Case No. 20-60105

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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MELISSA RUSHING,

*Plaintiff - Appellant*

v.

MISSISSIPPI DEPARTMENT OF CHILD PROCTECTION SERVICES; JESS DICKINSON, Individual and official capacities; DANA SPIERS, individual capacity; PAMELA CROSS, individual capacity; WENDY BRYANT, individual capacity; TRACY MALONE, individual capacity; KRIS JONES, individual capacity; JOHN DOES 1-10,

*Defendants - Appellees*

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On Appeal from the United States District Court, Southern District of Mississippi, No. 3:18-CV-511, Judge Tom S. Lee, Presiding

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# BRIEF FOR APPELLANT

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Joel F. Dillard
JOEL F. DILLARD, P.A.
775 N. Congress St.
Jackson MS 39202
(601) 509-1372

*Counsel for Melissa Rushing*

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Melissa Rushing 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 disqualifications or recusal.

| **Appellant** | **Appellee** |
|---|---|
| Melissa Rushing<br><br>**Counsel for Appellant**<br><br>Joel F. Dillard<br>JOEL F. DILLARD, P.A.<br>775 N. Congress St.<br>Jackson MS 39202<br>(601) 487-7369 | Mississippi Department of Child Protection Services,<br>Jess Dickinson<br>Dana Spiers<br>Pamela Cross<br>Wendy Bryant<br>Tracy Malone<br>Kris Jones<br><br>**Counsel for Appellee**<br><br>Benny M. "Mac" May<br>Mississippi Attorney General's Office, Civil Litigation Division<br>Post Office Box 220<br>Jackson, Mississippi 39205-0220<br><br>Bob Sanders<br>141 Township Ave., Suite 300<br>Ridgeland, MS 39158-6005 |

/s/ Joel F. Dillard
Counsel of Record for Appellant

## STATEMENT REGARDING ORAL ARGUMENT

Appellant, Melissa Rushing, respectfully requests oral argument and a published decision from this Court. This case concerns fundamental First Amendment rights, and involves dishonesty and corruption at the Mississippi Department of Child Protective Services. Given the importance of the issues at stake, Appellant asserts that oral argument and publication are appropriate.

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## JURISDICTIONAL STATEMENT

Melissa Rushing appeals from the January 13, 2020, Opinion and Order, and the Final Judgment entered on the same date, in which the district court entered summary judgment against the Plaintiff-Appellant, Melissa Rushing. These rulings were entered by the Honorable Tom S. Lee, in the United States District Court for the Southern District of Mississippi, which had jurisdiction of this First Amendment lawsuit pursuant to 28 U.S.C. § 1331. The appellant timely filed a Notice of Appeal on February 7, 2020. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Melissa Rushing discloses coworker and management misconduct to a Judge and guardian ad litem. Rushing's manager transfers Rushing out of the county and takes away Rushing's supervisory job duties, claiming poor performance. But in a private email, the manager says "by Melissa being housed in [another county] she will not have information to share with [the] Court. I'm thinking this just might work!" ROA.447 (MDCPA 424). Is there a triable question of unlawful motive under the First Amendment?
2. This Court holds that when "a public employee takes his job concerns to persons outside the work place . . . then those external communications are ordinarily not made as an employee, but as a citizen." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). Rushing informed the guardian ad litem of a crime of dishonesty committed by a coworker over whom Rushing had no supervisory role. Was this speech as a "private citizen?"
3. Whether a disciplinary "admonishment" is actionably adverse under the First Amendment.
4. Whether Rushing's ultimate termination was also motivated by

protected activity. In that regard the questions are:

a. Whether the prior pattern of retaliation for communications with the GAL and Judge supports the claim that retaliation was a motive for termination.

b. Whether MDCPS's refusal to contemporaneously document any reason for termination is evidence of pretext.

c. Whether a voicemail to the Judge letting her know that coworkers are resigning is protected speech under the First Amendment, given that the Judge's interest in the question was to protect children.

d. Alternatively, whether the Judge's testimony that these kinds of voicemails were commonplace is evidence that relying on the voicemail was a pretext.

e. Whether the Judge's testimony on this point shows that others were not punished for the same misconduct, and that the deciding officials knew this and lied about it under oath; and whether this is evidence of pretext.

f. Whether there is adequate evidence to show that deciding official (Bryant) likely suspected that a "call to action" letter was

sent by Rushing, and lied about it under oath.

5. Whether Rushing's email to the MDCPS Commissioner reporting the crime of Retaliation, Miss. Code § 97-9-127, is protected activity under state tort law.
6. Whether a letter reporting misconduct to legislators is protected activity under the Mississippi Whistleblower Protection Act, Miss. Code Sec. 25-9-171.

## STATEMENT OF THE CASE

### 1. Social worker Melissa Rushing is promoted to supervisor.

Plaintiff Melissa Rushing was hired as a social worker doing child protection work for the State of Mississippi in Pearl River County in March of 2008. ROA.402, 404 (MDCPA 18, 33 (work history)). After more than seven years she left the Agency because of worsening health problems. ROA.560 (Rushing Depo 23:23). But about ten months later Agency management sent her a Facebook message asking her to come back to the Agency with a promotion to supervisor. ROA.556 (Spiers Depo 14:22); ROA.560 (Rushing Depo 23:13).

The Agency needed more supervisors to avoid being in contempt of court related to its prior violations of the law and constitution as found in the *Olivia Y* consent decree. ROA.405-406 (MDCPA 35-36). "We were excited to have her with the department. . . . [E]verything that we heard from her work experience was good." ROA.511 (Cross Depo 18:19-19:1); ROA. 407-412 (MDCPA 55-60 (interview notes)). She agreed and submitted an application; an interview was conducted and she was hired in November 2016. ROA.511 (Cross Depo 19:2-16).

### 2. Rushing is a trusted source of MDCPS information for Judge Lumpkin.

The Honorable Richelle Lumpkin is both Circuit Court and Youth Court Judge in Pearl River County. ROA.512 (Cross Depo 23:4-5). As Youth Court Judge, she supervises virtually every step of CPS's work in protecting the safety of children. If CPS thinks a child may be in danger, it prepares a safety plan that requires the Judge's approval. ROA.513 (Cross Depo 25:6-25). If it takes custody of a child, or returns custody, each step typically requires an order from the Judge. ROA.516 (Cross Depo 37:10-16).

For this reason, Judge Lumpkin wants to be consulted on CPS personnel actions, as she explained: "I like to have people that I have trust in their ability to do the job," and "the reason is because, first of all, we're dealing with the lives of children" and "[m]y purpose in everything that I've ever done as youth court judge of Pearl River County was to have the best [CPS] workers here in this county to do what was in the best interest of the Pearl River County children." ROA.496,499,501 (Lumpkin Depo. 11:19-20; 23:21-22; 31:20-24); *see also* ROA.425 (MDCPA 367). Judge Lumpkin wants to be told about serious misconduct, such as "[i]f a worker has committed a crime, let's say stealing money from the agency." ROA.499

(Lumpkin Depo 24:7-8).

There are two people pertinent to this case that the Judge told CPS management that she did not want working as supervisors in her County. The first was Cory DeDual, a social work supervisor. ROA.496 (Lumpkin Depo. 12:8). The second was regional supervisor Dana Spiers. ROA.497 (Lumpkin Depo. 13:18-19); *see also* ROA.496 *(*9:12-14) ("everybody at this table probably knows we have not always seen eye to eye on her work as a supervisor"). After some delay, they were moved by the Agency. ROA.497 (Lumpkin Depo. 13:21-23). The Judge has also had disagreements with the Regional Director, Pam Cross, but has not explicitly asked for her to be moved. ROA.496 (Lumpkin Depo. 9:23).

In addition to staying informed of promotions and misconduct discipline, the Judge also wants to be told when someone at CPS is thinking about leaving - a conversation the Judge had with multiple CPS employees, including Ms. Rushing. ROA.498 (Lumpkin Depo 19:16-20:8). When this happens, the Judge takes action:

> I mean, there have been times that I've spoken to the workers themselves, asked them please not to leave, especially if it was a worker that did their job and did it in a manner that was beneficial to both the agency, to the children and to the Court. And I've probably discussed that with Wendy Bryant at times

and probably Justice Dickinson.

ROA.500 (Lumpkin Depo 26:18-25). Wendy Bryant is the Director of Field Operations for CPS on the east side of the State, and Justice Dickinson is the Commissioner, the head of all of CPS. ROA.565 (Bryant Depo. 10:11-12).

The Judge testified that she had these same kinds of discussions on a number of occasions, that it was not unusual for an employee to come to her with information like that, and "my practice had been to speak with Justice Dickinson and Wendy Bryant about those issues." ROA.500 (Lumpkin Depo 27:15-28:18). The Judge testified that she would tell Dickinson and Bryant "[t]hat they need to find out what's going on in Pearl River County where we won't lose good workers." ROA.500 (Lumpkin Depo 27:2-4).

It was not part of Melissa Rushing's job to provide this information. But the Judge did not trust management, and Melissa Rushing was a trusted and reliable source of this kind of information to the Judge. The Judge also testified "I never had any problem with her quality of work" throughout Rushing's more than eight years with CPS. ROA.496 (Lumpkin Depo. 9:1-5).

Wendy Bryant - and particularly Regional Director Pam Cross -

resented the Judge's desire to be involved, calling it "trying to control CPS." ROA.425 (MDCPA 367). For this reason, they engaged in a campaign to silence and ultimately fire Ms. Rushing for passing information to the Judge.

### 3. Management gets upset that Melissa Rushing is telling Judge Lumpkin about CPS missteps.

In March 2017, Ms. Rushing had an interaction with a police officer in which the officer threatened to shred CPS documents; Ms. Rushing reported this to her supervisor and to Judge Lumpkin. Judge Lumpkin was outraged and asked for a meeting to address the issue. The Regional Director Pam Cross, however, blamed Ms. Rushing for everything and told her that she should not have talked to the Judge. ROA.414 (MDCPA 149).

In early April 2017, an issue arose where Ms. Rushing learned that CPS had recommended visits with children for a father with a pending indictment for sexual abuse. Judge Lumpkin asked to meet with Pam Cross, Dana Spiers and Cory DeDual about the indictment. The Judge blamed them for not informing her of the indictment, and clarified that it was not enough to simply get a report, but she needed to be specifically told. The

Judge was highly "critical" of Cross, Spiers and DeDual.[1] Pam Cross suspected Rushing, and was angry with Rushing for telling the Judge about this. Her notes reflect that "Judge knew information . . . which indicated that she had spoken to a worker . . . Rushing informed Cory DeDual that **she calls Judge all the time** and informed her of this case . . ." ROA.415 (MDCPA 150); ROA.528-529 (Cross Depo. 87:16-90:11).

Regional Director Pam Cross tried to fire Ms. Rushing in retaliation, as revealed in an email she sent: "we highly suspect Melissa called the GAL (guardian ad litem) because it was too coincidental that we get blasted by the Judge for what we just discussed with Melissa & Melissa was only one Judge didn't blame . . . Plus Melissa been fishing all day about 'how was court!' . . . Are you sure we can't terminate her instead of a write up . . . ?" ROA.428 (MDCPA 372). (The disciplinary paperwork at issue did not mention this ulterior motive.) Central office did not approve this particular recommendation of termination.

Also in April 2017, Ms. Rushing saw Cross and Spiers working on paperwork to promote Cory DeDual to supervisor. Later that day, Judge

[1] It should be noted that the Defendants lied about this in their interrogatory responses, stating that the Judge Lumpkin "did not criticize Ms. Spiers or Ms. DeDual," while in contemporaneous emails Cross said "we g[o]t blasted by the Judge." Compare ROA.678 (Interrotatory p5 #7), with ROA.428 (MDCPA 372).

Lumpkin set a meeting with them to express her concerns about Cory DeDual's upcoming promotion.[2] Cross again believed that Ms. Rushing was the Judge's source and resented it. ROA.416;425 (MDCPA 151; 367).

To prevent further conversations, Cross and Spiers then tried to redirect communications with the Court to Ms. Spiers instead of Ms. Rushing. The Court was angry about this, and called Cross because, according to Cross's email to Wendy Bryant, "her court clerk was upset because Dana wouldn't allow Melissa to continue providing addresses to court to properly serve clients. Judge claimed that the court has emailed Dana repeatedly & never got addresses and Dana was rude to court clerk & this is just a power play on Dana's part (this is exactly what Melissa says about Dana to avoid the directives and protocols so I highly suspected Melissa had talked with Judge about this). . . . Melissa . . . probably mentioned not being allowed to provide addresses on all cases anymore because Melissa was one upset last week about this. . . . I believe Judge told [Melissa] what I said. . . . Melissa is damaging Dana, Cory, & my credibility with court." ROA.430 (MDCPA 407). Cross then added "we need to know

[2] The concerns of both Rushing and Judge Lumpkin about DeDual ultimately proved well founded. Not only did DeDual abuse her position and defraud the Agency (as discussed below), she was also found in criminal neglect of her *own children*. ROA.485 (MDCPA 1082).

which direction to go" and inquired, "Have you got a chance to talk to Tracy [Malone] or can we talk next week at RD meeting?" ROA.430 (MDCPA 407); *see also* ROA.416 (MDCPA 151).

#### 4. Management makes a plan to prevent Rushing from telling the Court about further CPS misconduct.

In June emails, upper management also discussed other ways to get Ms. Rushing to stop telling Judge Lumpkin and the GAL what was happening in CPS while hiding their purpose from the Judge and Ms. Rushing. Although they also discussed performance issues, it was clear that preventing further speech between Rushing and the Judge was key to their motivations. Cross initially suggested they could "Put Melissa in Hancock on special assignment . . . gets Melissa out of court drama in PR [Pearl River] . . . Court in PR might get mad but maybe we can portray it to Melissa as stevia needed in Hancock." ROA.448 (MDCPA 425). Wendy Bryant added that they could take away her usual supervisory job and put her in charge of intake. As Bryant described her motives, she said: "by Melissa being housed in Hancock she will not have information to share with PR [Pearl River] Court. I'm thinking this just might work!" ROA.447 (MDCPA 424). They did not act on this idea right away, however. Instead,

they decided to reassign Rushing to work directly under Cross's supervision, instead of Spiers. ROA.675 (Second Interrogatory Response at 2.)

### 5. Rushing tells the Youth Court's guardian ad litem about fraud and abuse of authority by a CPS supervisor and is disciplined in retaliation.

Later in June 2017, after Cory DeDual had been promoted to supervisor (against the Judge's wishes), Ms. Rushing learned that a social worker had signed hotel vouchers for a two-night trip to Jackson that she was not actually going on. Ms. Rushing confronted the worker, who said that DeDual had told her to do it. DeDual explained that she asked the worker to lie on the form so that she - DeDual - could stay in the hotel room with her children at Agency expense without a roommate. ROA.419 (MDCPA 198). As a result, DeDual had stayed in the room but the Agency refused to pay the hotel - in effect, she stole a free night in the hotel. ROA.601-603 (30(b)(6) Depo. at 19:17-21:23). Ms. Rushing had this conversation with the Youth Court's guardian ad litem in the room as a witness. This inevitably involved the Judge, who was certain to hear about it from the GAL. *See* ROA.428 (MDCPA 372) (Pam Cross equating telling the GAL with telling the Judge). CPS personnel were also "suspicious that

[Rushing] may have been talking [directly] to the Judge about the hotel situation." ROA.421-423 (MDCPA 204-206).

Rushing was immediately criticized for involving the GAL; Spiers said "this was a personnel issue that should never have been discussed with anyone outside of the agency . . . ." ROA.421 (MDCPA 204). Cross recommended and prepared a draft "group 3" disciplinary notice against Ms. Rushing, describing the involvement of the GAL as a "breach of agency security or confidentiality." ROA.418 (MDCPA 197).

Upper management deliberated about it, and agreed to discipline Ms. Rushing for this, but changed it to a form of discipline sometimes called an "admonishment" or "verbal counseling," which is "the lowest step in our progressive discipline." ROA.721 (MDCPS Reply brief in support of summary judgement) (referring to it as an "admonishment"); ROA.591-593 (30(b)(6) Depo. 9:20-11:6). The Regional Director, Pam Cross, testified that this is "a form of discipline" against the employee. ROA.521 (Cross Depo 57:4-7).

In so doing, MDCPS made a determination that Rushing was not acting within her job duties here. As the Commissioner, Jess Dickinson, testified, it is only a breach of confidentiality if it is not "in the scope of what

they are authorized to act on . . . [or] part of their job responsibility." ROA.702 (Dickinson Depo 58:13-15); *see also* ROA.701.

This decision was made by Director of Field Operations Wendy Bryant, Deputy Commissioner of Child Welfare Tracy Malone, and H.R. Director Kris Jones. ROA.593 (30(b)(6) Depo. 11:18-21). Based on this, it was clear to Ms. Rushing that "Pam and Dana [are] always trying to get me fired." ROA.422 (MDCPA 205). They also discussed disciplining Cory DeDual - the employee that had actually committed the fraud - but only because "by discipling them we can say if court brings this up that it is a personnel matter that has been addressed." ROA.456 (MDCPA 433).

Again, the concern was not with DeDual's dishonesty and criminal wrongdoing, but with the Court finding out about it.

In September, the Court again contacted Cross concerned about her efforts to prevent CPS employees from giving her information. In particular, she said that staff were saying they "couldn't talk to court staff without a supervisor present." Cross again blamed Rushing. Wendy Bryant instructed Cross to "hold up"on doing anything because "I don't want staff to feel threatened or to give the court any more ammunition." ROA.465-466 (MDCPA 543-44).

### 6. Melissa Rushing sends a letter to legislators, Judge Lumpkin, Wendy Bryant and the CPS Commissioner detailing fraud by CPS supervisor and other issues.

On or before September 27, 2017, Commissioner Dickinson, Judge Lumpkin, and the Mississippi legislators (among others) received a letter from Rushing. The letter was ultimately seen by Cross and Bryant also. ROA.682-685 (Cross-Spiers 211-214). The letter raised a host of issues, including the "forg[ing] documents, [and] st[ealing] from the agency" by DeDual discussed above. Ms. Rushing attested that, although the letter is unsigned, she wrote her name and return address on the envelope. And based on its contents, the letter is clearly written by a social worker in Pearl River County.

### 7. Management follows through on the plan to silence Rushing by stripping her of duties and reassigning her to Hancock to do intake.

On October 2, 2017, management followed through with the plan made in June to prevent further whistleblowing to Judge Lumpkin by stripping Rushing of her usual supervisory job duties and assigning her to intake in the Hancock County office.

At the same time, they were preparing to fire her. ROA.469 (MDCPA 599). Unlike the private emails, the official paperwork did not reveal that it

was based on Ms. Rushing's communications with Judge Lumpkin.

Ms. Rushing was coming back from sick leave, and Pam Cross was concerned: "If it's going to be 15 days before we can issue her termination papers I'm going to have to give her the new [door]code or she will definitely go out on FMLA because she's already suspicious." ROA.476 (MDCPA 606). She was concerned that further sick leave "is going to delay it again." ROA.481 (MDCPA 611). They then changed their mind about termination, but Cross still wanted to "move her Permanently to Hancock." ROA.483 (MDCPA 622). After further discussion, they elected to move her back to Pearl River but to keep her doing the same limited duties.

### 8. Rushing emails the Commissioner and upper management about the retaliation.

On December 27, 2017, Rushing left a message and sent an email to the Commissioner of CPS (and Bryant) describing the retaliation she was facing. ROA.491 (MDCPS 1142). Rushing and the Commissioner also had a phone conversation about it. In these conversations, Rushing described what had happened and how her new role stripped her of her supervisory responsibility. She said "I love working for this agency but I'm tired of being retaliated against for whistle blowing on others. . . . I would like to continue

working for this agency as a frontline supervisor, the job which I was hired for, but not in a hostile environment and put in under qualified jobs because one or two people are trying to pressure me to quit." ROA.489-490 (MDCPS 1140-1141).

**9. <u>Rushing is interrogated while on sick leave about a message she left with Judge Lumpkin.</u>**

In February 2018, while Rushing was on sick leave with the flu, she was called by Bryant and Malone. They knew she was on sick leave when they made the call. None of the participants are quite certain as to the exact words used on the call, and there is a disagreement among them on some important linguistic details. According to Rushing, they asked if she "spoke" with Judge Lumpkin about a coworker leaving, and she said truthfully "no, but I did send a text message." According to Bryant, she asked if Rushing left a voicemail for the Judge about the coworker leaving, and Rushing lied and denied it, but later admitted to sending a text message about it. According to Malone, she cannot remember whether they used the word "voice mail" or not, but remembers a general impression that Rushing was untruthful, although she also remembers that Rushing acknowledged sending a text message with the same information. ROA.567-568 (Bryant

Depo. 17:12-22:3); ROA.671-672 (Malone Depo. 15:14-19:17). The voicemail at issue said:

> Hey Judge Lumpkin, this is Melissa. If you can, please give me a call back. I just found out [coworker] Tequila is leaving the region entirely. Pam [Cross] is pushing state office to put Dana [Spiers] back immediately, and my bookkeeper is leaving and going to another region too because she can't handle it. So, I just wanted to keep you in the loop. Alright, bye.

Neither Malone nor Bryant documented their contemporaneous impressions or wrote up any emails or paperwork suggesting that discipline was necessary based on this voicemail or their phone conversation with Rushing about it.

### 10. Rushing is fired on February 22, 2018, without cause or reason.

In the termination letter, Child Protective Services claimed that it was firing Melissa Rushing without any cause or reason. ROA.401 (MDCPA 2). The letter is very clear and specific on this point: it specifies that firing can be either "with or without cause" and that CPS had chosen that her employment "is terminated without cause."

Indeed, there is no written recommendation, no written disciplinary documents, no emails - nothing, in short, which contemporaneously states the basis for the termination. By contrast, when another supervisor in Pearl

River - DeDual - was terminated, there was a clear paper trail as to the reason, including a signed recommendation with supporting documentation. ROA.485 (MDCPA 1082 et seq). This further clarifies the fact that the Agency was explicitly choosing to fire Rushing without a reason or supporting basis, and relying solely on basic "at will" doctrine to support the termination, as stated in the letter.

### 11. In litigation, Defendants now claim they fired Rushing because of the message she left with Judge Lumpkin.

Since this Complaint was filed, the Defendants have now abandoned their prior claim that Rushing was fired "without cause" and have developed a rationale in later filed affidavits and pleadings that they claim is the true reason for termination. They have testified that the one and only reason for termination was the voicemail Rushing left for Judge Lumpkin, discussed above, which they claim disclosed "confidential" information. They have claimed that nothing else - no prior disciplinary history, no allegations of unreliability, nothing whatsoever - factored into the termination in any way. ROA.571 (Bryant Depo. 33:18-34:12). They claim that this brief voicemail was, by itself, sufficient grounds for termination. They also claim that Rushing lied about leaving the voicemail, and that this

factored into the decision - although the witnesses did not place the same weight on each of the two factors. *See* ROA.673 (Malone Depo. 21:13-22:3) ("The disclosing of personnel issue information, certainly, was the reason that I concurred with the recommendation. Her then not being truthful about it, you know, certainly added to that."); ROA.696-697 (Dickinson Depo. 36:23-39:25) (emphasizing untruthfulness, but suggesting that he may have gone along with whatever was recommended to him regardless); ROA.646-647 (30(b)(6) Depo 64:21-65:21) (claiming that either the untruthfulness, or the breach of confidentiality, standing alone, would have resulted in termination).

However, the Youth Court Judge testified that these kinds of conversations happened frequently - both before and after Ms. Rushing's termination - and that "my practice had been to speak with Justice Dickinson and Wendy Bryant about those issues." ROA.500 (Lumpkin Depo. at 27:15-16). She specifically testified that she was "quite sure" that on these other occasions she had also told Dickinson and Bryant who the employee was who had given her the so-called personnel information. ROA.500 (Lumpkin Depo. at 28:17-18). And Bryant specifically testified that she was not "aware of anyone else being terminated for revealing

confidential personnel information." ROA.572 (Bryant Depo at 40:8-11).

### 12. The district court grants summary judgment against Ms. Rushing.

The district court granted summary judgment to MDCPS and Ms. Rushing timely appealed to this Court. ROA.569.

## SUMMARY OF THE ARGUMENT

Youth Court Judge Richelle Lumpkin was deeply concerned about the Mississippi Department of Child Protective Services in her county. For the safety and wellbeing of the children the Judge supervised, she wanted to be consulted whenever MDCPS promoted or disciplined employees. She wanted to know when MDCPS employees were dishonest, and when poor management was driving good employees away. When management was not upfront with her, she relied on other sources, such as the guardian ad litem and trusted line supervisors and workers in the Agency, to keep her in the loop on these issues.

One such trusted source for Judge Lumpkin was MDCPS line supervisor Melissa Rushing. Unfortunately for Ms. Rushing, MDCPS management suspected as much, and was determined to punish and silence Rushing to avoid MDCPS misdeeds and mismanagement from coming to the Judge's attention. MDCPS took three illegal steps in so doing.

First, MDCPS issued discipline - an "admonishment" - to Rushing explicitly for telling the guardian ad litem about a crime of dishonesty committed by a coworker. Rushing had reported that coworker Cory Dedual had instructed one of her employees to lie on a voucher form, thereby

stealing for Dedual two free nights' stay at a hotel.

In granting summary judgment to Defendants, the District Court held that this was not speech as a "private citizen," but this Court's precedent is clear that such reports outside the employer are typically speech as a private citizen. This outside reporting was not part of Rushing's job.

The District Court also found that this disciplinary "admonishment" was not an adverse action. But this Court has adopted a bright-line rule that true employment discipline like this is actionable. Thus, summary judgement was improper.

Second, MDCPS deprived Rushing of all her supervisory duties and reassigned her out of the county. The deciding official Wendy Bryant's private emails reveal that her true reason for this was to prevent Rushing from "hav[ing] information to share with PR [Pearl River] Court" - though she told Rushing it was because of Rushing's allegedly poor performance. ROA.447 (MDCPA 424). In granting summary judgment, the District Court correctly recognized that this was an adverse action, but simply ignored the direct evidence of unlawful motive and pretext.

Third, Rushing was terminated. Contrary to its usual practice, MDCPS made no documentation of any reasons for it, and simply stated it

was “without cause.” In litigation, however, MDCPS admits it is - once again - because of Rushing’s communications with Judge Lumpkin, in particular a voicemail telling the Judge that certain MDCPS employees are leaving because they “can’t handle” Cross’ and Spiers’ mismanagement.

Judge Lumpkin wanted to know this information - and Rushing wanted to tell her - because, as the Judge testified in this case, it is essential to public safety that she knows when employment changes impacting the children are anticipated. This was protected speech, and the termination was retaliation.

Alternatively, there is ample evidence that this reason was a pretext for other retaliatory motives. Specifically, the testimony of Judge Lumpkin shows that these kinds of voicemails were common, that others were not punished for it, and that the deciding officials knew this and lied about it under oath. The prior pattern of retaliation for communications with the GAL and Judge Lumpkin provides further support to the claim retaliation was a motive for the termination here.

Finally, very shortly before the termination, Rushing engaged in two other acts of protected speech which may have been motivating factors in her termination. First, she sent a “call to action” letter to the legislators

(and Judge Lumpkin) among others - a letter which MDCPS admits was protected under the First Amendment. (It is also protected under the Mississippi Whistleblower Protection statute.) MDCPS's defense is to claim that it did not know who sent the letter. But the record shows that every time anyone in Pearl River complained, management suspected it was Rushing. The issues raised in the letter - and the style in which they were raised - were the same issues Rushing had raised repeatedly in the past. And MDCPS management had lied about their motives in disciplining Rushing previously. In short, there is ample evidence on which a jury could find that these self-serving affidavits are untrue.

Second, Rushing sent a series of emails to the Commissioner which reported that she was the victim of retaliation. Although not protected under the First Amendment, these are protected under state tort law. The timing of her termination - and the evidence of pretext discussed above - presents a triable issue on the question of whether these emails also motivated her termination.

At each step along the way, direct evidence shows that the Agency was trying to stop Rushing from telling Judge Lumpkin (and the GAL) about MDCPS misconduct and mismanagement. It was prepared to discipline,

reassign, and ultimately terminate her to achieve this goal.

This is unlawful for very good reasons. The safety of our children depends on a strong anti-corruption culture at MDCPS, a culture which ensures that employee misdeeds and dishonesty can be reported, inside or outside the agency, without fear. This Court must vacate the decision and remand for trial, so that Ms. Rushing can demonstrate to MDCPS that the Courts will not tolerate retaliation against whistleblowers.

## ARGUMENT

### I. Standard of Review

This Court reviews summary judgment de novo. *Haverda v. Hays County*, 723 F. 3d 586, 591 (5th Cir. 2013). Defendants are not entitled to summary judgment unless they can show "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Cox v. Wal-Mart Stores E., L.P.*, 755 F.3d 231, 233 (5th Cir. 2014); see Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, a court "view[s] the evidence and draw[s] reasonable inferences in the light most favorable to the nonmoving party." *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015) (quoting *Cox*, 755 F.3d at 233). Before it can determine that there is no genuine issue for trial, a court must be satisfied that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

### II. First Amendment retaliation

As this Court recently observed, "[s]ummary judgment should be used most sparingly in First Amendment cases involving delicate constitutional rights, complex fact situations, disputed testimony, and

questionable credibilities." *Haverda v. Hays County*, 723 F. 3d 586, 591 (5th Cir. 2013) (quotations, emendations and citations omitted); *see also* 10B Charles Alan Wright & Arthur R. Miller et al., Federal Practice and Procedure § 2732.2 (3d ed. 2013) ("[C]laims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication.... If plaintiffs claim that some conduct on the part of defendant abridged their First Amendment rights, summary judgment may be precluded because questions concerning defendant's motives or knowledge must be determined.") (footnotes omitted).

"To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Anderson v. Valdez*, 845 F. 3d 580, 590 (5th Cir. 2016).

Three adverse employment actions were taken in this case. Each was explicitly because Ms. Rushing was sharing damaging (and true) information about MDCPS misconduct with the Pearl River County Youth

Court Judge and the guardian ad litem. These are as follows: (1) an official admonishment for "breach of agency security or confidentiality" to the guardian ad litem, ROA. 418 (MDCPA 197); (2) stripping her supervisory job duties and reassigning her to prevent her from "hav[ing] information to share with PR [Pearl River] Court," ROA.447 (MDCPA 424); and (3) terminating her for "disclosing . . . personnel issue information" to the Court, ROA.673 (Malone Depo. 21:13-22:3). Each will be discussed separately below.

### A. MDCPS issued an admonishment for "breach of agency security or confidentiality" to the guardian ad litem.

Melissa Rushing received an "admonishment" - a form of official discipline - explicitly because she told the guardian ad litem about a crime of dishonesty committed by her coworker. The Court did not dispute that this speech was on a matter of public concern, that it outweighed the government's interest, and that there was evidence of causation. Nonetheless the District Court granted summary judgment on this claim for two reasons: 1) it held that the admonishment was not an adverse action, and 2) that Rushing was speaking pursuant to her official duties and not as a private citizen. In both respects the District Court erred.

*1. The admonishment was actionable retaliation.*

The test for an actionable adverse action in the Fifth Circuit caselaw is a fairly clear and bright-line one. Mere criticism, on a supervisor's own personal initiative, "including oral threats or abusive remarks and investigations, are not adverse employment actions." *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000). But whenever that criticism crosses the line into employer disciplinary action - even without loss of pay, such as a "reprimand" - it becomes an adverse action. *Pierce v. Texas Dept. of Crim. Justice, Inst. Div.*, 37 F. 3d 1146, 1150 (5th Cir. 1994) (reprimand alone is adverse action).

Although this panel cannot by itself deviate from this standard, en banc consideration should be given to the matter. The Fifth Circuit's standard is inconsistent with Supreme Court precedent, and this Court is alone on the wrong side of a circuit split in applying this test of adverse employment action. The better analysis is contained in cases such as *Barton v. Clancy*, 632 F.3d 9, 28 (1st Cir. 2011).[3]

[3] The Supreme Court has noted that "the First Amendment . . . already protects state employees . . . from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (quotations omitted). The Fifth Circuit has erroneously attempted to evade this: "Although the Supreme Court has intimated that the First Amendment protects against trivial acts of retaliation, this court has required something more than the trivial." *Sharp v. City of*

With that said, the official "admonishment" issued in this case is an adverse action under the current Fifth Circuit test. For example, in *Harris v. Victoria Independent School Dist.*, 168 F. 3d 216 (5th Cir. 1999), the court held that a teacher had suffered an "adverse action" for First Amendment retaliation purposes because, among other things, she was

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*Houston*, 164 F. 3d 923, 933 (5th Cir. 1999). "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Pierce*, 37 F.3d at 1149. This Court has "declined to expand the list of actionable actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech," because expanding the list may "enmesh federal courts in relatively trivial matters." *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (quotations omitted). This is inconsistent, not only with *Rutan*, but also with the general thrust of *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006), which noted that actionable retaliation should include anything that "might well have dissuaded a reasonable worker from" engaging in protected activity.

In ignoring the Supreme Court's instructions, the Fifth Circuit appears to be alone on the wrong side of a circuit split. *Barton v. Clancy*, 632 F.3d 9, 28 (1st Cir. 2011) ("For purposes of a First Amendment retaliation claim, even in an employment setting, a plaintiff need not suffer an adverse employment action as the term ordinarily is used in the employment discrimination context. The term, 'adverse employment action' arose as shorthand for the statutory requirements of a Title VII employment claim, but there is no similar requirement for a First Amendment claim filed pursuant to § 1983. Instead, the `adverse employment action' inquiry in the section 1983 context focuses on whether an employer's acts, viewed objectively, place substantial pressure on the employee's political views — or, more generally, on whether the defendants' acts would have a chilling effect on the employee's exercise of First Amendment rights." (citations and quotations omitted)); *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); *Power v. Summers*, 226 F.3d 815, 820 (7th Cir.2000) ("Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable")); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir.2000) ("we conclude that a factfinder in this case could determine that the alleged retaliatory conduct was sufficient `to deter a person of ordinary firmness' from exercising his First Amendment rights and that some relief may be appropriate."); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078-79 (9th Cir. 2013) (holding that placement on administrative leave pending discipline can constitute an adverse action for a First Amendment retaliation cases).

"reprimanded" by her supervisor. The term "reprimand" in the caselaw is a business term used in the sense of "the act of telling somebody officially that they have done something wrong," whether verbally or in writing.[4] Of course, every employer uses its own language to describe this kind of discipline - and some may have reprimands in many different flavors with different names indicating different severity. They may call it an "admonishment" or a "counseling" or a "write-up" or a "reprimand," but this is not the legal issue: the legal question is whether this is "employment discipline" by the employer itself or "mere criticism" on the supervisor's own initiative.

This was employment discipline. It was a "reprimand" as used in the caselaw because Rushing was told "officially that [she had] done something wrong." *Id.* The Regional Director noted at deposition that this was a form of official discipline - not just a critical conversation. ROA.521 (Cross Depo 57:4-7). The Regional Director had to get permission from high levels in the Agency before issuing this admonishment. ROA.521 (Cross Depo 57:17-20) (testifying she needed Bryant's approval). It was intended as discipline, and was part of the overall "progressive discipline" policy of the employer. The

[4] Cambridge Business English Dictionary, Cambridge University Press, 2011.

testimony on this is clear. ROA.521 (Cross Depo 57:4-7) ("Q: Is that a form of discipline? A: It is."); ROA.569 (Bryant Depo 25:13) (describing it as part of "progressive discipline"); ROA.593 (30(b)(6) Depo. 11:1-2) ("It is kind of the lowest step in our progressive discipline."); *compare* ROA.617 (30(b)(6) Depo. 35:25) (later attempting to "clarify" that this is "informal disciplinary action").

In holding otherwise, the District Court said that "Rushing was only verbally counseled" rather than given the higher discipline known by the term "reprimand" under the unique parlance of this particular employer. But the lexicographical question here is not whether the employer called it a "reprimand," but what the employer meant by the terms "verbal counseling" and "admonishment." Because the employer meant this as discipline, then it is discipline and actionable here. The District Court said that "nothing was placed in her personnel file to reflect any misconduct or disciplinary action." But employer filing practices are likely to vary significantly and should not be determinative. There are many employers that may not document any discipline other than termination in the personnel file; that does not mean discipline is not happening or actionable.

In short, the District Court erred in relying on the "mere criticism"

line of cases to insulate Child Protective Services from liability for an admittedly retaliatory discipline. Employer discipline can never be "mere criticism."

2. *Disclosing the crime of dishonesty to the guardian at litem was not part of Plaintiff's job duties, but was in her private capacity.*

The second ground for granting summary judgment concerning the admonishment was the District Court's erroneous conclusion that Plaintiff told the guardian ad litem about the MDCPS employee's crime of dishonesty as part of the Plaintiff's official duties, and therefore unprotected by the First Amendment under *Garcetti* and its progeny. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

This Court has made it quite clear in caselaw interpreting *Garcetti* that when "a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). "This remains true when speech concerns information related to or learned through public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014). "The critical question under *Garcetti* is whether the speech at

issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 2379.

The facts of *Anderson v. Valdez* are very similar to the present case. In *Anderson*, a staff attorney for a state court sent a letter to the state supreme court and filed a disciplinary complaint with the State Commission on Judicial Conduct describing what he believed to be malfeasance by one of his bosses. The Complaint alleged that his boss retaliated by preventing him from working with another Judge. The Court denied a motion requesting qualified immunity, and held that, at the time of the events in that case - the year 2014 - it was well established law that these sorts of complaints to people outside the employer were typically speech as a private citizen, and clearly protected. *Anderson v. Valdez*, 845 F. 3d 580 (5th Cir. 2016)

And so the question here was whether Rushing's job duties included informing the guardian ad litem about her coworker's misconduct. They did not.

This was not about Rushing's own job. Of course (like the attorney in *Anderson* and the official in *Lane*) she had a general responsibility to try to protect children from dishonest MDCPS employees. But this particular

misconduct was by someone outside her supervision and had nothing to do with her own job. She was not an auditor responsible for uncovering this sort of misconduct. She had no authority to discipline the dishonest coworker.

More importantly, the way she did it - as in *Lane* and *Anderson* - was to reveal it to those outside the employer. She was not a P.R. Director or other person responsible for communicating with the public. This did not come up in the context of a meeting with the GAL as part of Rushing's job; rather, Rushing went out of her way to call the GAL over to hear this conversation. The District Court noted that "Guardians ad litem are private individuals" and "are not 'court officials'" and so obviously Rushing would have no official business reporting this to the GAL, who was not in a position to do anything directly about it anyway.[5]

Indeed, by disciplining her for violating "confidentiality," the Agency itself found that Rushing went beyond her duties. As the Commissioner testified, it is only a breach of confidentiality if it is not "part of their job

[5] Of course, it must be observed that the MDCPS supervisors were upset about the GAL learning about this because they knew it would be passed along to Judge Lumpkin. MDCPS management considered telling the GAL the equivalent of telling the Judge in this context. ROA.428 (MDCPA 372); *see also* ROA.421-423 (MDCPA 204-206) (MDCPS "suspicious that [Rushing] may have been talking [directly] to the Judge about the hotel situation.")

responsibility." ROA.702 (Dickinson Depo 58:13-15); *see also* ROA.701. If telling the guardian ad litem about this had been part of Rushing's job duties, by this logic, no discipline would have been issued. It was explicitly because she went beyond those duties and revealed agency "confidences" to a private citizen with "no business" knowing it that Rushing was disciplined.

The District Court relied heavily on the fact that Rushing asked for the GAL to be present only as a "witness," and reasoned that this meant it was part of Rushing's job duties. But it is not part of Rushing's duties to have a private citizen outside MDCPS serve as this witness. Any MDCPS employee could have served this function without controversy, but the fact she chose the GAL - a private citizen - was both the reason for the discipline and the reason the discipline was illegal.

The Court described the desire to have a witness as Rushing's "singular interest in having the guardian ad litem present was her personal interest in protecting her own employment." But, again, as in *Davis, supra* an employee reporting race discrimination outside the employer, for example, may also be motivated by a desire to save or get back his/her job. That motive is not the relevant question. The question is whether the

particular communication is made as part of his/her job duties.

Moreover, the reasoning is faulty. Any private citizen confronting a suspected criminal face-to-face about her crimes may want to have a neutral witness present for the citizen's own protection - regardless of any employment concerns. This is particularly true where the crime was a crime involving lying and dishonesty, as here, such that the citizen would reasonably fear that her words and actions may later be misrepresented by the suspected criminal.

In sum, MDCPS disciplined Rushing explicitly because she went outside her job duties to inform the guardian ad litem about a suspected crime of dishonesty committed by an MDCPS employee. This was unlawful retaliation in violation of the First Amendment.

B. MDCPS stripped Rushing of her supervisory job duties and reassigned her in order to prevent her from "hav[ing] information to share with PR [Pearl River] Court."

Adverse action can include reassignments or transfers. *Jett v. Dallas Independent School District*, 798 F.2d 748, 758 (5th Cir. 1986) ("Jett may recover for resulting injuries if he was reassigned in retaliation for protected speech"). Here, Rushing was stripped of all her supervisory responsibilities and moved outside the county. The Court correctly noted

that "given that she was relieved of her supervisory duties, there is at least an issue of fact as to whether this was a demotion and hence an adverse employment action." (footnote 11)

But the District Court erroneously concluded that there was insufficient evidence to present a triable issue on causation. In so doing, the fundamental error was to ignore the managers' own stated motivations - in private emails - for their decision. The managers said they transferred her to "get Melissa out of court drama in PR [Pearl River]" and that "by Melissa being housed in Hancock she will not have information to share with PR [Pearl River] Court. I'm thinking this just might work!" ROA.447 (MDCPA 424). This is evidence on which a jury could reasonably conclude that Ms. Rushing was transferred because of her protected speech.

The standard of causation here is lower than in a Title VII retaliation case. All plaintiff must prove is that the protected activity was a "motivating factor" - a lower burden. *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 380 (5th Cir. 1990); *compare Univ. of Tex. Southwestern Med. v. Nassar*, 133 S. Ct. 2517 (2013) (discussing the difference between the two causation standards, and applying the higher one to Title VII retaliation). It does not have to be the only factor, or even a "but for" cause; it is enough to

show that it was one among any number of other factors which motivated the decision. *Id.*

The District Court boiled the causation question down to a single factual issue: whether there was evidence that one admittedly-First-Amendment-protected "Call To Action" letter was known to be written by Rushing. This factual question will be addressed in greater detail below. But here it is sufficient to observe that this is not the central question concerning the transfer.

The question here is what management meant when it said it was trying to get Rushing out of "court drama" and why it was trying to prevent Rushing from having "information to share" with the court. The answer is simple. The managers knew or suspected that Rushing was the source of a host of embarrassing - and true - First Amendment protected disclosures about misconduct by MDCPS employees, and the managers were trying to shield themselves from further legitimate criticism by Judge Lumpkin for their incompetence and mismanagement. The background leading to this moment is critical:

- Ms. Rushing had reported to Judge Lumpkin that a police officer had threatened to shred CPS documents; management told Ms. Rushing

that she should not have talked to the Judge. ROA.414 (MDCPA 149).

- Management suspected that Ms. Rushing had told the guardian ad litem - and the GAL had told Judge Lumpkin - that CPS had recommended visits with children for a father with a pending indictment for sexual abuse. ROA.428 (MDCPA 372). Management was furious. ROA.415 (MDCPA 150); ROA.528-529 (Cross Depo. 87:16-90:11). The emails show that the regional director was in favor of termination because of this disclosure. ROA.428 (MDCPA 372).
- Management suspected Ms. Rushing told Judge Lumpkin that management was going to promote Cory DeDual (the employee who would later file fraudulent paperwork and abuse her children) to supervisor without discussing it with the Judge. Management was furious. ROA.416, 425 (MDCPA 151, 367).
- Managers suspected that Ms. Rushing had told the Judge that they were trying to prevent her from having communications with the Judge. Management was furious. ROA.430 (MDCPA 407).
- As discussed above, Rushing informed the Youth Court's guardian ad litem about fraud and abuse of authority by Dedual. Management issued discipline explicitly in retaliation for it.

As the pattern above clearly shows, whenever Judge Lumpkin (justly) criticized MDCPS management, they suspected that Ms. Rushing was the Judge's source of information and contemplated discipline against her.

It is in this context that Wendy Bryant stated that her reason for stripping Rushing of her supervisory role and transferring her out of the county was to prevent Rushing from having "information to share" with Judge Lumpkin and the guardian ad litem. In fact, in her email Bryant listed this as the *only* reason she was considering the transfer, though Cross had suggested a number of others as well.

These facts present at least a triable issue of fact as to whether the transfer was motivated in part by the desire to retaliate against Rushing for disclosing the matters noted in the bullet points above. The District Court erred in simply ignoring all this without explanation, and must be reversed.

### C. MDCPS fired Rushing for "disclosing . . . personnel issue information" to the Court.

The District Court also erred in granting summary judgment concerning Rushing's termination under the First Amendment. There is a triable fact question as to MDCPS's motivation in terminating Rushing. Again, the standard of causation here is the relaxed "motivating factor"

standard. *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 380 (5th Cir. 1990); *compare Univ. of Tex. Southwestern Med. v. Nassar*, 133 S. Ct. 2517 (2013). The evidence here is sufficient to support a jury finding of causation. This is so on the following theories: First, the voicemail MDCPS claims was the basis for termination is protected speech; Second, alternatively, it is a pretext for the true motivation, which was Rushing's long history of protected speech; Third, and again alternatively, it is a pretext for retaliation for the "call to arms" letter.

1. *The admitted reason for the termination is protected speech.*

MDCPS claims that Rushing was terminated because she left a voicemail with Judge Lumpkin noting that certain coworkers were planning to leave because they "can't handle it," which in this context clearly refers to the mismanagement of Cross and Spiers. This itself is an admission that Rushing was terminated for engaging in protected speech.

The case of *Salge v. Edna Independent School Dist.*, 411 F. 3d 178 (5th Cir. 2005) is closely analogous to the present one. As here, in *Salge*, a high school secretary was terminated after disclosing the resignation of another employee. *Id.* at 183. As here, she was discharged for "releasing

confidential information to the media in violation of school district policies that prohibit employees from discussing confidential personnel matters and from contacting the media about school district news." *Id.*

The Fifth Circuit upheld the grant of summary judgement **to the plaintiff**, finding that she had been subject to unconstitutional retaliation. It wrote, "although Salge's speech does not reveal official corruption, discrimination, or other such 'hot button' policy issues that we have held to be indisputably matters of public concern," nonetheless, her speech "against a backdrop of high interest and wide discussion on this topic" mean that "as a matter of law, Salge spoke on an issue of public concern." *Id.* at 191-192.

Here, as Judge Lumpkin testified, she was clearly highly interested in these matters, and this interest was motivated by a concern for the public welfare. Telling Judge Lumpkin about that crucial MDCPS employees were leaving was, from Judge Lumpkin's point of view certainly, speech on a matter of public concern. When Ms. Rushing shared these matters with Judge Lumpkin, Ms. Rushing was engaging in speech protected by the First Amendment, just as in *Salge*.

This is particularly clear when viewed in the context of the prior

exchanges between Rushing, the GAL, and Judge Lumpkin, and MDCPS's repeatedly stated desire to prevent Rushing from revealing any information to the Judge or GAL.

*2. Termination occurred against a backdrop of constant suspicion that Rushing was reporting MDCPS misconduct to the Judge and GAL.*

It is important to bear in mind the history leading up to termination. There are no fewer than five separate instances in the bullets above in which management expressed anger about Ms. Rushing's suspected communications with the guardian ad litem and Judge Lumpkin. In one of those instances, they issued discipline. Later they tried to prevent Ms. Rushing's communications by stripping her of her duties and transferring her out of the county. They hid this purpose from Rushing, however, and blamed it on Rushing's allegedly poor performance.

And in response to one of these instances, MDCPS drafted and deliberated on termination documents. The emails show that termination was being considered because Ms. Rushing had told the Court about MDCPS misconduct: "we highly suspect Melissa called the GAL (guardian ad litem) because it was too coincidental that we get blasted by the Judge for what we just discussed with Melissa & Melissa was only one Judge

didn't blame . . . Plus Melissa been fishing all day about 'how was court!' . . . Are you sure we can't terminate her instead of a write up . . . ?" ROA.428 (MDCPA 372). But in the termination paperwork and testimony, the manager described a completely different reason - a pretext - and made no mention of the protected speech. ROA.533 (discussing "failure to follow protocol" for "staffing" cases as reason for proposing termination). Although termination was not ultimately issued at that time, it shows that: a) MDCPS management constantly suspected Rushing was blowing the whistle; b) the managers knew they could not terminate her for it, though they wanted to; and c) they were prepared to point to any other convenient reason for discipline to hide their illegal purposes.

With that in mind, we turn to the evidence of pretext. That is, even assuming that the voicemail was not itself protected speech, there is adequate evidence that the voicemail was just a pretext for retaliation against other protected speech.

3. *The termination letter explicitly disclaims having any reason for termination, and there is no contemporaneous documentation of any reason for termination whatsoever.*

Inconsistent and shifting explanations are strong evidence of pretext.

*Burrell v. Dr. Pepper/Seven Up Bottling Group*, 482 F. 3d 408 (5th Cir. 2007). In the termination letter, Child Protective Services claimed that it was firing Melissa Rushing without any cause or reason. ROA.401 (MDCPA 2). The letter is very clear and specific on this point: it specifies that firing can be either "with or without cause" and that CPS had chosen that her employment "is terminated without cause." Indeed, there is no written recommendation, no written disciplinary documents, no emails - nothing, in short, which contemporaneously states the basis for the termination.

This is not the usual practice at MDCPS. In fact, when another supervisor in Pearl River - DeDual - was terminated, there was a clear paper trail as to the reason, including a signed recommendation with supporting documentation. ROA.485 (MDCPA 1082 et seq). It appears that MDCPS was deliberately trying to avoid making any paper trail concerning its reason for termination of Rushing, and to rely solely on basic "at will" doctrine to support the termination. This tends to cast into doubt their post hoc litigation strategy of alleging that they had good cause to terminate Rushing. If they had, they would have written the reasons up at the time as they had with DeDual.

*4. The later-stated reason (Rushing's voicemail) is a pretext because these kinds of voicemails were common and no one else was terminated for them.*

In litigation, MDCPS - for the first time - alleged that Rushing was fired solely because she left a certain voicemail with Judge Lumpkin and (allegedly) lied about it.

But Judge Lumpkin - a perfectly neutral and credible witness if there ever was one - testified that she had conversations with other employees similar to Rushing's voicemail, and that she told Dickinson and Bryant about them. ROA.500 (Lumpkin Depo. at 27:15-16). She specifically testified that she was "quite sure" that on these other occasions she had also told Dickinson and Bryant who the employee was who had given her the so-called confidential personnel information. ROA.500 (Lumpkin Depo. at 28:17-18). And Bryant specifically testified that she was not "aware of anyone else being terminated for revealing confidential personnel information." ROA.572 (Bryant Depo at 40:8-11). Indeed, assuming Judge Lumpkin is telling the truth, then Bryant lied under oath about this, claiming that no breach of "confidentiality" like this voicemail had ever happened before. ROA.572 (Bryant Depo at 40:16-25). Such lies often support a jury verdict that the true reason was unlawful.

Finally, it is worth using a little common sense. Anyone hearing that voicemail would reasonably ask themselves, is that it? Really? Is *that* the reason for termination? The claim is inherently incredible. Consider that Dedual was not fired for her criminal dishonesty in MDCPS paperwork. Consider that Rushing had had many other conversations with the Judge that revealed far more compromising "personnel" information. It is as if the Agency hunted out the most harmless communication it could find and said "that's it - that's the reason" in order to avoid liability for firing her for the really substantial revelations Rushing made to the Judge.

5. *Rushing credibly explained that she did not lie about the voicemail.*

Concerning the alleged "lie" about the voicemail, Rushing credibly explained that she did not lie. She meant to say that she had not spoken to the Judge in person, and everyone admits that Rushing said she had sent a text message to the Judge containing exactly this same information. Defendants also admit that the distinction between voicemail and text message is irrelevant, and Rushing would have absolutely no reason to admit one and deny the other, as the Agency claims. Also concerning the lie, the Agency made absolutely no effort to get Rushing's side of the story,

nor did they tell her at the time that they thought she was lying - just as if it did not matter at all whether she actually lied or not.

*6. Taken together, these facts establish that - regardless of the Call To Arms Letter - there is a triable issue concerning retaliation.*

As will be discussed next, the Defendants make much of their own self-serving testimony claiming they never knew or suspected that Rushing sent the "call to arms" letter to the state legislators. But they indisputably knew about a great deal of other protected speech discussed above.

This point is worth emphasizing. Even if the letter had never existed, the jury could still find that Defendants were retaliating under the First Amendment when they fired Rushing. The history of retaliatory discipline discussed above - taken together with the evidence of pretext - could support a finding that the prior protected activity was also a motivating factor in her termination.

The District Court rejected this argument and claimed that the prior protected speech was too distant in time to support a case of retaliation. In this regard the case of *Mooney v. Lafayette County Sch. Dist.*, (No 12-60753) (5th Cir. August 8, 2013) (unpublished) is instructive. In that case, Plaintiff engaged in protected election activity in 2007 and the

employer "began to criticize her performance immediately after the election but failed to produce any formal disciplinary write-ups;" in 2008 the employer "tried to demote Mooney, for varying reasons, ultimately deciding not to because she protested on the basis of gender discrimination," and, finally, "(in 2009-2010) . . . [the employer] terminated her position, when it became convenient to do so."

This Court held that "[t]his sequence of events is enough for a reasonable juror to infer retaliatory causation, especially considering that the 'causal link' need only be that her protected activity was one reason motivating LCSD's decision. Although it is true that the ultimate decision to not renew her contract occurred three years after the protected activity, the chain of circumstances outlined above, as reflected by deposition testimony in the record before us . . . is enough to raise a genuine issue of material fact regarding the causal connection."

The chain of causation here is at least equally apparent. We see a continuing series of escalating discipline against Rushing over the course of about ten months, ultimately resulting in termination, all of it linked fairly directly to Rushing's protected activity of reporting MDCPS misconduct and mismanagement to Judge Lumpkin and the GAL.

In sum, Rushing has identified sufficient evidence on which a jury could find a First Amendment violation and summary judgment must be denied.

*7. There is good reason to doubt the self-serving affidavits of Wendy Bryant that she did not suspect Rushing sent the "Call To Arms" letter.*

The District Court looked at the self-serving affidavit of Wendy Bryant in which she denied that she ever suspected the "Call to Arms Letter" was written by Rushing, and the District Court simply believed it. This Court has repeatedly cautioned against placing too much reliance on such conclusory affidavit testimony at the summary judgment stage. *See BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir.1996); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir.2001). And make no mistake, the testimony is self-serving, in that by it Bryant seeks to escape individual monetary liability for their unconstitutional actions.

Considering the many times that Cross had told Bryant - and Bryant had agreed - that they "highly suspect" Rushing of blowing the whistle on one thing or another, and Rushing's own statements to them that she is "tired of being retaliated against for blowing the whistle on others," there is reason to doubt this testimony. Bryant put two-and-two together quite

easily every other time. In fact, as the pattern above shows, she routinely suspected Rushing was the source of any ill report of management coming out in Pearl River County.

Together with the other facts discussed above, there is a significant circumstantial case that Bryant is lying about this, and that she did in fact suspect Rushing of writing this letter.

There is also the letter itself, which reads much like Rushing's other emails and complaints throughout the record, and which concerns the very same hobby horses which Rushing had been riding all year, as Bryant well knew.

The District Court's response to this point is fairly remarkable. It stated that "even if Bryant could have, or even should have been able to figure out that plaintiff wrote the letter, Rushing has offered no evidence from which it could be inferred that Bryant actually did 'put two and two together' at any time before the challenged employment decision."

But the fact that, based on what Bryant already knew, she would also suspect, based on its contents, that the letter was written by Rushing is itself circumstantial evidence that Bryant likely did so. The District Court apparently expects bad actors to simply admit to their unlawful intent, and

will believe any denial, no matter how unlikely. *Cf. Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985) (citations omitted) *overruled on other grounds by St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) ("Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to [protected speech].'").

Bryant herself had previously transferred Rushing because of her conversations with Judge Lumpkin and had falsely claimed that it was for poor performance and that the speech had nothing to do with it. Clearly, she was and is willing to hide her illegal motivations in this case.

And if the jury concludes that Bryant is lying about this, then the case for retaliatory motive will be overwhelming because such lies are the hallmark of a guilty motive.

## III. Wrongful discharge tort claim

In Mississippi, the tort of "wrongful discharge" is named after the seminal case, *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603 (Miss. 1993). Under the *McArn* doctrine, as subsequently developed, it is tortious to terminate any person's employment because the employee reported a crime - either internally or externally. *Morris v. CCA of Tenn., LLC*, (Cause No. 3:15-CV-00163-MPM-RP) (N.D. Miss. May 16, 2017).

Here, Rushing's claim is that she was fired for two reports of criminal activity. The first is DeDual's fraud concerning the hotel rooms. The second is Rushing's internal report to Commissioner Dickinson that she was being retaliated against by her immediate managers. The District Court based its decision on both points on a purported lack of evidence of causation.

First, concerning the report about Dedual, the Court correctly observed that Rushing was not fired at the time of that report. But Rushing was indeed disciplined at that time and for that reason. And it is plausible to think - as discussed in detail above - that this history played a role in her ultimate termination. The District Court reasoned that she was not disciplined for bringing it to light, but only for bringing it to the GAL. It is not clear how that changes the analysis, as the reason MDCPS did not want it revealed to the GAL was because MDCPS did, in fact, want "to conceal or cover up the alleged fraud." The only reason MDCPS ever disciplined Dedual for her criminal dishonesty was to save face with the Court. ROA.456 (MDCPA 433) ("by discipling them we can say if court brings this up that it is a personnel matter that has been addressed"). There is good reason to doubt in this context that any discipline would have been issued to Dedual if Rushing had not informed the GAL about it in addition to her

superiors.

Second, concerning the report to the Commissioner, Rushing wrote in January 2018 - very shortly before her termination - that "I love working for this Agency but I'm tired of being retaliated against for whistleblowing on others." ROA.489 (MDCPA 1140). In so doing, she reported another crime: Retaliation, Miss. Code § 97-9-127. "A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of public servant, witness, prospective witness or informant. Retaliation is a Class 2 felony." Miss Code § 97-9-127; *See Young v. State*, 119 So. 3d 304 (Miss 2013) (holding that the threat itself need not be unlawful, so long as the threat is to do an unlawful act); *Wilcher v. State*, No. 2015-KA-01008-SCT (Miss. March 23, 2017) (upholding statute from constitutional challenge) *available at* https://scholar.google.com/scholar_case?case=18377903195755146641. The relevant definitions make it quite clear that this is precisely what happened here.

Plaintiff was an employee, witness, prospective witness, and informant concerning the events at CPS. And the acts of harassment and

retaliation alleged thereafter clearly involved both "threats" ("any menace, however communicated, to . . . take or withhold action as a public servant or cause a public servant to take or withhold action") and "harm" ("loss, disadvantage or injury, or **anything so regarded by the person affected**") to Plaintiff. And, by doing so for unlawful reasons Defendants were engaging in "any unlawful act in retaliation."

The District Court claimed that Rushing's email was too vague to be "reasonably construed" as a report of retaliation. This is not true. Rushing spelled out exactly what was retaliatory. The retaliation was the reassignment to another county and depriving her of supervisory job duties, as discussed above. The key quote is as follows: "I would like to continue working for this agency as a frontline supervisor, the job I was hired for . . . [not] **put in underqualified jobs because one or two people are trying to pressure me to quit**." ROA.489. As also stated in the emails, "Pam Cross, Dana Spiers, and Wendy Bryant are all covering up major issues in Pearl River County . . . [and] continuing to lie and try to cover up misdeeds," ROA.491 (MDCPS 1142). She said she blew the whistle on it. ROA.489. She reported that, in retaliation they have taken away her job: "I am not allowed to supervise people." ROA.491 She said "my workers want

to know why I cannot supervise them." ROA.489 (MDCPS 1140).

Regardless, the emails were only a condensed encapsulation of the phone calls which also occurred on this topic, and are referred to in the emails. The jury could reasonably consider it likely that Rushing further clarified her "retaliation" claim on the phone.

In sum, these communications - sent to the deciding officials and accusing Bryant (one of the deciding officials) of the crime of "retaliation" - are protected activity under *McArn*, and the timing (and pretext evidence above) supports an inference that this protected activity motivated the termination.

Finally, the "call to arms" letter reported a whole host of crimes, and if the jury concludes that this was the basis for termination, as discussed above, the *McArn* claim is proven.

## IV. Rushing sent her letter to the legislators, and therefore to the members of the relevant committee under Miss. Code Sec. 25-9-171.

Finally, there is Mississippi Whistleblower Act. The Defendants' only argument here is that the "call to arms" letter was not sent to a "state investigative body" as defined in the statute.

But the letter states - and Defendants do not dispute it - that it was

sent to "the state legislators, state senators and representatives" among others. And a "state investigative body" is defined to include any and all "standing committee[s] of the legislature." Miss. Code 25-9-171(g). And of course, the members of these standing committees are none other than "the state legislators, state senators and representatives" that Plaintiff sent her letter to.

It appears - though the argument is by no means clear from the briefing - that the Defendants are arguing that there is a distinction between a letter addressed to "Representative X" and a letter addressed to "Representative X, Chair of the Committee on Y." No law is cited for this argument, nor would it make much sense of the statute.

As a practical matter, most of these "standing committees" in Mississippi have no independent mailing address or contact information apart from contacting their members. For example, a search by the undersigned for contact information for the House Public Health and Human Services Committee yielded only a list of members and no distinct contact information. ROA.394-399.

And Mississippi law is clear elsewhere that service on a member is service on the body. For example, in MRCP Rule 4(d)(8), you would serve

process on a standing legislative committee by serving a member: "Service upon any person who is a member of the 'group' or 'body' responsible for the administration of the entity shall be sufficient." And if delivery to a member is sufficient for formal service of process, it is likewise sufficient for a more informal whistleblower report.

Thus, if the jury can conclude - as discussed above - that Plaintiff was terminated in part because of her "call to arms" letter, then summary judgment must be reversed on the Mississippi whistleblower protection statute, Count 3, as well.

## CONCLUSION

Given MDCPS's mission to protect Mississippi's most vulnerable children, it is particularly important to ensure that the Agency fosters a culture of protection and respect for whistleblowers. Otherwise corruption, neglect and misconduct will remain hidden, eating away like a cancer on the institution which is the only hope for so many.

Judge Lumpkin understood this. She wanted to bring to light key information about issues impacting the children she supervised, including ill conceived promotions, dishonest employees, and resignations of good employees. Melissa Rushing understood this too, and kept the Judge informed on these crucial public welfare topics.

Here, unfortunately, we find an Agency management that considers revealing this information a breach of "confidentiality," and punishes the employees that uncover misconduct more severely than those that actually commit the misconduct.

This culture must change, and by vacating summary judgment and remanding for trial, this Court will play a crucial role in fostering that change, vindicating the concerns of Judge Lumpkin and Melissa Rushing, and protecting all those seeking to reform the rottenness from within.

Respectfully Submitted,

/s/ Joel F. Dillard
Joel F. Dillard
Joel F. Dillard, P.A.
775 N. Congress St.
Jackson MS 39202
(601) 487-7369

*Counsel for Melissa Rushing*

## CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2020, an electronic copy of the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system on all counsel of record.

/s/Joel F. Dillard
Joel Dillard

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,831 words, as determined by the word-count function of Google Documents, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Google Documents in 14-point Georgia font.

## CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that the foregoing document filed using the Fifth Circuit CM/ECF document filing system, 1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; 2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and 3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/Joel F. Dillard
Joel Dillard