APPEAL NO. 12-1855

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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EMILIO MARTINO,

Plaintiff-Appellant,

v.

WESTERN & SOUTHERN FINANCIAL GROUP,

Defendant-Appellee.

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Appeal From The United States District Court
For the Northern District of Indiana, South Bend Division
Case No.: 3:08-CV-308
The Honorable Judge Theresa L. Springmann

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# AMENDED BRIEF OF THE DEFENDANT-APPELLEE, WESTERN & SOUTHERN FINANCIAL GROUP

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# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appeal No: 12-1855

Short Caption: Emilio Martino v. Western & Southern Financial Group

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Western and Southern Life Insurance Company, incorrectly sued as Western & Southern Financial Group

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Barnes & Thornburg LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

The Western & Southern Financial Group, Inc., owns 100% of the stock of The Western and Southern Life Insurance Company, which owns 100% of the Western-Southern Life Assurance Company.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

---

Attorney's Signature: */s/Michael P. Palmer* Date: June 29, 2012

Attorney's Printed Name: Michael P. Palmer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X** No __.

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## JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the Brief and Required Short Appendix of Plaintiff-Appellant Emilio Martino ("Opening Brief") is not complete and correct.

The District Court had federal question subject matter jurisdiction of this civil action pursuant to 28 U.S.C. § 1331 based on Plaintiff-Appellant Emilio Martino's discrimination and retaliation claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. The District Court exercised supplemental jurisdiction under 28 U.S.C. § 1367 with respect to Martino's state law defamation claim. The District Court also had diversity jurisdiction under 28 U.S.C. § 1332 over all of Martino's claims. The amount in controversy exceeds $75,000, exclusive of interest and costs. [Dkt. 29].[1] Martino is a resident and citizen of the State of Michigan, and Defendant-Appellee, The Western and Southern Life Insurance Company, incorrectly sued as Western & Southern Financial Group, ("Western & Southern" or "the Company") is incorporated in the State of Ohio and has its principal place of business in Ohio. [Dkt. 29].

The Seventh Circuit has jurisdiction of this appeal pursuant to 29 U.S.C. §§ 1291 and 1294(1). On March 13, 2012, the District Court entered an Opinion and Order granting Western & Southern's Motion for Summary Judgment. [Dkt. 62]. The next day, March 14, 2012, Judgment was entered for Western & Southern and against Martino. [Dkt. 63]. Martino timely filed his Notice of Appeal on April 9, 2012. [Dkt. 68]. There has not been a prior related appeal in this action.

[1] This brief cites the abbreviation "Dkt." to refer to the District Court's CM/ECF docket.

## STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

1. Whether the dismissal of Martino's religious discrimination and retaliation claims should be affirmed because the District Court correctly held Western & Southern had a legitimate, non-pretextual reason for terminating Martino's employment (*i.e.*, Martino's failure to complete the I-9 process required by federal law) and for sending a notice of his termination to the Indiana Department of Insurance (*i.e.*, the notice was required by Western & Southern policy).

2. Whether the dismissal of Martino's religious discrimination and retaliation claims should be affirmed because Martino did not establish a *prima facie* case of discrimination or retaliation under the indirect method of proof.

3. Whether the dismissal of Martino's defamation claim should be affirmed because the District Court correctly held that Martino failed to offer sufficient evidence of special damages or malice to support his defamation *per quod* claim.

4. Whether the dismissal of Martino's defamation claim should be affirmed because an absolute privilege bars his claim.

5. Whether the dismissal of Martino's defamation claim should be affirmed because Martino failed to offer sufficient evidence of actual malice.

6. Whether the dismissal of Martino's retaliation claim should be affirmed because he failed to exhaust administrative remedies with regard to that claim.

7. Whether the dismissal of all of Martino's claims should be affirmed because he filed his lawsuit too late under the parties' six-month contractual limitations period.

## STATEMENT OF THE CASE

Federal law requires every employee to complete an I-9 Form and produce a document verifying employment eligibility within three days of commencing employment. Western & Southern terminated Martino's employment in October 2006 because he could not complete the I-9 process—even after he had an extra month to do so. Western & Southern notified the Indiana Department of Insurance ("Department") of Martino's termination because, at the time, the Company provided such notices after *all* involuntary terminations. Martino's termination and this notice had nothing to do with his national origin (Italian), his religion (Christian) or his second job as a pastor. In fact, none of the decision-makers were even aware of Martino's national origin, religion or pastor position.

Nevertheless, Martino filed two charges of discrimination with the U.S. Equal Employment Opportunity Commission against Western & Southern. [Dkt. 55-5 and 55-8; Martino Dep., pp. 281-87, Dep. Exs. 29, 31]. Martino's first charge, filed on April 12, 2007, alleged his termination amounted to religious and national origin discrimination. (*Id.*) Martino did not allege a retaliation claim in his first charge, make a claim about Western & Southern's letter to the Department, or allege any other adverse action besides his termination. (*Id.*) Martino filed his second charge on November 2, 2007 (more than a year after his termination and the letter to the

Department). [Dkt. 55-5 and 55-8, Martino Dep., pp. 285-87, Dep. Ex. 31]. In it, he alleged Western & Southern retaliated against him by terminating his employment and sending the Department its letter after he refused to resign his pastor position pursuant to Western & Southern's Outside Position Policy. (*Id.*) Martino made no effort to obtain a right to sue letter from the EEOC. [Dkt. 55-5, Martino Dep., pp.281-99].

Martino filed this lawsuit in Indiana state court on June 6, 2008. [Dkt. 1].[2] Martino amended his complaint twice. [Dkt. 2, 22]. His Second Amended Complaint alleges that his termination amounts to national origin discrimination,[3] religious discrimination, and/or retaliation; and that Western & Southern's letter to the Department amounts to unlawful retaliation and defamation by implication. [Dkt. 55-5 and 55-8, Martino Dep., pp. 285-99, Dep. Exs. 29, 31; Dkt. 22].

After the close of discovery, Western & Southern filed a Motion for Summary Judgment, supporting brief and appendix on July 27 and 28, 2011. [Dkt. 54-57]. On August 29, 2011, Martino filed his response to Western & Southern's motion. [Dkt. 58, 59]. Western & Southern filed its reply in support of its motion on September 15, 2011. [Dkt. 60].

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[2] Western & Southern removed the case to federal court on June 24, 2008. [Dkt. 3].

[3] Martino waived his national origin discrimination claim. Western & Southern offered evidence in support of its Motion for Summary Judgment that none of the decision-makers knew Martino's national origin before terminating his employment. [Dkt. 56, Def's Br. Supp. Mot. Summ. J., p. 17]. Martino did not respond to this argument and did not present any evidence to support his national origin discrimination claim. [Dkt. 58]. Accordingly, Western & Southern argued (and the District Court agreed) that Martino waived his national origin discrimination claim. [Dkt. 60, 62, p.28]. Martino makes no arguments in his Opening Brief to try to revive his national origin discrimination claim in this appeal.

On March 13, 2012, the District Court granted Western & Southern's Motion for Summary Judgment, and judgment was entered in favor of Western & Southern. [Dkt. 62]. On April 9, 2012, Martino filed his Notice of Appeal, appealing the District Court's order granting Western & Southern summary judgment. (*Id.*)

## STATEMENT OF FACTS

### I. Western & Southern.

Western & Southern is a Fortune 500 financial services company headquartered in Cincinnati, Ohio. [Dkt. 55-1, Skidmore Aff. ¶3]. Western & Southern, along with its affiliated companies, conducts business throughout the 50 states, Washington, D.C., and Guam, and employs more than 4,000 employees. (*Id.*) The Company conducts its sales operations through sales offices, including a district office in Mishawaka, Indiana ("Michiana office"). (*Id.*) Western & Southern groups its sales offices into divisions. (*Id.*) While the Field Human Resource Department managed personnel issues for these offices and assigned a Human Resource Manager to each division in 2006, the Divisional Vice President, who was in the sales operation, made all hiring and firing decisions in the division. (*Id.*)

### II. Martino.

Martino was born in Italy, emigrated to the United States in 1963, and became a United States citizen in 1978. [Dkt. 55-3, Martino Dep., pp. 103-07, 110]. Between 1977 and 1999, Martino primarily worked as a police officer for the South Bend Police Department and an agent for John Hancock Financial Services, but both careers were cut short by physical and psychological disabilities. [Dkt. 55-3, Martino Dep., pp. 23-44, 151-65]. After leaving John Hancock, Martino began

working as a pastor for First Baptist Church of Union in Union, Michigan and has been continuously employed there since May 21, 2000. [Dkt. 55-3 and 55-6, Martino Dep., pp. 192-93, Dep. Ex. 13]. In 2006, Martino decided to obtain a second job to supplement his income. [Dkt. 55-3, Martino Dep., pp. 192-93]. He first went to work selling insurance for American Family Life Assurance Company of Columbus ("AFLAC") from April 2006 until October 2, 2006. [Dkt. 55-3 and 55-6, Martino Dep., pp. 166, 207-14, Dep. Ex. 14].

## III. Western & Southern Hires Martino.

Martino submitted an application to Western & Southern on August 14, 2006 while working at AFLAC and as a pastor. [Dkt. 55-3 and 55-6, Martino Dep., pp. 207-14, Dep. Ex. 14]. The application explained that Western & Southern complies with the Immigration Reform and Control Act of 1986 ("IRCA") and would require Martino to produce documentation verifying his identity and work authorization within three days of the commencement of his employment. (*Id.*)

Western & Southern hired Martino to work as a Sales Representative effective September 4, 2006 in the Michiana office, which was in Division H of Western & Southern's organization. [Dkt. 55-9, Sobol Aff., ¶4; Dkt. 55-4 and 55-6, Martino Dep., pp. 224-27, Dep. Ex. 17]. Andrew Sobol, the Michiana office District Sales Manager, interviewed Martino, and William Skidmore, the Divisional Vice President of Division H, made the decision to hire Martino after conferring with Sobol. [Dkt. 55-9, Sobol Aff. ¶4].

## IV. Martino's Sales Representative's Agreement.

Shortly after being hired, Martino signed a Sales Representative Agreement ("Agreement") [Dkt. 55-4 and 55-6, Martino Dep., pp. 224-27, Dep. Ex. 17]. Martino did not try to negotiate any changes to it. (*Id.*) Martino does not claim anyone made fraudulent representations about the Agreement. (*Id.*) Martino's employment at Western & Southern and the compensation and benefits he received during his employment were contingent upon him signing the Agreement. [Dkt. 55-17, Johnson Aff. ¶6; Dkt. 55-11, Corlett Aff. ¶8]. Western & Southern agreed to pay Martino according to a commission schedule, or at a minimum, pay him $500 a week during his 13-week training period and his 39-week validation period. [Dkt. 55-4 and 55-6, Martino Dep., p. 227, Dep. Ex. 17]. Martino's commissions never exceeded $500, so he received $500 each week he worked at Western & Southern. [Dkt. 55-4, Martino Dep., p. 227].

The Agreement contains a number of provisions limiting Martino's ability to sue Western & Southern for actions arising out of his employment. [Dkt. 55-4 and 55-6, Martino Dep., pp. 224-27, Dep. Ex. 17]. Section III.C of the Agreement prohibits Martino from "commenc[ing] any action or suit relating to [his] employment with Western & Southern more than six months after the date of termination of such employment," and "waive[s] any statute of limitation to the contrary." (*Id.*) Moreover, in Section III.D, Martino agreed "[n]ot to commence any action or suit against Western & Southern by reason of its having furnished information to any regulatory agency … regarding [his] record as a Sales Representative, [his] actions

while a Sales Representative or the reason for termination of [his] employment." (*Id.*)

## V. Martino's Termination for Failing to Complete I-9 Process.

IRCA requires every employee hired after November 6, 1986 to complete an I-9 Form and submit documents to verify identity and eligibility to work in the United States. *See* 8 U.S.C. 1324a(b)(i). On or about September 5, 2006, Martino completed Section 1 of the I-9 Form and gave it to J. Maxine Edwards, District Administrator in the Michiana office. [Dkt. 55-4, 55-5 and 55-7, Martino Dep., pp. 230-32, Dep. Ex. 18]. Martino, however, could not produce any document verifying his employment eligibility. (*Id.*) Instead, Martino told Edwards he intended to apply for a duplicate social security card, would search his mother's house for his original card and submit the duplicate or original as soon as he could. (*Id.*) Edwards attached a note to the I-9 Form, explaining that Martino was applying for a replacement social security card, and she would send the duplicate card to Western & Southern's Field Human Resource Department when she received it. (*Id.*)

Tarah Corlett, the Human Resource Manager for Division H, became aware of Martino's incomplete I-9 shortly after he submitted it. [Dkt. 55-11, Corlett Aff. ¶10]. Martino was allowed some time to complete the I-9 process, but in light of the three-day deadline imposed by IRCA, Western & Southern was concerned about remaining out of compliance for too long. (*Id.*) Accordingly, Edwards and Sobol talked with Martino multiple times between September 5 and October 16, 2006, to stress the significance of completing the I-9 process. [Dkt. 55-4, Martino Dep., pp. 230-40; Sobol Aff. ¶8]. Edwards and Sobol reviewed the I-9 Form's lists of

acceptable documents with Martino to help him identify a document he possessed or could obtain to satisfy the I-9 process. [Dkt. 55-5, Martino Dep., pp. 238-39; Dkt. 55-9, Sobol Aff. ¶8]. Martino said his best chance for complying with the I-9 process was to find his social security card or apply for a replacement card. [Dkt. 55-9, Sobol Aff. ¶9].

Martino could not locate his original social security card during his tenure at Western & Southern, and fared no better applying for a replacement. [Dkt. 55-4, 55-5 and 55-7, Martino Dep., pp. 232-40, Dep. Exs. 19-20]. On September 19, 2006, the Social Security Administration ("SSA") office in Elkhart verified Martino's social security number ("SSN"), but did not allow him to apply for a duplicate social security card because he did not have evidence of his naturalization. [Dkt. 55-4, 55-5 and 55-7, Martino Dep., pp. 232-40, Dep. Ex 19]. Martino received a document from the Elkhart SSA verifying his SSN, but also explaining that the "PRINTOUT DOES NOT VERIFY YOUR RIGHT TO WORK IN THE UNITED STATES." (*Id.*) (capitalization in original.)

Martino also went to the South Bend SSA office on October 6, 2006, but was told he could not apply for a replacement social security card because he did not have documents establishing citizenship or lawful alien status. [Dkt. 55-5 and 55-7, Martino Dep., pp. 232-40, Dep. Ex. 20]. The SSA provided Martino with a letter memorializing its determination. (*Id.*) Specifically, this letter stated:

> We cannot give you a Social Security Card at this time because:
>
> You have not given the document(s) we need to show U.S. citizenship or lawful alien status.

The letter also indicated that the SSA was "[a]waiting DHS documentation." (*Id.*)

Martino gave these SSA documents to Edwards or Sobol the same day he received them. [Dkt. 55-5, Martino Dep., pp. 235-36]. Martino understood that the documents he received from the SSA and various other documents he brought in were not sufficient to meet the I-9 form's requirements. [Dkt. 55-5 and 55-7, Martino Dep., pp 235-39, Dep. Exs. 19 and 20].

These visits to the SSA revealed that Martino could not apply for a duplicate social security card until he obtained evidence of his naturalization, which would take approximately 30 to 45 days. [Dkt. 55-3 and 55-5, Martino Dep., pp. 117, 234]. Martino explained this lengthy process to Sobol [Dkt. 55-9, Sobol Aff. ¶11; Martino Dep., p. 239]. Martino claims he began this process, but never completed it. [Dkt. 55-5, Martino Dep., pp. 239, 242].

The Michiana office sent Martino's SSA documents to the Field Human Resource Department. [Dkt. 55-11, Corlett Aff. ¶11]. Corlett reviewed them and determined that neither SSA document was an acceptable receipt for the replacement of Martino's social security card; therefore, the so-called "receipt rule" did not apply. [Dkt. 55-11, Corlett Aff. ¶13; Dkt. 55-12, Corlett Dep., pp. 17-20].[4] Corlett reached this conclusion for several reasons. Corlett determined that neither SSA document looked like the social security card receipts she had encountered in the past. [Dkt. 55-11, Corlett Aff. ¶13; Dkt. 55-12, Corlett Dep., pp. 17-20]. Moreover, the October

[4] The "receipt rule" allows an employer to accept a receipt in lieu of a List A, B or C document when the employee applies for a replacement document because the document was lost, stolen or damaged. 8 C.F.R. 274a.2(b)(i)(vi). The employee then has to produce the actual replacement document 90 days after providing the receipt. *Id.*

6, 2006 letter established that SSA could *not* replace Martino's social security card until Martino gave SSA documents establishing his United States citizenship or lawful alien status. (*Id.*) In addition, Corlett talked to Sobol about the situation and learned that Martino could not obtain a replacement social security card until he obtained proof of his naturalization, which would take a significant period of time. [Dkt. 55-11, Corlett Aff. ¶12].

After reviewing the October 6, 2006 SSA letter and talking with Sobol about the situation, Corlett concluded Martino was not able to complete the I-9 process anytime soon and believed Western & Southern could not continue to employ Martino indefinitely without some document verifying his employment eligibility. [Dkt. 55-11, Corlett Aff. ¶13]. Accordingly, Corlett prepared a letter to Martino to explain that he would be suspended for five days to allow him additional time to produce a work authorization document, but if he could not do so within that five-day period, his employment must end. (*Id.*) The letter, dated October 9, 2006, stated:

> Your inability to provide acceptable documentation will result in placing you on an unpaid suspension from work until this matter is resolved. . . . we are providing you with five (5) business days to submit this required information to our Home Office.

[Dkt. 59-6]. This letter instructed Martino to "have the required documentation faxed to [XXX-XXX-XXXX] with a copy of this letter no later than the close of business on October 13th." (*Id.*)

Corlett discussed the suspension letter with Sobol before sending it. [Dkt. 55-12, Corlett Dep., pp. 17-20; Dkt. 55-9, Sobol Aff. ¶12]. Sobol asked if the Company

could suspend Martino indefinitely while he tried to obtain the required documentation. (*Id.*) Corlett told Sobol that Martino could resign before the end of the five-day period, but Western & Southern could not continue to employ him without a document verifying his employment eligibility. (*Id.*)

Sobol talked to Martino about Corlett's letter, but he did not tell Martino about the resignation option Corlett offered because Sobol wanted Martino to continue trying to find his social security card so he would not have to resign. [Dkt. 55-9, Sobol Aff. ¶14]. Sobol did tell Martino several times that if he was terminated and later obtained the necessary I-9 documentation, he could reapply and be rehired by Western & Southern. [Dkt. 55-2, Martino Dep., pp. 50-51; Dkt. 55-9, Sobol Aff. ¶14].

Sobol then called Corlett back and told her that he had discussed the resignation option with Martino, and Martino did not want to resign. [Dkt. 55-9, Sobol Aff. ¶15; Dkt. 55-11, Corlett Aff. ¶16; Dkt. 55-12, Corlett Dep., pp. 21-22]. Corlett, therefore, believed the resignation option had been communicated to and rejected by Martino. [Dkt. 55-11, Corlett Aff. ¶16]. Corlett told Sobol that Western & Southern would move forward with the termination if Martino did not produce the required I-9 documentation within the five-day period. (*Id.*)

Martino did not produce a document verifying his employment eligibility by October 13, 2006. [Dkt. 55-11, Corlett Aff. ¶18]. Corlett explained the situation to Johnson, and then recommended Martino's termination to Skidmore, who made the decision to terminate Martino's employment. [Dkt. 55-11, Corlett Aff. ¶18; Dkt. 55-1, Skidmore Aff. ¶8]. Neither Johnson nor Skidmore had any knowledge of

Martino's national origin, religion, his pastoral position, or his refusal to resign his pastoral position at the time this decision was made. [Dkt. 55-1, Skidmore Aff. ¶9; Dkt. 55-10, ¶¶10, 15]. Western & Southern sent Martino a letter dated October 16, 2006 and signed by Johnson to communicate the termination. [Dkt. 59-7]. This letter stated:

> Field Human Resources sent you a letter on October 9, 2006 requesting you send documentation for employment eligibility purposes by October 13, 2006. To date no documentation has been received. As such, your employment is terminated effective October 16, 2006.

[Dkt. 59-7].

Martino returned his Western & Southern property to Sobol on November 22, 2006 (more than a month after his termination). [Dkt. 55-9, Sobol Aff. ¶25-26, Aff. Ex. 2]. During this meeting, Sobol reiterated that if Martino obtained the necessary I-9 documentation, he could be rehired by Western & Southern. (*Id.*) Martino never reapplied at Western & Southern even though he claims he found his social security card a month after his termination. [Dkt. 55-2, 55-3 and 55-5, Martino Dep., pp. 54-55, 119, 251].

## VI. Notification to the Department of Martino's Termination.

In 2006, Western & Southern notified state insurance departments of *all* Sales Representative involuntary terminations of employment. [Dkt. 55-13, Feige Aff. ¶4].[5] Accordingly, Western & Southern notified the Department of Martino's involuntary termination. [Dkt. 55-13, Feige Aff. ¶9]. Brenda Feige, Enterprise

[5] Brenda Feige is now known as Brenda Elliott, but will be referred to throughout this Brief as "Feige".

Licensing Manager, did so on October 23, 2006, by sending the Department a form letter and enclosing a copy of Martino's termination letter. (*Id.*) Feige's October 23, 2006 letter was the same form letter she used to notify state insurance departments of other Sales Representative involuntary terminations. (*Id.*) Feige, alone, decided to send this letter, and she did so based solely on Western & Southern's policy at the time. (*Id.*)

Feige's department, the Enterprise Licensing Department, is completely separate from Western and Southern's Field Human Resources Department. [Dkt. 55-10, Johnson Aff. ¶11]. The Field Human Resource Department notified a number of Western & Southern departments, including the Enterprise Licensing Department, of Sales Representatives' involuntary terminations by sending them a copy of the Sales Representatives' termination letter. [Dkt. 55-10, Johnson Aff. ¶11]. Neither Johnson nor anyone else from the Field Human Resource Department had any input into notifying state insurance departments of Sales Representatives' terminations, and they had no knowledge of when the Enterprise Licensing Department sent such notices. [Dkt. 55-10, Johnson Aff. ¶ 11; Dkt. 55-11, Corlett Aff. ¶20].

The Department investigated Feige's letter to determine whether the SSN number disclosed on Martino's insurance application was valid, but quickly closed its investigation after confirming the validity of his SSN. [Dkt. 55-5, Martino Dep. pp. 258-63, 285, Dep. Ex. 33]. This investigation did not result in Martino's license being suspended, revoked or negatively impacted. (*Id.*) Martino has not applied for

employment with another insurance company since his Western & Southern termination [Dkt. 55-5, Martino Dep., p. 263].

## VII. Martino's Outside Position Form.

The Agreement prohibited Martino from engaging in any other outside position without the Company's prior written consent. [Dkt. 55-4 and 55-6, Martino Dep., pp. 224-27, Dep. Ex. 17]. Associates with outside positions have to seek written approval by completing an Outside Positions Form. [Dkt. 55-14, Miller Aff. ¶4]. During Martino's tenure, Western & Southern only approved outside positions involving five or fewer hours a week on average, not including Sundays, and an average weekly pay of $100 or less. (*Id.*) The Field Human Resource Department decided whether to approve outside positions at a weekly meeting. [Dkt. 55-14, Miller Aff. ¶5]. Erin Miller, Human Resource Generalist, was responsible for initially reviewing an Outside Position Form and presenting the position at issue along with its hours and compensation to the rest of the Department. (*Id.*) Miller did *not* identify the associate's name or any other information about the associate requesting the approval. (*Id.*) Sales Representatives with unapproved outside positions are not qualified for employment at Western & Southern. [Dkt. 55-10, Johnson Aff. ¶16]. Indeed, Sales Representatives must either resign their unapproved outside position, reduce the hours and pay of their outside position in order to comply with Western & Southern's policy, or have their employment at Western & Southern terminated. (*Id.*) Western & Southern approved numerous outside positions involving religious organizations, including Sales Representatives

who were preachers, pastors or ministers in churches. [Dkt. 55-11, Corlett Aff. ¶ 25].

Shortly after Martino was hired, he submitted an Outside Positions Status Form relating to his pastoral position, but Martino did not specify his hours and pay. [Dkt. 55-5, 55-6, 55-7 and 55-8, Martino Dep., pp. 263-81, Dep. Exs. 25, 26, and 28 Martino Aff. Ex. 4]. On September 18, 2006, Miller sent Martino an email asking for that information and sent him a follow-up email about this information on September 26, 2010. (*Id.*) Later, on September 26, 2006, Martino wrote back that his pastor position involved "[a]pproximately 8 to 10 hours per week,[6] no set days other than Sunday, at this time my average weekly pay is $300 per week,[7] and it may decrease in the future." (*Id.*) On September 27, 2006, Miller notified Martino that his pastor position did not comply with the Outside Positions Policy, and he needed to resign his pastor position. (*Id.*)

At this point, also on September 27, 2006, Sobol entered the conversation by emailing Miller. (*Id.*) He wrote that he has taught Sales Representatives "to dedicate 3-5 hours per week to community service work," and "[b]eing a pastor of a small congregation is the epitome of public service and community involvement." (*Id.*) Sobol closed by asking Miller to clarify if community service was forbidden.

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[6] Martino's estimate of eight to ten hours excluded hours worked on Sundays. [Dkt. 55-4, Martino Dep. 195-96].

[7] Martino admitted during his deposition that he earned more than $300 a week at the time. Martino's average weekly income from First Baptist Church in 2006—the year in which he worked for Western & Southern—was $439, with an average of $129.20 in tax-free weekly income. [Dkt. 55-4, Martino Dep., pp. 184-86].

(*Id.*) Miller wrote back on September 27, explaining "[t]his situation is a little different because of the amount of time and money involved." (*Id.*) Sobol responded by explaining that Martino was reluctant to give up his pastor position, but he wrote: "I *believe* that if we allowed [Martino] to keep this position, that he would probably do it for free. However, I am sure that he would like to make as much money at it, as we would allow." (*Id.*) (original all capitalization; italics added.) Sobol asked Miller whether there was "a standard amount of income that we will allow a person to make in a public service outside position, and if so, what is that amount?" (*Id.*) Sobol also indicated that he thought Martino had "inflated the [number] of hours per week that this position required." (*Id.*) Miller responded on September 29, 2006, explaining that Martino's position was "being denied due to consistent past practices regarding outside positions." (*Id.*)

Sobol responded, also on September 28, "It would help me in my future recruiting efforts to know if we will allow someone to ever hold a public service position" because Miller's "implication" was that such positions were not allowed when prior stated Company policy indicated that they were. [Dkt. 59-1 at 18]. Sobol asked: "Are you saying that the policy has now changed, because if so the field MGMT. needs to know." (*Id.*) Miller responded the same day: "No the policy has not changed, [Martino's] outside position does not fit into our policy due to [past] practices. Paid public service positions are subject to approval by [Field Human Resources] as stated in the policy." (*Id.*)

Sobol exchanged these emails with Miller on his own initiative. [Dkt 55-5, Martino Dep. 270-74; Dkt. 55-9, Sobol Aff. ¶33]. Martino never asked Sobol to get involved, and Martino did not tell Sobol that he thought Western & Southern was discriminating against him when it denied his outside position request. (*Id.*) Sobol got involved because he wanted to retain Martino as a Sales Representative, so Sobol could meet his recruiting and retention goals. [Dkt. 55-9, Sobol Aff. ¶33]. Sobol was trying to identify the maximum hours and compensation allowed under the policy, so he could try to convince Martino to reduce his pastor compensation and hours to be within that limit. (*Id.*) Martino never told Sobol he would work as a pastor for free or reduce his hours. [Dkt. 55-9, Sobol Aff. ¶34]. Martino only said he would reduce his pastor compensation and his hours when his Western & Southern compensation increased as he developed business. [Dkt. 55-9, Sobol Aff. ¶34].

On October 4, Martino responded to Miller's email of September 27 informing him that his outside position did not comply with the policy. Martino wrote:

> It has become evident from your decision via email on Sept. 27 telling me to terminate this 'outside business venture' immediately that I need to address this situation. It has also become very evident from your email conversations with my District Manager Mr. Sobol, that you have no intention of approving my public service position, which with God's blessings I will continue to serve in, as pastor of a small community church. Is the company denying my public service position and terminating my agent appointment with Western & Southern? Please be specific so I will know what my position is with the company. Thank you.

[Dkt. 59-1, Pl.'s Aff. Ex. 4 at 19]. The same day Miller responded: "Your position with Western & Southern is not being terminated. We are asking that you

terminate your public service position because, from the information you provided, it does not comply with our policy." (*Id.*) Miller copied Corlett on this email. (*Id.*)

Neither Skidmore (who made the decision to terminate Martino's employment) nor Johnson (who signed Martino's termination letter) knew about Martino's religion, his pastor position or his alleged refusal to resign his pastor position when the termination decision was made. [Dkt. 55-10, Johnson Aff. ¶¶10, 15; Dkt. 55-1, Skidmore Aff. ¶9]. Martino suggests otherwise, noting that the Field Human Resource Department ("Johnson's office") reviewed outside sales positions and Johnson had ultimate authority with regard to employment actions based on outside position issues. (Op. Br. p. 11). But this is misleading. It is undisputed that Miller presented outside position issues to Johnson and the Field Human Resource Department without identifying the associate involved. [Dkt. 55-10, Johnson Aff. ¶14]. Moreover, it is undisputed that Martino's outside position issue had not yet reached the point of Western & Southern needing to consider terminating Martino's employment because of his outside position. [Dkt. 55-10, Johnson Aff. ¶16]. In short, there is absolutely no evidence that Johnson knew about Martino's pastor position, his Outside Position Form or his email exchange with Miller about the issue.

**VIII. Michael Bacon's I-9 Process.**

Martino relies heavily on Western & Southern's treatment of a District Manager from Division B named Michael Bacon to support his claims. Bacon completed an I-9 Form when the Company hired him in April 1999. [Dkt. 55-15, Bacon Aff. ¶2]. At the time, Bacon had temporary work authorization status. (*Id.*) Bacon renewed his temporary work authorization status in February 2000, but the Company failed to

track when his employment eligibility expired again. [Dkt. 55-16, Hanseman Aff. ¶3]. So, when Bacon's work authorization expired in February 2001, no one at Western & Southern realized it or knew Bacon was working for the Company without a valid work authorization until May 2006, when Jim Hanseman, the Human Resource Manager for Division B, discovered this mistake. (*Id.*) Johnson learned of this issue during the summer of 2006. [Dkt. 55-10, Johnson Aff. ¶17].

Hanseman and others from the Field Human Resource Department initially followed up with Bacon to obtain a document to re-verify his work authorization, but in mid-July 2006, Keith Payne, the Divisional Vice President for Division B, took the lead in Bacon's re-verification. [Dkt. 57-1, Payne Aff. ¶5]. As Divisional Vice President, Payne had ultimate decision-making authority for hiring and firing decisions in Division B and was well within his authority to handle this situation, so Field Human Resources ceded primary responsibility for this issue to Payne. [Dkt. 57-1, Payne Aff. ¶5; Dkt. 55-10, Johnson Aff. ¶17].

From May until August 2006, Bacon assured Hanseman, Payne and everyone else involved that he was authorized to work in the United States, and his lawyer would provide him with documents to satisfy the I-9 process. [Dkt. 55-15, Bacon Aff. ¶9]. Based on Bacon's assurances that he could quickly produce work authorization documentation and the fact that Bacon had previously verified his employment eligibility through the I-9 process, Western & Southern gave Bacon some time to produce the necessary documentation. [Dkt. 57-1, Payne Aff. ¶6]. Payne's involvement in Bacon's re-verification delayed the process. [Dkt. 55-10, Johnson Aff.

¶24]. In addition, Bacon was able to delay the processing of his re-verification by intentionally misleading Western & Southern during the process, which he was able to do in part because he had previously complied with the I-9 process, had a long and successful history with the Company and a strong relationship with Payne. [Dkt. 55-10, Johnson Aff. ¶26].

However, in early August 2006, Western & Southern became concerned that Bacon may not be able to satisfy the I-9 process in the near future based on a letter the Company received from Bacon's lawyer. [Dkt. 55-10, Johnson Aff. ¶18]. As soon as this concern developed, the Field Human Resource Department stepped back in and set a five-day deadline for this issue to be resolved. [Dkt. 55-10, Johnson Aff. ¶18; Dkt. 55-17, Johnson's Dep., pp. 45-56, Dep. Ex. 1]. Indeed, Johnson met with Bacon on Friday, August 11, 2006 and gave Bacon until Friday, August 18, 2006 (*i.e.,* five business days) to have his lawyer contact Western & Southern to explain the steps and the timeline for demonstrating his work authorization status. (*Id.*) Johnson made clear that Bacon's employment could no longer continue if he did not meet this deadline. (*Id.*) Rather than being terminated, Bacon decided to resign on August 22, 2006. [Dkt. 55-15, Bacon Aff. ¶11]. Western & Southern did not suggest Bacon resign. (*Id.*)

Skidmore and Corlett had no substantive knowledge of or played any role in Bacon's re-verification or his resignation. [Dkt. 55-1, Skidmore Aff. ¶40; Dkt. 55-11, Corlett Aff. ¶26].

Martino contends Corlett's deposition testimony contradicts her affidavit on this point, and that she had some substantive involvement with Bacon's re-verification. (Op. Br., pp. 13, 23). This is wrong. As Corlett explained during her deposition, she knew Bacon's re-verification was an open item because she was copied on an email about it. [Dkt. 55-12, Corlett Dep., pp. 9-10]. But, as Corlett testified during her deposition and in her affidavit, she was "not familiar with the matter" and had no specific knowledge of how long Bacon had been employed, what documents he submitted during the I-9 process, whether his work authorization had expired, why his employment eligibility was being re-verified, how long his re-verification lasted, how the re-verification process concluded, or whether Bacon's employment with Western & Southern was impacted. [Dkt. 55-12, Corlett Dep., pp. 9-11; Dkt. 55-11, Corlett Aff. ¶26]. Because of her lack of involvement or knowledge of Bacon's re-verification, she could not provide any explanations regarding the details of that process during her deposition or compare Bacon's re-verification to Martino's I-9 process. [Dkt. 55-12, Corlett Dep. pp, 12-13].

## IX. Complete Mitigation of Potential Back Pay and Front Pay Damages.

The members at First Baptist Church responded to Martino's Western & Southern termination by making additional "pastoral" contributions, which were allocated directly to Martino's compensation. [Dkt. 55-4, Martino Dep., pp. 199-204]. As a result, Martino's First Baptist Church compensation jumped to $33,291.52 ($640.22 a week) in 2007, with $9,987.42 ($192.07 a week) being tax-free income. (*Id.*) Martino earned $500 a week each week he worked at Western & Southern, and he would have only been able to earn an additional $100 as a pastor to have

complied with the Outside Position Policy—for a total of $600 a week. [Dkt. 55-11, Corlett Aff. ¶¶8, 22, 23].

## SUMMARY OF ARGUMENT

The Court should affirm the District Court's dismissal of Martino's religious discrimination and retaliation claims for several reasons. First, the District Court correctly held that Western & Southern had legitimate, non-pretextual reasons for terminating Martino's employment, *i.e.*, he failed to complete the I-9 process, and for sending Feige's letter to the Department, *i.e.*, Feige was just following Company's policy. Martino's pretext arguments on appeal lack merit—especially since neither Skidmore nor Johnson knew about Martino's religion or his pastor position, and the Company could have been held civilly and criminally liable for continuing to employ Martino in violation of IRCA requirements.

The Court should affirm the dismissal of Martino's discrimination and retaliation claims for many other reasons. For example, Martino (who applies the indirect method to his claims) cannot establish a *prima facie* case of discrimination or retaliation because: (1) he did not engage in a protected activity to support his retaliation claim; (2) the decision-makers had no knowledge of Martino's religion or alleged protected activity; (3) Martino was not qualified for employment at Western & Southern since he could not satisfy the I-9 requirements; and (4) Martino has not identified any similarly situated employees outside of his protected classes who were treated more favorably. These claims also fail for procedural reasons—*i.e.*,

Martino failed to exhaust administrative remedies for his retaliation claim, and the six-month contractual limitation period in his Agreement bars these claims.

The Court should also affirm the District Court's dismissal of Martino's defamation claim. The District Court correctly held that Martino's claim is for defamation *per quod* (not *per se*) and that Martino failed to satisfy the malice or special damages element of *per quod* defamation. This claim fails for additional reasons. Specifically, Martino consented to Feige's letter being sent. Therefore, an absolute privilege applies to the letter and bars Martino's claims. Likewise, various qualified privileges apply (which Martino does not dispute) and require Martino to establish actual malice—which he cannot do. And finally, the six-month contractual limitation period also applies to Martino's defamation claim and provides another basis for dismissal.

## STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment *de novo*, viewing the record in light of the most favorable to the party opposing the motion and drawing all reasonable inference in the non-movant's favor to determine if there is a genuine issue of material fact as to any element of his claims. *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010). "A factual dispute is 'genuine' only of a reasonable jury could find for either party." *Id.* "Further, disputed facts that are not outcome-determinative are not material and will not preclude summary judgment." *Id.*

Before the non-movant can benefit from a favorable view of evidence, he must first actually place evidence before the courts. *Id.* He must "make a showing sufficient to establish any essential element of [his] cause of action for which [he] will bear the burden of persuasion at trial." *Id.* "Mere conclusory allegations do not constitute evidence." *Id.*

## ARGUMENT

### X. The Dismissal of Martino's Discrimination and Retaliation Claims Should Be Affirmed.

#### A. Western & Southern Had Legitimate, Non-Pretextual Reasons for its Actions.

Martino applies the indirect method to his discrimination and retaliation claims.[8] (Op. Br. pp. 20-21.) Under the indirect method, the plaintiff carries the

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[8] Martino appears to have waived his retaliation claim. In his Opening Brief, Martino states that his "case is, in the first instance, a case about discrimination on the basis of religion." (Op. Br., p. 20.) Moreover, Martino does not make any arguments in support of his retaliation claim in his Opening Brief. Nevertheless, in an abundance of caution, Western & Southern explains why the Court should affirm the District Court's dismissal of Martino's retaliation claim in this brief in the event Martino continues to pursue it.

Rather than pursue his retaliation claim, Martino tries to recast that claim into a failure to accommodate claim. (Op. Br., pp. 31-32) ("It appears that the trial court's analysis was unduly focused on the retaliatory aspect at the expense of overlooking a significant aspect of plaintiff's case—that failure to accommodate, including termination of an employee who seeks accommodation, can be unlawful discrimination on its own, in violation of Title VII, regardless of any retaliatory feature of such conduct.") But, as the District Court explained, Martino did not argue a failure to accommodate claim in response to Western & Southern's Motion for Summary Judgment. [Dkt. 62, p. 11, n. 2]. Rather, Martino only claimed that he "opposed the unlawful practice of failing to accommodate [his] status as a pastor" by refusing to resign his pastor position. (*Id.*) In fact, Martino, himself, acknowledges that he classified his "new" failure to accommodate claim originally as retaliation. (Op. Br., p. 20.) Martino should not be allowed to reinvent his claim now because he waived his failure to accommodate claim by not raising it in the District Court. *Fednav Int'l Ltd., v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) (a party "waive[s] the ability to make a specific argument for the first time on appeal when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms."). Even if this argument is not waived, it

initial burden of establishing a *prima facie* case of discrimination or retaliation. To establish a *prima fac*ie case, a plaintiff must offer evidence that: "(1) [he] is a member of a protected class, (2) [his] job performance met [the employer's] legitimate expectations, (3) [he] suffered an adverse employment action, and (4) another similarly situated individual who was not in the protected class was treated more favorably than the plaintiff." *Burks v. Wisconsin Dep't of Transportation*, 464 F.3d 711, 750-51 (7th Cir. 2006). Once a *prima facie* case is established, a presumption of discrimination is triggered. The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for its action. *Burks*, 464 F.3d at 751. When the employer does so, the burden shifts back to the plaintiff, who must present evidence that the stated reason is a "pretext," which permits an inference of unlawful discrimination. *Burks*, 464 F.3d. at 751.

The District Court did not consider Western & Southern's arguments that Martino failed to establish a *prima facie* case of discrimination or retaliation because Western & Southern also presented legitimate reasons for its actions. Accordingly, the District Court condensed its analysis to whether Martino could establish pretext. The District Court correctly held Martino cannot, as a matter of law, establish pretext.

To show this reason is pretextual, Martino "must present evidence suggesting that the employer is dissembling." *Coleman v. Donahoe*, 667 F.3d 835, 842 (7th

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lacks merit because Western & Southern had a legitimate, non-pretextual reason for terminating Martino's employment, and the decision-makers had no knowledge of his pastor position or his alleged need for a reasonable accommodation.

Cir.2011) (quoting *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir.2011). "The question is not whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reasons it has offered to explain the discharge." *Id.* "It is not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie." *Id.* (quoting *Naik v. Boehringer Ingelheim Pharms., Inc.*, 627 F.3d 596, 601 (7th Cir. 2010) (quoting *Ieneichen v. Ameritech*, 410 F.3d 956, 961 (7th Cir. 2005)). Martino presents no evidence suggesting Western & Southern's legitimate reasons for terminating him and sending Feige's letter were pretextual.

#### 1) Martino's Reliance on Michael Bacon as a Comparator Is Misplaced.

Martino claims Western & Southern treatment of Bacon during his I-9 process is evidence of pretext. Martino is wrong: Bacon was not similarly situated; there is no evidence Bacon was *outside* Martino's protected class; and Bacon was not treated more favorably.

Martino and Bacon are not similarly situated employees. Employees must be "directly comparable in all material respects" to be similarly situated. *See Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 561 (7th Cir. 2004) (internal quotation omitted); see also *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2011). "In the usual case, a plaintiff must at least show that the comparators (1) 'dealt with the same supervisor,' (2) 'were subject to the same standards,' and (3) 'engaged in

similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.'" *Coleman*, 667 F.3d at 846 (quoting *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 690 (7th Cir. 2008) (quoting *Snipes v. Illinois Dep't of Corrections*, 291 F.3d 460, 463 (7th Cir. 2002)). There must be "enough common factors … to allow for meaningful comparison in order to divine whether intentional discrimination was at play." *Id.* (quoting *Barricks v. Eli Lilly and Co.*, 481 F.3d 556, 560 (7th Cir. 2007). These standards establish that Martino and Bacon were not similarly situated employees.

Bacon worked as a District Manager in Division B, and he had been employed with the Company for nearly seven years when his I-9 issue arose. Martino, on the other hand, was a newly hired Sales Representative in Division H. More importantly, the people handling the investigation into their respective I-9 issues and the ultimate decision-makers were different. In Martino's situation, Corlett worked with Sobol to gather information about Martino's I-9 issues, and Skidmore made the ultimate decision to terminate Martino's employment when he could not satisfy the I-9 requirements. Neither Corlett, Sobol nor Skidmore had any involvement in processing Bacon's re-verification. And, those primarily involved in Bacon's re-verification (*i.e.*, Payne and Hanseman) had no involvement in Martino's I-9 verification or the decision to terminate Martino's employment. See *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004) (discipline from a different supervisor "sheds no light" on the alleged discriminatory disciplinary decision).

Martino suggests he and Bacon are similarly situated because Corlett was involved with both situations. Martino is wrong. Corlett was aware that Bacon's re-verification was an "open" I-9 issue, but she was not substantively involved in Bacon's re-verification. Indeed, it is undisputed that she knew nothing about how Bacon's re-verification was processed, how long that process lasted, or how the process was concluded. She simply had no substantive input into Bacon's re-verification. Therefore, Corlett's knowledge of Bacon's re-verification being an open issue does not suggest Martino and Bacon were similarly situated, or that Corlett somehow treated Bacon more favorably than Martino.

While Johnson had some involvement in both situations, Martino's reliance on Johnson in his similarly situated analysis also lacks merit. First and foremost, it is important to remember that Johnson had no knowledge of Martino's religion, his pastor position or his alleged refusal to resign his pastor position. Therefore, Johnson could not have been motivated by discriminatory or retaliatory animus. See *Salas v. Wisconsin Dep't of Corrections*, 493 F.3d 913, 924-25 (7th Cir. 2007) (employer must have knowledge of protected activity prior to terminating an employee for that termination to be retaliatory); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 668 (7th Cir. 2006) (recognizing that it is not sufficient to show that an employer could or should have known about an employee's complaint); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("It is difficult to see how an employer can be charged with discrimination on the basis of an employee's religion

when he doesn't know the employee's religion (or lack thereof[])....''). In other words, Martino's argument about Johnson is a red herring.

Moreover, neither Johnson nor anyone from Field Human Resources had control over the Bacon re-verification process. Rather, Payne (who, as Divisional Vice President, had ultimate decision-making authority over Bacon and a long-standing relationship with him) took the lead in communicating with Bacon about the re-verification issue. Payne's involvement added a layer of bureaucracy and delayed the re-verification because he focused primarily on his sales operation, did not specialize in human resource issues, was not familiar with labor and employment laws, and had a personal, long-standing relationship with Bacon. [Dkt. 55-10, Johnson Aff. ¶24]. In other words, Payne's involvement made a substantial difference in the amount of time Bacon's re-verification lasted, which in turn materially distinguishes Bacon's situation from Martino's.

In addition, Bacon's re-verification differed materially from Martino's I-9 process because Bacon was able to delay his re-verification process by lying to Hanseman and Payne. (*Id.*) For example, in May 2006, Bacon faxed Hanseman a copy of his Ontario driver's license, Ohio driver's license and an "I-94 Departure Record" from Immigration and Naturalization Service and wrote on the fax cover sent: "This is the only info I need to work and cross the border. We do not need passports until Jan 07." [Dkt. 55-16, Hanseman Aff. ¶4]. Bacon also completed Section 1 of a Form I-9 based on these documents and faxed it to Hanseman. (*Id.*) Hanseman was not familiar with the I-94 record, but eventually rejected it after determining it was not

acceptable for I-9 purposes. (*Id.*) Unbeknownst to Hanseman, Bacon sent him the I-94 and falsified the I-9 Form to delay Western & Southern's processing of his re-verification. [Dkt. 55-19, Bacon Dep., pp. 19-20, 45-46; Dkt. 55-15, Bacon Aff. ¶6].

Martino misses the point with regard to the relevance of Bacon's lying. It is not relevant because Western & Southern encourages lying or sought to reward Bacon's behavior. The point is: Bacon's lies concealed his inability to produce valid I-9 documents, which delayed Western & Southern's action on the issue—just like Martino's representations that he could obtain a replacement social security card delayed Western & Southern's action in his situation for longer than a month.

Martino also seems to argue that Payne's involvement and Bacon's concealment were not valid points of distinction because Corlett could not explain why Bacon's situation may have differed from Martino's, and "there is no evidence that Western & Southern considered length of employment, friendship with supervisors, or any other factor in determining whether they should enforce I-9 requirements." (Op. Br. p.24). Martino's argument is misleading. Corlett could not compare Martino's I-9 process to Bacon's re-verification because she had no substantive involvement in or knowledge of Bacon's re-verification. Moreover, Johnson, Payne and Bacon, all testified that Payne's involvement, his relationship with Bacon, Bacon's history with the Company and Bacon's concealment delayed his re-verification. [Dkt. 55-10, Johnson Aff. ¶24-26; Dkt. 55-15, Bacon Aff. ¶13; Dkt. 55-16, Dkt. 57-1, Payne Aff. ¶10].

In short, unlike in *Coleman*, there were different decision-makers and other meaningful differences between Bacon's and Martino's situations such that the two are not similarly situated.

Even if Martino and Bacon were similarly situated (which they are not), Martino has offered no evidence that Bacon was *outside* of his protected class. In fact, Martino testified during his deposition that he was relying on Bacon to support his national origin discrimination claim, not his religious discrimination or retaliation claims. [Dkt. 55-5, Martino Dep., p. 300]. Nevertheless, Martino now attempts to recast Bacon into a comparator for his religion discrimination and retaliation claims, but he does not offer any evidence regarding Bacon's religion or whether he did or did not ever seek a religious accommodation. In fact, Bacon is Christian (just like Martino). [Dkt. 60-1, Supp. Bacon Aff. ¶2]. This dooms Martino's argument that Western & Southern's treatment of Bacon somehow demonstrates pretext or a causal connection between his alleged protected activity and his termination. *See Salas*, 493 F.3d at 923-24 (no national origin discrimination claim where plaintiff offered no evidence of the national origin of alleged comparator employees).

And, even if Bacon was a similarly situated employee outside of Martino's protected class (which he is not), Western & Southern did not treat Bacon more favorably. Western & Southern gave both Martino and Bacon an open-ended amount of time to produce work authorization documents while they assured Western & Southern they could produce valid I-9 documentation and while it appeared they could quickly produce such documentation. But, when it became

apparent they could not quickly address the issue, Western & Southern set five-day deadlines for both. In addition, the Field Human Resource Department did not treat Bacon more favorably by allowing him to resign. On the contrary, Corlett instructed Sobol to offer Martino the option to resign, and Corlett reasonably believed that option had been communicated to and rejected by Martino. Moreover, Sobol offered Martino the option to reapply at Western & Southern if he obtained a work authorization document, but Martino chose not to do so—even after he allegedly found his social security card a month after he was terminated.

**2) Martino's Reliance on Tim Snyder is Misplaced.**

Martino tries to support his religious discrimination and retaliation claims by alleging Western & Southern treated Tim Snyder more favorably with regard to the Outside Position Policy. [Dkt. 55-5, Martino Dep., p. 300]. Martino claims Snyder was allowed to maintain a job teaching music even though his teaching position exceeded Western & Southern's hour and compensation limits. [Dkt. 55-3, Martino Dep. 98-99].

Snyder is not a valid comparator for a couple of reasons. First, Western & Southern's processing of Snyder's Outside Position Form is irrelevant because Martino has not alleged a claim based on the denial of his outside position. On the contrary, Martino's claims are based solely on his termination and Feige's letter.

Second, even assuming the processing of Snyder's Outside Position Form was relevant, Snyder and Martino are not similarly situated. For Snyder's situation to have any relevance, Martino would have to show the decision-makers involved with his form knew Snyder's outside position exceeded the requirements, and (unlike

Martino's situation) they approved Snyder's form anyway. No such evidence exists. Indeed, Martino, who has the burden of proof regarding this issue, offers no evidence that the same decision-makers processed Snyder's Outside Position Form and his form; that the employees who processed Snyder's form were involved in Martino's termination; or that any of the relevant decision-makers knew Snyder's outside position exceeded Western & Southern's requirements. To the contrary, it is undisputed that Snyder's Outside Position Form indicated that his teaching position was within the Company's limitations, and the Field Human Resource Department never had any information to suggest otherwise. [Dkt. 55-3 and 55-6, Martino Dep. 100-01, Dep. Ex. 5]. The Field Human Resource Department never received any information to suggest Snyder falsified his form or that he was working more hours or receiving more pay than he disclosed. [Dkt. 55-10, Johnson Aff. ¶27; Dkt. 55-11, Corlett Aff. ¶24]. Therefore, Snyder's position was approved. In contrast, Martino's Outside Position Form indicated that his pastor position did not meet Western & Southern's criteria. There is simply no inconsistency between how these two forms were processed.

**3) Corlett Honestly and Reasonably Believed the Receipt Rule Did Not Apply.**

Martino tries to cast doubt on the legitimacy of Western & Southern's termination decision by contending—for the first time—that the so-called "receipt rule" applied to the document he received from the Elkhart SSA office. This argument lacks merit for several reasons.

First, Martino waived this argument by failing to raise it during the summary judgment briefing in the District Court. *Fednav Int'l Ltd.*, 624 F.3d at 841.

Second, Martino offers no evidence to show that the document he received from the SSA is a valid receipt for purpose of the "receipt rule." On the contrary, Martino himself admitted that the SSA document did not satisfy I-9 requirements. Moreover, the "receipt rule" only applies when an employee submits a receipt for a replacement I-9 document. But here, Martino admitted that the SSA did not allow him to apply for a replacement social security card because he did not have any evidence of his citizenship or other work authorization status.

Third, the legitimacy of Corlett's rationale can only be called into doubt by providing evidence showing that she did not honestly apply the "receipt rule" to the situation. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) ("[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believed in the reasons it offers."); *Mills v. Health Care Service Corp.*, 171 F.3d 450, 459 (7th Cir. 1999) (to show pretext, plaintiff would have to produce evidence that evaluation of plaintiff's performance was dishonest, not merely mistaken). Martino offers no evidence that calls into question the veracity of Corlett's "receipt rule" analysis. On the contrary, Corlett honestly (and *correctly*) refused to apply the "receipt rule" to the document Martino received from the Elkhart SSA based on her past experiences and Martino's acknowledged inability to apply for a replacement card.

### 4) The Timing of Corlett's October 9, 2006 Letter Is Not Suspicious and Western & Southern Did Not "Dance Around" the I-9 Issue.

Martino contends suspicious timing exists because Corlett's suspension letter was sent shortly after he allegedly refused to resign his pastor position in his October 4, 2006 email. He suggests Corlett delayed addressing the I-9 issue until she became aware of Martino's alleged refusal to resign his pastor position.

There was nothing suspicious about the timing of Corlett's letter. Corlett and the Field Human Resource Department had been requesting employment eligibility verification from Martino since his employment began in September 2006. Corlett, Sobol and Edwards followed up on this issue throughout September and October 2006. In other words, Martino's I-9 problem was an ongoing issue to which the Field Human Resource Department was paying close attention and regularly addressing. On October 6, 2006, the Friday before Corlett sent her letter, Martino's I-9 issue came to a head when Corlett received the letter from the South Bend SSA office establishing that Martino was not going to be able to comply with the I-9 process any time soon. That development (not Martino's October 4 email) motivated Corlett to suspend Martino and give him five days to comply with the I-9 process. *Tomanovich*, 457 F.3d at 656 (timing not suspicious where the employer had started addressing on-going performance problems before the alleged protected activity); *Moser v. Ind. Dept. of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005) (explaining that "numerous incidents brought [employee's] professionalism and ability … into question" and thereby undermined any inference of suspicious timing).

Moreover, Martino's theory makes no sense given Western & Southern's consistent enforcement of its Outside Position Policy. Martino seems to argue Western & Southern manufactured a basis to terminate him (*i.e.*, his ongoing I-9 problem) to cover up the Company's real motivation (*i.e.*, his religion or refusal to resign his pastor position). But, if Martino really refused to resign his pastor position or reduce his pastor hours and compensation, Western & Southern would have been well within its rights to terminate Martino's employment. Indeed, Western & Southern consistently terminates employees when their outside positions exceed the Company's limits. [Dkt. 55-10, Johnson Aff. ¶16]. Moreover, there is no evidence Western & Southern has some bias against religious positions. On the contrary, the Company has approved numerous religious outside positions. [Dkt. 55-11, Corlett Aff. ¶25].

**5) The District Court Correctly Held that the "Cat's Paw" Theory Did Not Save Martino's Claims.**

Martino argues that the "cat's paw" theory applies to this case and shows that the decision regarding his outside position "infected" the decision to terminate him. (Op. Br. P. 29). Specifically, Martino appears to claim Corlett used Skidmore and/or Johnson as the "cat's paw" to carryout her discriminatory or retaliatory motives against Martino. However, Martino's "cat's paw" theory of causation fails because he must (and cannot) offer evidence of Corlett's discriminatory or retaliatory motive. *See Schandelmeier-Bartels v. Chicago Park District*, 634 F.3d 372, 380 (7th Cir. 2011).

Martino claims his "cat's paw" theory applies to this case "because Corlett knew about Martino's I-9 issues before she knew about his outside position issues; she took no action on the I-9 issues until she became aware of Martino's stance on not giving up his position as a pastor; her notice of suspension came on the heels of her learning of Martino's refusal to quit as a pastor; Johnson spoke with Corlett before deciding to terminate Martino; both Johnson and Corlett were familiar with Bacon's I-9 situation; Corlett should have allowed Martino 90 days to submit his social security card under the "receipt rule"; and Corlett could not explain why Bacon was treated more favorably." (Op. Br., p. 29.)

Martino's argument lacks merit; there is no evidence Corlett acted with discriminatory animus. On the contrary, she and the Field Human Resource Department addressed Martino's I-9 issue from the first day of his employment, regularly following up with him about the importance of providing the Company with a valid work authorization document. This was not something Corlett sprung on him after his October 4, 2006 email. In fact, Martino went to a SSA office to address his I-9 issue on September 19, 2006 (well before his October 4th email). Western & Southern was allowing Martino time to come up with the original or replacement social security card he said he could provide. But, after Corlett received the October 6, 2006 SSA document and talked with Sobol, it became apparent that Martino could not complete the I-9 process anytime soon. Therefore, she correctly decided Martino either needed to quickly get them the necessary documentation,

resign or be terminated. Indeed, continuing to employ Martino would have exposed the Company to civil and, possible, criminal penalties.

Moreover, as explained above, Corlett was not substantially involved in and had no knowledge of the specifics of Bacon's situation; therefore, any difference between Bacon's re-verification process and Martino's I-9 process does not implicate Corlett. And, Martino's new argument that the "receipt rule" applied here is waived and wrong—and even if the receipt rule applied, there's no evidence Corlett's interpretation was dishonest.

### B. The Court Should Also Affirm the Dismissal of Martino's Discrimination and Retaliation Claims Because He Cannot Establish a *Prima Facie* Case.

Martino's reliance on the indirect method to establish his claims also lack merit because he cannot establish a *prima facie* case of discrimination or retaliation. Specifically, Martino cannot establish that: (1) he engaged in a protected activity sufficient to sustain his retaliation claim; (2) the decision-makers knew about his alleged protected classes; (3) he was qualified to be a Western & Southern employee without a valid work authorization; and (4) he cannot identify similarly situated employees who were treated more favorably.

#### 1) No Protected Activity.

Title VII makes it unlawful for an employer to retaliate against an employee because he "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). An internal complaint with an employer may constitute a protected activity under Title VII, but only if the complaint "indicates that discrimination occurred because of sex, race, national origin, or some other

protected class." *Tomanovich*, 457 F.3d at 663; *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003). "Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient." *Id.*

Martino's only alleged protected activity is his October 4, 2006 email to Erin Miller. Martino contended his email constitutes a protected activity because he allegedly refused to resign his pastor position in opposition to a practice made unlawful under Title VII.

Martino's argument lacks merit for several reasons. First, Martino's email does not oppose *anything* (let alone religious discrimination or a failure to accommodate) or indicate Martino was refusing to resign his pastor position. He merely expresses a desire to retain his pastor position.

Second, nothing in Martino's email suggests he was refusing to resign or making a complaint *in opposition to discrimination*—let alone suggests he was opposing discrimination *resulting from his religion*. Martino does not use the word "discrimination" anywhere in his email or even claim Western & Southern's denial of his outside position request was unfair. The only words with a religious connotation in Martino's email are "pastor" and "God," but nothing about Martino's email suggests Martino believed Western & Southern's denial of his outside position request was inconsistent with its treatment of similar situations or suggests unfair treatment because of his religion. The email, therefore, was not a protected activity. In fact, Martino testified that he never complained to anyone at Western &

Southern that the denial of his outside position request was discriminatory. [Dkt. 55-5, Martino Dep., p.274].

2) No Knowledge of Martino's Protected Classes.

In the case of discrimination based on a protected status of which the employer would not obviously be aware, as is the case with religion, the plaintiff must show the employer was sufficiently aware of his status to have been capable of discriminating based on it. *See Reed*, 330 F.3d at 934. Likewise, a plaintiff cannot establish a retaliation claim under either the direct or indirect method unless the decision-makers knew of the plaintiff's alleged protected activity. *Salas*, 493 F.3d at 924-25; *Tomanovich*, 457 F.3d at 668. It is undisputed that the decision-makers in this case were not aware of Martino's religion or his alleged refusal to resign his pastor position; therefore, Martino cannot establish a *prima facie* case of discrimination or retaliation.

Thomas Johnson, Director of the Field Human Resource Department, is at the center of Martino's theory. (Resp. 2) Martino suggests Johnson knew about Martino's "stand on religion" because he worked closely with Miller and Corlett, who received Martino's October 4, 2006 email, and because Johnson had a role in approving outside positions. (Op. Br., pp.32-33.) But, as Johnson explained in his affidavit and deposition, he did not know Martino even submitted an Outside Position Form—let alone about Martino's October 4, 2006 email, his alleged refusal to resign his pastor position, or his religion. There is no evidence Miller or Corlett sent Johnson Martino's October 4 email or discussed it with him. In other words, Martino's attempt to impute Miller's or Corlett's knowledge about the email to

Johnson is based purely on speculation and is not a reasonable inference of fact. *See Tomanovich*, 457 F.3d at 668 (recognizing that it is not sufficient to show that an employer could or should have known about an employee's complaint); *see also, Lewis v. Washington*, 183 Fed. Appx. 553, 554 (7th Cir. 2006) ("the district court is never required to accept unreasonable factual inferences") (internal citations omitted); *Payne v. Pauley*, 337 F.3d 767 (7th Cir. 2003)(reasonable inferences do not derive from "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.") (internal quotations and citations omitted).

Likewise, it is undisputed that Feige, who sent Martino's termination notice to the Department, did not know about Martino's October 4, 2006 email, his alleged refusal to resign his pastor position, or his religion. Martino suggests Johnson was responsible for the notice being sent because he knew such a notice would result from Martino's termination. (Op. Br., pp. 35-36.) But again, there is no factual support for this in the record. On the contrary, Johnson did "not know when the Enterprise Licensing Department would notify state insurance departments of a Sales Representative's termination," and he had "no input into the decision to send a letter to the Department regarding Martino's termination." [Dkt. 55-10, Johnson Aff. ¶¶11-12].

**3) Not Qualified for Employment at Western & Southern**

To be eligible for Title VII protection, Martino must show that he was qualified for employment. IRCA requires all employees hired after November 5, 1986 to complete an I-9 Form and produce a document to verify their employment eligibility. Martino could not meet this requirement. Therefore, he was not

"qualified" for employment and cannot establish a *prima facie* case of discrimination. *See Chaudhry v. Mobil Oil Corp.,* 186 F.3d 502, 504-05 (4th Cir. 1999); *Egbuna v. Time-Life Libraries, Inc.,* 153 F.3d 184 (4th Cir. 1998)*, cert. denied,* 525 U.S. 1142 (1999); *Slaitane v. Sbarro, Inc.*, 2004 U.S. Dist. LEXIS 9839 * 62 (S.D.N.Y. 2004).

Martino never responded to this argument during the briefing of Western & Southern's Motion for Summary Judgment, thereby conceding the argument. *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (failure to oppose an argument creates an inference of acquiescence and "acquiescence operates as a waiver"). Based on that concession alone, the Court should affirm the dismissal of Martino's retaliation and discrimination claims.

#### 4) No Similarly Situated Employees Outside Of Martino's Protected Classes.

As explained above, Martino offers no evidence of similarly situated employees outside of his protected class who were treated more favorably.

### XI. The Court Should Affirm the Dismissal of Martino's *Per Quod* Defamation Claim Because He Cannot Establish Special Damages Or Malice.

Martino alleges defamation by implication, *i.e.*, Western & Southern's notice to the Department implied that he was terminated for one of the bad acts outlined in Indiana Code § 27-1-15.6-15. Indiana law recognizes defamation by implication. *Martino v. Western & Southern Financial Group*, 2009 WL 3444652 (N.D. Ind. 2009). It is actionable *per quod. McQueen v. Fayette County School Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). To maintain an action for defamation *per quod* or *per se*, a plaintiff must show a communication with defamatory imputation,

malice, publication, and damages. *Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 136 (Ind. 2006). However, a plaintiff alleging a defamation *per quod* claim must also plead and prove special damages. *Rambo v. Cohen*, 587 N.E.2d 140, 145-46 (Ind.Ct.App.1992).

Special damages are "damages that are pecuniary in nature and that have been actually incurred as a natural and proximate cause of the wrongful act." *Tacket v. Delco Remy Div. of General Motors Corp.*, 937 F.2d 1201, 1206 (7th Cir.1991). Injury to reputation without more, humiliation, mental anguish, physical sickness- these do not suffice. *Id.* It is undisputed that the Department closed its investigation shortly after receiving Martino's termination notice, and its investigation did not have any negative impact on Martino's insurance license. Moreover, Martino has not even sought work in the insurance industry since his Western & Southern termination. Therefore, Martino has not (and cannot) show he suffered any special damages as a result of Feige's letter.

To establish libel *per quod*, Martino must also establish that Western & Southern acted with ill will or garden variety malice against Martino. *Trail*, 845 N.E.2d at 136. Yet, the only evidence of record is that Feige acted in a purely routine, ministerial manner as part of a pre-ordained and uniformly applied company practice. Thus, there is no evidence that she acted out of any sense of malice toward Martino.

In his Opening Brief, Martino contends malice could be inferred because Johnson sent the Enterprise Licensing Department Martino's termination letter

rather than simply notifying them that Martino no longer worked for the Company. This argument lacks merit for a couple reasons. First, Johnson did not send Martino's termination letter to the Enterprise Licensing Department; Miller did. And there was nothing unusual about Miller's action. On the contrary, Field Human Resource Department always notified the Enterprise Licensing Department of Sales Representatives' involuntary terminations by sending that department a copy of the employees' termination letters. [Dkt. 55-13, Feige Aff. ¶ 5]. Moreover, Martino offers no evidence that his termination letter differed from any other employee terminated for a similar reason.

Martino also suggests that Feige and Western & Southern's former in-house counsel, Alice Fitzgerald, gave inconsistent information regarding when Western & Southern sends notices to state insurance departments about a Sales Representative's termination. (Op. Br., p. 36.) Fitzgerald said all terminations generate notices, while Feige said only involuntary terminations generate such notices. Martino does not explain how this alleged inconsistency suggests malice because under either standard, Western & Southern would have sent a notice to the Department about Martino's termination.

In addition, Martino attempts to dodge Western & Southern's defamation *per quod* argument by concluding—without citing a case—that his claim is defamation *per se.* That argument ignores clear Indiana authority to the contrary. *McQueen v. Fayette County School Corp.*, 711 N.E.2d 62 (Ind. Ct. App 1991). Defamation *per se* is an allegation that on its face qualifies as defamation. But, if the allegedly

defamatory language relies on extrinsic facts to establish the language was defamatory, then the language is defamatory *per quod,* at best. Indeed, by its very nature, defamation *by implication* means the communication is not defamatory on its face. It needs more. This is recognized in *McQueen*, where the Indiana Court of Appeals said "[w]ith respect to defamatory imputation, . . . *[w]ords not actionable in themselves* may become actionable *by some extrinsic fact*, or by being used and understood in a different sense from their natural meaning. Such words are deemed actionable *per quod*, and they acquire defamatory meaning *when placed in context or are connected with extrinsic facts or circumstance*." *McQueen*, 711 N.E.2d at 65 (emphasis added; citations omitted).

Martino needs extrinsic facts to render the language of the letter defamatory. He cites to an Indiana statute with regard to notification of termination for insurance agents. In addition, he cites to a notification he received from the Department with respect to his license following Western & Southern's letter. There are *no* falsehoods in Western & Southern's letter. It is only by examining extrinsic facts that Martino can allege Western & Southern defamed him. That is the very definition of defamation *per quod*.

Martino also misconstrues the implication of Feige's letter to support his argument. Martino contends the implication of Feige's letter was that Martino had violated I.C. 27-1-15.6-12, that is, an imputation of criminal or professional misconduct. (Op. Br., pp. 34-35.) But, this letter raises no imputation of criminal conduct or professional misconduct on its face. The letter states that Martino "no

longer represents" Western & Southern and "is no longer" employed by Western & Southern. And, Johnson's letter (which was enclosed with Feige's letter) only states that Martino failed to provide "documentation for employment eligibility purposes" by the date required by Western & Southern (which was a true statement). Moreover, the Department's response demonstrates that there was no criminal or professional implication. Indeed, the Department did not investigate Martino for criminal or professional misconduct. The Department simply took steps to verify Martino's social security number and then closed its investigation.

Once properly defined as defamation *per quod,* Martino's defamation claim must fail because he is required to plead and prove special damages and malice, which he cannot do.

## XII. The Court Should Affirm The Dismissal Of Martino's Defamation Claim Because The Absolute Privilege Bars His Claim.

"[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation." Restatement (Second) of Torts, § 583; *Eitler v. St. Joseph Regional Medical Center,* 789 N.E.2d 497, 501 (Ind. App. 2004). Martino consented in his Agreement to Western & Southern notifying the Department of his termination. Therefore, an absolute privilege applied to Feige's letter and bars Martino's defamation claim. *Eitler*, 789 N.E.2d at 501 (holding that absolute privilege applied to an alleged defamatory reference by a former employer because the plaintiff consented to the reference by signing an authorization and release that released the former employer from liability relating to the disclosure; the consent did not violate public policy).

### XIII. The District Court Should Affirm The Dismissal Of Martino's Defamation Claim Because He Cannot Establish Actual Malice.

Finally, the actual malice standard comes in to play here for three reasons. First, the letter to the Department is covered under IC 27-4-1-6, which applies the actual malice standard to reports to that Department. Moreover, courts have concluded that a qualified privilege applies to communications to the Department about an insurance broker in similar situations. *See e.g., Jones v. Western & Southern Life Insurance Co.*, 91 F.3d 1032 (7th Cir. 1996) (applying Illinois law). Second, the letter to the Department is subject to qualified privilege because it is a communication made under Indiana's "common interest" privilege. *Williams v. Tharp*, 914 N.E.2d 756, 762 (Ind. 2009). Third, it is a communication within the protection of Indiana's "issues of public concern" doctrine. *Journal-Gazette Co. v. Bandido's Inc.*, 712 N.E.2d 446, 452 (Ind. 1999). Once the alleged defamer establishes entitlement to the qualified privilege, the burden shifts to the plaintiff to establish that it has been abused. *Id.* Abuse is shown if: (1) the communicator was primarily motivated by feelings of ill will; (2) the communication was published excessively; or (3) the statement was made without belief or grounds for belief in its truth. *Id.* The burden is on the plaintiff to establish by "clear and convincing evidence" that the speaker made the statement knowing it to be false. *Williams*, 914 N.E.2d at 766.

Martino cannot clear these hurdles. As explained above, there is no evidence that Western & Southern was motivated (let alone "primarily motivated") by feelings of ill will. Secondly, there is no suggestion that Western & Southern sent

the letter to any party other than the Department. Finally, Martino cannot establish by "clear and convincing" of actual malice—*i.e.*, knowing the letter contained false statements or while entertaining serious doubts as to whether the letter contained falsehoods. *Shepard v. Schurz Communications, Inc.*, 847 N.E.2d 219 (Ind. Ct. App. 2006). As explained above, Martino does not and cannot state what the alleged knowing falsity was in the letter because the cover letter to the Department and the enclosed termination letter did not contain any misstatements.

## XIV. All of Martino's Claims Fail for Procedural Reasons

### A. Failure to Exhaust Administrative Remedies for Retaliation Claim

A plaintiff who fails to file a charge of discrimination within 300 days of the alleged adverse action cannot bring a lawsuit based on that adverse action. 42 U.S.C. § 2000e–5(e)(1). Western & Southern terminated Martino's employment on October 16, 2006, and Martino received Feige's letter to the Department on or about November 6, 2006. But, Martino did not file his second charge (which alleged retaliation) until November 2, 2007, well after the 300-day limitation period passed.

Any reliance on the first charge to save Martino's retaliation claim is misplaced. To determine whether the retaliation allegations fall within the scope of Martino's first charge, the Court must look at "whether the allegations are like or reasonably related to those contained in the [first] charge," *Kersting v. Wal-Mart Stores*, 250 F.3d 1109, 1118 (7th Cir. 2001) (internal quotations omitted), and also must assess whether a claim "reasonably could be expected to grow out of an EEOC investigation of the charge," *Peters v. Renaissance Hotel Oper. Co.*, 307 F.3d 535, 550 (7th Cir. 2002) (internal quotations and alterations omitted). "Claims are

reasonably related if there is a factual relationship between them ... [which] means that the EEOC charge and the complaint must, at a minimum, *describe the same conduct* and *implicate the same individuals*." *Kersting*, 250 F.3d at 118 (quoting *Cheek*, 31 F.3d at 501) (emphasis in original). Where the alleged retaliation occurred before or contemporaneous with the filing of the charge (as is the case here), plaintiffs must specifically include the retaliation claim in the charge. *See, e.g., Auston v. Schubnell*, 116 F.3d 251 (7th Cir. 1997).

Martino's retaliation claim does not reasonably relate to his first charge. Martino knew about his termination and Feige's letter when he filed his first charge. Yet, he did not check the retaliation box on that charge, or mention retaliation or Feige's letter anywhere in his first charge. In fact, he did not mention his October 4, 2006 email or his alleged refusal to resign his pastor position in opposition to alleged religious discrimination.[9] Moreover, Martino's retaliation claim based on Feige's letter involves different conduct (the "complaint" to the Department) than his discrimination claim (his termination) and different people. Therefore, Martino did not exhaust administrative remedies for his retaliation claim through his first charge.

### B. The Six-Month Contractual Limitation Period Bars Martino's Claims

Under Indiana law, contractual limitations shortening the time to commence suit are valid as long as a reasonable time is afforded. *New Welton Homes v. Eckman*, 830 N.E.2d 32, 35 (Ind. 2005). A six-month contractual limitations period,

[9] His charge only stated: "I did not terminate my pastor duties."

like the one in Martino's Agreement, is a reasonable limitation. *See Taylor v. Western and Southern Life Ins. Co.*, 966 F.2d 1188, 1206 (7th Cir. 1992) (six-month period reasonable). Only when the limitation was agreed to be based upon fraud, duress, misrepresentation, adhesion, or illusory contract will the court refuse to enforce a contractual limitation. *See Madge v. Rod O'Kelley, Inc.*, 855 N.E.2d 712, 714 (Ind. Ct. App. 2006).

Martino made several arguments to dispute the application of this six-month contractual bar to his retaliation claims in response to Western & Southern's Motion for Summary Judgment. None have merit.

First, without citing a case, Martino contended that because the Sales Representative's Agreement uses the words "action" and "suit," it is a reasonable inference that the terms have different meanings. [Dkt. 58, pp. 15-16]. Martino reasoned "suits" must mean lawsuits, and "action" must mean something else, which encompasses EEOC charges. Martino concluded that he commenced his "action" (as required by the Agreement) by filing his first charge (which was filed within the six-month window). This argument lacks merit because the words "action" and "suit" are synonyms and mean lawsuit, not an EEOC charge. *See, e.g., Teske v. State Farm Fire and Cas. Co.*, 2009 WL 4254583, 2 (W.D.Ky. 2009) (noting "the word 'action' is essentially a synonym for 'suit.'"); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984) (EEOC charge "is not the equivalent of a complaint initiating a lawsuit").

Second, Martino argued that the six-month limitation period violates public policy because it would allow discrimination with impunity, it thwarts the EEOC's investigative and conciliation process, and the parties had unequal bargaining power. [Dkt. 58, pp.17-18]. These arguments lack merit. Martino did not waive any Title VII rights by agreeing to the six-month contractual limitation. He just agreed to limit the time for filing a lawsuit for claims relating to his employment. Likewise, the contractual limitations period does not thwart the EEOC processes. Indeed, Martino could have filed his charges with the EEOC and immediately asked for a notice of right to sue. See *Taylor,* 966 F.2d at 1205-06. Or, Martino could have filed his charges with the EEOC, and if he did not receive notice to sue within six months, he could have filed his lawsuit, and then asked the court to stay its proceedings until the EEOC issued the notices of right to sue. *Id.* Finally, Martino had two other jobs at the time, so it is not as though he had no choice or lacked freedom to contract. Indeed, nothing prevented Martino from trying to negotiate the terms of the Agreement; he simply chose not to do so.

Third, Martino contended his Sales Representative's Agreement lacked consideration. [Dkt. 58, p. 18]. Martino is wrong. Continued employment constitutes valid consideration for employment agreements in Indiana. *Leatherman v. Mgmt. Advisors, Inc.*, 448 N.E.2d 1048, 1050 (Ind. 1983).

Finally, Martino argued that his post-termination claims based on the notice sent to the Department (*i.e.,* defamation and retaliation) do not "relate to" his employment and, therefore, are not barred by the six-month limitation period. [Dkt.

58, pp. 19-20]. Martino's argument lacks merit because case law establishes that the phrase "relate to" is extremely broad and the contractual limitations period applies to his post-termination retaliation and defamation claims. *See e.g., Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.,* 174 F.3d 907, 909-10 (7th Cir. 1999); *Millas v. Morgan Stanley & Co., Inc.*, 2008 WL 5095917, 6 (S.D. Ill. 2008); *Schmitt v. SSC Statesville Brian Center Operating Co., LLC*, 2008 WL 1745870, 1-2 (W.D.N.C. 2008).

## CONCLUSION

Because Martino's claims lack merit procedurally and substantively, the Court should affirm the District Court's order granting Western & Southern's summary judgment and dismissing all of Martino's claims.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) & (C), I hereby certify that, based on the word count function of Microsoft® Word XP, the foregoing Amended Brief of Appellee contains 13,922 words, excluding the Disclosure Statement, Table of Contents, Table of Authorities, signature block, this Certificate, and the Certificate of Service.

/s/ Michael P. Palmer

## CERTIFICATE OF SERVICE

I certify that on July 3, 2012, I caused copies of the foregoing **Amended Brief of Defendant-Appellee, Western & Southern Financial Group** to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to Plaintiff's counsel: Peter J. Agostino, Esq., Anderson, Agostino & Keller, 131 S. Taylor St., South Bend, IN 46601-1521.

/s/ Michael P. Palmer

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