Case No. 25-1324

In the United States Court of Appeals
for the Tenth Circuit

MARKESHA FUTRELL-SMITH,

Plaintiff-Appellant,

v.

BRINKER INTERNATIONAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 1:23-cv-03153-STV
Hon. Scott T. Varholak

APPELLEE'S CORRECTED RESPONSE BRIEF

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Oral Argument Requested

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF JURISDICTION 3

STATEMENT OF PRIOR OR RELATED APPEALS 3

STATEMENT OF THE CASE 3

A. Futrell-Smith Dined at the S. Monaco Chili's Restaurant Without Issue Until April 30, 2022, When She Was Identified as a Prior Walkout. 3

B. The S. Monaco Chili's Had Been Experiencing Issues with Walkouts and Kilwine Believed She Could Confront Guests Suspected of Walking Out. 4

C. There is No Evidence Kilwine Asked Futrell-Smith About Payment Due to Her Race. 4

D. Brinker Investigated Futrell-Smith's Complaint and Found No Evidence of Discrimination. 5

E. Futrell-Smith Filed a Motion for Sanctions Against Brinker, and the District Court Ruled on it Prior to Ruling on Brinker's Motion for Summary Judgment. 5

SUMMARY OF THE ARGUMENT 6

I. Review of Summary Judgment 8

II. Review of District Court's Order On Motion For Sanctions. 8

ARGUMENT 9

I. The District Court Did Not Fail to Issue Sanctions. 9

A. The District Court Determined that a Jury Instruction Regarding the Loss of the Interview Notes Was the Appropriate Sanction. 9

B. Futrell-Smith Failed to Meaningfully Raise an Issue Regarding Sanctions on Summary Judgment and Has Waived this Argument on Appeal. 11

II. The District Court Did Not Abuse its Discretion in Ruling on Futrell-Smith's Motion for Sanctions. 12

A. The District Court Appropriately Determined that the Sanctions Futrell-Smith Requested Were Not Warranted Under the Circumstances. 13

1. Any Prejudice Caused by the Loss of Chavez's Interview Notes is Speculative. 14

2. There Is No Evidence the Interview Notes Were Lost Due to Bad Faith. 14

3. Futrell-Smith Failed to Show the Interview Notes Would Have Been Favorable to Her. 15

4. Futrell-Smith Blames Her Failure to Pursue Discovery on Brinker. 16

B. The District Court Considered Lesser Sanctions Proposed by Futrell-Smith. 17

III. Futrell-Smith Failed to Show that She Was Treated Differently Than Other Similarly Situated Customers in Order to Establish a Section 1981 Claim. 17

A. The District Court Correctly Determined that Futrell-Smith Failed to Establish a Prima Facie Case of Race Discrimination. 18

B. Brinker Met Its Burden of Proffering a Legitimate, Nondiscriminatory Reason for Its Conduct. 20

1. Kilwine Confronted Futrell-Smith Because She Believed Futrell-Smith Was a Prior Walkout. 20

2. Walton and Chavez's Reports to Kilwine Are Not Hearsay and are thus Admissible. 22

C. Futrell-Smith Presented No Evidence of Pretext. 23

1. Minor Inconsistencies Are Insufficient to Establish Pretext and Do Not Justify a Credibility Assessment at the Summary Judgment Stage. 23

2. Futrell-Smith Did Not Identify Any Deviation From Brinker's Policies that Would Support an Inference of Discrimination. 26

3. Brinker's Internal Investigation Does Not Support a Finding of Pretext. 27

4. The Loss of Chavez's Interview Notes or Chavez's Failure to Show up to Her Deposition Do Not Show Pretext. 28

IV. Futrell-Smith's Title II Claim for Discrimination in Places of Public Accommodation Fails for the Same Reason as Her Section 1981 Claim. 29

CONCLUSION 30

STATEMENT REGARDING ORAL ARGUMENT 30

TABLE OF AUTHORITIES

Page(s)

CASES

Ainsworth v. Indep. Sch. Dist. No. 3,
232 F. App'x 765 (10th Cir. 2007) 26, 27

Allen v. Muskogee,
119 F.3d 837 (10th Cir. 1997) 8

Burlington N. & Santa Fe Ry. v. Grant,
505 F.3d 1013 (10th Cir. 2007) 9

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)....................8

Cypert v. Indep. Sch. Dist. No. I-050 of Osage Cnty.,
661 F.3d 477 (10th Cir. 2011) 8, 17

DePaula v. Easter Seals El Mirador, 859 F.3d 957, 970 (10th Cir. 2017) 20

EEOC v. Horizon/CMS Healthcare Corp.,
220 F.3d 1184 (10th Cir. 2000) 19, 20

Faulkner v. Super Valu Stores, Inc.,
3 F.3d 1419, 1434-35 (10th Cir. 1993)....................22

Faustin v. City & Cnty. of Denver,
423 F.3d 1192 (10th Cir. 2005) 8

Hampton v. Dillard Dep't Stores, Inc.,
247 F.3d 1091 (10th Cir. 2001) 18

Helget v. City of Hays,
844 F.3d 1216 (10th Cir. 2017) 11, 12

Henning v. Union Pac. R.R. Co.,
530 F.3d 1206 (10th Cir. 2008) 13

Hunter v. Buckle, Inc.,
488 F. Supp. 2d 1157 (D. Kan. 2007)....................22

Hysten v. Burlington N. Santa Fe Ry. Co.,
415 F. App'x 897 (10th Cir. 2011) 24

Jackson v. Ford Motor Co.,
No. 23-4034-JAR-TJJ, 2023 WL 7186654 (D. Kan. Nov. 1, 2023)..29

Kendrick v. Penske Transp. Servs.
220 F.3d 1220 (10th Cir. 2000)). 17, 18, 26

Lincoln v. BNSF Ry. Co.,
900 F.3d 1166 (10th Cir. 2018) 18

MacKenzie v. City & Cnty. of Denver,
414 F.3d 1266, 1277 (10th Cir. 2005) 18

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)...17, 18, 19

Mesa Oil v. Insurance Co. of N. Am.,
123 F.3d 1333 (10th Cir. 1997) 8

Nat'l Hockey League v. Met. Hockey Club,
427 U.S. 639 (1976)..8

Painter v. Midwest Health, Inc.,
2021 U.S. Dist. LEXIS 185108 (D. Kan. Sep. 28, 2021) 22

Philips v. Cohen,
400 F.3d 388 (6th Cir. 2005) 10

Reeves v. Sanderson Plumbing Prods.,
530 U.S. 133, 150 (2000)...25

Rivera v. City & Cty. of Denver,
365 F.3d 912 (10th Cir. 2004) 23

Roe ex rel. Roe v. Keady,
329 F.3d 1188, 1191 (10th Cir. 2003)). 22

Rosales v. Freeman,
Civil Action No. 23-cv-01357-GPG-CYC, 2025 U.S. Dist. LEXIS 189451 (D. Colo. Aug. 5, 2025) 21

Smothers v. Solvay Chem., Inc.,
740 F.3d 530 (10th Cir. 2014) 27

SRS Acquiom Inc. v. PNC Fin. Servs. Grp., Inc.,
2023 U.S. Dist. LEXIS 180519 (D. Colo. Sep. 8, 2023) 14

Turner v. Public Serv. Co.,
563 F.3d 1136 (10th Cir. 2009) 13

Zubulake v. UBS Warburg LLC,
220 F.R.D. 212 (D. Colo. Oct. 22, 2023)....................14

STATUTES

United States Code, Title 42
§ 1981....................2, 7, 17, 18, 29, 30
§ 2000a....................7
§ 2000a(a) 2

RULES

Federal Rules of Appellate Procedure
32(a)(6) 31
32(a)(7)(B) 31
32(f)....................31
37(e) 2, 30
P. 56 8
801(c) 22

INTRODUCTION

The district court properly dismissed Futrell-Smith's claims for intentional discrimination because Futrell-Smith failed to meet her burden of showing that she was asked for pre-payment at a restaurant *because* of her race. Instead, the evidence shows that Brinker's Assistant General Manager Natasha Kilwine ("Kilwine") asked Futrell-Smith about her ability to pay for her meal because two servers informed Kilwine that Futrell-Smith's family had previously walked out on their checks. Based on a recent conversation with her manager, Kilwine believed she should confront suspected walkouts in this manner. Even if Futrell-Smith was incorrectly identified, there is no evidence that Kilwine confronted Futrell-Smith *because of her race*. Due to this lack of evidence Futrell-Smith asked the district court, and now asks this Court, to reach conclusory assumptions.

Futrell-Smith also claims that the district court failed to rule on her Motion for Sanctions prior to ruling on Brinker's Motion for Summary Judgment. This is false. Futrell-Smith filed a Motion for Sanctions because when Brinker internally investigated Futrell-Smith's complaint of discrimination, the investigator accidentally failed to save his notes from his interview with one of the servers. Contrary to Futrell-Smith's assertions, the district court ruled on her Motion for Sanctions and determined that the appropriate sanction was to permit Futrell-Smith to introduce testimony at trial that the interview notes existed, and Futrell-Smith could seek a jury instruction that Brinker

should have kept the interview notes. The district court did not abuse its discretion in issuing sanctions considering Futrell-Smith did not show that the notes were lost in bad faith or that they contained information helpful to her claims.

Accordingly, Brinker respectfully requests that the Court affirm the district court's order granting summary judgment on Futrell-Smith's 42 U.S.C. § 1981 and 42 U.S.C. § 2000a(a) claims and deny her request for sanctions under Fed.R.Civ.P. 37(e). Brinker also requests that the Court deny Futrell-Smith's request to remand with instructions to impose sanctions and reconsider summary judgment.

STATEMENT OF THE ISSUES

1. Did the district court fail to issue sanctions prior to ruling on Brinker's Motion for Summary Judgment?

2. Was the sanction issued by the district court an abuse of discretion?

3. Did Futrell-Smith meet her burden of presenting evidence that she was treated differently than similarly situated customers?

4. Did Brinker proffer a legitimate, non-discriminatory reason for Kilwine asking Futrell-Smith about her ability to pay at the S. Monaco Chili's?

5. Did Futrell-Smith meet her burden of showing that Brinker's proffered reason for asking her for payment was pretext for race discrimination?

STATEMENT OF JURISDICTION

Brinker agrees with Futrell-Smith's statement of jurisdiction.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related cases.

STATEMENT OF THE CASE

A. Futrell-Smith Dined at the S. Monaco Chili's Restaurant Without Issue Until April 30, 2022, When She Was Identified as a Prior Walkout.

Futrell-Smith and her family frequently dined at the S. Monaco Chili's for years, and it was her "favorite place" and her family's "go-to restaurant." 1 App 210, 217-218. Futrell-Smith never had any issues regarding service (other than a complaint that an appetizer came out after an entree). 1 App 210, 216-218. Futrell-Smith had spoken with Assistant General Manager Natasha Kilwine ("Kilwine") numerous times about nails and how Futrell-Smith had formerly worked at another Chili's location. 1 App 223-224, 247. On one occasion, Kilwine even gave Futrell-Smith an application to work at the S. Monaco Chili's. 1 App 224. On April 30, 2022, Futrell-Smith visited the S. Monaco Chili's restaurant with her husband and two children. 1 App 237. Kilwine seated Futrell-Smith and her family within a normal amount of time. 1 App 222. That evening, Futrell-Smith had come from a birthday photo shoot and looked different that day due to her makeup. 1 App 221, 235. Kilwine did not initially recognize Futrell-Smith. *Id*. After Kilwine seated Futrell-Smith, two servers, Maddie Walton and Maria Chavez, informed

Kilwine that Futrell-Smith and her husband had previously walked out on their bill. 1 App 244-246, 259.

B. The S. Monaco Chili's Had Been Experiencing Issues with Walkouts and Kilwine Believed She Could Confront Guests Suspected of Walking Out.

In the Spring of 2022, the S. Monaco Chili's restaurant had a significant number of customers who walked out on their bills. 1 App 253. A few days prior to the incident involving Futrell-Smith, General Manager Jeffrey Simser informed Kilwine that she could confront an un-homed individual who had previously walked out on his bill and ask him to leave or about his ability to pay. 1 App 250, 259, 261. Based on that conversation with Simser, Kilwine believed that if she recognized a prior walkout, she could ask about the ability to pay upfront. *Id.* Accordingly, based on Walton and Chavez's reports, Kilwine approached the Futrell-Smith table and asked about their ability to pay. 1 App 233, 251, 256. Futrell-Smith immediately reacted and caused a scene in the restaurant. 1 App 252. Eventually, Kilwine provided Futrell-Smith with Brinker's guest services number, after which Futrell-Smith voluntarily left with her family. 1 App 236.

C. There is No Evidence Kilwine Asked Futrell-Smith About Payment Due to Her Race.

Kilwine testified that neither Chavez nor Walton made any reference to Futrell-Smith's race when they identified her as a walk-out. 1 App 258. No one used any racial slurs towards Futrell-Smith or commented on her appearance or race that would show some kind of discriminatory animus. 1 App 227-228.

Additionally, Futrell-Smith has not identified any comparators to show that Kilwine's behavior was based on race. She has not shown any non-Black customers who Kilwine suspected of walking out but did not ask about their ability to pay. 1 App 232. Futrell-Smith also has no evidence that Kilwine treated White guests suspected of walking out differently. 1 App 229-230. In fact, other than Futrell-Smith, Kilwine has approached one other individual who had previously walked out on a bill – a Caucasian male. 1 App 239-242.

D. Brinker Investigated Futrell-Smith's Complaint and Found No Evidence of Discrimination.

Futrell-Smith submitted a complaint to Brinker regarding the incident, and Brinker conducted an investigation. 1 App 269-286. Brinker determined Kilwine violated its policies regarding handling escalated guest complaints but did not find evidence of discrimination. 1 App 276-277, 286. As a result, Brinker issued Kilwine a written warning. *Id.* Brinker's investigator, Jesse Allison, interviewed relevant witnesses, including Chavez and Walton. 1 App 271-283. However, Allison testified that he accidentally failed to save his interview notes with Chavez. 2 App 349.

E. Futrell-Smith Filed a Motion for Sanctions Against Brinker, and the District Court Ruled on it Prior to Ruling on Brinker's Motion for Summary Judgment.

On November 6, 2024, Futrell-Smith filed a Motion for Sanctions against Brinker for failing to preserve Chavez's interview notes. 1 App 100–113. After a hearing on December 2, 2024, the district court held that while Chavez's interview notes should

have been preserved, the prejudice was speculative and there was no showing of bad faith. 3 App 662-664. Magistrate Judge Varholak determined the appropriate sanction was to permit evidence at trial about the existence of Chavez's notes and for Futrell-Smith to obtain a jury instruction that Brinker should have kept the notes. 3 App 665.

SUMMARY OF THE ARGUMENT

The district court granted Appellee's Motion for Summary Judgement because there is no evidence Kilwine or Brinker intended to discriminate against her on the basis of race. 3 App 725. The undisputed evidence shows that Kilwine confronted Futrell-Smith because her team members informed her that Futrell-Smith was a prior walkout. 3 App 724. This had nothing to do with race, particularly because Kilwine had previously identified a Caucasian man as a walk-out. 3 App 720. The district court also found that Futrell-Smith failed to show she was treated differently than similarly situated (*i.e.*, other customers who were suspected of previously walking out on a bill) non-Black customers. 3 App 720-721.

Additionally, Brinker met its light burden of proffering a legitimate non-discriminatory reason for Kilwine confronting Futrell-Smith – Kilwine's belief that Futrell-Smith was a prior walkout and Kilwine's misunderstanding of how to address issues with walkouts. 3 App 725. Contrary to Futrell-Smith's claims, Kilwine's testimony that she relied on information from Walton and Chavez is not inadmissible hearsay because the statements were offered to show Kilwine's mental state when confronting

Futrell-Smith and explain her actions, as opposed to being offered for the truth of the matter asserted – that Futrell-Smith had in fact previously walked out on a bill. 3 App 718-719 n. 12.

Futrell-Smith failed to meet her burden of demonstrating Brinker's proffered reason was pretext for discrimination. Futrell-Smith has no evidence of material inconsistencies or deviations from policies that would show pretext and her attempt to attack Kilwine's credibility is inappropriate at the summary judgment stage. Accordingly, Futrell-Smith's section 1981 claim of intentional discrimination was properly dismissed.

Futrell-Smith's Title II claim under 42 U.S.C. § 2000a for discrimination in places of public accommodation similarly fails because Futrell-Smith could not demonstrate she was treated less favorably than similarly situated persons who were not members of her protected class. Thus, the district court appropriately granted summary judgment as to this claim as well.

Lastly, the district court did not abuse its discretion in ruling on Futrell-Smith's Motion for Sanctions. Contrary to Futrell-Smith's assertions, the district court determined that the sanctions Futrell-Smith requested for the loss of Chavez's interview notes were too severe, and instead, the appropriate sanction was a jury instruction that Brinker should have kept the notes. None of the arguments Futrell-Smith raises on appeal warrant a reversal of the district court's ruling on Futrell-Smith's Motion for Sanctions or Brinker's Motion for Summary Judgment.

STANDARD OF REVIEW

I. Review of Summary Judgment

On appeal, the Court reviews a grant of summary judgment de novo applying the same standard that governed in district court. *Cypert v. Indep. Sch. Dist. No. I-050 of Osage Cnty.*, 661 F.3d 477, 480 (10th Cir. 2011). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. "If the movant bears the burden of showing the absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts in evidence showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Mesa Oil v. Insurance Co. of N. Am.,* 123 F.3d 1333, 1336 (10th Cir. 1997). A party opposing summary judgment must present specific, admissible facts from which a rational trier of fact could find in her favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes over material facts can create a genuine issue for trial and preclude summary judgment. *Faustin v. City & Cnty. of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). An issue is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

II. Review of District Court's Order On Motion For Sanctions.

On appeal, the Court reviews the district court's decision on whether and how to sanction a party for discovery violations for abuse of discretion. *Nat'l Hockey League v. Met. Hockey Club*, 427 U.S. 639, 642-43 (1976). In doing so, the Court accepts the

district court's factual findings unless they are clearly erroneous. *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

ARGUMENT

I. The District Court Did Not Fail to Issue Sanctions.

On November 6, 2024, Futrell-Smith filed a Motion for Sanctions because Allison failed to save notes from his interview with Chavez as part of Brinker's internal investigation of Futrell-Smith's complaint. *See* 1 App 100-113. Futrell-Smith incorrectly claims that the district court failed to rule on her Motion for Sanctions prior to ruling on Brinker's Motion for Summary Judgment. As discussed below, the district court ruled on Futrell-Smith's Motion for Sanctions, but even if it had not, Futrell-Smith failed to meaningfully raise this issue on summary judgment and waived this argument on appeal.

A. The District Court Determined that a Jury Instruction Regarding the Loss of the Interview Notes Was the Appropriate Sanction.

During the sanctions hearing on December 2, 2024, Magistrate Judge Varholak stated:

> "[W]hat I think the appropriate sanction is, is to permit at trial Plaintiff to introduce testimony about those interview notes existing and these interview notes no longer being present. Plaintiff can seek a jury instruction, in which I would instruct the jury that the Defendant should have kept the notes."

3 App 664.

This ruling is also reflected in the district court's minute order issued on December 2, 2024. 2 App 417. Magistrate Judge Varholak reiterated his ruling on

November 24, 2025, during a hearing on Futrell-Smith's motion to stay payment of the bill of costs and her state law claim pending appeal. 3 App 842.

> I disagree with the fundamental premise that the Plaintiff is arguing that I never ruled on the sanctions motion. I did rule on the sanctions motion and had determined that the sanctions that the Plaintiff sought, which was the exclusion of evidence, which was essentially a directed verdict, was wholly unwarranted based upon the speculation of what may have been in the evidence that was lost and upon the lack of any showing of bad faith in how the document was lost.").

3 App 855.

Futrell-Smith relies on *Philips v. Cohen*, where the district court granted the plaintiff's motion for sanctions but decided to defer until trial the decision as to the type of sanction. Appellant's Opening Brief, p. 15 (citing 400 F.3d 388 (6th Cir. 2005)). That is not the situation here. The only items the district court deferred ruling on until trial was whether Chavez would be prevented from testifying at trial and the exact wording of the jury instruction. 3 App 665. Neither of those issues affect summary judgment. It is indisputable that the district court ruled on Futrell-Smith's Motion for Sanctions on December 2, 2024, prior to ruling on Brinker's Motion for Summary Judgment on August 13, 2025. *See* 2 App 419.

B. Futrell-Smith Failed to Meaningfully Raise an Issue Regarding Sanctions on Summary Judgment and Has Waived this Argument on Appeal.

Even if the district court had not ruled on Futrell-Smith's Motion for Sanctions (which it did), Futrell-Smith "forfeited her right to seek refuge in her undecided motion for spoliation sanctions by failing to raise the argument in any meaningful way in opposing summary judgment." *Helget v. City of Hays*, 844 F.3d 1216, 1225-26 (10th Cir. 2017) (holding that failing to argue the sanctions issue in the response to summary judgment prevents plaintiff from attacking the court's decision on those grounds).

As in *Helget*, Futrell-Smith failed to meaningfully inform the district court how not ruling on the sanctions issue (which the district court did) would affect the summary judgment motion. The sanctions hearing was held on December 2, 2024, and Futrell-Smith filed her Response to Brinker's Motion for Summary Judgment on December 19, 2024. *See* 2 App 417, 419. In the Response, Futrell-Smith included two footnotes stating Brinker failed to save internal investigation notes for Chavez. 2 App 423-424. There is no indication in Futrell-Smith's brief that she (incorrectly) believed the district court needed to decide sanctions on the loss of the notes. *See generally* 2 App 419-439. As Magistrate Judge Varholak stated:

> "If there was some inference you wanted me to make at summary judgment, you needed to raise it in the summary judgment briefing. It's raised in one single notation in connection with the efficiency or the sufficiency of the investigation. But you didn't ask me to rule – to do anything more in the summary judgment, and I'm not going to on my own issue a sanction. I ruled on the sanctions motion and said the appropriate sanction was a potential jury instruction."

3 App 844-845.

Futrell-Smith argues that because her Motion for Sanctions requested that the court prohibit Brinker from arguing at trial or summary judgment that Chavez identified Futrell-Smith as a walkout, in addition to several other requests, that the Motion for Sanctions sufficiently alerted the district court that it should not rule on the Motion for Summary Judgment. 1 App 112.

Again, the district court ruled on Futrell-Smith's requested sanctions at the hearing – before she filed her Response to Brinker's Motion for Summary Judgment. If Futrell-Smith believed there was an outstanding sanctions issue, she should have raised it in her Response brief. Thus, Futrell-Smith forfeited any claim on appeal that the district court failed to rule on her Motion for Sanctions prior to ruling on Brinker's Motion for Summary Judgment because she made no effort to alert the district court to any impact any outstanding sanctions motions would have on the summary judgment briefing. *See Helget*, 844 F.3d at 1226-1227 ("[W]ithout guidance from the party seeking sanctions on how spoliation could affect pending summary judgment issues, it is difficult to see how the district court abused its discretion in proceeding the way it did.").

II. The District Court Did Not Abuse its Discretion in Ruling on Futrell-Smith's Motion for Sanctions.

A district court has broad discretion to impose sanctions and "substantial weaponry" in its arsenal to fashion appropriate relief. *Helget*, 844 F.3d at 1226. The district court issued appropriate sanctions since any prejudice to Futrell-Smith was

speculative and there was no evidence of bad faith in the failure to preserve Chavez's interview notes. Further, contrary to Futrell-Smith's assertions, the district court considered the lesser sanctions she requested. Thus, there is no basis for reversal of the district court's ruling on Futrell-Smith's Motion for Sanctions.

A. The District Court Appropriately Determined that the Sanctions Futrell-Smith Requested Were Not Warranted Under the Circumstances.

Futrell-Smith requested the following sanctions: 1) an adverse inference instruction that Chavez's investigation notes would have supported Futrell-Smith's claim of race discrimination; 2) precluding Chavez from testifying at trial; 3) precluding Brinker from arguing at trial or summary judgment that Chavez identified Futrell-Smith as a walkout; 4) precluding Brinker from arguing that it relied on Chavez's interview in not finding racial discrimination during its internal investigation; 5) precluding Brinker from arguing it did not use Futrell-Smith's race as a factor in identifying her as a prior walkout; 6) costs and fees in bringing the Motion for Sanctions; and 7) any other relief the district court deemed proper.

"Spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (internal citation and quotation marks omitted). To warrant an adverse inference instruction, a party must submit evidence of intentional destruction or bad faith. *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir.

2008). Where a party's spoliation was negligent or reckless, the moving party must demonstrate that the destroyed evidence would have been favorable to the movant. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (D. Colo. Oct. 22, 2023). Futrell-Smith failed to demonstrate prejudice, that notes were lost in bad faith or that the notes would have been favorable to her.

1. *Any Prejudice Caused by the Loss of Chavez's Interview Notes is Speculative.*

The district court determined that there was a duty to preserve Chavez's interview notes, but the prejudice to Futrell-Smith was speculative. 3 App 662. The burden is on the moving party to show the lost material would have been favorable to them. *SRS Acquiom Inc. v. PNC Fin. Servs. Grp., Inc.*, 2023 U.S. Dist. LEXIS 180519, *11 (D. Colo. Sep. 8, 2023) (internal citation omitted). Magistrate Judge Varholak noted that there was nothing to indicate that the interview notes would have included statements that Futrell-Smith was targeted because of her skin color or anything along those lines. 3 App 665. Yet, Futrell-Smith asked the district court to assume that the interview notes would have stated how Chavez identified Futrell-Smith. That is non-sensical and wholly speculative.

2. *There Is No Evidence the Interview Notes Were Lost Due to Bad Faith.*

The district court did not find bad faith, as Allison testified that he believes he accidentally failed to save his interview notes during his meeting with Chavez when he was interrupted by a phone call and the software system did not preserve the notes. 1 App 174. "There was an innocent explanation given for why those notes no longer exist. We

don't have anything indicating that they were destroyed on purpose or because of the inflammatory nature of them." 3 App 663. The district court therefore determined, "the sanctions that are being requested, such as an adverse inference instruction, or essentially striking the Defendant's key defense in this case, which is similar to allowing a directed verdict, I think are too severe." 3 App 664.

3. *Futrell-Smith Failed to Show the Interview Notes Would Have Been Favorable to Her.*

Futrell-Smith claims Chavez's interview notes are key to her case because Chavez was the only person who identified Futrell-Smith as a walkout. That is incorrect. Kilwine testified that both Chavez and Walton informed her that Futrell-Smith was a prior walkout. 1 App 244-246. Kilwine's HotSchedules notes, which she entered the night of the incident, also state that Walton and Chavez identified Futrell-Smith as a walkout. 2 App 358. Kilwine also informed Allison that "they both (Chavez and Walton) told me this family has walked their tab." 1 App 281. During Brinker's internal investigation, Walton reported, "When this family came in[,] my coworker Maria Chavez came to me and said this is the family that hasn't paid multiple times. I then went and informed Natasha [Kilwine] that this family was here." 1 App 279. Based on that statement, Futrell-Smith assumes Walton did not independently identify Futrell-Smith. Futrell-Smith disregarded the portion of Walton's interview where she stated, "I have been at Chili's for 3 years and there is a family that has not paid there (sic) bill several times." *Id.* Futrell-Smith did not depose either Walton or Chavez to obtain testimony to ascertain if

and how they identified Futrell-Smith and is now using the missing interview notes to create an assumption that Chavez's testimony or interview would have been favorable to her.

4. *Futrell-Smith Blames Her Failure to Pursue Discovery on Brinker.*

Futrell-Smith attempts to blame Brinker for her missteps during the discovery process and accuses it of misstating who identified Futrell-Smith as a walkout. As discussed above, Kilwine consistently reported that both Walton and Chavez reported Futrell-Smith as a walkout. Regarding Chavez's deposition, the district court noted during the sanctions hearing that Futrell-Smith failed to "take the next step" to compel Chavez's deposition. 3 App 645.

> It's you try to schedule through counsel, you said no fault of counsel you can't get her to show up, you then subpoena her, she doesn't show up. That's a violation of your subpoena as this Court's order. … You can go in and move to enforce it. **You didn't do that.** And then you could have deposed her, you couldn't [sic] have sought costs, you could have sought sanctions, you could have done a lot of stuff, but you didn't do any of that. And so now you're asking me to issue a very drastic sanction on -- but there's no evidence (a) that this is all that helpful to you, or (b) that there's anything other than an accident that this happened to you.

Id. (emphasis added).

Again, Futrell-Smith did not raise discovery issues to the district court on the motion for summary judgment. She failed to move to extend the discovery deadline or compel Chavez's deposition and now attempts to blame Brinker for her lack of diligence in discovery. This does not warrant reversal.

B. The District Court Considered Lesser Sanctions Proposed by Futrell-Smith.

Futrell-Smith erroneously claims that the district court failed to consider lesser sanctions, such as reopening discovery to allow Futrell-Smith to compel Chavez's deposition. Futrell-Smith did not request such a sanction (*see* 1 App 100-113). Futrell-Smith also falsely claims that the district court did not consider awarding Futrell-Smith her costs. The record on its own disproves these claims. During the sanctions hearing, Futrell-Smith's counsel asked if the district court would award fees for bringing the Motion for Sanctions. 3 App 665. Magistrate Judge Varholak specifically stated, "I'm not going to award fees at this point. I think given the relatively minimal sanction that I've imposed, I don't think full fees is appropriate." 3 App 666.

Accordingly, Futrell-Smith has raised no issues on appeal regarding sanctions that would warrant reversal of the district court's order on Futrell-Smith's Motion for Sanctions or Brinker's Motion for Summary Judgment.

III. Futrell-Smith Failed to Show that She Was Treated Differently Than Other Similarly Situated Customers in Order to Establish a Section 1981 Claim.

The Court reviews the district court's granting of summary judgment on Futrell-Smith's Section 1981 claim de novo. *Cypert*, 661 F.3d at 480. Section 1981 ensures, among other rights, that persons of all races have equal rights to make and enforce contracts. 42 U.S.C. § 1981. When a plaintiff relies on circumstantial evidence to support a section 1981 claim, courts apply the *McDonnell Douglas* burden shifting framework. *Kendrick v. Penske Transp. Servs.,* 220 F.3d 1220, 1225 (10th Cir. 2000) (citing

McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973)). First, Futrell-Smith must establish a prima facie case of discrimination. *Id.* at 1226. If she does so, the burden shifts to Brinker to articulate a legitimate, nondiscriminatory reason for its conduct. *Id.* Once Brinker makes that showing, the burden shifts back to Futrell-Smith to show Brinker's stated justification was pretext for discrimination. *Id.* As discussed below, Futrell-Smith failed to meet her burdens and Brinker presented a legitimate nondiscriminatory reason for asking Futrell-Smith if she had the ability to make payment.

A. The District Court Correctly Determined that Futrell-Smith Failed to Establish a Prima Facie Case of Race Discrimination.

To establish a prima facie case of discrimination, Futrell-Smith needs to show: (1) she is a member of a protected class, (2) Brinker had the intent to discriminate on the basis of race, and (3) the discrimination interfered with a protected activity as defined in section 1981. *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1102–03 (10th Cir. 2001). A plaintiff can show intentional discrimination by proving that she has been treated differently than similarly situated individuals. *MacKenzie v. City & Cnty. of Denver,* 414 F.3d 1266, 1277 (10th Cir. 2005), *abrogated on other grounds by Lincoln v. BNSF Ry. Co.,* 900 F.3d 1166 (10th Cir. 2018). Here, without any direct evidence of discrimination, Futrell-Smith must rely on this showing of comparators to meet her prima facie burden. Futrell-Smith failed to provide evidence that she was treated differently than similarly situated non-Black customers. 1 App 232, 229-230.

Futrell-Smith essentially seeks to have the relevant comparators be all the guests dining at the restaurant on April 30, 2022. As the district court noted, Futrell-Smith misinterpreted the comparator requirement. "Valid comparators under these circumstances are not just non-Black customers in the restaurant that night who were treated more favorably, but non-Black customers *suspected of having previously walked out on a bill* who were treated more favorably." 3 App 718 (emphasis in original).

Futrell-Smith argues that in defining comparators in this manner, the district court collapsed the prima facie and legitimate reason inquiries in the *McDonnell Douglas* burden shifting framework. Opening Brief, pp. 21-22 (citing *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000)). Futrell-Smith cites *Horizon* to argue that the legitimate business reason cannot also serve to defeat plaintiff's prima facie case. 220 F.3d at 1193. In *Horizon*, the employer argued that plaintiff could not show that she was qualified for her position (part of the prima facie case) because she failed to meet a qualification that was not essential to the job. *Id.* at 1192. While a legitimate reason for termination, this did not prevent the plaintiff from establishing her prima facie case as there was no evidence that the plaintiff was not qualified for the job she applied for. Here, Brinker is not relying on its legitimate, nondiscriminatory reason for its actions to defeat any claim that it intentionally discriminated against Futrell-Smith. Instead, the failure to show a true comparator demonstrates that Futrell-Smith has not met *her* burden of showing that she was intentionally discriminated against, by way of pointing to

similarly situated customers. Thus, *Horizon* is not applicable here. Futrell-Smith's prima facie case fails because she points to no non-Black individuals suspected of walking out that were treated differently. Conversely, Kilwine (the decisionmaker) testified that she actually treated a non-Black (Caucasian) similarly situated individual exactly the same. 1 App 239-242. Since Futrell-Smith had no evidence that similarly situated individuals were treated differently, the district court correctly determined that Futrell-Smith failed to establish a prima facie case of discrimination. 3 App 720.

B. Brinker Met Its Burden of Proffering a Legitimate, Nondiscriminatory Reason for Its Conduct.

Assuming *arguendo* Futrell-Smith met her burden of establishing a prima facie case of discrimination, Brinker easily met its burden of proffering a legitimate, nondiscriminatory reason for its conduct. "The defendant's burden is exceedingly light, as its stated reasons need only be legitimate and non-discriminatory on their face." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970 (10th Cir. 2017) (quotations and citations omitted). Kilwine asked Futrell-Smith about her ability to make payment based on her belief that Futrell-Smith previously walked out on a bill. Such evidence is not hearsay, and there is no credibility issue.

1. Kilwine Confronted Futrell-Smith Because She Believed Futrell-Smith Was a Prior Walkout.

Based on a conversation with her manager, Kilwine believed that if she recognized a prior walkout, she could ask them about payment. 1 App 250, 259, 261. Brinker

presented evidence that two team members, Chavez and Walton, informed Kilwine that Futrell-Smith was a prior walkout. 1 App 244-246, 259. The evidence regarding Chavez and Walton is used for nothing more than demonstrating the basis of Kilwine's belief when she approached Futrell-Smith.

Futrell-Smith attempts to increase Brinker's burden at this stage, claiming Brinker did not provide "evidence showing that it did not discriminate" and that there is no evidence that Chavez or Walton genuinely believed Futrell-Smith walked out or that they ever served her. Opening Brief, p. 31. That is not Brinker's burden to meet. *Rosales v. Freeman*, Civil Action No. 23-cv-01357-GPG-CYC, 2025 U.S. Dist. LEXIS 189451, at *8 (D. Colo. Aug. 5, 2025) (noting plaintiff has the burden of putting forth evidence of discriminatory intent). Brinker only needs to provide a reason for its conduct that is legitimate and nondiscriminatory on its face. *Id.* Futrell-Smith claims that Walton did not identify Futrell-Smith based on her own personal knowledge. Opening Brief, p. 17. That is immaterial. What matters is that Kilwine established a non-race based belief that Futrell-Smith walked out on a bill based on the reports of two servers.

While the legitimacy of the reports from the servers is immaterial to Kilwine's intent, Futrell-Smith did not depose Walton or Chavez to question them as to the basis of their reports to Kilwine. *See* 3 App 723. Even if the identification was incorrect, there is no evidence that the servers reported the information to Kilwine because of Futrell-Smith's race. As the district court noted, "Futrell-Smith, who bears the burden in this

case, has not offered any evidence that Ms. Chavez acted with discriminatory intent and the Court cannot speculate on Ms. Chavez's motivation." 3 App 719 n. 12.

2. *Walton and Chavez's Reports to Kilwine Are Not Hearsay and are thus Admissible.*

As Kilwine was the actor, in order to show intentional discrimination, Futrell-Smith must show that Kilwine had a discriminatory intent. *Hunter v. Buckle, Inc.*, 488 F. Supp. 2d 1157, 1169 (D. Kan. 2007) (citing *Roe ex rel. Roe v. Keady*, 329 F.3d 1188, 1191 (10th Cir. 2003)). Brinker has provided evidence of Kilwine's basis for her belief when she asked Futrell-Smith for proof of payment. Kilwine believed Futrell-Smith previously walked out on a bill. ("A: I believe my servers. And I was going off of what my team members had – the information they had provided to me."). 1 App 251. Walton's and Chavez's reports are not hearsay because they are not offered "to prove the truth of the matter asserted in the statement" (whether or not Futrell-Smith actually walked out) but rather the basis of Kilwine's belief. Fed.R.Evid. 801(c). "[S]tatements that are offered for purposes other than proving the truth of the matter asserted don't count as hearsay." *Painter v. Midwest Health, Inc.,* 2021 U.S. Dist. LEXIS 185108, at *14 n.8 (D. Kan. Sep. 28, 2021) (citing *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419, 1434-35 (10th Cir. 1993) (holding that statements about job applicants' bad conduct was not hearsay because they were not offered to prove the truth of the matter asserted but instead offered to establish the employer's state of mind when it decided not to hire applicants). Similarly here, Walton's and Chavez's reports are not being offered to show

that Futrell-Smith had in fact previously walked out on a bill. Instead, they are being offered to show why Kilwine confronted Futrell-Smith. Chavez's and Walton's reports are not being offered for the truth of the matter asserted, and thus are not hearsay.[1]

C. Futrell-Smith Presented No Evidence of Pretext.

To establish pretext, Futrell-Smith must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Brinker's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that [Brinker] did not act for the asserted non-discriminatory reasons." *Rivera v. City & Cty. of Denver,* 365 F.3d 912, 924–25 (10th Cir. 2004). Futrell-Smith failed to make this showing. She unsuccessfully relies on minor inconsistencies of immaterial testimony and improperly challenges a witness's credibility and Brinker's internal investigation which have no bearing on whether Kilwine intentionally discriminated against Futrell-Smith or had a legitimate reason for asking her if she had a form of payment.

1. Minor Inconsistencies Are Insufficient to Establish Pretext and Do Not Justify a Credibility Assessment at the Summary Judgment Stage.

Futrell-Smith claims that the district court applied a "pretext plus" standard by requiring her to show more than inconsistencies to establish pretext. The alleged inconsistencies Futrell-Smith notes are minor, and "[m]inor inconsistencies … do not

[1] Futrell-Smith's notes that Magistrate Judge Varholak flagged a possible hearsay issue with this evidence during a sanctions hearing on December 2, 2024. Brinker's Motion for Summary Judgment was not fully briefed at that time, and the district court was not ruling on the admissibility of this evidence at that hearing.

constitute evidence of pretext…". *Hysten v. Burlington N. Santa Fe Ry. Co.*, 415 F. App'x 897, 908 (10th Cir. 2011).

As examples of inconsistencies, Futrell-Smith claims Kilwine provided conflicting reasons for asking about payment. Opening Brief, p. 25. However, the evidence shows Kilwine both believed that her conduct was in line with her manager's instructions and she stepped in after employees notified her that Futrell-Smith was a walkout. 1 App 244-246, 259, 253, 250, 259, 261. Both can be true without being inconsistent.

Futrell-Smith also notes a deviation in Kilwine's testimony on when exactly she recognized Futrell-Smith – the same day or later on the news as an inconsistency showing pretext. Opening Brief, p. 28. Futrell-Smith argues that if Kilwine immediately recognized her, it is implausible that Kilwine genuinely believed she was a walkout. *Id.* First, this is another baseless assumption by Futrell-Smith. Just because Kilwine may have recognized Futrell-Smith does not mean that she is going to disregard her servers' reports. ("A: I believe my servers. And I was going off of what my team members had – the information they had provided to me."). 1 App 251. As the district court noted, when Kilwine recognized Futrell-Smith is immaterial because Kilwine relied on the report from Walton and Chavez, not her own knowledge of Futrell-Smith. 3 App 764. Had Kilwine been the individual to identify Futrell-Smith as a walkout, the district court noted that argument would be relevant. *Id.* Here, it is irrelevant and insufficient to demonstrate pretext of discrimination.

Futrell-Smith then points to these few immaterial inconsistencies to argue that Kilwine is not credible and thus the district court should not have relied on her testimony. Opening Brief, p. 28. As noted above, these inconsistencies do not constitute evidence of pretext. Additionally, as emphatically noted by the district court, summary judgment is not the place to assess credibility. 3 App 722-723 (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

In her Opening Brief, Futrell-Smith misstates the holding in *Reeves*, claiming that the court there held that a witness's lack of credibility can show discrimination. Opening Brief, p. 28 (citing 530 U.S. 133 (2000)). This is an inaccurate representation of *Reeves.* Instead, *Reeves* provides that a <u>court may not make credibility determinations on summary judgment</u> when considering a company's proffered legitimate business reason. *Id.* at 142 (a defendant's "burden is one of production, not persuasion; it can involve no credibility assessment."). Thus, it would have been inappropriate, here, for the district court to make a credibility assessment.[2]

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[2] In a second Hail Mary attempt to inappropriately attack Kilwine's credibility, Futrell-Smith points to evidence of a complaint from a former Brinker employee against Kilwine claiming that Kilwine treated her differently based on race. As Brinker has already noted, there is no credibility assessment at the summary judgment stage. Even if there was, this complaint was not corroborated, and Brinker interviewed team members who worked with Kilwine who all reported that she never made derogatory remarks and treated everyone with respect. 4 App 879. Additionally, this former employee is not a similarly situated comparator.

2. *Futrell-Smith Did Not Identify Any Deviation From Brinker's Policies that Would Support an Inference of Discrimination.*

Futrell-Smith also claims that Kilwine's failure to follow Brinker's policies is evidence of pretext. Opening Brief, p. 25 (citing *Kendrick v. Penske Transp. Servs.* 220 F.3d 1220 (10th Cir. 2000)). In *Kendrick*, the Court held that pretext may be shown by "evidence that the defendant acted contrary to a written company policy describing the action to be taken by the defendant under the circumstances." *Id*. This evidence can particularly show pretext if other similarly-situated individuals were treated differently. *Ainsworth v. Indep. Sch. Dist. No. 3*, 232 F. App'x 765, 774 (10th Cir. 2007). Futrell-Smith argues that Brinker's written policies do not permit requiring a customer to prepay and that Kilwine acted contrary to this policy. Opening Brief, pp. 25-26. This misstates Kilwine's testimony and the record. Brinker does not have a written policy regarding prepayment or how to handle customers suspected of walking out. 1 App 253. Brinker provided evidence that Kilwine believed the instruction from her manager was to ask for proof of payment. *Id.* 1 App 253.[3] When evaluating pretext, the "relevant inquiry is how

[3] Futrell-Smith for the first time argues that Kilwine's discipline is evidence of pretext because Brinker internally classified Kilwine's conduct as a "serious violation" of its policies, and Futrell-Smith assumes and concludes that a misidentification should have been a "moderate violation." Opening Brief, p. 26. Futrell-Smith failed to raise this in her Response brief and thus the argument is waived regardless. *See* 2 App 430-431 (only noting that Brinker disciplined Kilwine and arguing that the discipline showed Kilwine failed to follow its policies). Also, Brinker disciplined Kilwine for mishandling an escalated customer situation, not for violating a policy regarding pre-payment (and there is no such policy) or for a misidentification. 4 App 926. Further, this discipline is in line with Brinker's policies. 4 App 926. Brinker's policies provide examples of "serious

the facts appeared to the decision-maker, and a decision is not converted into pretext simply because it appears in hindsight to be a poor business judgment." *Ainsworth*, 232 F. App'x at 773. Here, Futrell-Smith cannot rely on any policy contradictions to show pretext as Kilwine believed she was acting in accordance with her manager's, and thus Brinker's, direction. 1 App 253.

3. Brinker's Internal Investigation Does Not Support a Finding of Pretext.

Futrell-Smith next tries to argue that Kilwine's legitimate non-discriminatory reason for confronting her is pretextual because Brinker's internal investigation was insufficient. First, an insufficient investigation cannot have any bearing on Kilwine's actions that occurred prior to the investigation. Futrell-Smith cites *Smothers v. Solvay Chem., Inc.,* 740 F.3d 530 (10th Cir. 2014) to assert that an insufficient investigation can demonstrate pretext. In *Smothers*, an employer's investigation was deemed deficient because, *after the investigation*, the decisionmaker terminated an employee without allowing the employee to address the allegations against him during the investigation. *Id.* at 542. The *Smothers* Court found that a jury could find that the inadequate investigation showed pretext since the employer terminated plaintiff based off of one-sided information. *Id.* at 543. Here, there was no sham investigation that resulted in Ms. Kilwine approaching Ms. Futrell-Smith. *See* 1 App 284-285. This is another red herring onto which Futrell-Smith is grasping because she has no evidence of pretext.

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violations" including, "failure to follow company standards/systems/initiatives." 4 App 959. Lastly, the timing of such discipline is irrelevant to a showing of pretext.

Futrell-Smith's claims regarding how Walton and Chavez identified Futrell-Smith as a walk-out have no bearing on why Kilwine approached her and asked her for a form of payment, which is the alleged discriminatory conduct.[4] Futrell-Smith did not provide any evidence that the reports to Kilwine were based on race. 3 App 719 n.12; 1 App 258. Thus, Brinker's subsequent investigation has no bearing on whether Kilwine's basis for her actions on April 30, 2022, were pretext for discrimination.

4. *The Loss of Chavez's Interview Notes or Chavez's Failure to Show up to Her Deposition Do Not Show Pretext.*

Lastly, Futrell-Smith claims that Allison's failure to save Chavez's interview notes and Chavez's failure to show up to her deposition are evidence of pretext. Opening Brief, p. 31. As discussed in sections I and II above, these issues were raised at the sanctions hearing, and the district court issued appropriate sanctions. 3 App 664. As the district court noted, there was no evidence that the notes would have supported Futrell-Smith's claims. 3 App 665. Futrell-Smith seeks for the Court to speculate as to what the notes contained and what Chavez would have testified to. Futrell-Smith failed to compel Chavez's deposition to obtain her testimony. 3 App 645. That is not Brinker's fault, and this has no bearing on Futrell-Smith's claim that Kilwine intentionally discriminated against her. Additionally, any action or inaction by Allison had no bearing on Kilwine's

[4] As alleged evidence of pretext, Futrell-Smith claims that the records show only two tables of four guests walked out without paying, and Chavez and Walton were not the servers. Opening Brief, p. 30. Again, this does not undermine Kilwine's explanation as to why she approached Futrell-Smith and her family, and Futrell-Smith has identified no evidence that the reports were based on race. *See* 3 App 719, 727; 1 App 251.

actions that occurred prior to the investigation. Thus Allison's actions cannot evidence that Kilwine's explanation is pretext for discrimination. Futrell-Smith failed to meet her burden of establishing pretext, and the district court appropriately granted summary judgment on her section 1981 claim.

IV. Futrell-Smith's Title II Claim for Discrimination in Places of Public Accommodation Fails for the Same Reason as Her Section 1981 Claim.

In order to establish a claim for discrimination in a place of public accommodation, Futrell-Smith must prove that she: (1) is a member of a protected class; (2) attempted to exercise her right to full benefits and enjoyments of a place of public accommodation; (3) was denied those benefits and enjoyment; and (4) was treated less favorably than similarly situated persons who are not members of the protected class. *Jackson v. Ford Motor Co.,* No. 23-4034-JAR-TJJ, 2023 WL 7186654, at *2 (D. Kan. Nov. 1, 2023). As with Futrell-Smith's section 1981 claim, Futrell-Smith's Title II claim fails because she has not presented any evidence that she was treated less favorably than other similarly situated persons outside of her protected class. *See* Section II. A supra. Alleging that she and her family were the only Black customers at the restaurant that evening and were asked for payment upfront does not meet her burden. "Those customers, however, are not valid comparators because there is no evidence that they were suspected of prior walkouts. … Without a valid comparator similarly situated, Futrell-Smith cannot raise an inference that the request for a form of payment was racially motivated." 3 App 730. Accordingly, the district court correctly dismissed

Futrell-Smith's Title II claim because, like her Section 1981 claim, she cannot show the prima facie elements of her claim.[5]

CONCLUSION

WHEREFORE, Brinker respectfully requests that the Court affirm the district court's order granting summary judgment on Futrell-Smith's claims and deny her request for sanctions under Fed.R.Civ.P. 37(e). Brinker also requests that the Court deny Futrell-Smith's request to remand with instructions to impose sanctions and reconsider summary judgment.

STATEMENT REGARDING ORAL ARGUMENT

Brinker believes oral arguments would assist the Court in assessing this Appeal.

Respectfully submitted this 2nd day of February, 2026.

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[5] The district court declined to exercise supplemental jurisdiction over Futrell-Smith's claim for discrimination in places of public accommodation under Colorado law. 3 App 731. However, the analysis is similar to a Title II claim, and summary judgment is appropriate for the same reasons discussed above.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed.R.App.P. 32(a)(7)(B) because the brief contains 7,592 words, excluding the parts of the brief exempt pursuant to Fed.R.App.P. 32(f).

2. This brief also complies with the typeface requirements 10th Cir. R. 32(A) and the typeface requirements of Fed.R.App.P. 32(a)(6) because the brief was prepared in 13-pt Times New Roman.

Dated this 2nd day of February, 2026.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served via the Court's ECF filing system in compliance with Fed.R.App.P. 25(b) and (c), on February 2, 2026, to all registered counsel of record and has been transmitted to the Clerk of the Court.

Dated this 2nd day of February, 2026.

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