IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16492

D.C. Docket No. 8:14-cv-01732-VMC-TBM

NORIS BABB,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(July 16, 2018)

AMENDED OPINION

Before ED CARNES, Chief Judge, NEWSOME and SILER,* District Judge.

PER CURIAM:

This appeal arises from an employment-discrimination action filed by Dr. Noris Babb, a

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

pharmacist at the C.W. "Bill" Young VA Medical Center in Bay Pines, Florida, against the Secretary of the Department of Veterans Affairs. Babb alleges that her managers discriminated against her based on her gender and age, retaliated against her because she had engaged in protected EEOC activity, and subjected her to a hostile work environment—all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 et seq. Babb appeals from the district court's grant of summary judgment in favor of the Secretary.

Babb raises three issues on appeal. First, she contends that the district court erred by applying the McDonnell Douglas standard[1] rather than the more lenient "motivating factor" test to her gender- and age-discrimination and retaliation claims. Second, she asserts that the district court overlooked genuine issues of material fact concerning intent and pretext. And finally, she argues that the district court erroneously granted summary judgment on her hostile-work-environment claim.

Having considered the parties' written briefs and oral arguments, we affirm the district court's grant of summary judgment on Babb's ADEA claim, her Title VII retaliation claim, and her hostile-work-environment claim. We reverse the district court's grant of summary judgment on Babb's gender-discrimination claim and remand for consideration under the motivating-factor standard.

I

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The facts here are complex—or at least unwieldy. For the sake of clarity, we divide our summary into three parts: (a) a description of Babb's employment and responsibilities in the years leading up to her (and others') complaints about alleged gender and age discrimination; (b) a brief description of those complaints; and (c) a slightly more extended description of the actions that Babb contends constituted unlawful discrimination and/or retaliation, as well as the Secretary's asserted reasons for those actions.

A

Babb, a clinical pharmacist, joined the Medical Center in 2004. As a clinical pharmacist, Babb worked under the auspices of the Medical Center's Pharmacy Services division. In 2006, Babb accepted a position as a geriatrics pharmacist. Between 2006 and June 2013, Babb was assigned to an "interdisciplinary team" of caregivers in the Medical Center's Geriatric Clinic. Accordingly, Babb's work scope and responsibilities were governed by a service agreement between Pharmacy Services and Geriatric. As a clinical pharmacist working in the Geriatric Clinic, Babb was supervised both by Dr. Leonard Williams, Chief of the Geriatric Clinic, and by Pharmacy Services administrators—Dr. Marjorie Howard, Babb's direct Pharmacy Services supervisor; Dr. Keri Justice, Associate Chief of Pharmacy; and Dr. Robert Stewart, the Clinical Pharmacy Supervisor.

In 2009, while a member of the interdisciplinary team, Babb obtained an "advanced scope of practice," which meant that she could practice "disease state management" (or "DSM")—i.e., she could see patients

and prescribe medication for conditions within the scope of her expertise without consulting a physician.

In 2010, the VA announced a nationwide initiative called "Patient Aligned Care Team" (or "PACT"), which triggered staffing changes at the Medical Center. As part of the PACT initiative, the VA established qualifications standards pursuant to which pharmacists spending at least 25% of their time practicing DSM would be eligible for promotion to GS-13. Because she had an advanced scope that enabled her to practice DSM, Babb sought a promotion.

B

Along the way, Babb and some of her colleagues concluded that Pharmacy Services was implementing the new qualifications standards in a way that evinced gender and age discrimination. Two other clinical pharmacists at the Medical Center, Drs. Donna Trask and Anita Truitt, filed EEO complaints in September 2011. In April and May 2012, Babb sent emails supporting Trask and Truitt to an EEOC investigator, and later, in March 2014, Babb gave a deposition in support of Trask and Truitt. Babb also advocated on her own behalf; in a February 2013 conversation with Dr. Justice, Babb says that she identified herself as "another over 40 female with a grievance" and complained about management's decision (of which more below) not to have her practice DSM anymore. In May 2013, Babb filed the EEOC complaint that ultimately led to this suit.

C

In the fall of 2012, Pharmacy Services and Geriatric began renegotiating the services agreement

governing Babb's responsibilities. Babb asked a Pharmacy Services supervisor whether she should "do anything" about the negotiations, but was told that they would be "taken care of at the Service Chief level and [that she] didn't need to be concerned about it." Babb later found out that two younger pharmacists—Drs. Lindsey Childs and William Lavinghousez—did participate in the service-agreement negotiations; Pharmacy Services explained that both were infectious-disease specialists and that its representative was unfamiliar with infectious-disease treatment protocol and so needed their input.

Pharmacy Services and Geriatric finalized the new service agreement governing Babb's responsibilities in December 2012. While they considered having Babb remain in the Geriatric Clinic, keep her advanced scope, and spend at least 25% of her time practicing DSM, they ultimately concluded that such a solution was unworkable. In particular, although Dr. Williams wanted to keep Babb in the Geriatric Clinic, he thought that reserving 25% of her time for DSM posed two problems: (1) he feared that it would detract from her role as a clinical pharmacist and patient caregiver and increase wait times for geriatric patients; and (2) he did not think that the DSM model was particularly well suited to geriatric patients. Accordingly, Williams determined that the Geriatric Clinic could not afford to allow Babb to devote more than three "slots" per day to DSM. Those three slots would equate to only about 18.75% of Babb's time, well short of the 25% required for promotion under the new PACT-based standards. When it became clear that Geriatric would not agree to an arrangement that would permit Babb to meet the necessary 25% DSM threshold,

Pharmacy Services and Geriatric agreed that Babb would not have any scheduled DSM responsibilities but would instead perform all of her work as part of an integrated patient-care team.

Because Babb would no longer practice DSM under the new service agreement, she would not need an advanced scope. Accordingly, shortly after the new service agreement was finalized, Pharmacy Services management began the process of removing Babb's advanced-scope designation.

During this same time period, Babb sought opportunities in the Medical Center's anticoagulation clinic. Initially in the fall of 2012, and then again in January 2013, Babb requested anticoagulation training so that she could help out in the anticoagulation clinic. Pharmacy Services denied both requests on the grounds that the clinic was responsible for training medical residents, that the clinic was understaffed and lacked the capacity to train additional people, and that the training was unrelated to Babb's work as a clinical pharmacist in the Geriatric Clinic.

Separately, in April 2013, Babb applied for two open positions in the anticoagulation clinic. A three-member panel conducted interviews for the positions and ultimately selected two younger female pharmacists. The interviewers explained that the two selected candidates had more anticoagulation experience than Babb (who had none) and that Babb had used unprofessional language and criticized other Medical Center employees during her interview. Babb herself characterized the interview as "the worst interview of [her] life."

That same month, Pharmacy Services convened an administrative investigation board ("AIB") to investigate a vulgar letter received by Dr. Gary Wilson, Chief of Pharmacy Services. The letter discussed concern over promotion practices in pharmacy between GS-11 and GS-13. During the AIB's investigation, Justice testified that Babb had been part of a group of pharmacists known as "mow-mows" or "squeaky wheels" who were "never happy, always complaining," and that certain employees perceived that "they were [being] discriminated against because they were older and female." Wilson testified that he believed that Babb had "felt that [she was being] discriminated against over age and sex." The AIB questioned a total of 26 employees; Babb was "really upset" about being one of those questioned.

When Babb learned that she had not been selected for either of the anticoagulation positions for which she had interviewed, she filed the EEOC complaint that led to this suit in May 2013. She also requested that she be moved out of the Geriatric Clinic and into the "float pool," where she would cover for absent staff in a variety of areas. Babb's position as a floater did not require an advanced scope and did not present promotion opportunities. Pharmacy Services approved Babb's request. Soon after Babb began floating in July 2013, Babb's supervisor received two complaints about Babb that had been filed by one of Babb's coworkers. The first asserted that Babb had been rude to a patient, the second that Babb had failed to answer her pager. Babb's supervisor talked to her about the complaints, and Pharmacy Services management knew about them, but they did not result in any discipline and did not affect Babb's

performance appraisal. Babb enjoyed her time in the float pool.

In early 2014, Babb applied for and was promoted to a PACT position that involved work in the hospital's Module B and Module D. The announcement that advertised the job opening read as follows: "Four 9 hour shifts Tuesday through Friday 7:00 am – 4:30 pm with a 4 hour shift Saturday 8:00 am-12:00pm. Nights, weekends and holiday[s] on a fair and equitable rotational schedule." In April 2014, Justice submitted paperwork to facilitate Babb's promotion; she marked "excellent" on all applicable forms and remarked that Babb was "an excellent practitioner with a broad knowledge of clinical pharmacy" and "great with patients!" The VA approved Babb's promotion to GS-13 in August 2014. After starting her new job, Babb learned that she was entitled to only four hours of holiday pay for each of the five Monday federal holidays. (A traditional schedule with five eight-hour weekday shifts would provide eight hours of holiday pay for each Monday holiday.) Babb was "very upset" and said that she would not have taken the job if she had known about the holiday-pay issue. The Medical Center offered to change Babb's schedule, but she declined; she testified that due to the additional pay she gets for working on Saturdays, she makes more money than employees who work eight hours a day Monday through Friday.

II

Babb sued the Secretary of the Department of Veterans Affairs in July 2014. In her complaint, Babb claimed that her managers discriminated against her based on her gender and age, retaliated against her

because she had engaged in protected EEOC activity, and subjected her to a hostile work environment—all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 *et seq*.

The Secretary filed a motion for summary judgment, which the district court granted. The court analyzed the gender- and age-discrimination claims, as well as the retaliation claim, under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). With respect to each of the claims, the court found (1) that Babb had established a prima facie case, (2) that the Secretary had proffered legitimate, nondiscriminatory, non-retaliatory reasons for the challenged employment actions, and (3) that no jury could reasonably conclude that those reasons were pretextual. On Babb's hostile-work- environment claim, the court held that the remarks about which Babb complained were not sufficiently severe and pervasive to create an objectively abusive working environment.

III

A

Babb first contends that the district court erred by applying the *McDonnell Douglas* test, rather than the more lenient motivating-factor test, to her "mixed-motive" Title VII gender-discrimination claim.[2] We agree.

[2] Unlike a "single-motive" claim (sometimes called a "pretext" claim), in which the plaintiff alleges that unlawful

In *Quigg v. Thomas County School District*, we held that a plaintiff alleging a mixed-motive Title VII discrimination claim need not satisfy *McDonnell Douglas*'s "overly burdensome" standard. 814 F.3d 1227, 1237 (11th Cir. 2016). Instead, we concluded that a plaintiff need only offer "evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a motivating factor* for the defendant's adverse employment action." *Id.* at 1239 (emphasis added) (internal quotation marks omitted). Gender discrimination constitutes a motivating factor if it "factored into [the employer's] decisional process." *Id.* at 1241.

The Secretary does not dispute that *Quigg*'s motivating-factor standard applies to Babb's mixed-motive gender-discrimination claim. Nor does the Secretary dispute that the district court failed to apply *Quigg*'s standard and evaluated Babb's claim under *McDonnell Douglas* instead. The Secretary asserts, however, that Babb waived her mixed-motive claim by failing to allege it specifically in her complaint. We disagree. As a plurality of the Supreme Court explained in *Price Waterhouse v. Hopkins*, a plaintiff should not be required to label her complaint "as either a 'pretext' case or a 'mixed-motives' case from the beginning in the District Court" because "[d]iscovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate

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discrimination was "the true reason" for an adverse employment action, *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016), a mixed-motive plaintiff need only allege that discrimination was "a motivating factor" for the employer's action, 42 U.S.C. § 2000e-2; *see also Quigg*, 814 F.3d at 1235.

considerations played a part in the decision against her." 490 U.S. 228, 247 n.12 (1989). Here, Babb sufficiently raised her mixed-motive theory in the district court by arguing it in response to the Secretary's summary judgment motion.

Rather than determine for ourselves whether Babb's evidence meets *Quigg*'s motivating-factor standard, we think it more prudent to remand Babb's gender- discrimination claim to the district court for consideration under the proper test in the first instance.[3]

B

Babb next contends that the district court erred in applying the *McDonnell Douglas* framework, rather than the motivating-factor test, to her ADEA age-discrimination claim. If we were writing on a clean

[3] Because we are remanding for reconsideration under the proper motivating-factor standard, we should clarify one thing about the district court's decision. In the course of rejecting Babb's gender- and age-discrimination claims, the court wrote that "the analysis above"—by which it meant its examination of Babb's separate retaliation claim—"demonstrates how each action was free of an illegal motive." In isolation, that "free of an illegal motive" phrase could be interpreted to mean that Babb's evidence would fail even a motivating-factor analysis. But given that "the analysis above" to which the district court was pointing focused, under *McDonnell Douglas*, on the question whether Babb had demonstrated pretext—an analysis that *Quigg* held is "fatally inconsistent with the mixed-motive theory of discrimination," 814 F.3d at 1237—we are reluctant to read the district court's brief remark for all it might possibly be worth. If the district court in fact meant to articulate a finding that would satisfy even the motivating-factor standard, then it may say so on remand.

slate, we might well agree. It is true, as the Secretary says, that the Supreme Court held in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), that the provision of the ADEA applicable to private-sector employees precludes application of a motivating-factor standard. In so holding, the Court hewed closely to that provision's particular text: "It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1)) (emphasis added in *Gross*). As the Court's italics indicate, it focused on the phrase "because of"— which, the Court held, requires an age-discrimination plaintiff to prove "that age was the 'reason' that the employer decided to act," *i.e.*, "the 'but-for' cause of the employer's adverse decision." *Id.*

As Babb has pointed out here, the provision of the ADEA that governs discrimination claims brought by *federal*-sector employees reads differently. In pertinent part, and with exceptions not relevant here, it states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age *shall be made free from any discrimination based on age*." 29 U.S.C. § 633a(a) (emphasis added). Babb contends that the federal-sector provision's particular framing—which, quite unlike the private-sector provision, requires that employment decisions be made "free from any discrimination" based on age— counsels a different result here than in *Gross*, and should be read to embody a motivating-factor (rather than but-for)

causation standard. Although Babb's argument is not insubstantial, it is foreclosed by our existing precedent.

In *Trask v. Secretary, Department of Veterans Affairs*, this Court applied the *McDonnell Douglas* standard to an ADEA claim brought by two federal-government employees—indeed, two employees who worked at the same facility where Babb worked and made many of the same allegations that Babb has made here. 822 F.3d 1179, 1191 (11th Cir. 2016). Under the prior-panel-precedent rule, *Trask* is binding on us. *See, e.g.*, *Breslow v. Wells Fargo Bank,* 755 F.3d 1265, 1267 (11th Cir. 2014) ("It is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court."). It is true, as Babb says, that the panel in *Trask* did not analyze the linguistic differences between the ADEA's private- and federal-sector provisions— differences that she claims make all the difference. Even so, we have long—and consistently, and forcefully—rejected an "overlooked reason" (or "overlooked argument") exception to the prior-precedent rule. *See, e.g.*, *Smith v. GTE Corp.*, 236 F.3d 1292, 1302–03 (11th Cir. 2001).

Accordingly, under *Trask*, the district court did not err in applying the *McDonnell Douglas* test to Babb's ADEA age-discrimination claim. And under that standard, we can find no reversible error in the district court's decision. In particular, we hold that the district court correctly concluded that Babb failed to demonstrate that the Medical Center's proffered reasons for the adverse employment decisions that

she alleges were pretextual and that the "real" reason for those decisions was because Babb was too old. There are four primary adverse employment decisions that Babb says were made against her because of her age: (1) removal of her advanced scope; (2) non-selection for anticoagulation; (3) denial of training opportunities; and (4) provision of only four hours of holiday pay under her new Module B schedule. We consider each in turn.

Addressing Babb's claim that her advanced scope was removed for discriminatory reasons, the Secretary proffered testimony from Dr. Williams, the decision-maker who removed Babb's advanced-scope designation, explaining a nondiscriminatory reason for the decision. Williams testified that he decided that Babb would no longer practice DSM—thereby eliminating her need for an advanced scope—because geriatric patients presented such complex medical cases that it would be in patients' best interest for care to be provided by interdisciplinary medical teams rather than by independent pharmacists practicing DSM. Babb quarrels with Williams' choice to remove DSM from her schedule in the Geriatric Clinic, but her arguments reduce to criticism of Williams' business judgment. Under the *McDonnell Douglas* framework, to successfully rebut an employer's proffered nondiscriminatory reason for making a business decision, a plaintiff must "meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). Here, Babb fails to tackle Williams' proffered nondiscriminatory reason "head on" to prove that a choice to provide interdisciplinary

care to frail geriatric patients is not, in fact, what motivated Williams' decision.

Addressing Babb's non-selection for the anticoagulation position, Babb argues that age discrimination underlay the Medical Center's hiring of two younger pharmacists. The Secretary offered evidence of the Medical Center's nondiscriminatory reasons: (1) that the selected pharmacists were more experienced than Babb and (2) that Babb performed poorly in her interview, offering inadequate answers to medical questions and making disparaging remarks about coworkers. Babb does not meaningfully contest the Secretary's assessment that she interviewed poorly for the anticoagulation position; in fact, she acknowledged that her interview was the worst of her life. Babb does contest the conclusion that she was less qualified for the positions than the chosen pharmacists. But while it may be (as Babb argues) that her experience was *different* from the selected pharmacists', it was not necessarily *better* than theirs. The fact is that the hired pharmacists had anticoagulation experience that Babb lacked, and a reasonable employer could rely on that particular experience in making an anticoagulation hiring decision, as the Secretary contends occurred here. Babb has failed to prove that that the Secretary's proffered explanations for her non-selection are pretextual and that age discrimination is the real reason she was passed over.

Addressing Babb's assertion that she was unlawfully denied access to training opportunities, the Secretary offers testimony from Dr. Howard and Dr. Stewart to explain nondiscriminatory reasons for those denials. Dr. Howard testified that she denied

Babb's request to attend a two-day geriatrics training because (1) the registration deadline had passed by the time Babb requested permission to attend the training, (2) Babb was responsible for caring for patients in the Geriatric Clinic at the time of the training, and (3) Howard believed that Babb already possessed a good understanding of the subject matter being taught at the training. Dr. Stewart testified that at the time Babb's request for anticoagulation training was denied, the anticoagulation department was busy, understaffed, and already burdened with the responsibility of training medical residents. Babb attempts to demonstrate that these proffered nondiscriminatory reasons for denials of training are pretextual by pointing out other individuals at the Medical Center who were provided with special training opportunities, but the fact that other individuals received some special training does not prove that the real reason that Babb's requested training was denied was discriminatory—*i.e.*, it does not meet the Secretary's explanation "head on."

Finally, addressing Babb's claim regarding discrimination in the administration of holiday pay in her Module B position, the Secretary has explained that holiday pay is tied to Babb's Module B schedule. Babb is scheduled to work nine-hour shifts Tuesday through Friday with a four-hour shift every Saturday; because Babb is never scheduled to work on a Monday, her Monday holiday pay is calculated by referencing back to her most recent work day, a four- hour Saturday shift. Babb admitted that she earned more money on her Tuesday- Saturday schedule (even with her holiday pay complaints) than she would have earned on a traditional Monday-Friday schedule with

eight hours of holiday pay for each Monday holiday. When Babb complained about her holiday pay, the VA offered to permanently move her to a traditional Monday-Friday schedule that would entitle her to eight hours of holiday pay for each Monday holiday, but Babb refused the offer. Babb has failed to rebut the Secretary's nondiscriminatory explanation for Babb's holiday pay—namely, that it was calculated in relation to her Tuesday-Saturday schedule.

The Secretary has provided nondiscriminatory reasons for adverse employment decisions about which Babb has complained. Babb has failed to adequately rebut those nondiscriminatory reasons—to meet them "head on"— and prove that they are pretextual. Thus, under *McDonnell Douglas*, we affirm the district court's order of summary judgment on Babb's age discrimination claim.

C

Babb similarly asserts that the district court erred in applying *McDonnell Douglas*—again, rather than the motivating-factor test—to her retaliation claim. And again, if we were starting from scratch, we might agree. But again, we are not, and so we cannot.

In *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), the Supreme Court held (following the rationale of its earlier decision in *Gross*) that Title VII's private-sector retaliation provision requires a but-for, rather than motivating-factor, causation standard. As it had done in *Gross*, the Court emphasized the provision's use of the phrase "because"—in particular, its prohibition of any discrimination "because" an employee has engaged in

protected EEO activity. *See id*. at 352 (quoting 42 U.S.C. § 2000e-3(a)). "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross,*" the Court held, "the proper conclusion here, as in *Gross,* is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Id*.

But, Babb asserts—as she does in connection with her ADEA claim—the language of Title VII's federal-sector anti-retaliation provision is different. Almost exactly like its ADEA analogue, it states that personnel decisions (again, with exceptions not relevant here) "shall be made free from any discrimination based on ... sex ...." 42 U.S.C. § 2000e-16(a). Babb insists that the absence of the "because" language that drove the result in *Nassar*, combined with the presence of the broad phrase "free from any discrimination," requires application of a motivating-factor, rather than but-for, causation standard.

Again, though, our earlier decision in *Trask* stands in Babb's way. There, citing both Title VII's private-sector anti-retaliation provision and *Nassar*, we held—again, in a case involving federal-government employees—that the *McDonnell Douglas* test and a but-for causation standard applied. And for reasons already explained, it is no answer to *Trask* that the panel there did not engage the linguistic differences between the private- and federal-sector anti-retaliation provisions. We are bound just the same.

Accordingly, we are constrained to hold that the district court did not err in applying the *McDonnell Douglas* framework to Babb's retaliation claim. And

under that standard, we cannot say that the district court was wrong to grant summary judgment to the Secretary. In particular, we hold that the district court correctly concluded that Babb failed to demonstrate that the Medical Center's proffered reasons for the adverse employment decisions that she alleges were pretextual and that those decisions were actually motivated by retaliatory animus.[4]

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[4] In connection with one aspect of her discrimination and retaliation claims, Babb argues—in a single page at the end of her brief—that the district court applied the wrong legal standard. Specifically, in rejecting Babb's argument that she had established pretext based, in part, on the superiority of her own qualifications for an anticoagulation position vis-à-vis those of the two individuals who were ultimately hired, the district court referred to a since-rejected colloquialism—"that the inquiry is not who was a better candidate for the position, but rather whether the discrepancy is 'so apparent as to virtually jump off the page and slap you in the face.'" DE 83 at 31 (quoting *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001)); *see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456–57 (2006) (rejecting the "slap you in the face" standard as "imprecise" and "unhelpful"). Here, though, the district court also (and more precisely and helpfully) described Babb's argument as being "that a reasonable employer could not have chosen" either of the other two individuals over her—a standard that the Supreme Court seems to have blessed, *see Ash*, 546 U.S. at 457, and that we have since approved and applied, *see Kidd v. Mando American Corp.*, 731 F.3d 1196, 1206 (11th Cir. 2013). Babb does not dispute the validity of the "reasonable employer" standard, nor does she deny (1) that the selected candidates scored highest during the interview for the anticoagulation position, (2) that she used coarse language and criticized other providers during the interview, or (3) that the interview, by her own admission, was "the worst interview of [her] life." Under the circumstances, we think it clear that the district court's error, if any, was harmless.

Babb points to the same adverse employment actions in her retaliation claims as she did in her age discrimination claims. As explained above—and for the same reasons—Babb has failed to demonstrate that the Secretary's proffered nondiscriminatory reasons for making each employment decision were pretextual. Just as Babb's age discrimination claims fail because Babb has failed to show that the Secretary's nondiscriminatory reason for the action was pretextual, Babb's retaliation claims similarly fail. We affirm the district court's order of summary judgment in favor of the Secretary on Babb's retaliation claims.

D

Finally, Babb claims that the district court erred in granting summary judgment for the Secretary on her hostile-work-environment claim. We disagree; summary judgment was proper.

"A hostile work environment claim under Title VII is established upon proof that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). "In evaluating the objective severity of the harassment, this court looks at the totality of the circumstances and considers, among other things: (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with employee's job performance." *Gowski*

v. Peake, 682 F.3d 1299,1312 (11th Cir. 2012). The district court here correctly concluded that Babb failed to allege an objectively hostile environment so filled with intimidation and ridicule that it was sufficiently severe or pervasive to alter her working conditions. *Id.* at 1313.

In support of her hostile-work-environment claim, Babb points to many of the same pieces of evidence that she invokes in connection with her discrimination and retaliation claims—*e.g.*, the removal of her advanced scope, the denial of her request for anticoagulation training, the fact that she was not hired for the anticoagulation position for which she applied. In addition, she points to three remarks made to her that, she says, pertained to her age, gender, or protected activity: (1) one pharmacy administrator once asked her, "When do you retire?"; (2) another once referred to "Magic Mike" as a "middle-aged woman movie" while speaking to Babb; and (3) the same called her a "mow mow" (which Babb interpreted as "a grandma comment") during an investigation of a vulgar email.

Babb has not raised a genuine issue of material fact regarding her hostile- work-environment claim. Her allegations pale in comparison to the sort of conduct that this Court has deemed sufficiently "severe and pervasive" to create an objectively abusive environment. *See, e.g.*, *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811–14 (11th Cir. 2010) (plaintiff's coworkers made gender- specific derogatory comments and showed plaintiff pornography); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000) (supervisor gave plaintiff unwanted massages and

stood so close that his body parts touched her). Given the facts alleged by Babb, the district court correctly ruled that her hostile-work-environment claim failed as a matter of law.[5]

IV

For the foregoing reasons, we affirm the district court's grant of summary judgment on Babb's ADEA age-discrimination claim, Title VII retaliation claim, and hostile-work-environment claim. We reverse the district court's grant of summary judgment on Babb's Title VII gender-discrimination claim and remand for consideration under the "motivating-factor" standard.

AFFIRMED in part; **REVERSED** and **REMANDED** in part.

[5] We have not decided whether hostile-work-environment claims are cognizable under the ADEA. We need not do so, because even if such claims are cognizable as a general matter, Babb's claim here fails as a matter of law.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:14-cv-1732-T-33TBM

NORIS BABB,

Plaintiff,

v.

ROBERT A. MCDONALD, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Filed: August 23, 2016]

ORDER

This matter comes before the Court pursuant to Defendant the Secretary of Veterans Affairs' Motion for Summary Judgment (Doc. # 52), filed on April 1, 2016. Plaintiff Noris Babb filed a Response in Opposition to the Motion (Doc. # 68) on May 18, 2016. The VA filed a Reply (Doc. # 70) on June 1, 2016, and with leave of Court, Dr. Babb filed a Sur-Reply (Doc. # 74) on June 13, 2016. For the reasons that follow, the Court grants the VA's Motion for Summary Judgment.

I. Background

A. Dr. Babb's Role as a VA Pharmacist in Geriatrics

Dr. Babb is a clinical pharmacist who is currently employed at the C.W. Bill Young VA Medical Center. (Babb Dep. Doc. # 59 at 8). At the time of the events in question, she was approximately 52 years old and was in a GS-12 position. (Doc. # 27 at ¶ 8). Dr. Babb worked in the geriatric primary care clinic at the VA from 2006, until June of 2013. (Babb Decl. Doc. # 68-2 at ¶¶ 1, 26). During her time in the geriatrics clinic, she was part of an "interdisciplinary team." (Hull Dep. Doc. # 54 at 8). One of her supervisors at the geriatrics clinic, Dr. John Hull, explained: "the interdisciplinary team is a team of caregivers that work closely together to achieve better outcomes for complex patients. . . . [T]he idea is that a group of people working together and sharing information can achieve success in complex situations much better than a solo practitioner." (Id. at 8-9).

Dr. Hull explained that the patients seen at the geriatrics clinic were "the oldest of the old" facing "frailty . . . usually psychosocial problems and a high rate of dementia." (Id. at 8). Dr. Hull noted, "we try to select patients that have multiple medical, psychosocial and functional problems, which means that our rate of death is much, much higher than a regular primary care environment, and dealing with the issues of death and dying." (Id. at 7-8).

At that time, Dr. Babb held an Advanced Scope, which means that she could perform Disease State Management. (Babb Decl. Doc. # 68-2 at ¶ 5). Disease

State Management entails a pharmacist independently managing patient care for specific conditions (diabetes, hypertension, and cholesterol), including writing prescriptions for these ailments without consulting a physician. (Id.; Justice Decl. Doc. # 52-2 at ¶ 2).

B. Dr. Babb Experiences Tribulations at Work

Starting in 2011, Dr. Babb's clinic was part of a national "Patient Aligned Care Team" or PACT program, which resulted in many staffing changes at the VA. (Justice Dep. Doc. #55 at 41, 65; Babb Decl. Doc. #68-2 at ¶ 8). In 2012 and 2013, the VA was in the process of implementing national qualifications standards so that pharmacy employees who spent at least 25% of their time practicing under an Advanced Scope would be promoted to a GS-13. (Justice Dep. Doc. # 55 at 63- 65; Babb Decl. Doc. # 68-2 at ¶ 11). Understandably, Dr. Babb - a GS-12 pharmacist with an Advanced Scope - sought such a promotion.

In June of 2012, Dr. Marjorie Howard, who was Dr. Babb's supervisor at that time, suggested that Dr. Babb consider a primary care position in "Module B" of the VA that had recently been vacated. (Howard Dep. Doc. # 57 at 52). Dr. Howard brought up the Module B position because she did not think that Dr. Babb could meet the 25% requirement for the GS- 13 promotion in geriatrics. (Id. at 54-57). Dr. Babb declined, even though Dr. Babb recognized that her direct supervisor said that moving to Module B "was the only way [Dr. Babb] could get a GS-13." (Babb Dep. Doc. # 59 at 84; Doc. # 52-2 at 29). According to

Dr. Babb, treating geriatric patients was her professional calling. (Babb Decl. Doc. # 68-2 at ¶ 10).

In August of 2012, the service agreement between the pharmacy and the geriatrics clinic was being renegotiated. (Williams Dep. Doc. # 56 at 6). Dr. Babb worked with Dr. Hull and others in the geriatrics clinic on a separate draft service agreement that supported Dr. Babb's use of an Advanced Scope in the geriatrics clinic performing Disease State Management. (Id. at 17). However, the service agreement that was ultimately signed did not call for Dr. Babb to perform Disease State Management, and in February of 2013, Dr. Babb's Advanced Scope was removed. (Id. at 18; Wilson Dep. Doc. # 53 at 16).

Dr. Leonard Williams is the Chief of Geriatrics and Extended Care at the VA, Bay Pines. (Williams Dep. Doc. # 56 at 4). He was the person who decided that Dr. Babb should not perform Disease State Management on VA geriatric patients. (Id. at 12, 21). In his opinion, Dr. Babb's role as a geriatrics pharmacist was to check for dangerous drug interactions and answer patient and caregiver questions about medications because geriatric patients are often prescribed multiple medications. (Id. at 13). Dr. Williams provided many reasons for omitting Dr. Babb's provision of Disease State Management from the service agreement: "Many times in very frail, elderly patients we don't need to treat their hypertension or we don't need to treat it aggressively as you would through [Disease State Management] protocols, because basically the damage that was going to be done by high blood pressure by that time was done." (Id. at 11). And, "it could be injurious to the patient" to try to control conditions

such as high blood pressure through Disease State Management in the geriatrics department. (Id. at 12).

Dr. Williams indicated that a geriatrics pharmacist needed to be available to "let the patient know of significant potential side effects and what to look for" and "see [a] patient before they left the clinic and make sure that the patient or the caregiver understood what we were doing." (Id. at 13). If Dr. Babb was performing Disease State Management consultations with patients, "she wouldn't be able to work in the essential role of a clinical pharmacist or consulting pharmacist in the geriatric clinic; and that is one of seeing the patients and going over what was usually a very complicated and long list of medications, and looking to see if there were any obvious possibilities of drug/drug interactions, that the physician should have known about." (Id. at 12-13).

In September of 2012, Dr. Babb sought to participate in a multi-day training, but Dr. Howard specified that Dr. Babb could not attend because (1) Dr. Babb had patients scheduled at the time of the training and Dr. Babb's attendance of the course would therefore impact patient care, (2) Dr. Babb would not benefit from the training because she already had knowledge of the information being presented, and (3) it was too late to register for the program. (Doc. # 52-3 at 59).

In October of 2012, Dr. Howard and Dr. Babb discussed Dr. Babb's "mid-term evaluation," where Dr. Babb received "fully successful" instead of "outstanding" in mentoring. (Babb Decl. Doc. # 68-2 at ¶¶ 14-15). Dr. Babb filed a grievance with respect to

her score, and eventually the "fully successful" was "upgraded" to reflect "outstanding," but Dr. Babb "felt belittled that she [was treated] this way." (Id. at ¶¶ 15-16).

C. Dr. Babb is not Selected for Anticoagulation

At the time Dr. Babb realized that her Advanced Scope was in jeopardy, she started asking for training in anticoagulation, but that training was not provided. (Babb Dep. Doc. # 59 at 9, 116). The anticoagulation clinic was understaffed, and the physician managing that clinic testified that they could never keep up with the patients' demands for anticoagulation. (Stewart Dep. Doc. # 60 at 60).

When a position was opened in anticoagulation, Dr. Babb applied. A three member panel comprised of Dr. Kim Hall, Dr. Catherine Sypniewski, and Dr. Robert Stewart conducted the interview. Dr. Hall provided detailed testimony about the interview, remembering that Dr. Babb used unprofessional language (such as "crap" and "screwed up") and harshly criticized other medical providers, which made Dr. Hall question whether Dr. Babb would be a good fit for the busy anticoagulation department where good communications skills were a top priority. (Doc. # 52-2 at 141). Dr. Sypniewski explained that the candidates that were selected had "significantly more experience" in anticoagulation when compared to Dr. Babb. (Doc. # 52-2 at 152). Dr. Stewart confirmed that Dr. Babb's anticoagulation experience was "nowhere near" the experience of the selected candidates. (Doc. # 52-2 at 160).

Dr. Babb interviewed poorly due to "anxiety and stress," admitting "that was the worst interview of my life." (Babb Dep. Doc. # 59 at 115, 124). Dr. Babb has conceded that she did not have any direct experience independently managing anticoagulation patients. (Id. at 119). Dr. Babb was notified that she was not selected for the anticoagulation position on April 23, 2013. (Doc. # 27 at ¶ 10(l)). Two younger pharmacists Dr. Sara Grawe (age 26) and Dr. Amy Mack (age 30) scored highest at the interview and were selected for the anticoagulation positions. (Doc. # 52-2 at 160).

During the course of these and other staffing changes at the VA, someone sent an anonymous and "vulgar" letter to Dr. Gary Wilson. (Babb Decl. Doc. # 68-2 at ¶ 22). An Administrative Investigation Board was initiated to determine who sent the troubling letter. On April 8, 2013, Dr. Keri Justice testified at the Administrative Investigation Board that Dr. Babb was one of the "mow-mows" – the "squeaky wheels" who are "never happy, always complaining." (Doc. # 68-2 at 140). In the same Administrative Investigation Board, Dr. Wilson testified that he believed Dr. Babb "felt that [she was] discriminated against over age and sex." (Doc. # 68-2 at 122). Dr. Babb "was really upset that anyone would think [she is] such a low person to do something like" send an anonymous letter complaining about others in a vulgar manner. (Babb Decl. Doc. # 68-2 at ¶ 22). However, it is not disputed that

26 employees were questioned about the origins of the troubling letter, including Drs. Trask and Truitt. (Doc. # 70- 1 at 15).

D. Dr. Babb "Floats" after Module B Transfer Denied

Dr. Babb requested a lateral transfer to Module B to work as a Clinical Pharmacy Specialist (the position that she previously rejected) in an effort to secure a GS-13 promotion, but at that point, and with the passage of approximately nine months, it was too late. (Babb Decl. Doc. # 68-2 at ¶ 21). Dr. Justice denied Dr. Babb's request to be transferred to Module B on April 24, 2013. (Id.). Notably, a younger pharmacist, Dr. Natalia Schwartz, also sought to be transferred to Module B, but management already decided that the position would not be filled. (Doc. # 52-2 at 185).

Dr. Babb continued on in the geriatrics clinic after her Advanced Scope was removed, but she was "extremely depressed." (Babb Dep. Doc. # 59 at 46). She "had gone from being a happy team player to someone that just came in, closed the door to [her] office, and left at 4:30." (Id. at 47). Dr. Babb felt like she was in "a very difficult work environment" and that "[i]t was probably the lowest point of [her] professional career." (Id. at 47-48).

Dr. Babb requested to move to the "float pool" in April of 2013, and began "floating" in June of 2013. (Doc. # 52-3 at 11; Babb Dep. Doc. # 59 at 128). Around that time, Dr. Babb's then supervisor, Dr. Robert Stewart, received two complaints about Dr. Babb. (Stewart Dep. Doc. # 60 at 52). The first complaint was that Dr. Babb was rude to a patient. (Babb Dep. Doc. # 59 at 142). The second complaint claimed that Dr. Babb was not available to her co-workers at the clinic. (Id. at 143). Dr. Babb learned about these complaints when she opened a sealed envelope addressed to Dr.

Stewart. (Stewart Dep. Doc. # 60 at 53). Dr. Babb faced no discipline or counseling for these events, and she testified that these events did not affect her performance appraisal. (Babb Dep. Doc. # 59 at 140). Dr. Babb testified that she enjoyed her time in the float pool, (Id. at 130); nevertheless, she filed an informal EEOC complaint on May 6, 2013. (Babb Decl. Doc. # 68-2 at ¶ 24).

E. Dr. Babb is Offered Two GS-13 Positions

Dr. Babb continued to apply for GS-13 positions. In late 2013, Dr. Babb applied for a GS-13 position, but it was offered to a younger pharmacist, Dr. Hetel Bhatt-Chugani (age 35). (Babb Dep. Doc. # 59 at 128). However, in early 2014, two GS-13 positions were posted: (1) a PACT assignment split between Modules B and D (this was the previously vacant position in Module B combined with another vacancy in Module D) and (2) a half anticoagulation and half Palm Harbor clinic position. (Doc. # 52-3 at 29; Babb Dep. Doc. # 59 at 134).

The job announcement for the PACT position split between Modules B and D stated that the position was comprised of "Four 9 hour shifts Tuesday through Friday 7:00 am - 4:30 pm with a 4 hour shift Saturday 8:00am-12:00pm [with] Nights, weekends and holiday on a fair and equitable rotation schedule." (Doc. # 52-3 at 30). In March of 2014, Dr. Babb accepted the PACT position split between Modules B and D. (Babb Dep. Doc. # 59 at 134, 176). On April 2, 2014, Dr. Justice submitted paperwork to facilitate Dr. Babb's promotion to GS-13. (Doc. # 52-3 at 45-46). Dr. Justice marked "excellent" on all of the forms and made handwritten comments stating that "Dr. Babb is an

excellent practitioner with a broad knowledge of clinical pharmacy. She is great with patients!" (Id.). A VA Director approved Dr. Babb's promotion in August of 2014. (Doc. # 52-3 at 49-50).

After Dr. Babb started working in her new position, she felt as though she was not being treated fairly with respect to holiday pay. "After reviewing her time cards, later, and time cards of other employees she learned that due to the scheduling, she was only entitled to four hours Holiday pay for each of the five legal federal Holidays on a Monday . . . [h]owever, other employees were being paid the full amount of a holiday." (Doc. # 27 at ¶ 10(p)). Dr. Babb testified, "after I found out about the Monday federal holiday issue, I was very upset about that." (Babb Dep. Doc. # 59 at 139). The VA offered to permanently change her schedule such that she would receive eight hours of holiday pay for the Monday legal holidays, but Dr. Babb declined. (Doc. # 52-3 at 144).

F. Dr. Megan Martinez

In October of 2014, several months after Dr. Babb's appointment to her PACT position split between Modules B and D, a younger female, Dr. Megan Martinez, obtained a Clinical Pharmacy Specialist Float, GS-13, "which was not posted anywhere so that [Dr. Babb] did not know that the job opened up." (Doc. # 27 at ¶ 10(o)). Dr. Babb alleges that she would have applied for this job had it been posted. (Id.). But, Dr. Martinez explained that her path to a GS-13 with an Advanced Scope was unique.

Dr. Martinez started out spending half of her time in endocrinology and the other half "covering different

areas of the pharmacy, clinical and nonclinical." (Martinez Dep. Doc. # 58 at 4). When she was "covering," Dr. Martinez did "whatever . . . needed to be done" from covering clinics to checking the mail. (Id. at 5). Regardless of her varying duties, Dr. Martinez spent 25% of her time doing Disease State Management. (Id. at 9). Nevertheless, the endocrinology physicians did not sign off on her Advanced Scope. (Id. at 10). Dr. Martinez retained her Advanced Scope because she left endocrinology altogether and spent 100% of her time covering for clinical and nonclinical tasks. She covered for two PACT pharmacists who took maternity leave: "one was out for three months and then the other was out for about six weeks." (Id. at 15). After covering for others for seven months with an Advanced Scope and performing Disease State Management, Dr. Martinez applied and was hired for an open anticoagulation position. (Id. at 14-15). At the time of her deposition on February 19, 2016, Dr. Martinez explained that she was leaving the anticoagulation department and taking a "CPS float position." (Id. at 16-17).

G. Related Prior Litigation and EEOC Activity

On February 26, 2013, Donna Trask and Anita Truitt (both VA pharmacists) filed an age and gender discrimination suit against the VA. (8:13-cv-536-MSS-TBM). In connection with those proceedings, Dr. Babb sent statements in support of Drs. Trask and Truitt by email to an EEOC investigator on April 26, 2012, May 10, 2012, and May 11, 2012. (Doc. # 27 at ¶ 5; Babb Dep. Doc. # 59 at 112-113). She also provided deposition testimony in support of Drs. Trask and Truitt on March 24, 2014. (Doc. # 68-2 at 38).

Dr. Babb testified in this case that "my whole career had changed after I had been a witness in the Truitt and Trask case. That up until then pharmacy administration had been in support of me." (Babb Dep. Doc. # 59 at 48). Dr. Babb specified that after she "participated in the EEO activity for Drs. Truitt and Trask, [her] career took a turn in a bad direction." (Id. at 112). Along the same lines, Dr. Babb testified: "Everything that happened in disqualifying me was after I testified in the Truitt and Trask case; and Truitt and Trask were discriminated against because they were older females." (Id. at 110).

The district court did not agree that Drs. Trask and Truitt were discriminated against and granted summary judgment in favor of the VA on March 19, 2015. (Case No. 8:13-cv-536- MSS-TBM Doc. # 101). The Eleventh Circuit affirmed in a published decision. Trask v. Sec'y, Dep't Veterans Affairs, 822 F.3d 1179 (11th Cir. Apr. 5, 2016).
Dr. Babb also participated in her own protected activity.

She verbally opposed age and gender discrimination in a lengthy conversation with Dr. Justice on February 8, 2013. Dr. Babb requested that her union representative be present at the February 8, 2013, meeting where she voiced her complaints to Dr. Justice, but the representative failed to appear. (Doc. # 68-6 at 86). In addition, Dr. Babb filed an informal EEOC complaint on May 6, 2013, and also initiated this lawsuit.

After opposing discrimination on February 8, 2013, Dr. Babb emailed Dr. Justice on February 22, 2013, telling her: "you need to pray for guidance" because

Dr. Babb "thought that [Dr. Justice] needed to be a little bit more Christian in the decisions that she made." (Babb Dep. Doc. # 59 at 163; Doc. # 59 at 218). Dr. Babb testified that Dr. Justice: "created an extremely hostile work environment for me. She discriminated against me based on my age, my gender and retaliated against me. None of those are Christian values, and I thought that it would be prudent of me to bring to her attention that she should ask God for guidance, because I felt that she really needed that." (Babb Dep. Doc. # 59 at 163).

H. Comments on Age, Gender, or EEOC Activity

Dr. Babb alleges Dr. Howard asked in March of 2012, when Dr. Babb planned to retire. (Id. at 130). Dr. Howard does not remember asking Dr. Babb this question. (Doc. # 52-3 at 57). Dr. Babb had a negative relationship with Dr. Howard and called Dr. Howard "Cruela" and other names in emails to her colleagues because Dr. Babb felt Dr. Howard was "harsh in meetings" and "wasn't gentle and friendly." (Babb Dep. Doc. # 59 at 161; Doc. # 59 at 216).

In addition, when a co-worker asked Dr. Babb if she had seen the movie "Magic Mike," Dr. Justice remarked that the movie was geared toward middle-aged women, which made Dr. Babb upset. (Babb Dep. Doc. # 59 at 61). Dr. Babb testified that she would not have been worried if Dr. Justice called the movie a "chick-flick," but she felt "middle-aged" was not an appropriate comment. (Id. at 62-63). When Dr. Justice referred to Dr. Babb as a "mow mow," Dr. Babb thought that Dr. Justice was calling her a "grand ma." (Id. at 61).

Dr. Babb does not recall any other comments about her age or gender and she has never heard any comments about her EEOC activity. (Id. at 61, 113, 114, 130). Dr. Babb also revealed during her deposition that she "took it all personally" and she "couldn't stop crying." (Id. at 183-184).

I. Dr. Babb Files this Lawsuit

On July 17, 2014, Dr. Babb filed her Complaint alleging sex and age discrimination (count I), retaliation (count II), hostile work environment (count III), and injunctive relief (count IV). (Doc. # 1). The Court held a Case Management Hearing on September 10, 2014, and at that hearing, authorized Dr. Babb to file an amended complaint. (Doc. # 10). On October 10, 2014, Dr. Babb timely filed her First Amended Complaint containing the same counts. (Doc. # 12). The VA filed a Motion to Dismiss the First Amended Complaint (Doc. # 14), but that Motion was denied as moot after Dr. Babb filed a Second Amended Complaint, with leave of the Court. (Doc. ## 17, 18).

The Second Amended Complaint, filed on November 12, 2014, contained the same counts as the prior versions of the Complaint. (Doc. # 19). On November 21, 2014, the VA filed a Motion to Dismiss the Second Amended Complaint. (Doc. # 20). The Court granted the Motion but once again authorized Dr. Babb to amend her claims. (Doc. # 22). Dr. Babb filed her Third Amended Complaint on December 19, 2014. (Doc. # 27). The Third Amended Complaint is the operative Complaint and contains the following counts: retaliation (count I), gender and age discrimination (count II), hostile work environment (count III), and injunctive relief (count IV). The VA

moved to dismiss the Third Amended Complaint (Doc. # 28), but the Court denied the Motion. (Doc. # 30). At this juncture, the VA seeks summary judgment on each of Dr. Babb's claims.

II. Legal Standard

Summary judgment is appropriate "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." Fed. R. Civ. P. 56(a). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (citing Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if it may affect the outcome of the suit under the governing law. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., Inc., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing

that there is a genuine issue for trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (citing Celotex, 477 U.S. at 324).

If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non- moving party's favor. Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. Samples ex rel. Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988) (citing Augusta Iron & Steel Works, Inc. v. Employers Ins. of Wausau, 835 F.2d 855, 856 (11th Cir. 1988)). However, if the non-movant's response consists of nothing "more than a repetition of his conclusional allegations," summary judgment is not only proper, but required. Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981), cert. denied, 456 U.S. 1010 (1982).

III. Analysis

A. Count I - Retaliation

1. Dr. Babb's Prima Facie Case

Title VII makes it illegal for "an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

hearing under this title." 42 U.S.C. § 2000e- 3(a). The Age Discrimination in Employment Act also includes an anti-retaliation provision. See 29 U.S.C. § 623(d). "To establish a prima facie case of retaliation, plaintiffs must prove that (1) they engaged in statutorily protected conduct; (2) they suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression." Trask, 822 F.3d at 1193-94 (citing Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1212-13 (11th Cir. 2008)).

After the plaintiff has established her prima facie case, the defendant has the opportunity to articulate a legitimate and non-retaliatory reason for the challenged employment action. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001). "The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff." Id.

The first element of Dr. Babb's prima facie case is satisfied because Dr. Babb engaged in protected activity when she participated in Drs. Trask and Truitt's employment discrimination lawsuit. It is not contested that she provided testimony on behalf of Drs. Trask and Truitt during multiple phases of their employment discrimination case against the VA. She not only testified on behalf of others that she felt were discriminated against, she has also pursued her own claims against the VA for discrimination and retaliation. In addition, Dr. Babb verbally opposed what she felt were discriminatory practices in lengthy conversation with Dr. Justice on February 8, 2013.

The second element is also satisfied. Dr. Babb claims that she faced adverse employment actions when her Advanced Scope was removed, in her non-selection for the anticoagulation position, in the denial of a lateral move to Module B, when a younger pharmacist, Dr. Martinez, was given a GS-13 position that was not advertized, and with respect to holiday pay. (Doc. # 27 at ¶ 15). An adverse employment action requires "a serious and material change in the terms, conditions, or privileges of employment." Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). "Short of termination, failure to hire, or demotion," an employer's action "must, in some substantial way, alter the employee's compensation, terms, conditions, or privileges of employment, deprive him or her of employment opportunities, or adversely affect his or her status as an employee." Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008).

Dr. Babb has described adverse employment actions directly impacting the terms of her employment - specifically her pay (including holiday pay). The removal of Disease State Management and of her Advanced Scope blocked her promotion (at least temporarily) from GS-12 to GS-13. In addition, her non- selection for anti-coagulation and the denial of a lateral transfer to Module B also delayed her in reaching her GS-13 goal.

As to the third element, a reasonable jury could determine that Dr. Babb established causation because she participated in protected activity and faced adverse employment actions shortly thereafter. Dr. Babb's protected activity in the Trask and Truitt case started when she provided statements to the

EEOC in April and May of 2012. Her EEOC activity in that case continued through March 24, 2014, when she testified in a deposition. (Doc. # 68-2 at 38). Dr. Babb had a pointed conversation with Dr. Justice on February 8, 2013, opposing gender and age discrimination, and she filed a complaint with the EEOC in her own case alleging discrimination on May 6, 2013.

Dr. Wilson, the Chief of Pharmacy Service at Bay Pines, testified that he "was notified" when Dr. Babb initiated informal EEOC activity, and was specifically aware of her EEOC activity as of May of 2013. (Wilson Dep. Doc. # 53 at 7, 27). He testified that in early 2013, Dr. Babb was being perceived as "part of a group of people that felt they were being discriminated against on the basis of age and gender." (Id. at 34). Dr. Wilson is a decision maker in the pharmacy department and was the "deciding official" for Dr. Babb being "placed in a PACT position in 2014." (Id. at 44).

In addition, although Dr. Justice testified that she was not aware of Dr. Babb's participation in the case brought by Drs. Trask and Truitt (Justice Dep. Doc. # 55 at 134-135), Dr. Babb complained directly to Dr. Justice that older females were not being promoted. (Id. at 14). In addition, the record shows that Dr. Justice emailed Dr. Stewart on January 30, 2013, stating that she felt EEO activity was "coming on" regarding Dr. Babb. (Id. at 46; Stewart Dep. Doc. # 60 at 43).

"Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." Bass v. Bd. of Cty. Comm'rs, 256 F.3d 1095, 1119 (11th Cir.

2001). In addition, "A causal relationship might reasonably be inferred from a series of adverse actions that commenced immediately after a plaintiff engaged in protected activity." Baroudi v. Sec'y, Dep't Veterans Affairs, 616 Fed. Appx. 899, 903 (11th Cir. 2015) (citing Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1457 (11th Cir. 1998)). Here, Dr. Babb verbally opposed age and gender discrimination (specifically complaining that older female pharmacists were not being promoted) in a 40-minute encounter with Dr. Justice on February 8, 2013 (Doc. # 59 at 203-204), and Dr. Babb's Advanced Scope was removed just days later on February 15, 2013. (Babb Decl. Doc. # 68-2 at ¶ 19).[1] Not long after that, on April 24, 2013, Dr. Justice denied Dr. Babb's request for a lateral transfer (and accompanying raise to a GS-13 position). (Id. at ¶ 21). Dr. Babb's unsuccessful anticoagulation interview and non-selection for that GS-13 position also occurred in April of 2013. Further, Dr. Babb submits that she gave testimony in the Trask and Truitt case on March 24, 2014, and that she was

[1] Removal of Dr.Babb's Advanced Scope was contemplated long before her February 8, 2013, opposition to discrimination, and thus, the February 8, 2013, meeting with Dr. Justice could not be the but for cause motivating the removal of the Advanced Scope. See Trask, 822 F.3d at 1194 ("Because pharmacy management had already decided to reassign module pharmacists who were not selected for PACT positions to the float pool following the implementation of PACT, the plaintiffs' protected activity could not have been the but-for cause of their reassignment."). The Court nonetheless will discuss the removal of the Advanced Scope in an effort to explain why the VA's collective, challenged employment decisions were free of a retaliatory or discriminatory motive.

denied holiday pay during the same time frame in March of 2014.

2. VA's Legitimate and Non-Retaliatory Reasons

The VA has offered a legitimate and non-retaliatory reason for every employment action that it took with respect to Dr. Babb, and Dr. Babb has not pointed to any weaknesses, implausibilities, or flaws in the VA's employment justifications for its actions such that a reasonable juror could find that the VA's proffered reasons are a pretext for retaliation. The Court will address each specific employment action Dr. Babb challenges below.

a. Removal of Advanced Scope

Dr. Williams was the decision maker that removed Disease State Management from the contract between the pharmacy and the geriatric clinic. Once Disease State Management was removed from the contract, it was no longer necessary for Dr. Babb to work under an Advanced Scope and that Scope was removed. Dr. Williams provided several reasons for his decision to remove Disease State Management from Dr. Babb's services. He explained that it was more important for Dr. Babb to check for dangerous drug interactions for the geriatric patients and to consult with those patients and their caregivers about medicines and side effects than it was to manage Disease States, such as high blood pressure and cholesterol. (Williams Dep. Doc. # 56 at 13).

Dr. Williams explained that the geriatric patients presented complex cases, were often frail, and that it

could be dangerous to treat those patients pursuant to Disease State Management protocols. (Id. at 11). He determined it was better to leave the treatment of complex geriatric patients to the geriatric clinic physicians and that the pharmacists were best utilized performing the traditional roles of patient consultation as to medications and side effects. (Id. at 11- 13).

"Pretext means more than an inconsistency or a mistake, pretext is 'a lie, specifically a phony reason for some action.'" Austin v. Progressive RSC, Inc., 510 F. Supp. 2d 855, 866 (M.D. Fla. 2007) (quoting Silvera v. Orange Cty. Sch. Bd., 244 F.3d 1253, 1261 (11th Cir. 2001)). A proffered reason is pretextual when it is false and the true reason is impermissible. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

"A plaintiff cannot establish pretext by merely questioning the wisdom of the employer's reasoning, especially where 'the reason is one that might motivate a reasonable employer.'" Austin, 510 F. Supp. 2d at 866 (quoting Lee v. GTE Florida, Inc., 226 F.3d 1249, 1255 (11th Cir. 2000)).

Dr. Babb has not pointed to any evidence that discredits Dr. Williams' reasons for the removal of Disease State Management and her Advanced Scope. Dr. Babb wishes that she could have stayed in the geriatrics clinic operating under an Advanced Scope being promoted to GS-13 in that department, but she has not demonstrated that Dr. Williams' decision, which is founded upon providing the best possible medical care to frail and complex patients with high rates of death, was tainted by a retaliatory animus. Dr. Babb has not met the VA's reason for its decision

"head on" and has not rebutted the VA's reason for the removal of her Advanced Scope. Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) ("A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason."). Dr. Babb has not presented an issue of fact for resolution by a jury on the issue of pretext because her arguments do nothing more than express her "dismay" at her Advanced Scope being removed and suggest that the geriatric patients would have benefitted from her managing their Disease States. (Doc. # 68 at 5). Her arguments amount to nothing more than a quarrel with the decision-maker's judgment. Dr. Babb falls well short of her burden of demonstrating "such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." Rioux v. City of Atlanta, 520 F.3d 1269, 1275 (11th Cir. 2008).

This Court must not substitute its judgment for the employer's business decision. Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). Here, the decision maker stated that elderly and frail geriatric patients would be adversely affected in the instance that a pharmacist practicing Disease State Management was in charge of monitoring their high blood pressure and other ailments rather than performing the more traditional role of checking for

adverse reactions between medications. He explained that geriatric patients were often prescribed multiple medications and that a pharmacist was needed to screen for drug interactions and to help explain medication side effects. Dr. Babb has not rebutted these legitimate and non-retaliatory reasons for the removal of her Advanced Scope. The Court thus determines that summary judgment in favor of the VA is warranted with respect to Dr. Babb's retaliation claim for removal of her Advanced Scope.

b. Non-Selection for Anticoagulation

Dr. Babb also asserts that she was retaliated against because she was not selected for the anticoagulation position. However, in her own deposition, she remarked that it was the worst interview of her life. (Babb Dep. Doc. # 59 at 115, 124). She also admitted that she did not have direct experience in administering anticoagulants. (Id. at 119). These statements speak for themselves. The VA should not be expected to hire an individual for an open position that interviews poorly, especially when several more qualified individuals apply for the position.

As noted, a panel of three interviewed the candidates in April of 2013. (Doc. # 52-2 at 144). Panel member Dr. Hall explained: "[s]ince anticoagulation experience was preferred, but not required, the clinical questions were structured in a manner that would allow a candidate without experience to still answer them correctly and score highly if they had a good understanding of anticoagulation literature and guidelines." (Id. at 140).

Dr. Hall further testified that the "selectees' prior experience indicated to the panel that they should be capable of doing the job in an efficient and skilled manner [and] should require little training to practice independently," in contrast to Dr. Babb who "did not have any direct experience in anticoagulation." (Id.). Dr. Hall also noted that Dr. Babb used derogatory and unprofessional language during the interview - specifically referring to another doctor as "screwed up" and calling her duties "crap." (Id. at 141). Dr. Hall explained that "the anticoagulation position requires a candidate with good communication skills and respect for other medical providers." (Id.).

Another member of the panel, Dr. Sypniewski recalled that the candidates selected "had significantly more experience in the applied for position" and "were better able to answer the questions," while Dr Babb "did not portray the confidence level needed" to treat anticoagulation patients. (Id. at 152- 153). Dr. Stewart likewise testified that Dr. Babb's experience was "nowhere near the other two who were selected for the position." (Id. at 160).

Dr. Babb has not confronted these reasons for her non- selection "head on." Chapman, 229 F.3d at 1030. Instead, she infers that she was best suited for the position, pointing out that one of the selected doctors, Dr. Grawe, "never had an advanced scope and was not a CPS." (Babb Decl. Doc. # 68-2 at ¶ 23).

Even assuming, arguendo, that Dr. Babb was the superior candidate, she falls short of showing that there was a disparity in qualifications "of such weight and significance" that a reasonable employer could not

have chosen Dr. Grawe over Dr. Babb. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1206 (11th Cir. 2013). On this point, the Eleventh Circuit has clarified that the inquiry is not who was a better candidate for the position, but rather whether the discrepancy is "so apparent as virtually to jump off the page and slap you in the face." Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 (11th Cir. 2001). That is not the case here.

The Court finds that Dr. Babb has not demonstrated that the VA's proffered reasons for not selecting her for the anticoagulation position - two other candidates had a better interview and had more relevant experience - are a pretext for retaliation. Courts should not be in the business of adjudging whether employment decisions are prudent or fair, but should merely determine whether an unlawful animus motivates a challenged employment decision. See Elrod, 939 F.2d at 1470. The VA is accordingly granted summary judgment on Dr. Babb's retaliation claim as to her non-selection for the anticoagulation position.

c. Refusal to Transfer Dr. Babb to Module B

Dr. Babb generally asserts that the denial her request for a lateral transfer to Module B was tainted by a retaliatory motive. However, the evidence shows that the Module B position did not exist at the time Dr. Babb requested to be transferred into Module B. (Doc. # 52-2 at 185). It is true that Dr. Howard had previously suggested that Dr. Babb consider a transfer to Module B in June of 2012, but Dr. Babb dismissed the opportunity because she felt the geriatrics department was her professional calling.

(Babb Decl. Doc. # 68-2 at ¶ 10). It was nine months later that Dr. Babb requested a lateral transfer to Module B. By that time (and with the implementation of mandatory national standards), the Module B position was not available. The VA was not required to create (or hold open) a position just to accommodate a disgruntled employee such as Dr. Babb. In addition, the record shows that a younger employee (Dr. Natalia Schwartz) requested to be transferred into Module B in June of 2012, and Dr. Schwartz was also turned down. (Doc. # 52-2 at 185).

Dr. Babb has not pointed to any evidence of pretext for the denial of her requested transfer. Instead the record shows that the VA was subject to constant staffing changes, was in the process of conforming with mandatory national guidelines, and (with respect to some clinics) was understaffed and could not meet patient demands. The VA eventually combined the Module B position with another position and offered it to Dr. Babb, and she accepted (and currently holds that position). With no evidence of pretext, summary judgment is appropriate as to the denial of a lateral transfer to Module B.

d. <u>Dr. Martinez</u>

Dr. Babb also claims that the VA's alleged retaliation can be seen through the way it treated Dr. Megan Martinez more favorably than Dr. Babb. Specifically, Dr. Babb asserts that Dr. Martinez was able to retain her Advanced Scope despite moving from one department to the next while Dr. Babb was not given that option.

However, the VA asserts that Dr. Martinez is not a comparator to Dr. Babb because "(1) unlike endocrinology, geriatrics did not ask to be without a pharmacist, (2) Dr. Babb did not already spend half of her time floating in a role that required an Advanced Scope, and (3) when Dr. Babb left geriatrics at her own request, there is no evidence of extended upcoming leaves she could cover." (Doc. # 52 at 25).

In contrast to Dr. Martinez, Dr. Babb was a pharmacist in the geriatrics department and a VA decision maker determined that geriatric patients did not need Disease State Management performed by a pharmacist. Dr. Babb's Advanced Scope was therefore removed. Thereafter, Dr. Babb continued to work in the geriatrics clinic and did not (at least at the time after the removal of her Advanced Scope) float from one clinic to the next or cover for employees utilizing maternity leave. Dr. Babb went from performing Disease State Management to not performing Disease State Management due to the removal of Disease State Management from her contract. In contrast, Dr. Martinez consistently performed Disease State Management in every position she occupied, and did so at least 25% of the time, regardless of her official title. The legitimate business reason for allowing Dr. Martinez to keep her Advance Scope even though she changed positions has not been called into question by Dr. Babb and there is no evidence of pretext or of retaliation with respect to the VA's treatment of Dr. Martinez vis-a-vis Dr. Babb.

e. <u>Holiday Pay</u>

Dr. Babb indicates that she works every Saturday. (Babb Decl. Doc. # 68-2 at ¶ 27). She claims that "the

loss to me of not getting the Monday Holiday pay has been $2,320 to date." (Id. at ¶ 34). However, Dr. Babb admitted that she already makes more money than someone on a regular Monday through Friday eight hour per day schedule. (Babb Dep. Doc. # 59 at 158). Dr. Babb agreed to her compressed schedule and was provided with all of the relevant information about her pay before accepting the position. (Doc. # 52-3 at 30). She testified that she weighed the pros and cons of the two job offers that the VA presented to her and she accepted the position with the compressed schedule. (Babb Dep. Doc. # 59 at 139).

After Babb complained about her Holiday pay, the VA offered to permanently adjust her schedule such that she would be entitled to eight, rather than four, hours of Holiday premium pay for all Monday federal Holidays, but she refused. (Doc. # 52-3 at 144). As such, Dr. Babb has not created a genuine issue of material fact with respect to her Holiday pay such that a reasonable jury could find in her favor on this issue. Summary judgment in favor of the VA is accordingly granted on Dr. Babb's retaliation claim for Holiday pay.

f. Denial of Training

Although denial of training is not alleged as a specific and discrete employment action, Dr. Babb repeatedly references the denial of training throughout her submissions and weaves the denial of training into several of her discrete claims. There are two separate instances of denial of training discussed in the depositions and evidence. First, Dr. Babb requested permission from Dr. Howard to attend a two day geriatrics training. Dr. Howard testified that

she did not allow Dr. Babb to go to this training because the registration deadline was past: "it means I couldn't register her." (Howard Dep. Doc. # 57 at 35). In addition, Dr. Babb had patients scheduled during the relevant time. (Id. at 36). Dr. Howard also explained that Dr. Babb did not need the training because she already had a good understanding of the subject matter being presented at the training. (Doc. # 52-3 at 59).

Dr. Babb also requested training in the anticoagulation department, but that training was denied by Dr. Justice. (Justice Dep. Doc. # 55 at 34). The record reflects that the anticoagulation department was tremendously busy and understaffed. Dr. Stewart explained that the anticoagulation department was "overwhelmed with patients." (Stewart Dep. Doc. # 60 at 60). He recalled one day where the clinic saw approximately 32 patients, but was nevertheless "falling behind" with "20-plus patients left over from yesterday." (Id.). He testified "there's never enough staff to handle the patient load." (Id. at 65). In addition, the anticoagulation clinic was responsible for providing training to medical student residents. (Id. at 5).

The reasons stated above for not providing Dr. Babb with certain training opportunities in question are legitimate and non-retaliatory. Dr. Babb has pointed out that other individuals were provided with special training opportunities, but she has not been able to demonstrate that her requested training was denied as an act of retaliation.

B. Count II - Gender and Age Discrimination

Employment discrimination claims all require proof of discriminatory intent. See Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 767 (11th Cir. 2005). When a Title VII or ADEA plaintiff's claim is based on circumstantial evidence of discrimination, courts apply the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). Kidd, 731 F.3d at 1202 (Title VII); Kragor v. Takeda Pharms. Am., Inc., 702 F.3d 1304, 1308 (11th Cir. 2012) (ADEA).

Under the McDonnell Douglas framework, a plaintiff must first create an inference of discrimination through her prima facie case. Vessels, 408 F.3d at 767. "Once the plaintiff has made a prima facie case, a rebuttable presumption arises that the employer has acted illegally." Alvarez v. Royal Alt. Devs., Inc., 610 F.3d 1253, 1264 (11th Cir. 2010). "The employer can rebut that presumption by articulating one or more legitimate non-discriminatory reasons for its action." Id. "If it does so, the burden shifts back to the plaintiff to produce evidence that the employer's proffered reasons are a pretext for discrimination." Id.

Here, Dr. Babb maintains that she was discriminated against on the basis of her gender and her age when she was not selected for the anticoagulation position and when she was denied transfer to Module B. These are some of the same actions by the VA that Dr. Babb contends were acts of retaliation for her protected activity. The Court's analysis above addresses each challenged employment action and demonstrates how each action was free of an illegal motive. However, to be abundantly thorough, the Court will discuss these issues under the prism of the McDonnell Douglas

burden shifting test for age and gender discrimination.

1. Non-Selection for Anticoagulation

In the related Trask case, the Eleventh Circuit held:

> In a typical failure to hire scenario, the plaintiff establishes a prima facie case of unlawful discrimination by demonstrating that: "(1) she was a member of a protected class; (2) she applied and was qualified for a position for which the employer was accepting applications; (3) despite her qualifications, she was not hired; and (4) the position remained open or was filled by another person outside of her protected class."

Trask, 822 F.3d at 1191 (citing EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002)).

Here, Dr. Babb meets these elements. She was a member of a protected class as a woman over the age of forty, she applied for the open anticoagulation position and she was generally qualified. She would not have been interviewed by the panel if she did not meet the minimum qualifications for the position. She was not hired, and the position was filled by two younger female pharmacists.

The burden accordingly shifts to the VA to rebut the inference of age discrimination by presenting a legitimate and non-discriminatory reason for not hiring Dr. Babb for the anticoagulation position at that juncture. Holifield v. Reno, 115 F.3d 1555, 1564

(11th Cir. 1997). This burden is "exceedingly light" and the VA need only produce evidence that could allow a rational juror to conclude that the challenged employment action was not made for a discriminatory reason. Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). The VA has met this burden with evidence that the three panel members who conducted the interviews for the anticoagulation position agreed that Dr. Mack and Dr. Grawe were the best of the four candidates. (Doc. # 52-2 at 139).

As noted, Dr. Hall testified that the "selectees' prior experience indicated to the panel that they should be capable of doing the job in an efficient and skilled manner [and] should require little training to practice independently," in contrast to Dr. Babb who "did not have any direct experience in anticoagulation." (Id. at 140). Likewise, Dr. Sypniewski explained that the selected candidates:

> Had significantly more experience in the applied for position. They had either done residencies where they were required to work in anti-coag clinic, or they actually already were processing anti-coag consults, or they had actually worked in anti-coag clinic post-residency. They knew and were familiar with the workings of the position to which they had applied, and their experience in anti-coag enabled them to answer the questions with examples.

(Id. at 152). In comparison, Dr. Sypniewski remembered that Dr. Babb appeared nervous at her interview, and did not answer the panel's questions with "specific examples." (Id. at 153).

Finding that Dr. Babb was less qualified for the position than the two younger pharmacists that were hired is a legitimate and non-discriminatory reason for the VA's hiring decision. The burden accordingly returns to Dr. Babb to supply evidence "sufficient to permit a reasonable fact-finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Davis v. Qualico Miscellaneous, Inc., 161 F. Supp. 2d at 1322 (citing Chapman, 229 F.3d at 1024).

Dr. Babb points out that she was eventually offered a position that included anticoagulation and argues that she could not have been that poor of a candidate or she would not have been offered a position involving administering anticoagulants. (Babb Decl. Doc. # 68-2 at ¶ 27). This argument misses the point. The VA has not argued that Dr. Babb's non-selection in 2013 was based on complete incompetence or a consideration that would have barred her from all anticoagulation positions indefinitely. Rather, at the time of the relevant interview, two other candidates with more experience applied and Dr. Babb admittedly interviewed poorly. The VA selected the two pharmacists for the anticoagulation position that had the most experience and who interviewed well.

As stated in Alexander v. Fulton County, 207 F.3d 1303, 1341 (11th Cir. 2000), "it is not the court's role to second-guess the wisdom of an employer's decision." Furthermore, the Court does not "sit as a super-personnel department that reexamines" hiring decisions. Davis, 245 F.3d at 1244. Accordingly, Dr. Babb has not shown that the VA's proffered reason for its hiring decision is unworthy of credence, and the VA is entitled to summary judgment on this issue.

2. Denial of Transfer to Module B

Dr. Babb claims that she was discriminated against because her request to be laterally transferred to Module B was denied by Dr. Justice. To establish a prima facie case of disparate treatment in an employment discrimination case, the plaintiff must show "(1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job." Trask, 822 F.3d at 1192 (citing Burke-Fowler v. Orange Cty., 447 F.3d 1319, 1323 (11th Cir. 2006)).

Dr. Babb does not have a prima facie case for gender or age discrimination because she has not identified a comparator that was treated more favorably than her with respect to a lateral transfer. In Trask, the court explained: "[w]ith respect to the third prong of the prima facie case, the plaintiffs and the employee they identify as a comparator must be similarly situated in all relevant respects. The comparator must be nearly identical to the plaintiffs to prevent courts from second-guessing a reasonable decision by the employer." Trask, 822 F.3d at 1192 (internal citation and quotation marks omitted). In order for Dr. Babb to establish a prima facie case of disparate treatment, she must show that a similarly-situated person outside of her protected class sought a lateral transfer to Module B (or another location) and was granted such a transfer under like circumstances. Id.

It is not an easy task to ascertain the identity of Dr. Babb's purported comparator. In her response to

the Motion for Summary Judgment, she indicates: "there are comparators for all of the events. In some instances those comparators are young females; in others young males; in others older males and in still others a combination of all three or two of those categories. However, in each instance, older females are being treated adversely." (Doc. # 68 at 27).

Dr. Babb did not come forward with a specific comparator that was treated more favorably than her. In fact, the record shows that a younger female, Dr. Natalia Schwartz, sought to be transferred into the Module B department and was also turned down. Dr. Babb has not shown that a pharmacist outside of her protected class was transferred into Module B (or any other department) in order to be eligible for a GS-13 upgrade. The lack of a comparator is fatal to Dr. Babb's prima face case for discrimination. And, even if Dr. Babb was able to assert such a prima facie case, the VA has come forward with a legitimate and non-discriminatory reason for denying Dr. Babb's request to be transferred into Module B - that position was no longer available at the time that Dr. Babb requested the transfer. The Court accordingly determines that the VA is entitled to summary judgment on Dr. Babb's discrimination claim.

3. Dr. Babb's Case under the Smith Mosaic Test

Dr. Babb contends in her response to the Motion for Summary Judgment that her discrimination claims survive under the "convincing mosaic" test articulated in Smith v. Lockheed Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011). There, the Eleventh Circuit explained that regardless of the outcome of the

McDonnell Douglas burden-shifting analysis, "the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." Id. at 1328. A triable issue of fact exists if, when viewed in the light most favoable to the plaintiff, the record shows "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." Smith, 644 F.3d at 1328; see also Sims v. MVM, Inc., 704 F.3d 1327, 1333 (11th Cir. 2013) (applying convincing mosaic test in ADEA case).

In Smith, the plaintiff failed to establish a prima facie case of race discrimination but the plaintiff presented evidence that the employer identified its employees by race, that all white employees under investigation were fired, and no black employees under investigation were terminated. In contrast, viewing the evidence in the light most favorable to Dr. Babb, the Court determines that there is not a convincing mosaic of circumstantial evidence showing discrimination.

C. Count III - Hostile Work Environment

Dr. Babb also asserts that she was subjected to an actionably hostile work environment based on age, gender, and retaliation for protected activity. In order to establish a hostile work environment under Title VII, a plaintiff must demonstrate that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment." Gowski v. Peake, 682 F.3d 1299, 1311 (11th Cir. 2012).

To support a hostile work environment based on age or gender, Dr. Babb must prove:

> (1) he or she belonged to a protected group, (2) he or she was subjected to unwelcome harassment, (3) the harassment was based on a protected characteristic, (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of his or her employment and create an abusive working environment, and (5) a basis exists for holding the employer liable.

Trask, 822 F.3d at 1195 (citing Gupta v. Florida Bd. of Regents, 212 F.3d 571, 582 (11th Cir. 2000)).

To support a retaliatory hostile work environment claim, Dr. Babb must establish that she engaged in protected activity, she was subject to unwelcome harassment, the harassment was based on protected activity, and the harassment was sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment. Gowski, 682 F.3d at 1311-12.

"It is a bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII." Jones v. UPS Ground Freight, 683 F.3d 1283, 1297 (11th Cir. 2012)(quotation marks omitted). "Therefore, only conduct that is based on a protected category [or protected activity] may be considered in a hostile work environment analysis." Id. "[T]he Courts of Appeals have uniformly observed that Title VII is not a civility code, and that harassment must discriminate on the basis of a protected characteristic in order to be actionable." Reeves v. C.H. Robinson

Worldwide, Inc., 594 F. 3d 798, 809 n.3 (11th Cir. 2010). As explained in Jones, 683 F.3d at 1297, "Innocuous statements or conduct, or boorish ones that do not relate to [age, gender, or protected activity] . . . are not counted."

"The requirement that the harassment be severe or pervasive contains an objective and a subjective component." Gowski, 682 F.3d at 1312. In considering the objective severity of alleged harassment, the Court looks at the totality of the circumstances and considers (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating (or a mere offensive utterance), and (4) whether the conduct unreasonably interferes with the employee's job performance. Id. In Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), the Court admonished: "we have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." Id.

Throughout Dr. Babb's deposition, she repeatedly expressed the sentiment that she was subjected to a hostile work environment. (Babb Dep. Doc. # 59 at 13, 15, 39, 57, 68, 81, 112, 122, 138, 143, 157, 185). However, when she actually recounted the specific instances that she felt were harassment, the Court finds that no reasonable jury could determine that Dr. Babb was subjected to a hostile work environment. As for age, gender, or protected activity- related remarks, Dr. Babb recalls that Dr. Howard asked when Dr. Babb planned to retire, and Dr. Justice remarked that the film "Magic Mike" was geared toward middle aged females and also called Dr. Babb a "mow mow" (a made up term used to describe a frequent complainer).

These sporadic and non- threatening remarks, as well as the litany of grievances Dr. Babb describes in her submissions ("fully successful" instead of "excellent" evaluation, being called to testify about the "vulgar letter," denial of training, reports of contact addressed to Dr. Stewart, and other tribulations) do not create a hostile work environment as a matter of law.

Dr. Babb has described feeling upset, crestfallen, and dismayed due to the VA's employment practices (Babb Decl. Doc. # 68-2); however, she has not described an objectively hostile working environment "filled with intimidation and ridicule that was sufficiently severe or pervasive to alter the plaintiff's working conditions." Gowski, 682 F.3d at 1313. Rather, Dr. Babb has described "the ordinary tribulations of the workplace," which do not constitute actionable harassment. Gupta, 212 F.3d at 586; see also Baroudi, 616 Fed. Appx. at 905 (actions that "upset" and "humiliated" the plaintiff, including cancellation of her clinic, removal of papers from her office, and general incivility, did not constitute a retaliatory hostile work environment as a matter of law); Trask, 822 F.3d at 1196 ("pharmacy management behaved rudely and made comments that plaintiffs considered offensive, belittling, and humiliating," but those actions did not constitute a hostile work environment based on age and gender.) After due consideration, the Court grants the VA's Motion for Summary Judgment as to Dr. Babb's hostile work environment claim.

IV. Conclusion

The existence of a mere scintilla of evidence in support of a non-moving party's position is

insufficient; the test is "whether there is [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Anderson, 477 U.S. at 252. A party opposing summary judgment must "show specific facts exist that raise a genuine issue for trial." Dietz v. SmithKline Beecham Corp., 598 F.3d 812, 815 (11th Cir. 2010). "Mere conclusions and unsupported factual allegations are legally insufficient to create a dispute to defeat summary judgment." Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1563 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Saltzman v. Bd. of Comm'rs of the N. Broward Hosp. Dist., 239 Fed. Appx. 484, 487 (11th Cir 2007).

Dr. Babb, confronted with the VA's properly supported Motion for Summary Judgment, has not met her burden because she has not shown that specific facts exist that raise a genuine issue for trial and has not supported her conclusional allegations with an evidentiary foundation. For this reason, and for the reasons articulated above, the Court grants the VA's Motion for Summary Judgment.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED**:

(1) Defendant the Secretary of Veterans Affairs' Motion for Summary Judgment (Doc. # 52) is **GRANTED.**

(2) The Clerk is directed to enter Judgment in favor of Defendant the Secretary of Veterans Affairs and thereafter to **CLOSE THE CASE**.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 23rd day of August, 2016.

Virginia M Hernandez Covington
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16492-FF

NORIS BABB,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

[Filed: October 9, 2018]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, NEWSOM and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.