XIV. APPENDICES

Appendix 1. Text of Statutory Provisions Involved

28 U.S. Code § 2101(c)

28 U.S. Code § 2101 – Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S. Code § 1331

28 U.S. Code § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S. Code § 12102 (1)

42 U.S. Code § 12102 -Definition of disability

(1) DISABILITY

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(3) Regarded as having such an impairment For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S. Code §12112

42 U.S. Code § 12112 –Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION
As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(3) utilizing standards, criteria, or methods of administration—
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;

(d) Medical examinations and inquiries
(1) In general:

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(4) Examination and inquiry
(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

42 U.S. Code § 12113–Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

29 CFR § 1630.2 Definitions.

29 CFR 1630.2(g)

Definition of "disability" —

(1) ***In general. Disability*** means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

29 CFR 1630.2(k)

Has a record of such an impairment—(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

29 CFR 1630.2(l)

"Is regarded as having such an impairment." The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental

impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

29 CFR 1630.2(n)
Essential functions —

(1) **In general.** The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

29 CFR 1630.2(q)
Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

29 CFR 1630.2(r)
Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

29 CFR 1630.9(d)
"Not making reasonable accommodation." An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

Georgia Code Title 31. Health § 31-12-3

(a) The department and all county boards of health are empowered to require, by appropriate rules and regulations, persons located within their respective jurisdictions to submit to vaccination against contagious or infectious disease where the particular disease may occur, whether or not the disease may be an active threat. The department may, in addition, require such other measures to prevent the conveyance of infectious matter from infected persons to other persons as may be necessary and appropriate. The department shall promulgate appropriate rules and regulations for the implementation of the provisions of this Code section in the case of a declaration of a public health emergency and shall include provisions permitting consideration of the opinion of a person's personal physician as to whether the vaccination is medically appropriate or advisable for such person. Such rules and regulations shall be adopted pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," but shall be automatically referred by the Office of Legislative Counsel to the House of Representatives and Senate Committees on Judiciary.

(b) In the absence of an epidemic or immediate threat thereof, this Code section shall not apply to any person who objects in writing thereto on grounds that such immunization conflicts with his religious beliefs.

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

EALAILA CONARD,

Plaintiff,

v.

CHANEL, INC.,

Defendant.

CIVIL ACTION NO.
1:22-CV-3784-MLB-CCB

FINAL REPORT AND RECOMMENDATION

Plaintiff Ealaila Conard, proceeding *pro se*, brings this action against her previous employer, Defendant Chanel, Inc., asserting claims of discrimination and retaliation under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111, *et seq.* (Doc. 1). This matter is before the Court for consideration of Defendant's motion to dismiss the complaint. (Doc. 7). Plaintiff filed a response to the motion, (Doc. 19), and Defendant filed a reply, (Doc. 20). The undersigned **RECOMMENDS** that Defendant's motion to dismiss the complaint, (Doc. 7), be **GRANTED**, and that Plaintiff's complaint be **DISMISSED** for failure to state a claim.

I. BACKGROUND

The Court draws the following factual allegations from the complaint, (Doc. 1), which are assumed to be true for the purpose of this discussion.

Plaintiff began working for Defendant in December of 2018 as a fashion advisor at its retail location within Neiman Marcus in Atlanta. (Doc. 1 at ¶ 19). Defendant required Plaintiff and her colleagues to work from home between mid-March of 2020 and mid-June of 2020 due to the COVID-19 public health emergency. *Id.* at ¶¶ 19, 20. On or about June 12, 2020, Defendant informed Plaintiff that she would be required to wear a surgical mask over her face and engage in frequent handwashing as a new condition of employment before returning to work at Defendant's premises. *Id.* at ¶ 21. Plaintiff returned to work on or about June 12, 2020, and she was required to wear a mask. (Doc. 1-1 at 2, ¶ 10). In late December of 2020, after a team member tested positive for COVID-19, Plaintiff was not allowed to work until she provided a negative PCR test, which caused Plaintiff to lose money and opportunities to earn commission when she missed a day of big sales. *Id.* at 2, ¶ 11.

On September 13, 2021, during a meeting, store manager Bradley announced that Defendant was requiring all employees to receive the COVID-19

vaccine as a condition of continued employment. (Doc. 1 at ¶ 23). Plaintiff was also emailed Defendant's COVID-19 policy, which mandated that all U.S. employees be fully vaccinated by November 8, 2021. *Id.*; (*see also* Doc. 1-1 at 6). On September 17, 2021, Defendant updated the Connect Chanel Hub with instructions on how to request an exemption from the vaccination policy, referring to an exemption as an "accommodation." (Doc. 1 at ¶ 24; *see also* Doc. 1-1 at 6). On September 22, 2021, Plaintiff asked for a religious exemption. (Doc. 1-1 at 2, ¶ 14). On October 6, 2021, store manager Bradley, assistant manager Hae, and Human Resources (HR) employee Michelle Rhee held a meeting with Plaintiff. *Id.* at 3, ¶ 16. Rhee and Bradley told Plaintiff that her religious exemption was denied because her position required regular, in-person presence and that she would be fired if she did not receive the COVID-19 vaccine. *Id.* On October 8, 2021, Defendant sent Plaintiff a letter formally denying the exemption request and reiterating that, as a condition of her employment, she was required to be fully vaccinated by November 8, 2021. (Doc. 1 at ¶ 26; Doc. 1-1 at 7). Defendant ultimately terminated Plaintiff on November 8, 2021. (Doc. 1 at ¶ 27).

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on February 16, 2022. (Doc. 1 at ¶ 5). She filed

an amended charge on May 4, 2022. (Doc. 1-1 at 18–24). The EEOC issued her a notice-of-right-to-sue letter on June 7, 2022. *Id.* at 25.

II. MOTION TO DISMISS AND PLAINTIFF'S RESPONSE

Defendant filed its motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). (Doc. 7). Defendant moves to dismiss the complaint in its entirety. *Id.* at 1.

Defendant first argues that Plaintiff's claims are time-barred because she did not file her suit within 90 days after receiving her notice of right to sue from the EEOC. (Doc. 7-1 at 7–8). Next, Defendant argues that Plaintiff's ADA discrimination claim fails because Plaintiff has not plausibly alleged that she was disabled within the meaning of the ADA or that she was discharged because of an alleged disability. *Id.* at 8–17. Defendant contends that having COVID-19 is not in and of itself a disability and that Plaintiff has not plausibly alleged that Defendant regarded Plaintiff as disabled or that Plaintiff had a record of a disability. *Id.* at 10–17. Defendant argues that Plaintiff's failure-to-accommodate claim fails because Plaintiff has not plausibly alleged that she was actually disabled or had a record of disability and because Plaintiff does not allege that she ever requested an accommodation related to a disability (as opposed to her request for a religious

exemption). *Id.* at 17–19. As to her ADA retaliation claim, Defendant argues that Plaintiff has not plausibly alleged that she is disabled, that she engaged in protected activity under the ADA, or that there is a causal connection between any alleged protected activity and her termination pursuant to the COVID-19 vaccination policy. *Id.* at 19–23. Finally, Defendant argues that Plaintiff has not plausibly pled that Defendant's mandatory vaccination policy constituted an unlawful medical examination, violated the ADA's confidentiality provision, or otherwise violated the ADA. *Id.* at 23–25.

Plaintiff responded to the motion to dismiss. (Doc. 19). First, as to the timeliness of her claims, Plaintiff argues that, based on delivery tracking and the Clerk's Office's processing stamp, she timely filed her complaint. *Id.* at 1. Plaintiff argues that she has sufficiently alleged a discrimination claim because she alleged that she was regarded as having a disability by virtue of Defendant's COVID-19 policy that regarded *all* employees as having or possibly having a contagious disease. *Id.* at 1–10. She also argues that she sufficiently alleged facts supporting the "record of" a disability prong because she alleged that Defendant misclassified her as having an impairment and that Defendant's COVID-19 policy was disproportionately applied to her. *Id.* at 10–13. Next, Plaintiff argues that she does

not allege a failure-to-accommodate claim in her complaint because she did not require or ask for any accommodations. *Id.* at 13–14. Plaintiff also argues that she has plausibly alleged an ADA retaliation claim, maintaining that she has shown protected activity, namely her opposition to Defendant's COVID-19 policy. *Id.* at 14–15. Plaintiff argues that Defendant's vaccination policy was an unlawful medical examination or inquiry under the ADA and that it violated the ADA's confidentiality provision. *Id.* at 15–16.

Defendant filed a reply brief, (Doc. 20), and the matter is now before the Court for consideration.

III. DISCUSSION

A. Standard on a Motion to Dismiss

The Federal Rules of Civil Procedure require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While a plaintiff need not include "detailed factual allegations" in the complaint, the requirement to demonstrate the grounds for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, Rule 8 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Instead, to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

These standards suggest a two-pronged approach for courts evaluating a motion to dismiss a complaint. *See id.* at 678–79; *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010). First, "eliminate any allegations in the complaint that are merely legal conclusions." *Am. Dental Ass'n*, 605 F.3d at 1290. While a court must accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), it need not consider "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Iqbal*, 556 U.S. at 678. Nor should it consider "a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Second, "where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Am. Dental Ass'n*, 605 F.3d at 1290 (internal quotation marks omitted).

Courts must liberally construe *pro se* filings. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (recognizing that a court "read[s] briefs filed by *pro se* litigants liberally"). However, "*pro se* complaints also must comply with the procedural rules that govern pleadings." *Beckwith v. Bellsouth Telecomms. Inc.*, 146 F. App'x 368, 371 (11th Cir. 2005).

"[T]he analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto." *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). Attachments that are "exhibit[s] to a pleading [are] a part of the pleading for all purposes." Fed. R. Civ. P. 10(c); *see also Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). And "when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (internal quotation marks omitted); *see also Little v. Select Portfolio Serv.*, No. 1:15-CV-0880-MHC-JSA, 2015 WL 11578456, at *3 (N.D. Ga. Oct. 15, 2015), *adopted by* 2015 WL 11605406 (Nov. 5, 2015).

B. Timeliness

Defendant first argues that Plaintiff's claims are barred because she did not timely file her complaint after receiving her notice of right to sue from the EEOC.

(Doc. 7-1 at 7–8). Before an employee may litigate a claim for discrimination under the ADA, "she must first exhaust her administrative remedies," which begins with "filing a timely charge of discrimination with the EEOC." *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317 (11th Cir. 2001) (citing 42 U.S.C. § 2000e-5(b)[1]). "For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act." *Id.* (citing 42 U.S.C. § 2000e-5(e)(1)). If the EEOC dismisses the charge and notifies the plaintiff of her right to sue, the plaintiff then has 90 days within which she may bring a civil action. *See* 42 U.S.C. § 2000e-5(f)(1); *Santini v. Cleveland Clinic Fla.*, 232 F.3d 823, 825 & n.2 (11th Cir. 2000).

Plaintiff received her notice-of-right-to-sue letter from the EEOC on June 7, 2022. (Doc. 1-1 at 4, ¶ 20; *see also* Doc. 1-1 at 25). Therefore, Plaintiff was required to file her lawsuit on or before September 6, 2022.[2] *See* 42 U.S.C. § 2000e-5(f)(1).

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[1] The Eleventh Circuit generally applies the legal standards developed in Title VII, ADA, and ADEA cases interchangeably, including the procedural requirements. *Rizo v. Ala. Dep't of Hum. Res.*, 228 F. App'x 832, 835 (11th Cir. Jan. 31, 2007); *see also Zillyette v. Cap. One Fin. Corp.*, 179 F.3d 1337, 1339 (11th Cir. 1999) ("It is settled law that, under the ADA, plaintiffs must comply with the same procedural requirements to sue as exist under Title VII of the Civil Rights Act of 1964.").

[2] The final day of the 90-day period—September 5, 2022—fell on a legal holiday (Labor Day). Therefore, Plaintiff's filing period continued to run through September 6, 2022. *See* Fed. R. Civ. P. 6(a)(1)(C).

Defendant argues that Plaintiff's complaint is untimely because it was not filed until September 19, 2022. (Doc. 7-1 at 8 (citing Doc. 1)). In response, Plaintiff argues that she timely filed her complaint on or before September 6, 2022, but that the filing date was entered incorrectly due to a clerk error. (Doc. 19 at 1). Plaintiff attaches her USPS receipt and delivery tracking, which show that she mailed her complaint on September 2, 2022, and that it was delivered on September 6, 2022. *Id.* at 19. Plaintiff's complaint also contains a file stamp showing that it was received on September 6, 2022, although that stamp was crossed out and a second file stamp on the complaint is dated September 19, 2022. *Id.* at 1; (*see also* Doc. 1 at 1). Plaintiff states that the crossed-out file stamp "was due to an administrative question which was later resolved." (Doc. 19 at 1). Defendant does not address Plaintiff's arguments on this issue or otherwise discuss timeliness in its reply brief. (*See* Doc. 20).

"Once a defendant contests the issue of whether the complaint was filed timely, the plaintiffs bear the burden of showing that they have met the requirement." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005); *see also Adebiyi v. City of Riverdale*, No. 1:09-CV-0025-RWS-JFK, 2009 WL 10664779, at *5 (N.D. Ga. July 21, 2009) (same), *adopted by* 2009 WL 10664836 (N.D. Ga. Sept. 8,

2009). Here, Plaintiff has attached her USPS receipt and delivery tracking, which show that she mailed her complaint on September 2, 2022, and that it was delivered on September 6, 2022. (Doc. 19 at 19).[3] Plaintiff also notes that her complaint contains a file stamp showing that it was received on September 6, 2022, although that stamp was crossed out and a second file stamp on the complaint is dated September 19, 2022. *Id.* at 1; (*see also* Doc. 1 at 1). The receipts and crossed-out stamp indicate that Plaintiff's complaint was received at the Court on September 6, 2022, meaning that it was timely filed.

Further, Defendant abandoned its argument that Plaintiff's claims should be dismissed as untimely by not addressing the arguments and evidence Plaintiff raised in her response brief. *See Hi-Tech Pharms. Inc. v. Dynamic Sports Nutrition,*

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[3] When evaluating a motion to dismiss, a court can consider documents attached to the complaint and documents filed in conjunction with a motion to dismiss without converting the motion to one for summary judgment if the documents are central to the complaint and not in dispute. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999); *see also Swauger v. Dep't of Def.-Def. Intelligence Agency*, 852 F. App'x 393, 394–96 (11th Cir. 2021) (considering postal receipts at the motion-to-dismiss stage because the documents "are central to the issue here [of delivery of a notice of right to sue] and their authenticity is not challenged"); *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n.3 (11th Cir. 2005) (explaining that documents are undisputed when there is no dispute about their authenticity). Here, Plaintiff's postal receipt and delivery tracking are central to the issue of whether her complaint was timely filed, and Defendant did not dispute their authenticity in its reply brief.

LLC, No. 1:16-cv-949, 2020 WL 10728951, at *12–13 (N.D. Ga. Jan. 10, 2020) (noting, in the summary judgment context, that the defendants abandoned arguments where they did not address arguments and case law raised by the plaintiff in a response brief); *Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-cv-3113-GET, 2009 WL 2986415, at *7 (N.D. Ga. Mar. 21, 2009) (finding that the defendant abandoned an argument made in a *Daubert* motion by failing to address the plaintiff's rebuttal arguments in its reply brief).

Accordingly, the Court **RECOMMENDS** that Defendant's motion to dismiss the complaint in its entirety as untimely be **DENIED**.

C. ADA Claims

Plaintiff brings discrimination and retaliation claims under the ADA. (Doc. 1 at 6, 18). She also alleges that Defendant's vaccination policy was an unlawful medical examination or inquiry under the ADA and that it violated the ADA's confidentiality provision. *Id.* at ¶¶ 34, 44, 46–47, 66. The Court considers each claim in turn.

1. ADA Discrimination

The ADA prohibits an employer from "discriminat[ing] against a qualified individual on the basis of disability" concerning hiring, promotion, discharge,

compensation, training, job application procedures, or "other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "[T]here are two distinct categories of disability discrimination claims under the ADA: (1) failure to accommodate and (2) disparate treatment." *Equal Emp. Opportunity Comm'n v. Eckerd Corp.*, No. 1:10-cv-2816-JEC, 2012 WL 2568225, at *4 (N.D. Ga. July 2, 2012). Here, Plaintiff alleges only disparate treatment.[4] Supreme Court precedent holds that the complaint in an employment discrimination case need not contain specific facts establishing a *prima facie* case under *McDonnell Douglas*[5] to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002). Nevertheless, the Eleventh Circuit has since held that complaints alleging discrimination still must meet the plausibility standard of *Twombly* and *Iqbal*. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300–01 (11th Cir. 2010) (noting that to state a hostile-work-environment claim post-*Iqbal*, the employee "was required to allege" five *prima*

[4] Defendant argues that Plaintiff fails to plausibly allege a failure-to-accommodate claim under the ADA. (Doc. 7-1 at 17–19). However, Plaintiff states in her response brief that she does not bring a failure-to-accommodate claim in her complaint. (Doc. 19 at 13–14 ("The plaintiff has not alleged failure to accommodate in her complaint . . . [t]he plaintiff was not asking for accommodations")). Accordingly, the Court does not construe the complaint as raising a failure-to-accommodate claim.

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

facie elements); *see also Henderson v. JP Morgan Chase Bank, N.A.*, 436 F. App'x 935, 937 (11th Cir. 2011) (holding that although a complaint in an employment case need not establish a *prima facie* case to survive a motion to dismiss, it still must satisfy the standards of *Twombly* and *Iqbal*). The complaint must "provide enough factual matter (taken as true) to suggest intentional . . . discrimination." *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1246 (11th Cir. 2015) (internal quotation marks omitted).

While Plaintiff need not establish a *prima facie* case to survive Defendant's motion to dismiss, it is useful to note that Plaintiff can establish a *prima facie* case of disparate treatment under the ADA by showing that: "(1) she is disabled; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability." *Smith v. Miami-Dade Cnty.*, 621 F. App'x 955, 959 (11th Cir. 2015). "A plaintiff bringing a disparate-treatment claim under the ADA must allege that the disability actually motivated the employment decision." *Id.* (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003)). Defendant argues that Plaintiff's discrimination claim fails because Plaintiff has not plausibly alleged that she was disabled within the meaning of the ADA. (Doc. 7-1 at 8–17). The Court agrees.

The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). Plaintiff states that she "never alleged to have any specific disability" and is proceeding under the "regarded as" and "record of" prongs of the definition. (Doc. 19 at 2). Plaintiff alleges in the complaint that she "is regarded as having a disability by the defendant's Covid-19 Policy . . . [which] rested on the assumption that every employee, the plaintiff included, had or could have [COVID-19]," (Doc. 1 at ¶¶ 39–40), that Defendant "regarded [her] as disabled because of [her] unvaccinated status," *id.* at ¶ 88, and that Defendant "made a record of such disability by mis-classifying [her] as having [a disability] . . . by adding [her] name to a list of employees who were 'unvaccinated' and then keeping an actual record of the same," *id.* at ¶¶ 121–22.

Considering first the "regarded as" prong, "[t]he relevant inquiry is whether the employer perceived the plaintiff to have an impairment, not whether the plaintiff was actually impaired." *Toney v. Ala. A&M Univ.*, No. 5:21-cv-689-LCB, 2023 WL 1973203, at *3 (N.D. Ala. Feb. 13, 2023). "The relevant time period for assessing the existence of a disability . . . is the time of the alleged

discriminatory act." *Equal Emp. Opportunity Comm'n v. STME,* LLC, 938 F.3d 1305, 1314 (11th Cir. 2019). And the Eleventh Circuit has held that "the disability definition in the ADA does not cover [the] case where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future." *Id.* at 1315 (holding that an employee did not meet the "regarded as" prong where she was healthy, but her employer regarded her as having the possibility of becoming infected with Ebola in the future if she traveled to Ghana). The court determined that "the terms of the ADA protect persons who experience discrimination because of a current, past, or perceived disability—not because of a potential future disability that a healthy person may experience later." *Id.* at 1311. Here, as in *STME,* Plaintiff does not allege that she was disabled (or that she actually had COVID-19 or was perceived to have COVID-19 at the time of her termination) but rather that Defendant perceived her as having the potential to be infected with COVID-19 in the future. (Doc. 1 at ¶¶ 39, 40, 43, 55).

Plaintiff has thus failed to state a "regarded as" disabled claim because she has not alleged that Defendant perceived her to have a disability at the time of her termination—only that Defendant, through its vaccination policy, considered Plaintiff at risk of potentially contracting COVID-19 in the future. *See, e.g., STME,*

938 F.3d at 1318 ("[F]or an employee to qualify as 'being regarded as' disabled, the employer must have perceived the employee as having a current existing impairment at the time of the alleged discrimination"); *Gallo v. Washington Nat'ls Baseball Club, LLC*, No. 22-cv-01092 (APM), 2023 WL 2455678, at *4 (D.D.C. Mar. 10, 2023) (finding that the unvaccinated plaintiff failed to state a "regarded as" claim related to COVID-19 because he did not allege that his employer perceived him as having a disability at the time of his termination and noting that "[e]very court that has considered [the] question [of whether possible future exposure to COVID-19 constitutes being regarded as having a disability] has held the same"); *see also Shklyar v. Carboline Co.*, 616 F. Supp. 3d 920, 926 (E.D. Mo. 2022) (reasoning that "to infer that [an employer] regarded [an employee] as having a disability" based on a "generally applicable" COVID-19 policy "would require inferring that [the employer] regarded all of its . . . employees as having a disability . . . [which] is not a reasonable inference"), *aff'd by* No. 22-2618, 2023 WL 1487782 (8th Cir. Feb. 3, 2023).

Plaintiff has also failed to plausibly allege that she is disabled because of a record of a disability. To state a claim for disability discrimination based on a "record of" having a disability, Plaintiff must plausibly allege that she has "a

history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment." 29 C.F.R. § 1630.2(k)(2). Plaintiff alleges that Defendant "made a record" of Plaintiff having a disability "by adding [her] name to a list of employees who were 'unvaccinated' and then keeping an actual record of the same." (Doc. 1 at ¶¶ 121, 122). However, Defendant did not classify (or misclassify) Plaintiff as having "an impairment that substantially limited one or more major life activities" by noting that Plaintiff was unvaccinated for COVID-19.

Other district courts to consider this issue have agreed that requiring an unvaccinated employee to become vaccinated under a generally applicable COVID-19 vaccination policy[6] does not satisfy the "record of" disability prong.

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[6] Plaintiff summarily argues in her response that Defendant's COVID-19 policy was "disproportionately applied" to her. (Doc. 19 at 8, 11). However, this is contradicted by Plaintiff's own allegations in the complaint that Defendant's COVID-19 vaccination policy "mandate[ed] that **all employees** in [Defendant's] U.S.-based organization be fully vaccinated as of November 8, 2021." (Doc. 1-1 at 6 (emphasis added); *see also* Doc. 1 at ¶ 23 ("[D]efendant was requiring **all employees** get vaccinated with the Covid-19 vaccine as a condition for continuation of employment" (emphasis added))). Nothing in Defendant's policy was "disproportionately" applied only to Plaintiff.

See, e.g., Librandi v. Alexion Pharms., Inc., No. 3:22cv1126(MPS), 2023 WL 3993741, at *7 (D. Conn. June 14, 2023) (finding that such an argument fails to state a claim and collecting cases); *Speaks v. Health Sys. Mgmt., Inc.*, No. 5:22-CV-00077-KDB-DCK, 2022 WL 3448649, at *5 (W.D.N.C. Aug. 17, 2022) (finding that the plaintiff failed to state a claim for disability discrimination based on a "record of" a disability where she alleged that her employer made a "record of" her alleged disability by misclassifying her as having an impairment and requiring her to become vaccinated under a generally applicable COVID-19 policy); *Shklyar*, 616 F. Supp. 3d at 924–26 (finding that the plaintiff did not plausibly allege a theory of being disabled based on a "record of" disability where the employer simply required her to comply with its COVID-19 policies that applied to all of its employees). As the court noted in *Speaks*, "inferring that [the employer] classified [the unvaccinated plaintiff] as impaired by requiring her to become vaccinated or seek an exemption would mean that [the employer] considered all its employees to have an 'impairment,' which is of course not a plausible inference, particularly in light of the possibility of an exemption." 2022 WL 3448649, at *5.

Plaintiff has simply not alleged facts suggesting that she was regarded as disabled or had a record of having a disability. As such, Plaintiff has not plausibly

alleged the existence of an essential element of her discrimination claim: that she is disabled within the meaning of the ADA. For this reason, Plaintiff's ADA discrimination claim fails and should be dismissed.

2. ADA Retaliation

In addition to prohibiting discrimination based on a disability, the ADA also prohibits retaliation against an individual for opposing an unlawful practice or making a charge under the ADA. *Batson v. Salvation Army*, 897 F.3d 1320, 1328 (11th Cir. 2018) (citing 42 U.S.C. § 12203(a)). To state a *prima facie* case of retaliation under the ADA, a plaintiff must allege "(1) that she engaged in statutorily protected conduct, (2) that she suffered an adverse employment action, and (3) that a causal connection exists between the two." *Id.* at 1329. And while Plaintiff need not establish a *prima facie* case for purposes of a motion to dismiss, as noted above, it is useful for guidance purposes to note how she may do so. *See Swierkiewicz*, 534 U.S. at 510.

Defendant argues that Plaintiff has failed to plead facts showing that she engaged in a statutorily protected activity or that a causal relationship existed between her protected activity and her termination. (Doc. 7-1 at 20–23). Plaintiff appears to allege that her protected activity was her opposition to or refusal to

participate in Defendant's COVID-19 policy. (Doc. 1 at ¶¶ 105, 107, 110, 119).[7] She alleges that she "exercised her right to refuse [Defendant's] Covid-19 Policy measures," which "was a protected activity," and that each time she "exercise[d] her right to refuse . . . [Defendant] . . . immediately or in a manner that was causally related to the exercise of such right, impose[d] adverse employment actions" such as requiring Plaintiff and other employees to work from home, requiring her to wear a mask and take a PCR test, requiring her to be vaccinated, and terminating her employment. *Id.* at ¶¶ 108, 109, 112–16, 119–20.

For retaliation purposes, a plaintiff need not establish that her protected activity is actually protected by the ADA—rather, she need show only that she "had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002) (internal quotation marks omitted). Nor is she required to show that she had a disability, within the meaning of the ADA, to establish that she engaged in

[7] Defendant also argues that Plaintiff's request for a religious exemption from its COVID-19 vaccination policy does not constitute a protected activity under the ADA. (Doc. 7-1 at 20–21). However, Plaintiff concedes that the denial of her request for a religious exemption does not give rise to a cause of action under the ADA and states that she does not claim that her request for a religious exemption is protected activity under the ADA. (Doc. 19 at 14).

protected expression. *See Whitfield v. Northside Hosp.*, No. 1:22-CV-2198-AT-JSA, 2022 WL 19518163, at *12 (N.D. Ga. Sept. 6, 2022), *adopted by* 2023 WL 2950009 (N.D. Ga. Jan. 30, 2023). Here, Plaintiff points to no authority in support of her assertion that her mere refusal to comply with her employer's COVID-19 policy was "protected activity" under the ADA. However, even assuming that Plaintiff's refusal to comply with Defendant's policy constitutes protected activity, Plaintiff has failed to plausibly allege causation between her allegedly protected conduct and her termination.

The third element of a *prima facie* case requires Plaintiff to plausibly allege a causal link between the protected activity and the adverse employment action. *Batson*, 897 F.3d at 1328. The "but-for causation" standard, which "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action . . . of the employer," applies to ADA retaliation claims. *Whitfield*, 2022 WL 19518163, at *12 (internal quotation marks omitted) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) and *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016)). Here, it is clear from Plaintiff's allegations in the complaint that she was terminated because she refused to comply with Defendant's COVID-19 vaccination policy and become vaccinated. (Doc. 1 at ¶¶

27, 128; Doc. 1-1 at 7). Plaintiff has not plausibly alleged that her termination was causally connected to her *opposition* to the policy, as opposed to her failure to comply with the policy. When considering a nearly identical claim, the court in *Shklyar* found that, "[g]iven that the adverse action taken against [the plaintiff] was taken pursuant to [COVID-19] policies that were implemented before [the plaintiff] engaged in her alleged protected activity, it is not reasonable to infer that there was a causal connection between the two events." 616 F. Supp. 3d at 927. And other district courts have taken the same view that, where an employer's vaccination policy was enacted before the employee opposed the vaccination requirement, "it is not reasonable to infer that there was a causal connection between [the employee's] criticism of the policy and her termination." *Speaks*, 2022 WL 3448649, at *6; *see also, e.g., Librandi*, 2023 WL 3993741, at *8 (dismissing an ADA retaliation claim where the plaintiff's allegations did "not suggest that [the plaintiff] was terminated for objecting to [the employer's] COVID-19 policy [which was enacted before Plaintiff opposed the vaccination requirement]; rather, they suggest[ed] that she was terminated because she failed to comply with it"); *Linne v. Alameda Health Sys.*, No. 22-cv-04981-RS, 2023 WL 3168587, at *3 (N.D. Cal. Apr. 28, 2023) (dismissing the plaintiff's ADA retaliation claim because she did not

allege "facts to show that Defendant's communications with and termination of Plaintiff were anything other than its enforcement of a [COVID-19] policy, in place before Plaintiff opposed it, that applied equally to all employees"). The Court finds these cases persuasive.

Plaintiff has alleged that Defendant implemented COVID-19 policies that required employees to temporarily work from home and to wear a mask upon returning to work and a COVID-19 vaccination policy that required all employees to receive the COVID-19 vaccine as a requirement for continuation of employment. (Doc. 1 at ¶¶ 19, 21, 23–24; Doc. 1-1 at 2, ¶¶ 10–12). After the implementation of these policies, Plaintiff alleges that she opposed the policies. (Doc. 1 at ¶¶ 108, 113). However, Plaintiff has not alleged facts suggesting that her termination (or any of the alleged adverse actions she describes in her complaint) were causally connected to her opposition of the policy, as opposed to being the established consequences for failing to comply with the policy. When implementing its vaccination policy, Defendant stated that any employee who had not received an exemption or been vaccinated by November 8, 2021, would be terminated. (Doc. 1-1 at 6–7). Plaintiff's facts show, quite simply, that each of her alleged adverse actions occurred because she did not comply with Defendant's

COVID-19 policy—there is just no plausible inference to be found that Plaintiff suffered these actions in retaliation for criticizing or opposing the policies previously enacted. For this reason, Plaintiff's ADA retaliation claim fails and should be dismissed.

3. Miscellaneous ADA Claims

Although not set forth as separate counts in the complaint, Plaintiff appears to allege that Defendant's COVID-19 policy otherwise violated the ADA because it constituted an unlawful, non-job-related medical inquiry or examination under the statute and violated the ADA's confidentiality provision. (*See* Doc. 1 at ¶¶ 44, 46–47, 60, 66; *see also* Doc. 19 at 15–16).

First, Plaintiff alleges that Defendant's COVID-19 policy "imposed certain medical treatments, including but not limited to experimental vaccines, wearing a surgical mask over the face, social distancing, segregation, isolation, disclosing medical records and medical history, and submitting to medical examinations." (Doc. 1 at ¶ 44). Plaintiff cites to 29 C.F.R. § 1630.13(b), which states that, except as otherwise permitted, "it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an

individual with a disability or as to the nature or severity of such disability." (Doc. 1 at ¶ 47).

Courts have found that similar allegations regarding employer COVID-19 policies fail to state a claim that an employer violated 29 C.F.R. § 1630.13(b). In *Librandi*, the District of Connecticut considered a similar claim that an employer's COVID-19 policy:

> imposed certain non-job related medical inquiries including disclosing private medical records and medical history. . . submitting to COVID-19 testing and non-job-related medical treatments including but not limited to: taking experimental vaccines; wearing a surgical mask over the face; [and] engaging in social distancing which is a euphemism for quarantine and isolation.

2023 WL 3993741, at *9 (internal quotation marks omitted). The court noted that the "ADA does not forbid all medical inquiries, but only those 'as to whether such employee is an individual with a disability or as to the nature or severity of the disability.'" *Id.* (quoting *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 95 (2d Cir. 2003)). The court in *Librandi* found that "[n]one of [the plaintiff's] allegations [regarding COVID-19 testing, masking, vaccines, social distancing, or required disclosure of COVID-19 vaccination status] amount to a plausible claim that [the employer] conducted a medical examination or an inquiry about a disability." *Id.* (collecting cases finding no violation of 29 C.F.R. § 1630.13(b) based

on employer's COVID policies or inquiries about vaccination status); *see also Friend v. AstraZeneca Pharms. LP*, No. SAG-22-03308, 2023 WL 3390820, at *5 (D. Md. May 11, 2023) (finding that an employer's inquiry about vaccination status did not violate 29 C.F.R. § 1630.13(b)). So too, here.

Plaintiff also argues that Defendant's COVID-19 policy violates 29 C.F.R. § 1630.14(c), (Doc. 1 at ¶ 66), "but that subsection simply explains the circumstances under which the medical examinations and disability-related inquiries generally prohibited by Part 1630.13 are permitted. Because, as described above, [Defendant's COVID-19 policies are] not barred by Part 1630.13, [Defendant] need not establish that [its policies] fall[] within the exceptions in Part 1630.14." *Jorgenson v. Conduent Transp. Sols., Inc.*, No. SAG-22-01648, 2023 WL 1472022, at *5 n.1 (D. Md. Feb. 2, 2023), *aff'd by* 2023 WL 4105705 (4th Cir. June 21, 2023).

Plaintiff also references 29 C.F.R. § 1630.9(d) in her complaint, (Doc. 1 at ¶¶ 34, 79). 29 C.F.R. § 1630.9(d) states that an employee is not required to accept a reasonable accommodation for a disability. As described above, Plaintiff has not plausibly alleged that she had a "disability" within the meaning of the ADA, and Plaintiff concedes in her response that she did not request any accommodations. (Doc. 19 at 13). Nor can Defendant's COVID-19 policies, such as masking or

vaccination requirements, "be described as accommodations, since they are not designed to assist an employee in performing his or her job tasks." *Jorgenson*, 2023 WL 1472022, at *4. Therefore, 29 C.F.R. § 1630.9(d) is inapplicable.

The miscellaneous ADA subsections cited by Plaintiff in her complaint are inapposite, and she has not plausibly alleged that Defendant's COVID-19 policy violated the ADA.

D. Leave to Amend

Prior to 2002, a district court could not dismiss a complaint with prejudice without first giving the plaintiff a chance to amend the complaint if a more carefully drafted complaint might state a claim. *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). In 2002, the Eleventh Circuit overruled *Bank* in part and held that, "[a] district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (*en banc*). The court was careful to note, however, that its holding did not address *pro se* complaints. *Id.* at 542 n.1. Therefore, following *Bank* and *Wagner*, "where a more carefully drafted *pro se* complaint might state a claim the 'plaintiff must be given at least one chance to amend the

complaint before the district court dismisses the action with prejudice.'" *Bettencourt v. Owens*, 542 F. App'x 730, 735 (11th Cir. 2013) (quoting *Bank*, 928 F.2d at 1112); *see also Clark v. Maldonado*, 288 F. App'x 645, 647 (11th Cir. 2008) (laying out the history of *Bank* and *Wagner* and holding that "the *Bank* rule remains applicable to *pro se* litigants when their complaints are dismissed with prejudice"). However, even under *Bank*, "if a more carefully drafted complaint could not state a claim . . . dismissal with prejudice is proper." *Bank*, 928 F.2d at 1112.

Here, allowing Plaintiff to amend her complaint would be futile. Plaintiff cannot plausibly allege that she was "regarded as" disabled or had a "record of" a disability related to Defendant's COVID-19 policy or that her termination was causally connected to her alleged opposition to Defendant's COVID-19 policy. Thus, the Court **RECOMMENDS** that, if the District Judge adopts this Report and Recommendation, Plaintiff not be given leave to replead her complaint.

IV. CONCLUSION

For the reasons stated above, **IT IS RECOMMENDED** that Defendant's motion to dismiss, (Doc. 7), be **GRANTED**, and that Plaintiff's complaint, (Doc. 1), be **DISMISSED.** This is a Final Report and Recommendation, there is nothing

further pending in this case, and the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO RECOMMENDED, this 13th day of July, 2023.

CHRISTOPHER C. BLY
UNITED STATES MAGISTRATE JUDGE

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

Ealaila Conard,

Plaintiff,

Case No. 1:22-cv-3784-MLB

v.

Chanel, Inc.,

Defendant.

_____/

ORDER

Plaintiff Ealaila Conrad sued Defendant Chanel, Inc. for violations of the Americans with Disabilities Act. (Dkt. 1.) Defendant filed a motion to dismiss. (Dkt. 7.) Magistrate Judge Christopher C. Bly issued a Report and Recommendation ("R&R") recommending the Court grant Defendant's motion to dismiss. (Dkt. 24.) No one objected to the R&R, and the Court adopted the R&R and dismissed Plaintiff's Complaint for failure to state a claim. (Dkt. 28.) Plaintiff filed a "Motion to Vacate Final Order" and an addendum to her motion. (Dkts. 30, 32.) For the following reasons, the Court denies Plaintiff's motion.

In Plaintiff's addendum, she contends her motion falls under Federal Rule of Civil Procedure 59. (Dkt. 32 at 1.) A Rule 59(e) motion must be based upon "newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). The decision to reconsider "is committed to the sound discretion of the district judge." *United States v. Jim*, 891 F.3d 1242, 1252 (11th Cir. 2018) (citation omitted). It is granted sparingly, and a Rule 59(e) motion cannot be used as a vehicle through which to "relitigate old matters." *Arthur*, 500 F.3d at 1343.

In her motion before the Court, Plaintiff does not argue she is entitled to relief because of newly discovered evidence or a change in the law. Nor does she identify a manifest error in law or fact. At most, Plaintiff argues that the magistrate judge misconstrued her arguments, largely by reiterating arguments she made in her Complaint or her response to Defendant's Motion to Dismiss. (*See* Dkts. 1, 19.) Plaintiff expresses disagreement with the Court's legal conclusions and essentially asks the Court to reexamine an unfavorable ruling. Accordingly, Plaintiff is not entitled to the relief she seeks.

The Court **DENIES** Plaintiff's Motion to Vacate Final Order (Dkt. 30).

SO ORDERED this 5th day of October, 2023.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

Appendix 3

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13624

Non-Argument Calendar

EALAILA CONARD,

Plaintiff-Appellant,

versus

CHANEL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-03784-MLB

Before LUCK, ABUDU, and WILSON, Circuit Judges.

PER CURIAM:

Ealaila Conard, proceeding *pro se*, appeals the district court's dismissal of her complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6), in her suit against her former employer, Chanel Inc. ("Chanel"), alleging discrimination and retaliation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111, *et seq.* After careful review, we affirm.[1]

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

In her *pro se* complaint, filed in September 2022, Conard, a former retail store employee, alleged that Chanel had adopted a discriminatory COVID-19 policy during the pandemic which required her to get vaccinated despite her objections to doing so. Conard alleged the policy applied to all employees and did not permit individualized assessments. Under Chanel's policy, Conard was required to wear a mask in her workplace and ordered to test herself for COVID-19 after one of her coworkers tested positive for COVID-19. Then, in September 2021, Chanel altered its policy and ordered Conard and other employees to become vaccinated by November 8, 2021. Conard sought a "religious exemption"—or accommodation—from Chanel's policy and identified her religion and the ADA as the bases for her request. After a meeting with store management, Conard's request was denied. Conard was

[1] We write only for the parties, so, as to any issues that we do not mention explicitly, we affirm without discussion.

terminated in November 2021 after she failed to get vaccinated. Conard alleged that Chanel admitted that her "refus[al]" to comply with "their COVID-19 [p]olicy w[as] the direct cause of the termination of her employment." This suit followed.

In her lawsuit, Conrad did not raise a religious discrimination or failure to accommodate claim.[2] Instead, she presented an ADA discrimination claim and an ADA retaliation claim against Chanel. Her discrimination claim rested on two disparate impact theories: (1) that Chanel regarded her unvaccinated status as a disability; and (2) that Chanel treated her (or had a record of her) as being disabled for being unvaccinated. *See* 42 U.S.C. § 12102(1) (defining "disability" to mean "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a *record of such* an impairment; or (C) *being regarded as having such* an impairment . . . ." (emphasis added)). Relatedly, she asserted that Chanel's COVID-19 policy was unlawful, applied disproportionally, and violated various ADA regulations. As to her retaliation claim, she argued that her refusal to get vaccinated was a protected activity and that Chanel's decision to terminate her for failing to do so was retaliatory.

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[2] Before the district court, Conard affirmatively waived any argument that Chanel was liable on a failure-to-accommodate theory. *See United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (*en banc*) ("[I]f a party affirmatively and intentionally relinquishes an issue, then courts must respect that decision.").

Chanel moved to dismiss the complaint. A magistrate judge recommended the motion be granted in a report and recommendation ("R&R"), which the district court later adopted. The R&R first determined that "failing to get vaccinated" was not a disability under the ADA, 42 U.S.C. § 12102(1)(A), and that nothing in the complaint showed that Chanel "regarded [her] as having" a disability or that Conard had a "record of" a disability, *id.* § 12102(1)(B), (C). Second, the R&R concluded that, because refusing to get vaccinated was not a protected activity, Conard could not maintain an ADA retaliation claim. The R&R explained that each of the adverse actions Conard described, including her termination, were not "causally connected to her opposition of [Chanel's COVID-19] policy, as opposed to being the established consequences for failing to comply with the policy." The R&R also rejected Conard's contentions that Chanel's policy was an unlawful non-job-related medical inquiry or examination, or a violation of the ADA's confidentiality provision. Finally, the R&R determined that any amendment to Conard's complaint would be futile.

The district court adopted the R&R and Conard timely moved, under Fed. R. Civ. P. 59, for reconsideration. The district court denied that motion, and Conard timely appealed.[3]

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[3] Chanel argues that Conard's appeal should be limited to the denial of her motion for reconsideration because that is the order she identified in her notice of appeal. However, Chanel is mistaken on this point. *See* Fed. R. App. P. 3(c)(5), (B) ("In a civil case, a notice of appeal encompasses the final judgment . . . if the notice designates . . . an order described in Rule 4(a)(4)(A)."). Therefore, we will review both orders.

II. STANDARD OF REVIEW

We review the dismissal of a complaint for failure to state a claim *de novo*, "accepting the factual allegations in the complaint as true, and construing them in the light most favorable to the plaintiff." *Plowright v. Miami Dade Cnty.*, 102 F.4th 1358, 1363 (11th Cir. 2024) (alterations adopted) (quoting *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1260 (11th Cir. 2019) (*en banc*)). In doing so, we liberally construe *pro se* filings. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).[4]

III. DISCUSSION

Even under the most liberal construction of Conard's complaint and her brief on appeal, we discern no reversible error in the R&R and affirm the dismissal of Conard's suit.

"To state a claim under the ADA, the plaintiff must establish: (1) that [s]he is a qualified individual with a disability; (2) that [s]he was either excluded from participation in or denied the benefits of a public entity's services, programs, activities, or otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019). Conard's argument that Chanel discriminated against her for being unvaccinated does not present a claim for

[4] Conard's challenges on appeal could be properly reviewed for plain error only, as she did not timely respond to the magistrate judge's R&R. *See* 11th Cir. R. 3-1. However, because her appeal fails under *de novo* review in any event, we need not decide whether her objections are properly preserved.

disparate treatment under the ADA because Conard's complaint does not allege that she was actually disabled under the ADA in the first place. *See* 42 U.S.C. § 12102(1).

Before the district court and on appeal, Conard primarily has argued that she was treated as having the potential of contracting or transmitting COVID-19, but this does not amount to having a disability under the ADA. *See Equal Emp. Opportunity Comm'n v. STME, LLC*, 938 F.3d 1305, 1315-16 (11th Cir. 2019). In *STME*, a plaintiff was terminated after stating she planned to take a trip to Ghana because her manager worried that she would bring the Ebola virus back from her trip. *Id.* at 1311. We rejected the contention that this violated the ADA, however, and explained that an employee has a disability under the ADA when that employee "actually has, or is perceived as having, an impairment that is not transitory and minor." *Id.* at 1314. Being perceived as having the possibility of developing a communicable impairment in the future is insufficient. *See id.* Applying that principle here, Conard's complaint neither alleged that she had a disability, nor that she had a record of having a disability, nor that she was regarded as having as a disability. 42 U.S.C. § 12102(1)(A), (B), (C); *STME*, 938 F.3d at 1315-16. Accordingly, we affirm the district court's dismissal of the ADA discrimination claim.

We also agree with the R&R that Conard's retaliation claim fails. The ADA prohibits retaliation against "any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a

charge . . . under [the ADA]." 42 U.S.C. § 12203(a). To support a retaliation claim under the ADA, a plaintiff must at least plausibly allege that (1) she engaged in a statutorily protected conduct, (2) she suffered an adverse action, and (3) there was a causal link between the adverse action and her protected conduct. *See Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998). Here, the adverse actions that Conard suffered were not "because" of any protected activity. Instead, as Conard's complaint makes clear, Chanel terminated her because she refused to comply with Chanel's company-wide vaccination policy. *Id.* On appeal, Conard contends that the policy was disproportionally applied to those who sought to opt out, but that argument is circular—the policy also applied to those who abided by it. Conard's argument that she became part of a class of employee-objectors that were treated differently than another class of employees (employees who complied), fails for the same reason: Chanel's policy was created before Conard objected and was enforced against all employees. Under the policy, termination was appropriate for *any* employee of either class who was not vaccinated and did not receive an exception. Thus, even if Conard reasonably thought Chanel's policy violated the ADA,[5] Chanel did not terminate Conard because she requested an exemption or opposed the policy—it terminated her for failing to comply with the policy. Thus, Conard's ADA retaliation claim also fails.

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[5] To the extent that Conard argues that Chanel's COVID-19 policy was unlawful under the ADA, she cites no caselaw that supports that contention.

Because the district court properly dismissed Conard's complaint, we also discern no abuse of discretion in denying her motion for reconsideration. *See PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1287 (11th Cir. 2021) (explaining that reconsideration under Fed. R. Civ. P. 59(e) is only warranted when a movant shows newly discovered evidence or manifest errors of law or fact).

IV. CONCLUSION

For the reasons stated above, we **AFFIRM** the district court's dismissal of Conard's case.

Appendix 4

In the United States Court of Appeals For the Eleventh Circuit

No. 23-13624

EALAILA CONARD,

Plaintiff-Appellant,

versus

CHANEL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-03784-MLB

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 17, 2025

For the Court: DAVID J. SMITH, Clerk of Court