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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10781
Non-Argument Calendar

D.C. Docket No. 1:13-cv-03553-ODE

GUY W. HARRISON, III,

Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA,

Defendant-Appellee,

ANGELA PARKER, et al.,

Defendants.

Appeal from the United States District Court for
the Northern District of Georgia

(May 17, 2018)
Before MARCUS, ROSENBAUM and HULL, Circuit Judges.

Appendix - A

PER CURIAM:

Guy W. Harrison III, a now-retired employee of the Public Works Department of Fulton County, Georgia, appeals pro se from the district court's order granting summary judgment in favor of defendant Fulton County. After careful review of the record and briefs, we affirm.

I. BACKGROUND

In granting summary judgment, the district court adopted the magistrate judge's 55-page report and recommendation (the "report"). That report included a meticulous and thorough review of the evidence and facts in this case. Since the parties are already familiar with these facts, we recount them more briefly.

A. Employment with the Public Works Department

This case arose out of plaintiff Guy Harrison's employment as a Sewer System Superintendent with the Fulton County Public Works Department from July 2000 until he retired on January 14, 2014. This case does not involve termination or his voluntary retirement. Rather, Harrison claims that, during a part of his employment, Fulton County failed to promote him, discriminatorily gave him lower-level job duties, and did not reasonably accommodate his disability.

In 2006, Harrison was diagnosed with prostate cancer. When he returned from six months of medical leave in 2007, Harrison (still as a Superintendent) was

assigned to a new program (but still in the Public Works Department) under the supervision of David Tucker. Both Harrison and Tucker are African Americans. The new program, referred to as Capacity Management Operations and Maintenance ("CMOM"), was focused on reducing and eliminating water overflows. At the times relevant to this action, Chris Browning was the Assistant Director of the Public Works Department, and Alysia Shands was the Human Resources Manager for the Water Resources Department.

B. New Work Plan

In 2008, under the CMOM program, supervisor Tucker developed a work plan to map, evaluate, and record data about manholes and water valves throughout Fulton County (the "Work Plan"). Before implementation, Assistant Director Browning and Human Resources Manager Shands consulted with the personnel department to ensure that the duties outlined in the Work Plan were consistent with the job classification for a Superintendent.

The Work Plan divided duties between Harrison and James Henson, another Superintendent. Henson, who is white, was required to locate manholes and sewer fixtures. Harrison was assigned to open and inspect the manholes and sewer fixtures. In one form or another, all Superintendents were required to perform physical activity as a part of their work.

C. Harrison's Complaints

As a result of his new duties, Harrison sought to work closer to home and later complained to his supervisor that, unlike his white coworker Henson, Harrison's duties were below his job classification, he did not receive proper equipment, and he was required to work in a cubicle instead of an enclosed office.

During his employment, Harrison also complained to his supervisor that he had been denied several promotions, including (1) water services manager in July 2008, (2) senior construction project manager in March 2009, (3) deputy land administrator in January 2011, and, later, (4) Sewer System Superintendent II in April 2013.

D. Internal Grievance, Accommodation Request, and First EEOC Charge

In early 2009, Harrison took a number of steps to express his dissatisfaction. First, Harrison filed a grievance with Fulton County. Second, he contacted the Fulton County Office of Disability Affairs ("ODA") and filed an "Understanding and Consent to Proceed" form but indicated that he did not wish to proceed with the reasonable accommodation process. Two months later, in April 2009, Harrison returned to the ODA and elected to proceed with the reasonable accommodation process.

Third, in March 2009, Harrison participated in an unrelated internal investigation on behalf of a coworker, James Marks, who had filed an Equal Employment Opportunity Commission ("EEOC") charge against Fulton County.

And fourth, in May 2009, Harrison filed his own EEOC charge against Fulton County, alleging discrimination in his job duties based on his race, a failure to reasonably accommodate his disability, and retaliation based on his participation in the EEOC investigation for James Marks.

E. Disability Determination and Fulton County's Responses to Harrison's Complaints

In late May 2009, Harrison's physician submitted documentation to Fulton County indicating that Harrison was unable to lift more than 100 pounds and may need to urinate frequently. In response, on June 2, 2009, the ODA issued a letter certifying Harrison as disabled for purposes of the Americans with Disabilities Act ("ADA") and scheduled an interactive meeting for later in June 2009.

Before the interactive meeting, the Fulton County Grievance Review Committee issued a report, finding that the Public Works Department had erred in its practices and procedures for assigning jobs. The Committee recommended that the Public Works Department reassign Harrison to tasks consistent with his "essential job duties." In response, the Public Works Department restructured itself back to having four Superintendents split between North and South Fulton

County and revised the Work Plan to ensure that Harrison had job duties identical to those of his white coworker, Henson.

On the day of the interactive meeting, June 19, 2009, Harrison initially met with an ADA coordinator, Wayne Stokes, and an equal employment officer, Tilford Belle, about reasonable accommodations. On the issue of frequent urination, as described by Harrison's physician, Harrison told Stokes and Tilford that he had to urinate "maybe once an hour" and that it took him "30 to 45 minutes" to access a restroom while working in the field. According to Harrison, Stokes and Tilford instructed him to keep a log of each time he used the restroom. Harrison later met with several employees of the Public Works Department at the scheduled interactive meeting and, as a result, received an additional employee on his team to lift manhole covers for him. After the fact, Harrison complained to his supervisor that this additional employee was not able to lift the manhole covers by himself and so Harrison was still required to help.

F. Second EEOC Charge and Desk Audit

On June 24, 2009, Harrison filed a second EEOC charge against Fulton County, alleging discrimination and retaliation based on his disability. Specifically, Harrison contended that, as a result of his first EEOC charge, Fulton County had retaliated against him by assigning him duties below his job classification and requiring him to keep a log of each time he used the restroom.

On August 21, 2009, during an ADA meeting, Harrison also informed Fulton County that his job assignment under the now-revised Work Plan was not sufficient and that the additional employee could not lift the manhole covers by himself. Fulton County responded by instructing Harrison to comply with his physician's orders and avoid engaging in any "heavy lifting."

On September 10, 2009, Fulton County conducted a desk audit of whether Superintendents were assigned duties that aligned with their job classifications. By memorandum dated September 11, 2009, the audit concluded that the duties performed by both Harrison and Henson were "not closely aligned with the essential duties as described in the job classification" of a Superintendent.

In October 2009, Fulton County removed Harrison from having to perform any fieldwork and moved him to a different office location that had different duties. Harrison does not complain about this move but says the move did not come fast enough.

G. EEOC Determination and Right-to-Sue Letters

Almost two years later, on September 14, 2011, Harrison received an EEOC determination related to his two EEOC charges. The EEOC letter indicated that there was "reasonable cause to conclude that [Harrison] was discriminated against because of his race . . . , his disability and in retaliation for opposing unlawful employment practices . . . ." and offered Harrison and Fulton County to join in

conciliation. After conciliation failed, the Department of Justice ("DOJ") sent Harrison a right-to-sue letter (dated July 10, 2012) indicating that Harrison had 90 days to file suit. This right-to-sue letter also indicated that it should not be interpreted as a "judgment [by the DOJ] as to whether or not [Harrison's] charge is meritorious." Just over a year later, on July 30, 2013, Harrison received a second, and otherwise identical, DOJ right-to-sue letter as to the same two EEOC charges.

Before the district court, Harrison argued that he did not receive the first right-to-sue letter dated July 10, 2012 and thus he was justified in suing under the second letter. Harrison's claims were allowed to proceed.

H. Pro Se Complaint and Counseled Second Amended Complaint

On October 28, 2013, proceeding pro se, Harrison filed this lawsuit against Fulton County and various employees of the Public Works Department. The defendants moved to dismiss the complaint, and Harrison retained counsel. Harrison later amended his complaint twice and removed the claims against the individual employees of the Public Works Department. This left Fulton County as the only defendant.

In his second amended complaint, Harrison asserted eleven claims against Fulton County: (1) racially hostile work environment and race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Count 1); (2) failure to accommodate and hostile work environment under the

ADA, as amended, 42 U.S.C. § 12101, et seq. (Count 2); (3) retaliation under Title VII (Count 3); (4) race-based failure to promote and racially hostile work environment under 42 U.S.C. § 1981 (Count 4); (5) retaliation in violation of § 1981 (Count 5); (6) negligent hiring, training, supervision, and retention under Georgia law (Count 6); (7) gross negligence and negligence per se under Georgia law (Count 7); (8) punitive damages (Count 8); (9) attorney's fees and costs (Count 9); (10) racially hostile work environment under 42 U.S.C. § 1983 (Count 10); and (11) retaliation in violation of § 1983 (Count 11).

I. Fulton County's Motion to Dismiss

Fulton County moved to dismiss Harrison's second amended complaint. On July 29, 2015, the district court granted in part and denied in part Fulton County's motion, merging Harrison's claims under § 1981 and § 1983 and allowing five of his eleven claims to proceed: (1) race discrimination under Title VII from Count 1; (2) failure to accommodate under the ADA from Count 2; (3) retaliation under Title VII from Count 3; (4) race discrimination under § 1983, merged from Counts 5 and 11; and (5) retaliation under § 1983, merged from Counts 4 and 10. Harrison later conceded that his only viable § 1983 claim

involved the alleged race-based failure to promote him to Sewer System Superintendent II in April 2013.[1]

J. Magistrate Judge's Report on Fulton County's Motion for Summary Judgment

After a period for discovery, Fulton County moved for summary judgment on Harrison's remaining claims. Harrison opposed the motion. In the 55-page report dated October 31, 2016, the magistrate judge recommended that the district court grant Fulton County's motion for summary judgment in its entirety.

As to Harrison's § 1983 race-based failure-to-promote claim, the magistrate judge determined that the only position within the applicable statute of limitations was the Sewer System Superintendent II position from 2013 and that Harrison had

[1] To bring a claim under Title VII, an employee must file a charge with the EEOC. See 42 U.S.C. § 2000e-5(e)(1) (stating that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."); Shiver v. Chertoff, 549 F.3d 1342, 1344 (11th Cir. 2008). Harrison has never filed an EEOC charge relating to either the deputy land administrator position from January 2011 or the Sewer System Superintendent II position from April 2013. Thus, Harrison may not assert a Title VII claim based on an alleged race-based failure to promote him to either of these positions. Rather, his only race-based failure-to-promote claim is under § 1983.

Similarly, the statute of limitations for a § 1983 claim arising out of events occurring in Georgia is two years. See Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) (noting that, in § 1983 cases, federal courts apply the state's statute of limitations for personal injury actions). Because Harrison filed this action in October 2013, the § 1983 statute of limitations has run on all alleged promotional opportunities prior to October 2011.

failed to state a prima facie case because the individual ultimately hired for this position was also an African American.

As to Harrison's retaliation claim under Title VII, the magistrate judge determined that Harrison failed to show a causal connection between any of Harrison's EEOC activity and any adverse employment action. Harrison's first EEOC charge in May 2009 occurred after his new manhole duties were assigned in 2008. Likewise, Harrison had not submitted any probative evidence that he was denied a promotion between his assisting a coworker, James Marks, in March 2009 and his filing an EEOC charge in May 2009. Lastly, as to Harrison's EEOC charge in June 2009, the magistrate judge determined that Fulton County's request that Harrison keep a restroom log was not an adverse employment action. As to race discrimination under Title VII, the magistrate judge determined that Harrison's challenged work assignments were not adverse employment actions because they

were not accompanied by any tangible harm (e.g., a decrease in salary). Likewise, Harrison could not show disparate treatment because Harrison's white coworker received similar below-classification job assignments as well. The magistrate judge also noted that the tasks delegated under the CMOM program were from Harrison's supervisor, David Tucker, who was also an African American, and was thus unlikely to discriminate against Harrison.

As to Harrison's failure-to-accommodate claim under the ADA, the magistrate judge determined that: (1) Harrison's first specific demand for an accommodation was in April 2009; (2) Harrison's physician did not send

documentation until late May 2009; and (3) Fulton County granted a timely and reasonable accommodation by providing Harrison with an additional employee to lift manhole covers for him in June 2009.

Along with the report, the magistrate judge issued an order telling each party that they had 14 days to file objections to the report, that their objections must specify with particularity any alleged error, and that challenges not preserved by a specific objection to the report would be deemed waived on appeal, as follows:

> Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Report . . . within [14 days] of service of this Order. Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report . . . may be adopted as the

> opinion and order of the District Court, and on appeal, the Court of Appeals will deem waived any challenge to factual and legal findings to which there was no objection, subject to interests-of-justice plain error review. 11th Cir. R. 3-1.

K. Harrison's Counseled Objections

Through counsel, Harrison filed four pages of timely objections to the report. In his objections, Harrison contended that the magistrate judge did not follow the summary judgment standard because the judge inferred Fulton County's motives and decided facts in the light least favorable to Harrison. After this general contention, Harrison objected specifically to these three determinations by the magistrate judge: (1) Browning and Shands consulted with the personnel

department to ensure the duties in the Work Plan were consistent with a Superintendent's job duties; (2) Harrison had not established he was the only Superintendent without an enclosed office; and (3) Harrison was not required to lift manhole covers after he was provided with an additional employee for this purpose.

L. District Court's Summary Judgment Order and Harrison's Appeal

In its order dated January 18, 2017, the district court overruled Harrison's three objections and adopted the magistrate judge's report. The district court found that each of the magistrate judge's determinations was supported by the record evidence and that Harrison's objections were without merit. Accordingly, the

district court granted summary judgment in favor of Fulton County. Harrison pro se appealed.

II. DISCUSSION

On appeal, Harrison contends that the record evidence presented genuine issues of material fact and that the district court erred by granting summary judgment in favor of Fulton County. Likewise, he seeks to reargue the merits of each of his claims. For the reasons that follow, we affirm the district court's grant of summary judgment.

A. Standard of Review and General Principles

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the district court must draw all reasonable inferences in the light most favorable to the non-moving party. Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1235 (11th Cir. 2016). Generally, we review a district court's grant of summary judgment de novo and apply the same legal standard as the district court. Id.; Chapman v. AI Transp., 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc).

The same is true where a district court adopts a magistrate judge's findings and recommendations as the district court's own ruling. In such cases, however, this Court "will generally not review a magistrate judge's findings or recommendations if a party failed to object to those recommendations below." Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir. 2017) (emphasis added). This principle was solidified in Eleventh Circuit Rule 3-1, which provides that—subject to notice regarding the timing and consequences of objections—the failure to object to specific portions of a report before the district court results in the waiver of those challenges on appeal. 11th Cir. R. 3-1. If, however, the challenging party demonstrates that the interests of justice instruct against a

waiver, this Court may still review the report's findings and recommendation for plain error. Id.

To establish plain error, the challenging party must show: (1) an error occurred; (2) that error was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness of the judicial proceeding. See United v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999) ("Plain error review is an extremely stringent form of review. Only in rare cases will a trial court be reversed for plain error.").

B. Properly Overruled Objections

As an initial matter, we note that, before the district court, Harrison specifically objected to only three findings in the magistrate judge's report. Consistent with the summary judgment standard, we review these challenges de novo. See Chapman, 229 F.3d at 1023. Under this standard of review, we consider whether the district court properly overruled Harrison's three objections to the report, and we conclude that it did.

Harrison's first specific objection to the report was that the magistrate judge improperly credited Assistant Director Browning's testimony that he and Shands met with personnel to ensure that the duties outlined in the 2008 Work Plan were consistent with a Superintendent's job classification. But, as the district court pointed out, the record demonstrates that Browning agreed to this fact in his

deposition. Harrison offered no evidence to rebut Browning's testimony, but rather Harrison challenged only whether it was sufficient to establish that the meeting occurred. The district court properly concluded that Browning's testimony was sufficient to establish this fact for purposes of summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986) ("Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'");

Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1089 (11th Cir. 2013) (citing same). We agree because Browning's testimony on that point was not contradicted by any other person's testimony.

Harrison's second objection involved his own Statement of Material Facts, wherein his counsel asserted that Harrison was the only Superintendent required to work in a cubicle instead of an enclosed office. Although Harrison claimed that the magistrate judge unfairly credited Browning's testimony while scrutinizing his own, that claim has no merit. The magistrate judge accepted Browning's testimony as true for purposes of summary judgement because it was not disputed by Harrison's evidence. The magistrate judge did not accept Harrison's counsel's allegation in his Statement of Material Facts—that other Superintendents were given offices—because it was not supported by any of Harrison's record citations or by any testimony. See Fed. R. Civ. P. 56(e) (stating that, if a party fails to

properly support an assertion of fact, the court may consider the fact undisputed and grant summary judgment).

In his deposition, Harrison talked only about his lack of an office but did not point to any other Superintendent who had an enclosed office. Similarly, Tilford Belle testified that Harrison "had concerns about working at a cubicle" but could not recall whether Henson worked at a cubicle. Even viewed in a light most favorable to Harrison, neither his testimony nor that of Belle established anything

about the office situation of the other Superintendents. The district court properly determined as much and did not err in overruling Harrison's objection on this issue.

Harrison's third and final objection focused on the magistrate judge's conclusion that Fulton County provided a reasonable accommodation when, at the June 19, 2009 interactive meeting, the county assigned an additional employee to lift manhole covers for Harrison. Harrison argued that the magistrate judge failed to consider Harrison's subsequent complaint to Fulton County that the additional employee was not able to lift the manhole covers by himself, which meant Harrison still had to help lift the manhole covers. Thus, Harrison argued, the accommodation of an additional employee was not reasonable.

This argument misses the mark. Fulton County's accommodation established that Harrison was not required to lift or to help lift the manhole covers,

and Fulton County even reiterated as much during the August 21, 2009 ADA meeting. Specifically, Fulton County instructed Harrison to comply with his physician's orders and not to engage in any "heavy lifting." To the extent that he complied with Fulton County's instruction, Harrison did not suffer any adverse employment action as a result of his compliance. Indeed, in October 2009, after Harrison complained to Fulton County about the additional employee's inability to lift manhole covers, Fulton County removed Harrison from the field entirely. The

district court properly overruled Harrison's third objection to the magistrate judge's report.

C. Waiver and Plain Error

As to the unobjected-to portions of the report, we note that Harrison was explicitly informed of the time period for filing objections, as well as the consequences of a decision not to object to specific portions of the report. Under this Circuit's Rule 3-1, Harrison has waived all other arguments on appeal that seek to challenge the magistrate judge's report or its findings or determinations as adopted by the district court. Although this principle is sometimes applied less stringently to parties proceeding pro se, it is undisputed that Harrison had counsel before the district court.

Even assuming arguendo that Harrison's arguments were not waived, nowhere in his appellate briefs does he assert that, in the interests of justice, this

Court should assess the district court's rulings for plain error. Construed broadly, however, Harrison's reply brief on appeal does suggest that this Court should address his claims on the merits because the DOJ and EEOC determined his "rights were violated." Harrison ignores the DOJ's express disclaimer that it passed no judgment on the merits of Harrison's claims. In any event, we find no plain error with respect to the unobjected-to portions of the magistrate judge's report.

Specifically, there was no plain error in the magistrate judge's conclusion—and hence the district court's conclusion—that Harrison had failed to state a prima facie case for each of his claims. First, as to Harrison's § 1983 race-based failure-to-promote claim, the individual ultimately hired for the Sewer System Superintendent II position was also an African American. Second, as to Harrison's retaliation claim under Title VII, he established no causal connection between protected conduct and any adverse employment action. Namely, Harrison's Work Plan job assignments in 2008 predated both Harrison's and his coworker's 2009 EEOC charges. In addition, Harrison failed to show any other adverse employment action resulting from his cooperation with the 2009 EEOC charge filed by his coworker, James Marks.

Third, as to discrimination under Title VII, Harrison's work assignments were not adverse employment actions and were also assigned to his white coworker. Fourth, as to reasonable accommodations under the ADA, Fulton

County granted Harrison a reasonable and timely accommodation by providing him an additional employee to lift manhole covers. This offered accommodation occurred shortly after Fulton County received documents from Harrison's physician and within two months of Harrison's first request for accommodation. We conclude that the district court properly overruled each of Harrison's objections to the magistrate judge's report and that there was otherwise no plain

error in the unobjected-to portions of the magistrate judge's report. The district court properly granted summary judgment in favor of defendant Fulton County.

III. CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment in favor of defendant Fulton County.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 17-10781-BB

GUY W. HARRISON, III,

Plaintiff - Appellant,

versus

FULTON COUNTY, GEORGIA,

Defendant - Appellee,

ANGELA PARKER, et al.,

Defendants.

On Appeal from the U. S. District Court for the
Northern District of Georgia

PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, ROSENBAUM and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled no rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP 2)

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

Appendix -B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GUY W. HARRISON, III,

Plaintiff,

v.

FULTON COUNTY, GEORGIA ,

Defendant.

CIVIL ACTION FILE

NO. 1:13-CV-3553-ODE-WEJ

JUDGMENT

This action having come before the court, Honorable Orinda D. Evans, United States District Judge on the Final Report and Recommendation of the Magistrate Judge, and defendant's Motion for Summary Judgment and the court having adopted in full said recommendation and granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia this 20th day of January, 2017.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Brittney Walker
Deputy Clerk

Prepared, Filed and Entered
In the Clerk's Office
January 20, 2017
James N. Hatten
Clerk of Court

By: s/ Brittney Walker
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GUY W. HARRISON, III,

Plaintiff

v.

FULTON COUNTY, GEORGIA,

Defendant

CIVIL ACTION NO.
1:13-CV-3553-ODE-WEJ

ORDER

This employment discrimination case comes before the Court on United States Magistrate Judge Walter E. Johnson's Final Report and Recommendation [Doc. 93], and Plaintiff Guy W. Harrison, III's Objection to the Report and Recommendation [Doc. 95]. For the reasons stated below, Harrison's Objection to the Report and Recommendation [Doc. 95] is OVERRULED, and Judge Johnson's Report and Recommendation [Doc. 93] is ADOPTED IN FULL.

I. Procedural History

On October 28, 2013 Harrison, acting *pro se*, filed the Complaint in this case [Doc. 1-1]. After retaining counsel, Harrison filed a First Amended Complaint on April 21, 2014 [Doc. 19]. On November 20, 2014 Harrison filed a Consolidated Second Amended Complaint [Doc. 38]. That Complaint alleged causes of action for:

(1) creation of a racially hostile work environment and race discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII);
(2) failure to accommodate and creation of a hostile work environment in violation of the Americans with Disabilities Act (ADA);
(3) retaliation in violation of Title VII;
(4) failure to promote based on race, and racially hostile work environment in violation of 42 U.S.C. § 1981 (Section 1981);
(5) retaliation in violation of Section 1981;

(6) negligent hiring, training, supervision, and retention under Georgia law;
(7) gross negligence and negligence per se under Georgia law;
(8) punitive damages;
(9) attorneys' fees and costs;
(10) racially hostile work environment and race discrimination in violation of 42 U.S.C. § 1983 (Section 1983); and
(11) retaliation in violation of Section 1983

[Id. at 12-35].

On December 4, 2014, Fulton County moved to Dismiss the Consolidated Second Amended Complaint [Doc. 39]. Harrison responded in opposition [Doc. 41], and Fulton County replied [Doc. 42]. On June 8, 2015 U.S. Magistrate Judge E. Clayton Scofield, III issued a Report and Recommendation (R&R) [Doc. 44]. The R&R recommended dismissing the claims for negligent hiring, gross negligence, negligence per se, punitive damages, and attorneys' fees, [id. at 29], and allowing all other claims to proceed [id.], with the Section 1981 claims merging into the Section 1983 claims [id. at 24]. Fulton County filed Objections [Doc. 46], and on July 29, 2015 this Court issued an Order dismissing the hostile work environment claims, and otherwise adopting the R&R [Doc. 48 at 12]. Thus, the claims remaining before the Court are:

(1) race discrimination in violation of Title VII;
(2) failure to accommodate in violation of the ADA;
(3) retaliation in violation of Title VII;
(4) race discrimination in violation of Section 1983; and
(5) retaliation in violation of Section 1983.

On July 11, 2016 Fulton County filed a Motion for Summary Judgment as to all claims [Doc. 75] and a Statement of Material Facts [Doc. 75-1], and on July 18, 2016 Fulton County filed an Amended Motion for Summary Judgment [Doc. 77]. On September 26, 2016 Harrison filed a timely Response in Opposition [Doc. 84], a Response

to Defendant's Statement of Material Facts [Doc. 83], and Plaintiff's Statement of Additional Material Facts [Doc. 85]. On October 13, 2016 Fulton County filed a Reply [Doc. 90] and a Response to Plaintiff's Statement of Additional Material Facts [Doc. 89].

On October 31, 2016 U.S. Magistrate Judge Walter E. Johnson issued a Final Report and Recommendation [Doc. 93]. The R&R finds that Harrison failed to make prima facie cases for failure to promote under Section 1983, retaliation under Title VII, race discrimination under Title VII, or failure to accommodate under the ADA [Id. at 39-54]. On that basis, the R&R recommends granting summary judgment to Fulton County on all claims [Id. at 54]. On November 14, 2016 Harrison filed Objections to the R&R [Doc. 95]. Accordingly, the R&R and Harrison's Objections are now ripe for ruling.

II. Legal Standard

The Court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted). "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Only after the moving party meets this initial burden does any obligation arise on the part of the nonmoving party. Chanel, Inc. v.

Italian Activewear of Fla., Inc., 931 F.2d 1472, 1477 (11th Cir. 1991). At that time, the nonmoving party must present "significant, probative evidence demonstrating the existence of a triable issue of fact." Id. If the nonmoving party fails to do so, the moving party is entitled to summary judgment. United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991).

All evidence and justifiable factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1532 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." Anderson, 477 U.S. at 255. However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48 (emphasis in original).

The Local Rules in this District set out specific requirements for Motions for Summary Judgment. A Motion for Summary Judgment must be accompanied by a statement of material facts, each of which is supported by citation to evidence, not to a pleading. LR 56.1(B)(1), NDGa. A movant's evidence is assumed to be supportive of the movant's facts unless the nonmovant informs the Court otherwise. LR 56.1(B)(2)(a)(3), NDGa. A movant's material facts are "admitted unless the respondent: (i) directly refutes the movant's facts with concise responses supported by specific citations to evidence . . .; (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support

the movant's fact . . . ." LR 56.1(B)(2)(a)(2), NDGa. A respondent may provide a statement of additional material facts, each of which must also be supported by citation to evidence. LR 56.1(B)(2)(b), NDGa. The movant can respond to these additional material facts by objecting to the admissibility of the underlying evidence, objecting that the evidence does not support the fact, objecting that the fact is immaterial or does not otherwise comply with the local rule, or conceding that the Court can consider the fact for the purposes of the motion. LR 56.1(B)(3), NDGa.

Pursuant to 28 U.S.C. § 636(b)(1), the Court must conduct a de novo review of those portions of the R&R to which Plaintiff has timely and specifically objected. "[T]he Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Portions of the R&R to which Plaintiff has not specifically objected are reviewed for clear error only. See Tauber v. Barnhart, 438 F. Supp. 2d 1366, 1373 (N.D. Ga. 2006) (Story, J.) ("[I]ssues upon which no specific objections are raised do not so require de novo review; the district court may therefore 'accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge[,]' applying a clearly erroneous standard." (quoting 28 U.S.C. § 636(b)(1))).

III. Discussion

In his Objections, Harrison contends that the Magistrate Judge did not follow the summary judgment standard because he inferred Fulton County's motives, and decided facts in the light least favorable to Harrison [Doc. 95 at 2-4]. However, Harrison provides

few specific objections. As noted above, the Court reviews *de novo* Harrison's specific objections to the R&R.

Harrison's first specific objection is that the Magistrate Judge credited Defendant's Statement of Material Facts ¶ 13 despite Harrison's objection [Id. at 2-3]. Fulton County's Statement of Material Facts ¶ 13 states "Mr. Browning and Alysia Shands, the Public Works HR manager, consulted with the Fulton County Personnel Department to make sure that the duties that were outlined in the Work Plan for Plaintiff and Mr. Henson were consistent with the Sewer System Superintendent's job classification" [Doc. 75-1 at 4 (citing Doc. 75-6 at 23-25)]. Harrison's response to this statement was as follows:

> Denied. Mr. Browning testified that this occurred, however, the Defendant did not produce any evidence that this occurred. To the contrary, on June 18, 2009 Defendant's Grievance Review Committee upheld a grievance filed by Mr. Harrison on January 26, 2009 that alleged that he was not assigned work duties and responsibilities that were commensurate with the essential job duties of a Sewer System Superintendent [citing Doc. 87-4]. Additionally, on September 11, 2009 a desk audit was conducted on Mr. Harrison's position and it too determined Mr. Harrison's duties were not closely aligned with the essential duties described in his job classification of Sewer System Superintendent [citing Doc. 87-6].

[Doc. 83 at 6-7]. The Magistrate Judge credited Fulton County's statement because the testimony Fulton County cited to was sufficient to support the statement [Doc. 95 at 14 n.12]. The Court has reviewed the testimony cited to [Doc. 75-6 at 23-25], and agrees. On this basis, Harrison's objection to Judge Johnson crediting Fulton County's Statement of Material Fact ¶ 13 is OVERRULED.

Harrison's next specific objection is to Judge Johnson finding Harrison's claim that he did not have an office like the other superintendents unsupported by the record [Doc. 95 at 3 (citing Doc.

93 at 23 n.17)]. In Harrison's Statement of Material Facts, he claimed "Mr. Harrison was the only Sewer Superintendent who did not have an office" [Doc. 85 at 15 (citing Docs. 77-3 at 35, 86-1 at 10)]. Fulton County responded that "[f]or the period 2007-2009, while he worked at the Government Center, Mr. Harrison was in a cubicle. [One of the sources Harrison cites] does not support the assertion that only Mr. Harrison did not have an office" [Doc. 89 at 23]. Having reviewed the sources Harrison cites in support of his statement [Docs. 77-3 at 35, 86-1 at 10], the Court finds that the sources do not support the claim that Harrison was the only Sewer Superintendent without an office [see Id.]. At best, these sources support the idea that Harrison was concerned with the type of office he had [see Id.]. On this basis, Harrison's objection to Judge Johnson finding Harrison's claim about not having an office unsupported is OVERRULED.

Harrison's last specific objection is to Judge Johnson crediting Fulton County's statements about whether it provided Harrison a reasonable accommodation, and discrediting Harrison's statements on the topic [Doc. 95 at 3 (citing Doc. 93 at 53]. Mr. Harrison contended that he was given the accommodation of a work crew, but was still required to lift manhole covers weighing over 100 pounds [Doc. 85 at 11 (citing Docs. 77-3 at 57, 85-5)]. He contended that he informed Fulton County that the crew member designated to lift the manhole covers could not do so [Doc. 85 at 12 (citing Docs. 86-1 at 15, 87-11)]. He further claimed that until October 2009 he had to engage in heavy lifting [Id. (citing Doc. 77-3 at 175)]. Fulton County agreed that Harrison informed it that the crew member assigned to do the lifting could not do so [Doc. 89 at 18-19]. The County

contended, however, that Harrison was not required to lift manhole covers, that it provided a crew member to do the heavy lifting, and that Harrison was disregarding his doctor's restrictions and the accommodation provided by lifting, for which he was admonished by Fulton County [Id. at 18-19 (citing Doc. 75-2 at 7-9, 17)].

In the R&R, the Magistrate Judge found that, contrary to Harrison's claim that he had to lift manhole covers because the team member Fulton County provided to do so could not do the lifting, Fulton County provided a team member to do the lifting as a reasonable accommodation, and a Fulton County representative informed Harrison that he must follow his doctor's restrictions on lifting [Doc. 93 at 53]. Having reviewed the testimony upon which Harrison [Docs. 77-3 at 57, 85-5, 86-1 at 15, 87-11, 77-3 at 175] and Fulton County [Docs. 89 at 18-19, 75-2 at 7-9, 17] relied in relation to this issue, the Court agrees with Judge Johnson's findings. Harrison was not **required** to lift manhole covers. Fulton County provided a crew member to lift the manhole covers, and reminded Harrison not to violate his doctor's orders by lifting heavy materials. On that basis, Harrison's objection to Judge Johnson crediting Fulton County's evidence and discrediting Harrison's evidence regarding reasonable accommodations is OVERRULED.

IV. Conclusion

For the reasons stated above, Harrison's Objection to the Magistrate Judge's Report and Recommendation [Doc. 95] is OVERRULED. Further, the Court finds no clear error in the Report and Recommendation [Doc. 93]. Accordingly, Magistrate Judge Johnson's Report and Recommendation [Doc. 93], which recommends granting summary judgment to Defendant Fulton County, is ADOPTED IN FULL.

SO ORDERED, this 18 day of January, 2017.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GUY W. HARRISON, III,

Plaintiff,

v.

FULTON COUNTY, GEORGIA,

Defendant.

CIVIL ACTION FILE NO.

1:13-CV-03553-ODE-WEJ

FINAL REPORT AND RECOMMENDATION

This matter is before the Court on Defendant's Motion for Summary Judgment [75] and Amended Motion for Summary Judgment [77].[1] For the reasons explained below, the undersigned **RECOMMENDS** that said Motions be **GRANTED**.

I. RELEVANT PROCEDURAL BACKGROUND

Plaintiff, Guy W. Harrison, III, began this action pro se by filing his Complaint [1-1] on October 28, 2013. He later obtained counsel, and after some

[1] Defendant filed the Amended Motion for Summary Judgment [77] because it inadvertently failed to include with the initial Motion a Memorandum of Law in Support of its Motion for Summary Judgment [77-1] and certain Appendix excerpts [77-2, 77-3]. Thus, while the docket lists two motions for summary judgment, there is only one.

preliminary motion work and the filing of a First Amended Complaint [19], on November 20, 2014, plaintiff filed an eleven-Count Consolidated Second Amended Complaint ("Compl.") [38], which alleges the following:

Count I	Creation of a racially hostile work environment and race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII");
Count II	Failure to accommodate and creation of a hostile work environment in violation of the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA");
Count III	Retaliation in violation of Title VII;
Count IV	Race-based failure to promote and creation of a racially hostile work environment in violation of 42 U.S.C. § 1981 ("Section 1981");
Count V	Retaliation in violation of Section 1981;
Count VI	Negligent hiring, training, supervision, and/or retention in violation of Georgia law;
Count VII	Gross negligence and negligence per se in violation of Georgia law;
Count VIII	Punitive damages;
Count IX	Attorneys' fees and costs;
Count X	Creation of a racially hostile work environment and race discrimination in violation of 42 U.S.C. § 1983 ("Section 1983"); and
Count XI	Retaliation in violation of Section 1983.

(Compl. ¶¶ 42-154.)

Defendant, Fulton County, Georgia (the "County"), filed a Motion to Dismiss [39] the Complaint on December 4, 2014. In a Report and Recommendation ("R&R") [44] dated June 8, 2015, the Honorable E. Clayton Scofield III, United States Magistrate Judge, recommended dismissal of Counts VI-IX, but recommended that Counts I-V and X-XI be allowed to proceed. (Id. at 29.)[2]

The County filed Objections [46] to the R&R on June 22, 2015. On July 29, 2015, the Honorable Orinda D. Evans, United States District Judge, issued an Order [48] adopting in part and rejecting in part the R&R. Judge Evans sustained the County's objection to that part of the R&R which recommended that plaintiff be allowed to pursue hostile work environment claims based on his race and/or

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[2] As discussed supra, Counts IV and V allege violations of Section 1981, while Counts X and XI allege violations of Section 1983. Section 1983 is the exclusive remedy against state actors for their alleged violation of rights found in Section 1981. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 733 (1989); see also Jones v. Fulton Cty., 446 F. App'x 187, 189 n.1 (11th Cir. 2011) (per curiam). In denying defendant's motion to dismiss plaintiff's Section 1981 claims, Magistrate Judge Scofield recommended that those claim be allowed to proceed as "effectively merged into Plaintiff's claims under § 1983." (R&R at 24.) In its Conclusion, the R&R recommended denial of the motion to dismiss with regard to "all claims arising under Section 1981" (id. at 29), without reiterating that they had been merged into plaintiff's Section 1983 claims.

disability, finding that such claims had not been administratively exhausted. (Id. at 11.) Judge Evans adopted the R&R in all other respects. (Id.)[3]

Given Judge Evans's Order, the only claims remaining for consideration by this Court are as follows:

1. Race discrimination (Count I) and retaliation (Count III) in violation of Title VII;

2. Race discrimination and retaliation in violation of Section 1983 (Counts IV and V merged into Counts X and XI); and

3. Failure to accommodate in violation of the ADA (Count II).

II. STATEMENT OF FACTS

To assist with framing the undisputed material facts, Local Rule 56.1 B.(1) requires a movant for summary judgment to file along with its motion and brief a "separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried." Id. In compliance with that Rule, the County filed Defendant's Statement of Undisputed Material Facts as to Which There is no Genuine Issue for Trial ("DSUMF") [75-1]. The Local Rules require the respondent (i.e., the non-moving plaintiff here) to submit a response to that

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[3] In the Conclusion of her Order, Judge Evans parroted the R&R's Conclusion (see supra note 2) and denied the motion to dismiss plaintiff's Section 1981 claims without reiterating that they had merged into his Section 1983 claims. (See Order at 12.) Like Judge Scofield, the undersigned does not address plaintiff's Section 1981 claims separately because they have been merged into his Section 1983 claims.

statement of undisputed material facts which contains "individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." N.D. Ga. R. 56.1 B.(2)a.(1). Mr. Harrison complied with that Rule by filing Plaintiff's Response and Opposition to Defendant's Statement of Undisputed Material Facts ("PR-DSUMF") [83].

The Local Rules also allow the respondent to submit a separate statement of additional facts which he contends are material and present a genuine issue for trial, but this separate statement must meet the requirements of Local Rule 56.1 B.(1). See N.D. Ga. R. 56.1 B.(2)b. For example, each material fact contained in this separate statement "must be numbered separately and supported by a citation to evidence proving such fact." N.D. Ga. R. 56.1 B.(1). However, Plaintiff's Statement of Material Facts ("PSMF") [59] often fails to follow the above-quoted Local Rule. Many paragraphs of PSMF contain multiple sentences, which prompted objections from the County. See generally Def. Fulton Cty.'s Resp. to Pl.'s Stat. of Mat. Facts ("DR-PSMF") [89]. The Court recognizes these objections and seeks to accommodate them by citing infra to specific sentences (e.g., abbreviated "s. 1") of PSMF.

The Court uses DSUMF and PSMF as the basis for this Statement of Facts, applying the following conventions. When a party admits the other's proposed fact (in whole or in part), the Court accepts that fact (or the part admitted) as

undisputed for the purposes of this Report and Recommendation and cites both the proposed fact and the response. When a party denies the other's proposed fact (in whole or in part), the Court reviews the record cited and determines whether that denial is supported, and if it is, whether any fact dispute is material. The Court sometimes modifies a proposed fact per the other party's response or the record cited to reflect the evidence more accurately. The Court also includes some facts drawn from its review of the record, see Fed. R. Civ. P. 56(c)(3), excludes immaterial proposed facts,[4] and rules on objections to proposed facts. Finally, the Court views the record in light of the standards for summary judgment set out Part II, infra.

A. Fulton County's Water and Sewer Operation

Defendant provides both water and sewer services in unincorporated Fulton County north of the Chattahoochee River (North Fulton) and only sewer services in unincorporated South Fulton County. (DSUMF ¶ 1; PR-DSUMF ¶ 1.) Defendant has significantly more customers and more lines to service and maintain in North Fulton than it does in South Fulton. (DSUMF ¶ 2; PR-DSUMF ¶ 2.) Defendant operates three large capacity wastewater treatment plants in North Fulton; in South Fulton, it operates one large capacity wastewater treatment

[4] The Court excludes as immaterial DSUMF ¶¶ 38, 40-41, 45, 47-49, and PSMF ¶¶ 2-4. The Court excludes other proposed facts, infra.

plant and one small capacity wastewater treatment plant. (DSUMF ¶ 3, as modified per record cited in PR-DSUMF ¶ 3.) North Fulton has more employees and approximately three times more equipment than South Fulton. (DSUMF ¶ 4; PR-DSUMF ¶ 4.) The distribution of equipment between North Fulton and South Fulton is based on the needs of the work, the County's budget, and the ability to borrow from one area to help out the other area. (DSUMF ¶ 5.)[5]

B. Plaintiff's Employment and the Department's Restructuring

The County hired plaintiff as a Sewer System Superintendent on or about July 15, 2000. (DSUMF ¶ 34; PR-DSUMF ¶ 34; see also PSMF ¶ 1; DR-PSMF ¶ 1.) All Sewer System Superintendents performed physical activities in their work. (DSUMF ¶ 46; PR-DSUMF ¶ 46.)

In 2001, plaintiff was terminated, filed a grievance appealing that termination, and was reinstated. (DSUMF ¶ 35; PR-DSUMF ¶ 35; see also PSMF ¶ 5; DR-PSMF ¶ 5.) Between plaintiff's termination in 2001 and his reinstatement later that same year, the Public Works Department's new Deputy

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[5] Plaintiff denies the above proposed fact because it was "evident to him" that there was a disparity in the allocation of resources between North Fulton and South Fulton that he "believed" was racially motivated. (PR-DSUMF ¶ 5.) However, the record cited fails to support those denials, and plaintiff's testimony is subjective and unsupported by any probative evidence. See Bickerstaff v. Vassar Coll., 196 F.3d 435, 456 (2d Cir. 1999) (stating that feelings and perceptions are not evidence of discrimination). Thus, the Court disregards those subjective denials and deems DSUMF ¶ 5 admitted.

Director, Chris Browning, restructured parts of that organization. (DSUMF ¶ 36.) Mr. Browning testified that when he did so, he did not know plaintiff was returning to work and had no knowledge of any prior claims he may have had against the County. (DSUMF ¶ 39, as modified per PR-DSUMF ¶ 39.)

When plaintiff was reinstated in 2001, giving him supervisory responsibilities would have meant dissecting the restructured group, so he was given a technical role. (DSUMF ¶ 37;[6] see also PSMF ¶ 6; DR-PSMF ¶ 6 (stating that upon his reinstatement, the County placed plaintiff in a technical role where he supervised no employees).)

C. Plaintiff's 2006 Cancer Treatment

Mr. Harrison was diagnosed with prostate cancer in 2006. He applied for FMLA leave and was out of work for treatment for about six months. When plaintiff returned to work in 2007, he was under the supervision of David Tucker, Manager of the CMOM Program (discussed infra), and began working on that Program. (PSMF ¶¶ 11, 16; DR-PSMF ¶¶ 11, 16; see also DSUMF ¶¶ 42-43; PR-DSUMF ¶¶ 42-43.)[7] Mr. Harrison's work on the CMOM project was primarily

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[6] Although plaintiff denies the above proposed facts in part because the cited testimony does not reflect his termination date (see PR-DSUMF ¶¶ 36-37), it is undisputed that his first termination occurred in 2001.

[7] Plaintiff only disputes that portion of DSUMF ¶ 43 which asserts that Mr. Tucker is African American, because the assertion is not supported by the record

technical from that point until late-2008, when he began to receive training for field work. (Harrison Aff. [87] ¶ 9.)

D. The CMOM Program

1. CMOM and Development of the Work Plan

The acronym "CMOM" refers to Capacity Management Operations and Maintenance. (DSUMF ¶ 6; PR-DSUMF ¶ 6.) Wastewater overflows were prevalent in North Fulton because of the area's growth. (DSUMF ¶ 7; PR-DSUMF ¶ 7.) The County developed the CMOM program in part to focus attention and effort on reducing and eliminating such overflows. (DSUMF ¶ 8; PR-DSUMF ¶ 8.)

Between 2003 and 2008, the County engaged a contractor named Camp Dresser & McKee, Inc. (the "Contractor") to, among other things, inventory and survey the manholes and water valves relative to the CMOM program. (DSUMF ¶ 9; PR-DSUMF ¶ 9.) Under the provisions of its contract with the County, the Contractor was not required to look for a manhole or valve for more than twenty minutes before the Contractor could move on to the next job. (DSUMF ¶ 10; PR-DSUMF ¶ 10.)

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cited. (See PR-DSUMF ¶ 43.) Although plaintiff is correct, it is undisputed that Mr. Tucker is African American, given that plaintiff's Complaint (see [1-1] p. 5 ¶ 11), his First Amended Complaint (see [19] ¶ 35), and his Consolidated Second Amended Complaint (see [38] ¶ 35) all make that allegation.

When the Contractor's contract expired in 2008, CMOM Program Manager Tucker was directed to create a work plan (the "Work Plan") to map, evaluate, and record data about 4,000 difficult to find manholes and water valves that the Contractor had not located. (DSUMF ¶ 11; PR-DSUMF ¶ 11; see also PSMF ¶ 17; DR-PSMF ¶ 17.) CMOM program manager Tucker chose to locate the program's office in North Fulton. (DSUMF ¶ 14.)[8]

When he was developing the Work Plan, CMOM Program Manager Tucker showed a draft of it to plaintiff, who pointed out some safety issues and asserted that changing the office location to North Fulton (Alpharetta) would bring travel hardship to him and some of his co-workers. (DSUMF ¶ 15, as modified per PR-DSUMF ¶ 15 and record cited.) On August 26, 2008, plaintiff sent an email to Mr. Browning (with a copy to Mr. Tucker) which reads as follows:

> I request to be allowed to work at the South maintenance Center.
> There is a vacant office and I can make a smooth transition.
> I would like to begin on Monday, September 1, 2008.
>
> I would like to make this change of work locations due to medical reasons and Also [sic], I can save on the cost of fuel with the shorter commute to the South office.

(Browning Dep. Ex. 92 [87-1], at 2; see also DSUMF ¶ 16, citing this email.)

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[8] Because plaintiff's denial of the above fact is not supported by the record cited (see PR-DSUMF ¶ 14), the Court deems DSUMF ¶ 14 admitted.

Mr. Browning responded to the above email that day (with copies to Mr. Tucker, Ms. Shands, and Angela Parker (the Director of Public Works)), and informed plaintiff that the County was assessing the assignments of a number of employees charged with CMOM projects, that Human Resources was analyzing the department's needs, and would make a recommendation, but that in the meantime, no one would be relocated. (Browning Dep. Ex. 92 [87-1], at 2.)[9]

Plaintiff asserts that, "[w]hen the CMOM was being prepared, [he] submitted a letter from his physician saying the CMOM work would adversely affect his medical condition." (PSMF ¶ 18.) The record cite provided to support this assertion is "Exhibit C, Harrison Affidavit." (Id.) Because PSMF does not cite a specific paragraph of the Harrison Affidavit [85-8], the Court reviewed it and found only one potentially relevant but vague paragraph, which states as follows: "Sometime before April 20, 2009, I provided my supervisor with a note

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[9] Plaintiff's email did not describe the medical reasons leading him to request relocation, and Mr. Browning's response did not refer plaintiff to the County's Office of Disability Affairs. (See PSMF ¶¶ 12-13; DR-PSMF ¶¶ 12-13.) Ms. Shands testified that the language of plaintiff's August 26, 2008 email should have triggered her to refer him to the Office of Disability Affairs. (PSMF ¶ 14.) As discussed infra, Ms. Shands did not refer plaintiff to that Office until after she received a copy of the grievance that he filed in January 2009. As also discussed infra, plaintiff did not start performing heavy lifting in the field until late-November 2008.

from my physician which stated I needed a reasonable accommodation." (Harrison Aff. [85-8] ¶ 7.)

PSMF ¶ 18 is unsupported by the record cited, because paragraph 7 of the Harrison Affidavit (1) does not mention the specific time period asserted in PSMF ¶ 18 (i.e., when the CMOM was being prepared), and (2) does not aver that the purported letter from plaintiff's physician stated that CMOM work would adversely affect his medical condition. Moreover, in response to PSMF ¶ 18, the County notes that plaintiff has not produced a copy of any physician's letter submitted when the CMOM was being prepared. (See DR-PSMF ¶ 18.) The County received only two letters from plaintiff's physician and placed both of them in the record as exhibits (discussed infra). Plaintiff does not challenge these statements. In fact, in an interrogatory response plaintiff stated that he had submitted only two letters from his doctor. (See Pl.'s Resp. and Objs. To Def.'s Request for Interrogs. No. 18 [75-8], at 17 ("My doctor, James Bennett, Urologist sent two letters stating that I should not do any heavy lifting as it could [be] detrimental to my condition and result in negative complications.").) Thus, the Court excludes PSMF ¶ 18, because there is no evidence that plaintiff submitted any letter from his doctor while the CMOM was being prepared.[10]

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[10] The Court cautions plaintiff's counsel that zealous representation does not permit misrepresentation of the record.

2. The November 2008 Work Plan

The Work Plan that CMOM Program Manager Tucker developed provided for two surveying teams, each having an Engineer II (as the project manager) and a Sewer System Superintendent.[11] One team included Engineer II James Mark and plaintiff (African American) as the Sewer System Superintendent. The other team included Engineer II Clint Ghahramani and Jim Henson (Caucasian) as the Sewer System Superintendent. (DSUMF ¶ 12.) Mr. Henson's team had a third member, maintenance worker Marcus Hendricks. (Id., as modified per PR-DSUMF ¶ 12; see also PSMF ¶ 36; DR-PSMF ¶ 36.)

Messrs. Harrison and Henson held the same title (i.e., Sewer System Superintendent), but the Work Plan gave them different duties. (PSMF ¶ 35, ss. 1-2.) According to the Work Plan, plaintiff was "responsible for surveying water and wastewater features and collecting attributes of same." (Id. at s. 3, quoting Work Plan [87-7], at 8.) Mr. Henson was "responsible for locating manholes and valves for the contractor to adjust. He will assist the surveying crew when necessary, such as when someone is out on vacation or is ill." (Id. at ss. 4-5, quoting Work Plan [87-7], at 8.)

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[11] A copy of the Work Plan that Mr. Tucker developed, dated November 21, 2008, is in the record as Browning Deposition Exhibit 116 [87-7]. (PSMF ¶ 17; DR-PSMF ¶ 17.)

As defendant correctly observes (see DR-PSMF ¶ 35), the Work Plan states that the locating aspect of the project, performed by the team to which Mr. Henson was assigned, involved "the use of metal detectors and closed circuit television when necessary." (Work Plan [87-7], at 3.) The survey aspect of the project, performed by the team to which plaintiff was assigned, appears more sophisticated, as it involved

> the use of Real Time Kinetic (RTK) global positioning system (GPS) to obtain the x, y and z coordinates of the feature[']s location." . . . In addition to coordinates, the crew assigned to survey will also obtain attributes of the features such as depth, invert elevation, location of structure, condition, type of cover, etc.

(Id.)

Mr. Browning and Alysia Shands, who served as the Public Works Human Resources Manager, consulted with the Fulton County Personnel Department to make sure that the duties outlined in the Work Plan for plaintiff and Mr. Henson were consistent with the Sewer System Superintendent's job description. (DSUMF ¶ 13.)[12]

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[12] Although plaintiff denies the above proposed fact, he admits that Mr. Browning so testified, but argues that defendant produced no evidence that this consultation occurred. (See PR-DSUMF ¶ 13.) Mr. Browning's testimony that this consultation occurred is sufficient. Thus, the Court rejects that denial and deems DSUMF ¶ 13 admitted. Ms. Shands testified that she discussed the information in the Work Plan with Mr. Browning, but she could not recall the specifics of their conversation. (Shands Dep. [86], at 33.) The fact that she could not recall—eight years after the fact—reviewing plaintiff's CMOM job duties

Plaintiff began training for the field work and survey aspect of the CMOM program assigned to him under the Work Plan in late-November 2008. (PSMF ¶ 15; DR-PSMF ¶ 15.)[13] Mr. Harrison avers that the surveying work was strenuous and labor intensive; that he was required to lift manhole covers that generally weighed in excess of 100 pounds; and that he was not given equipment that would help lift those manholes covers. (Harrison Aff. [85-8] ¶ 10.) Mr. Henson, who had the same title (i.e., Sewer System Superintendent) and supervisors as plaintiff, was also required to locate manholes, but plaintiff claims that Mr. Henson did not have to lift their covers. (Id. ¶ 12; see also PSMF ¶ 38, ss. 1-2; DR-PSMF ¶ 38.)

Mr. Harrison complained that he did not receive the equipment he required to perform successfully these job duties, including computers, GIS Survey equipment and other related survey equipment, including but not limited to rods,

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before he was assigned to them to determine if such duties were consistent with his job classification (see PSMF ¶ 37) is immaterial. As discussed infra, the County later determined that the duties assigned to both Mr. Harrison and Mr. Henson were inconsistent with their job classification.

[13] Plaintiff asserts that he began experiencing unspecified complications related to his medical condition when he began training in the field to survey manholes and valves. (PSMF ¶ 20.) The document that plaintiff cites to support that assertion (Browning Dep. Ex. 99 [87-3]) is a three-page typewritten memorandum dated May 18, 2009 that is unsigned and unsworn. Because the document has not been authenticated, see Fed. R. Evid. 901, the Court excludes PSMF ¶ 20.

manhole pullers, traffic signs, sledgehammers and measuring tape. (PSMF ¶ 43.) The County admits that plaintiff made these complaints (see DR-PSMF ¶ 43), but argues that there is no evidence that the denial of any such equipment was related to his race or in retaliation for anything he had done. Moreover, plaintiff submits no evidence that he ever received any discipline for poor job performance that he could have blamed on the absence of equipment he allegedly required.

Mr. Harrison also claims that he was given work assignments that were of a lower level than his white co-workers. (PSMF ¶ 44.) He argues that he was not given any employees to supervise, and he was assigned field work that subordinate employees would normally perform. (Id.) However, as the County correctly points out, plaintiff testified that both he and Mr. Henson were assigned duties that were outside of their job classification, i.e., performing work that would normally be performed by persons they supervised. (DR-PSMF ¶ 44; see also Harrison Dep. [77-3], at 27.) As discussed infra, the County subsequently agreed that both men had been assigned work outside of their classification.

E. Plaintiff's January 28, 2009 Grievance

On January 28, 2009, Mr. Harrison filed a grievance with the County which states as follows:

1. The new job assignment of surveying manholes and water valves will exacerbate my current medical condition.

The Assistant Director Chris Browning denied a previous request for me to report to the South Maintenance Facility due to health issues and the increase [sic] cost of transportation.

2. The new work description is not comparable to the essential job description of my job classification (Superintendent).

   The job duties of the new assignment relegate my performing manual labor tasks and not supervisory functions as my primary role.

3. Due to heavy traffic conditions safety is a primary concern with the new job Requirement.

4. Mr. Chris Browning is changing the reporting stations to a centralize [sic] location that will bring hardship to myself and fellow co workers.

   Mr. Browning has a history of unfair employee practices and harassment of minority employees; and as a result several EEOC complaints have been file [sic].

Requested Remedy:

1. Public Works to assign work that is in accordance with my essential job duties.

2. Allow me to report to the South Maintenance facility and provide an office as the other Superintendents.

(Browning Dep. Ex. 94 [87-2], at 3; see also DSUMF ¶ 17; PR-DSUMF ¶ 17; PSMF ¶ 21; DR-PSMF ¶ 21.)[14] The record reflects that Ms. Parker denied the

[14] The Court excludes PSMF ¶ 22, which makes assertions about Mr. Browning's response to the grievance, as unsupported by the record cited. (See DR-PSMF ¶ 22.)

grievance on February 26, 2009, which led plaintiff to appeal, resulting in a Grievance Review Committee decision, discussed infra.

F. February 11, 2009 Contact with the Office of Disability Affairs

Mr. Harrison completed an "Understanding and Consent to Proceed" form with the Office of Disability Affairs on February 11, 2009. (See Belle Dep. Ex. 143 [87-11], at 4 (Bates No. FC 002856); see also PSMF ¶ 23, s. 1.) This form gives the Office of Disability Affairs authorization to evaluate the employee's medical condition, to communicate with his physician, and to start the reasonable accommodation process. (PSMF ¶ 24; DR-PSMF ¶ 24.) Plaintiff placed his initials beside a number of paragraphs on that form acknowledging an understanding of his rights under the ADA and the reasonable accommodation process, but he also placed his initials beside the following statement: "***I do not want to proceed with the Reasonable Accommodation Process***." (See Belle Dep. Ex. 143 [87-11], at 4 (Bates No. FC 002856) (emphasis added); see also DSUMF ¶ 23.) Although plaintiff denies DSUMF ¶ 23 (see PR-DSUMF ¶ 23), the document he submitted to the Office of Disability Affairs speaks for itself.

G. Ms. Shand's February 25, 2009 Email to Plaintiff

As a result of receiving plaintiff's grievance, Public Works Human Resources Manager Shands sent an email to plaintiff on February 25, 2009, referring him to the County's Office of Disability Affairs. (DSUMF ¶ 22; PR-

DSUMF ¶ 22; see also PSMF ¶ 25, s. 1; Belle Dep. Ex. 145 [187-12], at 1.) On February 27, 2009, Mr. Harrison sent an email in response to Ms. Shands and stated that he had contacted the Office of Disability Affairs on February 11, 2009. (PSMF ¶ 25, s. 2; see also email [85-3], at 2.) Ms. Shands responded that same date via email confirming that he had contacted the Office of Disability Affairs on February 11. (PSMF ¶ 25, s. 3; see also email [85-3], at 1.)

H. April 20, 2009 Contact with the Office of Disability Affairs

On April 20, 2009, Mr. Harrison completed a second "Understanding and Consent to Proceed" form at the Office of Disability Affairs. (See Belle Dep. Ex. 143 [87-11], at 5 (Bates No. FC 002857).) This time he did ***not*** place his initials beside the sentence which states: "I do not want to proceed with the Reasonable Accommodation Process." (Id.) He also completed an "Intake Form" for that Office in which he stated that he could not lift, push, or pull any object over ten pounds. (PSMF ¶ 26, modified per DR-PSMF ¶ 26.) The Office of Disability Affairs immediately sought information about plaintiff's medical condition from his physician. (See Apr. 20, 2009 Fax Cover Sheet and attachments from Wayne Stokes to Dr. James Bennett [87-11], at 11-17.) However, as shown infra, it took plaintiff's physician about a month to respond to the County's information request.

I. Plaintiff's May 15, 2009 EEOC Charge

On May 15, 2009, Mr. Harrison filed a charge of discrimination against the County with the Equal Employment Opportunity Commission ("EEOC"). (PSMF ¶ 7, s. 1; DR-PSMF ¶ 7.) This charge, with boxes checked for discrimination based on race, retaliation, and disability, alleged that discrimination began on April 26, 2009, and provided the following particulars:

> I. . . . In March 2009, I participated in an internal investigation on behalf of a co-worker who filed both internal and EEOC charges of discrimination against Fulton County.[15] Since March 2009, I have been subjected to different terms and conditions of employment by not being provided the appropriate work equipment to perform my job and being denied opportunities for promotion. On April 26, 2009, I was assigned different job assignments that my White co-workers are not required to perform.
>
> Also, I have been denied reasonable accommodation for my disability. I made my request for reasonable accommodation to Human Resources.
>
> II. In reference to the new assignments, management informed me that by assigning me to the new job duties that it was saving the county an enormous amount of money. In reference to my accommodation, Human Resources is claiming that it does not have any knowledge of my disability.
>
> III. I believe that I have been discriminated against because of my race (African American) . . . , because of my disability . . . ,

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[15] Plaintiff was a witness for a co-worker, James Marks. (PSMF ¶ 9; DR-PSMF ¶ 9.) It is undisputed that Mr. Browning did not know that plaintiff had been a witness for Mr. Marks. (DSUMF ¶ 44; PR-DSUMF ¶ 44.)

> and in retaliation for opposing unlawful employment practices in violation of the ADA.

(Chg. No. 410-2009-04014, filed as Belle Dep. Ex. 138 [87-9].)

J. The First Doctor's Note and the County's ADA Certification

On May 28, 2009, plaintiff's physician, James K. Bennett, M.D., submitted documents to the Office of Disability Affairs which indicated that Mr. Harrison was twenty-five percent disabled. (PSMF ¶ 27, s. 1; DR-PSMF ¶ 27.) He wrote that plaintiff should lift no more than 100 pounds. (PSMF ¶ 27, s. 2; DR-PSMF ¶ 27.) The doctor also noted that Mr. Harrison may need to urinate frequently, or about every one to two hours. (PSMF ¶ 27, s. 3; DR-PSMF ¶ 27; see also Belle Dep. Ex. 143 [87-11], at 24 (Bates No. FC 002876)). No other restrictions were listed. (DSUMF ¶ 24; PR-DSUMF ¶ 24.)

By letter dated June 2, 2009 [85-4], the Office of Disability Affairs certified plaintiff as an individual with disabilities for purposes of the ADA. (PSMF ¶ 31, s. 1; DR-PSMF ¶ 31.) As a result of that certification, an interactive meeting was scheduled for June 19, 2009, between plaintiff, the Office of Disability Affairs, and the Department of Public Works to discuss plaintiff's need for a reasonable accommodation. (DSUMF ¶ 25; PR-DSUMF ¶ 25.)

K. The June 18, 2009 Grievance Review Committee Decision

On June 18, 2009, the Fulton County Grievance Review Committee held that the County's Public Works Department had erred in its practices and

procedures. (PSMF ¶ 45, s. 1; DR-PSMF ¶ 45.) Specifically, the Grievance Review Committee found that plaintiff was working outside of his class specification. (DSUMF ¶ 18; PR-DSUMF ¶ 18.)[16] The Grievance Review Committee thus recommended that the Department assign Mr. Harrison duties and responsibilities that were commensurate with his essential job duties. (PSMF ¶ 45, s. 2; DR-PSMF ¶ 45; see also Harrison Dep. Ex. 5 [77-2], at 4-5, and Harrison Dep. Ex. 6 [77-2], at 6.)

In response to that Grievance Review Committee decision, the County made an effort to revise the Work Plan so that Sewer System Superintendents Harrison and Henson could have supervisory responsibilities and also complete the project of locating water assets. (DSUMF ¶ 20; PR-DSUMF ¶ 20.) Ultimately, the County restructured the Department back to the way it was in 2001, with four Sewer System Superintendents—two in North Fulton and two in South Fulton—all performing the same work. (DSUMF ¶ 21; PR-DSUMF ¶ 21.) On August 19, 2009, the CMOM Work Plan was revised and assigned Mr. Harrison and Mr. Henson identical duties. (PSMF ¶ 46; DR-PSMF ¶ 46.)

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[16] The Court excludes DSUMF ¶ 19 as unsupported by the record cited.

L. Two Meetings on June 19, 2009

On June 19, 2009, immediately before the scheduled interactive meeting was set to begin, plaintiff met with Wayne Stokes and Tilford Belle[17] of the Fulton County Office of Disability Affairs and the Fulton County Office of Equal Employment Opportunity, respectively, about his need for accommodation. (DSUMF ¶ 26; PR-DSUMF ¶ 26; see also PSMF ¶ 29, ss. 1-2.) In this meeting

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[17] Mr. Belle held the title of Senior Equal Employment Opportunity Officer; his responsibilities included assisting the County to comply with its internal policies related to anti-harassment, anti-discrimination, prejudicial acts, policies and procedure issues, and investigating charges of discrimination, unlawful harassment and retaliation. (PSMF ¶ 28, s. 1; DR-PSMF ¶ 28.) Mr. Belle testified that his office became aware that Mr. Harrison could not engage in heavy lifting in May 2009. (PSMF ¶ 28, s. 2; DR-PSMF ¶ 28.) He added that Mr. Harrison was not given an interim reasonable accommodation. (PSMF ¶ 28, s. 3; DR-PSMF ¶ 28.) However, Mr. Belle testified that during this interim period, "it was reiterated in no uncertain terms [to Mr. Harrison] that he was not to exceed the recommendation of his physician as it related to his health condition." (Belle Dep. [86-1], at 53.) Mr. Belle investigated plaintiff's allegations in June 2009 and determined that he was similarly situated to Mr. Henson, and that since they both worked in the field, they should be given similar resources. (PSMF ¶ 38, s. 3; DR-PSMF ¶ 38; see also PSMF ¶¶ 39-40, as modified per DR-PSMF ¶¶ 39-40.) The Court excludes PMSF ¶ 41 (asserting that plaintiff was the only Sewer System Superintendent without an office) as unsupported by the record cited. With regard to PSMF ¶ 42 (asserting that plaintiff was not assigned a County vehicle but Mr. Henson was), the record shows that plaintiff had access to a County vehicle from the motor pool. (Belle Dep. [86-1], at 36-37.) Moreover, plaintiff has not directed the Court to any evidence that he asked for a vehicle and one was denied to him because of his race or in retaliation for protected activity. Finally, there was no race discrimination in vehicle assignment because Sewer System Superintendent Andrea Searles (African-American) had an assigned County vehicle. Thus, the Court deems DSUMF ¶ 42 immaterial and excludes it.

outside the presence of the Public Works Department's management, plaintiff told Mr. Stokes and Mr. Belle that he needed to relieve himself "maybe once an hour." (DSUMF ¶ 27.)[18]

In response to the inquiry from Messrs. Stokes and Belle about how long he thought it would take him to access restroom facilities when he was assigned to the field, the County contends that plaintiff responded, "30 to 45 minutes." (DSUMF ¶ 28.) Plaintiff denies the previous statement, citing his deposition testimony wherein he stated that he gave Messrs. Stoke and Belle no specific time frame because it would vary depending on how close his work location was to a public restroom. (PR-DSUMF ¶ 28.)

Plaintiff contends that, during this meeting, he was told to keep a log of every time he went to the restroom so that the County could monitor how often he needed bathroom breaks. (PSMF ¶ 29, s. 3.)[19] The County denies the preceding proposed fact, asserting that neither Mr. Stokes, Mr. Belle, nor anyone from the

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[18] Plaintiff denies the above proposed fact by citing PSMF ¶ 29. (See PR-DSUMF ¶ 27.) However, nothing in PSMF ¶ 29 refutes the above fact; thus, the Court deems DSUMF ¶ 27 admitted.

[19] Plaintiff actually testified that he could not recall whether the directive for him to keep a log came in this meeting or in a subsequent meeting. (Harrison Dep. [77-3], at 72.) The Court excludes sentence 4 of PSMF ¶ 29 because it is not supported by the record cited.

Department of Public Works told plaintiff that he was required to keep a log regarding the times he used the restroom. (DSUMF ¶ 32.)[20]

The parties then held the scheduled ADA interactive meeting. (See Mem. of June 24, 2009 from Wayne Stokes to Angela Parker [87-11], at 36; see also PSMF ¶ 31, s. 2; DR-PSMF ¶ 31.) Plaintiff avers that the accommodation he received was the assignment of an additional employee to his team to lift the heavy manhole covers. (Harrison Aff. [87] ¶ 14.)[21] Plaintiff further avers that this crew member was not able to lift the manhole covers and that he had to help him. (Id. ¶ 15.) Mr. Harrison adds that he told Mr. Tucker about this matter, but nothing was done. (Id. ¶ 16.) As a result, plaintiff contends that he was still required to lift manhole covers that weighed in excess of 100 pounds. (PSMF ¶ 32.) As discussed infra, the County contends that plaintiff was not required to lift manhole covers; that he was assigned a crew member to do that; and if he was

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[20] DSUMF does not have paragraphs numbered 30 and 31. Those missing paragraphs may have described the "plan" to which plaintiff reportedly agreed that is referenced in DSUMF ¶ 33. However, as plaintiff correctly contends, since there is no context for DSUMF ¶ 33, it is unclear and thus excluded. (See PR-DSUMF ¶ 33.) If the County is asserting that plaintiff agreed to its proposal that he keep a log, then plaintiff disagrees and contends that he was ordered to do so. (Id.)

[21] Plaintiff confusingly also points to a June 24, 2009 "Reasonable Accommodation Status Report" (Belle Dep. Ex. 143 [87-11], at 36 (Bates No. FC 002888)) prepared by Mr. Stokes which states that the Office of Disability Affairs recommended that plaintiff be accommodated by assignment to a sewer inspection work crew. (PSMF ¶ 31, s. 2 & PSMF ¶ 32.)

still lifting them, then he was disregarding his physician's orders and the accommodation provided to him. (DR-PSMF ¶ 32.)

M. Plaintiff's June 24, 2009 EEOC Charge

On June 24, 2009, plaintiff filed a second EEOC charge against the County. (PSMF ¶ 8, s. 1; DR-PSMF ¶ 8.) This charge, with boxes checked for discrimination based on retaliation and disability, alleges that discrimination began on June 19, 2009, and provides the following particulars:

> I. . . . I have requested reasonable accommodation for my disability. On May 15, 2009, I filed an EEOC Charge (410-2009-04014). On June 19, 2009, I was advised by management that I needed to keep a log of the times I use the restroom facilities. I have also been assigned to perform tasks of a lower level job classification in the field that other co-workers in my same position are not required to perform.
>
> II. I believe that I have been discriminated against because I am a person with a disability . . . and in retaliation for filing my previous charge in violation of the ADA.

(Chg. No. 410-2009-04675, filed as Belle Dep. Ex. 140 [87-10].)[22]

N. The Log

Plaintiff maintains that he began keeping a log of his bathroom breaks, and had his co-workers sign it to verify the times. (PSMF ¶ 30.) The County admits that Mr. Harrison kept a log with entries on 6/26/09, 6/29/09, 6/30/09, 7/21/09,

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[22] The Court excludes PMSF ¶ 10, which discusses the EEOC's findings with regard to plaintiff's two charges, as immaterial.

7/22/09, 7/23/09, 7/24/09, 7/27/09, 7/29/09 and 8/3/09, and that there are signatures at the bottom of the pages; however, the County asserts that the signatures are unrelated to any particular entries or times and it is impossible to tell what the numbers represent. (DR-PSMF ¶ 30.) A copy of this log is in the record as Browning Dep. Ex. 101 [87-5] and labeled, "Guy's Personal Log." (Id. at 2; see also Harrison Dep. [77-3], at 104 (identifying log as one recording his restroom breaks).) Construing the evidence in a light most favorable to plaintiff, this document appears to be a log of plaintiff's bathroom breaks at various dates in the summer of 2009.

O. The Second Doctor's Note

On July 28, 2009, Dr. Bennett wrote a letter to the County stating that plaintiff "should not be doing any heaving lifting as this can prove detrimental to his condition and result in negative complications." (See letter dated July 28, 2009 [87-11], at 19.)

P. Meeting of August 21, 2009 and Follow-up Memorandum

Mr. Belle states that he learned on August 21, 2009, that Mr. Harrison had been assisting the maintenance worker assigned to his team to lift manhole covers in violation of his doctor's restrictions on the amount of weight (100 pounds) that he could lift. (Belle Decl. [75-2] ¶ 20.) Mr. Belle and Mr. Stokes spoke to Mr. Harrison about his need to abide strictly by his doctor's orders. According to Mr.

Belle, Mr. Harrison explained that the worker assigned to perform the heavy lifting for him was incompetent and needed plaintiff's help to lift the manhole covers.[23] (Id.)

After this meeting, Mr. Stokes sent a memorandum to plaintiff (with a copy to Mr. Belle) addressing plaintiff's non-compliance with his medical restrictions. (Belle Decl. [75-2] ¶ 20.) This memorandum provides as follows:

> This memo serves as a reminder to your request for ADA Reasonable Accommodations and our meeting held on Friday, August 21, 2009.
>
> 1. You are to ensure that all work activities and actions are in compliance with your physician's latest medical restrictions dated July 28, 2009, **"should not be doing any heavy lifting".**
>
> 2. You are to forward any updated medical information to this office. This will ensure compliance with your ADA Reasonable Accommodations.
>
>   You are to notify this office and your supervisory team of any future problems that interfere with your accommodations.
>
> 3. Please inform this office of any changes in your current assignment or additional duties as a Sewer Systems Superintendent.
>
> 4. Please document any issues or concerns that are impacting your ADA Reasonable Accommodations as you attempt to perform the essential functions of your job.

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[23] Plaintiff's description of this August 21 conversation is similar to that provided by Mr. Belle. (See PSMF ¶ 33; admitted by defendant, see DR-PSMF ¶ 33.)

5. Your ADA accommodations will be re-evaluated within the next 30 days to ensure ADA compliance. This office will proceed in developing an ADA Reasonable Accommodations Plan.

Should you have any questions regarding the above, do not hesitate to contact me.

(Aug. 26, 2009 Mem. from Stokes to Harrison, filed as Ex. B to Belle Decl. [75-2], at 17.)

Q. Plaintiff's Automobile Accident on August 27, 2009

Plaintiff was involved in an automobile accident while working on August 27, 2009. (Harrison Dep. [77-3], at 108.) He was injured and subsequently missed some work, returning in January 2010. (See Jan. 29, 2010 Reasonable Accom. Status Rpt. [87-11], at 30.) He was approved to return to full duty, including driving in May 2010 (but with the aforementioned lifting restriction). (See May 6, 2010 Reasonable Accom. Status Rpt. [87-11], at 26.) During the interim, in October 2009, the County removed plaintiff from performing field work. (PSMF ¶ 34, as modified per record cited.)

R. The September 2009 Desk Audit

Plaintiff contends that the duties assigned to him in the CMOM Work Plan (i.e., surveying manholes and working in the field) should have been performed by someone he supervised and were thus outside of his job classification. (PSMF

¶ 19, s. 2.)[24] In a memorandum dated September 11, 2009 [87-6], County personnel department officials wrote that they had conducted a desk audit on September 10, pursuant to a request from the County Manager, to determine whether the duties performed by Sewer System Superintendents Henson, Harrison, and Searles were aligned with the essential duties of the position as described in its job classification. (Id. at 2.) They found as follows:

> Based upon the fact-finding above, it has been determined that incumbents James Henson and Guy Harrison, Sewer System Superintendents (C41) perform the duties as described in the analysis. The duties performed **are not** closely aligned with the essential duties as described in the job classification of Sewer System Superintendent (C41). Mr. Henson and Mr. Harrison indicated that they were recently transferred (two months ago) from South Fulton Sewer Division to Maxwell Road. With regard to incumbent Andrea Searles, it has been determined that the duties performed **are** in close alignment with the essential duties as described in the job classification of Sewer System Superintendent (C41).

(Id. at 3.) Mr. Henson is Caucasian and Ms. Searles is African American. (Harrison Dep. [77-3], at 81-82.)

S. Promotional Opportunities for Plaintiff 2008/2013

Plaintiff proposes facts about his unsuccessful applications for promotion to three positions in the Department: (1) water services manager (July 25, 2008), (2) senior construction project manager (March 26, 2009), and (3) deputy land

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[24] The Court excludes sentence 1 of PSMF ¶ 19 as unsupported by the record cited.

manager (January 25, 2011). (PSMF ¶¶ 47, 49-50; DR-PSMF ¶¶ 47, 49-50; see also Pl.'s Ex. H [85-7], at 1 (listing jobs sought and application dates).)

In June 2008, plaintiff interviewed for the position of water services manager. (DSUMF ¶ 51; PR-DSUMF ¶ 51.) Mr. Belle from the Fulton County EEO office observed these interviews. (DSUMF ¶ 52; PR-DSUMF ¶ 52.) The standard procedure used in Fulton County was followed here: Interview questions were developed prior to the interviews. The interviews were conducted by a panel asking these same questions of each candidate. Each panelist gave a numerical score to the candidates' responses. (DSUMF ¶ 53.)[25] No candidate scored high enough to qualify for the position. (DSUMF ¶ 54, deemed admitted per note 25, supra.) Mr. Belle interviewed each candidate—including plaintiff—after the panel interview to ascertain whether there was any aspect of the process

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[25] In response to four of defendant's proposed facts, plaintiff asserts that he "is without sufficient information to admit or den[y], therefore it is denied." (See PR-DSUMF ¶¶ 53-54, 57-58.) In one other, he asserts that he cannot admit or deny a deponent's observation. (Id. ¶ 60.) Under the Local Rules, the "response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Fed. R. Civ. P. 56(d)." N.D. Ga. R. 56.1 B.(2)a.(4). Because plaintiff has not complied with Federal Rule of Civil Procedure 56(d), the Court deems DSUMF ¶¶ 53-54, 57-58, and 60 admitted.

that the candidate felt was unfair; plaintiff did not report any perception that the process was unfair. (DSUMF ¶ 55.)[26]

Neither party submits any evidence about the position of Senior Construction Project Manager for which plaintiff reportedly applied in March 2009. Although the document Mr. Harrison submitted which lists his employment application history shows him as "qualified" for that job (see Pl.'s Ex. H [85-7], at 1), he must not have been interviewed. Given that plaintiff has the burden of proof, and has submitted no evidence about who applied and was chosen over him for this job, the Court cannot consider it.

Plaintiff opines that he and Ms. Searles were the most qualified individuals for the Sewer System Superintendent II positions that were available in 2013. (PSMF ¶ 48.) The County promoted Ms. Searles. (Harrison Dep. [77-3], at 152.) Mr. Belle also observed the interviews for the position of Sewer System Superintendent II. (DSUMF ¶ 56; PR-DSUMF ¶ 56.) The standard procedure used in Fulton County was followed here as well: Interview questions were developed prior to the interviews. The interviews were conducted by a panel asking these same questions of each candidate. Each panelist gave a numerical

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[26] Plaintiff denies the statement before this note (see PR-DSUMF ¶ 55), pointing to his general testimony that he was unfairly denied promotion. However, that denial does not refute Mr. Belle's testimony, which the Court deems admitted.

score to the candidates' responses. (DSUMF ¶ 57, deemed admitted per note 25, supra.) The promotions were given to the two candidates with the highest scores. (DSUMF ¶ 58, deemed admitted per note 25, supra.) Mr. Belle interviewed each candidate—including plaintiff—after the panel interview to ascertain whether there was any aspect of the process that the candidate felt was unfair; plaintiff did not report any perception that the process was unfair. (DSUMF ¶ 59.)[27] It was Mr. Belle's opinion that plaintiff did not interview as well as the other candidates did in both 2008 and 2013. (DSUMF ¶ 60, deemed admitted per note 25, supra.)[28]

III. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a

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[27] Plaintiff denies the statement before this note (see PR-DSUMF ¶ 59), pointing to his general testimony that he was unfairly denied promotion. However, that denial does not refute Mr. Belle's testimony. Thus, the Court deems DSUMF ¶ 59 admitted.

[28] The Court excludes as immaterial facts proposed about the vandalism of plaintiff's car by an unknown person. (See PSMF ¶¶ 51-53; DSUMF ¶ 61.) Plaintiff retired from his employment with the County in January 2014. (Harrison Dep. [77-3], at 175.)

genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

IV. LEGAL ANALYSIS

A. Plaintiff's Race Discrimination and Retaliation Claims

Plaintiff alleges race discrimination and retaliation in violation of both Title VII and Section 1983. (See supra Part I.) Claims under Title VII and Section 1983 employ the same analytical framework. Koch v. Rugg, 221 F.3d 1283, 1297 n.31 (11th Cir. 2000). However, Title VII and Section 1983 claims have different timeliness rules. For example, under Title VII a plaintiff must file a charge of discrimination with the EEOC within 180 days of a discrete discriminatory or retaliatory act. See 42 U.S.C. § 2000e-5(e)(1). If he fails to do

so, then a subsequent suit related to that discrete act is procedurally barred and must be dismissed for failure to exhaust administrative remedies. See Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980). Although there is no similar administrative exhaustion for a Section 1983 claim, the "statute of limitations for a section 1983 claim arising out of events occurring in Georgia is two years." Combs v. Nelson, 419 F. App'x 884, 886 (11th Cir. 2011) (per curiam).

Plaintiff filed this suit in October 2013. Because almost all of the events listed in the Statement of Facts occurred before October 2011, plaintiff concedes that his only Section 1983 claim relates to defendant's alleged race-based failure to promote him to the Sewer System Superintendent II position in April 2013. (Pl.'s Resp. Br. [84], at 13-14.)[29] Therefore, the Court begins in Part III.A.2. with plaintiff's only Section 1983 claim, then addresses his Title VII retaliation claim in Part III.A.3., and concludes with his Title VII race discrimination claim in Part III.A.4. But first, the Court summarizes in Part III.A.1 the analytical framework applied in discrimination cases.

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[29] Because plaintiff never filed an EEOC charge about this alleged 2013 race-based failure to promote, he cannot pursue a Title VII claim about it now. Moreover, plaintiff does not allege any retaliatory event during the two years preceding the filing of this action. Thus, he has no Section 1983 retaliation claim.

1. **The Analytical Framework**

The issue on summary judgment is whether plaintiff has carried his burden of producing evidence sufficient to create a genuine issue as to a material fact on each of his claims. Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998). Plaintiff can carry this burden either by producing (1) direct evidence of discrimination motivating the employment decision, (2) circumstantial evidence sufficient to allow an inference of discrimination, or (3) statistical proof of a pattern of discrimination. Wright v. Southland Corp., 187 F.3d 1287, 1293 n.8 (11th Cir. 1999). Because plaintiff has proffered no direct evidence or statistical proof, he is proceeding with circumstantial evidence.

When analyzing a disparate treatment claim based upon circumstantial evidence, courts use the burden-shifting framework articulated by the Supreme Court. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, the plaintiff must first establish a prima facie case of discrimination, which varies slightly depending on the type of claim raised. See Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002). Summary judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a prima facie case. See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1433 (11th Cir. 1998).

If plaintiff establishes a prima facie case, an inference of discrimination is raised, and the burden of production then shifts to the defendant to rebut the inference of discrimination by articulating a legitimate, non-discriminatory reason for its action. This burden is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997) (per curiam). If the defendant meets this light burden, then the inference of discrimination is erased, and the burden then shifts back to the plaintiff "to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination." Id. at 1565.[30] "To avoid summary judgment the plaintiff must introduce significantly probative evidence showing that the asserted reason is merely a pretext for discrimination. A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." Brooks v. Cty. Comm'n of Jefferson Cty, Ala., 446 F.3d 1160, 1163 (11th Cir. 2006) (citations and internal punctuation omitted).

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[30] See also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1332 (11th Cir. 1998) (plaintiff may establish triable issue on pretext (1) by showing that the legitimate nondiscriminatory reasons should not be believed; or (2) by showing that, in light of all of the evidence, discriminatory reasons more likely motivated the decision than the proffered reasons); Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (district court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence).

2. Plaintiff's Section 1983 Failure to Promote Claim

In order to establish a prima facie case of discriminatory failure to promote, plaintiff must show "(1) that he is a member of a protected class; (2) that he was qualified for and applied for the promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted." Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001). Plaintiff fails to submit any probative evidence establishing element four. In fact, as discussed supra Part II.S, the County promoted Ms. Searles to the Sewer System Superintendent II position instead of plaintiff in 2013, and she is a member of his protected class.

The County's promotion of an African-American employee to the position sought by plaintiff forecloses any race-based failure to promote claim. See Revere v. McHugh, 362 F. App'x 993, 997 (11th Cir. 2010) (per curiam) (African-American plaintiff failed to establish a failure to promote prima facie case when another African-American was promoted to the position she had sought); see also Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir. 2004) (stating a comparator must be outside the plaintiff's protected class); Martin v. City of Atlanta, Ga., No. 1:07-CV-326-WSD, 2013 WL 4507074, at *5 (N.D. Ga. Aug. 23, 2013) (promotion of person in same protected class as plaintiff to the job he sought defeats failure to promote claim), aff'd, 579 F.

App'x 819 (11th Cir. 2014). Plaintiff's failure to establish a prima facie case requires entry of summary judgment for defendant on plaintiff's Section 1983 failure to promote claim. See Turlington, 135 F.3d at 1433.

3. Plaintiff's Title VII Retaliation Claim

In the section of his Response Brief labeled, "**Mr. Harrison can prove retaliation**," plaintiff points to two events alleged in his June 24, 2009 EEOC charge which he claims were retaliatory. (See Pl.'s Resp. Br. [84], at 20.) This June 24, 2009 EEOC charge states that plaintiff had filed an EEOC charge on May 15, 2009, and then alleges that (1) on June 19, 2009, he received direction from management to keep a log of the times he used the restroom facilities; and (2) he had "also been assigned to perform tasks of a lower level job classification in the field that other co-workers in [his] same position [were] not required to perform." (See Chg. No. 410-2009-04675, filed as Belle Dep. Ex. 140 [87-10].)

The Court puts aside for a moment the June 19, 2009 directive that plaintiff keep a log of his bathroom breaks and focuses first on the second alleged retaliatory action, i.e., assigning plaintiff to perform tasks of a lower-level job classification in the field.

A prima facie case of retaliation[31] requires a plaintiff to show that: (1) he engaged in an activity protected under Title VII; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008); Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

Plaintiff engaged in activity protected under Title VII when he filed the May 15, 2009 EEOC charge. See 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against an employee "because he has . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [thereunder]."); see also Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1350 (11th Cir. 1999) (filing an EEOC charge is protected activity).[32]

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[31] In Univ. of Tex. Sw. Med. Ctr. v. Nassar, ___U.S. ___, 133 S. Ct. 2517, 2534 (2013), the Supreme Court held that a plaintiff bringing a Title VII retaliation claim "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." The Eleventh Circuit has held that the burden-shifting framework set forth in McDonnell Douglas continues to apply to retaliation claims after Nassar. See Mealing v. Ga. Dep't of Juvenile Justice, 564 F. App'x 421, 427 n.9 (11th Cir. 2014) (per curiam).

[32] Plaintiff also asserts that his January 28, 2009 grievance was protected activity. (Pl.'s Resp. Br. [84], at 9.) While that may be true, as shown infra, the County assigned plaintiff field work that he considered beneath his classification before he filed that grievance. Indeed, the grievance concerned that new work assignment. That work assignment could not have been in retaliation for engaging in protected activity because it preceded his protected activity.

Assuming that plaintiff could satisfy element two of a prima facie case (i.e., that the assignment to perform tasks of a lower level job classification in the field was an adverse employment action), he cannot show a causal connection between his filing of an EEOC charge on May 15, 2009 and any adverse employment action. The undisputed material facts show that plaintiff had been assigned to perform tasks of a lower level job classification in the field long before he filed that EEOC charge.

As noted above, the Work Plan designed by CMOM Manager Tucker assigned plaintiff to field work in late-November 2008. In his grievance dated January 28, 2009, plaintiff wrote, inter alia, that the "new work description is not comparable to the essential job description of my job classification (Superintendent)," and that the "job duties of the new assignment relegate my performing manual labor tasks and not supervisory functions as my primary role." (Browning Dep. Ex. 94 [87-2], at 3.) The remedy plaintiff requested included assignment of work that was "in accordance with [his] essential job duties." (Id.) In sum, because there is no evidence that defendant assigned plaintiff to perform tasks of a lower level job classification in the field in retaliation for his filing of the May 15, 2009, EEOC charge, summary judgment should be entered for

defendant on this part of plaintiff's Title VII retaliation claim given his failure to establish a prima facie case.[33]

Even if plaintiff's Response Brief had relied on the allegations made in the May 15, 2009 EEOC charge, the undersigned's recommendation would not change. For example, the May 15 charge alleges that plaintiff participated in an internal investigation on behalf of a co-worker who filed both internal and EEOC charges in March 2009, and since that date he had been subjected to different terms and conditions of employment by not being provided appropriate work equipment, denied opportunities for promotion, and on April 26, 2009, assigned different job assignments. (See Chg. No. 410-2009-04014, filed as Belle Dep. Ex. 138 [87-9].)

Plaintiff has submitted no probative evidence showing that he was denied a promotion during this relevant time period. Plaintiff has also submitted no probative evidence showing that his work equipment was inappropriate. But even if he had submitted such evidence, being provided with inappropriate work equipment would not constitute an adverse employment action. (See the following paragraph for a discussion of this concept.) This is especially true

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[33] The County points to an interrogatory response in which plaintiff states that was assigned field work beneath his classification in October 2007. (Def.'s Br. [77-1], at 7.) The Court does not rely upon this response because it appears to have been made in error. Given other record evidence, Mr. Harrison probably meant to write that he began performing field work in October 2008.

when there is no evidence that plaintiff was disciplined for poor performance caused by that inappropriate equipment. Finally, as plaintiff explained in his deposition, the date of April 26, 2009 that he inserted in the May 15 EEOC charge was one he arbitrarily selected. (Harrison Dep. [77-3], at 46.) He testified that he had been assigned to perform field work that he believed was below his job classification since "right before the beginning of 2009," i.e., late-2008. (Id. at 46-47.) The bottom line is that the assignment to plaintiff of field work that he believed was beneath his job classification occurred well before he either assisted a co-worker with an EEOC charge in March 2009 or filed his own EEOC charges in May and June 2009. Thus, the assignment to plaintiff of field work that was outside of his job classification could not have been in retaliation for engaging in protected activity.

The Court turns now to plaintiff's claim that, in retaliation for his filing of the May 15, 2009 EEOC charge, he was advised by management on June 19, 2009 to keep a log of the times he used the restroom facilities. As noted above, the second element of a retaliation prima facie case requires the plaintiff to show that he suffered an adverse employment action. To be sure, "not every unkind act is sufficiently adverse" to qualify as an adverse employment action and support a retaliation claim. Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1181 (11th Cir. 2003) (citation omitted); see also Davis v. Town of Lake Park, Fla., 245 F.3d

1232, 1238 (11th Cir. 2001) ("not all conduct by an employer negatively affecting an employee constitutes adverse employment action" for Title VII purposes). Instead, an employment action meets the above threshold only when it "results in some tangible, negative effect on the plaintiff's employment" through "a serious and material change in the terms, conditions or privileges of employment . . . as viewed by a reasonable person in the circumstances." Shotz, 344 F.3d at 1181-82 (citations omitted); see also Shannon v. Bellsouth Telecomms., 292 F.3d 712, 716 (11th Cir. 2002) (explaining that "some threshold level of substantiality" must be satisfied for conduct to constitute an adverse employment action, inasmuch as not everything that makes an employee unhappy is actionable). To show an "adverse employment action" for Title VII purposes, "the employer's action must impact the terms, conditions or privileges of the plaintiff's job in a real and demonstrable way," and a plaintiff must show that a reasonable person in the circumstances would have viewed it as "a serious and material change in the terms, conditions, or privileges of employment." Davis, 245 F.3d at 1239.

Defendant posits some legitimate reasons for asking plaintiff to keep a record of vehicle usage. (See Belle Decl. [75-2] ¶¶ 4-14.) However, for purposes of summary judgment, the Court accepts plaintiff's claim that he was asked to keep a log regarding the times he used the bathroom. However, such a request does not amount to an adverse employment action under the case law cited above.

Although the request may have been offensive to plaintiff, no reasonable person in the circumstances would have viewed this request as "a serious and material change in the terms, conditions, or privileges of employment." Davis, 245 F.3d at 1239. Accordingly, summary judgment should be granted to defendant on this part of plaintiff's Title VII retaliation claim given his failure to establish a prima facie case.

4. Plaintiff's Title VII Race Discrimination Claim

To establish a prima facie race discrimination claim, plaintiff must show that he (1) is a member of a protected class; (2) was subjected to an adverse employment action; (3) was qualified to do the job; and (4) was replaced or otherwise lost a position to a person outside the protected class. Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000). Alternatively, the fourth element may be satisfied if the plaintiff shows that he was treated less favorably than similarly situated employees outside the protected class. Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

The parties dispute element two, i.e., whether plaintiff suffered an adverse employment action. As already shown in the retaliation section, this is a very high threshold for a plaintiff to meet if he is not discharged, demoted, or suspended. Plaintiff complains about the Work Plan, and how it assigned him to perform tasks he considered beneath his job classification, such as manual labor

related to removing heavy manhole covers, that his Caucasian counterpart, Mr. Henson, allegedly did not have to perform.

In considering this race discrimination claim, the Court is mindful that an African-American supervisor, CMOM Manager Tucker, assigned the work that Sewer System Superintendents Harrison and Henson performed. It strains credulity to accept plaintiff's contention that Mr. Tucker decided to discriminate against a fellow African American in making those work assignments.

Moreover, plaintiff is simply disputing a work assignment. The Eleventh Circuit has stated that "[w]ork assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities." Davis, 245 F.3d at 1244. For this reason, "courts [] have been reluctant to hold that changes in job duties amount to adverse employment action when unaccompanied by any tangible harm" such as a reduction in salary. Id.; see also Melton v. Nat'l Dairy LLC, 705 F. Supp. 2d 1303, 1329 (M.D. Ala. 2010) ("Changes in work assignments that do not cause any economic injury to the employee do not constitute adverse employment action.").[34]

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[34] There is also no probative evidence of disparate treatment. Both Mr. Henson and plaintiff were assigned work outside of their Sewer System Superintendent job classification. Only Ms. Searles (African American) was assigned work consistent with that job classification. (See supra Part II.R.)

As amply stated already, the changes in plaintiff's job duties wrought by the Work Plan did not amount to an adverse employment action because there was no tangible harm to him, such as a reduction in salary. Mr. Harrison's personal belief that the change in job assignments constituted a "demotion" (see Pl.'s Resp. Br. [84], at 10) is immaterial. See Davis, 245 F.3d at 1239 (employee's subjective view of the significance and adversity of the employer's action is not controlling).

This Court is unwilling to substitute its judgment for that of the County in relation to Mr. Tucker's assignment of job duties to plaintiff and Mr. Henson. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (stating "Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions.'") (quoting Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir.1988)). For the same reasons, changes in work assignments are not adverse employment actions but rather "an 'ordinary tribulation of the workplace' for which employees should expect to take responsibility." MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1299 (M.D. Fla. 2002). Therefore, summary judgment should be entered for the County on plaintiff's Title VII race discrimination claim given his failure to establish a prima facie case.

B. Plaintiff's ADA Failure to Accommodate Claim

Plaintiff also alleges that the County failed to accommodate his disability in violation of the ADA. Congress enacted the ADA to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Under the ADA, an employer is prohibited from discriminating "against a qualified individual on the basis of disability" (id. § 12112(a)) by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." Id. § 12112(b)(5)(a).

> To state a prima facie claim for failure to accommodate under the ADA, a plaintiff must show that: (1) he is disabled; (2) he is a qualified individual, meaning able to perform the essential functions of the job; and (3) he was discriminated against because of his disability by way of the defendant's failure to provide a reasonable accommodation.

Russell v. City of Tampa, No. 15-14946, 2016 WL 3181385, at *2 (11th Cir. June 8, 2016) (per curiam) (citing Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001)). "[T]he initial burden of requesting an accommodation is on the employee." Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363-64 (11th Cir. 1999). The undisputed material facts show that, although plaintiff completed an "Understanding and Consent to Proceed" form with the County's

Office of Disability Affairs on February 11, 2009, he initialed the line indicating that he "did not want to proceed with the Reasonable Accommodation Process." (See Belle Dep. Ex. 143 [87-11], at 4 (Bates No. FC 002856).) An employer's duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made. Frazier-White v. Gee, 818 F.3d 1249, 1255-56 (11th Cir. 2016). Because plaintiff did not make a specific demand for an accommodation, and instead requested that the process not begin, the County's duty to provide a reasonable accommodation was not triggered at that time.[35]

The record also shows that Mr. Harrison returned to the Office of Disability Affairs on April 20, 2009, and this time indicated that he wanted the reasonable accommodation process to begin. (See Belle Dep. Ex. 143 [87-11], at 5 (Bates No. FC 002857).) At this point, the County had an obligation to "'make a reasonable effort to determine the appropriate accommodation.'" Gaston, 167

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[35] Plaintiff also argues that his email of August 26, 2008, which he describes as seeking a change in his work location from North Fulton to South Fulton, was his first request for reasonable accommodation. (Pl.'s Resp. Br. [84], at 17.) However, as already discussed (see Part II.D.1 n.9, supra), that email only vaguely references plaintiff's medical condition. The case law cited before this note requires a specific demand for accommodation, not the mere mention of a vague medical condition. See Frazier-White, 818 F.3d at 1255-56. In any event, plaintiff did not start performing the strenuous work which the County later learned was outside his lifting restriction until late-November 2008. There seems to have been no accommodation needed for a medical condition in August 2008.

F.3d at 1364 (quoting 29 C.F.R. pt. 1630 App. § 1630.9); see also Melange v. City of Center Line, 482 F. App'x 81, 84-85 (6th Cir. 2012) ("Once the employee requests an accommodation, the employer has a duty to engage in an 'interactive process' to 'identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.") (internal quotation marks omitted).

The undisputed material facts show that the County began that interactive process immediately after receiving that second "Understanding and Consent to Proceed" form. So that it could have information to make a decision, defendant requested information from plaintiff's doctor on April 20, 2009. (See Fax Cover Sheet and attachments from Wayne Stokes to Dr. James Bennett [87-11], at 11-17.) Unfortunately, plaintiff's doctor took a month to respond, not sending over a description of plaintiff's job-related limitations until May 28, 2009. (See Belle Dep. Ex. 143 [87-11], at 24 (Bates No. FC 002876).) Those limitations included a 100-pound lifting restriction and notice that plaintiff would need to urinate frequently. (Id.) The County then certified plaintiff as an individual with a disability for purposes of the ADA on June 2, 2009 [85-4], and scheduled an interactive meeting with plaintiff for June 19, 2009, to discuss his need for a

reasonable accommodation. (DSUMF ¶ 25; PR-DSUMF ¶ 25.)[36] At that meeting, the County assigned an additional employee to plaintiff's team so that he would not have to lift the heavy manhole covers. That was a reasonable accommodation. See McKane v. UBS Fin. Servs., Inc., 363 F. App'x 679, 681 (11th Cir. 2010) ("An employee with a disability is not entitled to the accommodation of his choice, but only to a reasonable accommodation.').

Plaintiff complains that the County took too long to provide reasonable accommodation, making him wait about four months after he first requested accommodation (i.e., from February 11, 2009 to June 2, 2009). (Pl.'s Resp. Br. [84], at 15.) However, as shown above, plaintiff did not give permission to start the reasonable accommodation process on February 11, 2009. He did not grant permission to do so until April 20, 2009. Because the interactive process only begins when an employee requests an accommodation, Bralo v. Spirit Airlines, Inc., No. 13-60948-CIV, 2014 WL 1092365, at *16 (S.D. Fla. Mar. 19, 2014),

[36] Although plaintiff argues that he was not given any interim accommodation (Pl.'s Resp. Br. [84], at 15), Mr. Belle's undisputed testimony is that plaintiff was informed not to perform any work outside of the limitations imposed by his physician during this process.

and plaintiff did not request one until April 20, 2009, the process took only about two months, not four as plaintiff claims.[37]

Plaintiff also complains that, after the County provided reasonable accommodation (i.e., assigning an employee to lift the manhole covers for him), he still had to perform this type of work. (Pl.'s Resp. Br. [84], at 16.) The undisputed facts show, however, that when Mr. Belle learned on August 21, 2009, that Mr. Harrison had been assisting the maintenance worker assigned to his team to lift manhole covers, he met with Mr. Harrison and told him that he needed to abide by his doctor's lifting restriction. Mr. Harrison's excuse was that the maintenance worker assigned to assist him was incompetent and needed help lifting manhole covers. After this meeting, the County sent plaintiff a

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[37] "[A]n employer's unreasonable delays in identifying and implementing reasonable accommodations can constitute a lack of good faith for purposes of the interactive process, and can serve as evidence of an ADA violation." Crutcher v. Mobile Hous. Bd., No. CIV.A. 04-0499-WS-M, 2005 WL 2675207, at *12 (S.D. Ala. Oct. 20, 2005). However, the record shows no unreasonable delays here. Once plaintiff requested accommodation, the County moved quickly by requesting information from his doctor. Although the process took two months, half of that delay was caused by plaintiff's doctor. In any event, even if the County had been responsible for the entire two-month delay, plaintiff could not complain, as other courts have excused much longer delays. See Terrell v. USAir, 132 F.3d 621, 628 (11th Cir. 1998) (three-month delay by the employer in granting a requested accommodation was not unreasonable); Hartsfield v. Miami-Dade Cty., 90 F. Supp. 2d 1363, 1373 (S.D. Fla. 2000) (delay of almost ten months in providing closed circuit television device for reading documents did not constitute failure to accommodate under ADA), aff'd sub nom. Hartsfield v. Miami Dade Cty., 248 F.3d 1179 (11th Cir. 2001).

memorandum directing him to abide by his physician's lifting restrictions. (See Aug. 26, 2009 Mem. from Stokes to Harrison, filed as Ex. B to Belle Decl. [75-2], at 17.)

If Mr. Harrison elected not to take advantage of the reasonable accommodation provided by continuing to lift heavy manhole covers in violation of the lifting restriction imposed by his doctor, then he cannot fault the County. See Smith v. Midland Brake, Inc., a Div. of Echlin, Inc., 180 F.3d 1154, 1177 (10th Cir. 1999) (once the employer has offered a reasonable accommodation, its duties under the ADA have been discharged); see also 29 C.F.R. § 1630.9(d) ("[I]f such individual rejects a reasonable accommodation, . . . that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified."). Because plaintiff fails to state a prima facie case of failure to accommodate, summary judgment should be entered for defendant on plaintiff's ADA claim.

V. CONCLUSION

As explained above, no genuine disputes as to any material facts remain for trial in this matter. Therefore, the undersigned **RECOMMENDS** that Defendant's Motion [75] and Amended Motion [77] for Summary Judgment be **GRANTED**.

The Clerk is **DIRECTED** to terminate the reference to the Magistrate Judge.

SO RECOMMENDED, this 31st day of October, 2016.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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EEOC Charge Nos. 410-2009-04014 and 410-2009-04675

Guy Harrison
4059 Thaxton Road
College Park, Georgia 30349

Charging Party

Fulton County Department of Public Works
141 Pryor Street, S.W.
Suite 4038
Atlanta, Georgia 30303

Respondent

DETERMINATION

I issue the following determination on the merits of these charges.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq. (Title VII) and Title I of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101e, et seq. (ADA).

Charging Party alleges that in March 2009, he participated in an internal investigation on behalf of a co-worker and was subsequently subjected to different terms and conditions of employment than his White co-workers by: (1) not being provided the appropriate work equipment to perform his job (2) denied opportunities for promotion (3) Respondent keeping a log for restroom breaks and (4) being assigned to perform tasks his White co-workers are not required to perform. Charging Party further alleges that he requested and was denied a reasonable accommodation. Charging Party believes that he was discriminated against because of his race (African-American), his disability and in retaliation for participating in a protected activity, in violation of Title VII and the ADA.

Respondent denies the allegations.

The Commission's investigation reveals that after Charging Party participated in a protected activity, he was subjected to different terms and conditions of employment than his White co-workers. The evidence further reveals that Respondent had knowledge of Charging Party's disability and denied his reasonable accommodation request until he filed his second EEOC charge on June 24, 2009.

Based upon the evidence and the record as a whole, there is reasonable cause to conclude that Charging Party was discriminated against because of his race (African American), his disability and in retaliation for opposing unlawful employment practices in violation of VII and the ADA.

Appendix - C

Letter of Determination
EEOC Charge Nos: 410-2009-04014 and 410-2009-04675

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. In this regard, conciliation of this matter has now begun. A conciliation agreement containing the types of relief necessary to remedy the violation of the statute is included for your review. When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any reason is unable to secure a settlement acceptable to the office Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party, aggrieved persons and the Commission. The confidentiality provisions of the statute and Commission Regulations apply to information obtained during conciliation.

You are hereby reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in the Commission's investigation is also prohibited. The protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission:

9/14/2011
Date

Bernice Williams-Kimbrough
Director
Atlanta District Office