APPENDIX

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12698

D.C. Docket No. 8:20-cv-01274-VMC-CPT

MARECIA S. BELL,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

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

(April 4, 2024)

OPINION

Before ROSENBAUM, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

Marecia Bell, a Black woman, has been a nurse at the James A. Haley Veterans' Hospital in Tampa (the "Tampa VA Hospital") for decades. She claims that, after she took a promotion in October 2016, she was subjected to race discrimination and retaliation for

her protected equal-employment-opportunity ("EEO") activity. According to Bell, that retaliation continued even after she transferred to another position at the hospital to escape the discriminatory treatment. The district court granted summary judgment in favor of the Secretary of Veterans Affairs, and Bell appeals. After careful review, we affirm.

I.

In the light most favorable to Bell, the relevant facts are as follows. In October 2016, Bell was promoted to a supervisory position as an assistant nurse manager/staffing coordinator in the Tampa VA Hospital's spinal-cord-injury unit ("SCI"). Although assistant nurse managers were usually supervised by a nurse manager, Bell reported directly to Julia Lewis, the assistant chief nurse at SCI.

Bell knew when she was hired that "there were a lot of leadership and administrative leadership duties that [Assistant Chief Nurse Lewis] needed [Bell] to assist her with." Among those duties, Bell made staffing assignments for the SCI "Resource Pool," a group of nursing staff members who "float[ed]" to the ten subunits and six clinics within SCI. The Resource Pool had nine to fifteen members during the period relevant to this case.

Within a month of Bell's start in her position, SCI's interim chief nurse, Kathy Michel, announced that Bell would take over "direct supervision" of the Resource Pool. That was a "shock" to Bell because "that's not what [she] was hired to do." Lewis had told her she would not be directly supervising staff, and according to Bell, no other assistant nurse managers

at the Tampa VA were a "directly supervising[,] first line supervisor of any staff." Nor had an assistant nurse manager been responsible for the Resource Pool before Bell; prior supervisors had all been at least nurse managers. Lewis agreed that Bell's position as originally conceived did not include these duties, but that the change "came out of [Lewis's] being overwhelmed after [multiple] management people left."

After the announcement, Bell asked Assistant Chief Nurse Lewis and interim Chief Nurse Michel if they were going to "change [her] position to a nurse manager's position and give [her] the pay for directly supervising staff." Lewis and Michel assured Bell that a promotion and pay raise were in the works and just needed to be processed by Laureen Doloresco, the chief nurse executive at the Tampa VA Hospital. Later, Lewis and Michel told Bell that Doloresco was waiting for a new chief nurse to be hired at SCI.[1] After Mary Alice Rippman was hired as SCI's permanent chief nurse, though, "it never happened."

[1] Assistant Chief Nurse Lewis denied promising to convert Bell to a nurse-manager position or discussing that matter with Nurse Executive Doloresco, and she testified that the VA "hiring system require[d] that it be a competitive position." We credit Bell's version of her conversations with Lewis for purposes of this appeal. *See Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1350–51 (11th Cir. 2022) ("[W]hen conflicts arise between the facts evidenced by the parties, we must credit [the non-movant's] version."). Still, Doloresco's testimony that she was not aware of any proposal or request to convert Bell to a nurse-manager position stands unrebutted.

In December 2016, Bell began experiencing disrespectful, demeaning, and hostile behavior from one of the nurse managers at SCI. Bell contacted the equal employment opportunity ("EEO") office in April 2017 based on the nurse manager's behavior, and she later submitted a formal complaint. Bell also documented instances of the complained-of behavior to SCI management in emails in February, April, June, and August of 2017. In particular, Bell copied Nurse Executive Doloresco on the June 2017 email, which referenced her prior EEO complaint. The problematic nurse manager eventually was moved to a position elsewhere in the Tampa VA.

Meanwhile, in June 2017, Chief Nurse Rippman reassigned Bell to work night shifts several times a week, from 3:30 p.m. to midnight. According to Rippman, this reassignment was part of an attempt to have a supervisor present during the night shift. While working the night shift, when Chief Nurse Rippman and Assistant Chief Nurse Lewis were not present, Bell was "in charge of the entire building." Other assistant nurse managers were also required to work the evening shift. The job posting for Bell's position listed the work schedule as 3:30 p.m. to midnight.

At other times, Bell objected to Chief Nurse Rippman's treatment of SCI nursing staff. Bell described two instances where Rippman ordered her to assign Black nurses on "light duty" status to janitorial work, such as removing gum from underneath bedside tables or cleaning the staff refrigerator, while a white nurse was assigned to answer phones.

Despite problems with a nurse manager, and occasional disputes with Chief Nurse Rippman, Bell excelled in her position. Bell received an "outstanding" rating in her performance review for the period from October 2016 to September 2017. The performance review noted that Bell joined SCI "amid sweeping leadership changes." The review continued in glowing terms:

> [W]ith almost no assistance, she shouldered full responsibility for the SCI Resource Pool to include hiring, coaching / mentoring, educating and even disciplining staff when needed. Further, when needed, she transitioned to work evening shifts routinely to provide a stabilizing leadership presence in-house during that work time. Due to her efforts, many staff members have commented that the work environment on that shift has greatly improved.

Although she excelled at her job, Bell increasingly felt that SCI management was taking advantage of her, discriminating against her based on race, and retaliating against her for filing EEO complaints. Hoping to escape what she viewed as a hostile environment, Bell applied for a staff position at another Tampa VA Hospital unit, the home-based primary care unit ("HBPC"), in January 2018.

Bell was not one of the candidates selected by the interviewing panel for the HBPC position, and the interviewers designated no alternates. After one of the selected candidates dropped out, though, Tammie Terrell, a Black woman and the nurse manager of HBPC, offered Bell the position, and Bell accepted. Dr. June Leland, the medical director of HBPC and a

member of the interviewing panel, objected that the interviewers should have been permitted to make the decision, but Human Resources determined that the selection was within Terrell's power and that Bell was validly hired.

Meanwhile, Bell continued to work at SCI in her assistant-nurse-manager/staffing-coordinator role. In early March 2018, Bell learned that she would be reassigned to an SCI subunit, SCI-D, under the supervision of Lynette Carballo, a nurse manager. The plan was for Bell to retain her role leading the Resource Pool, with Carballo acting as the "second line supervisor." Chief Nurse Rippman testified that the change was intended to standardize the reporting structure for assistant nurse managers and to give Bell experience running a discrete SCI unit, which would help her on the path to becoming a nurse manager.

But Bell viewed the transfer as part of a pattern of race discrimination and retaliation, as well as an attempt to undermine her claim for nurse-manager pay. Bell met with Nurse Executive Doloresco and asked to be removed from the SCI unit, stating that she was being "retaliated against for filing an EEO complaint and not following" Chief Nurse Rippman's direction with respect to an employee investigation. Bell filed a formal EEOC complaint in March 2018.

The next month, Bell left SCI and started as a registered nurse at HBPC. The usual practice at HBPC was to assign nurses to patients near where they lived, to cut down on travel time. But according to Bell, she was assigned patients further from her than was ordinary, in both Lakeland and South

Hillsborough Counties, and additional clinics. Terrell made the staffing decisions in collaboration with Dr. Leland. Bell was reassigned multiple times when white nurses living closer to her patients joined HBPC. Dr. Leland participated in the reassignment and said it was to balance patient caseloads.

Bell was "stressed to the max" working for HBPC. Her husband had multiple surgeries planned for 2019, and Bell herself developed stress-related medical issues for which she had surgery in January 2019 and June 2019. Plus, Bell planned to pursue further education to become a nurse practitioner.

In January 2019, Bell requested a move to part time, effective August 2019. She also reached out to another department to transfer to a part-time position. Raina Rochon, HBPC's chief nurse, denied Bell's request, stating that no part-time positions were available at HBPC or would be created. And the transfer never went forward.

In June 2019, in lieu of seeking a part-time position, Bell requested a leave of absence, or leave without pay ("LWOP"), from August 2019 to August 2020. She discussed her reasons for this request, including her and her husband's medical needs, in detail with Chief Nurse Rochon. In a memorandum to Human Resources, Rochon recommended the denial of Bell's request for LWOP because of its effect on patient caseloads. Other Tampa VA management, including Nurse Executive Doloresco and Hospital Director Joe Battle, signed off on Rochon's recommendation, and Bell's request was denied on July 31, 2019.

Bell learned of the denial of her LWOP request shortly after returning from a one-month period of Family and Medical Leave Act ("FMLA") leave. When she returned to work, her patients had been assigned to other nurses. She spoke with another employee who had been informed Bell was not coming back.

Bell again initiated contact with the EEO office, and she agreed to mediate her request for LWOP. At a mediation held in November 2019, Hospital Director Battle told Bell he would approve her LWOP request if she dropped all of her EEO complaints against the Agency. Bell told him, "Absolutely not."

Bell was absent from work from August 2019 to June 2020. After exhausting her FMLA leave, she was marked as absent without official leave ("AWOL"), and she received multiple letters ordering her to return to work and advising her that her continued absence would result in termination. Ultimately, though, Bell was not terminated, suspended, or officially reprimanded when she returned to work in June 2020.

II.

This Court reviews the grant of summary judgment de novo. *Anthony v. Georgia*, 69 F.4th 796, 804 (11th Cir. 2023). Summary judgment should be granted only if there is no genuine dispute of material fact, viewing evidence in the light most favorable to the non-movant. *Id.* There is a genuine issue if a reasonable jury could return a verdict for the non-movant. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1284–85 (11th Cir. 1997). But "[i]f the evidence is merely colorable, or is not significantly

probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (citations omitted).

III.

Title VII provides that "[a]ll personnel actions affecting [federal] employees . . . shall be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a). We have held that § 2000e-16(a) imposes different requirements for discrimination claims by federal employees than in other Title VII cases, explaining that federal personnel actions must not be tainted by differential treatment based on a protected characteristic. *Babb v. Sec'y, Dep't of Veterans Affs.*, 992 F.3d 1193, 1198–1200, 1204 (11th Cir. 2021) ("*Babb II*"). If "'discrimination plays any part in the way a decision is made,' then that decision necessarily 'is not made in a way that is untainted by such discrimination.'" *Id.* at 1199 (quoting *Babb v. Wilkie*, 140 S. Ct. 1168, 1174 (2020) ("*Babb I*")).

Therefore, to succeed on a discrimination claim under § 2000e-16(a), a federal employee must show that the protected characteristic was the but-for cause of differential treatment, but it need not be the but-for cause of the ultimate decision. *See Buckley v. Sec'y of Army,* No. 21-12332, 2024 WL 1326503, at *7 (11th Cir. Mar. 28, 2024). Rather, the discrimination must merely play a role in that decision. *Id.* Even when there are non-discriminatory reasons for an adverse employment decision, those reasons do not "cancel out the presence, and the taint, of discriminatory considerations." *Babb II*, 992 F.3d at 1204.

But "even if [Bell] proves that race discrimination tainted the decision-making process, she is not necessarily entitled to all remedies under § 2000e-16(a)." *Buckley*, 2024 WL 1326503, at *7. If Bell proves that race discrimination was a but-for cause of the employment decision, she may be entitled to relief from damages caused by the employment decision, like compensatory damages and back pay. *See id.* at *8. On the other hand, if Bell proves only that discrimination "tainted" the decision-making process but that the VA would have reached the same employment decision even if no discrimination tainted the process, she cannot recover relief from damages caused by the employment decision. *Id.* Rather, we "begin by considering injunctive or other forward-looking relief." *Id.* (quoting *Babb II*, 992 F.3d at 1205 n.8).

As for Bell's burden, she may establish discriminatory intent through circumstantial evidence, including discriminatory comments, suspicious timing, arbitrariness in the employer's actions, pretext in the employer's rationale, better treatment of similarly situated, non-Black employees outside the protected group, and similar experiences by Black employees. *See Lewis v. City of Union City. (Lewis II)*, 934 F.3d 1169, 1185–86 (11th Cir. 2019); *see also Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328, 1341–46 (11th Cir. 2011).

A.

Initially, Bell has abandoned certain issues by failing to adequately raise them on appeal. Ordinarily,

issues not "plainly and prominently" raised on appeal are deemed abandoned and we will consider them. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). The failure to properly raise an issue for appeal results in "forfeiture of the issue," subject to sua sponte review by this Court only in "extraordinary circumstances." *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (en banc).

In her briefing on appeal, Bell argues that a jury could infer differential treatment based on race from her evidence of unequal pay. But aside from a lone, passing reference to "denied appointments, promotions . . . , reassignment . . . and denial of" LWOP, she has not developed any argument that race played a role in the other employment decisions she raised before the district court. She also does not challenge the district court's ruling that her claims of race discrimination arising from her time at HBPC were unexhausted.

Accordingly, other than with respect to her allegedly unequal pay, Bell has forfeited any argument that employment decisions at SCI—such as her night-shift duties and forced reassignment to a subordinate position under a nurse manager—were tainted by race. She has likewise forfeited any argument that she properly exhausted a claim of race discrimination based on events at HBPC. *See Sapuppo*, 739 F.3d at 681 ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."). And Bell has not shown that "extraordinary circumstances" excuse her failure to

raise these claims. *Campbell*, 26 F.4th at 873. So we do not consider them here.

B.

Next, no reasonable jury could find, based on this record, that the decision to pay Bell only as an assistant nurse manager was tainted by differential treatment based on race. *See Babb II*, 992 F.3d at 1199–1200, 1204; *Buckley*, 2024 WL 1326503, at *7.

In the light most favorable to Bell, the record shows that, shortly after Bell joined SCI as an assistant nurse manager/staffing coordinator, she was given new duties as the direct supervisor of a group of nurses known the Resource Pool, a job ordinarily performed by a nurse manager or higher-level position. Bell's supervisors at the time, interim Chief Nurse Michel and Assistant Chief Nurse Lewis, promised her a promotion and raise to compensate for these new duties. But no paperwork was ever submitted to effectuate the change. Instead, in March 2018, after a new chief nurse came on board, SCI made the decision to reassign Bell to an SCI subunit, SCI-D, under Nurse Manager Caballo, while retaining her first-line supervisory duties over the Resource Pool.

Even assuming Bell was not fairly paid for the additional responsibilities she shouldered, the record contains no evidence to connect Bell's salary with her race. Bell relies on the fact that she was the only Black manager at SCI at the time of the events. But she has not identified any other assistant nurse managers, outside her protected class, who were paid extra for

undertaking additional supervisory responsibilities.[2] And there was evidence that other assistant nurse managers supervised staff when nurse managers were not present, just as Bell did. In addition, no meaningful comparison can be made between Bell and nurse managers at SCI, since they were subject to different hiring criteria, had different job titles, and were responsible for managing discrete clinical units within SCI. Thus, Bell has not identified any evidence of other employees from which to draw an inference of differential treatment based on race.

Not only that, but the evidence is otherwise undisputed that Bell joined SCI during a period of leadership turnover. Multiple members of management, including the chief nurse, had left just before Bell was hired, and Bell's position was intended to help fill that leadership gap by reporting directly to the assistant chief nurse instead of a nurse manager, like other assistant managers. Her role was "somewhat unique" in that respect. That Chief Nurse Rippman later decided to restructure Bell's position, standardizing the reporting structure, does not, without more, suggest any discriminatory animus. And Bell does not identify any other suspicious timing, ambiguous statements, arbitrariness, or pretext that could suggest that racial discrimination played a role in SCI's failure to promote Bell or to give her a raise. *See Lewis II*, 934 F.3d at 1185–86.

---

[2] The VA handbook's prescriptive pay increase for nurses in supervisory positions does not yield an actual comparator, as Bell did not identify any occasion on which someone's pay was increased in accordance with the provision.

Instead, Bell cites her own testimony that Chief Nurse Rippman twice assigned Black nurses on light duty to housekeeping duties, while a white nurse was told to answer phones.[3] Bell also introduced statements by other employees who felt they had been subject to racial discrimination at the Tampa VA.

Evidence that coworkers in the plaintiff's protected group were discriminated against may be probative of discriminatory intent. *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286 (11th Cir. 2008). In *Goldsmith*, for example, we upheld the admission of "me too" testimony from coworkers who were subjected to the "same supervisor[s]" and the same basic employment decision—termination. *See id.* We reasoned that this evidence was probative of the common decisionmaker's "intent to discriminate," and of the alleged racially hostile work environment. *Id.*

In contrast to the evidence in *Goldsmith*, though, Bell's evidence is not similar enough to support an inference that Bell was subjected to differential treatment based on race. The other employees who felt they had been subjected to racial discrimination at the Tampa VA were employed in different units and had different supervisors, so no inference can be drawn about the decisionmakers in Bell's case: interim Chief Nurse Michel, Chief Nurse Rippman, and Assistant

[3] Bell also points to alleged sexual comments Chief Nurse Rippman made to others. But whatever else may be said about these sexual comments, we fail to see how they are probative of race discrimination.

Chief Nurse Lewis.[4] *See id.* While Bell's testimony about discriminatory light-duty assignments involved Rippman, these incidents involved substantially different circumstances and employment decisions than are at issue here. *See id.*; *cf. Smith*, 644 F.3d at 1344 (indicating that "evidence of behavior toward or comments directed at other employees in the same protected group" must be "closely related to the plaintiff's circumstances" to show discriminatory intent). Accordingly, we cannot say that this evidence supports a finding that the pay and promotion decisions were tainted by "discrimination based on race." 42 U.S.C. § 2000e-16(a); *see Anderson*, 477 U.S. at 249–50.

For these reasons, Bell has not created a genuine issue of material fact as to whether SCI's decision to pay her only as an assistant nurse manager was tainted by differential treatment based on race. *See Babb II*, 992 F.3d at 1199–1200, 1204; *Buckley*, 2024 WL 1326503, at *7.

IV.

Title VII also protects federal employees from retaliation for filing charges of discrimination. *Babb II*, 992 F.3d at 1203 ("[D]iscrimination, as used in Title VII's federal-sector provision, by its own terms includes retaliation." (quotation marks omitted)). A plaintiff bringing a retaliation claim, whether based on discrete acts or a retaliatory hostile work

[4] Bell suggests that Nurse Executive Doloresco is the common thread that connects her experience to the experiences of these other employees. But Doloresco provided unrebutted testimony that she was not aware of any request to convert Bell's position to nurse manager or to offer her more pay.

environment, must show that "the conduct complained of 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Tonkyro v. Sec'y, Dep't of Veterans Affs.*, 995 F.3d 828, 836 (11th Cir. 2021) (quoting *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862–63 (11th Cir. 2020)). She must also satisfy the "more lenient causation standard" as outlined in *Babb I*—that is, that the conduct complained of was tainted by differential treatment based on her protected activity. *Id.* at 835.

Here, the evidence, construed in Bell's favor, does not support a reasonable inference that retaliation played a part in the actions of which Bell complains. As the district court explained, SCI's failure to change Bell's position to that of a nurse manager or offer her higher pay began well before Bell initiated her first EEO complaint in April 2017, so these failures cannot reasonably be considered causally related to that protected activity. *See, e.g., Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1233 (11th Cir. 2006) (holding that if alleged retaliatory conduct occurred before the employee engaged in protected activity, the two events cannot be causally connected).

Likewise, the decision to realign Bell's position in early 2018—effectively ending any chance of a promotion or additional pay—was made before she initiated her second EEO complaint. And these events occurred nearly one year after SCI management became aware of the first EEO complaint about an allegedly hostile work environment created by another nurse manager, and approximately six months after Bell's last email to management about those same issues in August 2017. That time lag is too

long to suggest causation. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (holding that a three- to four-month delay between the EEO action and the adverse action does not suggest causation).

Bell contends that the retaliation continued once she transferred to HBPC, but she has offered no evidence to show that the decision makers at HBPC were "aware of the protected conduct" at the time of their challenged actions.[5] *See Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000) ("In order to show the two things were not entirely unrelated, the plaintiff must generally show that the decision maker was aware of the protected conduct at the time of the adverse employment action."). There is no evidence that Dr. Leland—who objected to Bell's placement in the program and then later gave Bell less desirable assignments—had any knowledge of Bell's earlier EEO activity. There is similarly no evidence that Chief Nurse Rochon—who denied Bell's request for a part-time position or LWOP—was aware of Bell's prior EEO activity at the time of her decision. Because "[a] decision maker cannot have been motivated to retaliate by something unknown to

[5] Bell faults the district court for failing to consider her testimony that SCI Chief Nurse Rippman, SCI Assistant Chief Nurse Lewis, and HBPC Chief Nurse Roshon told HBPC Nurse Manager Carballo to retract her reference for Bell and "make it bad" in connection with her transfer to HBPC. Bell never raised this matter at summary judgment, though, so the court was not required to consider it. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment.").

[her]," *Brungart*, 231 F.3d at 799, Bell has not shown that the decisionmakers at HBPC were motivated even in part by retaliation for her protected activity.

Bell speculates that Nurse Executive Doloresco probably told Dr. Leland about this activity, or that Doloresco otherwise had a hand in these decisions apart from simply signing off on Rochon's denial of LWOP, but such speculation is insufficient to defeat summary judgment.[6] *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (stating that "[s]peculation does not create a genuine issue of fact" for purposes of summary judgment). No reasonable jury could conclude from the scattered bits and pieces of evidence Bell has assembled that Doloresco was wielding influence behind the scenes to blacklist Bell.

Bell also cites her change to the night shift and the warning letters she received for failing to report to work after her request for LWOP was denied. But the evidence does not show that these actions were causally related to her protected activity or that they would dissuade a reasonable worker from reporting discrimination. *See Tonkyro*, 995 F.3d at 836. The evening shift was advertised in the job posting for Bell's position, and other assistant managers were also required to work that shift. And it is undisputed that Bell was absent without authorized leave when she received the warning letters and that she was never disciplined for that period of absence from work.

---

[6] Accordingly, Bell's evidence about Nurse Executive Doloresco's alleged history of "EEO hostility" and "EEO retaliatory animus" is also insufficient to establish a genuine issue of material fact in this case.

For these reasons, we cannot say the evidence, even viewed in the light most favorable to Bell, would support a reasonable verdict in Bell's favor on her retaliation claims, whether based on a discrete employment action or hostile work environment.[7]

V.

In sum, we affirm the grant of summary judgment to the Secretary on Bell's Title VII claims of race discrimination and retaliation.

AFFIRMED.

---

[7] Bell has not raised on appeal, and so has abandoned, any argument that Hospital Director Battle's offer to settle her EEO complaints in exchange for granting her request for LWOP was retaliatory. *See Sapuppo*, 739 F.3d at 680.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:20-cv-1274-VMC-CPT

MARECIA S. BELL,

Plaintiff,

v.

DENIS McDONOUGH, Secretary, DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

ORDER

(February 17, 2022)

ORDER

This matter comes before the Court upon consideration of Defendant's Motion for Summary Judgment (Doc. # 46), filed on November 3, 2021. Plaintiff Marecia Bell responded on December 8, 2021 (Doc. # 52), and Defendant replied on December 21, 2021. (Doc. # 56). For the reasons that follow, the Motion is granted in part and denied in part.

I. Background

A. Bell is hired by the SCI Unit

In October 2016, Bell was hired as an Assistant Nurse Manager ("ANM") with the Spinal Cord Injury ("SCI") unit at the James A. Haley VA Medical Center (the "Tampa VA" or "the VA"). (Doc. # 46 at 2, ¶ 1; Doc. # 52 at 14, ¶ 1). Specifically, Bell occupied the role of Assistant Nurse Manager, staffing coordinator. (Doc. # 46-2 at 552 (8:5-8)). Bell's direct supervisor was Julia Lewis, the Assistant Chief Nurse for the SCI unit. (Id. at 156 (3:20-25)). One rung above Lewis was the position of Chief Nurse of the SCI unit. When Bell began with SCI, Kathy Michel was the interim Chief Nurse and Mary Alice Rippman became the Chief Nurse in January 2017. (Id. at 269 (5:15-21), 554 (15:3-9)).

Lewis explained that the Assistant Nurse Manager, staffing coordinator position "was intended to be the person who helped the chief nurse manage the human resources [of the department]. So that could include handling the movement of staff at different shift hours when there are call outs. In nursing we are required to provide safe numbers, so that person would help manage resources, meaning nurses, NAs, LPNs, and RNs to get the appropriate skill mix on the right unit at the right time to keep that safe mix." (Id. at 553 (9:18-25)). Typically, an ANM like Bell would have reported to a Nurse Manager. (Id. at 192 (12:19-20)). But, as Laureen Doloresco – the Chief Nurse Executive at the Tampa VA – explained, the situation in the SCI unit was "unique" because Bell was reporting directly to the Assistant Chief Nurse. (Id. at 191 (5:12-16), 192 (12:14-18), 307).

Within a month of starting the ANM position, Bell was asked to be the direct supervisor of the Resource Pool. (Doc. # 46-2 at 5 (14:23-15:2)). As explained by Lewis, the Resource Pool was a group of staff members who would "float" to the various units and clinics in the SCI, Polytrauma, and Rehab units. (Id. at 165 (41:13-22); see also Id. at 192 (11:5-10) (Doloresco explaining that the SCI Resource Pool was a "float pool" of nurses internal to the SCI who would go to different units to provide patient care)). Bell's job was to assign these workers to various units. (Id. at 158 (11:13-16)). The Resource Pool had 9 to 15 employees during the relevant time frame. (Id. at 157 (9:19-21)).

The Resource Pool announcement came as a "shock" to Bell because "that's not what [she] was hired to do" and she had been told that she would not be supervising people in the ANM position. (Id. at 5 (16:12-25)). Bell testified that the two previous employees to supervise the Resource Pool were both Assistant Chief Nurses. (Id. at 6 (17:9-16)). Additionally, "there were no other Assistant Nurse Managers in the Tampa VA that were directly supervising[,] first line supervisor of any staff." (Id. at 6 (18:15-18)). According to Bell, "other nurses that were the . . . first line supervisor over staff were at minimum Nurse Managers and then Assistant Chief and Chief. . . . That was the policy." (Id. at 6 (19:18-21)). Lewis confirmed that the three other people who have been responsible for the Resource Pool were all nurse managers. (Id. at 156 (4:14-5:7)). Lewis additionally confirmed that no other ANM had managed the Resource Pool prior to Bell and that decision "came out of [Lewis] being overwhelmed after

[multiple] management people left." (Id. at 173 (72:5-19)).

According to Bell, shortly after that announcement was made, she asked her supervisors, Lewis and Michel, "were they going to change [her] position to a nurse manager's position and give [her] the pay for directly supervising staff." (Id. at 5-6 (15:11-13, 17:1-4)). Bell testified that Lewis and Michel told her that this promotion and/or pay raise would happen, they just had to get Doloresco to "sign off" and "process the paperwork." (Id. at 6 (17:5-8, 19:24-20:6)); see also (Doc. # 52-4 at 1-2 (Bell's written declaration stating that in November 2016 Lewis and Michel told her that her position would be changed to that of a nurse manager and she would be paid on the nurse manager pay scale)). However, Lewis testified that it was not "within [her] power to make that happen" because the VA's "hiring system requires that it be a competitive position." (Id. at 168 (51:18-52:7)). And Doloresco testified that she never had discussions with anyone about making Bell a nurse manager or converting her position to a nurse manager position. (Id. at 201 (47-49)).

Overseeing the Resource Pool was not the only supervisory duty that Bell fulfilled while an ANM with the SCI unit. According to Lewis, Bell had the ability to certify employees' time and attendance records, a duty normally reserved for "supervisors" or nurse managers. (Id. at 163 (31:15-20, 33:14-25)). Bell testified that, in her very first month on the job, she assisted Lewis with multiple administrative tasks normally undertaken by the Assistant Chief Nurse. (Id. at 17 (63:1-4) (Bell testifying that Lewis "needed me to help her with leadership duties and to manage

SCI Polytrauma and Rehab")); see also (Id. at 115 (Lewis commenting in an email that she had previously been "overwhelmed" at work and needed Bell to help manage the SCI)).

B. Bell begins experiencing issues in the SCI unit

Bell stated that, beginning in December 2016, she was subjected to "hostility and unfair and vulgar behavior" by a co-worker, Wanda Soto-Hunter. (Doc. # 46-2 at 7 (24:1-4)). Soto-Hunter would yell "unpleasant comments" to Bell at staff meetings, stating for example that the meetings were only for nurse managers. (Id. at 7 (24:6-25:3)). In February 2017, Bell sent Lewis, Michel, and Rippman an email complaining about Soto-Hunter's "disrespectful [and] demeaning behavior" towards her. (Doc. # 46-2 at 95). Bell stated she was "not requesting intervention at this time." (Id.). In April 2017, Bell sent another email about Soto-Hunter's behavior to Lewis and Rippman, stating that Soto-Hunter "continues to be disrespectful, demeaning and unprofessional to me in a bullying and hostile manner." (Id. at 103). According to the email, Soto-Hunter had yelled at Bell, undermined her work staffing nurses, and continued to ridicule her for not being part of the management team. (Id.). Bell also noted in this email that she was planning to file a complaint with the Equal Employment Opportunity Commission ("EEOC"). (Id.).

Bell testified that Soto-Hunter's behavior was racially motivated because she was the only African-American employee in SCI management at that time and Soto-Hunter did not treat the other employees

badly. (Id. at 9 (32:16-25)). Based on Soto-Hunter's behavior, Bell filed her first complaint with the EEOC in April 2017. (Id. at 13 (46:10-12), 264).

In June or July of 2017, Bell was reassigned to work night shifts several times a week, from 3:30 pm to midnight. (Id. at 15 (53:1-54:17); 160 (22:1-23:14)). As Lewis explained, Bell "worked the evening shift for a period of time over several months, and she was representative of the management team in that role in the evenings." (Id. at 160 (20:24-21:2)). Rippman conceded that Bell was the only ANM who worked the late shift every day. (Id. at 372 (34:20-25)). Bell claims that moving her to the night shift was done in retaliation for the filing of her first EEOC complaint and was also racial discrimination. (Id. at 15 (54:8-55:2)).

Bell's problems with Soto-Hunter continued. In June 2017, Bell emailed management about how Soto-Hunter "continues to demean me in my job as assistant nurse manager and as a staffing coordinator and is very disruptive to my staffing coordinator work duties and bullies me to assign SCI Resource staff to the SCI units she manages." (Doc. # 46-2 at 258). Bell documented a June 2017 meeting in which Soto-Hunter raised her voice at Bell over certain staffing decisions Bell made. (Id.). In an August 2017 email, Bell documented an incident where Soto-Hunter undermined certain staffing decisions made by Bell, which decision Rippman upheld. (Id. at 119).[1]

[1] Soto-Hunter was eventually "removed from her position, detailed out," and moved to a nurse manager position elsewhere in the VA. (Doc. # 46-2 at 276 (35:1-9)).

Bell testified that, in her opinion, she was not initially allowed to sign the "proficiencies" (employee work evaluations) for SCI Resource Pool employees due to her race, stating that, "I was the only one African American Black in management in Spinal Cord at that time. . . . I had already filed an EEO Complaint. And I felt like this was further racial discrimination. And also with me just looking around the VA to see how many African American Blacks were in management at the James A. Haley hospital, which were not very many at all, very minimal." (Doc. # 46-2 at 29 (110:21-111:13). Lewis testified that ANMs at first were not allowed to sign evaluations, but eventually HR changed their position on that. (Id. at 157 (9:1-14)).

Bell also claims that her superiors pressured her to mistreat VA staff based on race. For example, when assigning "light duty" tasks, Bell's supervisors directed her to tell a black woman to scrape gum and food from underneath the bedside tables, while asking a white woman to answer phones. (Id. at 15 (55:14-56:20)).

As Defendant admits, Bell was a successful employee during her time with SCI. (Doc. # 46 at 1-2). She was rated as "outstanding" in her employee performance review for the time period between October 2016 and September 2017. (Doc. # 46-2 at 475). The performance review noted that Bell joined SCI as the ANM / Staffing Coordinator "amid sweeping leadership changes." (Id. at 474). And:

> [W]ith almost no assistance, she shouldered full responsibility for the SCI Resource Pool to include hiring, coaching / mentoring, educating

> and even disciplining staff when needed. Further, when needed, she transitioned to work evening shifts routinely to provide a stabilizing leadership presence in-house during that work time. Due to her efforts, many staff members have commented that the work environment on that shift has greatly improved.

(Id.).

Beginning in February or March 2018, Bell was going to be transferred to the SCI-D unit and placed under the supervision of Nurse Manager Lynette Carballo. (Id. at 164 (37:13-16); 281 (53:18-25); see also Id. at 518, 520). Bell would have retained her role leading the SCI Resource Pool, with Carballo acting as the "second line supervisor." (Id. at 518). Lewis testified that this move was contemplated as a "win/win" because Carballo had "one of the lower numbers of report to employees" and it would enable Bell to work as an ANM in an inpatient setting. (Id. at 164 (38:5-16)). Bell, however, viewed the transfer as racial discrimination and retaliation. (Id. at 30-31 (116-19)). Bell initiated contact with the EEOC in late February 2018 on an informal EEO claim, which claim became formal in March 2018. (Doc. # 52-3 at 12).

In March 2018, Bell met with Doloresco and asked to be removed from the SCI unit, stating that she was being "retaliated against for filing an EEO complaint and not following" Rippman's direction with respect to a certain employee investigation. (Id. at 524). According to a March 6, 2018, email, after that meeting, Lewis told Bell that her position had been eliminated. (Id.). Bell told Doloresco she was receiving disparate treatment, was being "bullied by [Lewis]

and [Rippman]," and was being forced to work in a hostile work environment. (Id.). Doloresco replied that same day saying, among other things, that Bell's position had not been eliminated – she was being "aligned" under a nursing manager (Carballo). (Id. at 523).

C. Bell moves to the HBPC program

Instead of moving to the SCI-D unit, however, in late March of 2018, Bell accepted a position with the VA's Home Based Primary Care ("HBPC") program. (Doc. # 46-2 at 34 (131:1-3), 640-43). Bell's direct supervisor at HBPC was Nurse Manager Tammie Terrell. (Id. at 804-08). At that time, Terrell's direct supervisor was Raina Rochon, Chief Nurse over multiple departments, including the HBPC program. (Id. at 807-08). Rochon, as a Chief Nurse, reported to Doloresco.

Dr. June Leland is the medical director of the Tampa VA's HBPC program. (Id. at 603 (5:10-12)). Dr. Leland wrote an email on March 30, 2018, that HBPC was "expanding" its use of RNs. (Id. at 600). According to the email, the group had selected five new RNs. (Id.). When one of the selected nurses declined the position, the position was offered to Bell as the "next in line" based on the hiring committee's scoring. (Id.).

Specifically, in a March 30, 2018, email chain, Terrell asked Dr. Leland where Bell should be placed. (Id. at 641-42). Dr. Leland responded, "There must be a mistake. We did not select her." (Id. at 641). Terrell wrote back that "based on your scoring from the interviews [Bell] is next in line[.]" (Id. at 640). Dr. Leland requested that Bell be placed elsewhere until

the entire hiring committee could reconvene to fill the spot. (Id. at 639). Dr. Leland also wrote to HR, "heartily object[ing] to [hiring] a candidate" that was not chosen by the entire committee. (Id. at 600). Eventually, HR stated that Bell's selection was valid, and her placement at HBPC went through. (Id. at 612 (41:7-16), 658-64).

According to Dr. Leland, she did not have anything against Bell, but was objecting to the selection process. (Id. at 612 (41:24-42:3)). But Bell believes that Dr. Leland tried to block her from the position due to her race stating that, after she began working in the HBPC program, Dr. Leland committed "multiple" acts of racial discrimination against Bell and other African-American employees. (Id. at 39 (150:9-21)).

According to Bell, the discriminatory conduct continued after she moved to HBPC. For example, all the other HBPC nurses were assigned patients close to where they lived, except for Bell. (Id. at 40 (155:4-9)). Nurse Manager Terrell verified that "we were trying to pair up everybody . . . based on where they resided." (Id. as 834 (25:2-5)).

Bell explained that she was assigned patients in both the Polk County, Lakeland-area and in south Hillsborough County, neither of which was close to where she lived. (Id. at 619 (69:9-11), 822). As noted by Dr. Leland in a June 2018 email: "Our new RN Marecia Bell has been given a panel of 26 patients across 4 providers ranging from South Hillsborough to Lakeland. Her drive times between all four providers are huge, and we are going to restrict her to 2 providers by next week." (Id. at 902).

Bell was eventually reassigned to just cover south Hillsborough County. (Id. at 655). Bell believed that moving her to the south Hillsborough County rotation was done in retaliation for her EEO complaint, although Terrell assured her it was only due to patient demands. (Id. at 872).

Terrell explained that Bell and others felt that the work was not being distributed fairly and that rules or policies were not being applied fairly by Dr. Leland. (Id. at 836 (34-35)). Terrell stated that, in her opinion, Dr. Leland gave differential and less preferential treatment to African-American staff members. (Id. at 834 (27:5-13), 836 (35:4-9)). As Terrell described it, Dr. Leland was "very strict" and inflexible on certain policies but "she didn't hold the same standards" across her entire staff and there was obvious favoritism. (Id. at 837 (38:3-15)).

D. Bell's request for a part-time position and LWOP

In January 2019, Bell requested a part-time position, effective that August or September. (Doc. # 46-2 at 45 (176:15-25), 781). Nurse Manager Terrell forwarded Bell's request to Chief Nurse Rochon. (Id. at 780). From the email traffic, it appears that Bell was trying to procure a part-time position in a different department. (Id. at 780).

Rochon testified that whether Bell would receive this part-time position in another department was out of her hands — employees could apply for new positions within the VA, and she would be notified by HR if the employee was going to be reassigned. (Id. at 734 (68:4-12)). But, as Bell tells it, Rochon had to

approve her move to a part-time position, and Rochon would not do it because of Bell's race and prior EEOC activity. (Id. at 46 (177:17-178:16), 48 (186:11-15)).

In June 2019, having been unable to find a part-time position, Bell requested leave without pay from August 2019 until August 2020 (the "LWOP request") in order to care for herself and her husband following surgeries they had. (Id. at 782). Rochon sent a memo to her supervisors regarding Bell's LWOP request, recommending that it be denied and essentially stating that the team did not have the capacity to cover an absent employee for a year. (Id. at 791-94). Andrew Sutton, the head of HR, Doloresco, and the VA's director, Joe Battle, also disapproved the request. (Id.). According to Bell, her LWOP request was denied on the basis of her race and prior EEOC activity. (Id. at 52 (203:1-9)). She explained that she was the only Black person working as an RN in the HBPC program at that time. (Id. at 203:16-20)). She said Battle told her he would approve the LWOP if she would drop all of her EEOC complaints. (Id. at 203-04). Bell refused to do so and, instead, filed a new EEOC complaint in August 2019 based on the denial of her LWOP request. (Doc. # 52-3 at 9-11).

Bell did eventually take leave under the Family Medical Leave Act ("FMLA") starting in June 2019. (Doc. # 46-2 at 926, 933-34). After her approved leave time under the FMLA was exhausted, Bell did not return to work and was marked as AWOL until she returned in June 2020. (Id. at 53 (205:14-18)).

Bell initiated this action against the Department of Veterans Affairs on June 3, 2020, asserting claims for racial discrimination under Title VII (Count One);

retaliation under Title VII (Count Two); and a hostile work environment under Title VII (Count Three). (Doc. # 1). Bell also brought a claim under the FMLA, but that claim was later dismissed. (Doc. #45). She seeks damages, attorneys' fees and costs, and injunctive relief. (Doc. # 1 at 20-25). The VA filed an answer, and the case proceeded through discovery. The VA now moves for summary judgment on all claims. (Doc. # 46). The Motion has been fully briefed (Doc. ## 52, 56), and is now ripe for review.

II. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (citing *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if it may affect the outcome of the suit under the governing law. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp.

v. Catrett, 477 U.S. 317, 323 (1986)). "When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (quoting Celotex, 477 U.S. at 324).

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

III. Analysis

Bell worked as a federal government employee and thus this case is controlled by Title VII's federal-sector provision. It states in relevant part that "[a]ll personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). The Eleventh Circuit recently held that the Supreme Court's decision in

Babb v. Wilkie, 140 S. Ct. 1168 (2020) ("Babb I") – which interpreted the nearly identical federal-sector provision of the Age Discrimination in Employment Act ("ADEA") – is applicable to Title VII federal sector cases. Babb v. Sec'y, Dep't of Veterans Affairs, 992 F.3d 1193 (11th Cir. 2021) ("Babb II").

As the Supreme Court explained in Babb I, the language "shall be made free from any discrimination" means that personnel actions must be "untainted by any consideration" of the protected factor. 140 S. Ct. at 1171. "If . . . discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by any such discrimination." Id. at 1174. "As a result, [the protected factor] must be a but-for cause of discrimination – that is, of differential treatment – but not necessarily a but-for cause of the personnel action itself." Id. at 1173. In other words, to state a claim under Title VII, the protected factor "must be the but-for cause of differential treatment, not that the [protected factor] must be a but-for cause of the ultimate decision." Id. at 1174.

But showing that a protected factor was the but-for cause of the challenged employment decision still plays an important role in determining the appropriate remedy. Id. at 1177. Showing that discrimination was the but-for cause of the ultimate employment decision or outcome will unlock all available forms of relief such as reinstatement, back pay, and compensatory damages. Id. at 1171, 1177-78. But if a plaintiff makes only the lesser showing, that is, if a plaintiff shows that discrimination was a but-for cause of differential treatment but not the but-for cause of the employment decision itself, that plaintiff

can still seek injunctive or other forward-looking relief. Id. at 1178.

In applying Babb I to a Title VII federal-sector case, the Eleventh Circuit wrote that:

> So, even when there are non-pretextual reasons for an adverse employment decision . . . the presence of those reasons doesn't cancel out the presence, and the taint, of discriminatory considerations. Without quite saying as much, then, it seems that the Supreme Court accepted Babb's argument that the District Court should not have used the McDonnell Douglas framework.

Babb II, 992 F.3d at 1204 (citation and internal quotation marks omitted).

Thus, under the Babb framework, Bell needs to show only that her race/color played a part in the way an employment decision was made, that is, that the decision was "tainted" by discrimination. Babb, 140 S. Ct. at 1174; see also Durr v. Sec'y, Dep't of Veterans Affairs, 843 F. App'x 246, 247 (11th Cir. 2021) (explaining that, after Babb, "a plaintiff's claim survives if 'discrimination played any part in the way a decision was made'" (internal alterations omitted)).

A. Racial Discrimination Claim

To be actionable, discrimination must influence a "personnel action." See 42 U.S.C. § 2000e-16(a) ("All personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination on race, color, religion, sex, or national

origin."). Personnel actions in the federal employment context "include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews." Babb I, 140 S. Ct. at 1172-73 (citing 5 U.S.C. § 2302(a)(2)(A)).

Here, with respect to her duration of employment in the SCI unit (October 2016 to March 2018), Bell claims that discrimination played a part in the following employment decisions: (1) "On February 20, 2018, [Bell's] position description was changed; (2) On March 5, 2018, [Bell] was denied a reassignment; (3) On March 5, 2018, [Bell's] position was eliminated; and (4) [Bell] was denied appropriate supervisory pay." (Doc. # 1 at ¶ 13). She also argues that the overall hostile work environment at the Tampa VA was a "personnel action" because it constituted a "significant change in . . . working conditions." (Doc. # 52 at 22); see also Babb II, 992 F.3d at 1209 ("The text of the federal-sector provision addresses 'personnel actions,' and so it seems clear enough that an actionable retaliatory-hostile-work-environment claim must describe conduct that rises to that level.").

The Court first examines Bell's claim with respect to her employment with the SCI unit. With respect to the alleged personnel actions taken during this time, Bell has little beyond her own subjective beliefs to demonstrate that racial discrimination played a part in any of these decisions. A plaintiff's speculative assertions of racial discrimination are not enough to overcome summary judgment. See Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.");

Jeffery, 64 F.3d at 593-94 (explaining that the party opposing summary judgment must come forward with evidence setting forth specific facts to show that there is a genuine issue for trial).

Bell points to the fact that she was the only African-American supervisor in the SCI unit, but she does not point to any non-African-American ANMs who were given supervisory or management duties and then persuaded the VA to give them a promotion and/or pay raise.[2] There is similarly no evidence of any ANM at the VA who was given supervisory powers and then, with or without a promotion, given pay commensurate with that of a nurse manager. Nor has Bell pointed to any other employees who were allowed, upon request, to transfer to another unit because they were unhappy in their current position.

Although it is true that Babb lessened the burden that federal-sector plaintiffs need to show, Bell has not met this lesser burden because she has not pointed to any evidence that racial discrimination was the but-for cause of any differential treatment she experienced. For example, the Eleventh Circuit has recently upheld a district court's grant of summary judgment in favor of the defendant-employer where the plaintiff offered no direct evidence that race played a role in the defendant's promotion decisions and his contention that he was more qualified than the people who got promoted was not supported by the record. Malone v. U.S. Att'y Gen., 858 F. App'x 296,

[2] The record reflects that Shernise Henshall was promoted from an ANM to an acting nurse manager position and then Henshall got the permanent nurse manager position with commensurate pay. (Doc. # 46-2 at 723-34 (24:23-26:14)). But Henshall is also African-American. (Doc. # 52 at 7).

301 (11th Cir. 2021) (writing that, even under the Babb standard, summary judgment was proper on racial discrimination claim where plaintiff could not "point to any record evidence that his application for DHO was treated differently because he is white"); see also Buckley v. McCarthy, No. 4:19-CV-49 (CDL), 2021 WL 2403447, at *1 & *6 (M.D. Ga. June 11, 2021) (granting defendant's summary judgment motion under Babb standard where plaintiff was the only Black provider at the subject clinic and contended that she was assigned fewer patients and that her coworkers called her an "angry Black woman" because the evidence did not demonstrate that race played any role in the decision to remove that plaintiff from federal service).

It is evident that Bell thinks it unfair that she was expected to perform supervisory duties while retaining the position and pay grade of an ANM. But this Court is not in the position to be the arbiter of whether certain employment decisions were fair, it is concerned solely with whether those decisions were based on illegal reasons. See Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1148 (11th Cir. 2020) ("The role of this Court is to prevent unlawful Title VII practices, not to act as a super personnel department that second-guesses employers' business judgments. Our sole concern is whether unlawful discriminatory or retaliatory animus motivates a challenged employment decision.").

The Court now turns to Bell's time with the HBPC program. During that timeframe, from April 2018 until March 2019, "Dr. Leland assigned [Bell] an unfair workload requiring her to conduct patient visits between two counties, the farthest travel

distance" and on July 31, 2019, her LWOP request for August 2019 through August 2020 was denied.[3] (Doc. # 1 at ¶ 38). In her testimony, Bell identifies the only other African-American nurse in the program, Dietrich Langston. (Doc. # 46-2 at 43 (167:1-4)). According to the testimony, Dr. Leland assigned Bell and Langston to work areas far from their homes and also unfairly blocked Bell and Langston from taking advantage of certain parking privileges. (Id. at 167:4-25). Bell testified that Dr. Leland did not treat other nurses in the program this way. (Id. at 40 (155:4-9)). And Bell has also presented the testimony of Nurse Manager Terrell that, in her opinion, Dr. Leland gave differential and less preferential treatment to African-American staff members. (Id. at 834 (27:5-13), 836 (35:4-9)). Given corroborated differential treatment by Dr. Leland, a reasonable jury could also infer that race played a part in Dr. Leland's efforts to block Bell from joining the HBPC program as a nurse. Thus, a reasonable jury could infer that race was a but-for cause of the different treatment that Bell experienced with respect to the HBPC application process and the work assignments she received once she was part of the HBPC program.

Finally, Bell has not produced any evidence beyond her own speculation that race played a part in the VA's decision to deny her LWOP request.

Accordingly, the VA's motion for summary judgment is granted in part and denied in part with

[3] None of the other actions that Bell complains of during this time frame, such as "inappropriate comments" being made, rises to the level of a personnel action or employment decision by the VA.

respect to Count One. The Motion is granted to the extent it seeks summary judgment with respect to Bell's claim of racial discrimination pertaining to personnel decisions in connection with her employment with the SCI unit and her LWOP request. But the Motion is denied with respect to Bell's claim of racial discrimination with respect to her employment with the HBPC program.

B. Retaliation Claim

A prima facie case of retaliation requires a plaintiff to establish that she (1) engaged in statutorily protected activity; (2) suffered an adverse employment action; and (3) established a causal link between the protected activity and the adverse employment action. Malone v. U.S. Att'y Gen., 858 F. App'x 296, 303 (11th Cir. 2021). "In the context of a retaliation claim, an adverse employment action is one that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). To show a causal connection, the plaintiff needs to show that the protected activity played some part in the way the decision was made. Tonkyro v. Sec'y, Dep't of Veterans Affs., 995 F.3d 828, 835 (11th Cir. 2021) (holding that federal-sector plaintiffs need not "prove that their protected activity was a but-for cause of the adverse actions" and remanding the district court to determine causation under the standard enunciated in Babb).

Here, it is undisputed that Bell engaged in protected activity through her multiple EEOC complaints. For reasons described more fully below, the Court will proceed next to the causation prong.

As the Eleventh Circuit explained just last month:

> In federal-sector cases, of course, the employee is not required to show that her protected activity was the but-for cause of the adverse action; it is sufficient to show that her protected activity played a role in the adverse action. Moreover, if the employee makes this showing, the employer cannot escape liability by presenting evidence that it also had nondiscriminatory reasons for its action. That is because "even when there are non-pretextual reasons for an adverse employment decision . . . the presence of those reasons doesn't cancel out the presence, and the taint, of discriminatory considerations.

Varnedoe v. Postmaster Gen., No. 21-11186, 2022 WL 35614, at *3 (11th Cir. Jan. 4, 2022) (citing Babb II, 992 F.3d at 1199, 1204-05).

Here, in the absence of any other evidence of retaliatory animus, Bell relies on temporal proximity between her EEO activity and the allegedly adverse actions taken against her. A plaintiff can show a causal connection by showing a close temporal proximity between her employer's discovery of the protected activity and the adverse action, but the temporal proximity must be "very close." Thomas v. Dejoy, No. 5:19-cv-549-TKW-MJF, 2021 WL 4992892, at *10 (N.D. Fla. July 19,2021) (looking to temporal proximity test post-Babb and citing Debe v. State Farm Mut. Auto. Ins., 860 F. App'x 637, 639-40 (11th Cir. 2021) (noting that a one-month delay may satisfy the test, but a three-to-four-month delay is too long)).

As Bell points out, in April 2017, she initiated her first EEOC Complaint. See (Doc. # 52-4 at 5). This EEOC complaint was based on Soto-Hunter's harassing behavior. (Doc. # 52-3 at 7-8). On June 19, 2017, Bell emailed Lewis, Rippman, and Dolorosco complaining of workplace harassment and stating that she had filed an EEOC complaint. (Doc. # 46-2 at 107).

On June 20, 2017, Chief Nurse Rippman changed Bell's working hours from the day shift to a shift stretching from 3:30 p.m. until midnight. (Doc. # 52-4 at 6). Bell claims that she was the only ANM made to work that later shift. (Id.). While other ANMs allegedly had to cover that shift two times per week, Bell never saw them and claims she was the only manager made to work that shift.

Bell filed her second EEOC Complaint on March 22, 2018. (Doc. # 52-4 at 5). In that complaint, Bell raised the issues of: (1) lack of supervisory pay; (2) being made to work the night shift; (3) her reassignment to working under Nurse Manager Carballo; and (4) Lewis and/or Rippman's statements to her on March 5, 2018, that her position was being eliminated. (Doc. # 52-3 at 13-14). Bell filed another EEOC complaint in August 2019, grieving the denial of her LWOP request. (Doc. # 52-3 at 9-11).

As an initial matter, the Tampa VA's refusal to change Bell's position in the SCI to that of a nurse manager or offer her higher pay cannot be causally related to any EEO activity because she was given supervisory duties over the Resource Pool in November 2016 (and requested the commensurate promotion at the same time), but she did not file her

first EEOC complaint until the next year. Similarly, while Bell identifies the "realignment" or "elimination" of her position in February or March 2018 as an actionable personnel decision, the record reflects that she filed her second formal EEOC complaint **after** these events occurred. See Debe, 860 F. App'x at 640 ("[I]f the alleged retaliatory conduct occurred before the employee engaged in protected activity, the two events cannot be causally connected."). And these events occurred nearly one year after Lewis, Rippman, and/or Doloresco became aware of the first EEOC complaint. (Doc. # 46-2 at 103); see Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (holding that a three- to four-month delay between the EEO action and the adverse action does not demonstrate causation).

While Bell's move to the HBPC program did occur near the time of her filing of the second EEOC complaint, there is no record evidence that Dr. Leland (who objected to Bell's placement in the program and then later allegedly gave Bell less desirable assignments) had any knowledge of Bell's earlier EEOC activity. There is similarly no evidence that Rochon was aware of Bell's prior EEO activity.[4] See Malone, 858 F. App'x at 303 (plaintiff's retaliation claim due to be dismissed where he could not point to any evidence that his supervisors were aware of his EEOC complaint at the time he was removed from his post). Bell speculates that Doloresco probably told Dr.

[4] To the extent Bell asserts in her declaration that Rochon "participated in an EEO mediation," that mediation did not take place until November 2019, well after all of the alleged adverse actions took place. (Doc. # 52-4 at 19).

Leland about this activity, but such speculation is insufficient to defeat summary judgment. See Id.

Thus, the only potentially adverse action that is close in time to Bell's EEO activity was the placement of Bell on a later shift in June 2017. But even if retaliatory animus did play a part in this shift change, it cannot form the basis of a retaliation claim because it was not, under the circumstances presented here, an adverse employment action.

Whether a particular employment action is materially adverse under the Burlington Northern standard "depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position considering all the circumstances." Revere v. Harvey, No. 1:06-cv-2485-CAP-RGV, 2009 WL 10666058, at *17 (N.D. Ga. Feb. 13, 2009), report and recommendation adopted, 2009 WL 10669716 (N.D. Ga. Mar. 20, 2009). Here, the record reflects that the original ANM position that Bell applied for was subject to working hours of 3:30 p.m. to midnight. (Doc. # 46-2, Ex. 2). There is also record evidence that several other ANMs were assigned to work this shift as well, although some of them initially resisted this request from management. (Id. at 315, 372 (35:12-25)). And Bell conceded during EEOC proceedings that three other ANMs were also required to work that evening shift starting in or around June 2017. (Id. at 391). Bell does not allege that the shift change was accompanied by any change in her benefits, pay, or promotion opportunities.

Under these circumstances, where the evening shift was clearly contemplated in the ANM, staffing

coordinator nursing position and where the VA also required several other ANMs to work this shift around the same time as Bell, the placement of Bell on an evening shift does not constitute an action that would dissuade a reasonable worker in Bell's position from making or sustaining a charge of discrimination. See Solomon v. Jacksonville Aviation Auth., 759 F. App'x 872, 876 (11th Cir. 2019) (concluding that "isolated schedule changes" did not rise to the level of an adverse action because they would not have dissuaded a reasonable person from filing a discrimination complaint); Benningfield v. City of Houston, 157 F.3d 369, 377 (5th Cir. 1998) (holding that a transfer to the night shift, alone, did not constitute an adverse action); see also Bolden v. City of Birmingham, No. 2:17-CV-1520-TMP, 2019 WL 763513, at *4-5 (N.D. Ala. Feb. 21, 2019) (holding that an employer's denial of a requested shift change was not materially adverse where the employee did not suffer a reduction in pay and did not lose any benefit or promotion opportunity).

For these reasons, the VA's Motion for Summary Judgment is granted as to Count Two.

C. Retaliatory Hostile Work Environment Claim

As an initial matter, Bell appears to assert only a retaliatory hostile work environment claim, not a traditional hostile work environment claim. See (Doc. # 52 at 27-30 (limiting her response to address a retaliatory hostile work environment claim)); see also (Doc. # 1 at ¶ 75 (alleging in her hostile work environment claim that the hostile work environment was "due to her EEO activity or . . . was motivated, at

least in part, by that activity" and that the VA's actions were "motivated by EEO animus")).

This distinction is important in light of the Eleventh Circuit's recent Babb II holding. There, the Court clarified that, in light of its decision in Monaghan v. Worldpay US, Inc., 955 F.3d 855 (11th Cir. 2020), "retaliatory hostile work environment" claims fall under the rubric of retaliation claims, not true hostile work environment claims. Babb II, 992 F.3d at 1206-07. Thus, such claims are not subject to the "severe or pervasive" standard (like true hostile work environment claims), but should instead be decided under the "well might have dissuaded" standard enunciated in Burlington Northern. Id. at 1207-08.

The VA argues that, even under this standard, Bell cannot show that the events making up her hostile work environment claim were based on, or causally connected to, her EEO activity. (Doc. # 46 at 22). The Court agrees. For the reasons described above, viewing the evidence in the light most favorable to Bell, Bell has failed to demonstrate a link between the totality of events that allegedly created the hostile work environment and her EEO activity. See Terrell v. McDonough, No. 8:20-cv-64-WFJ-AEP, 2021 WL 4502795, at *9 (M.D. Fla. Oct. 1, 2021) (rejecting plaintiff's retaliatory hostile work environment claim where she failed to link the allegedly adverse actions to her EEO activity).

In sum, Bell has failed to establish that a reasonable employee in Bell's position would have been dissuaded by any of these action from filing an EEOC complaint and, indeed, the record reflects that

none of them dissuaded Bell from doing so. See Burgos v. Napolitano, 330 F. App'x 187, 190-191 (11th Cir. 2009) (finding no materially adverse action where plaintiff "was not deterred in reinstating her EEOC claim").

Accordingly, the VA's Motion for Summary Judgment will be granted as to Count Three.

IV. Conclusion

For the reasons given above, summary judgment is due to be granted on Counts Two and Three and on Count One to the extent it is premised on claims of racial discrimination related to the denial of Bell's LWOP request or her employment with the SCI unit. The Motion is denied as to Count One on Bell's claim of racial discrimination with respect to her employment with the VA's HBPC program.

Accordingly, it is

ORDERED, **ADJUDGED**, and **DECREED**:

Defendant's Motion for Summary Judgment (Doc. # 46) is **GRANTED** in part and **DENIED** in part in accordance with this Order.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 17th day of February, 2022.

Virgina M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:20-cv-1274-VMC-CPT

MARECIA S. BELL,

Plaintiff,

v.

DENIS McDONOUGH, Secretary, DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

ORDER

(June 15, 2022)

ORDER

This matter comes before the Court upon consideration of Defendant's "Motion to Dismiss Remaining Claims." (Doc. # 65). Plaintiff has responded. (Doc. # 75). For the reasons explained below, the Motion is granted.

I. Background

This case was filed in June 2020 by Plaintiff Marecia Bell against the Department of Veterans

Affairs (the VA). (Doc. # 1). In the Complaint, Bell asserted claims for racial discrimination under Title VII (Count One); retaliation under Title VII (Count Two); and a hostile work environment under Title VII (Count Three). (Id.). The VA thereafter filed an answer. (Doc. # 24). On February 17, 2022, this Court entered an order granting in part and denying in part the VA's Motion for Summary Judgment. (Doc. # 58). As to the racial discrimination claim, the Court granted summary judgment to the VA with respect to Bell's claim of racial discrimination pertaining to personnel decisions in connection with her employment with the Spinal Cord Injury ("SCI") unit and her request for leave without pay, but it allowed Bell's claim of racial discrimination with respect to her employment with the VA's Home Based Primary Care ("HBPC") program to continue. (Id. at 25). The Court also granted summary judgment to the VA on Bell's claims for retaliation and a retaliatory hostile work environment. (Id. at 32, 34). Thus, only Count One survived summary judgment and only to the limited extent it was based on the VA's treatment of Bell regarding the HBPC program.

Now, the VA requests that the Court dismiss Bell's remaining claim – the limited portion of Count One pertaining to Bell's tenure with the HBPC program – for failure to exhaust administrative remedies and for mootness. (Doc. # 65). During summary judgment, the parties did not present and the Court did not consider any arguments pertaining to administrative exhaustion. It appears that, prior to the summary judgment Order being issued, the VA believed that Bell had accepted its defense that the incidents at issue in this order were untimely as discrete incidents

of racial discrimination, and the parties understood these incidents only to be background facts supportive of Bell's hostile work environment claim. At summary judgment, the parties did not present the Court with Bell's complete 2019 EEOC documents and, in reliance on certain of Bell's allegations in the complaint, see (Doc. # 1 at ¶¶ 38-41), it treated two of the incidents described by Bell as discrete incidents of racial discrimination.

The VA now argues that the remaining adverse actions underlying Count One are not actionable as discrete acts because Bell waited more than a year after the alleged acts to contact an EEOC counselor regarding two of the remaining trial claims, and that she never raised the third remaining trial claim at the administrative level at all. (Doc. # 65). As such, the VA argues that Plaintiff failed to exhaust her administrative remedies and that the remaining adverse actions in Count One should be dismissed.

Bell counters that she attempted to administratively raise her complaints vis-à-vis her tenure with the VA's HBPC program but that, essentially, she mistakenly failed to follow the formal process. (Doc. # 75). Bell therefore argues that the Court should modify or alter the administrative exhaustion requirement on equitable grounds. (Id. at 5-6).

The documents that the parties attach to their pleadings demonstrate the following facts. On March 22, 2018, Bell filed a formal EEOC complaint, raising allegations of racial discrimination and reprisal that occurred in February and March of 2018 (Case No. 200I-0673-2018102629 (hereafter, the "102629

Case")). (Doc. # 65-2 at 2-3). All of the complained- of incidents in the March 22, 2018, formal complaint pertained to Bell's time with the SCI unit. (Id. at 5-9, 17). Per the evidence submitted at summary judgment, Bell did not move to the HBPC unit until late March 2018. (Doc. # 46-2 at 34 (131:1-3), 640-43). The EEOC issued its report in the 102629 Case on August 28, 2018. (Doc. # 65-2 at 20-31).

On November 12, 2019, Bell filed a second formal EEOC complaint (Case No. 200I-0573-2019105279 (hereafter, the "105279 Case")). (Doc. # 65-3 at 3). Bell initiated contact with a counselor in that case on August 22, 2019. (Id. at 2). In her submission in the 105279 Case, Bell wrote that the racial discrimination, harassment, and retaliation that she experienced while on the SCI unit had "escalate[d]" – shewrote that Chief Nurse Raina Rochon and Dr. June Leland, the medical director of the Tampa VA's HBPC program, had tried to block her from joining the HBPC program and, once she was accepted into the program, continued to "harass" her and subject her to disparate treatment and racial discrimination. (Id. at 4). As Bell explained it in her submission, she was the only Black nurse assigned to drive to patients' home across two counties. (Id.).

In January 2020, the EEOC accepted Bell's claim in the 105279 Case as follows: It accepted her hostile work environment claim based on events from "March 2019" to the present. (Id. at 13). The EEOC letter identified an allegation that "[i]n April 2019,[1] Dr.

[1] The dates of this incident and the "March 2019" release date incident should have been reported as March 2018 and April 2018. (Doc. # 65-3 at 23, nn. 1 & 2).

Leland assigned [Bell] an unfair workload requiring her to conduct patient visits between two counties, the farthest travel distance." (Id.). However, the EEOC explicitly stated in its letter that this event "is a discrete act that was not raised within 45 days of occurrence and is DISMISSED as an independently actionable claim[.]" (Id.). The letter also identified an allegation that "[i]n March 2019, [Bell's] release date to her new staff nursing position was delayed," but this was only accepted as part of the hostile work environment claim. (Id.). Bell argues that, on September 19, 2018, she advised LaWanda Spencer, a counselor with the VA's Office of Resolution Management, that she wanted to file a complaint based on race discrimination and reprisal against Dr. Leland based on Dr. Leland's efforts to block Bell from joining the HBPC program. (Doc. # 75-1 at 1-11). On September 21, 2018, Spencer sent Bell an acknowledgement letter and the matter was assigned Case No. 200I-0673-2018106354 (hereafter, the "106354 Case"). (Id. at 12).

The record reflects that in December 2018 Bell emailed Spencer to follow up on her complaint. (Id. at 15). Spencer responded that the "Notice of Right to File Formal EEO complaint" was issued to Bell and received on October 29, 2018. (Id.). When Bell did not timely file her formal complaint, the matter was closed out on November 23, 2018. (Id.). According to Bell, she believed these new allegations would be folded into an existing EEOC complaint and did not realize what steps needed to be taken to preserve her claim in the 106354 Case. (Id. at 19-20).

II. Analysis

The VA has styled its request as a "motion to dismiss" but it is more properly considered a motion for reconsideration of the Court's prior summary judgment Order. See Akkasha v. Bloomingdale's, Inc., No. 17-CV-22376, 2019 WL 7480652, at *6 (S.D. Fla. Dec. 18, 2019) (considering a post- summary judgment motion on failure to exhaust administrative remedies as a motion for reconsideration). A court has the power to revisit its own prior decisions. Tristar Lodging, Inc. v. Arch Specialty Ins. Co., 434 F. Supp. 2d 1286, 1301 (M.D. Fla. 2006). There are three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. Instituto de Prevision Militar v. Lehman Bros., Inc., 485 F. Supp. 2d 1340, 1343 (S.D. Fla. 2007). If a court's prior ruling was clearly erroneous, it would be "wasteful and unjust to require the court to adhere to its earlier ruling." Id.

In response to the Motion, Bell argues that she was confused about the EEOC process and was given incorrect information by the counselor, and she therefore asks that this Court grant her equitable relief from the typical administrative exhaustion requirements.

"Under Title VII and the Rehabilitation Act, Federal employees are required to initiate administrative review of any alleged discriminatory or retaliatory conduct with the appropriate agency within 45 days of the alleged discriminatory act." Shiver v. Chertoff, 549 F.3d 1342, 1344 (11th Cir. 2008). "Generally, when the claimant does not initiate contact within the 45–day charging period, the claim is barred for failure to exhaust administrative

remedies." Id. However, there are exceptions for equitable tolling, waiver, and estoppel. Morrison v. Brennan, No. 8:17-cv-2850-TPB-AEP, 2019 WL 5722122, at *2 (M.D. Fla. Nov. 5, 2019). But the Eleventh Circuit has cautioned that courts should only apply the tolling rules sparingly, "such as when a plaintiff has actively pursued remedies but filed a defective timely pleading or when she was induced or tricked by her employer's misconduct into allowing the deadline to pass." Hunter v. U.S. Postal Serv., 535 F. App'x 869, 872 (11th Cir. 2013). The purpose of the exhaustion requirement is "to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer." Brown v. Snow, 440 F.3d 1259, 1263 (11th Cir. 2006).

Here, with the benefit of the parties' additional documents and briefing, it is apparent that Bell's remaining claim is untimely. First, on her claim that Dr. Leland and others within the HBPC tried to block her transfer to that program on the basis of her race and/or as reprisal for her former EEOC activity, the actions Bell complained off took place in March 2018. It is undisputed that Bell did not bring these allegations to the EEOC and did not initiate the 106354 Case until September 2018 – well after the 45-day limit had run. Bell does not allege that the VA induced or tricked her into allowing the deadline to pass or that she otherwise tried to initiate contact with the EEOC in this timeframe.

While Bell states that Spencer incorrectly told her that the September 2018 allegations would be added to an existing EEOC complaint and/or misled Bell that she should wait to be contacted by the investigator, this discrepancy is unpersuasive because it is

undisputed that Bell did not raise her concerns pertaining to the events of March and April 2018 with Spencer until September 2018. Thus, the claims were already outside of the 45-day period when Bell first raised them to Spencer.

Second, as to her claim that Dr. Leland actively assigned her to routes and patients that unfairly required Bell to drive longer distances than other nurses, there is no indication that this claim was ever raised in the 106354 Case. It was raised as part of the 105279 Case, but the EEOC explicitly identified that allegation as an untimely discrete claim and dismissed it. Therefore, the record is clear that the EEOC never substantively investigated or addressed either of these claims.

Finally, the VA argues that Bell "never raised the third Claim at the administrative level at all," (Doc. # 65 at 1), referring to Bell's allegations that the VA unfairly blocked her from taking advantage of certain parking privileges while she worked for the HBPC program. To be clear, the Court referenced this by way of background and did not view it as a discrete claim. See (Doc. # 58 at 24 (referencing certain deposition testimony that Dr. Leland allegedly treated Black staff members unfairly, including unfairly blocking Bell and another Black nurse from taking advantage of certain parking privileges)). And in any event, the Court agrees with the VA that this allegation was not raised at all by Bell before the EEOC.

Although cognizant that courts are "extremely reluctant to allow procedural technicalities to bar claims" brought under Title VII, see Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1280 (11th Cir.

2004), the Court also bears in mind that the ultimate purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employer and the employee. Brown v. Snow, 440 F.3d at 1263. Here, because Bell never properly brought these two discrete claims to the agency's attention and the agency therefore never had the opportunity to investigate those claims except as part of her hostile work environment claim, that requirement has not been met.

Nor has Bell shown that she is entitled to be one of the rare cases granted equitable relief from the administrative-exhaustion requirements. While administrative exhaustion deadlines under Title VII are not jurisdictional requirements and are therefore subject to equitable modification, the Supreme Court has warned that equitable modification should not be liberally construed; rather, only under certain circumstances should the doctrine be applied. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly."); Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) ("[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."). "As a general rule, 'equitable tolling' may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." Baker v. Peters, 145 F. Supp. 2d 1251, 1257 (M.D. Ala. 2000) (enunciating the limited circumstances recognized by the Eleventh Circuit as

grounds for equitable modification of the administrative exhaustion requirements in employment discrimination cases).

There is no evidence here that the VA actively misled Bell, that she was thwarted in some "extraordinary way" from asserting her rights, or that she mistakenly asserted her rights in the wrong forum. If anything, the record demonstrates that Bell not only had been through the EEOC process twice before these claims surfaced, but ORM counselor Spencer specifically told Bell about the time limits for filing her formal complaint. Under these circumstances, the Court cannot say that this is an extraordinary case in which equitable relief is appropriate.

Thus, reconsideration is warranted to prevent manifest injustice. Upon reconsideration, the Court determines that Bell's racial discrimination claim with respect to her time at the HBPC program was not administratively exhausted. Thus, Bell may not pursue it further. Accordingly, the VA's Motion for Summary Judgment is granted on all counts.

Accordingly, it is

ORDERED, **ADJUDGED**, and **DECREED**:

(1) Defendant's "Motion to Dismiss Remaining Claims" (Doc.# 65), which the Court construes as a motion for reconsideration of its prior summary judgment order, is **GRANTED**.

(2) Upon reconsideration, Defendant's Motion for Summary Judgment (Doc. # 46) is **GRANTED** as

to all counts for the reasons stated herein and in the Court's February 17, 2022, Order.

(3) The Clerk shall enter judgment in favor of Defendant the Secretary of the Department of Veterans Affairs and against Plaintiff Marecia Bell.

(4) Once judgment has been entered, the Clerk shall terminate all deadlines and pending motions, and closethis case.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 15th day of June, 2022.

Virgina M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE