

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

|                                      |   |                                      |
|--------------------------------------|---|--------------------------------------|
| <b>CARISSA POWELL,</b>               | ) |                                      |
| <b>Plaintiff,</b>                    | ) |                                      |
|                                      | ) |                                      |
| <b>v.</b>                            | ) | <b>CIVIL ACTION NO. 1:18-00018-N</b> |
|                                      | ) |                                      |
| <b>WAL-MART STORES EAST, LP, and</b> | ) |                                      |
| <b>CHRISTOPHER ORSTADT,</b>          | ) |                                      |
| <b>Defendants.</b>                   | ) |                                      |

**ORDER**

This action is before the Court on the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) (Doc. 2) filed by Defendant Christopher Orstadt.<sup>1</sup> In support of his motion, Orstadt attaches his own affidavit claiming he did not work at the subject Wal-Mart store during the time period relevant to the Plaintiff’s claims.

Under Federal Rule of Civil Procedure 12(d), “[i]f, on a motion under Rule 12(b)(6)...., matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56[.]” and “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Because the affidavit is a “matter outside the pleadings,” and because the Court currently finds no reason to exclude it *sua sponte*, the parties are hereby given notice that the Court intends to treat the motion to

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<sup>1</sup> As ordered (*see* Doc. 8), Defendant Wal-Mart Stores East, LP (“WMSE”) has timely filed a supplement to its notice of removal correcting certain deficiencies in its allegations supporting diversity of citizenship (*see* Doc. 9). Upon consideration of the notice of removal (Doc. 1) and supplement (Doc. 9), the undersigned finds that WMSE has alleged sufficient facts demonstrating both the citizenships of the parties and the minimum amount in controversy for purposes of subject matter jurisdiction under 28 U.S.C. § 1332(a). At this time, the undersigned expresses no opinion on WMSE’s claim that non-diverse defendant Orstadt has been fraudulently joined.

dismiss as a motion for summary judgment subject to the provisions of Federal Rule of Civil Procedure 56 and S.D. Ala. CivLR 56.

The Plaintiff must file and serve any response to Orstadt's motion (Doc. 2) no later than **Thursday, March 1, 2018**. Any reply to the response must be filed and served no later than **Thursday, March 15, 2018**. The motion will be taken under submission on **Friday, March 16, 2018**. Once the motion is taken under submission, no further submissions related to the issues raised may be filed unless the proponent obtains leave of court for good cause shown. Unless otherwise ordered, this motion is being submitted without oral argument. *See* Fed. R. Civ. P. 78(b); S.D. Ala. CivLR 7(h). Should the Court determine that oral argument will be beneficial, a hearing will be set by separate order. "Oral argument requests must contain specific reasons why oral argument would be helpful." S.D. Ala. CivLR 7(h).

**DONE and ORDERED** this the 1<sup>st</sup> day of February 2018.

*/s/ Katherine P. Nelson*  
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**KATHERINE P. NELSON**  
**UNITED STATES MAGISTRATE JUDGE**