the selected neutral location] to appear live at their interviews, not just [Complainant], albeit [Complainant's] attorney requested and was permitted to appear via telephone. [Vol. I, Tab 19 ([ ] Request to Attend Interview Remotely)] As to the PJO's questioning during the interviews, the PJO did not take any more of a cross-examination-

style posture when he questioned [Complainant]. [*See generally* Vol. I, Tab 20 at [Complainant] Interview] He asked [Complainant] simple questions about her allegations and the facts of the case as she saw them, and he began the interview by giving [Complainant] an open-ended opportunity to "fill in . . . [the] blanks" with facts that were missing from the complaint and, more generally, to provide any information she wanted to share before getting into specific questions. [*See id.* at 5]

Finally, [Complainant's] suggestion that [the judge] asked the PJO out to lunch at the end of [the judge's] interview is a clear mischaracterization of the record. At the conclusion of the interview, which [Complainant] does not dispute had carried into the lunch hour, [the judge] stated, "You probably want to go to lunch, right?" [Vol. I, Tab 20 at [Judge] Interview, p. 53] It is obvious, reading that comment in context, that [the judge] was not offering to take the PJO to lunch. He simply was commenting that the PJO and his law clerks probably were ready to break for lunch, given the time of day.

For all these reasons, we reject [Complainant's] argument that the PJO erred by ruling on her claims without providing additional procedures such as discovery and cross-examination. Further, and based on our review of the record, we find [Complainant's] suggestion that the PJO acted partially in dismissing her claims unfounded.

CONCLUSION

For the reasons stated above, we **AFFIRM** the PJO's final decision concluding that [Complainant's] claims against the [ ] District [Court] for wrongful conduct in violation of the EDR Plan are without merit.