No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2020

MELINDA PEARSON,
Applicant/Petitioner,

v.

AUGUSTA, GEORGIA, et. al.
Respondents.

APPENDIX

Petition for Writ of Certiorari
To the Eleventh Circuit

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December 4, 2020

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15275

D.C. Docket No. 1:14-cv-00110-JRH-BKE

MELINDA BEAZLEY PEARSON,

Plaintiff-Appellant,

versus

AUGUSTA GEORGIA,
through its Mayor Hardie Davis, Jr.,
in his official capacity, and its commission,
in its official capacity,
FRED RUSSELL,
individually and in his capacity as City Manager,
as a final policy maker, under color of law,
BILL SHANAHAN,
individually and in his official capacity,
under color of law,
SAM SMITH,
individually and in his official capacity,
under color of law,
JOHN AND JANE DOE,
whose true names are not known,
individually and in his or her individual capacity,
under color of law, Individually or jointly,
and in conspiracy with one another,

Defendants-Appellees.

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

(May 11, 2020)

Before ED CARNES, Chief Judge, JULIE CARNES, and CLEVENGER,[*] Circuit Judges.

PER CURIAM:

Melinda Pearson worked for the City of Augusta, Georgia, for thirty years. For most of that time she complained of unfair and discriminatory treatment. After being demoted, injured on the job, and then fired, Pearson sued her former employer and three of its employees alleging various forms of discrimination and retaliation. The district court granted summary judgment against her on all but one of her claims, which went to trial. At the close of Pearson's evidence, the court granted judgment as a matter of law against her, disposing of her last remaining claim. This is her appeal.

[*] Honorable Raymond C. Clevenger, III, United States Circuit Judge for the Federal Circuit, sitting by designation.

I. BACKGROUND

A. Facts

Pearson, a white woman, started working as a summer employee for the parks and recreation department in the City of Augusta in 1980.[1] She was promoted several times. In 1992 she became a Special Activities Supervisor. During her time as a supervisor she twice complained to human resources that, even though she was a supervisor, she was being forced to do manual labor in an attempt to make her "work out of [her] job." Nothing came of her complaints.

In 1996, Pearson was promoted to operations manager in the parks and recreation department. Despite the promotion, she continued to have problems. One of those problems arose in 1999 from her attempt to use "comp time," which is short for compensatory time, an alternative to overtime. Under the comp time system, an employee who worked more than 40 hours in a pay week could bank those extra hours for later use as paid time off. Instead of receiving overtime pay in cash, the employees could take an equivalent number of paid hours off work later. The City had a general policy of not allowing exempt employees — that is, salaried employees like Pearson who were exempt from the Fair Labor Standards Act's overtime requirements — to accrue or use comp time. Only those who were

[1] We refer to the defendants collectively as "the defendants," and, where context requires, to the City of Augusta by itself as "the City."

considered non-exempt employees under the FLSA were supposed to use comp time.

Despite that, until 1999 the human resources department had allowed Pearson to accrue and use comp time. But that year her manager denied her request to use comp time on the ground that she was an exempt employee. After she complained, however, the human resources director wrote a letter to Pearson and her manager, stating that because she had already accrued comp time that was "in the payroll system," there was "no other option other than to compensate her for her time," meaning to let her use it for paid time off.

That letter did not say if Pearson would be allowed to continue accruing comp time, although it did state that "exempt employees do not accrue compensatory time." And in a conversation they had, the department director told Pearson that, unlike non-exempt employees, she could no longer report comp time on her official timecard.

Both exempt and non-exempt employees submitted weekly timecards to the payroll department. Exempt employees indicated on their timecards only whether they had worked a full day or taken some sort of paid time off, like vacation or sick time. Non-exempt personnel, also known as hourly employees, recorded on their timecards the exact number of hours they had worked and also noted how many comp time hours they had accrued that week. If a non-exempt employee wanted to

use comp time, he would mark the timecard to show that he was not working and would write on the timecard the amount of comp time hours he wanted to use that day. The payroll department tracked comp time hours accrued by non-exempt employees. The department did not track comp time for exempt employees, because under City policy they were not supposed to have any.

But they did, at least to some extent and at least in the parks and recreation department, which created a system to allow exempt employees to use comp time, despite it being prohibited. Under that system, an exempt employee would fill out a piece of paper each time he accrued comp time and place the paper in a binder on the assistant director's desk. When he wanted to use accumulated comp time hours, the exempt employee would retrieve his comp time paper from the binder and submit it to his supervisor. The supervisor would then approve the exempt employee's use of comp time to take off a day or some part of it. That was, however, not quite enough to make the off-the-books operation work.

Before the comp time consuming employee in the parks and recreation department could be paid as though he had worked instead of being off that day, the payroll department had to approve the employee's timecard and, as we have explained, the City supposedly did not allow exempt employees to earn or use comp time. So Pearson and the other exempt employees in the parks and recreation department, with the approval of their managers, submitted timecards to

the payroll department showing that they were working a full day, even when they were not working all or even part of that day but were instead using comp time to be off. Under that informal, de facto system, the human resources and payroll departments had no record of any exempt employees, including Pearson, ever accruing and using comp time.

It was under that system that Pearson, like other exempt employees in the parks and recreation department, kept track of and used her comp time. And even after the 1999 incident, and throughout her remaining employment there, her managers continued to approve her use of it.

Comp time was not the only problem that Pearson complained about. She also complained that she was required to do manual labor despite her operations manager job description not mentioning that it was required. And doing manual labor eventually led to serious injury. In 2004 she was trying to wrestle a tent beam off the back of her truck when the beam got caught and threw her into the back of the truck. Because she was in pain and had major bruising, she went to the doctor. He told her that she had dislocated her shoulder, and he put her arm in a sling. When she returned to work a week later, her manager assigned her more manual labor.

The next week the pain got worse. She went to another the doctor who discovered that she had three ruptured discs in her spine, which the first doctor had

missed. Because it was a work-related injury, workers' compensation paid her medical expenses. Pearson was out of work for six months because of her back injury.

There were more problems. In 2005 Pearson complained that male managers were receiving extra pay for taking on extra work, but she was not. That year she filed an EEOC sex discrimination charge against her manager and the City, alleging that she was treated worse and paid less than the other managers — all of whom were men. All of the male managers had offices, she had none. All of the male managers could wear what they wanted, she had to wear a uniform. She was issued a right to sue letter but decided not to sue at that time.

In 2008 Pearson contracted MRSA (Methicillin-resistant Staphylococcus aureus), a serious infection, although the record does not indicate how she got it. It resulted in her having 29 surgeries between 2008 and 2011. After each one of those surgeries she was out of work for at least a week. Sometimes more.

In July 2011 Pearson had a severe MRSA flare up and was out of work until December 2011. During that time she was placed on Family Medical Leave Act leave. She was paid through mid-August (using her accrued vacation and sick leave), but after that her leave was unpaid. Pearson called a parks and recreation administrative assistant who handled timecards for the department and asked to use some of her comp time to extend the paid portion of her leave. But she was

told parks and recreation was "going to have to hold [her] time of comp until [she] returned."

She was instead granted catastrophic leave, a program under which employees can donate time off to an employee in need of it. Catastrophic leave is available only to employees who have exhausted all other forms of paid leave, including comp time. Many of the employees under Pearson's supervision donated their time off to her.

In December 2011, the City put out a new handbook explicitly providing that exempt employees could not accrue or use comp time. On December 8, 2011, Pearson signed a form acknowledging that she had received and had the opportunity to read the entire handbook.

Shortly after Pearson returned to work in December 2011, she experienced a new set of problems: she did not get along with her new manager, Dennis Stroud, and she found some of the employees under her supervision, particularly Sam Smith and Millie Armstrong, to be insubordinate. After one particularly "horrible conversation" (her description) in late December, Pearson told Stroud that she was going to file a formal complaint against him. She requested time off to cool down, and Stroud agreed: he told her not to come back until after the New Year, which would mean she would be out of work for four days. But there was a complication. Because Pearson had only recently returned from an extended leave

of absence, she had exhausted most of her available time off. All she had left was comp time, which she requested permission to use so she would not lose pay during those days that she would be out of work. Tom Beck, the parks and recreation director, approved her request. In keeping with the practice of the parks and recreation department, Pearson submitted a timecard indicating that she had worked each of those four days.

Pearson's four-day leave of absence did not go unnoticed. In early 2012 the City's human resources department began an investigation into her use of comp time. Bill Shanahan, who was acting as the interim director of human resources and, later, as the interim director of the parks and recreation department, oversaw the investigation. During the investigation Shanahan reviewed the parks and recreation payroll records and interviewed several employees including Pearson and Tom Beck, her supervisor (Stroud, her former supervisor, was fired between the time Pearson made the request and the time the comp time was approved).[2] Pearson also provided a written statement about the matter to Ron Clark, who worked in the human resources department.

[2] During the investigation, someone leaked several documents from Pearson's file to the media, including disciplinary write-ups that she had received over her thirty years of employment with the City for infractions such as failing to wear a uniform or leaving without telling a manager. Later, someone also leaked some medical documents related to her workers' compensation claim to the press and alleged that she had falsified that claim. The leaked information had been kept in the human resources office, and Pearson testified in her deposition that Shanahan had admitted leaking those documents to the press. But he denied admitting it or doing it.

Shanahan concluded that Pearson's December 2011 use of comp time was improper for two reasons. First, as an operations manager, she was an exempt employee and was thus ineligible to accrue and use comp time under the City policy. And second, she was required to have exhausted any comp time she did have during her July 2011 to December 2011 leave of absence before she used donated leave time from other employees. Shanahan demoted Pearson from operations manager to maintenance worker on May 2, 2012, a demotion that came with a pay cut of about fifty percent. Pearson appealed Shanahan's decision; it was reviewed and affirmed by Fred Russell, the City's administrator.

In May 2012, Pearson began working in the new position of maintenance worker to which she had been demoted. Although she complained that the work was hurting her back, her manager told her that she had to continue working without any assistance. By the end of the month she had re-injured her back and had to go on medical leave again. She remained on leave for over eight months, until February 2013. At that point Pearson had not been medically cleared to return to work, and she had exhausted all of the leave available to her, so the City terminated her employment.

B. Procedural History

In October 2012, before she was terminated but after she had been demoted and had left on medical leave, Pearson filed an EEOC charge. She alleged that her

demotion from operations manager to maintenance worker was the result of race and gender discrimination and retaliation. In March 2013, after she was terminated, she filed a second EEOC charge alleging that she was fired because she had a disability (her back injury) and in retaliation for filing her October 2012 EEOC charge. She received right to sue letters in January 2015 and, with the assistance of counsel, she sued the City. Pearson had already filed a separate lawsuit against the City, Shanahan, Russell, and Sam Smith involving related subject matter. The district court consolidated the two lawsuits.

In total, Pearson brought a plethora of claims in a plethora of paragraphs on a plethora of pages in three different complaints. The complaint in her first lawsuit was 28 pages and 242 paragraphs long. The complaint in her second lawsuit was originally 65 pages and 543 paragraphs long, but she submitted an amended 19-page, 125-paragraph complaint. Considering only the two complaints that went to judgment, and forgetting the second lawsuit's superseded one, in 367 paragraphs spread over 47 pages Pearson asserted claims under the Fair Labor Standards Act, the Family Medical Leave Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964 (for race-based discrimination, sex-based discrimination, hostile work environment, and retaliation), the Due Process Clause, and the Equal Protection Clause. She brought claims against the City as well as Shanahan, Smith, and Russell in both their individual and official capacities. Some

of the claims were based on her demotion, some were based on the City's denial of her comp time requests, and some were based on her termination. And it is not obvious from the face of the complaints which claims arose from whose actions.[3]

The district court first dismissed the official capacity claims against the individuals. It later granted the defendants summary judgment on all but one of Pearson's claims, the Title VII retaliatory termination claim. The case proceeded to trial on that one claim and after the close of Pearson's evidence, the court granted the defendants' motion for judgment as a matter of law on it.

As best we can tell from her briefs to this Court, Pearson challenges the district court's grant of summary judgment in the defendants' favor on these claims: procedural due process violations under the Fourteenth Amendment (for her demotion and for the termination of her employment); Title VII race and sex discrimination (based on her demotion); 42 U.S.C. § 1983 equal protection violation (based on her demotion); Title VII retaliatory hostile work environment; Title VII hostile work environment (based on her race and sex); FLSA retaliation; and an ADA claim (based on her termination). She also challenges two of the

[3] The district court described that complaint as "not clear at all" and "lack[ing] the clarity and precision that Rule 8 demands in abundance. It is replete with incoherent sentences, many of which are either missing words . . . or span up to nine lines without a single period . . . . It references over twenty individuals who are not defendants: some by first name, some by last name, some who were Ms. Pearson's subordinates, some who served in a supervisory capacity, some who worked for other City departments, and some whose relevance to Ms. Pearson's claims are tangential at best."

district court's evidentiary rulings at trial. Finally, she contends that the district court erred by granting judgment as a matter of law on her Title VII retaliatory termination claim.[4]

Pearson's contentions that the district court erred by granting summary judgment on her Title VII race discrimination claim, Title VII retaliatory hostile work environment claim, Title VII hostile work environment claims based on race and sex, FLSA retaliation claim, and ADA claim are clearly without merit and do not warrant discussion. We affirm the district court's judgment on those claims without saying more.

That leaves her contention that the district court erred in granting summary judgment on her due process claims, her § 1983 equal protection claim, and her Title VII sex discrimination claim, as well as her contentions that the court erred in its evidentiary rulings and its grant of judgment as a matter of law on her Title VII retaliatory termination claim. We discuss each of those contentions in turn.

II. SUMMARY JUDGMENT

"We review the district court's order[s] granting summary judgment de novo, viewing all the evidence, and drawing all reasonable inferences in favor of"

[4] Those are the only claims she addresses on appeal, and as a result she has abandoned any others. Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

the party opposing the motion. Scott v. United States, 825 F.3d 1275, 1278 (11th Cir. 2016) (quotation marks omitted). A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A 'material' fact is one that 'might affect the outcome of the suit under the governing law.'" Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1303 (11th Cir. 2016) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). And a "dispute about a material fact is 'genuine[]' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

A. Due Process Claims

Pearson contends that the defendants violated her due process rights by not providing any pre-deprivation process before her demotion or her termination. The district court relied on McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), to deny both of her procedural due process claims on the ground that state law, through a mandamus petition, provided a means to remedy any procedural deprivation she may have suffered, yet she failed to file one. See id. at 1563. According to Pearson, the McKinney rule does not relieve the City from providing her with the pre-deprivation process she was guaranteed under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). She argues that because she didn't

receive proper pre-deprivation process under Loudermill, the district court should not have granted summary judgment on her due process claims.

Pearson's argument fails because she did receive adequate pre-deprivation process under Loudermill. See Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) ("We may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below.").

Although the Due Process Clause of the Fourteenth Amendment requires a hearing before a public employee with a property right in her continued employment is terminated, the hearing "need not be elaborate" and "need not definitively resolve the propriety of the discharge." Loudermill, 470 U.S. at 545. The hearing "should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545–46. The "employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id.

Pearson received at least that much process before her demotion.[5] She was demoted in May 2012. As early as March 2012 she knew that Shanahan was investigating her December 2011 use of comp time. Around that time, Shanahan met with her and gave her the opportunity to explain her comp time use. She also knew that the investigators were looking at her payroll binder to see if she had falsified her timecards. And she knew that falsifying a timecard could warrant discipline up to and including termination. In April 2012, one month before her demotion, Pearson was given the opportunity to submit a written statement about her December 2011 use of comp time, and she took advantage of that opportunity. Taken together, all of this means Pearson knew she was being investigated for an infraction that could result in her demotion, and she had a chance to respond to the accusations verbally and in writing and did so.

As for her termination in February 2013, Pearson also received all the process she was due under Loudermill before that happened. At the time of the termination, she had been on leave since May 2012 because of her back injury. On February 7, 2013, Pearson met with two human resources employees to discuss her leave status. They gave her a letter from Mike Blanchard, who had replaced Shanahan as the City's interim human resources director. The letter informed

[5] Even though Loudermill addressed only the process required before termination, we have applied Loudermill's pre-deprivation due process requirements to demotions. See Hatcher v. Bd. of Pub. Educ., 809 F.2d 1546, 1553 (11th Cir. 1987).

Pearson that as of January 30, 2013, she had exhausted all available leave. It warned her that because she was "not eligible for any leave status for a continued absence," the City would "separate [her] from service" if she could not return to work by February 13, 2013. Pearson told those human resources employees that her doctor had not cleared her to return to work and that her next appointment was not until March 8, 2013, which was three weeks after the back-to-work deadline.

She met with the human resources employees again on February 13, 2013. Because she still had not been cleared to return to work, they told her that she would have to retire. They gave her one more week for her doctor to clear her to work, but the doctor didn't. As a result, Pearson's employment with the City was terminated.

Before she lost her job, Pearson had received written notice of the reason why the City was contemplating terminating her employment and an explanation of the City's supporting evidence. She also had been given more than one "opportunity to present h[er] side of the story" to the two human resources employees, Loudermill, 470 U.S. at 546, and she was given time to secure a medical clearance from her doctor. That is all the pre-termination process required under Loudermill.[6] See id.

[6] Pearson also argues that the district court erroneously denied her untimely motion to amend her complaint to add state law due process claims. The district court denied that motion because Pearson had not shown good cause for filing it late and because the amendment would

B. Title VII and § 1983 Sex Discrimination Claims Based on the Demotion

Pearson contends that she was demoted because of sex discrimination, in violation of both Title VII and (by way of § 1983) the Equal Protection Clause of the Fourteenth Amendment.[7] Her Title VII and § 1983 claims are based on the same allegations. We can analyze those claims together because "the analysis of disparate treatment claims under § 1983 is identical to the analysis under Title VII where the facts on which the claims rely are the same." Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008).

Under the McDonnell Douglas framework, a plaintiff alleging a Title VII or § 1983 discrimination claim must first establish a prima facie case of discrimination, showing: "(1) that she belongs to a protected class, (2) that she was subjected to an adverse employment action, (3) that she was qualified to perform the job in question, and (4) that her employer treated 'similarly situated' employees outside her class more favorably." Lewis v. City of Union City, 918 F.3d 1213, 1220–21 (11th Cir. 2019) (en banc).

"If the plaintiff succeeds in making out a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its

have been futile. That was not an abuse of discretion. See Smith v. Sch. Bd. of Orange Cty., 487 F.3d 1361, 1366–67 (11th Cir. 2018).

[7] Pearson brought her equal protection claims against Augusta, Shanahan in his individual capacity, and Russell in his individual capacity. She brought her Title VII claims against Augusta only.

actions." Id. at 1221. If the defendants do so, Pearson "must then demonstrate that the defendant[s'] proffered reason was merely a pretext for unlawful discrimination, an obligation that merges with the [plaintiff's] ultimate burden of persuading the [factfinder] that she has been the victim of intentional discrimination." Id. (first alteration added) (quotation marks omitted).

The parties agree that Pearson satisfied the first three prongs of the prima facie case: she is a woman, she was demoted, and she was qualified to do her job. But they disagree about whether Pearson satisfied the fourth prong by identifying a comparator who was sufficiently similarly situated to her who was treated differently.

"[A] plaintiff must show that she and her comparators are similarly situated in all material respects." Id. at 1224 (quotation marks omitted). A similarly situated comparator:

> - will have engaged in the same basic conduct (or misconduct) as the plaintiff;
> - will have been subject to the same employment policy, guideline, or rule as the plaintiff;
> - will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff; and
> - will share the plaintiff's employment or disciplinary history.

Id. at 1227–28 (footnote and citations omitted).

Pearson identifies five men as potential comparators for her sex discrimination claims: Donnell Conley, Chris Scheuer, Ron Houck, Christopher Yount, and Sam Smith. Four of those men, Scheuer, Conley, Yount, and Houck, were "subject to the same employment policy, guideline, or rule as" Pearson and were "under the jurisdiction of the same supervisor" as Pearson.[8] Id. at 1227–28. They were all managers and all exempt employees under the Fair Labor Standards Act, meaning that according to the City handbook they were not entitled to accrue or use comp time.

The question is, therefore, whether Pearson showed that any of those four men engaged in the same basic misconduct as she did: accruing comp time as an exempt employee and using it by marking their timecards to show that they were working when they weren't. Pearson submitted evidence, in the form of deposition testimony and declarations, that those four men used comp time even though they were exempt employees. And Shanahan would have known that at least some of the men were using comp time as exempt employees because one of them, Scheuer, admitted doing so. His admission came during an interview that the human resources manager conducted as part of the investigation into Pearson's use

[8] Smith is clearly not an appropriate comparator. Pearson argues that he is because he wrote on an employee's timecard that the employee was using sick leave when he did not show up for work, even though Smith did not know whether that employee was actually sick. She also asserts that Smith drove around in his car while on the clock. But neither of those alleged offenses is the same basic conduct as Pearson's use of comp time without reporting it on her timecard, which makes him an inappropriate comparator. See Lewis, 918 F.3d at 1227.

of comp time, and as acting director of human resources Shanahan would have reviewed the investigation interview notes. And Shanahan would have known that because human resources did not track comp time for exempt employees, Scheuer could not have taken comp time without falsifying his timecard in the same manner Pearson did. There was also direct evidence in the record that Yount had falsified a timecard in the same manner that Pearson did; there were three falsified timecards from Yount.

Pearson has, therefore, established that Scheuer, Conley, Yount, and Houck were "similarly situated in all material respects," id. at 1224, and the burden shifts to the defendants "to articulate a legitimate, nondiscriminatory reason for its actions," id. at 1221. The defendants, in their brief, claim that Pearson was demoted because she "knew that she was not eligible for comp time as an exempt employee and . . . she engaged in a process which resulted in falsified timecards in direct violation of [City] policy." But that cannot be a legitimate, non-discriminatory reason for Pearson's termination if, as her evidence shows, it is exactly what the comparators did.

Not only that, but Pearson has submitted other evidence of pretext. That evidence included her testimony and a letter that showed she had been told in 1999 that she could use comp time even though she was an exempt employee. And she presented evidence that when she attempted to use her comp time before she took

catastrophic leave, she was told that the parks and recreation department was "going to have to hold [her] time of comp until [she] returned." The implication of that evidence, which we must credit at this stage of the proceedings, is that the use of comp time was permitted — otherwise, why would the department hold it for her?

Taken together and viewed in the light most favorable to Pearson, with this evidence Pearson has raised a genuine issue of material fact as to whether the defendants' articulated reason for demoting her was pretextual. The defendants should not have been granted summary judgment on her Title VII and § 1983 sex discrimination claims.[9]

III. TRIAL RULINGS AND JUDGMENT

Pearson's Title VII retaliatory termination claim went to trial. She challenges two of the district court's evidentiary rulings during trial and the judgment as a matter of law it entered. First, she contends that the district court abused its discretion by excluding all evidence from before October 23, 2012 as not relevant to whether the defendants had retaliated against Pearson for filing the

[9] Pearson also makes a mixed-motive argument, see Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1235, 1239 (11th Cir. 2016), and a mosaic theory argument, see Smith v. Lockheed–Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011), for her Title VII sex discrimination claim. Because we find that a genuine issue of material fact exists about whether the City discriminatorily demoted her under the McDonald Douglas framework, we need not consider those other arguments.

EEOC charge on that date. Second, she challenges the court's exclusion of a December 2012 email from Shanahan that Pearson tried to put into evidence during the trial. Finally, Pearson contends that the district court erred by granting the defendants judgment as a matter of law after her close of evidence. We consider each contention in turn.

A. Exclusion Of The Pre-October 23, 2012 Evidence

The sole claim that made it to trial was that Pearson was terminated in retaliation for filing the October 23, 2013 EEOC charge. The court excluded as irrelevant evidence about anything that occurred before she filled out a questionnaire on October 23, 2012 prefatory to filing the EEOC charge. The parties and the district court treated that date as the beginning of her protected conduct, and so will we. The court excluded evidence of any conduct by the defendants before that date because it could not have been evidence of retaliation for protected conduct that had not yet happened.

We review that evidentiary ruling only for an abuse of discretion. Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., 402 F.3d 1092, 1103 (11th Cir. 2005). We will not reverse a district court's decision to exclude evidence "unless the ruling is manifestly erroneous." Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1312 (11th Cir. 2000) (quoting Gen. Elec. v. Joiner, 522 U.S. 136, 142 (1997)). And even if the decision is manifestly erroneous, we will not reverse if

the error was harmless. United States v. Langford, 647 F.3d 1309, 1323 (11th Cir. 2011).

According to Pearson, the district court erred by ruling any and all pre-October 23 evidence per se irrelevant instead of considering each piece of proffered evidence individually to determine its relevance. We disagree. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

The alleged events or conduct that occurred before October 23, 2012 that Pearson argues were relevant to the question of whether Shanahan had a retaliatory intent when he fired her, include:

> Shanahan's August 2012 false accusation of worker's compensation fraud against Pearson, Shanahan's July 2012 false accusation against Pearson of losing a radio, Shanahan's May 2012 leak of Pearson's personnel records to the media, Shanahan's prior retaliation and leak of information in 2010 when employed by the city of St. Mary's, Shanahan's manipulation of the H.R. process to get Sam [Smith] to replace Pearson as manager after her demotion, and the retaliatory hostile work environment suffered by Pearson . . . .

None of that evidence has any tendency to make it more probable that Shanahan retaliated against Pearson based on her October 2012 EEOC activities and filings, instead of for some other reason, because all of that evidence relates to incidents that occurred before she did the first protected act. See Fed. R. Evid. 401.

Pearson's evidence of pre-October 23, 2012 events and conduct actually tends to prove the lack of a retaliatory motive stemming from her protected conduct on and after that date. It shows that Shanahan had taken adverse actions against Pearson before she took the first step to filing the EEOC charge. Which tends to show there were other motives behind her termination. No matter how bad the motive for terminating Pearson may have been, if it was not in retaliation for her protected conduct in connection with the EEOC charge, it is not relevant — at least not in a direction that helps Pearson. If anything, the evidence would have harmed Pearson's retaliation case, which means that any error in excluding it would have been harmless to her. The district court did not abuse its discretion in excluding evidence of pre-October 23, 2012 conduct against Pearson.

B. Exclusion Of Shanahan's December 2012 Email

Pearson contended at trial that Shanahan was the decisionmaker and there was evidence he knew about her EEOC claim before he fired her. The defendants contended that Mike Blanchard, who became human resources director after Shanahan, was the actual decisionmaker, and that Pearson submitted no evidence that Blanchard knew about her EEOC claim before he fired her.

The district court denied Pearson's motion to admit an email from Shanahan to a City human resources employee. She contends that email would have shown that Shanahan, not Blanchard, was the decisionmaker. Pearson offered the email

as a business record under Federal Rule of Evidence 803(6) during the testimony of Starina Styles, who was the human resources employee who allegedly received the email, but Styles did not recognize it. The defendants objected to the admission of the email due to lack of foundation, and the trial court sustained the objection.

"The touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." United States v. Bueno-Sierra, 99 F.3d 375, 378 (11th Cir. 1996). A document is admissible as a business record under Rule 803(6) if it was "made at or near the time by — or from information transmitted by — someone with knowledge[,] . . . [and] kept in the course of a regularly conducted activity of a business," and if it was the "regular practice" of the business to make that record. Fed. R. Evid. 803(6)(A)–(C). The party submitting the evidence must lay the foundation that those elements have been met, which requires "the testimony of the custodian or another qualified witness." Id.; accord City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 559 n.12 (11th Cir. 1998). The only person Pearson called for that purpose was Styles. Because she did not remember or recognize the email, Styles was not a sufficient "custodian" or other "qualified witness" under Rule 803(6). Pearson failed to lay the proper foundation for

admission of the email, so the district court did not abuse its discretion in sustaining the defendants' objection to it.

Pearson contends that even though she didn't lay the proper foundation, the email should have been admitted. She points to a pretrial order saying that "[i]tems not objected to will be admitted when tendered at trial," notes that the email was listed in that order, and notes that the defendants did not object to it being included in the order.[10] Based on that, Pearson argues that the defendants should not have been able to object to the admission of the email at trial.

Pearson provides no authority for the proposition that boilerplate language in a pretrial order relieves her of the burden of laying a foundation for evidence as required by Rule 803(6). The only authority that she cites for the proposition that the evidence should have been admitted is a not-entirely-on-point, unpublished district court opinion from the Southern District of Indiana. That decision, of course, is utterly non-binding on us. See United States v. Johnson, 921 F.3d 991, 999 (11th Cir. 2019) ("Nor can we overlook that the opinion of a district court is not precedential."). We are not convinced that the language in the pretrial order compelled the trial court to accept into evidence everything that was listed,

[10] Pearson also claims that Styles should have been able to refresh her recollection before answering whether she recognized the email. But Styles was holding and reading the email when she stated that she did not recognize it. It is unclear what more could have been done to refresh Styles' recollection.

regardless of the Federal Rules of Evidence.[11] Again, the court did not abuse its discretion.[12]

C. Judgment As A Matter Of Law

Finally, Pearson contends that the district court erred by granting the defendants judgment as a matter of law, a ruling which we review de novo. Wilcox v. Corr. Corp. of Am., 892 F.3d 1283, 1286 (11th Cir. 2018). In doing so, "[w]e view the evidence and draw all reasonable inferences in [Pearson's] favor, and we may affirm only if we conclude that a reasonable jury would not have a legally sufficient evidentiary basis to find for her." Id. (citations and quotation marks omitted).

"To make out a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in an activity protected under Title VII; (2) she suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action." Kidd v. Mando Am. Corp., 731 F.3d 1196, 1211

[11] Pearson also makes two other cursory arguments for allowing the email in as evidence. First, she argues that under Federal Rule of Evidence 1003(a) the defendants failed to raise a genuine issue of authenticity, so a "duplicate [was] admissible." But the evidence was excluded for lack of foundation under Rule 803(6), not because it was a duplicate. Second, Pearson argues that under Federal Rule of Evidence 1008(b) the question of "genuineness" is a question for the jury. But the evidence was excluded for lack of foundation, which is firmly within the province of the court. United States v. Arias-Izquierdo, 449 F.3d 1168, 1183 (11th Cir. 2006).

[12] The evidence excluded under these rulings is the subject of a motion Pearson filed in this Court to supplement the record on appeal. Because the district court did not abuse its discretion in excluding the evidence, the motion is DENIED AS MOOT.

(11th Cir. 2013). "To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002) (quotation marks omitted). Once the plaintiff makes out a prima facie case of retaliation the burden shifts to the defendant to show a legitimate reason for the adverse action. Id. at 715. Then the burden shifts back to the plaintiff to establish that the proffered legitimate reason was pretextual. Id.

The district court based its judgment for the defendants on two grounds. First, it found that Pearson had failed to establish a causal link between the protected activity (filing an EEOC charge) and the materially adverse action (termination). Second, it found that she failed to rebut the legitimate reason provided by the defendants for her termination — that she could not return to work and had no additional leave.

Pearson contends that the evidence at trial showed that Shanahan was the person who decided to terminate her employment, he was aware of her EEOC activities including filing a charge, and the purported reason for her termination was pretextual. We disagree.

Viewed in the light most favorable to Pearson, the evidence at trial established the following. She suffered a work-related back injury in May 2012.

Because of that injury, she was out of work on approved medical leave beginning on May 31, 2012. She was out on leave for eight months until mid-February 2013. While on medical leave, she filed an EEOC charge in October 2012. Shanahan became aware of the EEOC charge sometime that fall.

In December 2012 Pearson's doctor wrote a note to the City saying that she would have to remain out of work until further notice and that he would update the City about her ability to return to work in March 2013. Under the City's policy, the only leave she had left to take was leave without pay. To qualify for it, she had to get the approval of her department director, of the human resources director, and of the city administrator. To get their approval for leave without pay, she had to show either that she was applying for long-term disability or that the doctor could confirm she would be able to return to work within six months. Pearson showed neither.

Her application for leave was approved by the director of the recreation department, Shanahan. But it was not approved by the head of the HR department at that time, Mike Blanchard. Instead, an HR department employee put a sticky note on the bottom corner of Pearson's final leave application that said "DENY + SEND FFD LETTER AFTER XMAS" (FFD meaning fit for duty). Blanchard later drafted a letter to Pearson explaining that she was "ineligible for any additional leave of absence" because she had "exhausted any eligible FMLA leave,

accrued sick and vacation leave, and the unpaid leave of absence granted" to her. The letter also warned that "if you are unable to return to work by February 13, 2013, we must regrettably separate you from service with Augusta, Georgia." She received that letter when she met with human resources on February 7.

There was some confusion about the precise date of Pearson's termination. As a result, three Requests for Personnel Action (RPA) were created for Pearson, all with different dates.[13] Each RPA was requested by human resources and signed by Shanahan as the parks and recreation department director.

On February 6, 2012, the day he signed the first RPA, Shanahan told a group of City employees that Pearson had been "terminated" and "doesn't work here anymore." The next day Shanahan told a parks and recreation employee that Pearson "don't [sic] work here anymore. She's terminated."

[13] Pearson was first marked in the system as resigning. Human resources requested that the Request for Personnel Action (RPA) be dated February 13, 2013, but there was an error and the parks and recreation department dated it February 1. Pearson was granted a one-week extension to get a doctor's note, so human resources requested a new RPA with a termination date of February 20; it received a new RPA with a February 15 termination date. Finally, human resources requested a third RPA, reflecting retirement instead of resignation (human resources did not specify the effective date, and the parks and recreation department dated it February 18).

Pearson testified during her deposition that the human resources employees she met with discovered on February 13, 2013 that she was listed as retired (and thus terminated) in the City's system as of February 1, 2013. At trial the human resources representative testified that Pearson's "termination date" was January 31st and her "retirement date" was an unknown date in February.

Pearson contends that the evidence at trial shows that it was Shanahan who made the decision to terminate her employment. But she points only to Shanahan's approval of the RPA on February 6, 2012, and his statements that day and the next that she had been terminated. She ignores the evidence about what led up to that RPA. It was Blanchard, not Shanahan, who denied Pearson's request for leave from January 3 until March 8, 2013, a request Shanahan had approved. It was Blanchard, not Shanahan, who drafted the January 30, 2013 letter informing Pearson that her employment would be terminated if she could not return to work by February 13, 2013. And it was Blanchard's, not Shanahan's, department of human resources that requested the RPAs.

The trial evidence shows that Blanchard, not Shanahan, made the decision to terminate Pearson, and Pearson presented no evidence that Blanchard was aware of her EEOC charge. As a result, she failed to establish the causation element of her Title VII retaliation claim. "[A] reasonable jury would not have a legally sufficient evidentiary basis to find for her." Wilcox, 892 F.3d at 1286 (citations and quotation marks omitted). The district court properly granted judgment as a matter of law to the defendants.

IV. CONCLUSION

The district court erred in granting summary judgment to the defendants on Pearson's § 1983 equal protection and Title VII sex discrimination claims, both of

which alleged that her demotion was based on her sex. The court did not err in any of the other decisions that Pearson appeals.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for a new trial on the section 1983 equal protection and Title VII sex discrimination claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MELINDA BEASLEY PEARSON, Plaintiff, v. AUGUSTA, GEORGIA through its Mayor Hardie Davis, Jr., in his official capacity, and its commission, in its official capacity et al., Defendants.	*	CV 114-110

O R D E R

This case arises out of Plaintiff's employment with Defendant Augusta, Georgia. After over thirty years of service, Augusta demoted Plaintiff for violating workplace policies. It then, according to Plaintiff, forced her into retirement. In response, Plaintiff sued Augusta and three Augusta employees under a number of federal employment statutes and the Fourteenth Amendment. But because the Court does not sit as a "super-personnel department assessing the prudence of routine employment decisions," Flowers v. Troup Cty., Ga, Sch. Dist., 803 F.3d 1327, 1338 (11th Cir 2015) (citation omitted) (internal quotation marks omitted), most of Plaintiff's claims fail. Only her Title VII retaliation claim will proceed.

I. Factual Background

Plaintiff began working for Augusta in 1980. Eventually, she became an operations manager in the Recreation, Parks, and Facilities ("Parks and Recreation") department. As part of her duties, Plaintiff managed over twenty employees and was responsible for the day-to-day operations of over sixty city facilities. And as an operations supervisor, Plaintiff was classified as an exempt employee under the Fair Labor Standards Act ("FLSA"). Thus, she did not receive overtime compensation for working more than forty hours in a workweek. But according to Plaintiff, she also performed a significant amount of manual labor, which she believed entitled her to overtime pay under the FLSA.

At some point, certain Parks and Recreation officials began allowing exempt employees to accrue "comp time" when they worked more than forty hours in a workweek. When employees worked certain special events that ran late into the night, for example, Parks and Recreation would allow them to record that time. The employees would later be permitted to use the comp time as paid time off from work. Plaintiff participated in this program.

In 1999, Plaintiff asked her supervisor for permission to use some of her comp time. But Plaintiff's request was denied because, as an exempt employee, she was not permitted to accrue

comp time. (Doc. 31, Pl. Dep. at 83-86.) Plaintiff contested this decision to the director of human resources, who allowed Plaintiff to use the time she had accrued. (Doc. 31-4.) Specifically, in a letter to the director of Parks and Recreation, the human-resources director noted that Plaintiff was in fact prohibited from accruing comp time because she was an exempt employee. (Id.) But he determined that because Plaintiff had been allowed to accrue the time, "there [was] no other option other than to compensate her for this time." (Id.) Thus, Augusta permitted Plaintiff to use the time she had accrued.

Following this incident, the director of Parks and Recreation, Tom Beck, instructed Plaintiff to stop recording comp time on her payroll records. (Pl. Dep. at 87.) Mr. Beck told her that she was instead required to record only 7.5 hours, regardless of how many hours she worked in a day. (Id. at 89.) Plaintiff disagreed with Mr. Beck's instruction, so she implemented her own method for tracking comp time. (Id. at 89-90.)

Employee timecards at the time contained three sheets — a white sheet, a blue sheet, and a yellow sheet. On the white copy, Plaintiff would record the 7.5 hours she was required to record. (Id. at 89.) This copy went to the payroll department. On the blue and yellow copies, Plaintiff would record the actual

time she worked. (Id. at 90.) And when Plaintiff wanted to use her comp time, she would fill out a request form and request her supervisor's approval.[1] (Id. at 93.) Plaintiff followed this practice from 1999 until 2012, when she was demoted.

In 2000, Augusta adopted an ordinance that created an employee policy manual. (Doc. 31-5.) In 2011, Augusta amended its policy manual. (See Doc. 31-7.) The 2011 version specifically provides that "comp time shall only be applicable to non-exempt employees." (Doc. 31-8 at 20.)

In July 2011, Plaintiff took a leave of absence from work for medical reasons. (Pl. Dep. at 118-19.) She received leave with pay from early July until August 19, 2011. (Id. at 119.) But in August, Plaintiff ran out of leave time. (Id. at 120.) Plaintiff then attempted to use the comp time she had purportedly accrued to continue her leave with pay. (Id. at 123.) Her request was denied, however, because the human-resources department did not have a record of her comp time. (Id. at 128.)

Because Plaintiff had run out of sick leave, some of her coworkers donated leave to her through Augusta's catastrophic-leave program. (Id. at 148-49.) Under this program, employees could request leave donations from other employees. But out-of-

[1] According to Plaintiff, other exempt employees followed a similar practice. (Pl. Dep. at 94.) But she was not certain of the other employees' exact practices because she was the only exempt employee in her division. (Id. at 94-95.)

work employees were permitted to make these requests only if they had exhausted all of their own leave. Plaintiff received catastrophic-leave pay from September 9 through December 2. (Id. at 153.) She returned to work on December 5, 2011. (Id. at 154-55.)

When Plaintiff returned to work, she immediately began having trouble working with another employee, Sam Smith, with whom she had previously had issues. (See id. at 160-61.) Plaintiff spoke with Dennis Stroud, her supervisor at the time, about Mr. Smith the first day she returned, but this proved unproductive. Two weeks later, she approached Mr. Stroud again. (Id. at 170-71.) This time, Plaintiff and Mr. Stroud got into a heated argument, and Plaintiff left work. (Id. at 171-72.) When she got home, Plaintiff called Mr. Stroud and asked to use her accrued comp time so she could have a few days to clear her head. (Id. at 172.) Mr. Stroud agreed, and Plaintiff took four days off. (Id. at 178.) Notably, while she was out, Plaintiff's timecard showed that she worked those days. (Id. at 180.)

In the spring of 2011, the human-resources department began an investigation into Plaintiff's use of comp time. According to Bill Shanahan, the interim director of human resources and of the Parks and Recreation department, Lisa Hall, an employee from Parks and Recreation, complained to human resources about

Plaintiff's use of comp time. (Doc. 41-1, Shanahan Dep. at 18.) Specifically, Mr. Shanahan contends that Ms. Hall questioned why Plaintiff was able to use comp time after returning to work when Plaintiff had previously requested catastrophic leave, which is only available when an employee has exhausted all other leave options. (Id. at 18.) Ms. Hall denies that she made this complaint and instead claims that others complained to her about Plaintiff's use of comp time. (Doc. 91-1, Hall Dep. at 26-27.)

In any event, Plaintiff learned about the investigation in February 2011 when Mr. Shanahan and other human-resources employees arrived at her office to review Plaintiff's records. (Pl. Dep. at 180.) Soon thereafter, Plaintiff spoke with Mr. Shanahan and explained her timekeeping process to him. (Id. at 187.)

As a result of Mr. Shanahan's investigation, Plaintiff was demoted to the position of maintenance worker. (Id. at 190.) She began work in that position in early May 2011. (Id. at 204-205.) Around the same time, Plaintiff also appealed her demotion. (Id. at 190.) As part of the appeal process, Plaintiff was granted a hearing in front of Fred Russell, Augusta's administrator. (Id. at 194.) At the hearing, however, Mr. Russell did not allow Plaintiff to present witnesses. (Doc. 37-1, Russell Dep. at 33-34.) Mr. Russell claims that the appeal was an "administrative review" and that

Plaintiff should have been afforded an opportunity to present witnesses at a prior hearing. (Id. at 34.) But Mr. Russell was apparently unaware that Plaintiff had not been given a prior hearing.

Plaintiff worked as a maintenance worker until May 31, 2011. (Pl. Dep. at 213.) At that time, she went out of work with an injury. (Id. at 219.) Plaintiff remained out of work for over a year, and in late 2012, she underwent back surgery. (Id. at 223-25.) Not long after her surgery, someone from Augusta contacted Plaintiff and requested that she return to work by January 2013. (Id. at 225-26.) She did not return in January, and in February 2013, Plaintiff met with someone in Augusta's human-resources office. (Id. at 226.) During that meeting, Plaintiff claims that she was presented with three options: (1) she could "retire and freeze [her] pension"; (2) she could retire and face a penalty for drawing from her pension early; or (3) she could choose not to act, in which case Augusta would choose for her. (Id. at 227.) Whether on purpose or not, Plaintiff apparently chose option three because she soon learned that Augusta had retired her without her permission.[2] (Id. at 228.)

[2] According to Plaintiff, her retirement was effective February 1, 2013. (Pl. Dep. at 228.) If this is true, it is unclear from the record whether Augusta had already made its decision when Plaintiff met with the human-resources official in February or whether Augusta chose to make her retirement effective retroactively.

II. Procedural Background

Plaintiff began this litigation in May 2014 when she filed suit against Augusta, Fred Russell, Bill Shanahan, and Sam Smith. In her complaint, she alleges that: (1) she was retaliated against in violation of the Family and Medical Leave Act ("FMLA")[3]; (2) she was retaliated against in violation of the FLSA; (3) she was denied due process; and (4) she was denied equal protection.

Plaintiff's complaint, however, did not include all of the claims she intended to bring. In November 2012, Plaintiff filed a charge of discrimination with the EEOC alleging that her demotion was the result of race and gender discrimination and retaliation. (Doc. 28-7.) In April 2013, Plaintiff filed a second EEOC charge alleging that she was fired based on her disability and in retaliation for filing her first EEOC charge. (Doc. 28-10.) Plaintiff did not receive her right-to-sue letters until January 2015. (Doc. 28-14.) So Plaintiff filed a second lawsuit against Augusta in August 2015. (CV 115-123.) In her second complaint, Plaintiff alleges: (1) that Augusta discriminated against her based on her race and gender in violation of Title VII; (2) that Augusta discriminated against her based on a disability; (3) that Augusta retaliated against

[3] Plaintiff explicitly withdrew her FMLA claims. (See Doc. 126 at 21.) The Court thus **GRANTS** Augusta's motion for summary judgment on those claims.

her for filing her November 2012 EEOC charge; and (4) a claim of hostile work environment. (CV 115-123, Doc. 6.)

At Plaintiff's request, the Court consolidated her two cases. The Court also allowed the parties time to complete discovery and file dispositive motions on the claims raised in the second case before ruling on the dispositive motions that were already pending in the original case. All of the parties' motions are now ripe for review.

III. Legal Standard

Summary judgment is appropriate only if "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). Facts are "material" if they could affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must view the facts in the light most favorable to the non-moving party, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in [its] favor." United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal punctuation and citations omitted).

The moving party has the initial burden of showing the Court, by reference to materials on file, the basis for the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

How to carry this burden depends on who bears the burden of proof at trial. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). When the non-movant has the burden of proof at trial, the movant may carry the initial burden in one of two ways — by negating an essential element of the non-movant's case or by showing that there is no evidence to prove a fact necessary to the non-movant's case. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 606-08 (11th Cir. 1991). Before the Court can evaluate the non-movant's response in opposition, it must first consider whether the movant has met its initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Jones v. City of Columbus, 120 F.3d 248, 254 (11th Cir. 1997) (per curiam). A mere conclusory statement that the non-movant cannot meet the burden at trial is insufficient. Clark, 929 F.2d at 608.

If — and only if — the movant carries its initial burden, the non-movant may avoid summary judgment only by "demonstrat[ing] that there is indeed a material issue of fact that precludes summary judgment." Id. When the non-movant bears the burden of proof at trial, the non-movant must tailor its response to the method by which the movant carried its initial burden. If the movant presents evidence affirmatively negating a material fact, the non-movant "must respond with

evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated." Fitzpatrick, 2 F.3d at 1116. If the movant shows an absence of evidence on a material fact, the non-movant must either show that the record contains evidence that was "overlooked or ignored" by the movant or "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." Id. at 1117. The non-movant cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. See Morris v. Ross, 663 F.2d 1032, 1033-34 (11th Cir. 1981). Rather, the non-movant must respond with affidavits or as otherwise provided by Federal Rule of Civil Procedure 56.

In this action, the Clerk of the Court gave the parties notice of the motions for summary judgment and informed them of the summary-judgment rules, the right to file affidavits or other materials in opposition, and the consequences of default. (Docs. 59, 60, 139, 142.) Thus, the notice requirements of Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam), are satisfied.

IV. Discussion

As noted, Plaintiff asserts a number of claims. Defendants move for summary judgment on all of Plaintiff's claims, and

Plaintiff moves for summary judgment on two of the claims. The Court addresses the parties' arguments below.

A. Race and Gender Discrimination

Plaintiff contends that Defendants[4] discriminated against her based on her race and gender. She asserts equal protection claims under 42 U.S.C. § 1983 (and the Fourteenth Amendment) and employment-discrimination claims under Title VII. Because Plaintiff's gender- and race-discrimination claims are based on the same facts, the Court addresses them together. And the Court analyzes Plaintiff's equal protection and Title VII claims together because "the analysis of disparate treatment claims under § 1983 is identical to the analysis under Title VII where the facts on which the claims rely are the same." Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). Also, Plaintiff asserts her claims both under a single-motive theory and a mixed-motive theory, and the Court addresses these theories separately below.

1. Plaintiff's single-motive theory

In a disparate-treatment case based on circumstantial evidence, such as this one, courts apply the familiar burden-shifting framework derived from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, a plaintiff

[4] Plaintiff brings her equal protection claims against Augusta and against Mr. Shanahan and Mr. Russell in their individual capacities. She brings her Title VII claims against Augusta.

must first establish a prima facie case of discrimination, which requires that she show: (1) that she belongs to a protected group; (2) that she suffered an adverse employment action; (3) that her employer treated similarly situated employees outside of her class more favorably; and (4) that she was qualified for the job. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). Comparators under the fourth prong must be "similarly situated in all relevant respects." Id.

If a plaintiff successfully establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. See Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1174 (11th Cir. 2010). But "[t]he employer need not persuade the court that it was actually motivated by the proffered reasons." Id. (citation omitted) (internal quotation marks omitted). Rather, once the employer articulates a nondiscriminatory reason for its actions, then the burden shifts back to the employee to show that the reason was merely pretext for discrimination. See id.

This burden-shifting analysis, however, is not "the sine qua non for a plaintiff to survive a summary judgment motion in Title VII cases." Flowers v. Troup Cty., Ga., Sch. Dist., 803 F.3d 1327, 1336 (11th Cir. 2015) (citation omitted) (internal quotation marks omitted). It does not "relieve Title VII

plaintiffs of their burden to put forth evidence of discrimination," id., and "[t]he critical decision that must be made is whether the plaintiff has "create[d] a triable issue concerning the employer's discriminatory intent," id. (citation omitted) (internal quotation marks omitted).

a. Plaintiff has failed to establish a prima facie case of discrimination.

Only the fourth prong of the prima facie case is contested in this case: Defendants contend that Plaintiff has failed to identify any similarly situated employees outside of her protected class who were treated more favorably. In response, Plaintiff names a number of other employees who she claims were treated more favorably. Plaintiff specifically names (1) Donnell Conley, (2) Chris Scheuer, (3) Ron Houck, and (4) Sam Smith. These individuals, however, are not similarly situated.

Plaintiff argues that Mr. Conley, Mr. Scheuer, and Mr. Houck are all exempt employees who used comp time but were not disciplined. In an affidavit, Mr. Conley stated that, even though he was an exempt employee, he accrued comp time while Mr. Shanahan was the interim director of Parks and Recreation and that his coworkers in Augusta's Athletic Department routinely did the same. (See Doc. 68-1.) Mr. Scheuer similarly testified that exempt employees in the Athletic Department were routinely permitted to accrue comp time, including while Mr. Shanahan was

the interim director. (See Doc. 114-1.) And Mr. Houck testified simply that he was aware that some exempt employees in the Parks and Recreation department were permitted to accrue comp time. (See Doc. 115-1.)

At bottom, this evidence shows that some employees in the Parks and Recreation department had been permitted to accrue comp time. And some of these employees may have accrued and used comp time while Mr. Shanahan was the interim director of the department. But it does not show — nor does Plaintiff argue that is shows — that Mr. Shanahan approved of this behavior or that he was aware of any specific individuals who accrued or used comp time while he was the interim director. And more notably, Plaintiff has not shown that any of these individuals' timecards indicated that they were working when they were not.

Plaintiff has likewise failed to show that Mr. Smith is an apt comparator. Plaintiff contends that, because Mr. Smith was not disciplined for his violations of Augusta's policies, he is a similarly situated employee who was treated more favorably. But Plaintiff has not pointed to any evidence that Mr. Smith engaged in similar conduct as Plaintiff. See Burke-Fowler v. Orange Cty., 447 F.3d 1319, 1323 (11th Cir. 2006) (per curiam) ("When a plaintiff alleges discriminatory discipline, to determine whether employees are similarly situated, we evaluate whether the employees are involved in or accused of the same or

similar conduct and are disciplined in different ways." (citation omitted) (internal quotation marks omitted)).

Rather, Plaintiff argues that Mr. Smith improperly covered up another employee's bad behavior and that he spent several hours at his home during work hours without permission. Plaintiff does not, however, argue that Mr. Smith ever improperly accrued or used comp time (with or without Mr. Shanahan's knowledge) or that he ever misrepresented whether he was working on his timecard. Furthermore, it is not clear from the record that Mr. Smith was not disciplined. Plaintiff instead argues that Mr. Smith was not demoted — that is, he did not receive the same punishment as Plaintiff. Thus, Mr. Smith is not similarly situated to Plaintiff.

b. Plaintiff has failed to rebut Defendants' legitimate, nondiscriminatory reason for demoting her.

Even if Plaintiff could establish a prima facie case of discrimination, her claim would still fail because she has failed to show that Defendants' reason for demoting her was pretext for discrimination. Defendants argue that they demoted Plaintiff because she accrued and used comp time and submitted a timecard that fraudulently stated that she worked days that she did not. Plaintiff argues that Defendants' proffered reasons are pretext for discrimination because: (1) Mr. Shanahan lied about what triggered the investigation into Plaintiff's

practices; (2) Mr. Shanahan and Mr. Russell knew that certain employees had previously received comp time; and (3) Mr. Shanahan and Mr. Russell did not adequately determine whether Plaintiff knew she could no longer use comp time.[5]

To support her first argument, Plaintiff points out that Lisa Hall disputes Mr. Shanahan's position that Ms. Hall raised the concern surrounding Plaintiff's use of comp time. Thus, Plaintiff contends, Mr. Shanahan fabricated that interaction so he could launch an investigation into Plaintiff's employment practices for the sole purpose of having Plaintiff demoted. But there is no evidence that this is what happened. Instead, there is at worst a discrepancy in the record about who posed the question that prompted the investigation, which is insufficient to create a triable issue on pretext. See Flowers, 803 F.3d at 1339 ("Allowing the plaintiff to survive summary judgment would be inappropriate, for example, if . . . the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." (citation omitted) (internal quotation marks omitted)).

[5] Plaintiff also repeatedly asserts that Mr. Smith replaced her after she was demoted. Evidence does indicate that Mr. Smith was promoted (to a different position than the one Plaintiff held) and that he assumed some of her responsibilities. But that evidence is insufficient to establish pretext.

As for her second and third arguments, Plaintiff contends that, because Mr. Shanahan and Mr. Russell knew that some exempt employees were permitted to accrue comp time, they should have known that Plaintiff was acting innocently. She also argues that Mr. Shanahan and Mr. Russell may have known that she did not willingly violate any policy. She contends, for example, that Mr. Shanahan and Mr. Russell were not certain that Plaintiff had read the 2011 policy manual, even though they based their decisions in part on her knowingly violating that manual.[6]

Plaintiff's arguments are essentially attempts to dispute the soundness of Mr. Shanahan's investigation and Mr. Russell's decision to uphold her demotion. That is, she claims that she did not actually commit the violations for which she was demoted. But the law "does not allow federal courts to second-guess nondiscriminatory business judgments, nor does it replace employers' notions about fair dealing in the workplace with that of judges." Id. at 1338. Indeed, an employer is free to fire its employees for "a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Id. (citation omitted) (internal quotation marks omitted). Thus, that

[6] Plaintiff also argues that Mr. Shanahan and Mr. Russell should have informed the exempt employees that the purported policy allowing them to accrue comp time was no longer in effect

Defendants arguably should have approached the situation differently or reached a different conclusion based on their investigation is insufficient to create a triable issue on pretext. This is especially true when there is no evidence that they did not honestly believe that Plaintiff acted wrongfully. See Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1266 (11th Cir. 2010) ("The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head.").

2. Plaintiff's mixed-motive theory

Plaintiff also argues that her discrimination claims survive under a mixed-motive theory. That is, Plaintiff contends that, even if Defendants acted in part based on lawful reasons, they were still motivated in part by unlawful discrimination. Because Plaintiff has not produced evidence of discriminatory intent, Plaintiff's claims fail under this theory.

"An employee can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, was a motivating factor for an adverse employment action, even though other factors also motivated the action." Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1235 (11th Cir. 2016) (citations omitted) (internal quotation marks omitted). The McDonnell

Douglas burden-shifting analysis does not apply in mixed-motive cases. Instead, courts evaluate whether a plaintiff has produced sufficient evidence from which a jury could conclude 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 (alterations in original) (internal quotation marks omitted) (quoting White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008)). Put differently, the Court "must determine whether the plaintiff has presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [her protected characteristic] was a motivating factor for [an] adverse employment decision." Id. (alterations in original) (citation omitted) (internal quotation marks omitted).

On this issue, Plaintiff relies heavily on the same evidence and arguments that she presented to rebut Defendants' nondiscriminatory reasons under her single-motive theory. But, again, those arguments are in effect attempts to challenge her demotion as unwarranted or unfair. Plaintiff also argues that Mr. Shanahan and Sam Smith had a close relationship and that Mr. Smith thought he was smarter than Plaintiff.

To the extent there is any evidence that Mr. Smith and Mr. Shanahan had a close relationship, there is no evidence that

they furthered their relationship by unlawfully discriminating against Plaintiff. And whether Mr. Smith thinks he is smarter than Plaintiff is irrelevant because, among other things, there is no evidence that he thinks that because of Plaintiff's race or gender. Thus, Plaintiff has not produced evidence showing that race or gender animus motivated Defendants' decision to demote her.

In sum, Plaintiff's discrimination claims are based on what she perceives to be unfair treatment.[7] She has failed to offer any evidence that would support the reasonable inference that Defendants demoted her based on her gender or race. Accordingly, the Court **GRANTS** Defendants' motions for summary judgment on these issues.

B. Due Process

Plaintiff alleges that Defendants violated due process in a number of ways. Although Plaintiff's arguments are not entirely clear to the Court, it has discerned that Plaintiff alleges: (1) that Augusta took away her right to accrue comp time without due process; (2) that Defendants[8] failed to provide her with an adequate opportunity to dispute the allegations surrounding her

[7] To the extent Plaintiff asserts that she was treated arbitrarily, a "class-of-one theory of equal protection does not apply in the public employment context." Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598 (2008).

[8] Similar to her discrimination claims, Plaintiff brings her due process claims against Mr. Shanahan and Mr. Russell individually and against Augusta.

demotion; (3) that Defendants failed to provide Plaintiff with adequate process before they terminated[9] her employment; and (4) that Defendants decreased her salary by an amount greater than was permitted.

Defendants move for summary judgment on Plaintiff's due process claims and argue essentially that Plaintiff received all the process she was due.[10] Plaintiff also moves for summary judgment on these claims.

1. Plaintiff's claim that Defendants improperly deprived Plaintiff of her right to accrue comp time

In her complaint, Plaintiff alleges that she was denied due process because Mr. Russell was biased against her, because Defendants did not provide her notice of the allegations against her or an opportunity to dispute them, and because Defendants lowered her pay by too much. In her motion for summary judgment, however, Plaintiff contends that Augusta deprived her of her property interest in her ability to accrue comp time without due process when it amended its policy manual to preclude exempt employees from accruing comp time. Plaintiff's claim fails for two reasons: (1) she did not allege this claim

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[9] As mentioned above, Plaintiff claims that she was forced into retirement. She argues that this forced retirement constituted a termination. At times, the Court refers to her retirement as the "termination" of her employment. In doing so, the Court does not make any finding or ruling on whether Plaintiff was actually fired.

[10] On January 25, 2017, the Court informed Plaintiff that it was considering granting summary judgment on these claims for different reasons and provided Plaintiff with an opportunity to respond, which she did. (Docs. 191, 192.)

in her complaint; and (2) Augusta amended its policy manual through legislative action.

First, as noted, Plaintiff did not plead this claim in her complaint. Rather, she asserted it for the first time in her motion for summary judgment. But a plaintiff may not "raise new claims at the summary judgment stage." Gilmor v. Gates, McDonald and Co., 382 F.3d 1312, 1314 (11th Cir. 2004). Thus, this claim fails for this reason alone.

Even if Plaintiff had sufficiently pleaded this claim, however, it would still fail because Augusta changed its policy through a legislative act. Augusta argues, and Plaintiff does not dispute, that Augusta amended its policy manual through the passage of an ordinance. Thus, the issue came before the board of commissioners on two separate occasions, and members of the public were permitted to be heard about the ordinance.

Government often acts in one of two capacities — legislative or adjudicative. When a government body acts through a legislative process, those affected "are not entitled to procedural due process." 75 Acres, LLC v. Miami-Dade Cty., 338 F.3d 1288, 1294 (11th Cir. 2003). Or, viewed differently, "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process — the legislative process." Id. (citation omitted) (internal quotation marks omitted). When the government's

conduct is adjudicative, however, affected citizens may be entitled to additional process. See id. The Eleventh Circuit has not adopted a bright-line test for distinguishing between legislative and adjudicative actions. See id. at 1296. But the principal difference is that legislative actions affect general classes of individuals, and adjudicative actions tend to affect only those involved in the decision. See id. at 1297-98.

Here, Augusta amended its policy manual through the passage of an ordinance. The board of commissioners, acting in a legislative capacity, passed that ordinance. And the amended policy manual applied to everyone bound to follow the manual. In fact, Plaintiff does not actually dispute that Augusta amended the manual through a legislative act.[11] Accordingly, Plaintiff's claim also fails for this reason.

2. Plaintiff's claims that Defendants failed to provide her with adequate notice and proper hearings

Plaintiff also alleges that Defendants violated due process because she did not receive notice of the allegations against her or a proper hearing before her demotion or her alleged termination. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const.

[11] Rather, Plaintiff argues that it was Defendants' decision in May 2012 to enforce the policy against her that violated due process. But Plaintiff has not explained — and the Court cannot discern — how Defendants' application of the policy violated due process.

amend. XIV, § 1. To succeed on a procedural due process claim, a plaintiff must show (1) a deprivation of a constitutionally protected property interest, (2) state action, and (3) a constitutionally inadequate process. Arrington v. Helms, 438 F.3d 1336, 1347 (11th Cir. 2006).

A plaintiff has not been deprived of a constitutionally adequate process "'unless and until the state refuses to provide due process.'" McKinney v. Pate, 20 F.3d 1550, 1562 (11th Cir. 1994) (quoting Zinermon v. Burch 494 U.S. 113, 123 (1990)). In other words, that a plaintiff suffered a procedural deprivation does not mean that the plaintiff suffered a due process violation. See id. at 1563. Thus, when state law provides a remedy for a plaintiff's deprivation, that plaintiff has not suffered a federal due process violation. See id. at 1562-64; Cotton v. Jackson, 216 F.3d 1328, 1331 (11th Cir. 2000) ("It is the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim.").

Here, Plaintiff complains that Defendants failed to give her proper notice of the allegations against her and that they failed to provide her with an adequate opportunity to dispute the allegations. More specifically, Plaintiff contends that Mr. Shanahan failed to provide her with notice and an opportunity to

respond before he demoted her, that Mr. Russell did not allow her to present witnesses and dispute the allegations against her at her appeal hearing, that Mr. Russell was a biased decisionmaker, and that Defendants terminated her employment without notice and an opportunity to respond.

Plaintiff has alleged that she suffered procedural deprivations. But she has failed to establish that she suffered a procedural due process violation because an adequate state-law remedy existed to cure the deprivation. Under Georgia law, if no other remedy exists and a party has a clear right to have an act performed, the party may seek a writ of mandamus. See O.C.G.A. § 9-6-20; Cotton, 216 F.3d at 1332. And courts have found that a writ of mandamus will work to provide the process due to an employee who is deprived of an adequate hearing before her employment is terminated. See Maddox v. City of Winder, No. 2:05-CV-0190-RWS, 2007 WL 788925, at *3 (N.D. Ga. Mar. 13, 2007); Cook v. City of Jackson, No. 5:05-CV-250 (CAR), 2007 WL 737514, at *6 (M.D. Ga. Mar. 7, 2013). Thus, if Defendants deprived Plaintiff of an adequate opportunity to challenge her demotion (or her termination), and she was clearly entitled to such an opportunity — as she contends she was — then she could have sought a writ a mandamus to compel Defendants to provide her that opportunity.

3. Plaintiff's claim that "too much pay was taken"

In her complaint, Plaintiff alleges that Defendants decreased her salary by an amount greater than Augusta's policy allowed. Specifically, Plaintiff alleges that "[i]n an arbitrary and capricious manner too much pay was taken, in violation of City policy . . . ." (Doc. 1 at 26.) According to Plaintiff, after her demotion, her salary was decreased by 50%. And under Augusta's policy, Plaintiff argues, an employee's salary could not be decreased by more than 15%.

It remains unclear to the Court whether Plaintiff contends that Defendants decreased her salary without providing her an adequate chance to object to that action or whether she believes that Defendants were simply not permitted to lower her salary to the level they did. If her claim is based on the former, then the Court's analysis above applies, and she could have sought a writ of mandamus to compel Defendants to provide her with an opportunity to object to her salary decrease. If her argument is the latter, however, she is essentially seeking to assert a substantive due process claim.

Substantive due process prevents "certain government actions regardless of the fairness of the procedures used to implement them." McKinney, 20 F.3d at 1556 (citation omitted) (internal quotation marks omitted). Substantive due process, however, protects only "those rights that are

fundamental . . . ." Id. (citation omitted) (internal quotation marks omitted). "[A]reas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution." Id. (citation omitted) (internal quotation marks omitted). And "[b]ecause employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection." Id. at 1560. Thus, Plaintiff's claim that "too much pay was taken" fails.

In sum, Plaintiff's procedural due process claim based on the alleged deprivation of her right to accrue comp time fails because she did not plead it in her complaint and because any deprivation occurred as a result of a legislative act; her claims based on Defendants' alleged failure to provide her with sufficient opportunities to be heard in opposition to her demotion and termination fail because adequate state-law remedies were available; and her claim based on her loss of salary fails because her right to her salary, to the extent she had one, was not a fundamental right. Accordingly, the Court **GRANTS** Defendants' motions for summary judgment on these issues and **DENIES** Plaintiff's motion for summary judgment.

C. Disability Discrimination

In her complaint, Plaintiff alleges that Augusta discriminated against her in violation of the Americans with Disabilities Act ("ADA") when it demoted her in May 2012 and when it terminated her employment in February 2013. Augusta and Plaintiff both move for summary judgment on Plaintiff's ADA claims.

1. Plaintiff's claim based on her demotion

Although Plaintiff alleges in her complaint that Augusta discriminated against her based on a disability when it demoted her, she has effectively abandoned that claim. And for good reason: she did not timely file an EEOC charge alleging this act of discrimination.

Under the ADA, a plaintiff must file a charge of discrimination with the EEOC within 180 days of the date of the discriminatory act. See 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a) (incorporating the procedures set forth in 42 U.S.C. § 2000e-5 into the ADA). Plaintiff's first EEOC charge does not reference her disability or any allegation of disability discrimination. In her second charge, she states that "[she is] a person with a disability" and that she was terminated because she could not perform her job duties. (Doc. 28-10.) But she did not file her second charge until April 4, 2013, which is

almost a year after Plaintiff's demotion.[12] Thus, Plaintiff failed to exhaust her administrative remedies for this claim.

2. Plaintiff's claims based on her termination

Plaintiff also asserts that Augusta discriminated against her based on her disability when it forced her to retire. She contends that Augusta failed to accommodate her by not allowing her to transfer to a different position and by not granting her additional leave.[13]

Under the ADA, an employer may not "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001). To succeed on a claim under the ADA, a plaintiff must show that: "(1) she is disabled, (2) she was a 'qualified individual' when she was terminated, and (3) she was discriminated against on account of her disability." Frazier-White v. Gee, 818 F.3d 1249, 1255 (11th Cir. 2016). A qualified

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[12] It also fails to mention her demotion.

[13] Plaintiff also contends that Augusta violated the ADA because it failed to engage in an interactive process. See 29 C.F.R. § 1630.2(o)(3). But the law in the Eleventh Circuit is clear that "where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant." Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997). Accordingly, to the extent Plaintiff seeks to hold Augusta liable for failing to engage in an interactive process, her claim fails.

individual is someone who can perform the essential functions of the job with or without reasonable accommodation. See Lucas, 257 F.3d at 1255.

A common form of discrimination under the ADA arises when an employer fails to reasonably accommodate a disabled employee. See id. "An accommodation can qualify as reasonable, and thus be required by the ADA, only if it enables the employee to perform the essential functions of the job." Id. (internal quotation marks omitted). And the ADA lists the following as examples of reasonable accommodations: "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position . . . ." 42 U.S.C. § 12111(9)(B).

a. Plaintiff failed to request a transfer to a new position.

Plaintiff's argument that Augusta should have transferred her to a new position fails because she did not request reassignment. An ADA plaintiff has the burden of identifying an accommodation and showing that the accommodation is reasonable. Frazier-White, 818 F.3d at 1255; Lucas, 257 F.3d at 1255-56. Indeed, "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made . . . ." Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999).

Plaintiff contends that Augusta failed to reasonably accommodate her because it did not allow her to transfer to a different position. In her brief in support of her motion for summary judgment, Plaintiff lists eleven jobs "she believes she was, and is, qualified" to perform. (Doc. 150 at 9-10.) Plaintiff, however, has not offered any evidence that she specifically requested transfer to any of these positions. In fact, Plaintiff admits in several affidavits that "[t]here were several jobs that [she] learned of in April 2016" that were available in 2012 and 2013. (Doc. 146-1 at 1, 5, 9, 13, 17, 21, 25, 29, 33, 37, 41 (emphasis added).) That these positions may have been available around the time Plaintiff retired is insufficient. She must show that she requested reassignment to a specific position, which she could not have done if she did not know about the jobs until 2016. See Frazier-White, 818 F.3d at 1256-57 (finding that a plaintiff's claim based on her employer's failure to reassign her could not prevail because she "did not ever request reassignment to a specific position or provide any information that would have enabled Defendant to determine whether she could perform the essential duties of a vacant position given her physical limitations"). Moreover, Plaintiff has not produced any evidence — other than her own belief — that shows that she was qualified for these positions. See id. (finding insufficient a plaintiff's "conclusory

statement that there were jobs she 'believe[s] she could have performed' with additional, unspecified accommodations" (alteration in original)).

b. Plaintiff has failed to show that her request for additional leave would have been reasonable.

Plaintiff's argument that Augusta discriminated against her when it did not extend her leave fails because she has not shown that additional leave would have allowed her to perform the essential functions of her job. As noted, it is a plaintiff's burden under the ADA to identify a specific accommodation and to show that it is reasonable. See Frazier-White, 818 F.3d at 1255. Thus, it is a plaintiff's burden to show that a proposed accommodation would allow the plaintiff to perform the essential functions of the job. See id. And although a leave of absence may be a reasonable accommodation, an indefinite leave of absence is not because "[t]he ADA covers people who can perform the essential functions of their jobs presently or in the immediate future." Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003).

There is evidence that Plaintiff requested leave in December 2012 until her next doctor's appointment in March 2013. (See Doc. 47-1.) But there is no evidence Plaintiff would have been capable of returning to work following her March 2013 doctor's appointment. Indeed, she testified that as of August

2013, her doctor had still not cleared her to perform physical tasks. (Pl. Dep. at 228-29.) If she could not perform physical tasks in August 2013, then she would not have been capable of returning to work in March 2013. Thus, this accommodation would not have allowed Plaintiff to perform the essential functions of the job. Rather, Plaintiff's request was for an indefinite leave of absence, which is unreasonable as a matter of law. See Wood, 323 F.3d at 1314.

Because Plaintiff did not request reassignment to a position for which she was qualified, and because her request for additional leave would not have allowed her to perform the essential functions of the job, Plaintiff's motion for summary judgment on this issue is **DENIED**, and Augusta's motion for summary judgment is **GRANTED**.

D. Hostile Work Environment

Plaintiff also asserts a hostile-work-environment claim. To prevail on a hostile-work-environment claim, a plaintiff must show:

> (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). To be considered sufficiently severe, the "behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceive[s] . . . to be abusive." Id. at 1276 (alterations in original) (citation omitted) (internal quotation marks omitted). On the issue of severity, courts evaluate: "(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 essence, Plaintiff argues that her African-American coworkers would not follow her instructions and that some of her superiors would not follow her disciplinary recommendations.[14] She also claims that one of her coworkers stated that she "did not want to work for a white woman" and referred to Plaintiff as living in a "f[******] white neighborhood." (Doc. 163 at 12-13.)

[14] In one of her briefs opposing summary judgment, Plaintiff references that she believes that Mr. Shanahan initiated his investigation as an attempt to "Portray Plaintiff As Creating A Hostile Work Environment, Including Racist." (Doc. 163 at 13.) It is unclear to the Court whether Plaintiff intends for this argument to support her hostile-work-environment claim. To the extent she does, the Court is unpersuaded.

The Court fails to see, however, how Plaintiff's allegations of insubordination could be considered a hostile work environment. And the alleged comments by Plaintiff's coworker were "mere utterance[s]." Miller, 277 F.3d at 1277. Plaintiff has not offered any evidence that shows that the alleged conduct was routine, physically threatening, or otherwise severe enough to establish that her workplace was "permeated with discriminatory intimidation, ridicule and insult . . . ." Id. Accordingly, the Court **GRANTS** Augusta's motion on this issue.

E. FLSA Retaliation

Plaintiff alleges that Augusta retaliated against her in violation of the FLSA. She claims that Augusta demoted her in retaliation for questioning whether she should have been classified as exempt under the FLSA. Plaintiff relies on three complaints that she made about her FLSA classification. First, Plaintiff points to a complaint that she made about her job duties in 1999. Second, she points to a 2005 grievance that she filed about her compensation. And third, Plaintiff contends that she raised an issue about her compensation during a March 2012 meeting with Mr. Shanahan.

Under the FLSA, employers are prohibited from retaliating against employees who assert their rights under the statute. See 29 U.S.C. § 215(a)(3). In a retaliation claim based on

circumstantial evidence, courts apply the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), burden-shifting framework. See Henderson v. City of Grantville, 37 F. Supp. 3d 1278, 1282 (N.D. Ga. 2014).

Thus, an employee must first establish a prima facie case by showing that: "(1) [the employee] engaged in activity protected under [the] act; (2) [the employee] subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse action." Wolf v. Coca-Cola Co., 200 F.3d 1337, 1343-44 (11th Cir. 2000) (second alteration in original) (citation omitted) (internal quotation marks omitted). If the employee successfully establishes a prima facie case, the burden shifts to the employer to proffer legitimate, nonretaliatory reasons for its actions. Id. at 1343. If the employer does so, the employee must then show pretext. Id.

1. Plaintiff's prima facie case

Plaintiff's first two complaints fail because she has not presented any evidence showing a causal connection between those complaints and her demotion.[15] In retaliation cases, a plaintiff can establish causation "by showing close temporal proximity between the statutorily protected activity and the adverse

[15] The Court also questions whether Plaintiff's 2012 meeting with Mr. Shanahan constitutes protected activity under the FLSA. But because Plaintiff's claim fails for other reasons, the Court will not address that issue.

employment action." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) (per curiam). Without more, however, temporal proximity must be "very close." Id. "Thus, in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law." Id.

Here, Plaintiff alleges that she was demoted because of complaints she made twelve and six years before her demotion. This significant temporal disparity between her complaints and her demotion are too remote, without more, to show a causal connection. In fact, Plaintiff has admitted that her 1999 complaint is too remote but insists that "there are connecting events showing that a cause of Plaintiff's demotion was Plaintiff's protected activity stemming from the 1999 complaint [because] Plaintiff continued complaining about being worked out of her job description and the amount of physical labor demanded of her from 1999 through 2005." (Doc. 126 at 9-10.) Even so, a six-year span between her complaint and her demotion, without more, is too remote.

2. Augusta's legitimate reasons and pretext

Plaintiff's retaliation claims, including her claim based on her 2012 meeting with Mr. Shanahan, fail because she has not rebutted Augusta's legitimate, nonretaliatory reason for

demoting her — that she improperly accrued and used comp time. On this issue, Plaintiff essentially reasserts her arguments about pretext under her equal protection and Title VII claims: she contends that there is evidence that Mr. Shanahan and Mr. Russell should have known that Plaintiff did not intentionally violate any rule. But, as with her equal protection and Title VII claims, that is insufficient show pretext.

Because Plaintiff has failed to establish a prima facie case of retaliation with respect to her 1999 and 2005 complaints, and because she has failed to show pretext with respect to any of her complaints, Plaintiff has failed to show that Augusta retaliated against her in violation of the FLSA. Thus, the Court **GRANTS** Augusta's motion for summary judgment on this issue.

F. Claims Against Sam Smith

Plaintiff also named Mr. Smith as a Defendant in her complaint. Plaintiff basically alleges that Mr. Smith and his girlfriend caused the investigation into Plaintiff's comp-time practices. More specifically, she contends that Mr. Smith and his girlfriend complained about Plaintiff's use of comp time after she had been on catastrophic leave. They did this, Plaintiff argues, because they wanted Mr. Smith to fill Plaintiff's position. Indeed, Plaintiff contends that "Sam Smith was part of a conspiracy to demote Plaintiff, so that he

would get her job and would not have to deal with her attempts to discipline him and make him follow city policy . . . ." (Doc. 125 at 4.) And Plaintiff believes that Mr. Shanahan was part of this conspiracy because he and Mr. Smith were allegedly friends.

A § 1983 conspiracy claim requires a plaintiff to prove three elements: "(1) a violation of [her] federal rights; (2) an agreement among the Defendants to violate such a right; and (3) an actionable wrong." Gibbons v. McBride, 124 F. Supp. 3d 1342, 1379 (S.D. Ga. 2015) (citation omitted) (internal quotation marks omitted).

Here, Plaintiff's claim against Mr. Smith fails because, as explained above, she has not produced sufficient evidence to show that she was denied a constitutional right. Mr. Smith could not have engaged in a conspiracy to violate Plaintiff's constitutional rights if those rights were never violated. Accordingly, Plaintiff's claim against Mr. Smith fails, and the Court **GRANTS** his motion for summary judgment.

G. Title VII Retaliation

Finally, Plaintiff alleges that Augusta terminated her employment (by forcing her to retire) in retaliation for filing her 2012 EEOC charge. Under Title VII, it is unlawful to retaliate against an employee for opposing an unlawful employment practice. 42 U.S.C. § 2000e–3(a). Similar to a

retaliation claim under the FLSA, courts utilize the McDonnel Douglas analysis in Title VII retaliation cases, and a plaintiff must first establish a prima facie case by showing: "(1) that [the plaintiff] engaged in statutorily protected expression; (2) that [the plaintiff] suffered an adverse employment action; and (3) that there is some causal relation between the two events." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) (per curiam) (citation omitted) (internal quotation marks omitted). The employer may then provide a legitimate, nonretaliatory reason for its actions. Brown v. Ala. Dep't. of Transp., 597 F.3d 1160, 1181 (11th Cir. 2010). If the employer does so, then the plaintiff must rebut that reason and show pretext. Id.

Here, Augusta argues only that Plaintiff has failed to establish a prima facie case.[16] First, it contends that Plaintiff's claim fails because she did not suffer an adverse employment action. And second, Augusta argues that there is no casual connection between the filing of Plaintiff's EEOC charge and the end of her employment with Augusta. It is not disputed that Plaintiff's filing of an EEOC charge constitutes protected activity. See 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified,

[16] It does not argue, for example, that Plaintiff cannot rebut a legitimate, nonretaliatory reason for its actions.

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

1. Plaintiff's adverse employment action

Augusta argues that Plaintiff did not suffer an adverse employment action because she retired. As already mentioned, however, Plaintiff disputes whether her retirement was voluntary.

To satisfy the adverse-employment-action prong, a plaintiff must show that the challenged action was "materially adverse." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). But showing material adversity requires a plaintiff to show only that the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. (citation omitted) (internal quotation marks omitted).

Augusta contends that Plaintiff "voluntarily retired when she was unable to return to work." (Doc. 141-1 at 18-19.) But Plaintiff disagrees and argues that Augusta separated her without her knowledge or consent. And Augusta has not cited any authority supporting its position. Thus, without more, the Court is unpersuaded that Plaintiff has failed to present evidence that she suffered an adverse employment action.

2. Causation

Augusta also argues that Plaintiff has failed to establish a causal connection between the end of her employment and her filing of an EEOC charge. As previously mentioned, causation in a retaliation case may be met by showing close temporal proximity. Cooper Lighting, Inc., 506 F.3d at 1364. A gap of only a few months may be sufficiently proximate to satisfy the causation prong of a prima facie case. See Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999) (finding the causation prong satisfied when seven weeks had passed between the filing of an EEOC charge and a plaintiff's termination).

Here, again without citing any authority on the issue, Augusta argues that Plaintiff cannot establish a causal connection. This is so, Augusta contends, because Mr. Shanahan stated in an affidavit that he did not make any "inquiries" into Plaintiff's employment status based on her filing of the charge.[17] (Doc. 141-3 ¶ 10.) But this self-serving statement alone is insufficient to warrant summary judgment. Without more, the Court is unable to say that Plaintiff has failed to create a triable issue on causation for purposes of a prima facie case of retaliation.

[17] Mr. Shanahan is referring to a December 2012 e-mail in which he inquired about how long he would have to wait before filling Plaintiff's position with someone else. (Doc. 41-7.)

Because, based on the arguments asserted by Augusta, there is sufficient evidence that Plaintiff's Title VII retaliation claim should survive summary judgment, Augusta's motion for summary judgment on this issue is **DENIED**.

V. Conclusion

In sum, Plaintiff's motions for summary judgment (docs. 54, 138) are **DENIED**. Fred Russell's, Bill Shanahan's, and Sam Smith's motions for summary judgment (docs. 56, 57, 58) are **GRANTED**. Augusta, Georgia's first motion for summary judgment (doc. 55) is **GRANTED**, and Augusta Georgia's second motion for summary judgment (doc. 141) is **GRANTED IN PART AND DENIED IN PART**. Only Plaintiff's Title VII retaliation claim will proceed. The Clerk is instructed to **TERMINATE** Fred Russell, Bill Shanahan, and Sam Smith as Defendants in this case. The Clerk shall also **TERMINATE** the following motions, which are now moot: Plaintiff's motion to extend (doc. 131); and Plaintiff's motion to supplement (doc. 185). Moreover, the Clerk is instructed to **CLOSE case number CV 115-123.**

ORDER ENTERED at Augusta, Georgia this 9th day of March, 2017.

HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA