UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK SABATELLI, on behalf of himself and
on behalf of all others similarly situated,

Plaintiff - Appellant

v.

BAYLOR SCOTT & WHITE HEALTH;
SCOTT & WHITE CLINIC,

Defendants - Appellees

On Appeal from the Western District of Texas
Frank Sabatelli, et al v. Baylor Scott & White Health and Scott & White Clinic, 1:16-CV-00596-RP

APPELLANT'S BRIEF

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*Frank Sabatelli, Plaintiff - Appellant v. Baylor Scott & White Health and Scott & White Clinic, Defendants -Appellee*s Fifth Circuit No. 19-50047

CERTIFICATE OF INTERESTED PERSONS/
CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument in this case. This is an appeal from the lower court's decision to grant summary judgment on claims under the Americans With Disabilities Act, the Age Discrimination in Employment Act and a request for declaratory judgment regarding the arbitrability of the disputes. As such the matter is factually intensive and appellant believes oral argument would be beneficial.

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I. STATEMENT OF JURISDICTION

The appeal is from entry of a final judgment on all claims and parties. Jurisdiction exists under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES

Issue 1: Whether the district court erred in granting summary judgment in favorof SWC on Frank Sabatelli's Age Discrimination in Employment Act ("ADEA") discrimination case.

Issue 2: Whether the district court erred in granting summary judgment in favorof Baylor Scott & White Health and Scott & White Clinic ("SWC") on Frank Sabatelli's Americans With Disabilities Act, ("ADA") discrimination case.

Issue 3: Whether the district court erred in granting summary judgment in favorof Defendant and failing to affirm summary judgment in favor of the Plaintiff rulingthat Frank Sabatelli had waived his right to invoke arbitration in regard to his breachof contract claim.

III. STATEMENT OF CASE

A. Course Of Proceedings And Disposition Below

This cases arises out of Appellant Sabatelli filing a lawsuit alleging wrongful termination by SWC in violation of the ADA and ADEA.

Sabatelli was hired by SWC as a radiologist in February 2012 pursuant to an

employment agreement (the "Agreement") which specified the terms and conditions of Sabatelli's employment. ROA.910. The Agreement also contained an arbitration provision calling for arbitration of any controversies, disputes or claims arising out the Agreement. Id.

On July 17, 2014, notified Sabatelli that he would be terminated if he did not resign. ROA.911. Sabatelli chose to resign. Id.

On May 19, 2016, Sabatelli brought an action in the United States District Court for the Western District of Texas alleging that his termination violated the ADEA and the ADA. ROA.8. In the lawsuit, Sabatelli did not assert, and did not ever assert a breach of contract claim based on the notice provisions contained in the contract. On July 17, 2017, Defendants moved for summary judgment on Sabatelli's discrimination claims. ROA.82.

On September 11, 2017, Appellant filed an arbitration demand alleging that SWC breached its contract with Appellant by failing to provide proper notice of termination as required by the Agreement. ROA.911. Appellees subsequently moved to have the arbitration demand dismissed, which was denied by the arbitrator. ROA.912.

Appellees then filed a counterclaim on September 27, 2017 requesting that the Court declare that Sabatelli had waived his right to arbitration on the contractual

notice claim. ROA.537. On October 4, 2017 the District Court granted Appellees' motion for summary judgement on Appellant's discrimination claims. ROA.739.

Appellant and Appellees thereafter filed competing motions for summary judgment regarding Appellee's counterclaim on March 23, 2018. ROA.739; ROA.759. On December 3, 2018 the District Court granted Appellees' motion for summary judgment on the declaratory action and denied Appellant's motion on the same issue. ROA.910. On December 14, 2018 the District Court entered a final judgment disposing of the entirety of the case. ROA.922. This appeal followed. ROA.923.

B. Statement of Standard For Review

This circuit reviews *de novo* a district court's grant of judgment of summary judgment. *See* *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 467 (5th Cir. 2002); *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 574 (5th Cir. 2003). The Court examines all of the evidence in the record as a whole and must draw all reasonable inferences in favor of the plaintiff. *See* *id.* The court does not assess the credibility of the witnesses or otherwise weigh the evidence. *See* *id.*

Judgment as a matter of law is appropriate if there is no legally sufficient evidence that forms the basis for a reasonable jury to find for that party on that issue. *See* *Laxton v. Gap, Inc.*, 333 F.3d 572, 577 (5th Cir. 2003). This occurs when the facts

and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not arrive at a contrary verdict. *See id.* The court disregards evidence favorable to the moving party that the jury is not required to believe. *See id.*

In the summary judgment context, court must construe factual disputes in favor of the non-moving party. *See Goudeau v. National Oilwell Varco*, 793 F.3d 470, 472 (5th Cir. 2015). In doing so, the court must "draw all reasonable inferences in favor of the non-moving party and avoid credibility determinations and weighing of the evidence. *Id.* at 474. When a court in deciding summary judgment chooses "which testimony to credit and which to discard, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party." *Burton v. Freescale Semiconductor Inc.*, 2015 WL 4742174 (5th Cir. Aug. 10, 2015).

IV. SUMMARY OF ARGUMENT

A. Discrimination Claims

In regard to Appellant's discrimination claims, Appellees concede that Appellant has established a prima facie case. ROA.741. Therefore, under the *McDonnell Douglas* burden shifting framework applied to ADA and ADEA claims, Appellees were required to state a legitimate, non-discriminatory reason for Appellant's termination. The District Court ruled they did. This decision was in error because the reasons offered by Appellees were not sufficiently specific to meetthat burden.

Alternatively, in the event that this Court finds that Appellees did state a legitimate, non-discriminatory reason for Appellant's termination, Plaintiff produced sufficient evidence that such reasons were pretext to raise a question of material fact regarding the existence of pretext and summary judgment must be reversed.

Pretext can be established in a variety of ways, including inconsistent reasons for termination, false reasons for termination, co-worker retaliation, inadequate investigation, and failure to follow company policy. Sabatelli has provided evidence of these elements which raise a material fact question as to whether Southwest engaged in pretext. Because a material fact issue exists, summary judgment was improper and should have been denied.

B. Declaratory Judgment

In regard to summary judgment on Appellees' declaratory judgment counterclaim, that decision was also in error. The decision was in error because the Court ruled that Appellant's claim splitting issue barred his breach of contract claim, when that issue was either required to be decided by the arbitrator or alternatively, was in error as the doctrine of claim splitting does not apply to a claim that is clearly subject to arbitration such as Appellant's breach of contract claim based on the failure to provide notice contained in the contract.

V. ARGUMENT

A. Statement of Facts

The following are the facts which, if taken as true which must be done for the purposes of summary judgment, are evidence of pretext that precludes summary judgment on Appellant's discrimination claims in this case.

Declaration of Tammy Payton

Tammy Payton was the radiology manager at the facility and was there the entire time that Frank Sabatelli, M.D. worked there. ROA.399. She supervised the radiology nurses and technicians, including Matt Alvarado and Jennifer Varner. She reported to Jessica Delaune and was present at the facility and witnessed the interactions between Dr. Sabatelli, Jennifer Varner and Matt Alvarado as she worked closely with all of them. Id.

She testified that problems in the radiology department were in no way being caused by Dr. Sabatelli. Id. Instead, the problems in the radiology department were being caused by Jennifer Varner, a nurse and a technician, Matt Alvarado, who repeatedly acted inappropriately and unprofessionally, and management's unwillingness to do anything about it. Id. Payton repeatedly spoke to Jessica Delaune about this who agreed it was a problem and who knew the problems were not being caused by Dr. Sabatelli. Id. The only thing she ever did about it though was to talk to

Ms. Varner and Mr. Alvarado about acting appropriately and professionally but other than that nothing was done and the problems continued and were constant throughout Dr. Sabatelli's tenure there. Id.

During the entire time Tammy Payton worked with Dr. Sabatelli, she never saw him raise his voice or belittle another employee, never saw him yell at anyone, and never saw him acting inappropriately or unprofessionally. Id. She did see both Ms. Varner and Mr. Alvarado act inappropriately and unprofessionally on numerous occasions. Id. Tammy Payton believes that Ms. Varner and Mr. Alvarado were acting that way on purpose and were attempting to get Dr. Sabatelli fired from the facility. Id. They were constantly acting unprofessional to him and did not like him. They eventually succeeded in getting him fired from the facility. She believes they were instrumental in getting Dr. Sabatelli fired. Id.

Declaration of Frank Sabatelli

Dr. Sabatelli is a practicing radiologist who was hired to work at the Baylor Scott & White Medical Center in Round Rock. ROA.403. He was hired in February 2012 and worked there until July 2014 when he was forced to resign. Id. During his time there, he had numerous issues with a nurse named Jennifer Varner and a radiology technician named Matt Alvarado. Id. This was because they repeatedly acted unprofessionally and acted in a way that could potentially endanger the care of

the patients.

His complaints about the way they were acting fell on deaf ears because nothing was ever done about it, putting the patients at risk. Id. For example, during a P.A.D. Revasularization/Angioplasy/Stent placement of SFA Occlusion there were disruptive conversations taking place with loud rap music playing which diverted the attention of the treatment team. Id. This potentially raised the possibility of risk/complication.

Dr. Sabatelli spoke to Dr. Felix Lin about this issue in May 2014. Id. On another occasion, Jennifer Varner interrupted Dr. Sabatelli while he was performing a transcatheter spinal tumor embolization, the first such procedure at that facility. Id. This raised a potential threat to the quality care of the patient with potential complication. He spoke to Dr. Jeff Helmcamp about this issue. Id.

On another occasion, he was performing a gastrostomy tube placement when Jennifer Varner burst into the procedure room, not wearing a mask, and stated in a very loud voice, "where are all the clipboards." ROA.404. This took everyone's attention away from the patient and operation. He discussed this matter with Dr. Jeff Helmcamp. Id.

On another occasion, Jennifer Varner deliberately delayed scheduling of a patient for a procedure despite the patient being in intolerable pain and the patient

could not tolerate narcotics. Id. He spoke to Dr. Jeff Helmcamp about this issue. Id. One time Matt Alvarado did not know how to operate the equipment during a procedure. Id. Instead of asking his supervisor, he instead just sat in the control room and watched. Dr. Sabatelli discussed this issue with the Dr. Helmcamp. Id.

On another occasion, Jennifer Varner and Matt Alvarado delayed another case. Id. This case was to follow up in OR at 10:00. During the procedure Jennifer Varner yelled out, "how much longer," disrupting a risky procedure. The case should have started at 8:00 but did not until 10:00. Dr. Sabatelli emailed Dr. Helmcamp about this issue as it could potentially harm the patient and should not be tolerated. Id.

On another occasion, Dr. Sabatelli reported to Dr. Helmcamp that Matt Alvarado smelled of alcohol on his breath at work. Id. Nothing was done about it as the clinic determined that he was not "impaired." ROA.447.

Other than at the Round Rock Scott & White clinic, Dr. Sabatelli has never before or since had to deal with these kinds of issues. ROA 404. These issues were potentially harmful to the patients and in no way should have been tolerated. Id.

One time Dr. Sabatelli was instructing them about a procedure and how to do it when Jennifer Varner called him "an old fart." ROA.405. This was not said jokingly or said directly to him but was muttered under her breath to another co-worker. On another occasion Dr. Sabatelli was telling them how to do a different procedure, in

order to get the needed products. Matt Alvarado had a reputation for not ordering things that he was asked to order and Matt said something to the effect that he was getting old and forgetful like Dr. Sabatelli. Id.

Whenever a doctor would come through to interview in the group, one of the radiologists named Patty Lee, who was much younger than Dr. Sabatelli would say one of the best things about this facility is that all the staff are young which creates a certain kind of climate and that we didn't have a lot of "old dead wood." Id. This happened on at least three occasions.

One time she said that to a doctor when Jennifer Varner then spoke up after Dr. Lee made the "all staff are young" comment and said "with some exceptions" and looked directly at Dr. Sabatelli. Id. From Dr. Sabatelli's experience working at that clinic, there was a culture of valuing younger workers over experience. Id. It was a culture that dismissed the value of experience and wisdom at the expense of quality patient care. This was something he witnessed on a regular basis. This translated into suboptimal patient care.

The lack of listening to Dr. Sabatelli's concerns about the disruptive and unprofessional behavior of Jennifer Varner and Matt Alvarado put patients at risk. Id. Jennifer Varner and Matt Alvarado were in their 20s. Id. Instead of properly dealing with the problems they were creating that was putting patients potentially at

risk, they instead terminated Dr. Sabatelli for "not getting along" with them. Id.

One time when Dr. Helmcamp and Dr. Sabatelli were discussing medical terms, infiltrate versus opacity, he remarked that the words Dr. Sabatelli was using were "an old thing. That's your generation." Id. He was implying that Dr. Sabatelli was using those terms due to his age. That happened on at least three occasions. Id.

Dr. Sabatelli never raised his voice or yelled at anyone at work. ROA.406. He never belittled anyone at work. He was not "difficult to work with" or "temperamental." Those are all lies. The only time he would have to raise his voice would be to have someone hear him over the music being played or to capture their needed attention during an operation. Id.

During the termination meeting, Dr. Watson basically told Dr. Sabatelli he was being terminated, did not explain why, did not say that he had previously been counseled, but did state "I don't know what you're discussing with your psychiatrist." Id. Dr. Sabatelli had not been seeing and has never seen a psychiatrist. He did speak to a therapist in order to better understand how to deal with the people he was working with and the problems and stress they were creating and told Dr. Helmcamp that. Id.

Apparently Dr. Helmcamp told that to Dr. Watson who misunderstood thinking Dr. Sabatelli was seeing a psychiatrist. Id. Dr. Sabatelli has not seen a therapist

before or since his time at the Round Rock Scott and White Clinic. Id. Dr. Sabatelli now understands that Jennifer Varner and Matt Alvarado repeatedly complained to management about him. Id.

There was nothing wrong with his conduct at work as he was simply trying to get them to do their jobs properly without endangering the patients. Based on this, Dr. Sabatelli believes that Jennifer Varner and Matt Alvarado were instrumental in getting him fired/forced to resign. Id.

The problems in the radiology department were as a direct result of management failing to deal with the younger nurses and technicians not properly doing their job. Id. Instead of dealing with the issues with the younger employees, they chose to instead get rid of Dr. Sabatelli. He was not demeaning or belittling anyone, he was trying to instruct the nurses and technicians, mainly Jennifer Varner and Matt Alvarado, to properly do their jobs in a team-like manner so that patients were not put at risk. Scott & White chose to retain those younger employees and get rid of Dr. Sabatelli and put keeping them on as a higher priority than caring for its own patients. Dr. Sabatelli has never been in such a situation before or since. Id.

Deposition of Rob Watson, M.D.

Dr. Watson testified that he is a Baylor Scott & White employee. ROA.411. He made the ultimate decision to terminate Dr. Sabatelli's employment. ROA.411.

The LEAN program did not play a part in the termination decision. ROA.413. Part of the reason he terminated Dr. Sabatelli was based on what Jessica Delaune was telling him. ROA.417. If true, that means Jessica Delaune was lying to him. ROA.399.

When asked for anything specific that Dr. Sabatelli said that caused Dr. Watson to terminate his employment, Dr. Watson testified "I can't quote anything specific that he said to the staff that I remember, not a verbatim, direct quote, no." ROA.420-21. He mentioned that Dr. Lin had brought up some concerns about clinical issues but it was not a "major driving force" behind the termination decision. ROA.422.

He never personally saw Dr. Sabatelli being argumentative or inappropriate, answering that question "No, absolutely not." ROA.423. Dr. Sabatelli was always professional with him. Id.

When he decided to terminate Dr. Sabatelli, he had concluded that the situation had become untenable for Dr. Sabatelli and asked him for his recommendation for improving the department. ROA.425-26. Dr. Watson asked him for improvement recommendations because he valued his opinion. ROA.427. Clinical concerns did not play a part in the termination decision. ROA.427-28. When asked if he brought up that Dr. Sabatelli was seeing a psychiatrist in the termination meeting, Dr. Watson replied "I don't recall saying that." ROA.429. In other words, he did not deny it.

Deposition of Felix Lin, M.D.

Dr. Lin testified that he has no specific criticism of Dr. Sabatelli's work. ROA.434. In contrast to his 10 page affidavit attached to Defendants' Motion for Summary Judgment which discusses a number of issues, Dr. Lin testified in his deposition that there were only two reasons for the termination of employment, (1) multiple conflicts with the nurses and technicians in radiology, and (2) a refusal to abide by and lack of adherence to new process changes. ROA.435. Dr. Watson did not mention the second reason in his deposition as a reason for the termination decision. ROA.413, 415-16.

Deposition of Jeffrey Helmcamp, M.D.

Dr. Jeffrey Helmcamp, who was the medical director during the vast majority of Dr.Sabatelli's tenure before being replaced by Dr. Lin shortly before Dr. Sabatelli was terminated, testified in his deposition that he never personally witnessed Dr. Sabatelli say anything that he considered to be demeaning or degrading or insulting. ROA.439. He never witnessed anything regarding protocols not being followed or procedures not being properly done with respect to Dr. Sabatelli. Id. Jennifer Varner never told him anything that Dr. Sabatelli did that would impair patient care. ROA.440.

When Dr. Sabatelli complained to him about the nurses talking during a procedure, he told Dr. Sabatelli he would talk to the nurse and staff. ROA.441. When he did so, they did not deny it but said "they would try not to do it in the future." ROA.442. He does recall the incident where Jennifer Varner burst into the procedure room without a mask on yelling "where are all the clipboards." ROA.444. He spoke to Jessica Delaune about that so she could relay it to Jennifer Varner. Id. He does not know if Jessica Delaune spoke to Jennifer Varner about it. Id. He testified that Dr. Sabatelli complained about the nurses and techs acting unprofessionally and inappropriately "several times a week." ROA.446. At one point in time there was a plan to remove Jennifer Varner from the IR but for unknown reasons it never happened. ROA.448-49.

Dr. Helmcamp confirmed that Matt Alvarado cancelled a case when he should not have. ROA.450-51. It is undisputed that Mr. Alvarado still works for Round Rock Scott & White. The other radiologist who worked with Dr. Sabatelli, also complained about the nurses delaying cases. ROA.453.

Dr. Helmcamp acknowledges that Dr. Sabatelli's concerns about the way the nurses and techs were performing their jobs were "legitimate complaints" in his opinion. ROA.455-56.

The Contract

The contract between Dr. Sabatelli and Scott & White states that it may be terminated by Scott & White upon 60 days written notice to Dr. Sabatelli if the Board of Directors by a two thirds vote find that the employee "is perceived as uncooperative, difficult to get along with, or is incompatible with other Employee(s) of the Clinic." ROA.836. It is undisputed that Dr. Sabatelli was not given 60 days written notice of his termination and that the Board of Directors did not meet and have a vote on the matter. It is also undisputed that this Contract is subject to an arbitration clause.

Gill Naul, M.D.

One of the doctor's that Dr. Watson says was involved in the termination decision, wrote an email to Dr. Sabatelli acknowledging that everything he said was being "taken out of context and twisted around" and to be careful. ROA.415 ("I certainly talked with Gil Naul, because he and I would have talked about that.").

B. The district court erred in granting summary judgment in favor of SWC on Frank Sabatelli's ADEA discrimination case.

1. Standard of Proof in an ADEA discrimination claims

The inquiry into the kind and amount of evidence sufficient for a plaintiff to survive an employer's motion for summary judgment in an age discrimination case,

such as this, is controlled by *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed. 2d 105 (2000). *See* *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222, 223 n. 4 (5th Cir. 2000) (recognizing that "Reeves is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases"); see also *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097 (observing that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law").

a. Prima Facie case

Appellees have conceded that Appellant has established a prima facie discrimination case. Because of this there exists a presumption that Appellant's termination was discriminatory.

b. Legitimate, non discriminatory reason for termination

Under the *Reeves/McDonnell Douglas* burden shifting scheme, to overcome the presumption of discrimination, Appellees must offer a legitimate, non discriminatory reason for Appellant's termination, and the Defendant must set forth a specific reason for termination. Subjective assessments of performance will only satisfy the employer's burden of production if the employer articulates a clear and reasonably specific basis for its subjective assessment. *See* *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004) (finding that employer failed to articulate legitimate non-

discriminatory reason). A defendant cannot merely state vague and conclusory reasons. *See id.* An employer must articulate reasonably specific facts that explain how it formed its subjective opinion regarding the employee. *See Alvarado v. Texas Rangers*, 492 F.3d 605, 617 (5th Cir. 2007) (employer failed to specifically identify reason applicant was not hired and therefore did not meet its burden of production); *See also Parker v. American Airlines, Inc*., 2008 WL 2811320 (N.D.Tex. 2008) (same).

Defendant has failed to set forth a specific reason for Appellant's termination. There has been no evidence presented that can point to anything specific that Dr. Sabatelli actually did that led to his termination. Instead, employees repeatedly testified that they never actually saw him do anything wrong and in fact saw him performing his job. And Dr. Watson, who ultimately made the termination decision, cannot name any specific instances of misconduct on Appellant's part. No one can clearly articulate a reason for the termination decision, relying solely on hearsay and offering competing reasons for his termination.

Basically, at best as Plaintiff understands it, Defendants claim that Dr. Sabatelli was mean to his co-workers and made a couple of them cry. Appellant denies such assertions and, regardless, those allegations lack sufficient specificity for Appellees to carry their burden. Therefore, Appellees' motion for summary judgment should

have been denied, and the granting of that motion should be reversed by this Court.

c. Pretext

In the event that this Court rules that Defendants did articulate a sufficiently legitimate, non-discriminatory reason for termination, Appellant has produced ample evidence of pretext to defeat Appellees' motion for summary judgment.

Critically, at the summary-judgment stage, the ultimate question is not whether the plaintiff has "proven" or "established" that the Defendant's proffered reasons are pretextual but rather only whether he has produced sufficient evidence to create a "genuine issue" as to whether those reasons are pretextual. *See* *Jackson v. Cal-Western Packaging, Corp.*, 602 F.3d 374, 378 (5th Cir. 2010); *see also* *Bright v. GB Bioscience Inc.* 305 Fed. Appx. 197, 203 (5th Cir. 2008) ("While the ultimate burden of proving discrimination remains with the plaintiff throughout the case, within the context of a summary judgment motion, 'the question is not whether the plaintiff *proves* pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext.'")(quoting *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991)). The evidence of the nonmovant must be believed, and all justifiable inferences are to be drawn in favor of nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not thoseof

a judge, whether he is ruling on a motion for summary judgment or for a direct verdict."

A Plaintiff usually defeats summary judgment through circumstantial evidence

Since employers rarely admit that they fired an employee for illegal reasons, direct evidence of a discriminatory intent is rare, and plaintiffs ordinarily must prove pretext by circumstantial evidence. *See* *Northwestern Resources Co. v. Banks*, 4 S.W.3d 92, 96 (Tex.App.—Waco 1999) (finding more than a-scintillaof evidenceof pretext). *See* *Passons v. The Univ. of Texas at Austin*, 969 S.W.2d 560, 564 (Tex.App.—Austin 1998, no pet.) ("Discriminatory intent can generally only be inferred from circumstantial evidence."). In a unanimous decision in 2000, the United States Supreme Court has held that when there is evidence that the employer's explanation for discharge is unworthy of credence, that is circumstantial evidence of discrimination. *See* *Reeves*, 530 U.S. 133, 147-48 ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

Inconsistent reasons or false reasons for termination show pretext

An employer's inconsistent explanations for an employment decision "cast doubt" on the truthfulness of those explanations. *Gee v. Principi*, 289 F.3d 342, 347-48 (5th Cir. 2002); *see also* *Burrell v. Dr. Peppers/Seven Up Bottling Grp., Inc.*, 482 F. 3d 408,

412 n.11 (5th Cir. 2007) ("[A]n employer's inconsistent explanations for its employment decisions at different times permit a jury to infer that the employer's proffered reasons are pretextual."). See, e.g., *Burrell*, 482 F.3d at 412-13 & n.11 (stating simply that "an employer's inconsistent explanations for its employment decisions at differed times" are probative of whether those explanations are pretextual, and considering statements made by the employer's representatives before the EEOC, the district court, and the Fifth Circuit.

Here, Plaintiff was given no reason for his termination at the time he was terminated. Since that time, Appellees have told the EEOC that Appellant was terminated "based solely on Complainant's work place behavior, including condescension, yelling at and berating coworkers, and refusal to cooperate in the work flow improvement efforts. ROA.295. Then, Dr. Lin testified that the termination was a result of Appellant's inability to maintain a professional working relationship with staff, communicate effectively with staff and cooperate in process improvement efforts. ROA.112.

However, Dr. Watson (the actual decisionmaker) never mentioned work flow improvement as a termination reason. In addition, Dr. Watson contradicted Dr. Lin's statements and the letter to the EEOC when he testified that he could not "quote anything specific that (Appellant) said to the staff that I remember, not a verbatim,

direct quote," that clinical issues were not a "major driving force" behind the termination decision, and that he never personally saw Dr. Sabatelli being argumentative or inappropriate, answering that question "No, absolutely not." ROA.423. Dr. Watson testified that Dr. Sabatelli was always professional with him and that when he decided to terminate Dr. Sabatelli, he had concluded that the situation had become untenable for Dr. Sabatelli. ROA.426-26. And Dr. Watson asked him for his recommendation for improving the department because he valued his opinion. Id. Appellee's reasons for termination are inconsistent, and there is evidence that they are false.

Appellees cannot really articulate why Dr. Sabatelli was fired other than trying to portray him as being some sort of malcontent based solely on hearsay, which not only does Dr. Sabatelli deny but is contradicted by a disinterested witness, Tammy Payton, who regularly witnessed Appellant's conduct. Plaintiff does not understand why Defendants would not submit an affidavit from Dr. Watson in support of its motion for summary judgment but that the fact that they have not, should preclude summary judgment all by itself since he was after all the final decisionmaker.

Co-worker retaliation can form the basis of discrimination claim

Typically, the person with authority over the employment decision is the one who executes the action against the employee. However, that is not necessarily the

case. *See* *Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir. 1996) ("[O]rdinary employees ... normally [cannot affect the employment of their co-employees.]" (emphasis added)). The retaliatory animus of a subordinate can be imputed to a final decisionmaker through "cat's paw" analysis. *See* *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015) (cat's paw analysis is a viable means for establishing causal connection between protected activity and adverse employment action); *Hitt v. Connell*, 301 F.3d 240, 248 (5th Cir. 2002)("A decision-maker may serve as the conduit of the subordinate's improper motive, for example, if he merely 'rubber stamps' the recommendation of a subordinate.").

This is not only true for a supervisor, but also lower level employees as well. *See* *Zamora*, 798 F.3d 326, 335 (5th Cir. 2015); *Crisp v. Sears Roebuck & Co.*, 628 Fed. Appx. 220, 223 (5th Cir. Oct. 6, 2015) (confirming that discriminatory remarks may be imputed to the decision-maker if they were made by "lower-level employees who had 'influence or leverage over the [formal] decisionmaker'"); *Gorman v. Verizon Wireless Texas, L.L.C.*, 753 F.3d 165, 171 (5th Cir. 2014) (a coworker's discriminatory animus may be sufficient even if that coworker is not the decisionmaker). If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker. *Haas v.*

ADVO Systems, Inc., 168 F.3d 732, 734 n. 1 (5th Cir.1999) (rejecting defendant's argument that subordinate exerted no influence over ultimate decisionmaker and thus determining that sufficient evidence existed to demonstrate a causal nexus between the discriminatory remarks and the employment decision (citing *Long*, 88 F.3d at 307)).

Therefore, the Defendant can be liable even if the decision makers did not have a discriminatory animus. An employee's retaliatory animus can be imputed to the alleged official decisionmaker regarding the termination if there is evidence that he influenced the official decisionmaker on the termination. *See Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *Gee*, 289 F.3d at 346. Discriminatory comments made by persons in a position to influence the decisionmaker can be used to establish pretext even if the decisionmaker lacked discriminatory intent. *See id.*

To assert a valid "cat's paw" theory, "a plaintiff must establish two conditions: (1) that a co-worker exhibited retaliatory animus and (2) that the same co-worker possessed leverage, or exerted influence, over the titular decisionmaker." *Evans v. Tex. DOT*, 547 F.Supp.2d 626, 656 (E.D.Tex. 2007) (citing *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004)). "When the person conducting the final review serves as the 'cat's paw' of those who were acting from retaliatory motives,

the causal link between the protected activity and adverse employment action remains intact." *Gee*, 289 F.3d at 346.

Recently, the Fifth Circuit found a decision by the lower court after an evidentiary hearing that an African-American employee was not retaliated against based under the cat's paw theory of a person with discriminatory animus influencing a decision maker was "clearly erroneous" and reversed the lower court decision that had found against the employee. *See Fisher v. Lufkin Industries, Inc.*, 847 F.3d 752, 759-60 (5th Cir.2017).

In *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011), the Supreme Court held that, under the "cat's paw" theory, an employer can be held liable for a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act even if the ultimate decisionmaker herself holds no discriminatory animus as long as the plaintiff demonstrate that her decision was influenced by another who does hold such animus. Applying general principles of tort law, the Court explained, "Animus and responsibility for the adverse action can both be attributed to the earlier agent ... if the adverse action is the intended consequence of that agent's discriminatory conduct." *Id*. At 419, 131 S.Ct. 1186. In recent years, the Fifth Circuit has repeatedly applied *Staub*. In *Gorman*, 753 F.3d at 171, a case involving an allegation of retaliatory discharge in violation of the Texas Commission

on Human Rights Act, the Fifth Circuit recognized that the "earlier agent" who harbors retaliatory animus may be a coworkers, rather than a supervisor.

Our sister circuits also support this approach. For instance, in *Shager v. Upjohn Co.*, Judge Posner, writing for a panel of the Court of Appeals for the Seventh Circuit, reversed a summary judgment for the employer in an ADEA case, finding that the influence of the person with the discriminatory attitude may well have been decisive in the employment decision. *See* 913 F.2d 398, 405 (7th Cir. 1990). "If the [formal decisionmakers] acted as the conduit of [the employee's] prejudice-his cat's paw-the innocense of the [decisionmakers] would not spare the company from liability." *Id.* Many circuit cases have also echoed the idea underlying Judge Posner's "cat's paw" analysis that courts will not blindly accept the titular decisionmaker as the true decisionmaker: "[A] defendant may be held liable if the manager who discharged the plaintiff merely acted as a rubber stamp, or the cat's paw for a subordinate employee's prejudice, even if the manager lacked discriminatory intent." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000)(citing *inter alia, Long*, 88 F.3d at 307); *see also Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (Stating that "discriminatory comments ... made by the key decisionmaker or those in a position to influence the decisionmaker" can be used by the plaintiff to establish pretext); *Ercegovich v. Goodyear Tire & Rubber Co,*

154 F.3d 344, 354-55 (6th Cir. 1998) ("[Decisionmaker] rule was never intended to apply formalistically, and [thus] remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant."); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C.Cir.1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence.").

Here, Dr. Watson testified that he partly based his termination decision on complaints by Appellants co-workers. ROA.417. The evidence shows that at least one of those co-workers, Jennifer Varner, displayed discriminatory animus toward Appellant in regard to his age. ROA 405-06. Given that Dr. Watson never saw any misconduct on Appellant's part, yet decided to terminate him anyway, it is clear that Appellant's co-workers possessed leverage, or exerted influence, over the titular decisionmaker.

Same Actor inference is just that, an inference

Defendant argues that it is entitled to the "same actor" inference under *Brown v. CS Logic, Inc*. 82 F.3d 651, 658 (5th Cir. 1996), abrogated on other grounds by *Reeves*, 530 U.S. at 134. But the same actor inference is just that: an inference. It is not an irrebuttable presumption that the same actor was not discriminatory.

Thus,plaintiffs may present evidence to overcome this inference. *See* Brown, 82 F.3d at 658 ("By expressing our approval of this inference, we do not rule out the possibility that an individual could prove a case of discrimination in a similar situation.").

Pretext can be shown by failure to follow an employer's procedures

Failure to follow procedures is evidence which can establish pretext. *See* *EEOC v. Product Fabricators, Inc.*, 763 F.3d 963 (8th Cir. 2014) ("'A plaintiff may show pretext, among other ways, by showing that an employer (1) failed to follow its own policies '" (*quoting* *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874 (8th Cir.2010)).

Scott & White did not follow the procedures set forth in their own contract for terminating Dr. Sabatelli. If he really had done what they claimed, they were requiredto give him 60 days written notice and only terminate him after a board of director vote. None of that happened.

Each case must be evaluated on its own merits

There are no hard and fast requirements for establishing a prima facie case, and the "prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic." *City of Austin Police Dept. v. Brown*, 96 S.W.3d 588, 596 (Tex. App.-Austin 2002, rev. dism'd), *citing* *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Instead, "[t]he facts necessarily will vary and the specification above of the prima facie proof required

from respondent is not necessarily applicable in every respect to differing factual situations." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (Title VII), quoting *McDonnell Douglas*, 411 U.S. at 802 n.13. See also *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir.1982) (§ 1981) ("[N]o single formulation of the prima facie evidence test may fairly be expected to capture the many guises in which discrimination may appear"); *Leffel v. Valley Financial Services*, 113 F.3d 787, 793 (7th Cir. 1997), *cert. denied*, 522 U.S. 968 (1997) (ADA) ("the nature of the proof giving rise to the requisite inference of discrimination cannot be reduced to a formula that will serve any and all discrimination cases"); *Grace v. Potter*, 2006 WL 1207735, at *3 n.13 (S.D. Tex. May 3, 2006) (Title VII) ("The components of a McDonnell Douglas-type prima facie case are variable, and do not apply to all discrimination cases across the board."). Nor does the fact that case law repeats a particular formulation mean that it is always required. *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 939-940 (3d Cir. 1997).

The "Stray Remarks" doctrine has been discredited or at a minimum, minimized by the Courts.

Appellees' motion for summary judgment relied on an argument that discriminatory comments made to or about Appellant were "stray remarks" and should be ignored. First, appellant disagrees that they were stray remarks. In aunanimous decision in 2000, the United States Supreme Court held that age related

remarks are circumstantial evidence of discrimination that can support a jury finding of age discrimination. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147-48 (2000). "The Supreme Court in *Reeves* emphasized the importance of jury fact finding." *Evans v. City of Bishop*, 238 F.3d 586, 592 (5th Cir.2000) (reversing summary judgment). In addition before *Reeves* was decided by the Supreme Court, the Fifth Circuit warned that "the 'stray remark' jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined." *Vance v. Union Planters Corp*., 209 F.3d 438, 442 n. 4 (5th Cir.2000). *Reeves* confirmed that was the case.

The Fifth Circuit, in response to *Reeves*, has modified the "stray remarks" test. To defeat summary judgment the statement need only (1) demonstrate a discriminatory motive, and (2) be made by a person responsible for the adverse employment action or by a person with influence or leverage over the formal decisionmaker. *See Laxton v. Gap, Inc*., 333 F.3d 572, 583 (5th Cir.2003) ("We continue to apply the *CSC Logic* test when a remark is presented as direct evidence of discrimination apart from the McDonnell Douglas framework . . . [T]he *Russell* court did not apply the CSC Logic test to a remark introduced as additional evidence

of discrimination." Discriminatory remarks made by decision-makers or persons with influence over them constitute circumstantial evidence of discrimination even though they would have been "stray remarks" under the *CSC Logic* test. *See* *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 225 (5th Cir.2000).[1] In a circumstantial case like this one, in which the discriminatory remarks are just one ingredient in the overall evidentiary mix, the remarks are now considered under a "more flexible" standard. *Id.*

To be relevant evidence considered as part of a broader circumstantial case, "the comments must show: (1) discriminatory animus; (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage. *See* *id.* The Fifth Circuit has found that comments allegedly made about, among other things, "old farts" and wearing "old man clothes" meet this less stringent standard. *See* *Goudeau*, 793 F.3d at 476.

As noted in the factual summary above, there were numerous comments about Appellant's age while he worked for SWC.

Clearly, Appellant has offered sufficient evidence to raise a material fact issue regarding the existence of pretext, and the ruling of the District Court must be

[1] To the extent Defendant attempts to argue that later Fifth Circuit opinions appear to apply the old and now discredited stray remarks test, when two panel opinions appear in conflict, it is the earlier which controls. *See* *Harvey v. Blake*, 913 F.2d 226, 228 n.2 (5th Cir.1990).

reversed.

C. The district court erred in granting summary judgment in favor of on Frank Sabatelli's Americans With Disabilities Act ("ADA") discrimination case.

1. The District Court based its ruling on arguments that were not before it.

It must first be pointed out that the District Court's ruling on Appellant's ADA claim goes well beyond the scope of what was argued by Appellees. In Appellees' motion, they argued against Appellant's ADA claim citing law that is completely irrelevant to Appellant's claims. Appellees' motion cited case law that was decided before the 2008 amendments to the ADA, which radically changed the law (as discussed, *infra*), and so the cases cited and the arguments regarding them have no bearing on the merits of Appellant's case. There was no argument at all about how the current, existing law should be applied to the facts of this case.

President George W. Bush signed into law the Amendments to the Americans with Disabilities Act on September 25, 2008. In a rare display of complete bipartisanship, the law was passed unanimously by both the House and Senate. The opening states that it is "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990." The Act further states the following:

(3) while Congress expected that the definition of disability under the ADA

> would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled; . . .
>
> (5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucy, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
>
> (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
>
> (7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucy, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress.

See Americans with Disabilities Act, as amended, 2008, 42 U.S.C. § 12101, note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553.

Congress went on to further reject the standards enunciated by the Supreme Court in the *Toyota Manufacturing* case, reaffirm the congressional intent that the

courts have created an inappropriately high level of limitation necessary to obtain coverage under the ADA, that the primary objection of attention should be whether entities have complied with their obligations under the ADA, and that whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." See id. Congress further defined working, learning, reading, concentrating and thinking as "Major Life Activities" and stated that a person can be regarded as disabled even if the impairment does not actually limit a major life activity. The definition of disability is to be construed in favor of broad coverage, and an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. See id.

Despite this fact, the District Court's analysis immediately goes into a discussion regarding how the post amendment law should be applied. The Court's analysis is incorrect, as discussed *infra,* but it was analysis that had nothing to do with the arguments presented to the Court by Appellees. Therefore, the Court's ruling on Appellant's ADA claim must be reversed as it was based on reasoning not even articulated by the Appellees.

2. Standard of Proof in an ADA discrimination claims

Alternatively, as noted above, Appellees have misstated the law on disability discrimination claims to the District Court. There, they noted that to establish a

claim for "perceived disability under the ADA, the plaintiff must present sufficient evidence that he was regarded as having a substantially limiting impairment because: "(1) [he] has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) [he] has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) [he] has no impairment at all but is regarded by the employer as having a substantially limiting impairment." *Collins v. Saia Motor Freight Lines, Inc.*, 144 F. App'x 368, 371 (5th Cir. 2005) (citations omitted). Thisis a misstatement of the law with respect to a claimant's burden in a disability discrimination case. *Collins* is a case which applied the law before it was amended in 2005.

Under the amended law, a plaintiff can prevail by establishing "she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §12102(3)(A). "This 'whether or not' language was enacted as part of the ADA Amendments Act of 2005 [("ADAAA"); *Mendoza v. City of Palacios*, 962 F. Supp.2d 868, 871 (S.D.Tex.2013). The ADAAA overrules prior authority "requiring plaintiff to show that the employer regarded him or her as being substantially limited in a major life activity." *Dube v. Texas Health*

& Human Servs. Comm'n., No. SA-11-CV-354-XR, 2012 WL 2397566, *3 (W.D. Tex. June 25, 2012); see also *Neely v. PSEG Texas, Ltd., P'ship*, 735 F.3d 242,245 (5th Cir.2013). A plaintiff need only show that her "employer perceived [her] ashaving an impairment" and that it discriminated against her on that basis. *Mendoza*, 962 F.Supp.2d at 871.The ADA's definition of "disability" allows plaintiffs who, although not actually disabled under §12102(2)(A), are nonetheless "regarded by the employer as having such impairment." 42 U.S.C. §12102(2)(c).

As stated earlier, Plaintiff does not have to show his perceived disability substantially limited a major life activity, just that the employer perceived him as having an impairment. During Appellant's termination meeting Dr. Watson stated that he, "(didn't) know what (Appellant) was discussing with (his) therapist," (ROA.406) is evidence that Dr. Watson regarded Dr. Sabatelli as having an impairment, specifically a mental condition (which he did not have). Appellant has presented more than a scintilla of evidence to raise the material fact issue of whether Dr. Watson perceived Appellant to have a disability.

D. The district court erred in granting summary judgment in favor of Defendant and denying summary judgment in favor of Plaintiff ruling that Frank Sabatelli waived his right to invoke arbitration in regard to his breach of contract claim.

Defendants do not dispute that Plaintiff's breach of contract claim against is subject to arbitration At the outset it is important to note that Defendants do not dispute, and there is no doubt, that Plaintiff's breach of contract for failing to comply with the notice provisions of the contract is governed by the arbitration agreement entered into by the parties. ROA.840. ("Any controversies, disputes or claims arising out of or relating to this Agreement, or breach thereof, shall be resolved by arbitration in Bell County."). The parties further agreed that any "judgment upon the award rendered may be entered in any Bell County court having jurisdiction thereof." See id. The parties agreed to both venue and jurisdiction in Bell County and its state courts.

1. Claim Splitting/res Judicata Argument

a. The District Court did not have the authority to decide whether Appellant's breach of contract claim was barred.

The District Court ruled that it was the correct forum to decide whether Plaintiff's breach of contract claim is barred by res judicata or claim splitting. This decision was incorrect. Not only does Appellant disagree with such a ruling, the arbitrator has the right to make such a decision. And, in fact, the arbitrator ruled that such a claim was not barred. "Whether the [arbitration] award can be given an effect akin to res judicata or stare decisis with regard to future disputes that may arise

between the parties, neither the district court nor this court should decide. If the parties do not agree, that issue itself is a proper subject for arbitration." *Hancock Fabrics, Inc. v. Rowdec, LLD*, 126 F.Supp.3d 784, 789-90 (N.D. Miss.2015) quoting *Oil, Chem. & Atomic Workers Int'l Union v. Rohm & Haas, Tex., Inc.*, 677 F.2d 492, 494 (5th Cir.1982).

In *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the United States addressed what subjectsare for the court to decide and what subjects are for the arbitrator to decide. The Court noted thatprocedural issues such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation are for the arbitrator to decide. See id., 123 S.Ct. at 588. Following this decision, the Eleventh Circuit held that res judicata is such aprocedural matter that is a question for the arbitrator. See *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir.2004). Other Circuits have reached the same conclusion. See *Citigroup, Inc. v. Abu Dhabi Investment Auth.*, 776 F.3d 126 (2nd Cir.2015); *Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir.2014); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir.2000). In the present case, SWC hasalready argued to the arbitrator that Sabatelli's breach of contract claim for not givingproper notice under the contract are barred by res judicata/claim splitting. The

arbitrator has already properly rejected that argument.

b. Appellees' claim splitting argument fails because of the FAA.

In the alternative, in the event that this Court rules that res judicata or claim splitting was for this Court to decide, Plaintiff is still entitled to summary judgment on the declaratory judgment action set forth by Defendants. This is due to the mandate of the FAA. The United States Supreme Court has made clear that "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which the parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (emphasis added); see *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927 (1983) ("[F]ederal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." (emphasis in original)); see also *Trippe Mfg. Co. v. Niles Audio Corp*, 401 F.3d 529, 532 (3d Cir.2005) ("When a dispute consists of several claims, the court must determine on an issue-by-issue basis whether a party bears a duty to arbitrate."). Given that Supreme Court mandate, it is therefore appropriate for a court to treat arbitrable and non-arbitrable claims differently. See *American Ex. Financial Advisors, et al v. John Beland*, 672 F.3d 113, 142 (2nd Cir.2011). Any resulting bifurcation of the

proceedings with respect to the breach of contract claims and the federal statutory discrimination claims would in fact be the outcome required by the FAA. See *Byrd*, 470 U.S. at 220-21 (noting that *Moses H. Cone* "affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings"); *Nilsen v. Prudential–Bache Sec.*, 761 F. Supp. 279, 288 (S.D.N.Y. 1991) ("Although this order will split plaintiff's claims between two forums, the possible inefficiency of resulting parallel proceedings is a consequence of the [FAA] itself").

When some claims before the court are arbitrable and others are not, a court has no discretion to hear the arbitrable claims, notwithstanding that those claims are based on facts common to the non-arbitrable claims. See *Nilsen*, 761 F.Supp at 288. While Plaintiff's breach of contract claim in arbitration for lack of proper notice prior to termination may result in piecemeal litigation, that is a consequence of the FAA itself and a consequence of the manner in which the arbitration agreement was written by Defendants. See ROA.836. Bell County state courts would not have jurisdiction over Plaintiff's federal statutory discrimination claims.

2. Appellant's Motion for Summary Judgment regarding waiver should have been granted.

Having ruled on the claim splitting issue in favor of Appellees, the District

Court ruled that it was not necessary to resolve whether Appellant waived his right to arbitration by substantially invoking the judicial process. It is clear that there was no waiver by Appellant and summary judgment on the issue should have been granted for Appellant.

There is a strong presumption against waiver of arbitration. See e.g. *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164 (5th Cir.1987) ("Waiver of arbitration is not a favored finding and there is a presumption against it."); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("[A]s a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Accordingly, a party alleging waiver of arbitration must carry a heavy burden. See *Associated Builders v. Ratcliff Constr. Co.*, 823 F.2d 904, 905 (5th Cir.1987).

The Fifth Circuit has stated that "We hold today that a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate. *Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir.1999) (holding that party did not waive its right to arbitrate a claim by filing suit based on different claims).

Appellant never asserted a breach of contract claim for failing to provide proper notice under the contract in his lawsuit and no party has ever sought to compel

arbitration of the federal statutory discrimination claims. As such, Defendants cannot meet their substantial burden to show that Plaintiff has waived his breach of contract claim for failing to provide notice by bringing federal discrimination claims.

The Fifth Circuit in *Subway* went on to say:

> As we make clear today, in order to invoke the judicial process, a party must have litigated the claim that the party now proposes to arbitrate. ... Thus, to invoke the judicial process, the waiving party must do more than call upon unrelated litigation to delay an arbitration proceeding. The party must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration.

Id. at 328-29. Appellees have no evidence of such an overt act by Appellant whatsoever that the Fifth Circuit requires. As such, Appellant's motion for summary judgment should have been granted.

Finally Appellees cannot show that the discrimination litigation prejudiced them in any way with respect to the breach of contract arbitration over whether or not timely notice was provided under the contract. Appellees in their counterclaim seem to claim that the litigation costs they incurred in defending the discrimination lawsuit somehow prejudices them in the arbitration. This assertion makes no sense as those costs were incurred as a result of the discrimination lawsuit, are undisputedly due to the discrimination lawsuit, and therefore Appellees argument that this prejudices them from defending the arbitration breach of contract claim makes no sense.

In any event, Appellees cannot show any prejudice and therefore Appellant's motion for summary judgment should have been granted.

VI. CONCLUSION AND PRAYER FOR RELIEF

Appellant has provided sufficient evidence to raise issues of material fact regarding his discrimination claims, including whether Appellees have articulated a sufficiently legitimate, non-discriminatory reason for Appellant's termination and the existence of pre-text, if necessary. Because of this the summary judgment on Appellant's discrimination claims must be reversed. In addition Appellant has established that there is no claim splitting issue in this case and, regardless, the existence and outcome of such an issue is for the arbitrator to decide. Therefore, Appellant respectfully requests that this Court reverse the lower court's summary judgments and remand this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature hereunder affixed, I certify that a true and correct copy of the foregoing document, including an electronic copy, has been transmitted to all parties of record via email and first class mail on this 1st day of May, 2019, addressed as follows:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP (32)(a)(7)(B). This entire brief contains 11,390 words according to the word-count function of the word-processing system, WordPerfect Office X3, used to prepare the brief. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Office X3 in Times New Roman format in 14 point font.

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