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OPINIONS AND ORDERS

CONSTITUTIONAL AND STATUTORY PROVISIONS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (NOVEMBER 29, 2022)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHRISTEN ROBINSON KELLEY,

Plaintiff-Appellant,

v.

CATHERINE HOWDEN, GEMA/ HOMELAND SECURITY,

Defendants-Appellees,

THE STATE OF GEORGIA,

Defendant.

No. 21-13573

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:19-cv-04429-WMR

Before: WILSON, JORDAN, and ANDERSON,
Circuit Judges.

PER CURIAM:

Christen Robinson Kelley, an African-American employee, filed a lawsuit alleging that her employer, the Georgia Emergency Management Agency ("GEMA"), and her Caucasian supervisor, Catherine Howden, racially discriminated and retaliated against her in violation of 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964,42 US.C. §§ 2000e *et seq.;* and the Fourteenth Amendment. Ms. Kelley claims that GEMA and Ms. Howden treated her differently than similarly situated employees of other races by failing to promote her quickly enough and by putting her on a performance improvement plan ("PIP"). The district court entered summary judgment in favor of GEMA and Ms. Howden because they produced legitimate, non-discriminatory reasons for their actions and because Ms. Kelley failed to create an issue of fact that those proffered reasons were pretextual. We affirm.

I

We review *de novo* a district court's grant of summary judgment, construing all facts and drawing all reasonable inferences in favor of the non-moving party. *See Jefferson v. Se won Am., Inc.* 891 F.3d 911, 919 (11th Cir. 2018).

Summary judgment is appropriate when the record evidence shows that there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). An issue of fact is not genuine unless a reasonable jury could return a verdict in favor of the non-moving party. *See Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013). We have consistently held that conclusory allegations have no probative value at

summary judgment unless supported by specific evidence. *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000). We will give credence to evidence favoring the non-movant, as well as uncontradicted and unimpeached evidence from disinterested witnesses that supports the moving party. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

II

In October of 2016, Ms. Howden hired Ms. Kelley as a Communication Specialist I ("CS1") at an annual salary of $36,000 and served as her direct supervisor. From the most junior position to the most senior, GEMA classifies its communication specialists as CS1, Communication Specialist 2 ("CS2"), and Communications Specialist 3 ("CS3"). By the spring of 2017, Ms. Kelley was on a team with Uyen Le, an Asian American CS2; Julia Regeski, a Caucasian CS2; and Brandy Mai, a Caucasian CS3.

Ms. Howden and GEMA opted for an informal approach to reviewing the performance of their employees. This entailed team meetings and regular feedback on assignments, rather than following the State Personnel Board ("SPB") rules, which called for the use of a uniform rating system and the designation of an agency review official. The parties disagree about whether the SPB rules were mandatory, but it is undisputed that GEMA and Ms. Howden did not conduct formal reviews for any of the members of the team, including Ms. Kelley.

In the fall of 2017, Ms. Howden began noticing Ms. Kelley's performance slip. Specifically, Ms. Howden found that Ms. Kelley's written work product required

substantial editing before publication due to grammatical and other writing-related issues. Ms. Howden addressed these deficiencies through regular, informal, and constructive feedback. Believing that Ms. Kelley's subpar performance was due to her busy schedule, as she was working at GEMA while taking online graduate courses, Ms. Howden told Ms. Kelley in November of 2017 that she expected her to meet the performance level of her position following her graduation in December. In that November meeting, Ms. Kelley shared that she felt excluded from team meetings.

On January 9, 2018, Ms. Howden posted a job opening for a CS2. Ms. Kelley requested a salary increase to $45,000 and promotion to the CS 2 level via email. In support of her request, Ms. Kelley stated that her duties went beyond her job description as a CS1 and that she had earned her master's degree. According to Ms. Howden, she denied Ms. Kelley's request because of her poor performance, which did not even meet the level of a CS1, much less a CS2. Ms. Howden also said that she denied Ms. Kelley's request because she did not submit a formal application, but instead sent an informal request via email.

On February 8, Ms. Howden placed Ms. Kelley on a PIP. Ms. Howden believed that the quality of Ms. Kelley's work was not improving "commensurate with her time and experience with the agency, most of her written work product still required editing prior to publication, she was still not completing tasks in a timely manner, and she [had] difficulty digesting constructive feedback about her job performance." Ms. Kelley signed the PIP to acknowledge that she received it but did not agree with its content.

The day after being placed on a PIP, Ms. Kelley had a meeting with Ms. Howden and two African-American representatives from the Office of Planning and Budget to discuss Ms. Kelley's next steps. Ms. Kelley asked why she was being treated differently and pointed out that she was the only African-American in her department. She did not get a response from the group and was instead met with blank stares. In her rebuttal to the PIP, Ms. Kelley wrote that she believed the PIP was issued in retaliation for her request for a salary increase, but she did not accuse her employers of racial discrimination.

On April 6, 2018, GEMA received a Notice of Charge of Discrimination from the Equal Employment Opportunity Commission on behalf of Ms. Kelley, alleging racial discrimination and retaliation. Three days later, GEMA assigned Brandy Mai, the CS3 on the team, to be Ms. Kelley's direct supervisor, so that Ms. Kelley and Ms. Howden would no longer need to interact. In a follow-up meeting on May 1, Ms. Mai and GEMA's director of administration and finance signed a PIP update document that continued to outline the same deficiencies in Ms. Kelley's work performance. Ms. Kelley claims the discrimination continued after the supervisor change, but at this meeting, Ms. Kelley did not report any issues.

On June 26, 2018, based on her improved work performance, Ms. Kelley was removed from the PIP. On August 1, Ms. Kelley was promoted to CS2 and received a salary increase to $45,000.

Ms. Kelley asserts that Ms. Howden and GEMA denied her request for a promotion and salary increase because she is African-American and placed her on a PIP in retaliation of that same request. As noted, the

district court granted the defendants' motion for summary judgment, and Ms. Kelley appealed. On appeal, Ms. Kelley argues that the district court erred by (1) failing to consider Ms. Howden's failure to follow the SPB guidance as direct evidence of discrimination; (2) holding that she did not raise sufficient evidence that the defendants' proffered reasons for failing to promote her are pretextual; and (3) entering summary judgment on the retaliation claim and mixed motive claims.

III

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Equal Protection Clause prohibit employers from discriminating against employees on the basis of their race. *See* 42 U.S.C. §§ 2000e-2(a), 1981; U.S. Const. amend. XIV. Employment discrimination claims brought under Title VII, as well as under § 1981 and § 1983 based on the Equal Protection Clause require a showing that the employer intended to discriminate.

As to this element, the §§ 1981 and 1983 claims are subject to the same standards of proof and use the same analytical framework as intentional discrimination claims brought under Title VII, where the claims are based on the same set of facts. *See Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1312 n. 6 (11th Cir. 2018). *See also Lewis v. City of Union City*, 918 F.3d 1213, 1220 n. 5 (11th Cir. 2019) (en banc) ("The same analysis—and in particular, the *McDonnel Douglas* burden-shifting framework—applies to those claims, as well"); *Flowers v. Troup County Sch. Dist*, 803 F.3d 1327, 1335 n. 7 (11th Cir. 2015) ("Though Flowers brought claims under the Fourteenth Amendment's

Equal Protection Clause and 42 U.S.C. §§ 1981 and 1983 as well, their fates rise and fall with his Title VII claim."); *Tumes v. AmSouth Bank, NA*, 36 F.3d 1057, 1060 (11th Cir. 1994) ("The *McDonnell Douglas* scheme for the allocation of burdens and the order of presentation of proof also applies in § 1981 cases involving discriminatory treatment in employment situations."). For all of these claims, an employee must establish, through either direct or circumstantial evidence, that the employer acted with discriminatory intent.

Where a plaintiff has direct evidence of discrimination, the summary judgment inquiry ends there. In other words, the district court may not grant summary judgment for the employer where the employee "presents direct evidence that, if believed by the jury, would be sufficient to win at trial . . . , even where the movant presents conflicting evidence." *Jefferson*, 891 F.3d at 922 (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997)) (internal quotation marks omitted).

If the plaintiff only presents circumstantial evidence of the employer's discriminatory intent, we generally analyze the claim under the *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This framework requires the plaintiff to create an inference of discrimination through a *prima fade* case. *See Springer v. Convergys Customer Mgmt Grp. Inc.*, 509 F.3d 1344, 1347 n. 2 (11th Cir. 2007).[1]

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[1] To establish a prima facia case on the basis of a failure to promote, a plaintiff must show that "(i) she belonged to a protected class; (ii) she was qualified for and applied for the position; (iii) despite qualifications, she was rejected; and (iv) the position

Then, "the burden shifts to the employer to articulate a non-discriminatory bases for its employment action." *Id* (citation omitted). "If the employer meets this burden, the plaintiff must show that the proffered reasons were pretextual." *Id* (citation omitted).

As an alternative to the *McDonnell Douglas* framework, an employee can survive summary judgment if he or she presents "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (en banc). But, even under this framework, a plaintiff must establish that the employer's justification is pretextual. *See id* ("a 'convincing mosaic' may be shown by evidence that demonstrates . . . that the employer's justification is pretextual"); *Jenkins v. Nell*, 26 F.4th 1243, 1250 (11th Cir. 2022) ("A plaintiff may establish a convincing mosaic by pointing to evidence that demonstrates, among other things . . . pretext.").[2]

Ms. Kelley invokes the "convincing mosaic" and the *McDonnell Douglas* frameworks. As explained more fully below, Ms. Kelley's claims fail under both.

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was filled with an individual outside the protected class." *Springer*, 509 F.3d at 1347 n. 2 (citing *McDonnell Douglas Corp.*, 411 U.S. at 802 and *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 (11th Cir. 2005)).

[2] The "convincing mosaic" test is generally used in cases where a plaintiff cannot point to a similarly situated comparator and thus cannot establish a prima fade case under *McDonnell-Douglas*. *Lewis*, 934 F.3d at 1185.

A

We will first address Ms. Kelley's contention that the defendants' failure to follow the SPB rules is direct evidence of discrimination. The district court determined that the failure to follow the SPB rules was not direct evidence of discrimination. It pointed to the "uncontradicted evidence" that Ms. Howden used (or failed to use) the same procedures with all employees "across the board and not just as to [Ms. Kelley]." DE 110 at 3-4. Ms. Kelley argues that the failure to follow the rules is direct evidence of racial discrimination because the purpose of the SPB rules is to eliminate employment discrimination and because the SPB rules are mandatory. Neither of these arguments have merit.

"Direct evidence is evidence that, if believed, proves the existence of discriminatory intent without inference or presumption." *Jefferson*, 891 F.3d at 921-22. In contrast, circumstantial evidence "suggests, but does not prove a discriminatory motive." *Id* "[O]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." *Id* at 922 (internal quotation marks and citation omitted); *Holland v. Gee*, 677 F.3d 1047, 1055 (11th Cir. 2012) (same).

Under Ms. Kelley's theory, the Georgia legislature passed O.C.G.A. § 45-20-1, which established the SPB, in order to achieve six objectives including assuring fair treatment of employees "without regard to race, color, national origin, sex, age, disability, religious creed, or political affiliations." Then, the SPB made a

series of rules, including Rule 14, which requires a formal evaluation process for employees.[3]

According to Ms. Kelley, the defendants' failure to follow Rule 14, which it was passed by a board that was formed in part to prevent employment discrimination, is direct evidence that she was not promoted because of her race. Ms. Kelley's theory fails because it requires many inferences, presumptions, and entire leaps in logic. For example, her theory assumes that Ms. Howden and GEMA ignored Rule 14 in order to racially discriminate against Ms. Kelley and that Ms. Howden and GEMA did not promote her because of the lack of formal review.

The defendants' failure to follow the SPB rules—regardless of whether those rules are mandatory rules or mere guidelines—does not prove racial discrimination in declining to promote Ms. Kelley. The failure to conduct formal reviews of all team members does not explicitly implicate race in any way, and, as the district court pointed out, the uncontradicted evidence shows that Ms. Howden used the same review process procedures with all the employees she supervised "across the board." D.E. 110 at 4. Ms. Howden treated all of her subordinates the same, and therefore the failure to follow the SPB rules is not direct evidence of racial discrimination.

Ms. Kelley asks us to apply what she views as a broader definition of "direct evidence"—*i.e.* "evidence from which a reasonable trier of fact could find, more

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[3] GEMA and Ms. Howden contend that Rule 14 suggests but does not require formal evaluations. We assume for summary judgment purposes that Rule 14 is mandatory because we must examine the evidence in the light most favorable to Ms. Kelly.

probably than not, a causal link between an adverse employment action and a protected personal characteristic." *Wright v. Southland Corporation*, 187 F.3d 1287, 1293 (11th Cir. 1999). Her reliance on Judge Tjoflat's opinion in *Wright* is misplaced, however, because neither of the other two members of the panel joined the opinion, instead concurring only in the result because they agreed that the employee's evidence was sufficient to create a genuine issue of material fact as to survive summary judgment. *Id* at 1306 (Cox, J. concurring in result only); *id.* (Hull, J. concurring in result only). Further, our case law both before and since *Wright* has defined direct evidence as "evidence, which if believed, proves existence of fact in issue without interference or presumption." *See Merritt*, 120 F.3d at 1189; *Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1081 (11th Cir. 2005); *Dixon v. The Hallmark Companies, Inc.*, 627 F.3d 849, 854 (11th Cir. 2010); *Holland*, 677 F.3d at *1055; Jefferson*, 891 F.3d at 921.

Even if the language in *Wright* were binding, Ms. Kelley's evidence is not direct evidence under any definition. The failure to conduct formal reviews does not suggest race discrimination because Ms. Howden and GEMA did not conduct formal reviews for any of the team members, regardless of their race. And, at any rate, evidence that merely suggests discriminatory motive is not direct evidence. *See Burrell v. Bd. Of Trustees of Ga. Military College*, 125 F.3d 1390, 1393 (11th Cir. 1997) (the employer's statement that too many women filled First Federal's officer positions suggests but does not prove that gender discrimination was the motive to terminate Plaintiff). In short,

the district court correctly determined that Ms. Kelley did not present any direct evidence of discrimination.

B

We next address Ms. Kelley's argument that GEMA and Ms. Howden's proffered reasons for declining to promote Ms. Kelley are pretextual. Ms. Kelley seems to invoke both the *McDonnell Douglas* framework and the "convincing mosaic" test in her brief, but her claims fail under either approach because she did not show that the defendants' proffered reason was pretextual.

GEMA and Ms. Howden proffer that they did not promote Ms. Kelley due to her lackluster performance as a CS1. Ms. Kelley attempts to show that this reason is pretext and that she was really not promoted because of her race.[4]

When pretext is an issue, the ultimate question is whether the employer's proffered reasons were a cover-up for discrimination. *See Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002). A plaintiff "cannot recast the reason but must meet it head on and rebut it." *Holland*, 677 F.3d at 1055 (internal quotation marks omitted). At this stage, the plaintiffs burden of rebutting the employer's proffered reasons 'merges with the [plaintiffs] ultimate burden of persuading [the finder of fact] that she has been the victim of intentional discrimination.'" *Id* at 1056 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255

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[4] Because we conclude that Ms. Kelley did not show that the employers' proffered reasons are pretextual, for the purposes of this appeal, we assume that Ms. Kelley sufficiently established a prima facie case.

(1981)). The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs or "reality as it exists outside of the decision maker's head." *Alvarez*, 610 F.3d at 1266.

The plaintiff may demonstrate pretext by revealing "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" in the employer's proffered reasons for its actions that a reasonable factfinder could find them "unworthy of credence." *Springer*, 509 F.3d at 1348 (quotation marks omitted). If the reason is one that might motivate a reasonable employer, the plaintiff cannot succeed by simply quarrelling with the wisdom of the reason. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). The sole concern is whether the adverse action was prompted by discriminatory animus. *See Rojas*, 285 F.3d at 1342. Because of the summary judgment posture of the case, Ms. Kelley had to present sufficient evidence for a jury to find pretext.

Ms. Kelley argues that a "convincing mosaic of circumstantial evidence" refutes Ms. Howden's and GEMA's claim that they did not promote Ms. Kelley due to her poor performance. Ms. Kelley's proffered mosaic consists of six pieces: (1) GEMA's inherently discriminatory failure to follow Georgia's State Personnel Board rules, (2) GEMA's failure to keep employee performance records in violation of SPB rules, (3) GEMA's failure to follow promotion protocols under the SPB rules, (4) the length of time between Ms. Howden first noting Ms. Kelley's poor performance and placing Ms. Kelley on the PIP, (5) Ms. Howden's inquiry about Ms. Kelley's teleworking, and (6) GEMA's failure to maintain an Agency Review Official in violation of SPB rules.

As a crucial threshold matter, none of these pieces—individually or collectively—rebut the employers' proffered reasons for declining to promote Ms. Kelley head on—*i.e.*, none of these pieces show (or permit a jury to find) that Ms. Kelley did not have poor performance. *See EEOC v. Tex. Instruments Inc. 1101* (5th Cir.) ("proof that an employer did not follow correct or standard procedures" may "well be unfair or even unlawful and yet not be evidence of [racial] bias") (citation omitted). Regarding arguments one, two, three, and six, the failure of GEMA and Ms. Howden to follow the SPB rules with respect to all members of the team, regardless of that team member's race, does not show (or permit a finding of) racial discrimination. Nor does this failure indicate pretext because it has no bearing on whether Ms. Kelley's performance was poor.

Ms. Kelley's fourth argument—that the seven months between Ms. Howden first noticing Ms. Kelley's poor performance and placing Ms. Kelley on a PIP is evidence of pretext—also misses the mark. In asserting this argument, Ms. Kelley blends together her discrimination claims and her retaliation claim. She alleges that her employer declined to promote her because of her race and that she was put on a PIP for requesting the promotion—not that she was put on a PIP because of her race. Ms. Kelley's timing argument does not show that her employers' proffered reasons for deciding not to promote her are pretextual.

Ms. Kelley's fifth argument fares no better. Ms. Kelley points to a comment that Ms. Howden made in September of 2019, over a year and a half after she denied Ms. Kelley's request for a promotion and a raise. Ms. Howden asked someone in human resources

whether Ms. Kelley was teleworking one day. This single query is not sufficient to create a jury issue as to whether Ms. Howden refused to promote Ms. Kelley a year and a half earlier because of racial animus. *See Rojas*, 285 F.3d at 1342-43 (isolated comments outside of the relevant time do not support pretext).

C

We now address Ms. Kelley's argument that the district court erred in granting summary judgment on the retaliation claim because the "PIP is nothing but retaliation for Ms. Kelley asking that her salary be equal to her comparators." Appellant's Br. at 36. This conclusory statement is woefully insufficient at the summary judgment stage. *See Leigh*, 212 F.3d at 1217 (for the purposes of summary judgment "conclusory allegations without specific supporting facts have no probative value").

In support of her argument, Ms. Kelley also points out that (1) Ms. Howden "never received any training on creating a PIP"; (2) Ms. Howden "had never written a PIP before February 8, 2018"; and (3) GEMA does not "have a policy examining when an employee should be put on a PIP." Appellants' Br. at 35-36. None of these contentions rebut the defendants' assertion that she was placed on a PIP due to her poor performance. Nor do they suggest that they placed her on the PIP in retaliation for her request for a promotion. *See University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013) ("a plaintiff making a discrimination claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."). At

most, Ms. Kelley's contentions show a that GEMA's processes were informal or disorganized.

D

Finally, we examine Ms. Kelley's cursory contention that the district court erred by granting summary judgment on the discrimination claims under a mixed motive theory. Ms. Kelley does not make any argument specific to this theory, and instead incorporates her arguments regarding her employers' racial discrimination, which have all been addressed above. Her failure to make any argument or cite any authority means that she has abandoned the argument. *See Singh v. U.S. Att'y Gen.*, 561 F.3d 1115, 1120 (11th Cir. 2009) ("[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal.").

IV

We affirm the district court's entry of summary judgment in favor of Ms. Howden and GEMA.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (SEPTEMBER 20, 2021)

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

CHRISTEN ROBINSON KELLEY,

Plaintiff,

v.

CATHERINE HOWDEN, GEMA/ HOMELAND SECURITY,

Defendants.

Civil Action File No. 1:19-CV-4429-WMR

Before: William M. RAY, II,
United States District Judge.

ORDER

This matter is before the Court on the Magistrate Judge's Final Report and Recommendation ("R&R"), [Doc. 105], which recommends that Defendant's Motion for Summary Judgment be granted and that judgment be entered in favor of Defendants on all of Plaintiff's claims. [Doc. 89]. Plaintiff has timely filed objections. [Doc. 107].

I. Legal Standard

In reviewing the R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). If no specific objections are made or no objections are made at all, "the appropriate standard of review for the report and recommendation is clear error." *Lattimore v. Bank of Am., N.A.*, No. 1:12-CV-1776-CAP-JSA, 2014 WL 11456272, at *1 (N.D. Ga. Feb. 10, 2014), *aff'd sub nom. Lattimore v. Bank of Am. Home Loans*, 591 F. App'x 693 (11th Cir. 2015).

II. Discussion

This is a case in which Plaintiff alleges race discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964 via 42 U.S.C. § 1981 and § 1983, and a claim under the Equal Protection Clause of the Fourteenth Amendment via Section 1983. Generally, Plaintiff contends that Defendants discriminated against her, on the basis of her race, by failing to pay her the same as her non-African American co-workers, denying her request for a promotion and pay increase, and for placing her on a Performance Improvement Plan. The Defendants are her employer, the Georgia Emergency Management and Homeland

Security Agency ("GEMA") and her supervisor therein, Catherine Howden ("Howden").

The R&R recommends that Defendant's Motion for Summary Judgment be granted. Plaintiff raises several objections to the R&R that the Court analyzes under a de novo standard of review. The Court otherwise incorporates and adopts the facts as set forth in the R&R.

A. Plaintiff Has Not Offered Direct Evidence of Race-Based Discrimination

First, Plaintiff contends that the Magistrate Judge did not apply the proper standard when analyzing Defendants' failure to comply with state law and state rules. She argues that a "reasonable person" standard should have applied; in other words, the Magistrate Judge should have determined that no reasonable person, in the exercise of impartial judgment, would have believed that following state law and rules is not mandatory. [Doc. 107 at 2]. This, however, is not the correct standard. Rather, the Magistrate Judge applied the correct standard in determining whether Howden and GEMA's failure to follow rules was direct evidence of discrimination by considering whether this failure reflects "a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990). And, the Magistrate Judge was correct in concluding that this failure was not direct evidence of discrimination;[1]

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[1] Plaintiff's statement that "racial animus more likely than not motivated Ms. Howden not to follow state law and rules" is

if anything, Defendants may have been negligent, but there is no other evidence to suggest they were discriminatory in this regard. This is particularly true when there is uncontradicted evidence that Howden used, or failed to use, the same procedures with all the employees she supervised, and any deviation was "across the board and not just as to Plaintiff."[2] [Doc. 105 at 44-45].

It is true, however, as the Plaintiff points out in her objections, that the Magistrate Judge cites to the dictionary definition of direct evidence and not the more appropriate "preponderance" definition, which is more akin to that of circumstantial evidence. [Doc. 107 at 11]. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999) (explaining that the proper definition is "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic"). Yet, although Plaintiff is correct that the "preponderance definition" should be used in employment discrimination cases, the result the Magistrate Judge reached would still be no different.

In all the cases that the Eleventh Circuit discusses in *Wright,* the Court had more inferences to rely on in

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conclusory at best and does not dictate reversal of the Magistrate Judge's conclusion. [Doc. 107 at 12].

[2] Plaintiff also argues that not maintaining records about her performance demonstrates that Howden's employment decisions were discriminatory. However, this is not the case. "[T]he absence of documentary proof—alone—does not establish pretext." *E.E.O.C. v. Winn-Dixie Montgomery, LLC*, No. CA 09-0643-C, 2011 WL 111689, at *13 (S.D. Ala. Jan. 12, 2011).

finding a causal link between a protected characteristic and an adverse employment action, as opposed to the mere fact that a supervisor failed to abide by procedures and policies.[3] For example, in *Buckley v. Hospital Corp. of America,*758 F.2d 1525 (11th Cir. 1985), there were statements made "that tended to prove that the decisionmaker held certain ageist stereotypes . . . and reflected a generalized *ex ante* desire for younger employees." *Wright*, 187 F.3d at 1296. These statements do not exist in this case. Even in cases in which the Eleventh Circuit found there to be no direct evidence of racial discrimination, there were blatant statements reflecting "inappropriate racial attitudes," none of which we have here. *Wright,* 187 F.3d at 1299; *see also Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306 (11th Cir. 1998). And, there is not otherwise any "powerful circumstantial evidence from which a trier of fact reasonably could have concluded that the decisionmaker more probably than not fired the plaintiff because of her [race]." *Id.* This is insufficient.

Moreover, related to this objection, Plaintiff argues that GEMA should have placed Howden, Plaintiff's supervisor, on a Performance Improvement Plan, just like it did for Plaintiff, for Howden's failure to follow the personnel procedures. [Doc. 107 at 9]. Yet, as the Magistrate Judge noted, GEMA's supervision of Howden, an employee in an entirely different position than Plaintiff, with a different title and different job

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[3] Defendants have also produced evidence that it was not mandatory for supervisors to follow the performance evaluation system in Rule 14, but that it was rather used as a guideline. [Doc. 83 (Sexton Depo.) at 10:2-15:7; Doc. 82 (Howden Depo.) at 13-15].

responsibilities, does not bear on whether discrimination occurred in this case against Plaintiff. "Plaintiff, in other words, clearly was not substantially similar in all relevant respects with Howden herself," so Plaintiff's objection that the same action should have been taken against Howden is unfounded. [Doc. 105 at 45 n.25].

B. Plaintiff Has Not Established That Spoliation Occurred, and the Magistrate Judge Did Not Err in This Regard

Plaintiff also objects to the Magistrate Judge's finding in a footnote that spoliation did not occur. [Doc. 107 at 3]. First, Plaintiff contends that the Magistrate Judge erred because he cited a local rule of the court addressing a motion to compel as opposed to a spoliation argument. [*Id.* at 3-4]. Yet, Plaintiff misunderstands the key point made there—the Magistrate Judge was simply stating that Plaintiff should have addressed any argument she had about Defendant Howden's alleged failure to turn over documents in a motion to compel, but, at this point, Plaintiff is well past the deadline to do so, according to the local rules. *See* L.R. 37.1(B) N.D. Ga. In other words, the avenue to assert the spoliation argument was through use of a motion to compel made within the time remaining prior to the close of discovery, instead of in response to a summary judgment motion outside of the discovery period. [Doc. 105 at 8 n.4].

Perhaps it was incorrect for the Magistrate Judge to state that "Plaintiff makes no showing that Defendants could have turned over the requested documents," because the Rules of the State Personnel Board for GEMA require completed performance

evaluations to be maintained in the Human Resources Information System. [Doc. 94-1 (Rules of the State Personnel Board) at 5]. But, again, as noted above, any failure on Defendant's part to maintain these records does not show intentional discrimination or bad faith, particularly when both Plaintiff and Howden have admitted that Howden did not conduct a performance evaluation on any of her direct reports. [Doc. 89-2 at ¶ 14]. *Rojas v. Florida*, 285 F.3d 1339, 1344 n.4 (11th Cir. 2002) (*per curiam*) ("To establish pretext, a plaintiff must show that the deviation from policy occurred in a discriminatory manner"). It may have been negligent for Howden not to do so, but it does not evidence discrimination when she failed to take these actions with all her subordinate. The records themselves may in fact not exist. Thus, the objection does not affect the overall conclusion reached by the Magistrate Judge.

C. The Magistrate Judge's Analysis for Similarly Situated Comparators Was Correct

Plaintiff also objects to the conclusion that the Magistrate Judge reached regarding similarly situated comparators. [Doc. 107 at 13-14]. Specifically, Plaintiff contends that Regeski and Sneider are non-African American comparators similarly situated to her. [*Id.* at 14]. However, Plaintiff notes, incorrectly, that "[t]here are only three relevant factors to decide if the Comparators are similarly-situated in all material respects." [*Id.*]. Those factors are whether the employees are (1) subject to the same rules, (2) subject to the same supervisor, and (3) performing the same job duties and responsibilities. [*Id.*]. And, the Court agrees that those factors certainly are relevant, but

Plaintiff cites no law requiring a court to "only" consider those three factors.

Instead, to the contrary, the Magistrate Judge points to case law suggesting that other factors are relevant and may be considered. For example, "a proferred comparator's prior work experience can strip an individual of the comparator label" for purposes of a wage discrimination claim. *Vinson v. Tedders*, 844 F. App'x 211, 213 (11th Cir. 2021) (*per curiam*); *see also Crawford v. Carroll*, 529 F.3d 961, 975 (11th Cir. 2008) ("Not only had Brennaman been employed at GSU for several years longer than Crawford but also Brennaman possessed specialized and highly valued expertise in the information systems field that Crawford does not claim"). Thus, it was proper for the Magistrate Judge to consider other factors, including prior work experience.

Plaintiff claims that Ms. Regeski and Ms. Sneider are nonetheless comparators, because they, along with Plaintiff, are subject to the same rules at GEMA, Howden supervised them, and that they were all performing the same duties and responsibilities. [Doc. 107 at 14-15]. And, the Magistrate Judge does not necessarily disagree about Regeski, noting that Regeski may have had less prior work experience than Plaintiff and similar job duties and responsibilities, yet is receiving a higher salary. [Doc. 105 at 38]. However, Defendants have provided nondiscriminatory reasons for the pay differential, such as Regeski's recommendation from the Governor's Deputy Chief of Staff for Communications about her work and abilities and the fact that Defendants observed several deficiencies in Plaintiff's work product, ability to manage tasks and productivity, and how to accept

constructive criticism.[4] [Doc. 89-5 (Howden Declaration) at ¶¶ 12-15]. Thus, even if Plaintiff could have established a comparator in Regeski, it would not have mattered, because Defendants have satisfied their burden of production by articulating sufficient race-neutral justifications for the employment decisions. *See Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 770 (11th Cir. 2005) ("So long as the employer articulates "a clear and reasonably specific" nondiscriminatory basis for its actions, it has discharged its burden of production"). And, Plaintiff cannot "merely quarrel[] with the wisdom of the reason" to attempt to rebut it. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000).

Plaintiff also objects to a footnote offered by the Magistrate Judge. [Doc. 107 at 6]. That footnote addresses Plaintiff's prior objection about Howden's testimony that working for the Office of the Governor was "known for being a fast paced environment offering significant writing opportunities and having the expectation of high quality work product." [Doc. 105 at 10-11 n.7]. Howden's testimony was being offered to establish why she may have believed Regeski's prior work experience was more significant than Plaintiff's, but Plaintiff argued that Howden should not be able to testify about this as a witness without having personal knowledge of working in the Governor's Office.

In that objection, Plaintiff clarifies that she meant to argue that this testimony instead violates Federal Rule of Evidence 602. [Doc. 107 at 6]. However,

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[4] Plaintiff was also given the raise and promotion she sought after it was determined that her performance had improved. [Doc. 81 at 262-25].

the fact that Plaintiff cites to the more applicable rule here is irrelevant because Howden would be permitted to testify about the subjective basis of her hiring decisions and beliefs about Regeski's work performance. Her testimony is not being offered to prove the truth of the matter asserted, such as to indicate that the Office of the Governor's work is fast paced. Rather, Howden is only attempting to explain why she made the employment decisions she made with regards to Regeski. Regardless, as noted above, the Magistrate Judge actually agreed with Plaintiff that Regeski's experience was not that different than Plaintiff's, so they may have been comparators. [*See* Doc. 107 at 38 ("[T]he evidence offered by Defendants as to the objective circumstances of Regeski's employment—including her previous experience, her job duties, and her operation under the same supervisor as Plaintiff—does not conclusively foreclose an argument that Regeski was similar to Plaintiff in all material respects.")]. Thus, this objection about Howden's testimony is irrelevant because the Magistrate Judge essentially ruled in favor of Plaintiff on this point.

D. Plaintiff Failed to Offer Evidence Establishing Defendants' Pretext for Unlawful Racial Bias

Plaintiff further objects by stating that her own deposition contradicts assertions that the Magistrate Judge referenced in the R&R about a conversation she had with Howden. [Doc. 107 at 7]. For example, the Magistrate Judge noted, in a footnote, that Plaintiff tried to deny the court's characterization of the conversation and meeting she had with Howden. [Doc. 105 at 12 n. 12]. Plaintiff's objection is that her own deposition testimony shows that she complained to

Howden about how she was being treated differently on the basis of race, when in fact all her deposition says is exactly what the Magistrate Judge reported—that Plaintiff stated to Howden that she felt she was being treated differently by being left out of meetings and off of emails. [*Id.* at 12]. In her deposition, Plaintiff states that she only asked Howden why she was being left out of meetings, being taken off emails, and not being able to attend trainings and conferences like other members of the team, not that she communicated that she thought she was being treated differently because of her race. [Doc. 81 (Plaintiff Depo.) at 124:1-25]. The Magistrate Judge, therefore, did not err here.

The Magistrate Judge may have erred, however, when he concluded that Plaintiff failed to put Howden on notice of discriminatory actions based on Plaintiff's race because she did not communicate the words "race," "discrimination," or "African-American." [Doc. 107 at 7-8]. Eleventh Circuit case law does not require this. And, although the Magistrate Judge somewhat recognizes this to be true, he nonetheless concludes that "Plaintiff's request . . . does not mention race, discrimination, mistreatment, or differential treatment." [Doc. 105 at 51]. All that is required of Plaintiff, however, is that she put Howden on notice of her complaint of racial discrimination, in violation of Title VII, as opposed to "general unfair treatment in the workplace." *Smith v. Mobile Shipbuilding & Repair, Inc.*, 663 F. App'x 793, 800 (11th Cir. 2016). In *Smith*, the plaintiff had previously complained about being harassed by a defendant, but made no mention that this harassment was associated with his race. Here,

however, it is at least possible that Plaintiff did mention that she felt she was being unfairly treated based on her race when she asked Howden, "Why do you treat me differently from everyone?" [Doc. 81 at 125:1-4]. This is true particularly because Plaintiff was the only black person on the team at the time, a fact that Plaintiff should not necessarily be required to communicate to her supervisor. Thus, Plaintiff may have demonstrated "that the decision maker was aware of the protected conduct at the time of the adverse employment action." *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000).

But, as noted in *Smith*, "even assuming [Plaintiff] established a *prima facie* case of discrimination or retaliation, Defendants proffered evidence showing that they terminated [Plaintiff's] employment because of poor work performance, not race or retaliation." *Smith*, 663 F. App'x at 800. Thus, although it is possible that Howden "may have harbored some racial animus, the allegations do not present any specific facts which cast doubt on Defendants' proffered reason for [Plaintiff's] termination." *Id.* Accordingly, the Magistrate Judge did not make an error in his ultimate findings.

Plaintiff further objects to another footnote in the R&R that states that although Plaintiff may not agree with the contents of the Performance Improvement Plan ("PIP"), she does not deny the contents of the PIP. [Doc. 107 at 8]. Plaintiff claims that her own deposition testimony confirms that she does in fact dispute the allegations made against her. [*Id.*]. But, after review of the deposition testimony, the Court finds it to state exactly what the Magistrate Judge quoted: that Plaintiff "signed it to acknowledge only receipt, but not agreement to the contents." [Doc. 81 at

164:4-6]. In other words, obviously, Plaintiff disputes the four main areas of concern that Howden identified in the PIP, such as "technical skills, failure to complete assigned tasks, inadequate productivity, and failure to meet teleworking requirements." [Doc. 105 at 15-16]. But, that is exactly what the Magistrate Judge states here, and Plaintiff does not disagree in her deposition testimony. This analysis applies similarly to Plaintiff's objection about the "written follow up" and "Defendants' assertion as to her statement during the meeting" with Mai and Sexton. [Doc. 107 at 8, ¶¶ 10, 11].

The Magistrate Judge also concluded that it was not pretext for Howden to keep Plaintiff "under surveillance." [Doc. 105 at 48]. And, the Magistrate Judge points out that this comment was made in September of 2019, over a year and a half after Howden denied Plaintiff's request for a raise/promotion and over a year after Plaintiff was ultimately granted the promotion. [*Id.*]. Plaintiff objects, however, and argues that the "incident is admissible evidence that proves Ms. Howden's intent" and was made "within the two-year statute of limitations." [Doc. 107 at 19]. But, the fact that it was made within the statute of limitations is not the point the Magistrate Judge sought to address. Rather, what is important is that the isolated statement was made long after any adverse action occurred, so it does not establish the causal link between Plaintiff's protected characteristic and the employment decisions in this case. The Court agrees and finds the same to be true.

Similarly, Plaintiff argues that Howden and GEMA's ability to "bend the rules" for white employees demonstrates discrimination. [Doc. 107 at 20]. Although

it is true that Howden on occasion did not follow procedures with regards to her employees and their promotions,[5] this does not establish discriminatory treatment. Defendants do not contend that Plaintiff was denied a promotion on the grounds that she did not meet the minimum experience threshold, as was required by the rules and policies of GEMA. Instead, Defendants provide non-discriminatory reasons for the initial denial of Plaintiff's request for a promotion or raise, such as her lack of work productivity, problems with writing skills, etc. Thus, when arguing that it was discrimination for Howden to deviate from the minimum experience threshold when granting Regeski a promotion, Plaintiff fails to account for the other considerations that Howden may have evaluated, such as Regeski's work product, experience, and other factors. The evidence as to Plaintiff is that Defendants simply made a nondiscriminatory business decision not to promote her at the time.

E. Plaintiff's Mixed-Motive Claim Fails as a Matter of Law

In her objections, Plaintiff also argues that the Magistrate Judge did not explain why summary judgment should be granted to Defendants on Plaintiff's mixed-motive discrimination claim. [Doc. 107 at 21]. And, it is true that the Magistrate Judge did not go into great detail on this point, but that is likely because he had already found a lack of discrimination. Nevertheless, the Court addresses the mixed-motive claim here.

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5 *See* Doc. 99-1 at 24-26.

In Count Two and Eight of the Amended Complaint, Plaintiff alleges a mixed-motive race discrimination claim under § 1981 and Title VII. [Doc. 17 at 15]. An employee can succeed on a mixed-motive claim by showing that illegal bias on the basis of race "was a motivating factor for" an adverse employment action, "even though other factors also motivated" the action. 42 U.S.C. § 2000e-2(m); *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). However, for claims brought under § 1981 for discrimination and Title VII for retaliation, the plaintiff must prove that discrimination or retaliation was the but-for cause of the adverse employment action they suffered. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019, 206 L. Ed. 2d 356 (2020) (§ 1981); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m)."). In other words, a plaintiff must "ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp.*, 140 S. Ct. at 1019.

Here, Plaintiff does not satisfy that test. First, as has been reiterated throughout this Order and the R&R, Plaintiff has not met her burden of establishing the discrimination necessary through direct or circumstantial evidence. Thus, it is not clear that any racial animus affected Defendants' employment decisions. But, even if it had, Defendants have demonstrated that there is no but-for causation. There is no evidence in the record that, at the time Plaintiff requested a promotion, there were any other open positions within

the External Affairs unit at a higher level, or that she was hired at a salary outside the applicable salary range for her qualifications. Further, Plaintiff chose not to apply for the open CS2/External Affairs position when it was posted, despite that the job could have offered her the same duties and salary she hoped for. Instead, she merely asked for a reclassification to that position. [Doc. 81 at 130-135]. Howden testified that she did not consider Plaintiff for the position, even though she met the minimum qualifications for a similar role, because she did not apply and because she was not meeting her current job expectations. [Doc. 89-2 at ¶ 31].

Moreover, Plaintiff contends that she must succeed on this claim because "Ms. Howden is the direct and proximate cause why Ms. Kelley was placed on a PIP." [Doc. 107 at 22]. And, that is certainly not disputed. But, that fact doesn't establish the type of but-for causation necessary for this type of claim. There is no evidence that Plaintiff has produced showing that, but for her race, things would have been any different. Instead, Defendants have provided evidence that Plaintiff was placed on a PIP because of deficiencies in her work product and performance, and Plaintiff even acknowledges that she recognized these deficiencies in a conversation with Howden. Accordingly, her mixed-motive claim fails.

III. Conclusion

After considering the Final Report and Recommendation, the Court receives the R & R with approval and adopts its findings and legal conclusions as the Opinion of this Court. [Doc. 105]. Defendant's Motion

for Summary Judgment is therefore GRANTED. [Doc. 89].

IT IS SO ORDERED, this 20th day of September, 2021.

/s/ William M. Ray, II
United States District Judge

ORDER AND FINAL REPORT AND RECOMMENDATION ON A MOTION FOR SUMMARY JUDGMENT (JULY 8, 2021)

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

CHRISTEN ROBINSON KELLEY,

Plaintiff,

v.

CATHERINE HOWDEN AND
GEMA/HOMELAND SECURITY,

Defendants.

Civil Action File No. 1:19-CV-4429-WMR-JSA

Before: Justin S. Anand,
United States Magistrate Judge.

Plaintiff Christen Robinson Kelley filed this employment discrimination action on October 1, 2019. Plaintiff claims that her employer, the Georgia Emergency Management and Homeland Security Agency ("GEMA"), and her supervisor therein, Catherine Howden, discriminated against her because of her race. Plaintiff alleges that Howden engaged in race discrimination in violation of the Civil Rights Act of

1866 ("§ 1981"), 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that GEMA engaged in race discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.* Plaintiff additionally alleges that Howden and GEMA unlawfully retaliated against her in violation of § 1981 and Title VII, respectively.

The action is before the Court upon Defendant's Motion for Summary Judgment [89]. For the reasons discussed below, the undersigned RECOMMENDS that Defendant's Motion for Summary Judgment [89] be GRANTED and that judgment be entered in favor of Defendants on all of Plaintiff's claims. Further, the Clerk is DIRECTED to unseal documents [93], [94], and [95].

I. Facts

Unless otherwise indicated, the Court draws the facts stated herein from Defendants' "Statement of Material Facts as to Which There is No Genuine Issue to be Tried" [89-2] ("Def. SMF"), Plaintiff's response thereto [97-3] ("Pl. Resp. SMF"), Plaintiff's "Statement of Additional Facts" [97-2] ("Pl. SMF"), and Defendants' response thereto [102] ("Def. Resp. SMF"). Where appropriate, the Court directly cites to underlying exhibits filed by the parties.

Under the Local Rules, the Court must deem admitted those facts submitted by Defendants that are supported by citations to record evidence, and for which Plaintiff has not expressly disputed with citations to record evidence. *See* LR 56.1(B)(2)(a)(2), NDGa ("This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes

the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1).").

Accordingly, for those facts submitted by Defendants that Plaintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true, so long as the facts are supported by citations to record evidence, do not make credibility determinations, and do not involve legal conclusions. *See E.E.O.C. v. Atlanta Gastroenterology Assocs., LLC*, No. CIV. A. 1:05-CV-2504-TWT, 2007 WL 602212, at *3 (N.D. Ga. Feb. 16, 2007). The Court has nevertheless viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

The Court has excluded assertions of fact by either party that are clearly immaterial, or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in a party's brief and not in its statement of facts. *See* LR 56.1(B)(1), NDGa ("The court will not consider any fact: (a) not supported by a citation to evidence . . . or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."); *see also*

LR 56.1(B)(2)(b) (respondent's statement of facts must also comply with LR 56.1(B)(1)). Nevertheless, the Court includes certain facts that are not necessarily material, but which are helpful to present the context of the parties' arguments. The Court will not rule on each objection or dispute presented by the parties and will discuss those objections and disputes only when necessary to do so regarding a genuine dispute of a material issue of fact.

As an initial matter, it must be noted that Plaintiff's Statements of Material Facts and her Response to Defendants' Statement of Material Facts are riddled with improprieties. Plaintiff's 188-paragraph Statement of Material Facts is filled with pages of immaterial facts that do little to clarify the focus of her claims or relevant material facts. To wit, several pages of Plaintiff's Statement of Material Facts consist simply of extensive quotes of the State Personnel Board's and GEMA's separate Performance Management Policies. *See* Pl. SMF at ¶¶ 25–90. Many of Plaintiff's factual allegations in both her Statement of Material Facts and Response to Defendant's Statement of Material Facts cite to numbered exhibits—presumably attached to her response to Defendants' Motion for Summary Judgment—that do not actually appear with any clear demarcation in her 1,571-page response filing. Worse yet, Plaintiff's Response to Defendants' Statement of Material Facts purports to deny a substantial portion of Defendants' assertions with non-sequitur assertions of additional facts that do not contradict them, or with legal arguments as to the significance of those facts. The Court will address Plaintiff's serial denials and objections wherever possible. However, the undersigned emphasizes that

purported denials of Defendants' stated facts that rely on non-sequitur assertions of other facts irrelevant to Defendants' assertion will result in the admission of Defendants' assertion. *See Nealy v. SunTrust Banks, Inc.*, 1:19-CV-2885-SDG-LTW, 2020 WL 9219293, at *1-2 (N.D. Ga. Nov. 16, 2020), *report & rec. adopted by* 2021 WL 1116004 (N.D. Ga. Mar. 23, 2021).

GEMA is an agency of the State of Georgia tasked with preparing and implementing the State's response to various threats to public safety. *See* O.C.G.A. § 38-3-20.[1] On October 17, 2016, the agency hired Plaintiff to the position of Communications Specialist I, which was housed in GEMA's External Affairs Unit, which is sometimes referred to as the Strategic Communications Unit. Def. SMF at ¶ 5. A state-prepared summary of the role noted that a Communications Specialist I generally operates "under supervision" to "assist[] with the planning, development and implementation of a communications program, and/or public relations plan[.]" Pl. Dep. Exh. D-4 [81-4]. Minimum qualifications for the position included a bachelor's degree in communications, or a related field, and of three years of communications-related experience. *Id.* At the time of her hiring, Plaintiff held an Associate of Arts degree in Media Studies and a Bachelor of Science degree in Communications; she would go on to earn a Master's degree in Strategic Communications in December 2017. Def. SMF at ¶ 83. Plaintiff's resume listed the following relevant experience: (1) a one-year public relations internship at Wellstar Health System; (2) a five-month internship

[1] The undersigned takes judicial notice of this background fact pursuant to Rule 201 of the Federal Rules of Evidence.

at Enchanted Branding & PR; (3) eight months as a Qualitative Assistant at Schlesinger Associates; (4) four months as a Consumer Affairs Specialist at Randstad; and (5) ten months as a journalist/news assistant at the Gainesville Times newspaper. Def. SMF at ¶ 84; Pl. Resp. SMF at ¶ 84. At the time she began the role, Plaintiff was assigned an annual salary of $36,000. Def. SMF at ¶ 5. Once she started, Plaintiff's day-to-day duties included coordinating the External Affairs Inbox and a Constituent Call Log, creating the layout of and contributing articles and photographs to a newsletter, preparing news content to be included in GEMA's Daily Digest, and monitoring social media. *Id.* at ¶ 11.

Plaintiff was interviewed, hired, and initially supervised by Catherine Howden, who joined GEMA in July 2015 as its Senior Policy and Strategic Communications Director, and who would go on to serve as the agency's Chief of Staff until March 2019. *Id.* at ¶ 2, 5, 10. During all periods relevant to this action, Homer Bryson served as GEMA's Director, and Mark Sexton served as its Deputy Director of Administration and Finance. *Id.* at ¶ 1. Howden, Bryson, and Sexton are Caucasian; Plaintiff is African-American. *Id.* at ¶ 3.

In the spring of 2017, the External Affairs team consisted of Plaintiff, Uyen Le, Julia Regeski, Lisa Rodriguez-Presley, and Brandy Mai, all of whom worked under Howden's supervision. *Id.* at ¶ 10. Le and Regeski each occupied the roles of Communications Specialist II and Media Relations Specialist II. *Id.*[2]

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[2] Plaintiff purports to deny this assertion on the grounds that the positions of Communications Specialist II and Media Relations Specialist II occupy somewhat differing pay scales. Pl. Resp.

Rodriguez-Presley occupied the roles of Communications Specialist II and Senior Communications Strategist. *Id.* Mai occupied the roles of Communications Specialist III and Senior Communications Strategist. *Id.*

Le was initially hired as a Communications Specialist I/Media Relations Specialist I on September 16, 2016 at an annual salary of $36,000. *Id.* at ¶ 88. At the time of her hiring, she held a Bachelor of Arts degree in Journalism, with a major in Broadcast Journalism and a minor in Political Science. *Id.* at ¶ 89. She brought nearly two years of full-time professional experience and one-and-a-half years of reporting-related internship experience. *Id.* at ¶ 91. Her experience included nearly two years as a reporter for NBC/WAGT, a year as an investigative intern with Channel 2/WSB-TV, and four months as a general assignment intern with Cox Media Group's Washington Bureau. Pl. Dep. Exh. D-26 [81-26]. One month into her tenure at GEMA, Le was promoted to Communications Specialist II/Media Relations Specialist II, which included an annual salary of $39,600. Def. SMF at ¶ 88.[3] Howden explained that Le's promotion was the result of her "hit[ing] the ground running during

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SMF at ¶ 10. However, whether or not the positions' formal pay scales differed has no bearing on whether Le and Regeski occupied the positions.

[3] Plaintiff purports to deny this assertion, explaining that Howden allegedly "gave Le a raise without giving her a performance evaluation." Pl. Resp. SMF at ¶ 88. Plaintiff contends that a "performance evaluation is required for all salary increases." *Id.* However, whether or not Plaintiff feels the promotion and/or raise was procedurally proper has no bearing on whether or not it occurred.

her first disaster," showing strong writing skills, operating without oversight, and having videography experience. Def. SMF at ¶ 93 (citing Howden Decl. [89-5] at ¶ 46).[4] Le would receive a discretionary raise to a

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[4] Plaintiff objects to the consideration of the declaration in which Howden explains her rationale. Pl. Resp. SMF at ¶ 93. Plaintiff claims that, during discovery, she sought from Howden all documents related to Le's work assignments and that Howden did not turn them over. From here, Plaintiff makes the leap of contending that the Court must apply "Georgia's spoliation law" and make adversely inferences against them contradicting essentially all testimonial statements made about Le's work assignments and performance. *Id.*

This argument must be rejected. First, to the extent that Plaintiff's arguments depend on her lack of satisfaction with Defendants' June 2020 responses to her discovery requests, the time to raise and preserve such an argument was at that time rather than in a January 2021 response to a summary judgment motion filed well after the close of discovery. *See* L.R. 37.1(B), N.D.Ga. ("Unless otherwise ordered by the Court, a motion to compel a disclosure or discovery must be filed within the time remaining prior to the close of discovery or, if longer, within fourteen (14) days after service of the disclosure or discovery response upon which the objection is based.")

Second, a spoliation argument requires, at a minimum, a showing that (1) "the missing evidence existed at one time"; (2) "the defendant had an obligation to preserve it"; and (3) that "it was crucial to the plaintiff being able to prove her case." *Ata v. Cisco Sys., Inc.*, 1:18-CV-1558-CC-JKL, 2020 WL 7384689, at *4 (N.D. Ga. Aug. 4, 2020), *report & rec. adopted by* 2020 WL 7022450 (N.D. Ga. Nov. 3, 2020). An adverse inference resulting from a spoliation finding requires a further showing of bad faith on the party against whom it is sought. *Id.* Other than a conclusory statement that "[s]uch documents should be in [Defendants'] custody," Plaintiff makes no showing that Defendants could have turned over the requested documents. Plaintiff makes no argument as to Defendants' bad faith.

salary of $44,000 on May 1, 2017, *id.* at ¶ 94; in a contemporary memorandum, Director Bryson noted that Le was receiving the raise because took "on additional responsibilities as the newly most-senior of our Strategic Communications Strategists in training and mentoring our newest communications staff and as the expert on Ready Georgia and other technology-based media outlets," Lowe Decl. Exh. A [89-4] at 15.[5]

Regeski was hired by Howden on April 16, 2017 as a Communications Specialist II/Media Relations Specialist II at an annual salary of $42,000. Def. SMF at ¶ 97. Regeski had spent the previous three-and-a-half months as a scheduler in the Office of the Governor at a salary of $35,000. *Id.*[6] Before her stint as a scheduler, Regeski spent one-and-a-half years completing marketing, writing, and communications internships. Pl. Dep. Exh. D-27 [81-27]. At the time

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Plaintiff's flurry of objections to Howden's declaration continue in the form of arguing that other evidence show that Le "was responsible for making newsletters like everyone else" and that she "could not have received a raise without an annual performance evaluation." Pl. Resp. SMF at ¶ 93. None of these contentions, however, contradict the factual assertions at hand as to Howden's reasons for promoting for Le or other personnel decisions.

[5] Plaintiff lodges the same objections and/or denials as above. Pl. Resp. SMF at ¶ 94. They are rejected for the same reasons.

[6] Plaintiff purports to deny the previous two sentences on the grounds that Regeski "did not qualify for the position [to which she was hired] when she was hired," because she allegedly did not have the requisite minimum experience, making an unclear citation to "Exhibit 6" without noting which document that exhibit is appended to. Pl. Resp. SMF at ¶ 97. Plaintiff's assertion has nothing to do with whether Regeski was hired as she was.

she was hired, Regeski held a bachelor's degree with a major in English and a minor in Business Administration. Def. SMF at ¶ 98. Howden explained that she valued Regeski's experience working in the Office of the Governor, which she understood to be a fast-paced environment with significant writing opportunities with high work product expectations. *Id.* at ¶ 99.[7] In addition to multiple agency-wide salary increases, Regeski would receive a raise to a salary of $45,000 in August 2018, *id.* at ¶ 100; that raise was recorded as

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[7] Plaintiff objects to Howden's testimony indicating that she believed that the Office of the Governor was "known for being a fast paced environment offering significant writing opportunities and having the expectation of high quality work product." Howden Decl. [89-5] at ¶ 48. According to Plaintiff, Howden has no personal knowledge on which to make such a statement and her testimony as to its reputation is inadmissible under Rule 405 of the Federal Rules of Evidence because reputation testimony may only be admitted to show truthfulness. Pl. Resp. SMF at ¶ 99.

Plaintiff's objection is misplaced. The Rule she cites relates only to methods of proving character, which is not the point. Howden's testimony is not offered as to character, or as to whether the work at the Governor's office is actually fast-paced. Her testimony, rather, is offered only to prove Howden's hiring decision, that is, what Howden <u>believed</u> as to the nature of Regeski's past work and how that understanding contributed to the decision to hire Regeski. Howden plainly has personal knowledge to testify about such subjective facts. Moreover, although Plaintiff does not object on grounds of hearsay, her statements as offered for the purposes of explaining her own hiring decisions are not hearsay.

having been conferred due to Regeski's "increased responsibilities," Lowe Decl. Exh. E [89-4] at 20.[8]

In early 2017, Howden scheduled one-on-one meetings with each member of her team to discuss expectations and performance. Def. SMF at ¶ 12. Plaintiff's meeting with Howden had to be rescheduled from its initial date; according to Plaintiff, she had to repeatedly follow up with Howden to set a new date for their meeting. Def. SMF at ¶ 12; Pl. Resp. SMF at ¶ 12. The two eventually met on May 24, 2017 and had what the parties agree to have been a positive discussion regarding Plaintiff's responsibilities. Def. SMF at ¶ 12; Pl. Resp. SMF at ¶ 12. Later, Howden asked her team to submit a list of their current and desired job duties and their strengths and weaknesses as part of an informal performance evaluation. Def. SMF at ¶ 13. Plaintiff submitted her list to Howden on July 5, 2017, stating that she needed to improve her interviewing techniques, her ability to decipher the appropriate focus of an article, and her journalistic writing style. *Id.*[9] Outside of these meetings, other regular meetings, and regular assignment feedback, Howden did not conduct formal performance evaluations for any member of her team in 2017 and

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[8] Plaintiff's spoliation argument and non-sequitur denial on the grounds that Regeski was tasked with making newsletters, Pl. Resp. SMF at ¶ 100, are rejected for the reasons already stated.

[9] Plaintiff objects to Defendant's assertion about Howden's informal evaluation of Plaintiff, again raising her spoliation objection. Pl. Resp. SMF at ¶ 13. She additionally denies all assertions, seemingly on the grounds that Howden's evaluation process was not in accordance with guidance from the State Personnel Board. *Id.* Her spoliation argument and inapposite, argumentative denial must be disregarded.

2018. Def. SMF at ¶ 14.[10] In August 2017, Howden tasked her team members with various projects. Def. SMF at ¶ 18. Plaintiff with responsibility for the team's Paise and Preparedness ("P&P") initiative. *Id.* Le was assigned all Private Sector projects. *Id.* Regeski took on the Volunteer Organization Active in Disasters program. *Id.*[11]

In a November 2017 meeting between the two, Howden told Plaintiff that there was room for improvement in her work and that she was not carrying an appropriate workload, but that she expected Plaintiff to improve and take on more responsibility after Plaintiff's anticipated graduation with a master's degree the following month. *Id.* at ¶ 23.[12] In response, Plaintiff stated that she felt that Howden was treating her differently from other members of the team by not including her in certain meetings and emails. *Id.* at ¶ 24.[13] Plaintiff did not bring up her rate of pay or any

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[10] Plaintiff's purported denial of this fact on the grounds that she was allegedly left out of meetings and emails is disregarded. Pl. Resp. SMF at ¶ 14.

[11] Plaintiff's spoliation arguments raised in objection to Defendants' assertions regarding Howden's assignments must be disregarded.

[12] Plaintiff purports to deny this characterization of her meeting with Howden, but states only that she complained to Howden that she was treating her differently than other employees by not including her in certain meetings or emails. Pl. Resp. SMF at ¶ 23. Plaintiff's assertions do not contradict Defendants' assertions.

[13] Plaintiff purports to deny this assertion by noting that she asked Howden why she was treating her differently but that Howden did not answer her question. Pl. Resp. SMF at ¶ 24. This assertion does not contradict Defendants' assertion.

pay discrepancy between her and her teammates, nor did she use the words "race," "discrimination," or "African-American," in her query to Howden. *Id.* at ¶ 25.[14]

On January 9, 2018, Howden advertised a job opening for a Communications Specialist II/External Affairs Specialist position with a salary range of $40,000– $46,000. *Id.* at ¶ 29.[15] Although Plaintiff was aware of the posting, she did not apply to it. *Id.* at ¶ 29.[16] The job listing noted that applicants were required to have experience with video equipment, which Plaintiff admitted to not having at the time. *Id.* at ¶ 30.[17] Howden states that she did not consider

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[14] Plaintiff purports to deny this assertion, but states only that she told Howden that she believed she was being treated unfairly. Pl. Resp. SMF at ¶ 25. This purported denial is entirely consistent with Defendants' assertion. Moreover, the portion of her deposition testimony to which she cites confirms Defendants' assertion that Plaintiff did not bring up her race in her November 2017 meeting with Howden. *See* Pl. Dep. [81] at 125:5-7.

[15] Plaintiff purports to deny this assertion by arguing that Howden's public posting of the position violated GEMA's policy on filling roles through internal hiring and that many of the duties Howden listed were those that Plaintiff was already doing. Pl. Resp. SMF at ¶ 29. This does not contradict Defendants' assertion that Howden posted the job opening.

[16] Plaintiff again purports to deny Defendants' assertion without asserting or citing anything to the contrary. Pl. Resp. SMF at ¶ 29.

[17] Plaintiff purports to deny this assertion by stating that the job posting required applicants to have experience using Adobe Creative Suite products, which she claims to have had at the time. Pl. Resp. SMF at ¶ 30. However, this does not contradict Defendants' assertion that the posting additionally required

Plaintiff for the open position because she did not apply and because, in her view, she had not been meeting the expectations of her current job. *Id.* at ¶ 31.[18] Howden would eventually hire Kelsi Eccles, an African-American female, to the position in April 2018 at a salary of $45,000. *Id.* at ¶ 32.[19]

On January 24, 2018, Plaintiff emailed Howden and Gary Hoy, a human resources employee, with a request that she be reclassified to a Communications Specialist II position and that her salary be raised to $45,000. *Id.* at ¶ 33. She grounded her request in her recent graduation with a master's degree and an assertion that her performance exceeded her listed duties. *Id.* at ¶ 34. Although Howden admits that Plaintiff met the State's listed minimum qualifications for the similar role of Media Relations Specialist II, *see* Howden Dep. [82] at 64:19-22, Howden states that she did not think that Plaintiff qualified for a promotion or a raise because she had not demonstrated an ability to work independently and that her obtaining of an advanced degree did not outweigh her relevant experience, Def. SMF at ¶ 35.

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applicants to have experience with videography equipment. *See* Pl. Dep. Exh. D-7 [81-7] at 2.

[18] Plaintiff purports to deny this assertion by quoting GEMA's internal hiring policy and by asserting that she was qualified for the position. Pl. Resp. SMF at ¶ 31. Neither contention contradicts Howden's testimony as to her own motivations in not considering Plaintiff for the position.

[19] Plaintiff purports to deny this bare assertion of fact by again quoting GEMA's internal hiring policy. Pl. Resp. SMF at ¶ 32. Plaintiff's non-sequitur quotation does not deny Defendants' assertion.

Before hearing back from Howden on her request for a raise, Plaintiff contacted the Office of Planning and Budget to note that she had not heard back from Howden and to ask what "protocol" should be followed on the matter. *Id.* at ¶ 45; Pl. Dep. [81] at 169:22-170:13. In response to her call, OPB's Deputy Director, Yvonne Turner, and its Director of Human Resources, Felicia Lowe, both African-American, scheduled a mediation between Plaintiff and Howden. Pl. Dep. [81] at 170:4-13. On February 8, 2018, Howden denied Plaintiff's request for a raise and instead placed her on a Performance Improvement Plan ("PIP"). Def. SMF at ¶ 36. The next day, Plaintiff, Howden, Turner, and Lowe met to discuss Plaintiff's work performance, the state of communications between Howden and Plaintiff, and an allegation by Plaintiff that she had been placed on the PIP in retaliation against her request for a raise. *Id.* at ¶ 46; Pl. Resp. SMF at ¶ 46. Plaintiff alleges that, while complaining of her treatment by Howden during the meeting, she told Turner and Lowe that she was the only African-American on her team. Pl. Dep. [81] at 173:15-21.

Howden's PIP identified four main areas of concern: technical skills, failure to complete assigned tasks, inadequate productivity, and failure to meet teleworking requirements. Def. SMF at ¶ 38.[20] The PIP noted that the last issue area—a failure to meet teleworking requirements—concerned Plaintiff's alleged lack of communication while teleworking on February

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20 Plaintiff purports to deny Defendants' assertion as to the contents of the PIP because she "does not agree with the contents of the PIP." Pl. Resp. SMF at ¶ 38. This does not amount to a denial of the contents of the PIP.

1 and 2, 2018. Pl. Dep. Exh. 9 [81 9] at 2. Plaintiff submitted multiple rebuttals to the PIP's allegations that month in which she stated that she felt she was placed on the PIP because she had requested a raise and reclassification of her job title; none of her rebuttals asserted that the PIP was issued because of her race. Def. SMF at ¶ 47; Pl. Dep. Exh. D-10 [81-10]; Pl. Dep. Exh. D-17 [81-17]. Turner and Lowe investigated Plaintiff's allegation that the PIP was issued in retaliation against her request for a raise. Def. SMF at ¶ 48. On March 13, 2018, Lowe contacted Plaintiff to inform her that her investigation found that Plaintiff's allegations were unsupported. Def. SMF at ¶ 49.[21]

On April 3, 2018, Plaintiff submitted to the Equal Employment Opportunity Commission ("EEOC") a charge of race discrimination, which she alleged to have occurred on February 8, 2018, the date on which Howden issued the PIP. Pl. Dep. Exh. D-14 [81-14] at 2. On April 5, 2018, Plaintiff submitted an internal grievance letter to Finance Director Tracey Wilson, alleging that Howden was treating her differently from her teammates because of her race and that she was placed on a PIP because she had requested a raise. Def. SMF at ¶ 52. Plaintiff's letter further alleged that Howden had made "derogatory" comments toward her, that Howden had yelled at her while she was home sick, that Howden had accused her of lying, that Howden deliberately impeded her

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[21] Plaintiff purports to deny the assertion that she was informed of the results of the investigation by stating that, the next month, she wrote a letter saying that Howden was discriminating against her. Pl. Resp. SMF at ¶ 49. Plaintiff's assertion that she disagreed with the results of the investigation does not amount to a denial of the results of the investigation.

work and excluded her from team meetings, that Howden failed to communicate with her, and that Howden generally behaved in an intimidating and disrespectful manner toward her. *Id.* at ¶ 53. The next day, Deputy Director Sexton and Wilson asked Plaintiff to meet with them and offered her a lateral transfer to the position of Grants Manager, in which Plaintiff would operate under Wilson's supervision. *Id.* at ¶¶ 54-55. Sexton and Wilson asked Plaintiff to mull the offer over the weekend. *Id.* at ¶ 55. That same day, GEMA received a notice of Plaintiff's EEOC charge. *Id.* at ¶ 55.

Plaintiff ultimately declined Sexton and Wilson's offer on April 9, 2018. *Id.* Later that day, Sexton informed Plaintiff that, moving forward, she would report to Mai rather than Howden as her immediate supervisor, but that her job title and duties would remain the same as before. *Id.* at ¶ 58. Howden was not involved in the decision to place Plaintiff under a different supervisor. *Id.* at ¶ 59.

On May 1, 2018, Mai and Sexton met with Plaintiff and provided her with a written follow up to the February 2018 PIP. Def. SMF at ¶ 62. The written follow up highlighted some improvement in Plaintiff's skills but noted continued inconsistencies in Plaintiff's layout skills, ongoing issues with her handling of External Affairs' inbox and constituent log, the need to heavily edit her written work, and a lack of attention to detail. *Id.*[22] During the meeting, Mai asked

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22 Plaintiff purports to deny this assertion because, in her view, the written follow up consisted of "false accusations of the work [she] produced." Pl. Resp. SMF at ¶ 62. Whatever the veracity of

Plaintiff how she felt things were going since her supervisory change. Plaintiff responded that things were going better and that she did not have any issues that she wanted to address. *Id.* at ¶ 63.[23]

On June 26, 2018, Sexton lifted the PIP that had been placed over Plaintiff. *Id.* at ¶ 69. In a memorandum explaining his decision to lift the PIP, Sexton explained that timeliness and quality of her recent work warranted the decision. Pl. Dep. Exh. D-24 [81-24]. On August 1, 2018, Plaintiff was promoted to the positions of Communications Specialist II/Media Relations Specialist II and received a salary increase up to $45,000. *Id.* at ¶ 70. She was placed under the supervision of Deputy Director Thomas Moore. *Id.*

II. Discussion

A. Sealed Filings

Plaintiff's evidentiary filings include three deposition transcripts which, along with their attached exhibits, she has filed under provisional seal. *See* Deps. [93][94][95].

"What transpires in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947). As such, the Local Rules of this Court do "not allow the filing of documents under seal without a Court order,

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the contents of the writing, Plaintiff does not deny that its contents were as Defendants state.

[23] Plaintiff purports to deny Defendants' assertion as to her statements during the meeting by alleging that Mai and Sexton had ulterior motives in holding the meeting. Pl. Resp. SMF at ¶ 63. This is not a denial that Plaintiff's statements were as Defendants represent.

even if all parties consent" to such a filing. LR App'x H(J)(1), NDGa. A party seeking to file a document under seal "must electronically file a motion to file under seal, a supporting brief," and the relevant document itself under provisional seal. *Id.* at App'x H(J)(2).

The sealed transcripts filed by Plaintiff recount the depositions of Thomas Moore, Homer Bryson, and Lauren Huff. It is unclear why Plaintiff has filed these exhibits in this manner. They neither include nor are accompanied by any statement from Plaintiff indicating why she has filed the documents under seal, let alone a proper motion and supporting brief on the matter. Further, they appear to be near-exact duplicates of the same transcripts Defendants have filed without any sealing.

See Deps. [84][85][86]. Plaintiff's provisional sealing of the documents thus runs afoul of the Local Rules. The filings must be unsealed.

B. Motion for Summary Judgment

1. Summary Judgment Standard

Summary judgment is authorized when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court

that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for

trial.'" *Id.* at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259.

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See id.* at 249; *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

2. Plaintiff's Claims

Plaintiff asserts claims against Howden in her individual capacity under § 1981 and the Equal Protection Clause, which she asserts via 42 U.S.C. § 1983. She claims that Howden is liable for race discrimination and retaliation under § 1981 and denial of equal protection as guaranteed by both § 1981 and the Equal Protection Clause. *See* Am. Compl. [17] at ¶¶ 68-77. She seeks to hold GEMA liable for both race discrimination and retaliation under Title VII. *See id.* at ¶¶ 80-85.

a. Standards of Proof Under Title VII, § 1981, and the Equal Protection Clause

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In addition to prohibiting discrimination based on an employee's race, color, religion, sex, and/or national origin, Title VII prohibits employers from retaliating against employees because of their opposition to practices made unlawful under the statute or their participation in related investigations or enforcement proceedings. *Id.* at § 2000e-3(a).

Similarly, § 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981. It is well-settled law that the statute prohibits race discrimination in both the public and private employment context. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997); *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) ("The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."); *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts."). Further, § 1981 encompasses claims of race-based retaliation as well as claims of

race discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *see also Bryant v. Jones*, 575 F.3d 1281, 1301 (11th Cir. 2009).

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Violations of the clause are actionable via 42 U.S.C. § 1983, which subjects any person acting under the color of law to liability for deprivation of another person's "rights, privileges, or immunities" secured by the Constitution. 42 U.S.C. § 1983. When a public employee challenges an employment decision as an act of discrimination on the basis of race or sex, such a claim may also violate the constitutional right of equal protection. *See Thigpen v. Bibb Cty.*, 223 F.3d 1231, 1237 (11th Cir. 2000); *see also Cross v. Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995) (citing *Davis v. Passman*, 442 U.S. 228, 235 (1979)). However, generic claims of retaliation unlinked to a plaintiff's race or gender are not cognizable under the Equal Protection Clause. *See Watkins v. Bowden*, 105 F.3d 1344, 1354-55 (11th Cir. 1997) (*per curiam*). Further, in order to prevail on a claim under § 1983, a plaintiff must demonstrate: (1) that a person deprived her of a right secured under the Constitution or federal law, and (2) that such a deprivation occurred under color of state law. *Arrington v. Cobb Cty.*, 139 F.3d 865, 872 (11th Cir. 1998) (citing *Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir. 1993)); *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1522 (11th Cir. 1995). In this case, no party disputes that, as a state official, Howden was acting under color of state law for all relevant purposes.

In cases in which a plaintiff has asserted a claim under § 1981 in the employment context, the elements required to establish a claim under § 1981 generally mirror those required for a Title VII claim. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (the same analysis applies to a Title VII race discrimination claim and a § 1981 race discrimination claim because both statutes "have the same requirements of proof and use the same analytical framework"); *see also Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 n.2 (11th Cir. 1994); *Brown, v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991). Likewise, claims of discrimination in public employment asserted under the Equal Protection Clause are subject to the same analysis as those claims asserted under Title VII. *See Cross v. Alabama*, 49 F.3d 1490, 1508 (11th Cir. 1995) (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980)). Accordingly, the standards of proof for Plaintiff's claims under Title VII also apply to her claims brought under § 1981 and the Equal Protection Clause.

Discrimination claims "are typically categorized as either mixed-motive or single-motive claims." *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). An employee can succeed on a mixed-motive claim under Title VII by showing that illegal bias was a motivating factor for an adverse employment action, even though other factors also motivated the action. *See id.* By contrast, single-motive claims, *i.e.*, pretext claims, require a plaintiff to show that bias was the true reason for the adverse action. *Id.* Claims of discrimination under § 1981 and claims of retaliation under Title VII may not proceed under a mixed motive theory; rather, plaintiffs asserting such

claims must show that discrimination or retaliation was the but-for cause of the adverse employment action they suffered. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (§ 1981); *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (Title VII retaliation). Both single-motive and mixed-motive claims can be established with either direct or circumstantial evidence. *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To prevail on a claim for discrimination or retaliation, a plaintiff must prove that the defendant acted with discriminatory or retaliatory intent. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-81 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged burden-shifting test set out for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (*en banc*). Similarly, proof of unlawful retaliation may be in the form of direct evidence or circumstantial evidence generally governed by the *McDonnell Douglas* burden-shifting framework *See Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986); *see also Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162-63 (11th Cir. 1993).

Direct evidence is evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Evidence, Black's Law Dictionary* 596 (8th ed. 2004); *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993); *Carter v. City of Miami*, 870

F.2d 578, 581-82 (11th Cir. 1989); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. *Clark*, 990 F.2d at 1226; *Carter*, 870 F.2d at 581. Evidence that only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence. *See Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996). "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *see also Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998).

Evidence that merely "suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence" is, by definition, circumstantial. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-82 (11th Cir. 1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent, which can be done using *McDonnell Douglas* burden-shifting framework referenced above. *See Holifield v. Reno*, 115 F.3d 1555, 1561-62 (11th Cir. 1997), *abrogated on other grounds by Lewis v. City of Union City*, 918 F.3d 1213, 1226 (11th Cir. 2019) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527-28 (11th Cir. 1997). Under the *McDonnell Douglas* standard, a plaintiff may establish a *prima facie* case of discrimination by showing that (1) she is a member of a protected class; (2) she was subjected to an adverse employment

action by her employer; (3) she was qualified to do the job in question, and (4) her employer treated similarly situated employees outside her protected classification (*i.e.*, those of a different race) more favorably than it treated her. *See McDonnell Douglas*, 411 U.S. at 802; *Evans v. Books-A-Million*, 762 F.3d 1288, 1297 (11th Cir. 2014); *Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999); *Holifield*, 115 F.3d at 1562. To establish a *prima facie* case of illegal retaliation, a plaintiff must show that: (1) she engaged in a protected activity or expression, (2) she received an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action. *See, e.g.*, *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1524 (11th Cir. 1991); *Simmons v. Camden Cty. Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985).

Once a *prima facie* case has been established under the *McDonnell Douglas* framework, the employer must come forward with a legitimate non-discriminatory reason for its action. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162-63 (11th Cir. 1993); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600–01 (11th Cir. 1986); *see also Weaver*, 922 F.2d at 1525–26. If the employer carries its burden of production to show a legitimate reason for its action, the plaintiff then bears the burden of proving by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Goldsmith*, 996 F.2d at 1162-63; *Donnellon*, 794 F.2d at 600-01.

However, the *McDonnell Douglas* proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way

to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1184 (11th Cir. 1984), *abrogated on other grounds by Lewis v. City of Union City*, 918 F.3d 1213, 1226 (11th Cir. 2019) (*en banc*). Indeed, "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

Thus, a plaintiff may also defeat a motion for summary judgment by presenting "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id.* (internal quotation marks omitted). As such, the Eleventh Circuit has held that a "plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (quoting *Smith*, 644 F.3d at 1328). "Even without similarly situated comparators," a plaintiff will survive summary judgment if they present a convincing mosaic of circumstantial evidence from which a factfinder can infer discriminatory motivation. *Lewis*, 934 F.3d at 1185. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. *Tex.*

Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

b. Discrimination

(1) Direct Evidence

Defendants first contend that Plaintiff cannot present any direct evidence of discrimination. Mot. Summ. J. [89-1] at 5. Plaintiff responds that the record does, in fact, contain direct evidence that Defendants intentionally discriminated against her. According to Plaintiff, Defendants were obligated to follow rules issued by Georgia's State Personnel Board when handling matters related to her employment. Resp. [97-1] at 14-16. Some of these rules, says Plaintiff, are intended to prevent employment discrimination. *Id.* at 15. Plaintiff claims that Defendants violated these rules in failing to conduct proper evaluations of her performance, and that Defendant's departure from these rules is direct evidence of their discriminatory intent. *Id.* at 16-17.

Plaintiff is mistaken as to what constitutes direct evidence. As stated above, direct evidence is evidence that, if taken as true, establishes discriminatory intent without any additional inference or presumption. As such, evidence that "is subject to more than one interpretation" is not direct evidence. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997) (citing *Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996)). Evidence that Defendants departed from its typical or otherwise required internal standard operating procedures in dealing with Plaintiff, without more, does not estab-

lish that they did so with discriminatory intent. Plaintiff does not point to any evidence evincing why Defendants allegedly departed from rules set by the State Personnel Board. Rather, Plaintiff makes the logical leap that Defendants' alleged failure to follow state rules is itself evidence of discriminatory intent because there is no "legitimate, nondiscriminatory reason" for such a failure. Resp. [97-1] at 16. However, this conclusory, unsupported statement does not close the gap between the evidence Plaintiff proffers and the meaning she ascribes to it. For example, Plaintiff does not explain why one could not reasonably conclude that Defendants' alleged failure to follow their rules stemmed from simple negligence.

Thus, whatever the circumstantial value of the evidence to which Plaintiff points, it is not direct evidence of discrimination. Without any direct evidence of discrimination, Plaintiff's claims must proceed solely with circumstantial evidence.

(2) Plaintiff's *Prima Facie* Case

Plaintiff presses her claims of discrimination based on two distinct, but related, theories. First, she argues that she was discriminatorily paid less than her co-workers. Second, she argues that Defendants' discriminatorily failed to promote her. Because Plaintiff cannot proceed with direct evidence, she must present a *prima facie* cases of discrimination with circumstantial evidence in order to proceed under either of these theories.

As applied to discriminatory wage claims, the *McDonnell Douglas* framework allows a Plaintiff to show circumstantial evidence of discrimination, and establish a *prima facie* case of discrimination, by

showing the following: (1) she belongs to a protected class; (2) she received low wages; (3) similarly situated comparators outside her protected class received higher wages; and (4) she was qualified to receive a higher wage. *See Smith v. Thomasville*, 753 F. App'x 675, 697 (11th Cir. 2018) (*per curiam*); *Robertson v. Interactive Coll. of Tech./Interactive Learning Sys., Inc.*, 743 F. App'x 269, 274 (11th Cir. 2018) (*per curiam*); *Cooper v. S. Co.*, 390 F.3d 695, 734–35 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). In a failure-to-promote context, *McDonnell Douglas* permits a plaintiff to establish a *prima facie* case by establishing that: (1) she belongs to a protected class; (2) she applied for and was qualified for a promotion; (3) that she was rejected despite her qualifications; and (4) that other equally or less-qualified employees outside her class were promoted. *See Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1174 (11th Cir. 2010); *Collins v. Navicent Health, Inc.*, 499 F. Supp. 3d 1307, 1322 (M.D. Ga. 2020).

In *Lewis v. City of Union City*, the Eleventh Circuit clarified how the courts are to assess comparison evidence for plaintiffs proceeding under the *McDonnell Douglas* framework. 918 F.3d 1213, 1221-24 (11th Cir. 2019) (*en banc*). Evidence that an employer "has treated like employees differently" is often necessary to "supply the missing link and provide a valid basis for inferring unlawful discrimination" through use of the framework. *Id.* at 1223 (emphasis in original). A plaintiff is "like" other employees only when "she and her comparators are similarly situated in all material respects." *Id.* at 1224. While a plaintiff need not show that she and her comparator are "nearly identical" in

their circumstances, they should be similar in the legitimate circumstances that may have factored into their employer's decision to act adversely toward them, such as their conduct or misconduct, their work histories, and the policies under which they operate. *See id.* at 1225-28. Further, proper comparators "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff[.]" *Id.* at 1227-28. Without a proper comparator, a plaintiff cannot generally establish a *prima facie* case under the *McDonnell Douglas* framework. *Id.* at 1224.

Defendants argue that Plaintiff cannot establish a *McDonnell Douglas prima facie* case of discrimination under Title VII, § 1981, or the Equal Protection Clause as those claims relate to Plaintiff's rate of pay and Defendants' initial refusal to promote Plaintiff. According to Defendants, Plaintiff cannot proffer a similarly situated employee who was treated more favorably than she was.[24] Defendants argue that Uyen Le and Julia Regeski, two other employees who worked under Howden, brought more valuable experience into their employment with GEMA, had different responsibilities from Plaintiff at GEMA, and performed their responsibilities more successfully and

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24 In a footnote concerning Plaintiff's failure-to-promote claim, Defendants additionally contend that Plaintiff's *prima facie* claim fails because she did not formally apply for the position she sought and because the position ultimately was filled by an African-American woman. Mot. Summ. J. [89-1] at 7 n.4. Generally, arguments raised solely in a footnote are not properly before the Court. *See Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (11th Cir. 2010) (*per curiam*). Even if properly raised, however, the Court need not consider Defendants' arguments because, as explained below, Defendants are due judgment on Plaintiff's discrimination claims on other grounds.

with less supervision. Mot. Summ. J. [89-1] at 9-11. In response, Plaintiff contends that there "are only three relevant factors" to decide whether comparator employees are similarly situated to a plaintiff: (1) whether they are subject to the same rules as the plaintiff; (2) whether they share supervisors; and (3) whether they have the same job duties and responsibilities. Resp. [97-1] at 17. Plaintiff argues that she, Le, and Regeski all operated under the same rules, shared a supervisor in Howden, and had similar responsibilities. *Id.* at 18.

At the outset, the undersigned rejects Plaintiff's argument that she, Le, and Regeski categorically shared the same duties and responsibilities, as it rests solely on a putative adverse inference she seeks against Defendants on the subject, based on the unsupported evidentiary spoliation argument rejected above. As such, on the question of Plaintiff, Le, and Regeski's shared responsibilities, the Court is left only with evidence that all three were responsible for making newsletters but that each were assigned to different projects and that Le was additionally tasked with training newer employees. *See* Mot. Summ. J. [89-1] at 11. Further, as the Eleventh Circuit has made clear, the inquiry into whether an employee is similarly situated to a plaintiff is one that turns on all circumstances that may be material to the complained-of adverse act, rather than a checklist of formal likeness. *See Lewis*, 918 F.3d at 1227-28. Thus, Plaintiff does not show that Le and Regeski are proper comparators solely on the grounds that all three of them worked under Howden and were subject to the same general rules. Instead, Plaintiff must offer evidence that they were similarly situated with respect

to circumstances relevant to Defendants' decision to pay her less than them and/or refuse to promote her to a similar position.

Plaintiff fails to do so with respect to Le. Circumstances material to an employee's rate of pay and entitlement to a promotion include an employee's previous work experience and their job duties. *See Vinson v. Tedders*, 844 F. App'x 211, 213 (11th Cir. 2021) (*per curiam*) ("[A] proffered comparator's prior work experience can strip an individual of the comparator label" for purposes of a wage discrimination claim); *Etheridge v. Bd. of Trs. of Univ. of W. Ala.*, No. 7:18-CV-00905-RDP, 2020 WL 4260598, at *10 (N.D. Ala. July 24, 2020) (finding that an employee with more work experience could not serve as a comparator in a Title VII wage discrimination case); *Vinson v. Macon-Bibb Cty.*, No. 5:18-CV-00306-TES, 2020 WL 2331242, at *4-6 (M.D. Ga. May 11, 2020) (citing *Crawford v. Carroll*, 529 F.3d 961, 974-75 (11th Cir. 2008)). Le's professional experience, both before and during her employment with GEMA, is plainly distinguishable from that of Plaintiff. Before joining GEMA as a Communications Specialist I/Media Relations Specialist I in September 2016, Le spent two years as reporter, a year as an investigative intern, and four months as a general assignment intern. *See* Pl. Dep. Exh. D-26 [81-26]. Although Plaintiff brought with her a similar amount of internship experience, she spent only ten months in a journalistic role similar to Le's. *See* Def. SMF at ¶ 84; Pl. Resp. SMF at ¶ 84. Moreover, Defendants adduce uncontroverted evidence that, unlike Plaintiff, Le was immediately responsible for responding to disasters with minimal oversight and took on responsibility to train newer

employees. *See* Def. SMF at ¶ 93; Lowe Decl. Exh. A [89-4] at 15. As such, it could reasonably be expected that Le would receive a pay raise and/or promotion more quickly than Plaintiff. In other words, a jury could not reasonably infer that Defendants' differential treatment of the two regarding their pay and job titles was because of Plaintiff's race.

The Court faces a closer question on Regeski. Defendants contend that Plaintiff had "less professional experience" than Regeski prior to their respective arrivals at GEMA. Defendants characterize Regeski as having had "over a year and a half of related professional experience" prior to being hired as a Communications Specialist II/Media Relations Specialist II, and minimize Plaintiff's prior experience as consisting of less than a year of journalistic experience "in addition to her internships[.]" Mot. Summ. J. [89-1] at 10. However, Regeski had only four months of full-time, professional experience at the time of her hiring—her experience adds up to one-and-a-half years' worth if it is considered in combination with her internships. *See* Howden Dep. Exh. 10 [82-10]. That is less full-time experience than Plaintiff had. The length of Plaintiff's internship experiences likewise exceeded Regeski's. Thus, unlike Le, it is not apparent that Regeski arrived at GEMA with more experience that Plaintiff. Further, other than briefly noting that Howden at one point assigned Regeski a different assignment than Plaintiff, Defendants do not offer evidence that Regeski's responsibilities were materially different from Plantiff's. To the extent Defendants argue that Regeski cannot function as a comparator because Howden assigned special valuation to her experience

at the Office of the Governor, or because she performed her duties in a more satisfactory manner, or because she worked on a projects Howden considered to be more important than Plaintiff's projects, *see* Mot. Summ. J. [89-1] at 10-11, the undersigned notes that, at the *prima facie* stage of a case, a court is not to consider "any subjective evaluations of [a plaintiff] or subjective criteria that may have differentiated [her] from [her] comparators," *Brown v. Wrigley Mfg. Co., LLC*, No. 2:18-CV-00141-RWS-JCF, 2021 WL 1697916, at *15 (N.D. Ga. Feb. 1, 2021), *report & rec. adopted by* 2021 WL 1696384 (N.D. Ga. Mar. 29, 2021). Rather, for purposes of evaluating the circumstances of any proffered comparators, the Court is limited to considering information that is in some sense "objectively verifiable." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005) (*per curiam*).

Accordingly, the undersigned finds that the evidence offered by Defendants as to the objective circumstances of Regeski's employment—including her previous experience, her job duties, and her operation under the same supervisor as Plaintiff- does not conclusively foreclose an argument that Regeski was similar to Plaintiff in all material respects.

(3) Legitimate Reason and Pretext

As explained above, upon the showing of a *prima facie* case of discrimination, the *McDonnell Douglas* framework requires that an employer must articulate a legitimate, nondiscriminatory reason for the adverse action of which a plaintiff complains. This is an "exceedingly light burden"—the employer's "burden is 'merely one of production, not proof.'"

Perryman v. Johnson Prods. Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983) (quoting *Lee v. Russell Cty. Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982)). "So long as the employer articulates a 'clear and reasonably specific' non-discriminatory basis for its actions, it has discharged its burden of production." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769-70 (11th Cir. 2005) (*per curiam*) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)).

Defendants have set forth evidence that their decisions as to Plaintiff's rate of pay and/or her request for a promotion did not stem from Plaintiff's race. Defendants contend that they paid Plaintiff a lower salary than Regeski because Plaintiff's experience was qualitatively different from Regeski's. *See* Mot. Summ. J. [89-1] at 10, 12-13. Defendants offer testimony from Howden in which she notes that she highly valued Regeski's experience working in the Office of the Governor, which she understood to be a fast-paced environment with a high expectation as to the work product of its employees, and from which Regeski came with a recommendation from the Governor's Deputy Chief of Staff for Communications. *See* Howden Decl. [89-5] at ¶ 48. As for their initial refusal to raise Plaintiff's salary, Defendants contend that Howden observed deficiencies in Plaintiff's work product, including issues with her writing, layout, and productivity; difficulty accepting constructive feedback about her performance; and an apparent inability to take on more duties or work more independently. Mot. Summ. J. [89-1] at 12-13 (citing Howden Decl. [89-5] at ¶¶ 24-26). Defendants bolster these justifications by noting that Bandy Mai and Mark Sexton, who supervised Plaintiff after Howden was

removed from her chain of command, observed similar issues, *see* Pl. Dep. Exhs. 19–21 [81-19-81-21]; Howden Dep. [83] at 31, and because Plaintiff was eventually given the raise she sought after Sexton determined that Plaintiff had improved her performance, *see* Pl. Dep. [81] at 262-65; Pl. Dep. Exhs. 24-25 [81-24-81-25].

Plaintiff thus bears the burden of showing that Defendants' proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or that the stated reasons were insufficient to motivate the decision. *See Wisdom v. M.A. Hanna Co.*, 978 F. Supp. 1471, 1479 (N.D. Ga. 1997). She can either directly persuade the Court that a discriminatory or retaliatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. *See Burdine*, 450 U.S. at 256; *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522 (11th Cir. 1991).

In other words, Plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804; *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1530 (11th Cir. 1997) ("In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the *prima facie* case."). Comparator evidence may also be considered when evaluating

whether the defendant's reasons for adverse employment action were pretextual. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1276-77 (11th Cir. 2008).

But Plaintiff cannot show that Defendants' proffered reasons for paying her as they did and initially refusing to promote her were pretextual simply by "quarreling with the wisdom" of those reasons. *See Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Chapman*, 229 F.3d at 1030). She may nevertheless establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*)). However, "[a] reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Brooks*, 446 F.3d at 1163 (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Stated another way, it is not the truth of Defendants' justifications, alone, that Plaintiff is obligated to rebut. Rather, it is Plaintiff's burden to prove that Defendants did not, in fact, rely on those justifications in taking any adverse action against her.

Because Plaintiff bears the burden of establishing that Defendants' reasons are a pretext for discrimination or retaliation, she "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "Conclusory

allegations of discrimination [or retaliation], without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830; *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993).

Plaintiff offers six different arguments for why Defendants' proffered reasons for her rate of pay and initial refusal to promote her were pretextual. Plaintiff argues that she can show pretext because: (1) Defendants allegedly failed to follow Georgia law in the implementation of the PIP Howden placed over Plaintiff; (2) any disparity between her and Regeski's work performance is not sufficiently documented; (3) Defendants were allegedly willing to "bend the rules" for non-African-American employees like Regeski in hiring and compensation matters; (4) several months elapsed between Howden's first observation of Plaintiff's performance deficiencies and her placement of Plaintiff under a PIP; (5) Howden's inquiry into Plaintiff's teleworking indicates that she placed Plaintiff "under surveillance"; and (6) Howden's opinions as to Plaintiff's work performance were subjective. *See* Resp. [97-1] at 21-30.

None suffice as evidence of pretext. Many of Plaintiff's arguments, even accepted as having evidentiary support, do nothing to evince that Defendants treated her differently than other employees or that Defendants' proffered reasons for their actions were otherwise untrue or supplemented by racial bias.

While in some cases a failure to follow disciplinary or other procedures can suggest pretext, that is not so

here. While it is undisputed that Howden did not perform regular formal performance reviews as Plaintiff asserts she was required to do as a supervisor by state law, Defendants have shown without contradiction that GEMA did not consider those guidelines to be mandatory, and that Howden did not conduct such reviews or follow those guidelines as to any of the employees under her supervision. *See* Def. SMF at ¶¶ 14-15 (citing Howden Dep. [82] at 14-15; Huff Dep. [84] at 11-13). Instead, Defendants produce evidence indicating that Howden generally managed her employees—including Plaintiff—through informal, verbal feedback rather than through formal evaluations. *See* Def. SMF at ¶ 14 (citing Howden Dep. [82] at 14-15).

Perhaps Howden should have done more under Georgia law. But even if that were so, Defendants have shown, without contradiction, that Plaintiff was not singled out for any such failure to conduct formal reviews or otherwise follow these state guidelines, and that the same omission applied equally to all other employees under Howden's supervision. In these circumstances, no inference of race discrimination can be drawn. *See Connelly v. WellStar Health Sys., Inc.*, 758 F. App'x 825, 829 (11th Cir. 2019) (*per curiam*) ("[M]ere failure to follow operating procedures, without more, does not necessarily suggest than an employer was motivated by illegal discriminatory intent or that its proffered reason for termination was pretextual.") (citing *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999); *Rojas v. Florida*, 285 F.3d 1339, 1344 n.4 (11th Cir. 2002) (*per curiam*) ("To establish pretext, a plaintiff must show that the deviation from policy occurred in a discriminatory manner.").

The same principles preclude Plaintiff's argument that Defendants did not properly document her alleged performance deficiencies. It remains that Defendants have shown, without contradiction, that Howden supervised Plaintiff via the same procedures that Howden employed with the others under her supervision. Even if there were a deviation from some policy regarding documentation, this deviation apparently occurred across the board and not just as to Plaintiff.[25] There remains no basis to conclude that a supposed policy deviation was motivated by race.[26] *See E.E.O.C. v. Winn-Dixie Montgomery, LLC*, No. CA 09-0643-C, 2011 WL 111689, at *13 (S.D. Ala. Jan. 12, 2011) (collecting authority).

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[25] Plaintiff argues that neither Howden nor the GEMA Legal Counsel who approved of the PIP were themselves placed on a PIP for failing to comply with the applicable personnel procedures governing how they should have supervised Plaintiff, and that this discrepancy further supports Plaintiff's claims that she was placed on a PIP for discriminatory reasons. This argument is wholly meritless. First, Defendant has introduced evidence that GEMA did not perceive the personnel supervisory procedures referenced by Plaintiff to be mandatory on its supervisors. Second, how GEMA supervised Howden and its Legal Counsel as to how well they managed their personnel is a clearly different matter from how an employee in Plaintiff's position was supervised for her writing and other work product. Plaintiff, in other words, clearly was not substantially similar in all relevant respects with Howden herself.

[26] To the extent that Plaintiff argues that any lack of formal documentation of performance deficiencies renders such a justification from a defendant vulnerable to claims of pretext, Plaintiff improperly seeks to raise Defendants' burden of production at the second stage of the *McDonnell Douglas* framework. *See Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 827 (7th Cir. 2006).

Plaintiff's argument that Defendants were willing to "bend the rules" for non-African-Americans rests on the fact that Regeski was hired to the position of Communications Specialist II/Media Relations Specialist II in 2017 despite being six months short of the role's listed two-year professional experience minimum. *See* Resp. [97-1] at 4. However, Defendants' explanation of their legitimate, nondiscriminatory reasons for their actions accounted for their favorable treatment of Regeski: Howden valued her experience in the Office of the Governor and the strong recommendation she carried from a supervisor there. *See* Def. SMF at ¶ 99. Plaintiff's mere restatement of the admitted fact that Regeski was hired before meeting the minimum experience threshold does nothing to contradict Defendants' proffered nondiscriminatory justification for that treatment. Further, no party contends that Defendants justified their initial denial of Plaintiff's request for a promotion to a similar position on the grounds that she did not meet the minimum experience threshold.

Next, that several months elapsed between Howden's first notation of Plaintiff's alleged performance deficiencies and her placement of Plaintiff under a PIP is irrelevant to whether Defendants' justifications resting on Plaintiff's alleged performance deficiencies are pretextual. The sole authority to which Plaintiff cites in support of this argument does no such thing; Plaintiff relies on the Eleventh Circuit's decision in *Thomas v. Cooper Lighting, Inc.*, in which the court held that a plaintiff could not establish a causal connection between her statutorily protected activity and her termination solely by temporal proximity when "three to four month[s]" had elapsed

between them. *See* 506 F.3d 1361, 1364 (11th Cir. 2007) (*per curiam*). From this statement concerning a plaintiff's *prima facie* burden when asserting a retaliation claim, Plaintiff claims that she can show that Howden lacked a good faith reason for placing her under a PIP because several months had elapsed between Howden's notation of Plaintiff's poor work performance during the summer of 2017 and her placement of Plaintiff on a PIP in early February 2018. Putting aside that Plaintiff states in her own declaration that Howden discussed her dissatisfaction with Plaintiff's performance in November 2017, *see* Pl. Decl. [97-5] at ¶ 2, it is unclear why Howden should have been expected to immediately place Plaintiff under a PIP once she noticed any performance deficiencies, instead of first seeing whether the initial informal coaching feedback might solve the problems.

Plaintiff then argues that she can show pretext because Defendant's justifications rely on Howden's subjective evaluations of Plaintiff. Although Plaintiff concedes, as she must, that a supervisor's subjective evaluation of an employee can stand as a proper justification for an adverse action, she insists that GEMA's internal operating rules render the subjective evaluation of an employee improper. However, whether or not Howden's actions and subjective justifications were factually correct and/or consistent with internal requirements mandating objective decisionmaking is of no matter. *See Springer v. Convergys Customer Mgmt. Corp.*, 509 F.3d 1344, 1350 (11th Cir. 2007) (holding that a breach of internal policy alone does not establish pretext). This Court does "not sit as a super-personnel department" charged with re-examining a

defendant's judgments and internal operating procedures. *See Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 F. App'x 461, 464 (11th Cir. 2016) (*per curiam*) (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000)). Rather, what matters is whether Howden sincerely held and acted upon those justifications, as opposed to illegal discriminatory animus. That her actions may have been internally improper sheds no light on that question.

Plaintiff's argument that Howden kept her "under surveillance" also fails to show pretext. Plaintiff points to an example in which Howden asked Lauren Huff, a human resources employee, about Plaintiff's use of teleworking. According to Huff, Howden made a "big deal" out of the fact that Plaintiff was teleworking that day. Huff claims to have told Howden that other employees routinely teleworked when they were feeling sick, and that she asked Howden why she was making a "big deal" out of it when it came to Plaintiff. *See* Huff Dep. [84] at 47:4–19. Plaintiff argues that the incident "shows [Howden's] racial animus." Resp. [97-1] at 29.

Among other reasons why this incident is not sufficient to show pretext, Howden's comment to Huff was made in September 2019—over a year and a half after she denied Plaintiff's request for a raise/promotion and over a year after Plaintiff was ultimately granted that raise/promotion. Such an "isolated comment, unrelated to [the adverse actions at issue in this case], alone, is insufficient to establish a material fact on pretext." *Rojas v. Florida*, 285 F.3d 1339, 1342-43 (11th Cir. 2002) (*per curiam*); *see Chambers v. Fla. Dep't of Transp.*, 620 F. App'x 872, 877 (11th Cir. 2015) (*per curiam*) (finding that a supervisor's discriminatory comment regarding a plaintiff made

years before their alleged termination was insufficient to create an issue of material fact as to pretext); *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1229 (11th Cir. 2002) (finding a supervisor's comments about a plaintiff, which were racially prejudicial but unrelated to the termination at issue, insufficient to support a pretext argument because such comments, alone, are "usually not [] sufficient absent some additional evidence supporting a finding of pretext").

Plaintiff thus lacks sufficient evidence to create an issue of material fact as to the alleged pretextual nature of their justifications for Plaintiff's rate of pay and the denial of her promotion request. As the record lacks evidence from which to conclude that they acted with any discriminatory intent, Defendants are due summary judgment on Plaintiff's discrimination claims, including on her claims of mixed-motive discrimination.[27]

c. Retaliation

Defendants contend that they are entitled to summary judgment on Plaintiff's retaliation claims because she has not presented evidence that she engaged in any protected activity prior to Howden's February 8, 2018 issuance of a PIP. Plaintiff responds that she complained to Howden in November 2017 "that she was treating her differently from her teammates" and that, in January 2018, she asked Howden for a salary "equal to her coworkers." Resp.

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[27] Because Plaintiff fails to present a discrimination claim, the Court need not address Defendants' argument that Howden is entitled to qualified immunity against such a claim. *See Brown v. Davis*, 684 F. App'x 928, 937 n.6 (11th Cir. 2017).

[97-1] at 13. Plaintiff argues that the February 2018 PIP is thus "nothing but retaliation for [Plaintiff] asking that her salary be equal to her comparators." *Id.*

A plaintiff alleging unlawful retaliation must show that she engaged in a protected activity or expression under Title VII or § 1981 through evidence of either opposition to a practice made unlawful under Title VII or § 1981 or participation in an investigation, proceeding, or hearing regarding such a practice. *See* 42 U.S.C. § 2000e-3(a). "To maintain a claim for retaliation [against opposition to an unlawful practice], an 'employee must, at the very least, communicate her belief that discrimination is occurring to the employer.'" *Mason v. Clayton Cty. Bd. of Educ.*, No. 1:06-CV-2761-CC, 2008 WL 11406167, at *11 (N.D. Ga. Sept. 30, 2008) (quoting *Webb v. R & B Holding Co.*, 992 F. Supp. 1382, 1389 (S.D. Fla. 1998)). Communicating a belief of discrimination is more than just complaining about general mistreatment. *See Smith v. Mobile Shipbuilding & Repair, Inc.*, 663 F. App'x 793, 800 (11th Cir. 2016) (*per curiam*) (distinguishing between complaints of racial discrimination and those of "general unfair treatment in the workplace"). An employee "'must reasonably convey that she is opposing discrimination based specifically on race, versus some other type of discrimination or injustice generally.'" *Henley v. Turner Broad. Sys., Inc.*, 267 F. Supp. 3d 1341, 1354 (N.D. Ga. 2017) (quoting *Cochran v. S. Co.*, No. 14-cv-0569, 2015 WL 3508018, at *2 (S.D. Ala. June 3, 2015)). While there is no requirement that any specific words be used in a protected complaint, an employer should not need to infer that an employee believes that the mistreatment they are complaining of is

occurring because of a protected characteristic. *See Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1323 (N.D. Ga. 2009).

Plaintiff's statements during her November 2017 meeting with Howden fall short of constituting protected activity. Plaintiff testifies that, during the meeting, she asked Howden "why she was treating [her] differently from the rest of the team." Pl. Dep. [81] at 124:15. Plaintiff asked Howden why she was being left off certain emails denied various opportunities. *See id.* at 124:22-25. She further asked Howden: "Why do you treat me differently from everyone?" *Id.* at 125:3-4. Plaintiff admits that, during the meeting, she never mentioned her race and never expressly accused Howden of discrimination. *Id.* at 125:5-7. Plaintiff's January 2018 request for a raise and/or promotion does not mention race, discrimination, mistreatment, or differential treatment. *See* Pl. Dep. Exh. D-8 [81-8].

Defendants are correct that Plaintiff has failed to carry her burden that she engaged in any protected activity that the February 8, 2018 PIP could have been retaliatory toward. Without any direct reference to race or any context making clear that she was tying her alleged mistreatment to her race, Plaintiff's November 2017 complaints to Howden did no more than convey her belief that she was the victim of general unfair treatment which, "absent discrimination based on race . . . is *not* an unlawful employment practice[.]" *Coutu v. Martin Cty. Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (*per curiam*) (emphasis in original). Because her November 2017 statements did not convey a belief of unlawful discrimination, it cannot constitute protected activity. *See Suber v.*

Lowes Home Ctrs., 845 F. App'x 899, 900 (11th Cir. 2021) (*per curiam*) (finding that an employee's email complaining of general mistreatment without any mention of a protected characteristic did not constitute protected activity); *Banks v. Marketsource, Inc.*, No. 1:18-CV-2235-WMR-JSA, 2019 WL 8277274, at *17-18 (N.D. Ga. Dec. 5, 2019), *report & rec. adopted by* 2020 WL 6291422 (N.D. Ga. Mar. 20, 2020) (finding that an employee's complaints about a supervisor's behavior towards her in comparison to her colleagues did not constitute protected activity under Title VII or § 1981 because she did not "reference[] [her colleagues'] race or ma[k]e any suggestion as to why" her supervisor was allegedly singling her out). Nor can Plaintiff's January 2018 request, which makes no complaint of any mistreatment, let alone unlawful mistreatment.

Plaintiff does not rest her retaliation claims upon any other alleged protected activities. *See* Resp. [97-1] at 12–13. Defendants are due summary judgment.[28]

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28 Defendant also argues that Plaintiff's purportedly protected activities in November 2017 were too remote in time from Howden's issuance of a PIP in early February 2018 so as to support an inference of causation. The chronology is a bit unclear, however, as the parties' briefs refer to the 2017 meeting as occurring generally during the month of November, without precision. It seems that the PIP was issued sometime between approximately 75 and 105 days after the meeting. Whether this imprecise range of timing is enough to support an inference of causation is unnecessary to consider, because summary judgment is due to be awarded on other grounds. *See Suber*, 845 F. App'x at 900 n.2. Nor does the Court need to address whether Howden should be afforded qualified immunity in her individual status, because the Court has already found that there is insufficient evidentiary support for any of the claims against any of

III. Conclusion and Recommendation

For the reasons discussed above, the undersigned RECOMMENDS that Defendant's Motion for Summary Judgment [89] be GRANTED and that judgment be entered in favor of Defendants on all of Plaintiff's claims. Further, the Clerk is DIRECTED to unseal documents [93], [94], and [95].

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is DIRECTED to terminate the reference of this matter to the undersigned.

IT IS SO ORDERED AND RECOMMENDED this 8th day of July, 2021.

/s/ Justin S. Anand
United States Magistrate Judge

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the Defendants. It follows that there is no need to grant immunity from liability.

Additional material from this filing is available in the Clerk's Office.